NOTE

Freedom of Speech and the Language of Architecture

by KEVIN G. GILL *

[A]rchitecture is life; or at least it is life itself taking form and therefore it is the truest record of life as it was lived in the world yesterday, as it is being lived today or ever will be lived.

-Frank Lloyd Wright[1]

1. The following new single-family residences and additions to existing single-family residences shall be compatible with the character of the immediate neighborhood:

a. New residences that are proposed to be developed on vacant lots;

b. New residences that are proposed to replace existing residences;

. . . .

2. [N]eighborhood character means the existing characteristics in terms of the following:

a. Scale of surrounding residences;

b. Architectural styles and materials; and

c. Front yard setbacks.

-Rancho Palos Verdes Municipal Code[2]

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* J.D., U.C. Hastings College of the Law, 2003; M.Arch, San Francisco Institute of Architecture, 1996; B.A. in Architecture, U.C. Berkeley, 1988. The author is an associate with Rimac & Martin, P.C., of San Francisco. The author is also a licensed architect, California Architecture License no. C24930.

1. FRANK LLOYD WRIGHT, AN ORGANIC ARCHITECTURE: THE ARCHITECTURE OF DEMOCRACY 44 (1939) (emphasis added).

2. RANCHO PALOS VERDES, CAL., MUN. CODE § 17.02.030(B) (2000) (emphasis added).

I. INTRODUCTION

When Liliane Kaufmann and Edgar Kaufmann, Sr., came to visit their son Edgar, Jr., an apprentice at Frank Lloyd Wright's Taliesin studio, they fell under the spell of the famed, old architect.[3] Kaufmann, Sr., described as "magnetic and unconventional," was a clever businessman who would go on to commission several works from Wright.[4] These included a design for a planetarium, a new office at Kaufmann's department store, and, perhaps most importantly, a wilderness retreat at Bear Run, Pennsylvania.[5]

The manner in which Wright finally rendered the design of the house is legendary. Kaufmann delivered a topographical site map to Wright's studio during the winter of 1935.[6] Wright appeared to give no consideration whatsoever to the project until he received a telephone call from Kaufmann in September of the following year, asking if he could come look at the plans the next day.[7] Wright replied, of course, that Kaufmann could come on over and that Wright was ready for him.[8] That next morning, with only a few hours left before Kaufmann's arrival, Wright sat down at a desk and poured out the design, floor plans, sections, and elevations.[9] After finishing the drawings, at the bottom of the front page, Wright gave the project the title Fallingwater, for "a house has to have a name."[10]

The end result appears, in defiance of gravity, to float upon air over a waterfall.[11] Fallingwater has been described as "a feat of architecture that prompts in a visitor approaching it for the first time a temptation to applaud, as in astonishment one might applaud an exceptional feat of magic onstage."[12] Wright said of the house, "I think you can hear the waterfall when you look at the design."[13]

3. BRENDAN GILL, MANY MASKS: A LIFE OF FRANK LLOYD WRIGHT 343-44 (1987).
4. *Id.*
5. *Id.* at 344.
6. *Id.*
7. *Id.* at 345.
8. GILL, *supra* note 3, at 345.
9. *Id.* at 346.
10. *Id.*
11. *Id.*
12. *Id.* at 352.
13. GILL, *supra* note 3, at 346.

II. THESIS

Would a client and architect be permitted to create an equally visionary home today? In many municipalities, the answer is no.[14] There, strict aesthetic controls preempt buildings that do not mimic a certain architectural style, or harmonize with their neighbors' through conformity and mimicry. These municipalities push for a uniform community appearance, both in business and residential districts, at the expense of individual voice.

The result of much of these aesthetic controls is a community steeped in the language of what has been built before, watered down to be accessible to cost-conscious builders. Rarely can a community agree on a positive vision of their built environment. Instead, these design guidelines end up being based on what is least offensive to the majority of people. These guidelines are promulgated on notions of community harmony; the argument is made that unconventional architectural design is somehow discordant, that this discord will adversely affect property values, and that conformity is the only means of protection.

Architecture has been called humanity's greatest form of expression. It can be a physical expression of philosophical, religious, political, and aesthetic beliefs. Yet, in a feeble nod to community beautification, this expression is reigned in and oftentimes extinguished.

The problem involves a clash of three interests: the individual interest in freedom of expression, the community police power, and the neighbor's interest enmeshed in the common law nuisance doctrine. This Note will explore the intersection of these three deeply rooted interests and search for a proper balance that allows creativity and self-expression, the freedom guaranteed by the Constitution.

14. For examples of restrictive design guidelines, see RANCHO PALOS VERDES, CAL., MUN. CODE § 17.02.030(B) (2000); San Marino, Cal., Residential Design Guidelines, 7-14 (Dec. 15, 1999); Hillsborough, Cal., Architecture and Design Review Board's Design Guidelines, § II, A-K (1996).

III. AESTHETIC DESIGN CONTROL

Nothing to my mind could be worse imposition than to have some individual, even temporarily, deliberately fix the outward forms of his concept of beauty upon the future of a free people or even of a growing city.

-Frank Lloyd Wright[15]

The advent of municipal design review came about in response to the rapid development that created urban sprawl.[16] In an effort to protect their communities from characterless or jarring new buildings, municipalities established architectural design review to gain a voice over the character of new and renovated buildings. At the same time, rapid growth was leading to nostalgia for the quaint old towns of the past, and design review guidelines were modified to better attempt to retain the small-town feel, irrespective of whether it had ever actually existed in the community. Projects that were different or unusual were generally not trusted to aid in the quest for quaintness, and were often denied approval. The resultant design review process, necessary to obtaining a building permit, may mandate not only height, bulk and use of a building, but also color, material and architectural style.

A. Historical Roots of Design Review

Architectural Design Review, a questionable extension of the community police power, was first extended to zoning by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*[17] The zoning power allows a community to pass laws to protect the public health, safety, morals and general welfare.[18] Traditional zoning law stipulates the allowed use, height, bulk, and property line setbacks for a project.[19]

This extension of the police power into the built environment was not initially construed to apply to aesthetics.[20] It was not until the Supreme

15. Frank Lloyd Wright, *In the Cause of Architecture, Second Paper* (May 1914), *reprinted in* ARCHITECTURAL RECORD 125 (Hugh Dunlan & Martin Filler eds., 1975).

16. See Part III:B, *infra*, for a discussion of the rationale and methods for regulating architectural aesthetics.

17. 272 U.S. 365 (1926).

18. *Id.* at 394.

19. *Id.*

20. *See* Woman's Kansas City St. Andrew Soc. v. Kansas City, Mo., 58 F.2d 593, 603 (8th Cir. 1932) ("Mere aesthetic considerations bear no such relationship to public welfare as to sustain restrictions of zoning ordinances."); Spann v. City of Dallas, 235 S.W. 513, 516 (Tex. 1921) ("It is not the law . . . that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors.").

Court confronted the problem of urban renewal that the lid was inadvertently opened on aesthetic control. In *Berman v. Parker*,[21] Justice Douglas rhapsodized on the purview of the public welfare:

> [T]he 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.[22]

And of course, since protection of the public welfare was within the municipal police power, aesthetics were ushered in as subject to that same regulatory control. Legislatures were then empowered to determine what was beautiful.

The Court gave further fuel to the regulatory fire in *Penn Central Transportation Co. v. New York City*.[23] There, the Court held that cities and states may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of the city.[24]

Since then, aesthetics have regularly been held to be subject to regulatory control in many jurisdictions. In Rancho Santa Fe, California, for example, Patricia Dolan-King wanted to remodel her home and replace her fence with one that would contain her pets.[25] Her proposal included "turret-style" additions to her living room and family room, designed with "large windows and French doors wrapped around their upper and lower levels to provide increased natural lighting as well as views north and east of her house."[26] Ms. Dolan-King also proposed to replace her existing "three-rail corral-type" fence with one composed of stucco pilasters and horizontal wooden slats.[27]

There was one roadblock. Rancho Santa Fe is governed by a restrictive covenant, adopted in 1928 and amended "as needed" over the years.[28] The covenant specifies, among other things, that new structures and property improvements be approved only upon the written advice of an

21. 348 U.S. 26 (1954).
22. *Id.* at 33.
23. 438 U.S. 104 (1978).
24. *Id.* at 128-29.
25. Dolan-King v. Rancho Santa Fe Ass'n, 81 Cal. App. 4th 965, 971-72 (2000).
26. *Id.*
27. *Id.*
28. *Id.* at 970.

"Art Jury."[29] To guide the Art Jury, the covenant divided Rancho Santa Fe into Architecture Districts.[30] Ms. Dolan-King's home was in an Architecture District described as:

> That distinctive type of architecture which for several decades has been successfully developing in California, deriving its chief inspiration directly or indirectly from Latin types, which developed under similar climatic conditions along the Mediterranean or at points in California, such as Monterey.[31]

The Art Jury did not think Ms. Dolan-King's proposal was in keeping with the covenant.[32] They suggested, as an "aesthetic alternative" to her proposed stucco and wood fence, that Ms. Dolan-King instead retrofit her existing fence with wire mesh.[33] The Art Jury further stated that Ms. Dolan-King's turret additions would be acceptable if she "decreased the proportion of window to stucco mass" and that she "reevaluate" the thickness of the walls and size and quantity of windows.[34]

Following a bench trial, the California Superior Court declared the rejection of Ms. Dolan-King's plans arbitrary and an abuse of power.[35] The California Court of Appeal overturned the lower court, finding that Ms. Dolan-King had failed to meet her burden to show the Board's decisions were unreasonable and arbitrary.[36] The California Supreme Court has stated that restrictions on the use of property contained in a covenant are presumed reasonable and will be enforced unless they are arbitrary, impose burdens that substantially outweigh the benefits conferred, or violate a fundamental public policy.[37]

Does free expression count as a fundamental public policy? Freedom of speech is unquestionably a constitutional right.[38] The First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[39] These

29. *Id.*
30. *Dolan-King*, 81 Cal. App. 4th at 970.
31. *Id.* at 971.
32. *Id.* at 972.
33. *Id.*
34. *Id.*
35. *Dolan-King*, 81 Cal. App. 4th at 970.
36. *Id.*
37. Nahrstedt v. Lakeside Vill. Condo. Ass'n, 8 Cal. 4th 361, 386 (1994).
38. U.S. CONST. amend. I.
39. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

protections do not end at the written or spoken word.[40]

Before beginning a discussion of the nature of architectural expression,[41] it is important to look at the basis for municipal regulation in the field.

B. Rationale and Methods for Regulating Architectural Aesthetics

There are multiple reasons why municipalities want to regulate architecture. Stated reasons include preservation of neighborhood character,[42] protection of property values,[43] maintenance of "environmental quality,"[44] protection of the municipalities' "unique," "high quality," "aesthetic values,"[45] and promotion of design that will enhance the municipalities' established, prosperous neighborhoods.[46] Advocates argue that laws regulating aesthetics protect areas from "discordant neighboring architecture" and "give local governments a strong voice in the character of new or renovated buildings."[47]

Aesthetic regulation may allow municipalities to prevent detrimental eyesore caused by poorly constructed, poorly conceived buildings, hastily completed to maximize returns and beat the bottom line. Some municipalities take dead aim at what they term "common 'developer tract' styles" and state that such projects are "discouraged."[48] However, rather than focusing toward such prescriptive goals, many seek to push a definitive aesthetic vision of what the community should be, based typically on that which is already present. In San Marino, California, the design review guidelines couch this vision in terms of compatibility:

> The key to a successful residential project in San Marino is to assure its compatibility with the surrounding homes in the neighborhood. What is compatibility? The City Code defines it as follows: "Having an architectural style, visual bulk, massiveness, height, width and length which is compatible with the neighborhood and

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

41. "The phrases 'freedom of speech' and 'freedom of the press' are often used interchangeably with the more inclusive phrase 'freedom of expression.'" ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW – INDIVIDUAL RIGHTS: EXAMPLES AND EXPLANATIONS 295 (2001).

42. San Marino, Cal., Residential Design Guidelines, *supra* note 14, at 1.

43. *Id.*

44. HILLSBOROUGH, CAL., MUN. CODE § 2.12.060(B) (1996).

45. *Id.*

46. City of San Marino, *supra* note 14, at 1.

47. Constance Epton Beaumont, *Making Design Review Boards Work*, ARCHITECTURAL RECORD, Jan. 1992, at 34.

48. *See* City of San Marino, *supra* note 14, at 13.

> which harmonizes with the existing residential or commercial structures in the neighborhood and, in the case of a building addition, with the existing building."
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> . . . .
>
> Every neighborhood has a defined character based upon some or all of the above factors. Its identity should be maintained by designing a project that complements its surroundings.
>
> . . . .
>
> Compatibility primarily emphasizes architectural style. The emphasis is on expansive, horizontal gestures with natural materials. Roof forms are handled simply and consistently, and tend not to be "boxy." Styles run to the traditional interpretations, and colors are generally muted. Most neighborhoods tend to have a very quiet elegance and front yards are designed to not obscure visibility of the main residence from public view.[49]

Even in neighborhoods that have a mixture of architectural styles that would seem to preclude a requirement to harmonize, municipalities may make it clear that their decisions on appropriateness still govern:

> Although San Marino tends to encourage the retention of traditional architecture, applicants should not restrict themselves from displaying the flexibility of good design principles. Occasionally, older neighborhoods have one or more homes that reflect contemporary architectural elements. This is an opportunity to design a project that may contain key architectural elements that reflect current thought.[50]

And lest anyone still be unclear, specific appropriate styles may be named outright:

> The following architectural styles are illustrated and described to clarify styles commonly seen in San Marino . . . . These styles include, but are not limited to: Spanish Colonial Revival, Neoclassical, Mediterranean/Italian Renaissance, Tudor, Monterey Period Revival, Colonial Revival, Ranch House, Cape Cod, Minimal Traditional.
>
> . . . .
>
> New homes should incorporate a specific architectural style compatible with those found on other homes in the neighborhood. This is not meant to inhibit the use of design flexibility. Any architectural style is acceptable provided it "fits" into the

49. *Id.* at 7-8 (emphasis omitted).

50. *Id.* at 8.

neighborhood.[51]

Though not unanimous, many courts support municipal regulation of architectural aesthetics. In *Village of Hudson v. Albrecht, Inc.*, the Supreme Court of Ohio found that "there is a legitimate governmental interest in maintaining the aesthetics of a community" because "the appearance of a community relates closely to its citizens' happiness, comfort and general well-being."[52] The court held that, where a municipal legislature passes an ordinance regulating aesthetics, and that ordinance supposedly "reflects a concern for the monetary interests of protecting real estate from impairment and destruction of value," without any further showing, the ordinance is a reasonable exercise of municipal police power.[53]

C. Problems with Aesthetic Design Review

The contention that architecture that fails to harmonize with the pre-existing neighborhood will bring down property values, resulting in "destruction of value," is rebuttable. Dissenting in *Village of Hudson v. Albrecht, Inc.*, Justice Clifford Brown took issue with the "superficial" ties between aesthetic regulation and the preservation of property values.[54] There is no clear-cut way to determine whether an aesthetic choice will harm property values, and any attempt at prognostication is by necessity based on the personal taste of the prognosticator.[55] Further, the majority in *Albrecht* was willing to uphold the regulations despite the lack of any evidence anywhere in the record that the building changes Albrecht proposed would be detrimental to property values.[56] Justice Brown found the idea that government could favor one person's taste over another's anathema, stating:

> If a zoning code regulation or restriction devoted solely to aesthetic considerations, as in this case, can be bootstrapped to the status of lawfulness by merely adding a provision somewhere in the zoning code that the purpose of the zoning regulation is to protect real estate "from impairment or destruction of value," then any zoning code provision, no matter how absurd, unreasonable or confiscatory can

51. *Id.* at 8-14.

52. 458 N.E.2d 852, 856 (Ohio 1984).

53. *Id.* at 857.

54. *Id.* at 858 (Brown, J., dissenting).

55. *Id.*

56. *Id.*

be given the aura of lawfulness.[57]

The purpose of zoning codes, as endorsed in *Village of Euclid*,[58] is "to allow for the controlled and orderly growth of cities."[59] "Zoning . . . was never meant to be a vehicle to enforce the personal taste of one on another."[60] Justice Brown cautioned that a standard based on harmony with existing structures "does not adequately circumscribe the process of administrative decision nor does it provide an understandable criterion for judicial review."[61]

This leaves the determination of what does or does not fit in with the local style to a handful of administrative board members, whose individual peccadilloes can predominate the process. Decisions can be based on anything from a desire to be reappointed to the board to a personal dislike for glass block.[62]

An example of the subjective nature of the decision, and the need to please specific members of the reviewing commission, comes from a case involving the design review guidelines of the city of Issaquah, Washington, circa 1993.[63] The Issaquah Municipal Code enumerated a variety of qualitative requirements that had to be met before a project would be approved, yet did not provide any quantitative parameters.[64]

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57. *Albrecht*, 458 N.E.2d at 858 (Brown, J., dissenting).

58. 272 U.S. 365 (1926).

59. *Albrecht*, 458 N.E.2d at 858 (Brown, J., dissenting).

60. *Id.*

61. *Id.* at 859.

62. From my own experience as a licensed architect, in 1996, during a design review hearing over a residential addition in Piedmont, California, a member of the city council proclaimed their dislike of glass block to my clients and me, in spite of the fact that the house we sought to remodel was built in the 1940s in an art deco style and had already incorporated a significant amount of glass block. That council member voted against our proposal.

63. Anderson v. City of Issaquah, 851 P.2d 744 (1993).

64. *Id.* at 746-47. The Issaquah Municipal Code section 16.16.060 provided in pertinent part:

> (B) Relationship of Building and Site to Adjoining Area
>
> 1. Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.
>
> 2. Harmony in texture, lines, and masses shall be encouraged.
>
> . . . .
>
> (D) Building Design.
>
> 1. Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.
>
> 2. Building components, such as windows, doors, eaves and parapets, shall have appropriate proportions and relationship to each other, expressing themselves as a part of

M. Bruce Anderson owned commercial property along Gilman Boulevard, one of the main streets in Issaquah.[65] In 1988, Anderson applied for a land-use certification to develop the property and planned to build a 6,800 square-foot commercial building with space for several retail tenants.[66] Things proceeded smoothly until Anderson submitted his plans to the Issaquah Development Commission, whose role included building design review.[67]

The buildings surrounding Anderson's project included a Victorian house remodeled as a visitors' center, several gas stations, a bank built in the "Issaquah territorial style," a "box building" containing an Elks hall, an auto repair shop, and a veterinary clinic.[68] The city described this area as "a natural transition area between old downtown Issaquah and the new village style construction of Gilman Boulevard."[69] The commission expressed concern that Anderson's first submittal was not compatible with the image of Issaquah and continued the hearing so that Anderson might modify the design.[70] Anderson came back with modifications that still did not please the commission.[71] In response to Anderson's request for more specific guidelines, one commissioner stated that the commission had already given direction and it was Anderson's "responsibility to take the direction/suggestions and incorporate them into a revised plan that reflects the changes."[72] A second commissioner simply felt that the building was "not compatible with Gilman" Boulevard.[73] A third stated that "the application needs major changes to be acceptable," and suggested that Anderson "drive up and down Gilman and look for good and bad examples

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the overall design.

3. Colors shall be harmonious, with bright or brilliant colors used only for minimal accent.

. . . .

6. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complementary details, functional orientation of buildings, parking and access provisions and relating the development to the sight.

Id.

65. *Id.* at 746.

66. *Id.*

67. *Issaquah*, 851 P.2d at 746.

68. *Id.* at 747.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Issaquah*, 851 P.2d at 747.

73. *Id.* at 748.

of what ha[d] been done with flat facades."[74] The commission again continued the discussion for a later date.[75]

At the third hearing, one of the commissioners stated that he had driven Gilman Boulevard and taken notes, which were then placed into the minutes. Those notes read:

> *"'My General Observations From Driving Up and Down Gilman Boulevard.'"*
>
> I see certain design elements and techniques used in various combinations in various locations to achieve a visual effect that is sensitive to the unique character of our Signature Street. I see heavy use of brick, wood and tile. I see minimal use of stucco. I see colors that are mostly earthtones, avoiding extreme contrasts. I see various methods used to provide modulation in both horizontal and vertical lines, such as gables, bay windows, recesses in front faces, porches, rails, many vertical columns, and breaks in roof lines. I see long, sloping, conspicuous roofs with large overhangs. I see windows with panels above and below windows. I see no windows that extend down to floor level. This is the impression I have of Gilman Boulevard as it relates to building design.[76]

A second commissioner agreed with this explanation of what they were looking for.[77] Another commissioner said he believed Anderson may have no choice but to start again from scratch, and when Anderson indicated that he would be willing to change from stucco to wood, but not make any more changes, the commission denied his application.[78]

In addition to the subjective and amorphous nature of a municipality's aesthetic decisions, there is a belief among many architects that design review "encourages mediocrity and discourages excellence."[79] Famed New York architect Charles Gwathmay observes that "review boards tend to equate 'good' with traditional and 'bad' with modern architecture."[80] "When a new building comes before a board," says Gwathmay, "there is a presumption of guilt."[81]

Design review can censor architectural expression. Mandating building type and style reigns in any desire to branch out, to try something

74. *Id.* at 747-48.

75. *Id.* at 747.

76. *Id.* at 748 (emphasis and quotations omitted).

77. *Issaquah*, 851 P.2d at 748.

78. *Id.*

79. Beaumont, *supra* note 47, at 34.

80. *Id.*

81. *Id.*

new. Being required to design to a specific style runs counter to the freedom of expression that architects are trained and dedicated to pursue. Imagine telling a bunch of modern artists they had to paint in Rembrandt's style. You might get some close imitations, perhaps almost as good as the original, but you would also get a bunch of mediocre and uninspired work.

Some might argue that the surrender to subjectivity is a small price to pay for a more orderly, quaint community. Others would argue that this is the height of Orwellian thought control, designed to sap the individuality out of town members.[82] Without a guiding principle, the argument might well swing back and forth ad nauseam. However, if architecture is a means of expression, then the protections provided by the First Amendment, "Congress shall make no law . . . abridging freedom of speech,"[83] may resolve disputes like those in *Anderson* in favor of the speaker. The question remains, then, whether architecture is speech. And if so, what kind of speech? What can architecture really say?

IV. THE LANGUAGE OF ARCHITECTURE

> *[As] a small boy, long after I had been put to bed, I used to lie and listen to my father playing Beethoven – for whose music he had conceived a passion – playing far into the night. To my young mind it all spoke a language that stirred me strangely, and I've since learned it was the language, beyond all words, of the human heart. To me, architecture is just as much an affair of the human heart.*
>
> -Frank Lloyd Wright[84]

The term "architecture," as commonly used in the legal community and throughout society, is invoked to emphasize a structural design, whether literal or figurative.[85] Used in this way, the term seems to suggest a contemplative working of parts, fitting together to form a whole. Conversely, in a preponderance of case law and law review articles, architecture, the product of an architect and client, is referred to as an aesthetic choice.[86] These descriptions are both incomplete.

Architecture is a melding of science, social science, and art into

82. *See Albrecht*, 458 N.E.2d at 858-59 (Brown, J., dissenting).

83. U.S. CONST. amend. I.

84. Frank Lloyd Wright, *In the Cause of Architecture: IX – The Terms*, ARCHITECTURAL RECORD, December 1928.

85. *See, e.g.*, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990).

86. *See, e.g., Vill. of Hudson*, 458 N.E.2d at 855-56; Shawn G. Rice, *Zoning Law: Architectural Appearance Ordinances and the First Amendment*, 76 MARQ. L. REV. 439 (1993).

something more than the sum of these parts.[87] Architecture "aims at emotional satisfaction as well as physical integrity. It is a language which has the emotional power to express with authority the structural meaning of a functional space."[88] This language of architecture, properly considered, may speak to politics, philosophy, sociology, psychology, religion, cultural identity and aesthetics.

A. Architecture as Political Expression

Prior to the nineteenth century, architecture was largely the purview of political and religious leadership.[89] Architecture expressed the power and importance of a building and, by extension, of the denizens therein. The pyramids of ancient Egypt, said to house the spirits of the pharaohs and gods, evoke the stoic permanence of a society rooted to the land.[90] Throughout western history, churches sought to have taller and taller naves, politicos sought grander and more elaborate palaces; architecture has expressed power, vanity and the quest for spirituality and security.

Even in present-day United States, architecture often conveys a political message. The hierarchical arrangements of a courtroom invoke the authority of the law. The casual, business-like atmosphere of the White House and the Oval Office, particularly compared to the throne rooms of Europe, reinforce the American belief in civilian rule. The great hall of the House of Representatives is an embodiment of the nation's commitment to citizen-spawned political discourse.

Certainly, specific building types represent different political statements. Individual architects also may express a political view through their built work.

The nineteenth century and the industrial revolution brought about a great expansion in the number of building types.[91] As the demands of new building types and new, urbanized living conditions required innovative solutions, architects' responses illustrated their conception of the desired relationship between individuals and society.

The architecture of Frank Lloyd Wright embraced and celebrated individuality and liberty. Wright saw a need for expressing personal identity in an increasingly open and mobile society, and responded with the

87. AMOS IH TIAO CHANG, THE TAO OF ARCHITECTURE 44 (Princeton Paperback 1981) (1956).

88. *Id.*

89. *See* CHRISTIAN NORBERG-SCHULZ, MEANING IN WESTERN ARCHITECTURE 6-166 (Rizzoli 3d ed. 1983) (1974).

90. *Id.* at 6, 19-20.

91. *Id.* at 168.

creation of the modern house.[92] As Wright put it: "There should be as many kinds (styles) of houses as there are kinds (styles) of people, and as many differentiations as there are different individuals. A man who has individuality (and what man lacks it?) has a right to its expression in his own environment."[93]

The architecture of the Swiss-born architect Le Corbusier embraced the aesthetics of the machine age and mass production.[94] Le Corbusier advocated creating a "spirit of mass-production," and designing "House-Machines" which would be "healthy (and morally so too) and beautiful in the same way that the working tools and instruments which accompany our existence are beautiful."[95] He espoused a different path to cleaning up the industrial clutter of the age than that advocated by Wright, suggesting that people view these mass-produced "machines for living" as a tool, rather than as a way to display the "pretensions of wealth" that people could not afford.[96] Le Corbusier even included schemes to share ownership in his new machines for living, designing buildings appropriate for "rent-purchase schemes" and "freehold maisonettes."[97] Le Corbusier wrote of the housing predicament facing industrialized society:

> The machinery of Society, profoundly *out of gear*, oscillates between an amelioration, of historical importance, and a catastrophe.
>
> The Primordial instinct of every human being is to assure himself of a shelter.
>
> The various classes of workers in society to-day *no longer have dwellings adapted to their needs*; neither the artisan nor the intellectual.
>
> It is a question of building which is at the root of the social unrest of to-day; architecture or revolution.[98]

Happily, Le Corbusier concludes that with appropriate architecture, "revolution can be avoided."[99]

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92. *Id.* at 183.

93. Frank Lloyd Wright, *In the Cause of Architecture*, ARCHITECTURAL RECORD, March 1908.

94. LE CORBUSIER, TOWARDS A NEW ARCHITECTURE 6-7 (Frederick Etchells trans., Dover 1986) (1931).

95. *Id.*

96. *Id.* at 240.

97. *Id.* at 247-49.

98. *Id.* at 271.

99. LE CORBUSIER, *supra* note 95, at 289.

B. Architecture as Sociological and Philosophical Expression

In many ways, the recent history of changes in architectural thought mirrors the changing schools of thought in jurisprudence.[100] Both, of course, echo changes in sociological and philosophical beliefs espoused by society in general. By drawing parallels between the advances in theory in the two professions, one can see that each profession engages in a continuous shifting and rethinking of how best to answer changing societal needs and, perhaps more importantly, how best to keep society moving in a positive and prosperous direction.

1. Langdellian Formalism and Architectural Classicism

Up through the early part of the twentieth century, the predominant method of legal thinking emphasized conceptualism, abstraction, and strict adherence to precedent.[101] Law was viewed as a self-contained science, with all the ingredients necessary to solve a problem already extant in the principles and doctrines announced through previous cases.[102] This method of approaching law, termed Langdellian formalism,[103] emphasized the weight of the authority of past precedents and eschewed consideration of unrelated disciplines.

Nineteenth and early twentieth-century architectural training and practice, likewise, emphasized adherence to the principles and forms of the past.[104] The nineteenth century saw an explosion in the types of buildings needed and the tasks those buildings were required to perform.[105] This was the age of the industrial revolution.[106] The museum, the dwelling, the factory and the office building took center stage, pushing aside the church and the palace.[107] The stricture to classical elements in architectural design evidenced an attempt by architects to mitigate the jarring impact of the new building types and new uses, and to make them appear nothing more than a

100. It is assumed that the readers of this note are more familiar with jurisprudence than architectural history. References to the underpinnings and shifts in jurisprudential thought are thus cursory at best and serve only to provide a signpost on which to tether corresponding architectural thought.

101. ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS AND NARRATIVES 11-12 (West 1995).

102. *Id.*

103. *Id.* at 12. (Langdellian formalism is named for Christopher Columbus Langdell, Dean of Harvard Law School from 1870-1895).

104. *See* NORBERG-SCHULZ, *supra* note 90, at 168.

105. *Id.*

106. *Id.*

107. *Id.* at 173.

simple progression in existing precedent.[108] Because these new building types did not have any historical precedent of their own to draw from, architects studied the various historical styles and applied those styles to their new projects, with varying degrees of success.[109] As a result, there appeared more and more to be a lack of any convincing relationship between the general purpose and plan for a building and its architectural style and details.[110] Classical forms, long associated with a display of political or religious power, seemed ill-at-ease adorning all facets of the secular environment. These new buildings were failing to find an identity of their own.

As with legal formalism, classicism was showing the strains of an overly rigid dogma that gave short shrift to the needs of the architect, the client and the times. Architects came to view the continued attempts to force classical language on new building forms as a moral problem.[111] The coming "revolt against the falsification of forms and against the past was a moral revolt."[112]

2. *Sociological Jurisprudence and the Organic Movement*

Around the turn of the twentieth century, legal scholars began to address what they saw as the inability of formalism, steeped in past precedent strictly construed, to tackle contemporary problems.[113] A move away from formalism, toward contemplation of societal needs ensued, termed sociological jurisprudence.[114] Dean Roscoe Pound suggested that legal scholars abandon the notion that the answers to all legal questions could be found in formalist principles, and instead include economics, sociology, and philosophy in their inquiry to promote better understanding of law.[115] Pound suggested that lawyers "look the facts of human conduct in the face."[116] Likewise, Oliver Wendell Holmes recommended shedding the "unnecessary confusion" of the "fossil records" of history, and look instead to "the ends sought to be attained and the reasons for desiring

108. *See id.*

109. NORBERG-SCHULZ, *supra* note 90, at 175.

110. *Id.* at 175-76.

111. *Id.* at 176.

112. *Id.* (quoting Henri van de Velde, circa 1890).

113. HAYMAN & LEVIT, *supra* note 102, at 12-13.

114. *See id.*

115. *Id.* at 13 (quoting Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 35 (1910)).

116. *Id.*

them."[117]

In architecture, the rigid application of the classical approach began to give way to a search for character and principles that better served the needs of society.[118] Architects sought to humanize modern technology and the growing metropolis, in part through a reassertion of humanity's connection to nature, and to find an appropriate expression of place for every facet of society.[119] The theory being: an office building should look like an office building, and not a stretched-out Greek temple.

As the industrial revolution encouraged further urbanization, the opening of society prompted an opening of architecture.[120] Where homes had always been enclosed spaces, emphasizing refuge and protection, architects like Frank Lloyd Wright were seeking to express what their clients and society were feeling – a sense of freedom, mobility, and participation in, and openness to, the world outside.[121] Wright termed this ideal the "architecture of democracy."[122] Rather than relying on the past, architects were looking to the needs of individual clients and society as a whole to express individual and differential identity.[123] It is in this period that the architect Louis Sullivan is said to have coined the term "form follows function."[124]

With a goal of breaking from the chains of the past, both Sociological Jurisprudes and Organic Architects pointed to changing societal needs and shifting power structures to advocate change. Both groups wanted to step away from a system that invented abstract principles first and then used them to explain and solve the problems at hand.[125] Both groups argued that reason, or rational thought, should be applied directly to the problem itself, rather than reliance on preexisting axioms.[126]

3. Legal Realism and Modernism

After World War I, as the United States slipped into depression, legal scholars continued to pursue a shift "away from the principles of formalism

117. Oliver Wendell Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 464-65, 476 (1897).

118. *See* NORBERG-SCHULZ, *supra* note 90, at 175-76.

119. *Id.*

120. *Id.* at 182.

121. *Id.*

122. *Id.*

123. NORBERG-SCHULZ, *supra* note 90, at 183.

124. *Id.* at 180.

125. *See id.* at 184-85; Holmes, *supra* note 118, 464-65.

126. *See* NORBERG-SCHULZ, *supra* note 90, at 184-85; Holmes, *supra* note 118, 464-65.

and toward social forces and consequences."[127] Legal Realists like Karl Llewellyn amplified the focus on results and all but discarded the notion of a preexisting set of rules from which to cull those results.[128] With the range of choices open to a judge in deciding a case and the multiplicity of dissents, concurrences, and the like, the belief in old hard-and-fast rules seemed negated by the circumstances.[129] What was left, then, was a search for an understanding of the "real rules," or what Llewellyn referred to as not rules at all, but the "practices of the courts."[130] The Realists strove to do away with the old concepts of law as a deterministic set of rules and sought to reinvent legal thought in light of the dynamics of a changing, multicultural, multi-political society, or, as L.L. Fuller put it, how to relate "Law to Life."[131]

In architecture, the period after World War I was also characterized by a search for new, sustaining principles, more appropriate to a growing society.[132] Modernists believed these principles, rather than being the principles of the past, would be the "inevitable [sic] logical product of the intellectual and technical conditions of our age."[133] Advocates of this "modern movement" hoped that the discovery of appropriate standards and principles would lead to a "polite and well-ordered society."[134] This was an attempt to rationalize the general approach introduced by Wright and Sullivan.[135] This rethinking of the basic principles and ideas behind architecture was evinced in the return to elementary shapes and geometric relationships.[136] The belief was that the problems of the time were a result of a false and deficient environment.[137] Elementary forms and strict principles were a protest against the devaluing falseness of historicism.[138]

Nevertheless, modernism's basic goals were positive and based on a strong belief in humanity and architecture.[139] Modernists believed that

127. HAYMAN & LEVIT, *supra* note 102, at 13.

128. *See* Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431, 434-49 (1930).

129. *See id.*

130. *Id.* at 447-48.

131. L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 448 (1934).

132. NORBERG-SCHULZ, *supra* note 90, at 186.

133. *Id.* (quoting WALTER GROPIUS, THE NEW ARCHITECTURE AND THE BAUHAUS, 18 (1935)).

134. *Id.* at 187 (quoting GROPIUS, *supra* note 133, at 27).

135. *Id.* at 186.

136. *Id.*

137. NORBERG-SCHULZ, *supra* note 90, at 187.

138. *Id.*

139. *Id.*

clean, simple beauty, like that of the machine, coupled with extensive planting of vegetation, would lead society away from the inhumane squalor that marked industrialized cities in the nineteenth century.[140] The modernists embraced humanity's need for beauty.[141] Le Corbusier, a principle proponent of the movement, was a staunch advocate of humanity's need for beauty.[142] Le Corbusier believed that the purpose of true architecture was to move us, to make us happy.[143] Le Corbusier explained:

> You employ stone, wood and concrete, and with these materials you build houses and palaces; that is construction. Ingenuity is at work.
>
> But suddenly you touch my heart, you do me good, I am happy and I say: 'This is beautiful.' That is Architecture. Art enters in.
>
> My house is practical. I thank you, as I might thank Railway engineers or the Telephone service. You have not touched my heart.
>
> But suppose that walls rise towards heaven in such a way that I am moved. I perceive your intentions. Your mood has been gentle, brutal, charming or noble. The stones you have erected tell me so. You fix me to the place and my eyes regard it. They behold something which expresses a thought. A thought which reveals itself without a word or sound, but solely by means of shapes which stand in a certain relationship to one another. These shapes are such that they are clearly revealed in light. The relationships between them have not necessarily any reference to what is practical or descriptive. They are a mathematical creation of your mind. They are the language of architecture. By the use of inert materials and *starting from* conditions more or less utilitarian, you have established certain relationships which have aroused my emotions. This is architecture.[144]

In response to the clutter and oppressiveness of nineteenth century industrial cities, modernism offered clean, simple lines, free-flowing floor plans, large sunny windows, lightness and freedom. This was both a solution to a societal problem and a concretization of a new philosophy of humanity's relation to the environment, an opening of thought from concentration on the past to perception of the present.

140. *Id.* at 187-90.

141. *Id.* at 187.

142. NORBERG-SCHULZ, *supra* note 90, at 187.

143. LE CORBUSIER, *supra* note 95, at 19.

144. *Id.* at 203.

4. Post-World War II

After World War II, diverse schools of thought appeared in both law and architecture, as each study went in the multiple directions opened up by modernism and realism. Law saw the emergence of legal positivism, legal liberalism, law and economics, critical legal studies, feminist legal theory, critical race theory, pragmatism, post-modernism, and a host of others.[145] Architecture saw the emergence of structural expressionism, brutalism, post-modernism, deconstructivism, neo-modernism, and a similarly broad host of others. Drawing parallels between at least one set of these offshoots highlights the continued effort to question and innovate in both professions.

5. Critical Legal Studies and Deconstructivism

Toward the end of the 1970s, leftist legal theorists began to critique what they viewed as the false assumptions and fundamental contradictions in traditional legal theory.[146] With an eye toward exposing these flawed structures, critical legal theorists developed a method of "trashing" famous legal texts.[147] Trashing involves taking a text apart, isolating specific arguments, taking those arguments very seriously, drawing them out to an extended logical end, and showing how ludicrous that idea is.[148] The result is a display of the "internally contradictory, incoherent chaos" that underlies the particular legal argument.[149]

Architectural deconstructivism also emerged toward the end of the 1970s and sought to challenge traditional thinking about the nature of architecture, and to highlight the flaws and inconsistencies that are allegedly intrinsic to any structure.[150] To achieve this end, traditional architectural forms and structures are twisted, pulled apart, and reassembled in ways that defy the harmony expected of architecture.[151] Some might say that the resultant buildings look trashed, for they can evoke a sense of unease that is quite apparent.[152] The message is clear, though, that traditional assumptions can quickly lead to chaos.

Architecture addresses philosophical questions such as man's or woman's place in the world, in society, in the community, and in

145. *See generally* HAYMAN & LEVIT, *supra* note 102, at 15-21.

146. *Id.* at 213.

147. Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984).

148. *Id.*

149. *Id.*

150. PHILIP JOHNSON & MARK WIGLEY, DECONSTRUCTIVIST ARCHITECTURE 11 (1988).

151. *Id.*

152. *See id.* at 19-20.

relationship to the environment, all in expositions of concrete, steel and wood. Architecture also addresses more personal philosophical questions, liberal or conservative, introvert or extrovert, proclaiming freedom or providing refuge. Such issues speak to the psychological needs and desires of the client.

C. Architecture as Psychological Expression

Architecture begins and ends with the client. It is the arrival of a client with a problem to be solved that sparks the architectural process. It is the finished resolution of that problem in the form of a built work that ends the process.

An architect will start the process by interviewing the client.[153] In addition to finding out the specifics of what a client needs, what type of use, how many rooms and bathrooms, etc., an architect must find out what a client's hopes for a building are and what will make him or her happy. Bruce Goff, an American architect who was known for designing unusual, highly striking buildings, explained that the first thing he did was try to understand the clients and get a feeling for what they would like and feel at home in.[154] Goff would try to get a feel for what kind of people his clients were, whether they were quiet and reserved or more extroverted, tentative or bold.[155] The resultant building had to embody what the clients themselves wanted and needed, not what the architect wanted or would desire for his own home.[156]

An architect is not free to operate in the way most artists do.[157] Architecture is done on commission, for a specific client. Goff explains that an architect "has to become a good friend of his client; he has to enter into the client's way of feeling or living, in the sense of giving them the kind of expression and plan that they need. The client is part of all this."[158] A successful project is one that the clients can use, feel close to and love.[159]

An ultimate goal of architecture then, is to provoke a positive response in both the client and other users. "The business of architecture is to establish emotional relationships by means of raw materials."[160] "All

153. *See, e.g.*, BRUCE GOFF, GOFF ON GOFF – CONVERSATIONS AND LECTURES, 34-35 (Philip B. Welch ed., 1996).

154. *Id.*

155. *Id.* at 35.

156. *Id.*

157. *Id.* at 203.

158. GOFF, *supra* note 154, at 204.

159. *Id.* at 219.

160. LE CORBUSIER, *supra* note 95, at 4.

architecture is shelter; all great architecture is the design of space that contains, cuddles, exalts, or stimulates the persons in that space."[161]

D. Architecture as Expression of Religious and Cultural Identity

Religion has long used architecture to express different aspects of belief. Gothic cathedrals encompass tall, slender volumes filled with light, symbolizing the closeness of God and the illumination of man.[162] Zen temples, conversely, are generally low-slung and focus outward onto manicured landscapes, which allows one to forget oneself and contemplate nature.

As different religions use different architectural forms to reinforce their philosophies, so too different cultures and ethnicities have architectural forms that represent their histories. Different cultures around the world each have architectural forms and histories indigenous to themselves, and expression of these differences should not depend on whether they might harm adjacent property values.

E. Architecture as Artistic Expression

Architecture is also a means of artistic expression. Great architecture is an expression of the architect's artistry in the same way that great music is of the composer, sculpture is of the sculptor, dance is of the dancer, and cuisine is of the chef.[163] Le Corbusier puts it this way:

> Architecture is a thing of art, a phenomenon of the emotions, lying outside questions of construction and beyond them. The purpose of construction is to make things hold together, the purpose of architecture is to move us. Architectural emotion exists when the work rings within us in tune with a universe whose laws we obey, recognize and respect . . . . Architecture is a matter of "harmonies," it is "a pure creation of the spirit."[164]

It is art that we live in, work in, worship in, love, sleep and eat in.[165] Architecture is part of our life existence, part of our environment, "and it becomes a very important part of our lives."[166] Architecture says a great deal about what we value, what we believe, what we cherish, where we come from, and who we are now. Architecture says so much that it is often

161. PHILIP JOHNSON, WRITINGS 262 (1979).

162. NORBERG-SCHULZ, *supra* note 90, at 109-12.

163. *See* GOFF, *supra* note 154, at 204.

164. LE CORBUSIER, *supra* note 95, at 19 (emphasis omitted).

165. *See* GOFF, *supra* note 154, at 206.

166. *Id.*

taken for granted. More than a specific type of speech, architecture is a means of expression, a method of communicating. Architecture is a language.

V. REGULATING ARCHITECTURE AS SPEECH

Where and to what extent, then, is regulation of architecture appropriate? In *Village of Euclid*, the Supreme Court endorsed zoning regulation as an extension of the municipal police power to protect the public health, safety, morals and general welfare.[167] The zoning power allows municipalities to regulate viewpoint and content-neutral aspects of building, including maximum heights, property line set-backs, type and adequacy of construction, and uses allowed in a given area.[168] Outside the specific question of architecture, where the zoning power has run up against claims of free speech, the Court has responded in several ways, depending on the nature of the speech.

A. Zoning Power and Commercial Speech

In *Metromedia, Inc. v. City of San Diego*, the Supreme Court considered regulation of billboards.[169] The court noted that "[b]illboards are a well-established medium of communication, used to convey a broad range of different kinds of messages."[170] The Court held that the "government has legitimate interests in controlling the noncommunicative aspects of the medium, . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects."[171] Further, where regulation of noncommunicative aspects of a medium "impinges to some degree on the communicative aspects, . . . the courts [must] reconcile the governments regulatory interests with the individual's right to expression."[172] Commercial speech enjoys less protection than non-commercial speech, such that commercial speech may be forbidden and regulated in situations where non-commercial speech may not.[173] In *Metromedia*, the Court reaffirmed the use of the four-part test first enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[174] to determine the validity of a government restriction on

167. *Vill. of Euclid*, 272 U.S. at 395.

168. *Id.*

169. 453 U.S. 490, 493 (1981).

170. *Id.* at 501.

171. *Id.* at 502.

172. *Id.*

173. *Id.* at 506.

174. 447 U.S. 557, 563-66 (1980).

commercial speech:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.[175]

The Court noted that aesthetic judgments "are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose."[176]

In *City of Ladue v. Gilleo*, the Supreme Court considered a regulation that banned all residential signs except those falling within a few exceptions.[177] The Court noted that, although signs are a form of protected expression, "they pose distinctive problems that are subject to municipalities' police powers."[178] Signs may "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."[179] However, regulation of signs may run afoul of the First Amendment in two ways.[180]

First, a measure may restrict too little speech because its exemptions discriminate on the basis of the sign's message.[181] There, exemptions from an otherwise permissible regulation may represent a governmental attempt to give one side an advantage in expressing its views on a debatable public question to the people.[182]

Second, a measure may be open to attack for prohibiting too much protected speech.[183] There, through the combined operation of a speech restriction and its exemptions, the government might seek to select the subjects open to public debate, and thereby control the search for truth.[184] Prohibitions applying to a category of speech that is a "uniquely valuable or important mode of communication" will generally violate the First

175. *Metromedia*, 453 U.S. at 507.

176. *Id.* at 510.

177. 512 U.S. 43, 45 (1994).

178. *Id.* at 48.

179. *Id.*

180. *Id.* at 50-51.

181. *Id.*

182. *City of Ladue*, 512 U.S. at 51.

183. *Id.*

184. *Id.*

Amendment.[185]

B. Zoning Power and Entertainment Speech

In *Schad v. Mount Ephraim*, the Supreme Court considered a zoning ban on live entertainment, including nude dancing.[186] The Court stated:

> [A ban on] live entertainment . . . prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.[187]

The zoning power is broad and essential to achieving satisfactory quality of life in a community, but it must be exercised within constitutional limits.[188] Where "a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.'"[189]

In a concurring opinion, Justice Blackman noted that "the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment."[190] To sustain an exercise of the zoning power in such a case, the municipality must be able to "articulate, and support, a reasoned and significant basis" for the rule.[191] Concerning the contention that a municipality should be free to eliminate a particular form of expression where it is available in a nearby area, Justice Blackmun stated:

> [I]n attempting to accommodate a locality's concern to protect the character of its community life, the Court must remain attentive to the guarantees of the First Amendment, and in particular to the protection they afford to minorities against the 'standardization of ideas . . . by . . . dominant political or community groups.[192]

185. *Id.* at 54-55.

186. 452 U.S. 61, 62 (1981).

187. *Id.* at 65.

188. *Id.* at 68.

189. *Id.*

190. *Id.* at 77 (Blackmun, J., concurring).

191. *Schad*, 452 U.S. at 77.

192. *Id.* at 79 (Blackmun, J., concurring).

C. Zoning Power and Architecture

The Supreme Court has yet to consider architecture as a form of speech. When and if the Court does take up the issue, they will undoubtedly have to wrestle with a clash of three interests: the individual interest in freedom of expression, the community police power, and the neighborhood interests enmeshed in the common law nuisance doctrine. Much of the threat of nuisance can be handled with viewpoint and content-neutral zoning ordinances. Height, bulk, use, setbacks, and materials (at least to an extent needed to prevent fire and promote safety and cleanliness) can all be regulated without resorting to aesthetic controls. And nuisance law is perhaps the best way to approach aesthetic considerations as well. If a color scheme is so shiny and bright that it hampers the visibility of nearby drivers, regulation would seem appropriate based on the viewpoint and content-neutral need to promote vehicular safety. Beyond that, though, regulating architectural "aesthetics" enters the realm of the subjective and the prognosticative.

Regulations that promote certain styles of architectural expression and discourage others are viewpoint-specific, and unnecessarily trample on speech that may in turn be part political, philosophical, psychological, cultural, and religious. Even if there were specific evidence that the out-of-favor styles detracted from property values, that is not a sufficient reason to stifle such a unique and viewpoint-laden means of communication.

Regulations based on "harmony" pose even more problems, due to their inherent subjectivity. As Bruce Goff stated:

> The idea . . . that the only way we can have harmony is through conformity . . . is ridiculous. We have harmony in nature without this kind of conformity or duplication or monotony, you see. Even in the desert, where things are apparently monotonous sometimes, if you get to looking, they are not. There is always something that varies the monotony . . . . We certainly need something to vary the monotony. Just by having all the buildings the same height, or the same color, or the same style, or the same kind of roof, doesn't mean there is going to be harmony, does it? Maybe and maybe not.
>
> Because buildings are different doesn't mean there will be chaos, either. In nature you see different kinds of things together: you see rocks that are not like trees, and you see trees that are not like water, and you have water that isn't like flowers, and all sorts of things, and they all seem to get along together, don't they? We can't criticize nature. We have all this variety and interest that is always changing, that is always part of the continuous present, and still the only way we think we can have harmony in buildings is to say that they all have to have the same height, or the same materials or the same

something else.[193]

D. An Architectural Standard of Review

Even more so than billboards, architecture is a "well-established medium of communication, used to convey a broad range of different kinds of messages."[194] The Court's directive on billboard regulation in *Metromedia* — that government may control noncommunicative aspects but is restrained by the First and Fourteenth Amendments from controlling communicative aspects — should be applied with equal force to architecture.[195] Any work of architecture is, of necessity, a construction of communicative and noncommunicative aspects. While billboards typically contain purely commercial speech, architecture, as explained above, may speak to the entire arena of ideas.

As with other forms of speech, architectural speech may be regulated in accord with the type of speech involved. Where architectural speech is primarily commercial, particularly in a municipal commercial district, the community interest in its regulation is greatest. In such circumstances, the *Central Hudson/Metromedia* test provides a ready standard for evaluating regulation: such regulation must directly advance a substantial government interest and reach no further than necessary.[196]

In non-commercial settings, where architecture speaks more to the values of the persons creating it than to the quest to appeal to customers, the community interest in regulating architectural expression must yield to the right of the speakers to express their ideas. Justice Blackmun's admonition to protect the minority voice "against the standardizing of ideas by dominant political or community groups" finds special resonance in non-commercial architectural expression.[197] Accordingly, strict scrutiny is the appropriate standard to apply to regulation of architectural expression in the non-commercial arena.

VI. CONCLUSION

Frank Lloyd Wright's Guggenheim Museum in New York is entirely at odds with the surrounding neighborhood. Likewise is Frank Gehry's Guggenheim Museum in Bilbao, Spain. Their undulating shapes stand in stark contrast with the boxy profiles of the buildings around. And yet they,

193. GOFF, *supra* note 154, at 222.

194. *Id.* at 501.

195. *See Metromedia*, 453 U.S. at 502.

196. *Id.* at 507. *See, e.g.*, Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (confirming the societal interest in preservation of historical landmarks).

197. *See Schad*, 452 U.S. at 77 (Blackmun, J., concurring).

like Fallingwater, are celebrated as among the greatest of twentieth century architecture.

In attempting to channel architectural expression toward a forced common cohesiveness, municipalities are denying themselves the chance to allow greater beauty into their midst. Like pearls on a swine, architecture that creates new standards for beauty almost by definition does not harmonize with its surroundings. Rather, it is that very difference that shows something new and unusual is happening. By precluding such expression, municipalities are driving the artists, the architects, and the visionaries away, letting them know their unconventional ideas are not welcome. Snuffing out these individuals' speech violates the very heart of the First Amendment.

Architecture is not necessarily pretty or quaint, it is not necessarily harmonizing, and it is not necessarily kind to its neighbors. However, does architecture convey a message, prove a point, highlight a problem, provide a solution, look to the future, indicate wealth, values, beliefs, and lift the spirits? In short, do buildings speak? For the architect, for the client, and for society, they most certainly do.

* * * *