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The Law of Yards

James Charles Smith

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Property law regimes have a significant impact on the ability of individuals to engage in freedom of expression. Some property rules advance freedom of expression, and other rules retard freedom of expression. This Article examines the inhibiting effects on expression of public land use regulations. The focus is on two types of aesthetic regulations: (1) landscape regulations, including weed ordinances, that regulate yards; and (2) architectural regulations that regulate the exterior appearance of houses. Such regulations sometimes go too far in curtailing a homeowner's freedom of expression. Property owners' expressive conduct should be recognized as "symbolic speech" under the First Amendment. The Supreme Court developed the symbolic speech doctrine in contexts other than land use, but the rationale for the doctrine supports its extension to aesthetically based land use regulations. The clearest case of protected speech is a homeowner's conduct that conveys a political message, such as a yard display that protests a decision made by a local government. Other conduct, however, that is nonpolitical in nature can convey a particularized message, and thus can merit First Amendment protection. Examples are a homeowner's decision to plant natural landscaping, motivated by ecological concerns, or to install a nativity scene at Christmas. A regulation that restricts an owner's protected speech is unconstitutional unless the government proves both that the regulation is narrowly tailored and that it protects a substantial public interest. If the public interest is solely based on the protection of aesthetic values, ordinarily it is not substantial enough to justify the restriction on speech. The government must come up with a plausible justification other than aesthetics to prevail. When the justification consists of an interest in addition to aesthetics, the balancing rules developed by the Supreme Court for symbolic speech should apply. If the
regulation restricts expressive conduct, it may survive scrutiny only if it protects the community from conduct that causes significant economic or other non-aesthetic harm, while minimizing infringement on expression.

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INTRODUCTION

My general purpose in this Article is to explore relationships between property rights and freedom of expression. Property rights can be defined so as to increase opportunities for freedom of expression, or they can be defined so as to decrease opportunities for freedom of expression. Many illustrations of this principle could be developed. In this paper, I attempt to develop one illustration by focusing on the law of yards.

How can a person express herself by what she does with her yard? A topic of this nature necessarily takes a broad view of the central term "expression." By expression, I mean more than words or the communication of particularized messages. I mean to include nonverbal conduct that has significant interpretive content. The actor or "speaker" intends to express herself by doing something. Other people, the prospective audience, have the opportunity to "listen;" that is, to perceive, absorb and contemplate the communicative symbols directed their way. For an introductory example of expression through the appearance of a home and its yard, consider, from the world of fiction, Mr. Pine's Purple House.1 In this classic children's book, Mr. Pine lives in a Levittown-style neighborhood of lookalike homes. "A white house is fine, but there are FIFTY white houses all in a line on Vine Street."2 In an effort to distinguish his home, he adds landscaping features (a pine tree, then a bush), but is frustrated when his neighbors copy his efforts assiduously. Finally, he paints his house purple. Voila! Rather than mimic Pine's purple, his neighbors do repaint, but they pick other, distinctive

1. LEONARD KESSLER, MR. PINE'S PURPLE HOUSE (1965).
2. Id. at 1.
shades. From Mr. Pine's expressive conduct, his neighbors hear the message of individualism, and appreciate its virtue.

This Article deals with the public regulation of expression through architecture and yards, although parallel issues of great importance are raised by private regulation of property-based expression through the law of servitudes. This is because private covenants often include landscaping regulations and other rules dealing with yard usage, sometimes with a great amount of detail, especially for newer large-scale residential communities.3

Although my topic includes consideration of First Amendment principles, it has broader parameters. The expansive view of expression I take resembles the approach to "symbolic speech" taken by the Supreme Court in its First Amendment jurisprudence. But my mission involves more than exploring constitutional law. Property rights may promote or inhibit expressive conduct, regardless of the scope of the First Amendment.4 If we had no First Amendment at all, property law systems would still have characteristics that directly affect the nature and extent of freedom of expression in our society. Some property rules advance freedom of expression,5 and other rules retard freedom of expression.6 Such dualism is inevitable as long as our legal system recognizes both the institution of property and the value of expression. Nevertheless, it is proper to analyze the benefit derived from property rules in terms of their impact on freedom of expression, bearing in mind that valuing

3. Homeowners associations usually are given authority to enforce yard rules. In general, courts are favorably inclined to private controls based on the contract theory of consent through recordation of the covenants. In servitudes law, constitutional principles are submerged because state action is typically lacking. Instead, notions of reasonableness provide limits to community censorship in planned communities. See generally AALS Common Interest Developments Symposium, 37 URB. LAW. 325 (2005).

4. More precisely, the First Amendment as interpreted judicially is a floor but not a ceiling to determining rights regarding expression. Property rights may not be defined and enforced so as to infringe the First Amendment rights of landowners or other members of society. Such property rights must give way when First Amendment entitlements are asserted. On the other hand, property rights may be defined so as to promote expression even though the expression is not constitutionally protected. See infra note 5.

5. A narrowing of the landowner's right to exclude persons from her land can promote expression. See State v. Shack, 277 A.2d 369 (N.J. 1971). In Shack, individuals entered a farm to visit with migrant farm workers in an effort to provide them with health and legal services. The farm owner refused to permit their entry and obtained criminal convictions for trespass. The defendants claimed the convictions violated the First Amendment, but the appellate court decided the case on other grounds, reversing on the state-law basis that the owner had no property right to exclude the defendants.

6. The property rights associated with the recent evolution of large residential gated communities is one example. See generally EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES (1999); David L. Callies, Paula A. Franzese & Heidi Kai Guth, Ramapo Looking Forward: Gated Communities, Covenants, and Concerns, 35 URB. LAW. 177 (2003).
expression may at times conflict with other societal values that merit protection.

I. EXPRESSION ARCHITECTURE

The idea that architecture may constitute expression is not novel. A brief review of the public regulation of architecture is useful before turning to the subject of yards. Prior to the middle of the twentieth century, American zoning did not attempt to regulate the look or style of architecture. A landowner who wished to put up a building merely had to observe use, size, and siting regulations. This meant that a person who erected an office building or a house had to have land in a proper use district, observe height and size limits, and comply with set-back requirements which often mandated the size and existence of yards. Beyond this, architectural style was not regulated. What the structure looked like was totally up to the architect and the owner, provided it met safety-related building code requirements. This “hands-off” approach to architecture and other matters of appearance coincided with the purposes of zoning offered by its first proponents. Zoning was rationalized as a device to suppress nuisances, not as a vehicle to force owners to make their properties beautiful or aesthetically pleasing. In the vocabulary of economics, the goal was to limit negative externalities, not to compel the production of positive externalities.

The zoning restrictions on use, size, and site are still with us, but in many communities today there is also public regulation of architectural

9. True to this heritage, modern zoning ordinances usually say nothing about vegetation, grass cutting, and the like. See DANIEL R. MANDELFER, LAND USE LAW ch. 5 (5th ed. 2003) (describing features of modern zoning regimes). These matters are handled by special purpose ordinances. “Junk ordinances” and similar laws often limit the storage of objects in yards, such as inoperable cars. See City of Jamestown v. Tahran, 657 N.W.2d 235, 237 (N.D. 2003) (holding that a city junk ordinance is a criminal ordinance, not a zoning ordinance). Sometimes such ordinances are primarily aesthetic in orientation, although they can relate to safety issues and to the exclusion of businesses from residential areas.
10. The chief goal of the early zoning regimes was to separate uses thought to be conflicting. In particular, the paramount interest was to protect single-family homes from externalities stemming from industrial and commercial uses. Those externalities included airborne pollution, noise, and increased automobile traffic. It was also thought that community planning, accomplished through zoning, would improve public health, reduce fire risks, and make possible the more efficient delivery of public services. See Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 691-94 (1973).
look and style. The typical ordinance requires the submission of plans for approval by an architectural review board. Often such boards require that the planned building have a style and appearance that is similar to, or in harmony with, neighboring existing buildings. A more common example of public regulation of architecture is the almost universal practice of zoning mobile homes and other types of prefabricated housing out of neighborhoods with more expensive site-built housing.

These sorts of architectural regulations cannot be justified on the basis of preventing nuisances without significant expansion, and thus severe distortion, of the current legal meaning of the term “nuisance.” The only value of such regulations is to promote and protect aesthetic values, and they must seek their justification on that basis. Prior to the 1950s, almost all courts struck down aesthetic laws as violations of substantive due process. Observing that community aesthetics had no perceiveable link to health and safety, these courts asked whether legislative promotion of aesthetics, when imposing restraints on private property, could be legitimated by the end of providing for the “general welfare.” Many opinions answered the question “no,” with two rationales generally espoused. First, the end of furthering aesthetics was less

11. Some residential communities have anti-copycat architectural design rules, which may or may not be coupled with homogeneity rules. For example, the rule may require a house to have a similar style to the neighbors, but not the identical look. E.g., Village of Hudson v. Albrecht, Inc., 458 N.E.2d 852, 854 (Ohio 1984) (upholding on aesthetic grounds anti-lookalike regulations and requirements that the “architectural character . . . will not be at such variance” with neighboring structures so as to cause a “substantial depreciation” in property values). In the absence of public controls, or private controls set forth in recorded servitudes, intellectual property law determines whether the copying of architectural styles is privileged or wrongful. See Adam T. Mow, Comment, Building with Style: Testing the Boundaries of the Architectural Works Copyright Protection Act, 2004 UTAH L. REV. 853 (2004).

12. E.g., Miss. Manufactured Hous. Ass’n v. Bd. of Aldermen of Canton, 870 So. 2d 1189 (Miss. 2004) (allowing association standing to challenge city’s adoption of zoning ordinance that excluded mobile homes from certain zones); Town of Cuyler v. Pfleegor, 785 N.Y.S.2d 780 (App. Div. 2004) (upholding exclusion of mobile home from residential zone, even though owner used it only for storage, because ordinance promoted “community aesthetics”).

13. For the definitions of public and private nuisance, see RESTATEMENT (SECOND) OF TORTS § 821B-D (1979); cf. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding that the state must compensate owner if it prohibits building on beachfront lot unless owner’s planned house would constitute common law nuisance under background principles of state law).

14. By “aesthetic values” I mean the preferences of individuals for physical objects, features, and characteristics that they consider to be beautiful or pleasing. Regulations that promote aesthetic values generally have economic effects. See infra note 104 and accompanying text (critiquing preservation of property values rationale for aesthetic regulation).

15. Nuisance prevention fails to justify the regulation of architecture due to the “aesthetic nuisance” doctrine, which posits that aesthetic harm by itself is not actionable. See Part III infra.

16. E.g., Crawford v. City of Topeka, 33 P. 476 (Kan. 1893) (invalidating setback requirement for billboards and other advertising structures). In so doing, courts were very much in step with the pre-New Deal United States Supreme Court which, during the era of Lochner v. New York, 198 U.S. 45 (1905), actively scrutinized state regulation that interfered with property and contract rights.
important than the ends served by traditional uses of the police power. Second, early courts perceived that aesthetic regulation carried too great a danger of unrestrained subjectivity.  

This judicial bias against aesthetic laws, at first hearty, gradually diminished during the first half of the twentieth century. Instead of striking down laws that had a predominant aesthetic component, judges began to sustain such laws by finding that they were designed to advance one of the traditional governmental ends—health, safety, or the general welfare. It became firmly established that a measure that had more than one end, the protection of aesthetics and something else, was constitutional if the “something else” fit within traditional police power canon. The proscription was restricted to aesthetics-only zoning or other controls. The final stage in the decline of meaningful judicial review of aesthetic regulation came in 1954, with the decision of the United States Supreme Court in *Berman v. Parker*. In *Berman*, the Court sanctioned the legislative promotion of communities that are “beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully regulated.”

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17. *E.g.*, City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co., 62 A. 267 (N.J. 1905) (invalidating ordinance requiring signs to be set back at least ten feet from street because it was neither necessary for public safety nor valid based on aesthetics); City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842 (Ohio 1925) (noting that aesthetic considerations do not justify exclusion of an apartment building from a single-family residential zone). Unlike other areas of state regulation, in which it was thought that objective evaluation of the merits of a particular “end” of government was possible, an aesthetic law was seen as no more than a reflection of the subjective aesthetic values of the legislative body. Their aesthetics might well differ from those of other citizens, with no objective test available to judge whether the legislators’ or the dissenting citizens’ aesthetics were preferable or “right.”

18. *E.g.*, Gorieb v. Fox, 274 U.S. 603 (1927) (upholding the establishment of setback lines, which added to neighborhood “attractiveness,” because they also promoted public health and safety); Ghaster Props., Inc. v. Preston, 200 N.E.2d 328 (Ohio 1964) (prohibiting highway advertising based on safety and aesthetic considerations was justified).

19. More significantly, the courts began to strain to find traditional justifications for controls that quite clearly were enacted for aesthetic reasons. The classic case of this genre is *St. Louis Gunning Adver. Co. v. City of St. Louis*, 137 S.W. 929, 942 (Mo. 1911), dismissed per stipulation, 231 U.S. 761 (1913). In sustaining a city ordinance banning billboards in certain neighborhoods, the Missouri Supreme Court found the evil that the legislative body sought to eradicate was not visual blight upon the urban landscape, but rather the use of billboards as shields for illicit activities: “behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim.” *Id.*

20. 348 U.S. 26 (1954). The key question concerned the scope of the eminent domain power in the context of an urban renewal project. Finding the scope of that power to be broad and expansive, Justice Douglas, in a ringing opinion for the Court, went on to observe in dictum:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

*Id.* at 33 (internal citations omitted).
patrolled." The state courts were not compelled to follow the federal principles espoused in *Berman* when evaluating the extent of their states' police power, but nonetheless they quickly fell into step, jettisoning the anti-aesthetics principle.22

Public architectural controls raise First Amendment concerns, even when it is conceded that they are rationally related to advancing a legitimate governmental end in promoting community aesthetics. A person's choice as to architecture can be seen as a form of expression. The desired architecture, which the state refuses to allow, would convey a message jointly authored by owner and architect.23 There are no reported cases that adjudicate the claim that architecture represents protected expression, although there are analogies dealing with sculpture24 that suggest its merit. Commentators have concluded that at least certain architecture should be entitled to First Amendment protection,25 and the

21. *Id.*

22. In the decades since *Berman*, the modern view validating aesthetic regulation has become firmly entrenched as a core principle of land use and environmental law. Functionally, the new rule has served as the catalyst and prime legal prop for a wide variety of programs, ranging from historic preservation and the protection of scenic vistas to public architectural and landscaping controls. Most courts have extended their full blessing to aesthetic regulation, according that purpose coequal status with the more traditional police power objectives. *E.g.*, Gouge v. City of Snellville, 287 S.E.2d 539 (Ga. 1982) (upholding prohibition of satellite TV dish in front yard); State v. Jones, 290 S.E.2d 675 (N.C. 1982) (upholding regulation of junkyards); Village of Hudson v. Albrecht, Inc., 458 N.E.2d 852 (Ohio 1984) (upholding architectural controls on exterior appearance of shopping center). A few modern courts have striven for a middle ground, characterizing aesthetics as a proper legislative end, but somewhat lower in rank than concerns such as health and safety, and therefore demanding less judicial deference. City of Chicago v. Gordon, 497 N.E.2d 442, 447 (Ill. App. Ct. 1986) (when government justifies prohibition of outdoor advertising signs on aesthetic grounds, "the justification must be carefully scrutinized to determine if it is merely a public rationalization for an improper purpose"); Modjeska Sign Studios, Inc. v. Berle, 373 N.E.2d 255, 260-61 (N.Y. 1977) (noting that an aesthetic goal "does not provide a compelling reason for immediate implementation" of land use regulation with respect to existing structures or uses and that the owner must be allowed a reasonable period of amortization).

23. American architect Louis Sullivan, known as the first modernist, described "the real architect" as "not a merchant, broker, manufacturer, business man, or anything of that sort, but a poet who uses not words but building materials as a medium of expression." LOUIS H. SULLIVAN, KINDERGARTEN CHATS AND OTHER WRITINGS 140 (1947) (emphasis in original).

24. PETA v. Gittens, 396 F.3d 416 (D.C. Cir. 2005) (remanding to the district court to clarify whether damage award was based on city's failure to allow public display of sculpture of suffering circus elephant); Hopper v. City of Pasco, 241 F.3d 1067 (9th Cir. 2001) (city's exclusion of artists' controversial sculptures and prints from its art gallery violated First Amendment); Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) (visual artists have First Amendment right to sell works on public streets, without compliance with city's vendors law), *cert. denied*, 520 U.S. 1251 (1997); Serra v. U. S. Gen. Servs. Admin., 847 F.2d 1045 (2d Cir. 1988) (after artist sold sculpture to government, relocation was considered a permissible time, place, and manner restriction).

Supreme Court’s treatment of symbolic speech solidly supports this conclusion. The strongest case is architecture designed by a recognized, professional architect to which neighbors object because of its lack of conformity to the architectural style represented by nearby structures. But protected architectural expression should not be so limited.

It is true that the message expressed by a famous architect may be the clearest and most articulate message that can relate to land use. First Amendment law, however, properly rejects evaluation of the quality of speech and the clarity of the message as a predicate for protection. The Drudge Report and Macbeth are both speech, both enjoying the same sphere of protection. For this reason, it is not clear how symbolic speech could stop with an illustrious designer or the landowner who hires her. What of the journeyman architect who designs a simple house that nonetheless is “out of character” with neighboring structures? Is it not disquietingly elitist to label the creation of a high-priced Frank Lloyd Wright wannabe as “speech,” but not the more modest efforts that are within the means of middle-class home buyers? Consider whether an undistinguished tract home can convey a message. Is it not possible that the owner, through the builder or architect, is saying “This is my house. I like it. It’s my home, and it expresses my being”? 

Smith, Law, Beauty, and Human Stability: A Rose is a Rose is a Rose, 78 CAL. L. REV. 787, 800-07 (1990).

26. See infra notes 85-95 and accompanying text.

27. See Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) (recognizing that the government was not engaging in content-neutral regulation if it evaluated the quality of artistic expression, although denying that the government’s regulations made an “artistic judgment” in this case). See also Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (holding that the state cannot employ its public accommodation law to force Saint Patrick’s parade organizers to include gay activists because their participation would change the organizers’ message at the parade, which is expressive conduct entitled to First Amendment protection).

28. The Drudge Report merits First Amendment protection, even though many readers may conclude its content is less articulate than outlets of mainstream journalism, such as the New York Times and the Economist. The First Amendment safeguards both refined and vulgar speech. See Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (finding cartoon portraying Jerry Falwell as having engaged in incest as protected speech); Cohen v. California, 403 U.S. 15 (1971) (wearing jacket in courthouse displaying the words “Fuck the Draft” is protected speech). It is also worth noting that cultural perceptions of the value of certain expressive forms change over time. See LAWRENCE W. LEVINE, HIGH BROW, LOW BROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA 85 (1988) (Shakespeare was viewed as popular entertainment as late as the nineteenth century, only later becoming entrenched as a high-cultured form of literature).

29. Houses that are “in character” with neighboring houses conform to the status quo. Houses that are “out of character” present challenges to the status quo relationships. In so doing, they “speak against” the dominant neighborhood values. An architectural form can be seen as an indexical reference to social class and culture, or subculture. Opponents of zoning claim that it is an instrument of class separation, producing a hierarchy of land values that simulates the hierarchy of the landowners’ wealth and class. See, e.g., Richard S. Chused, Euclid’s Historical Imagery, 51 CASE W. RES. L. REV. 597 (2001).
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Even something as simple as a building’s exterior color can constitute expressive conduct. When Mr. Pine painted his house purple, he galvanized an entire neighborhood. Color in the real world can have the same impact. A neighborhood conflict in Avondale Estates near Atlanta, highlighted by local and national media, illustrates the point. In 2003, homeowner Stan Pike sought approval from the historic preservation commission to add a circular stairway at the front of his house. After the commission denied his request, an aggrieved Mr. Pike painted the front of the house lime green with big purple polka dots. He intended to convey, and did convey, a message—one that the commission members and his neighbors well understood. The story ended well (perhaps). Several weeks later, the city commission reversed the decision of the historic preservation commission by a vote of three-to-two, allowing Mr. Pike to add his stairway. He promptly repainted his house.

II. EXPRESSIVE YARDS

The message elements that may be associated with land use are not limited to the display of architecture through the construction of buildings. The visual appearance of a parcel of real estate is composed of both the architecture and its surroundings. Consider a modern cultural icon, the American yard. Most homes in America have some form of yard, and homeowners choose to do many different things with respect to their yards. The front yard embodies a visible statement made to one’s neighbors and one’s community. It can express a person’s individuality. It can tell you something about a person’s self image. Is there a grass lawn, manicured to the hilt? A stately stand of shade trees? Luxuriant flower beds? A productive vegetable garden? Natural landscaping that consists of indigenous plants and provides a wildlife habitat?

30. See supra notes 1–2 and accompanying text.
31. Karen Hill, How Do You Like It Now? Angry Homeowner Paints a Colorful Protest, ATLANTA JOURNAL CONSTITUTION, May 8, 2003, at 10C. City officials attempted to determine whether they had the right to force Pike to repaint the house to its original white color. Id. It is not clear whether the city ordinance required a certificate of appropriateness for a change in exterior color. The ordinance does not specifically mention color, but a certificate is needed for “a material change in the appearance of” a building, which includes changes to the building’s “architectural style,” “general design,” and related “features, details or elements.” AVONDALE ESTATES, GA., CODE OF ORDINANCES ch. 5, art. 8, § 5–231 (2004), available at http://www.municode.com/services/mcsgateway.asp?sid=10&poid=12763 (last visited Jan. 26, 2006).
Artificial objects installed in an owner's yard may speak even more plainly than landscaping. On a large scale, consider the *Cadillac Ranch* outside of Amarillo—ten Cadillacs half-buried, nose down in the Texas prairie.\(^{34}\) Or the *Cross Garden* outside of Montgomery, Alabama, warning passersby about hell's temperature.\(^{35}\) Or the *Enchanted Highway* of mega metal sculptures in Regent, North Dakota.\(^{36}\) On a smaller scale, appropriate to an average-sized urban or suburban lot, ubiquitous yard art may also speak, although more quietly. Doesn't a pink flamingo, or a nativity scene in December, say something about the owner?\(^{37}\) The nativity scene, at a minimum, suggests that the owner has chosen to celebrate Christmas. The message that a flamingo exhibitor may intend is more obscure, but it can have a perceptible meaning.\(^{38}\) The fact that all flamingo viewers will not perceive the same meaning does not prove that the owner is not expressing herself. Often expressive conduct, whether it is sculpture, dance, or poetry, is only appreciated by a particular community.

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34. The *Cadillac Ranch*, commissioned by oil heir Stanley Marsh and created by an experimental art collective named Ant Farm, is "possibly the best-known public artwork in the country." Scott Rappaport, *Film Professor's Revolutionary Past to be featured in Berkeley Art Museum Retrospective*, UC SANTA CRUZ CURRENTS, Jan. 19, 2004, available at http://currents.ucsc.edu/03-04/01-19/ant_farm.html. See also Bruce Springsteen, *Cadillac Ranch*, on *THE RIVER* (Sony 1980).


37. In some neighborhoods, a homeowner's failure to display an object that all her neighbors display can express a message. See JOHN GRISHAM, *SKIPPING CHRISTMAS* (2002). See also the movie adaptation of Grisham's book *CHRISTMAS WITH THE KRANKS* (Sony Pictures 2004). In this comedy, empty-nesters Luther and Nora Krank become nonconformists, deciding not to celebrate Christmas. They bewilder their neighbors by, among other things, refusing to decorate their house with a rooftop Frosty the Snowman. They stand out by violating the community norm that everyone should "speak" by installing a holiday display. First Amendment law protects "anti-speech" as well as speech. *E.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (public school cannot require students to salute American flag).


"Pink plastic flamingos are a symbol of North American consumerism . . . . The 1960s were . . . a time to go back to nature, and the plastic flamingo quickly became the prototype of bad taste and anti-nature. . . . But that wasn't the end . . . If pink flamingos were the ultimate in bad taste, then people were sure to place them on their lawn to bug their neighbors. . . ."
Different yards say different things. I am not suggesting that every homeowner intends to convey a message with her landscaping, its design and maintenance, or the objects she places in her yard. A person who permits tall weeds to overcome a grass lawn in a neighborhood where everyone else has trimmed lawns may or may not intend to make a statement. The owner may simply be too busy to maintain the lawn, or too lazy. On the other hand, the owner may express part of herself, some value or values, through what she displays to the world. A fishing boat parked in the front yard may be the only convenient place its owner can put it when he’s not out on the water. But putting the boat out front might, for some individuals, be more than just a place of storage. People use things to portray themselves to others—apparel, jewelry, cars, and other objects. Prominent display of the boat might make a statement to viewers, “I’m a sportsman, this is my number one hobby.” For a boat, or any object in a yard, to convey a message, the viewer must interpret its presence. Because interpretations differ between observers, a specific object may not convey a distinct message; however, the homeowner can clarify her message by adding signs to her yard.

On occasion, a yard display conveys a discrete, particularized message because it responds to a neighborhood conflict or a governmental regulation. Mr. Pike’s lime green, polka-dot house told his neighbors and city officials that he did not appreciate being told he could not add a staircase to his home. A Christmas display in Monte Sereno, California, conveyed a similar message of protest. For five consecutive years, Alan and Bonnie Aerts set up a dazzling light display, including Santa, his reindeer, angels, and singing carolers. Their efforts attracted over 1,500 cars per night to view their creation. The Aerts lived on a cul-de-sac street, and the visiting cars congested their neighborhood and left behind litter. The family across the street organized a petition, which they

39. See, e.g., Judge Rules in Favor of Cross-Dressing Student, ASSOCIATED PRESS, May 8, 1999 (federal judge rules high school cannot stop male student from wearing black formal dress to prom since the decision to wear a dress is a protected First Amendment right).

40. Gretna, Louisiana, has a controversial new zoning ordinance that attempts to get boats, campers, and other objects out of front yards, which has been met by the vehement protest of some town residents. See Christopher Cooper, In a Town of Eyesores, A Boat in the Yard is a Thing of Beauty, WALL ST. J., Jan. 26, 1999, at A1.

41. For example, the naturalist landscaper may obtain a Backyard Habitat Wildlife sign from the National Wildlife Federation. The text of the sign reads, “This property provides the four basic habitat elements needed for wildlife to thrive: food, water, cover, and places to raise young. It has been certified by the National Wildlife Federation as an official Backyard Wildlife Habitat.” National Wildlife Federation, Backyard Wildlife Habitat, http://www.nwf.org/backyardwildlifefederation/createhabitat/cfm (last visited January 28, 2006). It is unlikely that a local government’s sign ordinance could prevent the owner from displaying such a sign, even if the ordinance is content neutral. See City of Ladue v. Gilleo, 512 U.S. 43 (1994) (homeowner has the right to post a sign opposing the war in the Persian Gulf, despite a city ordinance prohibiting all signs except those falling within a narrow list of exemptions).
presented to the city council. By a three-to-two vote, the council passed an ordinance that limited outdoor exhibits to three days, unless the owner obtained a permit. For the 2004 holidays, the Aertses put a massive Mr. Grinch on their lawn, with a swinging arm pointing to the petition-leading neighbors, singing “You’re a mean one, Mr. Grinch.”42 Through their Grinch, the Aertses told their local community that they thought the new ordinance was unjustified and that they resented their neighbors’ efforts in procuring its passage. Ironically, their Grinch attracted much more attention than their bigger, costlier display from Christmases past. The story made the national news, with appearances for the Aertses on NPR, CNN, and national television shows.43

III. THE AESTHETIC NUISANCE DOCTRINE

When we consider various expressive yard activities and ask whether a person has the legal right to engage in them, the key starting point is the status of the yard as private property. The expression takes place not on

42. Dan Reed, Grinchy Frown Hits Small Town; Monte Sereno Couple Halt Christmas Extravaganza, SAN JOSE MERCURY NEWS, Nov. 24, 2004, at 1A.
public property or on property owned in common with neighbors, as
would be the case for condominium ownership. With fee simple title, the
homeowner has the general right to use her property as she sees fit. A
strong view of private property empowers the landowner to do what she
wishes with her yard.

Yet the right to use one's real property as desired, historically
cherished as it is, was never conceived as absolute. From the earliest
days of English common law, the law of nuisance has imposed a
significant set of restrictions on land use. When a person's land use
significantly diminishes her neighbors' use and enjoyment of their
property, that use may constitute an actionable nuisance.

Nuisance analysis typically balances the gravity of the harm to the
plaintiff against the utility of the defendant's conduct, but there are
certain activities that are privileged and not subject to nuisance balancing.
One such range of activities is embraced by the doctrine of aesthetic
nuisance. A boat in the front yard is, in the language of the law, an
aesthetic nuisance, and the traditional rule of aesthetic nuisance is
nonliability: the actor has immunity if an aesthetically offended observer
brings an action for nuisance. Two policy justifications are commonly
said to underlie the aesthetic nuisance rule. The first rationale is
economic: market values are maximized if landowners have the right to
improve and develop their land, free of the risk that neighbors may
challenge improvements on the basis of aesthetic blight. Second, aesthetic
standards are thought to be inherently subjective. Indeterminacy would

44. Blackstone is often misquoted and bashed on this point. He said: "The third absolute
right, inherent in every Englishman, is that of property: which consists in the free use,
enjoyment, and disposal of all his acquisitions, without any control or diminution, save only
by the laws of the land." William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND,
VOLUME I at 134 (1765). The last clause, usually omitted by those who quote Blackstone,
demonstrates he did not use the adjective "absolute" to mean subject to no restrictions as to use.

45. See JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW 52-56

46. See JACQUELINE P. HAND & JAMES CHARLES SMITH, NEIGHBORING PROPERTY
OWNERS 14-17 (1988).

47. See, e.g., Oliver v. AT&T Wireless Servs., 90 Cal. Rptr. 2d 491 (Cal. Ct. App. 1999)
(holding that a cellular transmission tower "looming" over neighboring property was only an
aesthetic harm, not a nuisance, even if property values were diminished); Wernke v. Halas, 600
N.E.2d 117 (Ind. Ct. App. 1992) (reversing a trial court judgment and holding that a toilet seat,
orange plastic fencing, and vulgar graffiti in yard does not constitute a nuisance); Perry Mount
Park Cemetery Ass'n v. Netzal, 264 N.W. 303, 303 (Mich. 1936) (stating that "mere esthetics is
[sic] beyond the power of the court to regulate"); Ness v. Albert, 665 S.W.2d 1, 1-2 (Mo. Ct.
App. 1983) (noting that "unsightliness, without more, does not create an actionable nuisance");
Houston Gas & Fuel Co. v. Harlow, 297 S.W. 570, 572 (Tex. App. 1927) (holding that an
unsightly structure does not constitute a nuisance); Parkersburg Builders Material Co. v.
Barrack, 191 S.E. 368, 369 (W. Va. 1972) (commenting that "courts of equity have hesitated to
exercise authority in the abatement of nuisances where the subject matter is objected to by the
complainants merely because it is offensive to the sight").
result were courts to intervene by declaring some land uses to be actionable aesthetic nuisances.\textsuperscript{48}

What does the aesthetic nuisance rule have to do with expression? It is pro-expression. It represents a structuring of property rights that increases the opportunities for freedom of expression. Although the courts that developed and applied the rule did not base their opinions on freedom of expression that was the consequence—even if unintended. The rule had the effect of promoting expression whenever the landowner’s use served an aesthetic function. To this day, most courts still promote freedom of expression by immunizing the owner from neighbors’ nuisance claims under the aesthetic nuisance rule.

IV. NATURAL LANDSCAPING AND WEED ORDINANCES

There are many types of expressive activities that a landowner may pursue within the confines of her yard. A particular practice that has become common in our day is natural landscaping. An urban or suburban landowner in a typical neighborhood of manicured lawns may decide to let her yard go “back to nature.” Alternatively, the landowner who is industrious, and perhaps more committed to the naturalist cause, may not just sit back and let nature decide what to grow in her yard. She may affirmatively select and cultivate the plants that fit in with a natural landscaping theme.\textsuperscript{49} Soon the neighbors complain about the naturalist’s vegetation, calling them “weeds” and decrying the general lack of landscape maintenance. The naturalist explains that her yard reflects an environmental ethic of returning the land to its natural environment, coupled perhaps with disdain for the homogeneity of the suburbs. It is hard to dispute that the unkempt yard does convey such a message. As a matter of common-law property rights, the aesthetic nuisance doctrine shelters the natural landscaper. Public regulation of land use, however, may prohibit at least some types of natural landscaping. The remainder of this section discusses those regulations and how they have evolved since the start of the twentieth century.

Traditional zoning separated uses of property thought to be incompatible. In so doing, it sought to forestall the creation of nuisances. Zoning laws made no mention of vegetation growing in yards.

\textsuperscript{48} This is the same perspective that led early courts to strike down aesthetic legislation. See supra notes 13–17 and accompanying text.

\textsuperscript{49} Within the natural landscaping community, there is debate as to whether natural landscaping is limited to plants that are indigenous to the geographical area, or whether it may include plants introduced from elsewhere. See, e.g., NORTHEASTERN ILLINOIS PLANNING COMMISSION, SOURCEBOOK ON NATURAL LANDSCAPING FOR LOCAL OFFICIALS 65 (2004) ("native landscaping" uses only indigenous plants, but "natural landscaping" may have in addition to indigenous plants "some small percent of exotics"), available at http://www.nipc.org/environment/sustainable/naturallandscaping.
Confronted with the resulting regulatory gap, many communities adopted a special purpose control, often called a "weed ordinance,"\textsuperscript{50} to regulate vegetation. The similarity between an architectural review ordinance and a weed ordinance is notable. As applied to urban and suburban properties, both impact the visual appearance of the property to neighbors and persons on nearby public property, such as streets and sidewalks. The weed ordinance is to the yard what the architectural review ordinance is to the structure. The latter law regulates building architecture; the former targets landscape architecture.\textsuperscript{51}

There is one distinction based on pedigree between architectural controls and vegetation controls that might have legal significance. The weed ordinance, unlike the architectural review board, was initially rationalized as a device to restrain nuisances. Near the end of the nineteenth century, several state legislatures enacted statutes to protect farmers from the spread of weeds that interfered with crops.\textsuperscript{52} These statutes usually delegated to local government the power to enact ordinances specifying the types of prohibited vegetation, the landowner's duty to eliminate them, procedures for official notice to offending landowners, and enforcement mechanisms.\textsuperscript{53} In these statutes, agricultural control of weeds has no aesthetic dimension and is plausibly grounded on nuisance law.

Before long, weed ordinances became popular in residential neighborhoods as well. The residential weed ordinances relied on two justifications, neither of which included protecting farmers' economic interests: advancing aesthetic concerns\textsuperscript{54} and safeguarding public health

\textsuperscript{50} See 6A EUGENE McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.90 (3d ed. 1997). Many ordinances regulate other plants as well, such as grasses and saplings, and sometimes bear titles showing a broader scope, such as "grass and weeds ordinance." See, e.g., People v. McKendrick, 468 N.W.2d 903 (Mich. Ct. App. 1991) (enforcing a "noxious vegetation" ordinance, which defined weeds as "all weeds, grass, brush, wildings, second growth, rank vegetation or other vegetation that is not growing in its proper place, having a greater height than seven (7) inches or spread of more than seven (7) inches").

\textsuperscript{51} Weed ordinances typically are special-purpose ordinances that are not part of the local zoning code. See supra note 9. Architectural review ordinances may be free-standing, but often are incorporated in the zoning code. With respect to the issues I discuss, the distinction is purely semantic. In other words, there is no difference between living in a residential community that is "zoned" to prohibit bamboo vegetation than one that has a special purpose "no bamboo" ordinance.


\textsuperscript{53} E.g., N.Y. Town Law § 64(5-a); WIS. STAT. ANN. § 66.0407 (West 2005).

\textsuperscript{54} E.g., Rose v. Bd. of Zoning Adjustment Platte County, Mo., 68 S.W.3d 507 (W.D. Mo. Ct. App. 2001) (upholding weed ordinance that contained several aesthetic terms).
by decreasing allergies and noxious odors.\textsuperscript{55} While the aesthetic justification is sound, the allergy and noxious arguments are weak for three reasons. The first reason is that pollen travels many miles, making restrictions on small local lots ineffective when allergies can easily result from areas out of town that are not zoned. The second is that most weed ordinances do not attempt to differentiate plants whose pollen causes allergies in significant numbers of people from those plants whose pollen does not.\textsuperscript{56} Third, ridding neighborhoods of weeds, after all, has precious little to do with nasty smells.\textsuperscript{57} Thus, in residential neighborhoods, aesthetics was (and is) the only real reason for weed control laws, and reliance on health was arguably mere pretext.\textsuperscript{58}

\section*{V. MODERN WEED CASES}

Though weed ordinances are numerous, weed litigation is a backwater; it is not a glamour child and has never generated a high volume of reported cases.\textsuperscript{59} The first reported U.S. case was decided in 1903,\textsuperscript{60} with a trickle of decisions ever since. Modern cases, however, suggest a nascent shift in cultural values. Opinions from Louisiana, Pennsylvania, and Illinois, explored below, display a growing ethic of ecology.

Of the three cases, \textit{Baton Rouge Audubon Society v. Sandifer}\textsuperscript{61} is the only one that invalidates a weed ordinance. From 1984 to 1995, the Baton Rouge Audubon Society acquired forty-one acres of land on the front Chenier of Cameron Parish along the Gulf of Mexico for the purpose of restoring natural vegetation.\textsuperscript{62} The acquisition included twenty-one of the

\begin{itemize}
\item \textsuperscript{55} \textit{E.g.}, Lundquist v. City of Milwaukee, 643 F. Supp. 774 (E.D. Wis. 1986) (upholding weed ordinance designed to limit growth that would cause hay fever).
\item \textsuperscript{56} Growing up in a town in Wisconsin, I suffered from hay fever at the end of every summer. My father, the weed commissioner, was death to all of the town's ragweed, goldenrod, and thistle that he could spot. Alas, I perceived no improvement to my condition.
\item \textsuperscript{57} When was the last time you saw a person overcome by odor from living plants? As reported by ELQ editors, for three months each year female Ginko trees in Boalt Hall's courtyard overwhelm students with a stench variously described as "dog droppings" or "vomit." It is improbable, however, that a weed ordinance would control the Ginkos.
\item \textsuperscript{58} Where to draw the line between aesthetic regulations and those that promote health, safety, or other aspects of welfare is not easy. When the distinction matters legally, many courts have had great trouble in line drawing, and unfortunately some courts accept the government's artificial claims that a measure is designed to protect health, safety, or morals.
\item \textsuperscript{59} A Westlaw search conducted in February 2005 reveals only twenty-six reported cases involving local weed control laws (state and federal databases, including old case databases).
\item \textsuperscript{60} City of St. Louis v. Galt, 77 S.W. 876 (Mo. 1903) (sustaining homeowner's conviction for weeds four to five feet tall under ordinance enacted in 1900; one-third of his weeds were sunflowers).
\item \textsuperscript{61} 702 So. 2d 997 (La. Ct. App. 1997).
\item \textsuperscript{62} The restored Chenier was to serve as a habitat for migratory songbirds and butterflies. Does it change the equation when the landowner's purpose in planting natural vegetation is not solely cultivating the vegetation for its own sake? She wants flora for fauna. Suppose that the
\end{itemize}
thirty-six lots in a subdivision called Little Florida. The Audubon Society planted live oak and hackberry seedlings and cultivated undergrowth vegetation. Neighboring subdivision homeowners complained that the undergrowth encouraged insects and small nuisance animals and that it was a fire hazard. In response, Cameron Parish extended its “Grass and Weeds” ordinance to include the Little Florida Subdivision and promptly sent a notice of violation to the Audubon Society. The Society then sued to enjoin enforcement of the ordinance and for a declaratory judgment that the ordinance was unconstitutional, either facially or as applied to its property.

The trial court permanently enjoined the parish from enforcing the ordinance against the Audubon Society, and the parish appealed. The court of appeals affirmed, reasoning that the Society was pursuing a legitimate purpose:

It was overwhelmingly established that the undergrowth of vegetation is valued by the owner of the property, the Audubon Society. The weeds cannot be considered obnoxious, nor can the grass and weeds be deemed “deleterious or unhealthful growths,” considering the testimony. Expert testimony at trial evidenced that the vegetation in the sanctuary is not only desirable for the Audubon Society’s purposes and goals but even necessary for their accomplishment.

What is significant is the court’s exclusive focus on whether the landowner with a natural landscape, the Audubon Society, considered the undergrowth to be of value (non-weeds). There was no reference to community standards and no deference to the local government’s interpretation of the meaning of the ordinance. The court discounted completely the neighbors’ complaints of an increase in mosquitoes and wildlife attracted by the vegetation (or, for that matter, certain flora) are protected by the federal Endangered Species Act. In balancing the interests of the landowner against the government and neighbors, one may count this strongly in the landowner’s favor. Moreover, the introduction of a protected species may lead to federal protection of the landscape, barring the local government from enforcing its law. In addition, the spillover of a protected species to neighboring parcels of real estate may likewise restrict the neighbors.

63. The ordinance makes it unlawful for landowners to “‘fail to regulate the growth or accumulation of grass, obnoxious weeds, or other deleterious or unhealthful growths’” on their property. Baton Rouge Audubon Soc’y v. Sandifer, 702 So. 2d 997, 998 (La. Ct. App. 1997) (quoting Cameron Parish Weed Ordinance). The police jury may issue notice of a violation and, if not cured, remove the vegetation and assess the cost to the owner.

64. The trial court did not clearly express its grounds for the injunction. It stated that enforcement “‘under these particular circumstances . . . is not a legitimate exercise of the police jury’s police power.’” Id. at 1000.

65. Id. at 1001. The ordinance did not define “weeds,” and at trial the parties contested whether the undergrowth contained weeds. The court of appeals concluded that the growth was not weeds because the Audubon Society valued plants, relying on a dictionary definition which defined “weed” as “‘a plant that is not valued where it is growing and is usually of rank growth, especially one that tends to overgrow or choke out more desirable plants.’” Id. (quoting WEBSTER’S NINTH COLLEGIATE DICTIONARY).
other externalities. The court emphasized the Audubon Society's purpose and its investment in the sanctuary, but said nothing about the homeowners' purposes and investments.

Due to these omissions, the Baton Rouge Audubon Society analysis is highly questionable. Preventing an environmental society from growing tall grasses and weeds in a residential subdivision may be a good idea or an unwise governmental decision, but it surely is rationally related to a legitimate governmental objective, as that hands-off test is commonly understood.

If Baton Rouge Audubon Society was rightly decided, it was for two reasons that the court did not address. First, when the Audubon Society acquired its property and commenced its natural landscaping, there was no weed ordinance in effect. Only after neighbors complained did the parish extend the ordinance to the Audubon Society's property. Arguably, this sequence justifies protecting the Audubon Society because they were proceeding lawfully, with no notice of any legal problem, when they acquired and developed their property. In the language of the law of zoning, they had a vested right to continue a nonconforming use. The law of regulatory takings provides another way to express the importance of the timing: the Audubon Society had investment-backed expectations, which the parish could not destroy without compensation.

The second reason why the Baton Rouge Audubon Society may have been rightly decided takes us closer to the First Amendment. The trial and appellate courts both paid great attention to the ecological values expressed by the Audubon Society. They were highly impressed by the Society's mission, which added credibility to its position. It was clear the Society acted in good faith, prompted by its members' sincere conviction in their beliefs. The courts paid careful attention to the Audubon Society's motivations for its actions, which is very unusual.

66. See id. at 1001–02.
67. The court of appeals found that enforcement against the Society was "arbitrary and capricious." Id. at 1002. Such language generally signals the application of substantive due process, but the court insisted that its decision was non-constitutional. This sleight of hand was necessary for the court to preserve its jurisdiction. Under state civil procedure, appeal was only to the state supreme court in a case considering the constitutionality of an ordinance.
69. When the government amends zoning to prohibit a use that was lawful, the owner is generally allowed to continue the current use under the doctrine of nonconforming use. JACQUELINE P. HAND & JAMES C. SMITH, NEIGHBORING PROPERTY OWNERS 199–202 (1988).
70. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (holding that the government could not mandate public access to lagoon without compensation where marina owner connected lagoon to navigable bay because owner had an "investment-backed expectation" that its lagoon was private property under Hawaiian law).
Normally, the government can regulate behavior without the legitimacy of the regulation turning on the subjective reasons a person wants to behave otherwise. But, if we treat the Audubon Society's natural landscaping as expressive conduct—necessary to publicize and promote its agenda—the decision makes sense. If planting endemic grasses was necessary for the Society to express its environmental ethic, then under First Amendment analysis the government cannot prohibit that conduct unless it articulates a compelling, or at least an important, reason.

The second case, the Pennsylvania decision of Commonwealth v. Siemel, illustrates the traditional application of substantive due process to weed ordinances. Alexandra Siemel was convicted under an ordinance prohibiting as a nuisance "any grass, weeds, bushes, brush, saplings or similar vegetation exceeding six inches in height except such as are planted for useful or ornamental purposes." She claimed the ordinance was unconstitutional because its sole purpose was aesthetic. Moreover,

71. The government could argue that the Society had other avenues of communication available, which it could use effectively to convey its message. Under the time, place, and manner test of the First Amendment, the inquiry is whether the speaker has "no alternative means of expression." In this context, a key issue is whether one should consider alternative methods of expression that are off premises. Can the Society purchase other land to devote to natural landscaping? Can the Society convey its message through the print and broadcast media? Arguably, however, the Society has the right to express itself on its real property. See City of Ladue v. Gilleo, 512 U.S. 43 (1994). Thus, the issue is whether there are alternative effective means of expression that take place on the property. The Society could put up a sign that calls for wildlife preservation and natural ecosystems on a traditionally landscaped lot, but would this be effective?

72. Some First Amendment cases call for the government to demonstrate a "compelling" interest in order to sustain a speech-limiting regulation. E.g., Boos v. Barry, 485 U.S. 312 (1988) (invalidating content-based restriction on signs near embassies of foreign governments because it is not narrowly tailored to serve compelling state interest). Other cases appear to call for a lesser standard: a substantial or important government interest. E.g., Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (government has substantial interest in maintaining national parks and thus can prohibit camping by demonstrators who wish to call attention to plight of homeless).

At least one case implies that the label is not material. In United States v. O'Brien, 391 U.S. 367, 377 (1968), the Court upheld the conviction of an antiwar protester, who burned his draft card. Justice Warren observed, "[t]o characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." Id. at 376–77 (footnotes omitted). Without deciding which term was more appropriate, Justice Warren concluded that prohibition of destruction of the draft card was justified by an "important or substantial governmental interest" because the incidental restriction on freedom of expression was "no greater than is essential to the furtherance of that interest." Id. at 377.

All three cases, Boos, Clark, and O'Brien, regulate speech that takes place on public property. Our situation is quite different; the speech takes place on the private property of the speaker. In this context, assuming that the descriptive terms reflect different standards, the highest level of justification (compelling interest) should apply.


74. Id. (quoting BOROUGH OF LANSDALE, PA., WEED AND GRASS ORDINANCE 876 § 1(d)).
she alleged it was unconstitutionally vague because it failed to define the terms “useful and ornamental” or “planted.” Rejecting both challenges, the court found the ordinance supported by the nuisance rationale because weeds tend to emit allergenic pollen and noxious odors, and the terms have a sufficient common meaning.\(^7\)

In *Siemel*, Judge Friedman dissented on both grounds. She believed that ordinary people could have different views of what vegetation is “useful” and that the borough should have to prove that defendant’s plants were in fact a nuisance jeopardizing public health.\(^6\) Ordinances commonly follow the practice of defining the prohibited vegetation as a nuisance, which distinguishes this type of control from architectural review ordinances. Most courts defer to the statutory designation of nuisance without requiring the government to prove that the landowners’ particular plants are a nuisance in fact.\(^7\) The majority in *Siemel* followed

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75. Other courts split on the issue of whether the term “weeds” without meaningful embellishment is unconstitutionally vague. *Compare* City of Newark v. Garfield Dev. Corp., 495 N.E.2d 480, 482 (Ohio Mun. Ct. 1986) (landowner whose land had dandelions, goldenrod, and thistle cannot be convicted under ordinance banning uncontrolled “‘plant growth which [is] noxious or detrimental to the public health and welfare or a public nuisance;’” ordinance must define or designate particular vegetation; approving of state statutes that use horticulturally correct terms) with Howard v. City of Lincoln, 497 N.W.2d 53, 56 (Neb. 1993) (landowner properly charged with city’s costs in cutting weeds under ordinance banning “all weeds or worthless vegetation” extending more than six inches above the ground; term has “common enough meaning” understood by average citizen even though owner testified plants had value as ground cover and he ate produce of some plants; an ordinance that listed “every type of prohibited vegetation by its scientific name . . . would be extremely confusing to citizens—save, perhaps, horticulturists?”).

76. Judge Friedman stated:

> [W]hen it comes to assessing the usefulness or ornamental value of different forms of vegetation, people of common intelligence can hold widely differing views . . . . *Siemel* offers the testimony of . . . a biologist and naturalist, who characterized *Siemel*’s property as a beautiful natural garden which did not represent any threat to the community . . . . Moreover, *Siemel* indicated that she believes her “natural garden” is environmentally superior to typical manicured lawns and is her statement of what she considers both ornamental and healthy for the environment.

*Siemel*, 686 A.2d at 902.

77. For example, a federal court permitted an ordinance designed to limit the growth of grasses and weeds that cause hay fever in human beings to be over inclusive. Lundquist v. City of Milwaukee, 643 F.Supp. 774 (E.D. Wis. 1986). The ordinance imposed a one-foot height limit on enumerated grasses and “weeds,” with no definition of the latter term. The court rejected the landowner’s argument that the ordinance was unconstitutionally vague:

> [T]he failure to distinguish between wild vegetative growth over one-foot high which does and does not cause hay fever in human beings simply illustrates the practical difficulties in drafting cogent public health ordinances. . . . [I]f the ordinance were broken down scientifically into groups of weeds which do and do not cause hay fever in human beings, I think it would be even more difficult for a person of ordinary intelligence to understand and act upon than the way it currently reads.

*Id.* at 777.
the modern trend of deferring to a legislative declaration of nuisance.\textsuperscript{78} The dissent, in contrast, shifted to the government the burden of showing that the landowner's use would cause actual harm.

The third decision, \textit{Schmidling v. City of Chicago},\textsuperscript{79} arose out of federal court litigation brought by six homeowners who had cultivated natural landscapes employing native plants, wild flowers, legumes, and grasses. This conduct arguably violated the City of Chicago weed ordinance.\textsuperscript{80} Plaintiffs sued the city for declaratory relief, claiming the ordinance violated their constitutional rights.\textsuperscript{81} The court failed to reach the merits, holding that the gardeners lacked standing because they did not demonstrate a real and immediate danger that the city would cite them for violating the ordinance.

These three cases, \textit{Baton Rouge Audubon Society}, \textit{Siemel}, and \textit{Schmidling}, are perhaps just blips on the radar screen. They may not sound the death knell for weed ordinances in residential areas, but they do, in a small way, demonstrate the impact of cultural change brought about by the environmental movement. The direction of change is toward toleration of diversity in plant life. Today's American culture has more respect for ecology-minded individuals than it did a generation ago.

\textbf{VI. FIRST AMENDMENT IMPLICATIONS}

Attaching First Amendment significance to certain landscape or yard elements doesn't necessarily mean that the government is precluded from restricting that expressive behavior. The effect of finding First Amendment protection is to remove the normal presumption of legitimacy attached to the regulation, placing the burden on the government to prove that it has acted, narrowly and properly, to protect a substantial public interest.

\begin{itemize}
\item \textsuperscript{78} The classic statement of the modern deferential approach is that of Justice Sutherland in \textit{Vill. of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 388–89 (1926) (zoning may prohibit all industry from residential zones; "[T]he inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.").
\item \textsuperscript{79} \textit{Schmidling v. City of Chicago}, 1 F.3d 494 (7th Cir.), cert. denied, 510 U.S. 994 (1993).
\item \textsuperscript{80} "[A]ny person who owns or controls property within the city must cut or otherwise control all weeds on such property so that the average height of such weeds does not exceed 10 inches." \textit{Id.} at 495 (quoting CHICAGO, ILL., MUNICIPAL CODE § 7–28–120(a)(1990)).
\item \textsuperscript{81} The complaint alleged violations of due process and equal protection on the basis that the ordinance failed to define "weed" and thus was too vague and was not rationally related to a legitimate government interest. On appeal, an amicus brief of the National Wildlife Federation argued that plaintiffs' natural landscaping was protected First Amendment speech. Bret Rappaport, \textit{As Natural Landscaping Takes Root We Must Weed out the Bad Laws—How Natural Landscaping and Leopold's Land Ethic Collide with Unenlightened Weed Laws and What Must be done About It}, 26 J. MARSHALL L. REV. 865, 907–08 n.129 (1993).
\end{itemize}
We presently have no body of First Amendment case law on yard expression to guide us. The Supreme Court has yet to decide the extent to which the First Amendment applies to aesthetically-oriented land use regulations. Of its First Amendment decisions, however, four lines of cases appear potentially apposite: those addressing symbolic speech; sign ordinances (commercial speech); adult entertainment; and time, place, and manner regulations. Each group of cases has its own distinctive doctrinal analysis, and consequently it makes a difference which is applied in land use regimes that limit constitutionally protected expression. The cases suggest different ways to balance expression and regulation. Of these categories, the symbolic speech cases seem most relevant to the issue of yard expression.

Of the four First Amendment free speech categories, the sign ordinance cases are the second-most useful for analysis of a yard's expressive qualities. Signs, like yard elements, are placed on private property and the intended audience is whoever happens to come into visual contact with the site. However, the key distinction between signs and expressive yard elements is that signs are considered pure speech. The other two lines of cases, adult entertainment and time, place, and manner restrictions, appear less useful. The adult entertainment cases involve expression that takes place inside buildings, intentionally kept from the view of passersby. Time, place, and manner restrictions on protected speech usually involve speech that takes place in public forums, not on private property where the property owner is the speaker. Thus, in the remainder of this section I will concentrate on the treatment of expressive conduct in yards as symbolic speech, including the various intersections of symbolic speech with the other free speech categories.

Certainly, some of the most difficult issues presently encountered in First Amendment law concern the scope of symbolic speech and its degree of constitutional protection. The symbolic speech cases extend the ambit of the free speech clause to nonverbal conduct that is intended to

82. Many but not all sign ordinance cases involve commercial speech. Those involving non-commercial speech offer useful analogies for expressive conduct in yards. E.g., City of Ladue v. Gallio, 512 U.S. 43 (1994) (holding that the city may not prohibit homeowner from displaying sign protesting Persian Gulf War).

83. The adult entertainment cases are unlike the architecture and yard scenarios because the message is not visible to the neighbors or the general public. Consumers of adult entertainment are customers who pay to enter the premises to hear, view, or purchase the message inside. Importantly, these cases involve regulation of “secondary effects” on the neighborhood of the activity. City of Erie v. Pap's A.M., 529 U.S. 277, 290-91 (2000); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976). This consideration is absent for yard regulations.

84. Sharp lines differentiating the four categories are not always drawn. There is a degree of overlap among cases in the categories. For example, the Court has analyzed symbolic speech represented by the conduct of camping in a public park in terms of time, place, and manner restrictions. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).
express a message to others. The point of labeling an action "symbolic speech" is to remove the normal presumption of constitutionality that applies when the government regulates the conduct of its citizens in order to promote a legitimate governmental objective. To date, in addition to expressive conduct related to flags, the activities explicitly recognized by the Court as protected symbolic speech include picketing to promote causes, wearing black armbands to protest the Vietnam War, and sit-ins to protest racial segregation. One might add to the list draft-card burning and camping on the District of Columbia Mall, depending upon how one interprets the Court's opinions.

Treated a landowner's proposed architecture and other "expressive" land use activities as symbolic speech would have two implications. First, a given landowner's symbolic speech might not qualify for First Amendment protection if it is not a form of political protest. A line could be drawn here based upon the espoused but dubious concept that political discourse is more highly valued under the Constitution than other speech.

On occasion, a landowner's conduct can qualify as political discourse. Suppose that a homeowner, to demonstrate outrage against her local government, burns the mayor in effigy. Recent examples of yard expression based on anger over government action, prominently reported by the media, are the previously mentioned Avondale Estates polka dot house and the Monte Sereno Mr. Grinch. Nevertheless, most landowners' expressive conduct is not easily seen as political symbolic speech. But when one looks harder, messages with political undertones may emerge. At least some architects and sculptors would consider radical design to carry a "political" message. A common truism pronounces that "All art is inherently political." This saying ought to

91. In both O'Brien and Clark, the Court assumed that the conduct amounted to First Amendment expression, but upheld the regulation by finding that the measure was narrowly tailored to protect a sufficiently weighty governmental interest.
93. See supra notes 31-32 and accompanying text.
94. See supra notes 42-43 and accompanying text.
95. In an interview, German Conceptual artist Hans Haacke explains:

TG: Today it has become a somewhat common (and perhaps cynical) refrain that "all art is inherently political," a statement that may implicitly reject the usefulness of a
apply to yard art as much as it does to a sculpture or a painting, but nonetheless it can be difficult for a neighbor or a court to determine whether a pink flamingo is art or junk. Indeed, one reason for refusing to distinguish between political and nonpolitical speech in First Amendment law is that the distinction is inevitably shadowy.

The second implication for treating an expressive lawn as symbolic speech is that the court affords a lesser degree of protection than it would for pure speech.\(^6\) The government will prevail upon a showing that its regulation furthers an "important or substantial governmental interest," provided that interest is "unrelated to the suppression of free expression."\(^7\) The government may also have to show that the restriction on expression is "no greater than is essential to the furtherance of that interest."\(^8\) It is possible that the Court might also apply a "time, place, and manner" test to a landowner's symbolic speech. If so, this would favor the government because the Court has held that the "least restrictive analysis" requirement disappears under "time, place, and manner" analysis.\(^9\)

category or even a practice defined as "political art." Do you agree with such a statement?

HH: Of course "all art is inherently political."

Every public articulation in a socially privileged place, such as the art world, has the potential of affecting the zeitgeist, i.e., the set of generally accepted attitudes and beliefs that have an effect in the realm of practical politics. We should examine, however, what attitudes and beliefs are, in fact, proposed or promoted in each case. Such an endeavor is at times difficult because artists' intentions and the effect of their works do not necessarily correspond. The reception is in constant flux and escapes the artists' control. As we know, artworks accumulate rather complex accretions of meaning and can serve contradictory purposes.

Even though the inherently political nature of all art is seemingly accepted as a truism, works that explicitly refer to social issues are nevertheless still branded "political art" so as to differentiate them from other, supposedly "nonpolitical art." This distinction not only demonstrates that the political aspect of all art is far from being accepted but also has an effect on the "careers" of artists, i.e., their commercial viability and opportunities to exhibit.


\(^{96}\) Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word") (citations omitted); \(^{97}\) See United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

\(^{98}\) O'Brien, 391 U.S. at 377.

\(^{99}\) Id.

\(^{99}\) See Ward v. Rock Against Racism, 491 U.S. 781 (1989) (holding that city can regulate volume of music in Central Park without proving that method of regulation is least intrusive means to protect nearby residents and park users from unwanted sound). My position, however, is that the "time, place, and manner" test is inapposite to speech on private property by the owner of that property. Time, place, and manner restrictions were developed to resolve issues of conduct taking place in a public forum or on other property, such as a school, where the would-
It is hard to identify a substantial public interest in aesthetic regulation of yards. One justification for aesthetic regulation that limits expressive building architecture, advanced by Professor John Costonis, is the protection of neighborhoods from destabilization. Under this rationale, society protects certain features of its physical environment, not because of aesthetic beauty, but because they nurture our personal and collective sense of stability. Change is destabilizing. This justification is not persuasive, either for buildings or yards, because it is based on the content of the message, and the Court has often struck down regulations impinging on speech when they are not "content neutral." If neighbors are destabilized—if they suffer emotional or psychological harm—it is because they dislike the message component of their neighbor's symbolic speech.

Proponents of aesthetic regulation often justify the restriction on the basis that it preserves the neighbors' property values. The factual predicate may be true; if the regulation reflects widely shared preferences, then buyers will pay more for a property that is proximate to properties that conform to the aesthetic regulation. Nevertheless, preservation of property values does not suffice as a justification when it collides with First Amendment values. Regulating the aesthetics of yards to preserve neighbors' property values is content-based regulation. The negative effect on property values, if proven, only demonstrates that a significant portion of the homebuying public dislikes the message. Thus, both the destabilization and the property value arguments depend on the content of the message, which renders them highly suspect under First Amendment analysis.

The regulation of expressive yards also cannot be seen as content-neutral in the sense of the adult entertainment cases, where the theoretical government aim is to regulate the "secondary effects" of the

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be speaker and other persons have shared rights of use and enjoyment. In contrast, when a speaker engages in expressive conduct on her property, this is a "place" where the speaker has an absolute right to be. She has the right to exclusive possession of the place, and is not sharing use with others who may not want to listen to the message.

100. Costonis, supra note 25, at 95–100.

101. See, e.g., Reno v. ACLU, 521 U.S. 844 (1997) (holding that a federal statute prohibiting internet transmission of obscene or indecent communications to persons under age eighteen is an unconstitutional content-based restriction on speech); City of Renton v. Playtime Theatres, 475 U.S. 41, 47–48 (1986) (holding that adult entertainment regulation was constitutional only if it was a "content neutral" attempt to regulate secondary business effects, rather than the adult content itself); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (noting that a sign ordinance impermissibly distinguished between on-site commercial speech and noncommercial messages).

102. For a fuller critique of the destabilization rationale, see Smith, supra note 25, at 793–96, 803–05.

103. See Boos v. Barry, 485 U.S. 312 (1988) (law prohibiting display of signs that tend to bring foreign government into "public odium" or "public disrepute" is content-based restriction on speech).
message. With the adult businesses, externalities imposed on the neighborhood properly can be seen as secondary effects. But when the regulation addresses symbolic speech, signs, building exteriors, and other visual elements of real property, talk of "secondary effects" of the message is simply nonsense. The goal of the landowners' expressive conduct, be it architectural or landscaping innovation or something else, is to broadcast a message to the neighbors and the community, unlike that of the proprietors of adult businesses who engage in an indoor activity for profit. If a regulation silences a landowner's message, that outcome will be both the purpose of the regulation and its primary effect.

Justifications other than protecting neighborhood stability and preserving property values for aesthetic controls limiting freedom of expression are available. The "captive audience" paradigm, sometimes used to evaluate free speech in places such as public forums and educational institutions, might conceivably apply here. State-imposed aesthetic controls may be justified, even when they suppress protected symbolic speech, because the neighbors of the "speaker" are a captive audience. As a general rule, those who are offended by the First Amendment speech of others have the right and ability to refuse to listen by absenting themselves from the locale where the speech is taking place. In most symbolic speech cases, bystanders are free to avert their eyes from the symbol or activity. But when the symbol involves a land use of permanent or long-term duration, not a single incident, the neighbors are arguably captives.

Our fan of "back to nature" landscaping does not live in isolation on an island. Her neighbors are compelled to see her lawn and observe her expression each time they pass by. Living on the same street as a front yard covered with chest-high weeds and other untamed growth, they cannot avert their eyes in any realistic sense without abandoning their

104. In the adult theatre zoning cases, the problems addressed by the zoning do not stem from the audience reaction to the speech itself. Rather, for example, prostitution increases in the neighborhood because of the congregation of a certain type of patron that prostitutes target (not because prostitutes are reacting to the sexual nature of the speech that brings patrons to the business establishment).

105. Moreover, in the adult theatre context, permissible regulation does not totally exclude adult theatres; zoning just restricts them to certain locations. In contrast, landscaping regulations generally seek uniform expatiation of weeds and cutting of grasses.

106. E.g., Lee v. Weisman, 505 U.S. 577, 590-91 (1992) (attendees of public school graduations are captive audience, and thus invocations and benedictions are unconstitutional, even though they constitute otherwise protected speech).

107. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (overturning ordinance barring drive-in theatres from showing films containing nudity; those offended can readily avert their eyes). See also Cohen v. California, 403 U.S. 15 (1971) (state may not convict defendant, who walked through courthouse corridor wearing jacket bearing words "Fuck the Draft," of disturbing the peace by "offensive conduct").
Further, the right that a neighbor may have to sell her home if she is sufficiently offended by her neighbor's natural lot does not ameliorate the captive audience problem. Any purchaser of a home in the immediate vicinity would step into the seller's shoes, becoming a new captive audience. Such a sale also provides no escape from the speech to the seller because she will receive a discounted purchase price reflecting the proximity to the offensive natural lot, assuming that the seller is not hypersensitive. If most homebuyers share the seller's preferences for typical landscape maintenance and distaste for unkempt neighboring properties, proximity to the natural lot has reduced the value of the seller's property.

Recognizing that a landowner's symbolic speech is addressed largely to a captive audience does not necessarily mean that it is always proper for the state to silence the speech to protect the captive neighbors. Under First Amendment analysis, the term "captive audience" developed in a different context from the present one: to permit greater latitude for the government in crafting time, place, and manner regulations when a captive audience was present. Generally, time, place, and manner regulations must be content-neutral to withstand constitutional scrutiny; in the context of a captive audience, however, regulations may be content-based if they are reasonably tailored to protecting the legitimate interests of the captives.

Time, place, and manner rules are generally inapposite in the land use context because they apply to speech taking place in a public forum, but the style of balancing the conflicting rights of the speaker and the captives employed in time, place, and manner regulation analyses may be translated to the problem of the landowner's symbolic speech. One application of this translation might be to permit state-imposed aesthetic controls to override protected symbolic speech only when the harm to the captives substantially outweighs the benefit to the speaking landowner. Alternatively, captive audience analysis may imply that a landowner's speech cannot be restricted by the state solely for aesthetic reasons, no matter how important those reasons may be to the state and to some members of society. The government must come up with a plausible

108. See FCC v. Pacifica Found, 438 U.S. 726, 748 (1978) (allowing the government to restrict the radio broadcast of indecent language because the medium is "uniquely pervasive," extending into the privacy of the home which makes it impossible to avoid content that is "patently offensive").


110. See DANIEL R. MANDELMAN, LAND USE LAW § 2.50 (5th ed. 2003).

111. See Pacifica Foundation, 438 U.S. at 748-49 (upholding federal ban on use of indecent language in radio broadcast); Lehman v. City of Shaker Heights, 418 U.S. 298, 302-04 (1974) (Blackmun, J., plurality opinion) (upholding city ban on political advertising on bus, but allowing commercial advertising).
justification other than aesthetics to prevail. This latter translation is preferable. Landowners' symbolic speech merits substantial protection. The government, even when it represents the will of the landowners' neighbors, should not be allowed to stifle speech for reasons of insufficient weight.

CONCLUSION

What a person does with her yard can say a lot about that person. The residential yard is one venue for the expression of individuality. Such expression extends well beyond linguistic conduct such as the creation and placement of signs in the yard. Other forms of expressive conduct include distinctive landscaping, architecture, and the placement of manmade objects, including sculptures and "yard art." That the message is expressive rather than verbal or written does not lessen its meaning and potential for significance.

First Amendment law, as it presently stands, strongly implies that the government may not regulate yard features that are clearly intended by landowners to be expressive conduct. This follows from the structure of the First Amendment: freedom of expression, as a core value, overrides government regulation that would otherwise be valid. This certainly introduces a degree of uncertainty into the law. Visualize two identical residential lots, both overgrown with the same blend of grasses, this vegetation having an average height of twenty inches. Both owners are in violation of a clearly drafted weed ordinance. Owner A "maintains" her yard in this fashion because she is too lazy to cut the grass. Owner B explains, to her neighbors and anyone else who inquires, that she is rebelling against the "industrial lawn," saving fossil fuel energy, and promoting an ecosystem with a diverse mix of animal and plant life. Under my analysis, the government may force Owner A, but not Owner B, to cut the vegetation.

The divergent treatment of the two tall-grass owners has implications for local communities and their elected representatives. In principle, a city could adhere to a regulatory strategy of vigorous enforcement of weed laws and other aesthetic rules applicable to yards. If my analysis is correct, the city must grant exemptions to owners who demonstrate that a significant expressive motive underlies their conduct. But the city and community should think carefully about the cost and benefits of such an effort. It will not be easy to distinguish Owner A's motive from that of Owner B. Incorrect determinations ("you say you are expressing yourself, but this is a pretext") may result in legal liability for the city. I am not arguing that the protection of property and expressive conduct merits a return to the rule we had a century ago, when the public regulation of property aesthetics was invalid, period. However, aesthetic regulation
imposes substantial costs. It limits the autonomy of dissenting landowners, those who did not support enactment of the regulatory measure in question. Thus, public aesthetic regulation is a tool to be used sparingly. When the regulation in question is justifiable solely on the basis of the protection of community aesthetic values, then it is ordinarily unconstitutional for the government to apply the regulation to a landowner who wishes to engage in expressive conduct. The government must advance a plausible justification other than aesthetics to prevail. When an alternative, non-aesthetic justification exists, the balancing rules developed by the Supreme Court for symbolic speech should apply. If the regulation restricts expressive conduct, it must be clearly written and narrowly tailored, to protect the community from conduct that causes significant economic or other harm while minimizing infringement on the expressive freedom of the homeowner.

112. Historic preservation districts may present a special, possibly unique, case. If the government wants to preserve a neighborhood's historic architecture, there is no alternative to the requirement that owners must keep existing buildings in harmony with the district's special characteristics. The public interest in aesthetics is stronger than in other contexts, even though the First Amendment harm may be the same. An owner in a historic district may have a constitutional right to add expressive yard elements, but should not have the right to impair historic values by, for example, redesigning the facade of the house.
