
Blightened Scrutiny

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*There is perhaps no fate worse than a declaration that one's property is blighted. With that label in hand, the government obtains a virtually limitless power to regulate, to condemn, and to take for the greater good. Yet, the word "blight" is nearly meaningless, functionally and legally. Times Square, downtown Las Vegas, unspoiled wildlife habitat, prime Brooklyn real estate, and the entire city of Coronado, California all have been declared blighted at one time or another. Since the Supreme Court's decision in *Berman v. Parker* in 1954, courts nationwide have applied the most deferential scrutiny to blight designations and the takings they license.*

*In a time before *Kelo*, the idea that the state might declare a property a "blight" and condemn it thereby was merely disquieting. But now, standing as it does as the last line of defense between a property owner and the State — undermined by the dangerous incentives to take advantage of its deep conceptual failings — blight rises to a level of constitutional concern. "Blight," in all its forms, is State Aestheticism, a constitutionally suspect category. Throughout American history, across fields as diverse as First Amendment law, constitutional Privacy, Intellectual Property, Torts, Contracts, and indeed the law of Property itself, the shadow-right to be free of the State's aesthetic judgments surfaces and resurfaces. This Article discusses this constitutional right to aesthetic and moral self-determination as it has developed in fields ranging from the constitutional right to privacy to free expression to property itself. It first canvasses how aesthetic neutrality was protected historically. It then discusses how this shadow-right manifests across a variety of areas of constitutional, statutory, and common law, and argues that this implicit constitutional right has become increasingly explicit in recent years. Finally, it argues that the judicial*

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failure to carefully police blight takings constitutes a significant oversight in our constitutional order.

This Article concludes that it is time to revisit Berman’s premises and its holding. Following Kelo’s elimination of the last theoretical limitations on the “public use[s]” for which the State may exercise the power of eminent domain, blight’s newfound role as the primary protection for property owners from illegitimate takings means its legal and conceptual defects are due for reexamination, and a return to heightened scrutiny is warranted.

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INTRODUCTION

Blight stains the American legal landscape. For more than a half century “blight” has proven a polished scalpel in the takings toolkit. Since 1954’s *Berman v. Parker*, a blight determination has been enough to qualify a taking as a “Public Use.” The rationale being that taking the property allows the State to excise the blight. This was long the conventional understanding: blight as malignancy, taking as surgery.

Blight has been thrust into a new and disturbing role since the Supreme Court’s landmark ruling in *Kelo v. City of New London*, however. Unsettled by that decision, more than forty states have enacted statutes meant to guard against bare “economic development” takings — the takings *Kelo* sanctioned. But in many of these jurisdictions there remains a stark exception to the statutory safeguard: Blight. Many states preserved blight condemnations even while closing off *Kelo*-style economic development takings. A blight determination is often now all that stands between the ordinary, law-abiding citizen and the full power of the State’s exercise of eminent domain.

In a time before *Kelo*, the idea that the state might declare a property a “blight” and condemn it thereby was merely disquieting. But now, standing as it does as the last line of defense between a property owner and the State — undermined by the dangerous incentives to take advantage of its deep conceptual failings — blight rises to a level of constitutional concern. “Blight” in all its forms is State Aestheticism, a constitutionally suspect category.

Throughout American history, across fields as diverse as First Amendment law, Constitutional Privacy, Intellectual Property, Torts, Contracts, and indeed the law of Property itself, the shadow-right to be free of the State’s aesthetic judgments surfaces and resurfaces. It is an amorphous right, but also a deep and embedded one. It stems from a belief — rooted in history and intuition — that the government is an ineffective aesthetic arbiter, that bad-faith is easily masked beneath the veneer of “objective” aesthetic judgment, and that our core constitutional commitments to tolerance and liberty require devotion to a constitutional value that we might even call the right to blight. It is the implied constitutional right to be ugly, to live differently, to waste, to worship, to be as one sees fit.

Blight upsets this constitutional order. It literally adds insult to injury. In addition to the loss of property they portend, blight condemnations constitute a very public, official declaration that one’s use and disposition of one’s own property is inconsistent with the moral and aesthetic values of the Community and the State. Blight condemnations without a more substantial accompanying harm are

not only aestheticism, but a solemn declaration that one is not entitled to the privileges and dignity of property ownership itself.

Among all the takings that we might find constitutionally impermissible, it is the pernicious declaration that an otherwise blameless use of one's own property constitutes a "blight" that should disturb us most of all. To make such a declaration is to leave a mark, indelible and dark, upon the individual falsely branded and upon the constitutional commitment to liberty itself. Yet, because so many States have sought to preserve blight as a category of property subject to economic development takings, and because blight declarations in the interests of public health and safety might often be justifiable, it would go too far to simply declare such takings off-limits. The solution would seem to be a compromise, one that settles the question as it has long been settled. *Heightened scrutiny*.

Especially now that the concept of blight has been tasked with such a heavy burden — often standing as the last firebreak between the politically powerful and the politically meek — a judicial requirement that blight designations withstand searching judicial scrutiny would seem the least the courts could do to ameliorate the shadow our current blighted scrutiny casts upon the landscape.

The remainder of this Article discusses the constitutional right to aesthetic and moral self-determination as it has developed in fields ranging from the constitutional right to privacy to free expression to property itself. It first canvasses how aesthetic neutrality was protected historically. It then discusses how this shadow-right manifests across a variety of areas of constitutional, statutory, and common law, and argues that this implicit constitutional right has become increasingly explicit in recent years. Finally, it argues that the judicial failure to carefully police blight takings constitutes a significant oversight in our constitutional order.

This Article concludes that blight determinations warrant heightened scrutiny. Because laws founded on such judgments are anathema to principles as deeply embedded as any in our constitutional scheme, the judiciary should inspect them in a similar manner, and to a similar degree.

I. LIMITS-AS-LIBERTY AND THE PROHIBITION ON "AESTHETIC REGULATION"

Before there were rights¹ — to privacy,² expressive freedom,³ and freedom from animus⁴ — debates roiled legislative assemblies,⁵ and

¹ See generally AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 141-42,

surged across the quarto and octavo pages of law reviews and judicial opinions, in the language of *limits*.⁶ Limits on government power, and the space for individual self-determination they opened.⁷ An unfortunate consequence of the blood brotherhood that now obtains

151-56 (2012) (tracing the Fourteenth Amendment's conferral of "rights" through Warren Court decisions); ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 791 (1st ed. 1948) (describing "the creation of an elaborate new constitutional law of civil liberties and private rights"); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 237-58 (1995) (detailing the birth of America's "Second Bill of Rights").

² Discovered and really robustly protected for the first time in the 1960s. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744-46 (1989) [hereinafter *Privacy*].

³ First robustly recognized only after the transformation of the Supreme Court following the tenures of Holmes and Brandeis. See J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 255 (1990); Louis H. Pollak, *Advocating Civil Liberties: A Young Lawyer Before the Old Court*, 17 HARV. C.R.-C.L. L. REV. 1, 11-12 (1982).

⁴ Appearing in its contemporary forms for the first time in the period following *Brown v. Board of Education* and the rise of Warren Court rights-consciousness. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113-14, 1128-29 (1997).

⁵ See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 100, 150 (1988) (chronicling the legislative debate surrounding the Fourteenth Amendment's ratification).

⁶ See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 3-5, 9, 11-13, 127 (2011); 8 OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 158-65 (1993); see also HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 45-48 (1993). Late nineteenth century and early twentieth century articulations abound, see, for example, *Loan Ass'n v. Topeka*, 87 U.S. 655, 663 (1874) and THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION*, at iii-iv (Boston, Little, Brown, & Co. 1868).

⁷ See, e.g., 8 FISS, *supra* note 6, at 127-28, 159 ("[L]iberty of contract . . . was, in the end, not a principle from which limits on state power were derived, but rather the space or area left to the individual after the reasons for the creation of state power were exhausted."); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 3-5 (1991) (describing the development of the judicial theory that individual liberties are best protected by a government with limited powers). For a late nineteenth century article articulating the concept contemporaneously, see Frederick N. Judson, *Liberty of Contract Under the Police Power*, 14 ANN. REP. A.B.A. 231, 232 (1891). With respect to the unique subject matter of this Article, a tailor-made primer may be found in Darrel C. Menthe, *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. PUB. INT. L.J. 225 (2010), which ably chronicles the transformation of judicial scrutiny of aesthetic regulation from one rooted primarily in limitations on government power to one rooted primarily in the First Amendment. See generally *id.* at 238-58 (tracing the transformation).

between late twentieth-century civil libertarianism and textual literalism is that much of the abundance and diversity of this once-rich legal order has been lost.⁸ One can find in the modern case reports — in rare specimens like *NFIB v. Sebelius*⁹ and *Bond v. United States*¹⁰ — the bantam descendants of these limits-as-liberty arguments. But they are a stunted and disfigured progeny, nothing like their magisterial forebears.¹¹

A century ago, in addition to explicit textual and historical limits on government power, it was widely assumed that there existed expansive “conceptual” or “theoretical” limits on that power as well.¹² Places the State could not go, not because an individual had an affirmative right to be free from the intrusion, but simply because the State *could not go there*.¹³ This was the era of protracted conflicts over the meaning of ambiguous terms, the era of endless disputations over talismans like “due process,” the “police power,” and “commerce.”¹⁴ These words

⁸ See BERNSTEIN, *supra* note 6, at 126 (noting that the “conservatives’ preferred narrative [of conservative constitutional history] revolves around a tradition of judicial restraint based on textualism, originalism, and respect for long-standing constitutional principle” even though this is ahistorical); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 167, 176-77, 351-55 (1990); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38-47, 144-49 (Amy Gutmann ed., 1997); Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 *GEO. WASH. L. REV.* 1373, 1389-90 (1998).

⁹ 132 S. Ct. 2566 (2012); *see id.* at 2587 (opinion by Roberts, C.J.).

¹⁰ 131 S. Ct. 2355 (2011); *see id.* at 2364; Brief for Petitioner at 21, *Bond v. United States*, 133 S. Ct. 978 (2013) (No. 12-158), 2013 WL 1963862, at *21 (“The absence of a national police power is a critical element of the Constitution’s liberty-preserving federalism.”).

¹¹ See John Phillip Reid, *Liberty and the Original Understanding*, in *ESSAYS IN THE HISTORY OF LIBERTY: SEAVER INSTITUTE LECTURES AT THE HUNTINGTON LIBRARY* 1, 11-13 (1988) (“[E]ighteenth-century liberty was founded on values we no longer comprehend and no longer command our allegiance.”).

¹² See, e.g., BERNSTEIN, *supra* note 6, at 9-14 (describing the underpinnings of those limits); Reid, *supra* note 11, at 9 (same); Jed Rubenfeld, *Usings*, 102 *YALE L.J.* 1077, 1097-99 (1993) [hereinafter *Usings*] (describing that the bounds of some of those “limits” were defined by a strong respect for liberty of contract); Harry N. Scheiber, *Economic Liberty and the Constitution*, in *ESSAYS IN THE HISTORY OF LIBERTY*, *supra* note 11, at 75, 75-77 (reviewing the theoretical underpinnings of property rights in early constitutional jurisprudence).

¹³ See 8 FISS, *supra* note 6, at 127-28, 159; GILLMAN, *supra* note 6, at 20; DAVID M. GOLD, *THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM* 137-39 (1990); NELSON, *supra* note 5, at 10; Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 496-98 (2010) (explaining that due process implied a requirement of impartiality and generality in lawmaking).

¹⁴ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 820 (1935); *see also* Felix Frankfurter, *Some Reflections on the*

were debated with an earnestness and seriousness that today we can hardly imagine and only scarcely understand — as if hidden in them were the keys to liberty itself.¹⁵

While these artifacts are now best known by their abuses,¹⁶ it is unfortunate that this notion — that there exist theoretical limits on government power — has fallen so far into desuetude. For among the richest and most fruitful debates that arose in all this tumult still strikes at the heart of many of those rights we most cherish.¹⁷ The debate concerned whether the government possesses the power to engage in regulation on the basis of purely “aesthetic” concerns.¹⁸ It is a debate this Article revisits in the disquieting context of “blight.”

Reading of Statutes, 47 COLUM. L. REV. 527, 543 (1947) (describing the “police power” as a “label” that has no meaning). Compare *Lochner v. New York*, 198 U.S. 45, 58 (1905) (holding a bakery work-hour restriction outside the legitimate scope of the State’s police power), with *id.* at 66-67 (Harlan, J., dissenting) (such laws fall within the legitimate scope of the police power).

¹⁵ See GILLMAN, *supra* note 6, at 15 (“The eventual collapse of this constitutional tradition signaled the rise of a new American Republic . . .”).

¹⁶ See, e.g., BERNSTEIN, *supra* note 6, at 108 (describing the ignominy of the *Lochner* decision and the rationale it elucidated); Scheiber, *supra* note 12, at 84 (same). See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 773 (1964) (“In sustaining . . . major inroads on private property [in brokering the New Deal revolution], the Supreme Court rejected the older idea that property and liberty were one, and wrote a series of classic opinions upholding the power of the people to regulate and limit private rights. The struggle between abuse and reform made it easy to forget the basic importance of individual private property. The defense of private property was almost entirely a defense of its abuses — an attempt to defend not individual property but arbitrary private power over other human beings.”).

¹⁷ See Scheiber, *supra* note 12, at 89 (arguing that limited-government-as-liberty has been splintered and redistributed among a panoply of other constitutional rights).

¹⁸ See Note, *Public Esthetics as a Basis for Legislation*, 27 HARV. L. REV. 571, 572 (1914) [hereinafter *Public Esthetics*] (“Thus, esthetic considerations, it would seem, fall outside the scope of the police power . . .”). The articles were many in number and rich in detail and argument. See, e.g., ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS* §§ 180-83 (1904) (commenting on the aesthetic limits of the police power then-prevailing and noting that “if the purpose [of a law] were purely aesthetic, the impairment of property rights even upon payment of compensation, would not pass unchallenged”); Walter L. Fisher, *Legal Aspects of the Plan of Chicago*, in DANIEL H. BURNHAM & EDWARD H. BENNETT, *PLAN OF CHICAGO* 127, 127-30, 140 (Charles Moore ed., 1908) (illustrating the argument in the context of urban planning); Wilbur Larremore, *Public Aesthetics*, 20 HARV. L. REV. 35 (1906) (giving commentary on whether regulating aesthetics are within the legitimate limits of states’ police powers); Henry T. Terry, *The Constitutionality of Statutes Forbidding Advertising Signs on Property*, 24 YALE L.J. 1 (1914) (same); Note, *Aesthetics and the Fourteenth Amendment*, 29 HARV. L. REV. 860, 860 (1916) [hereinafter *Aesthetics and the Fourteenth Amendment*] (same); Comment, *Delimitation of the State Police Power as to Building Restrictions*, 26 YALE L.J. 151, 152 (1916) (same); Comment, *Exercise of the Police Power for Aesthetic Purposes*, 30 YALE L.J. 171, 172 (1920) [hereinafter *Exercise*]

Blight takings are exercises of eminent domain founded on a determination that a property or group of properties is blighted. If that definition sounds circular, it's because it is. The word "blight" has proven itself as adaptable as the needs of the occasion.¹⁹ States and municipalities have shown themselves willing to declare nearly anything blighted.²⁰ Times Square,²¹ downtown Las Vegas,²² unspoiled wildlife habitat,²³ prime Brooklyn real estate,²⁴ the Manhattanville neighborhood of West Harlem,²⁵ a thriving St. Louis shopping mall,²⁶ the entire city of Coronado, California²⁷ all have been declared blighted at one time or another.

Yet the idea that one might declare a property or neighborhood blighted and condemn it was controversial until recently,²⁸ and would

(same); Note, *The Constitutionality of the Flag Laws*, 19 HARV. L. REV. 532, 533 (1906) (same); Note, *The Police Power and the Public Taste*, 17 HARV. L. REV. 275 (1904) (same).

¹⁹ See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 307 (2004); Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 205 n.18 (2006).

²⁰ See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2120 (2009) [hereinafter *Limits of Backlash*]; Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1034-35.

²¹ *W. 41st St. Realty LLC v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121, 124 (App. Div. 2002); see Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 22 (2005).

²² *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 5-6 (Nev. 2003); see Boudreaux, *supra* note 21, at 24.

²³ See Paul Shigley, *Lawmakers Threaten to Diminish Eminent Domain Authority*, CAL. PLAN. & DEV. REP., Sept. 2005, at 5, available at <http://www.cp-dr.com/node/371>; see also Robert McClure, *Displaced by Automobile Test Facility in California*, SEATTLE POST-INTELLIGENCER, May 3, 2005, at W; Jim Herron Zamora, *Lockyer Challenges Seizure of Land for Private Project*, S.F. CHRON., July 27, 2005, at B8.

²⁴ See NEIL DEMAUSE & JOANNA CAGAN, *FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT* 280 (Bison Books rev. & expanded ed. 2008).

²⁵ *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 11-13, 20-28 (App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010).

²⁶ See *JG St. Louis W. Ltd. Liab. Co. v. City of Des Peres*, 41 S.W.3d 513, 516-18 (Mo. Ct. App. 2001); John Gibeaut, *The Money Chase*, A.B.A. J., March 1999, at 58, 61.

²⁷ Peter Detwiler & John Dale, *Redevelopment and Blight: A Background Staff Paper for the Joint Interim Hearing: Hearing Before the S. Comm. on Hous. & Land Use & S. Select Comm. on Redevelopment*, S. -831-S, 1995-1996 Reg. Sess. 11 (Cal. 1996).

²⁸ See, e.g., Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 257 ("The history of aesthetic regulation suggests that only relatively recently have courts begun to feel comfortable in allowing governments to regulate land use on such grounds.").

have been categorically impermissible a century ago.²⁹ As a Note in the *Harvard Law Review* declared in 1914, it was “consistent with the authorities” that regulation on the basis of “public esthetics” was not an interest within the scope of the police power,³⁰ an argument reiterated two years later: “[Courts] were practically unanimous in holding a regulation of the use of private property for æsthetic reasons alone beyond the police power.”³¹ Limitations on eminent domain were widely thought to be tied to these limitations on the police power, the two understood to be each other’s inverse.³² As one article succinctly put it, “under eminent domain, a *beneficial* use is acquired; under the police power, a *harmful* use is prevented.”³³ Many believed,

Indeed, if one sees Justice O’Connor’s opinion in *Kelo* itself as in-line with this tradition, such regulation remains controversial today. See *Kelo v. City of New London, Conn.*, 545 U.S. 469, 500-01 (2005) (O’Connor, J., dissenting).

²⁹ See, e.g., Charles C. Dickinson, *Leading Limitations upon the Exercise of the Right of Eminent Domain*, 1 CORNELL L.J. 1, 32, 35-36, 52-53 (1894) (illustrating the prevailing legal paradigm of the early 1900s that would not have allowed such regulations); sources cited *supra* note 18 (giving specific examples of the same). See generally Meg Stevenson, *Aesthetic Regulations: A History*, 35 REAL EST. L.J. 519, 521-29 (2007) (recounting the historical context that shaped early aesthetic regulation).

³⁰ Note, *Public Esthetics*, *supra* note 18, at 571.

³¹ Note, *Æsthetics and the Fourteenth Amendment*, *supra* note 18, at 860.

³² See, e.g., T.D. Havran, *Eminent Domain and the Police Power*, 5 NOTRE DAME L. REV. 380, 380-84 (1930) (elucidating the relationship between eminent domain and states’ police powers); Comment, *Public Use in Eminent Domain*, 23 YALE L.J. 274, 274 (1914) (same); Note, *The Constitutionality of Building Lines for Aesthetic Purposes*, 34 HARV. L. REV. 419, 421 (1921) (same); Note, *The Extent of the Power of Eminent Domain*, 15 HARV. L. REV. 399, 400 (1902) (same); Note, *What Constitutes a Public Use*, 32 HARV. L. REV. 169, 171 (1918) (same). Professor Rubenfeld’s excellent article, *Usings*, *supra* note 12, recognizes and lauds that it was once accepted that abating a nuisance was conceptually distinct from making “use” of property, but does not seem to acknowledge that when it thus came to “aesthetic abatements,” as one might call them, the implications of this doctrine were that sometimes the government could neither *take* (for the taking was not a “use”) nor *police* (because aesthetic harms are not harms within the proper scope of the police power). See Rubenfeld, *Usings*, *supra* note 12, at 1114-18.

³³ Comment, *Municipal Zoning*, 19 MICH. L. REV. 191, 202 (1920). This was emphatically the common law view. As Chief Justice Lemuel Shaw of the Massachusetts Supreme Court wrote in 1851 in *Commonwealth v. Alger*, the State must exercise the police power where a use is

a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain.

61 Mass. 53, 86 (1851). See also FREUND, *supra* note 18, § 511 (“It may be said that the state takes property by eminent domain because it is useful to the public, and under

and most courts held, that eminent domain could not be used as a means of circumventing limits on the police power.³⁴ After all, if an aesthetic use was not harmful then how could its elimination be beneficial?

Over the arc of twentieth century, blight has lost all fixed definition,³⁵ and the barriers to purely aesthetic regulation have slowly worn away. But the process has been gradual, and the contours and limits of aesthetic regulation remain ill-defined. From its categorical exclusion from the purview of regulation at the turn of the century, by the 1920s shafts of light began to pierce the veil.³⁶ A “decided tendency to give . . . more weight” to aesthetic considerations,³⁷ began to emerge, a tendency “to broaden the scope of the police power and to use it to accomplish aesthetic purposes whenever in sound public policy there is reason to do so.”³⁸ As a 1923 Comment in the *Yale Law Journal* explained, the law had evolved such that “[w]here purely aesthetic considerations are involved . . . the power of eminent domain can be used,” which was “a development from the time when aesthetic purposes could not be served at all, constitutionally.”³⁹ A 1922 Article

the police power because it is harmful From this results the difference between the power of eminent domain and the police power, that the former recognises a right to compensation, while the latter on principle does not.”)

³⁴ See Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 835 (1924); Note, *Municipal Corporations — Eminent Domain — Limitations*, 7 N.Y.U. L.Q. REV. 743, 745-46 (1930). Yet, as the text accompanying *infra* note 39 explains, already by the 1920s a more expansive definition of “public use” as “equivalent to public benefit, utility and advantage” had begun to sprout in the interstices of constitutional interpretation. Note, *Condemnation of Property for the Public Welfare*, 20 COLUM. L. REV. 591, 591 (1920) (quoting 1 JOHN LEWIS, EMINENT DOMAIN §§ 257, 258 (3d ed. 1909)). As even that Note cautions, however, “Mr. Lewis makes a strong argument . . . [that ‘public use’ means ‘for the public benefit’] but the tendency of modern courts would seem to be against him.” *Id.* at 591 n.3. It would not remain so for long.

³⁵ See Gordon, *supra* note 19, at 310.

³⁶ See Newman F. Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124, 124-25, 127-42 (1926-1927); Comment, *Condemnation of Property Against Use for Apartment Building*, 18 MICH. L. REV. 523, 528 (1920) (calling the Minnesota Supreme Court’s decision to uphold an aesthetic zoning ordinance, “a distinct departure from any previously decided case” that “inaugurates the rather broad and general principle that a public purpose as distinguished from a public use may serve as a basis for the exercise of the right of eminent domain”); Current Decisions, *Constitutional Law — Eminent Domain — Restriction of Apartment-Houses as Aesthetic Use*, 29 YALE L.J. 936, 936 (1920) (praising the decision).

³⁷ Comment, *Municipal Zoning*, *supra* note 33, at 202.

³⁸ Comment, *Exercise*, *supra* note 18, at 173.

³⁹ Comment, *The Constitutionality of Zoning Laws*, 32 YALE L.J. 833, 834 n.15 (1923); see also Comment, *Exercise*, *supra* note 18, at 172-73 (noting that while some jurisdictions had upheld ordinances as exercises of eminent domain rather than

in the *A.B.A. Journal* also saw change afoot,⁴⁰ though even it candidly acknowledged that “[i]n the United States the courts have repeatedly laid down the rule that the police power cannot be exercised for aesthetic purposes.”⁴¹ Scholars through the 1920s, no matter their views, remained careful to point out that “civic beautification alone, unsupported by a more substantial motive, is viewed as too tenuous an objective to warrant the exercise of the police power.”⁴²

So extensive, contentious, and important a concern was the problem of aesthetic regulation it formed the basis of scores of law review articles and court cases well into the 1930s and beyond.⁴³ A 1930

violations of the police power — essentially converting the regulations into “regulatory takings” — these were suspect given that “a taking under the power of eminent domain . . . must be for a ‘public use,’ and there is as much difficulty in defining this term as the term ‘public welfare’ [under the police power]”).

⁴⁰ See Henry P. Chandler, *The Attitude of the Law Toward Beauty*, 8 *A.B.A. J.* 470, 470 (1922).

⁴¹ *Id.* at 471.

⁴² See Robert W. Stayton, *Municipal Corporations — Zoning Texas Cities — Constitutionality Under Police Power*, 9 *TEX. L. REV.* 50, 50-51 (1930) (noting a Texas Supreme Court decision affirming the prevailing view); Note, *Constitutionality of Zoning Laws*, 24 *COLUM. L. REV.* 640, 644 (1924); *Constitutional Law — Due Process of Law — Validity of Billboard Regulations for Aesthetic Purposes*, 48 *HARV. L. REV.* 847, 848 (1935) (“All prior cases in America have held against the validity of such regulations on the ground that aesthetic interests had no substantial relation to the public welfare.”); Note, *Municipal Corporations — Zoning — Aesthetic Considerations and Extent of Police Power*, 35 *YALE L.J.* 238, 239 (1925) (“Aesthetic considerations alone have generally been held insufficient as a basis for zoning ordinances.”); Comment, *Municipal Corporations: Extent to Which the Private Land in a City May Be Zoned in the Exercise of the Police Power*, 12 *CALIF. L. REV.* 428, 430 n.6 (1924) (“That the police power cannot be exercised for purely esthetic purposes is settled by numerous zoning decisions.”); Note, *The Social Interest in the Aesthetic and the Socialization of the Law*, 29 *W. VA. L.Q.* 195, 195 (1923) (noting that West Virginia courts still hold to the more-or-less “universal” doctrine that “an owner of property could not lawfully be restrained from making an anti-esthetic use of his property when the only objection was that such use merely injured the esthetic sensibilities of his neighbors”).

⁴³ See, e.g., Vance G. Ingalls, *The Law of Aesthetics*, 23 *A.B.A. J.* 191 (1937) (noting that courts are beginning to give broader interpretations of aesthetic regulations); Charles P. Light, *Aesthetics in Zoning*, 14 *MINN. L. REV.* 109, 122 (1930) (noting that aesthetic considerations alone are insufficient for exercising police power); Henry W. Proffitt, *Public Esthetics and the Billboard*, 16 *CORNELL L.Q.* 151 (1931) (examining “the present attitude of the public and the judiciary on the subject of billboard regulation by governmental agencies regardless of whether or not such regulation is a proper function of government”); Current Decisions, *Constitutional Law — Exercise of Police Power for Purely Aesthetic Purposes*, 31 *YALE L.J.* 783 (1922) (noting that aesthetic considerations alone are insufficient for exercising police power); *Constitutional Law — Regulation of Billboards — Aestheticism — Police Power*, 15 *B.U. L. REV.* 337, 337 (1935) (illustrating how the Supreme Judicial Court of Massachusetts

Article in the *Michigan Law Review* lamented how “few courts have been courageous enough to declare that the police power may be utilized for aesthetic purposes.”⁴⁴ Though the courts seemed never to waiver, scholars remained convinced of the doctrine’s imminent demise — predicting its downfall just around the corner in 1930,⁴⁵ in 1936,⁴⁶ in 1939,⁴⁷ in 1943,⁴⁸ in 1949,⁴⁹ and so on.⁵⁰ As a Note in the 1952 *Harvard Law Review* remarked wryly, “[i]t has long been predicted that courts would soon allow aesthetic regulations” and yet “there have been no cases which could be said to have [so] held.”⁵¹ An Article three years later in the *George Washington Law Review* intimated the same: “It is certainly a rule which has not relaxed either so rapidly or so fully as certain authorities in the field of municipal law have anticipated.”⁵²

Scholars might be forgiven for believing the forces against aesthetic regulation were ever on the brink of annihilation, however, for in that same score of years, something altogether extraordinary happened to the doctrine of eminent domain.⁵³ In a transformation of breathtaking scope and speed,⁵⁴ by 1940 eminent domain saw the meaning of

has boldly upheld aesthetic regulations relating to outdoor advertising devices as within the scope of police powers); Recent Case, *Highways — Rights and Remedies of Abutters — Erection by State of Screen to Hide Billboard*, 46 HARV. L. REV. 157, 158 (1932) (noting that the present court did not uphold the decision on purely aesthetic grounds, but left open how legislation targeting aesthetic considerations may be constitutional).

⁴⁴ Baker, *supra* note 36, at 128.

⁴⁵ See *id.*

⁴⁶ See Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 219 (1936); see also Note, *Validity of State Condemnation for Low-Cost Housing*, 45 YALE L.J. 1519, 1522-23 (1936).

⁴⁷ See Dix W. Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1, 17 (1939).

⁴⁸ See Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 33 (1943).

⁴⁹ See Paul Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public Welfare?*, 35 A.B.A. J. 471, 471 (1949).

⁵⁰ As far back as 1911, scholars were arguing the demise of the rule that aesthetic considerations alone cannot justify the exercise of the police power or the power of eminent domain. See 2 JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* 1600-84 (5th ed. 1911).

⁵¹ Note, *Land Subdivision Control*, 65 HARV. L. REV. 1226, 1234 n.64 (1952).

⁵² Robert A. Bergs, Note, *Aesthetics As a Justification for the Exercise of the Police Power or Eminent Domain*, 23 GEO. WASH. L. REV. 730, 732 (1955).

⁵³ For an excellent note lamenting the sudden overwhelming transformation, see Note, *Public Use in Eminent Domain*, 21 N.Y.U. L.Q. REV. 285, 285-95 (1946).

⁵⁴ See Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 626-29 (1940) (describing the rapid disappearance of the “narrow doctrine” of public use, which required the government to “use” acquired property,

“public use” swell to include nearly any taking that could be plausibly claimed for a public purpose.⁵⁵ Takings on behalf of private entities⁵⁶ and for slum clearance (i.e., blight takings)⁵⁷ were abruptly embraced by courts nationwide.⁵⁸ Then in 1954 the Supreme Court announced in *Berman v. Parker* that eminent domain could be used to excise the “cancer”⁵⁹ of blight,⁶⁰ and from that time to this, nary a word has been said of freestanding aesthetic limits on the power of eminent domain.

Yet, even as the yin of eminent domain abruptly spun-off from the yang of the police power, incredibly, the courts maintained a tight

contrasting it with the new “ultimate purpose” doctrine then-ascendant in the courts which cares only for whether the taking generally serves the public interest). The transformation could probably be dated even earlier to 1936. See Note, *Eminent Domain — Slum Clearance and Low-Cost Housing Program as Public Use*, 35 MICH. L. REV. 148, 148-50 (1936) (commenting on the New York Court of Appeals’ seminal decision in *New York City Housing Authority v. Muller*, 270 N.Y. 333 (1936)).

⁵⁵ Compare Wayne E. Babler, Comment, *Public Housing and Slum Clearance as a “Public Use,”* 36 MICH. L. REV. 275, 278-79 (1937) (describing the theretofore prevailing test of “public use”), Recent Case, *Constitutional Law — States — Municipal Housing Authorities — Eminent Domain for Slum Clearance Purposes*, 5 GEO. WASH. L. REV. 131, 132 (1936) (calling the argument that “public use means the same as use by the public . . . quite persuasive” and explaining that “[t]he language of many cases certainly would seem to preclude a use for slum clearance from the category of a public use”), Note, *Constitutional Law: Slum Clearance and Eminent Domain*, 20 CORNELL L.Q. 486, 486 (1935) (describing a recent Kentucky case in which “[t]he power of eminent domain was held to be unavailable for purposes of slum clearance”), and Note, *Eminent Domain: Slum Clearance and Low-Cost Housing Program As Public Use*, 22 CORNELL L.Q. 161, 161 (1936) (“According to one view, ‘public use’ means ‘use by the public’ . . . This view is the weight of authority.”), with *Public Land Ownership*, 52 YALE L.J. 634, 645 (1943) (“[P]ublic purpose and public use have been expanded to remove most of the limitations once placed on state legislation.”), Nichols, *supra* note 54, at 630 (noting that “every state court which has considered the question” has upheld slum clearance as a valid exercise of eminent domain since 1936’s *New York City Housing Authority v. Muller*), and Robert H. Skilton, *Governmental Efforts in Slum Clearance*, 11 TEMP. L.Q. 538, 546 n.22 (1937) (“Practically all recent authorities dealing with state powers of eminent domain reject the . . . more restricted test of public use.”).

⁵⁶ See, e.g., *Public Land Ownership*, *supra* note 55, at 643-44 (showing multiple examples of eminent domain where private corporations and individuals were granted the power of eminent domain for public welfare and advantage).

⁵⁷ See *id.*

⁵⁸ See William H. Brown, Jr., *Urban Redevelopment*, 29 B.U. L. REV. 318, 337-41 (1949); Nichols, *supra* note 54, at 630, 631-32. See generally *Public Land Ownership*, *supra* note 55, at 640-46 (tendering a sweeping and comprehensive account of the transformation of the doctrine of eminent domain in the preceding twenty years).

⁵⁹ See ROBERT M. FOGELSON, *DOWNTOWN: ITS RISE AND FALL 1880–1950*, at 349 (2001) (describing the widespread understanding of “blight” in the 1920s as a “cancer” on cities); Gordon, *supra* note 19, at 310, 326-27.

⁶⁰ See *Berman v. Parker*, 348 U.S. 26, 33 (1954).

leash on aesthetic land-use regulations.⁶¹ While the immediate aftermath of the Supreme Court's 1954 *Berman* decision — which broadly claimed that aesthetics were within the scope of *both* eminent domain and the police power⁶² — witnessed the fall of restrictions on aesthetic regulation in a few important jurisdictions,⁶³ and its weakening in others,⁶⁴ in the vast majority of states an uneasy schism settled in the law between taking and policing.⁶⁵ The government's power to exercise eminent domain became virtually limitless while the government's ability to regulate land use on the basis of aesthetics remained subject to more careful scrutiny.⁶⁶ There followed a “slow

⁶¹ See generally Clinton Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149, 149-51 (1954) (commenting briefly on this apparent asymmetry).

⁶² See *Berman*, 348 U.S. at 33.

⁶³ See Louis H. Masotti & Bruce I. Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URB. L. 773, 786 (1969) (surveying the law of each of the fifty states as of July, 1968, and noting that only “three jurisdictions (New York, Oregon, Florida) have sanctioned zoning on aesthetic considerations only”); Susan Abigail Schatzel, *Public Historic Preservation in Texas*, 49 TEX. L. REV. 267, 272 (1971); *The Legitimate Objectives of Zoning*, 91 HARV. L. REV. 1443, 1448 (1978); Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 715 (1963); Recent Case, *Zoning — Ordinance Prohibiting Business on Aesthetic Grounds Is Valid Exercise of Police Power*, 79 HARV. L. REV. 1320, 1321 (1966); Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81, 83 (1964) [hereinafter *Zoning, Aesthetics, and the First Amendment*].

⁶⁴ See Masotti & Selfon, *supra* note 63, at 786; Mendes Hershman, *Beauty as the Subject of Legislative Control*, 15 PRAC. LAW. 20, 22, 31, 34 (1969).

⁶⁵ Comment, *The Legal History of Zoning for Aesthetic Purposes*, 8 IND. L. REV. 1028, 1043-44 (1975) [hereinafter *Legal History of Zoning*]; see Masotti & Selfon, *supra* note 63, at 786; Travis C. Broesche, Comment, *Land-Use Regulation for the Protection of Public Parks and Recreational Areas*, 45 TEX. L. REV. 96, 101-03 (1966); Melvin Rose & George Yim, Comment, *Aesthetics as a Zoning Consideration*, 13 HASTINGS L.J. 374, 374-75 (1961) (explaining that “[m]ost courts have denied the exercise of the police power for aesthetic purposes alone”). See generally J.J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218 (1955) (explaining that, even after *Berman v. Parker*, it was unclear whether it would be constitutional to engage in direct land-use regulation purely on the basis of aesthetics but holding out hope that the case could be the “watershed” necessary to allow for such regulation).

⁶⁶ See Masotti & Selfon, *supra* note 63, at 786; Michael de Haven Newsom, *Zoning for Beauty*, 5 NEW ENG. L. REV. 1, 1 (1969); Sidney Z. Searles, *Aesthetics in the Law*, 41 N.Y. ST. B.J. 210, 211 (1969); Comment, *Legal History of Zoning*, *supra* note 65, at 1043-44. See generally Beverly A. Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603, 605-07 (1981) (explaining that, even as late as 1981, “aesthetics alone [would] not justify the exercise of the police power” though in the decades since *Berman v. Parker* courts showed ever increasing willingness to accept minimal, even pretextual, health, safety, and general welfare justifications for regulations to evade the rule).

and lingering death”⁶⁷ threaded out over a period of decades. Today the schism has reached something like a jagged close.⁶⁸ The very notion that aesthetic considerations might be beyond either the police power or the eminent domain has been fundamentally discarded.⁶⁹ Save the occasional brazen First Amendment violation, aesthetic

⁶⁷ Rodda, *supra* note 61, at 179; see Masotti & Selfon, *supra* note 63, at 786-87; Comment, *Aesthetic Zoning: Preservation of Historic Areas*, 29 *FORDHAM L. REV.* 729, 733-34 (1961); Frank L. Barkofske, Comment, *Regulation of Outdoor Advertising for Aesthetic Reasons: A Jurisprudential View*, 6 *ST. LOUIS U. L.J.* 534, 534, 543-44 (1961); see, e.g., Note, *Zoning — General Welfare Includes Consideration of Aesthetic and Property Values*, 78 *DICK. L. REV.* 605, 609-11 (1974) (describing the decision of an intermediate Pennsylvania Appellate Court — the Commonwealth Court of Pennsylvania — upholding a purely aesthetic regulation on the strength of *Berman*).

⁶⁸ See Gregory S. Alexander, *Property As Propriety*, 77 *NEB. L. REV.* 667, 700 (1998). A noteworthy deviation from the trend came in the form of a brief resurgence of intense interest in aesthetic property regulation in the late 1970s and 1980s, as pre-New Deal “inherent limits” arguments were reconceptualized within the new post-Warren Court language of rights. See generally Kenneth Kyre, *Bibliography to Legal Periodicals Dealing with Historic Preservation and Aesthetic Regulation*, 12 *WAKE FOREST L. REV.* 275 (1976) (listing every scholarly work dealing significantly with aesthetic regulation since 1922; the first work to address Aesthetic regulations from a First Amendment perspective is a 1975 Note in the *Stanford Law Review*). In the 1970s, 80s, and even as late as the early 90s, scholars and courts began to reconceive objections to aesthetic regulation as possibly embedded in a generalized First Amendment right. See ROBERT C. ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS: CASES AND MATERIALS* 63 (1981) (“The third value at stake [in land-use regulation], civil liberties, was once protected in a crude way by that . . . constitutional workhorse, the Due Process Clause. Some zoning restrictions that would trample upon an individual’s capacity to define or express himself have been held to violate the limits that clause has been interpreted to set on a municipality’s use of its police power. Today, the more common judicial ground for safeguarding civil liberties is the First Amendment’s explicit and implicit protection of free expression, free religious exercise, privacy, and association.”); Menthe, *supra* note 7, at 252-53, 258 (commenting on this relocation); Stephen F. Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 *MINN. L. REV.* 1, 4-5 (1977); Lori E. Fields, Note, *Aesthetic Regulation and the First Amendment*, 3 *VA. J. NAT. RESOURCES L.* 237, 238 (1984); Annette B. Kolis, Note, *Architectural Expression: Police Power and the First Amendment*, 16 *URB. L. ANN.* 273, 277-78 (1979); Bruce A. Rubin, Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 *STAN. L. REV.* 179, 181, 184 (1975).

⁶⁹ See James Charles Smith, *Law, Beauty, and Human Stability: A Rose Is a Rose Is a Rose*, 78 *CALIF. L. REV.* 787, 790 (1990) (reviewing JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* (1989)) (“[T]he modern view validating aesthetic regulation has become firmly entrenched . . .”). One searches the modern legal databases in vain for any mention of the aesthetic limitation doctrine in the modern scholarship, but to the extent it can be found at all, it confines itself simply to explaining this history. See, e.g., Menthe, *supra* note 7, at 239-48 (discussing the history); David Burnett, Note, *Judging the Aesthetics of Billboards*, 23 *J.L. & POL.* 171, 176-77 (2007) (summarizing the history).

regulations — including blight designations — are virtually immune to judicial invalidation.⁷⁰

Arguments over land-use regulation have been around as long as there have been cities,⁷¹ and the parabolic sweep from total prohibition

⁷⁰ And the violations must be brazen indeed. One of the more famous cases upholding regulations primarily on the basis of aesthetic concerns involved a city ordinance passed explicitly to quash an individual property owner's protest against city taxes. See Comment, *Zoning, Aesthetics, and the First Amendment*, *supra* note 63, at 81-82. The Stovers had taken to hanging undergarments and rags in the front yard as a form of protest. *Id.* The city responded by explicitly outlawing precisely this conduct, not even bothering to conceal that the ordinance was meant specifically to target the Stover's protest. Nahmod, *supra* note 28, at 258. In upholding the ordinance, the New York Court of Appeals proclaimed, "[t]he prohibition against clotheslines is designed to proscribe conduct which offends the sensibilities and tends to depress property values. The ordinance and its prohibition bear 'no necessary relationship' to the dissemination of ideas or opinion and, accordingly, the defendants were not privileged to violate it by choosing to express their views in the altogether bizarre manner which they did. It is obvious that the value of their 'protest' lay not in its message but in its offensiveness." *People v. Stover*, 12 N.Y.2d 462, 470 (1963). This of course gets the First Amendment precisely backwards. See Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769 (2001) ("The actor's purposes are not relevant to free speech analysis. The state's purposes, on the other hand, are dispositive."). Especially since "[s]ymbolic conduct is an exceptionally vivid means of communication." Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1091 (1968). As one commentator described the sorry state of affairs in the *Stover* era, "[t]he case law was . . . waterproof to any First Amendment concerns. One gets the sense that they were considered a sort of novelty." Menthe, *supra* note 7, at 248. While there have been a few First Amendment victories for challengers in the decades since, especially the landmark case *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981), and a few spirited dissents in cases like *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 821-22, 828 (1984) (Brennan, J., dissenting), for the most part, First Amendment challenges have proven almost totally irrelevant to setting legislative limits on aesthetic regulation.

⁷¹ Gary Gumpert & Susan J. Drucker, *Media Development and Public Space: The Legislation of Social Interaction*, in 4 BETWEEN COMMUNICATION & INFORMATION 435, 440 (Jorge R. Schement & Brent D. Ruben eds., 1993) ("Public controls of private land use have been with us to some degree almost from the beginnings of civilization."); John R. Nolon, *Comparative Land Use Law: Patterns of Sustainability*, 37 URB. LAW. 807, 813 (2005) ("Although scholars disagree about how precisely ancient Mayan cities were organized, they understand that they followed a prescribed pattern designed to meet that ancient society's needs."); Robert R. Wright, *Constitutional Rights and Land Use Planning: The New and the Old Reality*, 1977 DUKE L.J. 841, 841 ("Controls on the private use of land are not of recent vintage — they go back at least to the Romans, if not into the darker past, and find expression in various statutes and judge-made doctrines of centuries ago."); see also RICHARD W. NICE, THE TREASURY OF THE RULE OF LAW 71 (1964) (quoting the earliest code of Roman Law, the Twelve Tables, drafted between 451-445 B.C. as providing detailed land use regulation, including that "[w]hoever sets a hedge around his land shall not exceed the boundary; in the case of a wall, he shall leave one foot; in the case of a house, two feet. If a well, a

to breathtaking judicial deference tracks America's increasing urbanization and suburbanization over the last century.⁷² But blight has always stood apart as an aberrant strand. Even advocates of aesthetic regulation have long conceded that blight is not among the kinds of defined aesthetic judgments to which courts should show extraordinary deference.⁷³

Granting the State unilateral power to declare not just single properties but whole neighborhoods "blighted" invites all of the most strenuous objections to aesthetic regulation, and in their strongest form. Aesthetic regulation unavoidably impinges on values of tolerance, equality, and liberty by endorsing the elimination of property uses that may be deeply important to their holders.⁷⁴ Moreover, because aesthetic values are highly subjective, penalizing one's use of one's property for primarily aesthetic reasons is especially demoralizing.⁷⁵ Aesthetic disputes are not easily judged even when conducted with the best of intentions, and because there exist no objective indicia for beauty, the catch-all label "aesthetics" is easily transformed into a smokescreen for animus.⁷⁶

For all these reasons, aesthetic regulation is most dangerous where it is likely to result from defects in the political process and where it singles out aesthetic uses for regulation as an instrument for expressive oppression.⁷⁷ The power to declare "blight" invites both of

path, an olive or fig tree, nine feet. Finally, whoever plants other trees shall leave a space of five feet between [his] property and his neighbor's. If there is litigation about boundaries, five feet.").

⁷² Kolis, *supra* note 68, at 273-74; cf. FREDERICK HAIGH BAIR, JR. & ERNEST R. BARTLEY, *THE TEXT OF A MODEL ZONING ORDINANCE 1* (2d ed. 1960) ("The need to zone arises because humanity clustered in cities demands a form of protection which is of no importance to humanity dispersed.").

⁷³ See Frank Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 36, 41-42 (Feb. 1969) [hereinafter *Toward a Practical Standard*]. See generally John J. Costonis, *Law and Aesthetics: A Critique and a Reformation of the Dilemmas*, 80 MICH. L. REV. 355, 358 & n.5, 363-71, 459-61 (1982) (discussing aesthetic regulations in general).

⁷⁴ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1013-15 (1982).

⁷⁵ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-16, 1234 (1967) (describing the significant demoralization costs that attend reassigning property rights); Michelman, *Toward a Practical Standard*, *supra* note 73, at 41-42.

⁷⁶ See Costonis, *supra* note 73, at 367-71.

⁷⁷ See JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* 12-13, 30 (1989); Michelman, *Toward a Practical Standard*, *supra* note 73, at 40-42 (describing these situations as those that should give rise to suspicion of aesthetic interest zoning).

these abuses most perniciously, and the overwhelming evidence from over a half-century of blight designations is that such designations are systematically abused in precisely these ways.⁷⁸

Extreme judicial deference to legislative blight determinations stands at a constitutional crossroad. Because of the Supreme Court's decision in *Kelo*, the judicial firmament has shifted, stretching blight to the breaking point.⁷⁹ Following *Kelo*'s elimination of the last theoretical limitations on the "Public Use[s]" for which the State may exercise the power of eminent domain, blight's newfound role as the sole protection for property owners from illegitimate takings means its legal and conceptual defects are due for re-examination, and a return to heightened judicial scrutiny for blight designations is warranted.

There is no shortage of possible sources for these limitations. Indeed, if anything the problem is that there are too many sources, and review of blight designations does not quite fit neatly within any of them. Blight designations violate the content-neutrality principles firmly rooted in the Supreme Court's First Amendment jurisprudence. Blight designations violate autonomy and anti-stigmatization principles in the Supreme Court's privacy jurisprudence. Indeed, the very notion of blight is seemingly at odds with the unwritten aesthetic and moral neutrality principles embedded in the common law.

The reasons to subject blight designations to heightened judicial scrutiny are manifold. Courts could place the justification for heightened scrutiny in any number of locations in: (1) the First Amendment's right to freedom of expression; (2) the right to personal autonomy and freedom from animus in the Supreme Court's right to privacy jurisprudence; or (3) a general interpretive commitment to aesthetic and moral neutrality latent in the law itself.

⁷⁸ See Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 *FORDHAM URB. L.J.* 657, 687 (2007); Nicole Stelle Garnett, *The Public-Use Question As A Takings Problem*, 71 *GEO. WASH. L. REV.* 934, 955 (2003); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL'Y REV.* 1, 6 (2003) ("The role of blight terminology in restricting racial mobility has also been under-appreciated by legal scholars. Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods."); see, e.g., HERBERT J. GANS, *PEOPLE AND PLANS: ESSAYS ON URBAN PROBLEMS AND SOLUTIONS* 209-25 (1968) (providing an example highlighting Boston's West End). See generally MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962* (1964) (describing the process and consequences of urban renewal programs).

⁷⁹ See Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 *URB. LAW.* 833, 836 (2007).

Given blight's deep inconsistency with many settled constitutional norms, it is difficult to fathom how rational basis review ever became so powerfully entrenched. The courts, for their part, always point to 1954's *Berman v. Parker*, and perhaps that alone is the answer.⁸⁰ As Justice Jackson once wrote, a "doctrine of the Constitution . . . has a generative power of its own, and it creates . . . in its own image."⁸¹ Yet, even though *Berman v. Parker* has become blight's Polaris, it is not clear that the freewheeling blight designations to which contemporary courts show such reverence were the kind of "blight" Justice Douglas sanctioned in *Berman* itself.⁸² The definition of blight continues to change, and it now seems divorced from all fixed definition. A better reading of *Berman* is that the city's blight designation, and the deference the Court showed it, arose from the particular historical and political context of the case, and the Court's satisfaction that the city's proposed redevelopment respected important constitutional norms.⁸³ But if that is the case, then courts have been generating a body of blight doctrine divorced from blight's original meaning, and detached from the purposes that gave it life.

II. THE AESTHETIC NEUTRALITY PRINCIPLE

There is a sense woven into our constitutional fabric that we should be free from the aesthetic judgments of the State. This permeating value is familiar for it appears in many masks and guises in the law. But it appears as all shadow rights appear: in the interpretations, justifications, and ordering principles that courts tender across fields of American legal doctrine, rather than as the rule of law itself. This

⁸⁰ Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 424-25 (2010) ("[W]hile *Berman v. Parker* is frequently cited by the courts, it is rarely analyzed in detail and it is almost never set in its proper historical context . . . *Berman v. Parker*, in short, has become precedent without context, a mantra invoked to avoid searching judicial review.").

⁸¹ *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); see also *Kelo v. City of New London*, 545 U.S. 469, 501 (2005) (O'Connor, J., dissenting) ("There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*"); Williams, *supra* note 68, at 2 ("[*Berman*'s] language has had a profound effect on the attitude of courts toward land use regulation In recent years, the words 'beautiful as well as healthy' have become something of a talisman for courts forced to decide the validity of regulations that serve solely or predominantly aesthetic purposes.").

⁸² See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 45 (2006).

⁸³ See *id.* at 50.

section outlines the manifestations of the aesthetic neutrality principle in First Amendment Law, Privacy Law, Intellectual Property Law, Contracts, Torts, and the law of Property itself.

A. *The First Amendment*

For the First Amendment scholar, the shadow right to aesthetic neutrality appears across the spectrum of decisions — from the impregnable content-neutrality requirement,⁸⁴ to the strange and irregular doctrine of secondary effects,⁸⁵ to the regulation of billboards, campaign posters, and symbolic speech.⁸⁶ It is in the First

⁸⁴ *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); see *United States v. Stevens*, 559 U.S. 460, 468 (2010) (striking down restrictions on creation, sale, and possession of animal crush videos as violating the content-neutrality requirement); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992) (striking down a content-based restriction on unprotected speech); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); David Kairys, *The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. ILL. L. REV. 195, 209 (“The First Amendment principle that content-based restrictions on speech are presumptively unconstitutional and trigger strict scrutiny is as old and basic as any.”).

⁸⁵ Secondary effects is a legal fiction the Supreme Court created to treat content-based restrictions on adult entertainment establishments as “content neutral” because they are directed at the “secondary effects” of such establishments, namely their tendency to create crime and other unwanted social harms. David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL’Y REV. 19, 20 (2012) (“Simply stated, the secondary-effects doctrine allows government officials to claim that patently content-discriminatory regulations — often those that restrict only businesses featuring adult-oriented expression — are treated as content-neutral.”); see *City of L.A. v. Alameda Books*, 535 U.S. 425, 434 (2002); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 291 (2000); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47-48 (1986); *Young v. Am. Mini Theatres*, 427 U.S. 50, 70 (1976). While in theory a doctrine like “secondary effects” could be principled, the fact that it has only been held to apply to zoning restrictions on adult entertainment establishments reveals it to be an area where the Court felt the need to lower the threshold of scrutiny in order to accommodate a widely-held discomfort with such speech. See Daniel R. Aaronson, Gary S. Edinger & James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects Is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741, 741 (2009) (“The present state of the law is both confused and intellectually dishonest; the federal circuits are split on issues both large and small, and the guidance offered to lower courts resembles instructions for operating a Ouija board.”).

⁸⁶ E.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55 (1994) (campaign posters); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513 (1981) (billboards) (even while upholding certain elements of billboard regulations, striking down other limitations because they preferred some messages to others); *Cohen v. California*, 403 U.S. 15, 25 (1971) (symbolic speech) (“[O]ne man’s vulgarity is another’s lyric.”).

Amendment that the principle of aesthetic neutrality has received its fullest and most complete expression. As Justice Jackson once wrote (in words of impossible ambition⁸⁷) “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁸⁸

The First Amendment right to freedom of speech seems to encompass freedom from state-prescribed beliefs, and state-mandated expressions of such belief.⁸⁹ If one can imagine even one simple corollary to such a sweeping and important right it would have to be that each and every person is entitled to judge aesthetic merit for himself, and develop his own tastes, values, and opinions as he sees fit.⁹⁰ As Justice Scalia wrote, concurring in *Pope v. Illinois*: “For the law courts to decide ‘What is Beauty’ is a novelty even by today’s standards,”⁹¹ and as Justice Marshall wrote, applying this logic and dissenting in *Village of Belle Terre v. Boraas*: “It is inconceivable to me that we would allow the exercise of the zoning power to burden First Amendment freedoms, as by ordinances that restrict occupancy to individuals adhering to particular religious, political, or scientific beliefs.”⁹²

⁸⁷ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 945 (1995) (“[I]t has never been the case that ‘officials,’ whether high or petty, have been forbidden from prescribing ‘what shall be orthodox’ in politics, nationalism, and other matters of opinion.”).

⁸⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁸⁹ See *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (holding that the government may not require the affirmation of a belief).

⁹⁰ See *Cohen*, 403 U.S. at 25 (“Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”); Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 277-78 (1998) (calling it “axiomatic”).

⁹¹ 481 U.S. 497, 505 (1987) (Scalia, J., concurring); see also *Memoirs v. Massachusetts*, 383 U.S. 413, 427 (1966) (Douglas, J., concurring) (“We are judges, not literary experts We are not competent to render an independent judgment as to the worth of this or any other book”).

⁹² 416 U.S. 1, 14-15 (1974) (Marshall, J., dissenting) (“Zoning officials properly concern themselves with the uses of land — with, for example, the number and kind

Scholars have recognized and sought to name and validate this sense at the First Amendment's heart. Many scholars, among them Martin H. Redish, C. Edwin Baker, and David A. Strauss have propounded visions of a First Amendment founded on this libertarian core.⁹³ As Redish would have it, "free speech ultimately serves only one true value . . . 'individual self-realization.'" By which he means both "development of the individual's powers and abilities" and a development of an "individual's control of his or her own destiny through making life-affecting decisions."⁹⁴ Redish explains the aesthetic neutrality principle by reference to this overarching value. Because "[a]ny external determination that certain expression fosters self-realization more than any other is itself a violation of the individual's free will" the Supreme Court "should not determine the level of constitutional protection [speech receives] by comparing the relative values of different types of speech."⁹⁵ Redish's conception of the First Amendment is that because speech is essential to self-realization, but essential to self-realization is that no one but the individual can decide *what* speech is self-realizing, it is inappropriate for the State to distinguish between the value of different types of speech.⁹⁶ In other words, Redish posits that speech-value judgments are personal because to deprive the individual of that choice is to destroy the very essence of why we preserve the freedom of speech at all. This is one means of arriving at the aesthetic neutrality principle, for aesthetic neutrality follows *a fortiori* from any theory that expressive values are reserved to the individual by their very nature.

Baker begins from a different premise and arrives at aesthetic neutrality from another direction. According to Baker, "[s]peech is

of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.")

⁹³ Many more scholars have put forth theories that vary from these, but Redish, Baker, and Strauss propound three discrete visions of the "autonomy" theory of the First Amendment. The work of other autonomy theorists, that of Thomas Scanlon for instance, though notable and praiseworthy, is similar enough to one of these three that little would seem to be gained by describing them in detail in the main text. See generally Thomas M. Scanlon, Jr., *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (propounding a "Millian" theory of freedom of expression similar in many respects to that of C. Edwin Baker; its divergences from Baker's work are not important to this Article). For obvious reasons, "deliberative democracy" theorists are similarly not discussed.

⁹⁴ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

⁹⁵ *Id.* at 594-95.

⁹⁶ See *id.* at 595.

protected [by the First Amendment] because, without disrespecting the autonomy of other persons, it promotes both the speaker's self-fulfillment and the speaker's ability to participate in change."⁹⁷ When balanced against the fact that most speech is harmless,⁹⁸ under Baker's conception speech is protected because it both satisfies essential human values and is ordinarily fundamentally nonviolent and noncoercive.⁹⁹ This is another means of arriving at the aesthetic neutrality principle, different from the one put forth by Redish. Under Baker's theory, the State must exercise aesthetic neutrality because doing the opposite is unjustifiable. For the State to effectuate an aesthetic judgment it must coerce an individual to change his aesthetic sensibilities, even though aesthetic choices are harmless and self-realizing.¹⁰⁰ Since the "point of the First Amendment is to prohibit unnecessary restraints on self-expressive behavior"¹⁰¹ coercive interference with one's expression of his or her own aesthetic values — unless it is designed to serve a necessary "instrumental" end — violates that prohibition.¹⁰²

Strauss articulates a third understanding, though his theory too ultimately encompasses a requirement of aesthetic neutrality. In Strauss's view, there is a conceptual throughline undergirding all American First Amendment jurisprudence, which he calls the Persuasion Principle, "that the government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech."¹⁰³ According to Strauss, the

⁹⁷ C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 69 (1989) ("This leads to the conclusion that, as long as speech represents the freely chosen expression of the speaker, depends for its power on the free acceptance of the listener, and is not used in the context of a violent or coercive activity, freedom of speech represents a charter of liberty for noncoercive action.").

⁹⁸ Save "to the extent that people 'mentally' adopt perceptions or attitudes" on the basis of what they hear or see and therefore become the party responsible for whatever actions they ultimately undertake as a result. *See id.* at 56.

⁹⁹ *Id.* at 47, 68-69 ("[C]onstitutional protection of speech is justified not merely because of the values served by speech but because freedom of speech serves these values in a particular, humanly acceptable manner, that is nonviolently and noncoercively.").

¹⁰⁰ *Id.* at 51-54 (describing the many ways in which speech is self-realizing even when it is not particularly or even specifically communicative); *id.* at 54-69 (describing the essential harmlessness of speech).

¹⁰¹ *Id.* at 76.

¹⁰² *Id.* at 77-81 (describing the distinction between substantive and instrumental prohibitions on expressive conduct, and how the costs of protecting expression should be measured and reckoned).

¹⁰³ David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM.

Persuasion Principle must protect offensive speech because the government might act pretextually in censoring offensive speech as a means of suppressing substantive speech,¹⁰⁴ and it is difficult to disentangle the offensive elements of speech from its persuasive elements.¹⁰⁵ Consequently, “the persuasion principle calls for a general, but not unrelenting, hostility to measures that restrict speech on the ground of offensiveness.”¹⁰⁶ This is the third expressive pathway to aesthetic neutrality one might proffer. Under the Straussian view, it is not that all aesthetic judgments are subjective or even personal, but that aesthetic rationalizations are so easily manufactured that the danger of infringing other important expressive values is too great to allow its regulation. Under Strauss’s theory, the threat that aesthetics will serve as a cover for animus means the government dare not touch it at all.

All three of these autonomy theories emerge from an engagement with over a century of First Amendment doctrine and offer descriptive and normative accounts of American First Amendment jurisprudence. And though each of them arrives at its justification for a different reason, all would agree that aesthetic regulation is anathema to the First Amendment. Redish because it is essential to individual self-realization to decide for oneself which aesthetic expression one values, Baker because aesthetic expression is self-fulfilling, nonviolent, and noncoercive, and Strauss because it is impossible to disentangle valid limits on aesthetic expression from invalid ones.

Even though all of these theories of First Amendment freedom seem rooted in a commitment to liberty and autonomy more general than the First Amendment, they nonetheless are limited by its protection for speech and speech alone.¹⁰⁷ But contemporary aesthetic land-use regulation is a massive First Amendment-free zone precisely because land use is not speech. Without the old limits-as-liberty principles that once treated like infringements on personal autonomy alike, our contemporary rights-oriented constitutionalism demands that

L. REV. 334, 334 (1991).

¹⁰⁴ *Id.* at 342.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Some have even used this generality as a sword to cut down arguments that autonomy is a uniquely First Amendment value. *See, e.g.*, LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 79-81 (2005); FREDERICK F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 6-7 (1982) (explaining that “if there is no principle of free speech independent of a more general liberty, then free speech is more a platitude than a principle” because the right to freedom of speech would be derivable from a general liberty interest latent in the Constitution anyway).

challenges to expressive regulation proceed through the First Amendment.¹⁰⁸ This creates an anomalous distinction between speech and other liberty interests — even forms of action as unexceptionable as the harmless use of one’s own property.

B. *The Right to Privacy*

The aesthetic neutrality principle is broader than the First Amendment, and for the privacy scholar, it appears in cases ranging from *Griswold v. Connecticut*¹⁰⁹ to *Lawrence v. Texas*.¹¹⁰ This right is now manifested in two distinct, though interwoven, constitutional strands. The first conceives of the privacy right as carving a sphere of action beyond which the State simply cannot reach.¹¹¹ This strand is the conceptual obverse of the limits-as-liberty principle. Rather than circumscribing limits on the State’s powers, the privacy right as expressed in the autonomy cases grants inviolable powers to the individual.¹¹² The privacy right derived from these cases carves out a sphere of action over which the individual possesses an unqualified privilege to direct the path of her own life.¹¹³

A second strand of privacy jurisprudence now seems to recognize that the community’s bare moral condemnation of an otherwise harmless practice, without more, is fundamentally irrational.¹¹⁴ That

¹⁰⁸ See Williams, *supra* note 68, at 21-24.

¹⁰⁹ 381 U.S. 479, 482 (1965). Subsequently, in *Stanley v. Georgia*, the Court held that the possession of obscene material in the privacy of the home is not criminally punishable because one has a constitutional right “to satisfy his intellectual and emotional needs in the privacy of his own home.” 394 U.S. 557, 565 (1969).

¹¹⁰ 539 U.S. 558, 562 (2003).

¹¹¹ See Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 701-05 (1973).

¹¹² While initial privacy decisions possessed aspects emphasizing the importance of the privacy of the home, later decisions largely displaced that rationale with a more fundamental concern for personal autonomy. In *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), for example, the Court cited favorably to *Griswold* and *Stanley* for the idea that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* Similarly, the Court’s decision in *Roe v. Wade* was deeply concerned with personal autonomy, not the sanctity of houses. 410 U.S. 113, 152-53 (1973).

¹¹³ Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1411 (1974) (terming it a “presumptive immunity to governmental regulation”).

¹¹⁴ See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (denial of recognition of same-sex unions is not rationally related to a legitimate government purpose); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (denial of protection from unlawful discrimination for homosexuals is not rationally related to a legitimate

there is a close association between the privacy right and the right to be free from animus is no coincidence.¹¹⁵ It allows the court to protect a greater multiplicity of activities than the absolute constitutional privilege of the privacy-autonomy strand of the privacy right. The right to freedom from animus provides that if a practice causes no harm, it may not be proscribed.¹¹⁶ In the era of limits-as-liberty, this would have been expressed as the requirement that the police power not be exercised unless its use was “require[d]”¹¹⁷ or “necessary.”¹¹⁸ The freedom from animus strand of the privacy right provides a constitutional requirement that moral majorities tolerate the harmless practices of moral minorities.¹¹⁹

The aesthetic neutrality principle is easily located in both of these underlying foundations for the privacy right, though it is the robust emergence of the anti-animus principle that offers the more realistic path forward.

government purpose); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (statute “intended to prevent so called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program” is not rationally related to a legitimate government purpose); *Baird*, 405 U.S. at 453 (a prohibition on distributing birth control to the unmarried is not rationally related to a legitimate government purpose).

¹¹⁵ See Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 75 (2000) (“The most dramatic Court assault on the power to regulate public morality has been the invention and expansion of a radically new legal notion of privacy.”).

¹¹⁶ See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1282 (2004) (“To the extent actions actually do speak louder than words, the Court’s consistent disinclination to rely on, or even respond to, morals rationales for lawmaking tells us that the days in which mere reference to morality could justify government action are long over, if indeed they ever existed outside of *Bowers*.”).

¹¹⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *122 (“[T]hat system of laws, is alone calculated to maintain civil liberty, which leaves the subject the entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.”); see Reid, *supra* note 11, at 11.

¹¹⁸ 1 WILLIAM BLACKSTONE, TRACTS CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 19 (3d. ed. 1771) (“[C]ivil liberty is the natural liberty of mankind, so far restrained by human laws as is necessary for the good of society.”); see Reid, *supra* note 11, at 11.

¹¹⁹ There are numerous well-made and oft-raised objections to the notion of “harmlessness.” See, e.g., Williams, *supra* note 68, at 55-56 (arguing that the purely psychic harms stemming from moral objections to the actions of others are still legally cognizable harms and that therefore such behavior, even if purely private or purely aesthetic or merely morally objectionable, is not really harmless). Raising and responding to each of them would be a great diversion from the thrust of the argument here. However, there are ways of arriving at an understanding of the word “harmless” that are philosophically acceptable, if perhaps imprecisely captured by that word, and that encompass a commitment to aesthetic neutrality.

From the autonomy strand of the right to privacy, aesthetic neutrality emerges in the recognition of each individual's right to pursue her own vision of the good life.¹²⁰ As Justice Douglas, concurring in *Roe v. Wade* explained the privacy right, the right grants to each person "autonomous control over the development and expression of . . . [her] intellect, interests, tastes, and personality,"¹²¹ echoing his statement in *Griswold v. Connecticut* that the "penumbra" of the First Amendment demands "not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach — indeed the freedom of the entire university community."¹²²

This vision of the right to privacy overlaps substantially with the vision of autonomy propounded by First Amendment scholars but locates it in the right to liberty promised by the Fourteenth Amendment, rather than the First.¹²³ Thus, for the State to break aesthetic neutrality — to interpose itself and declare that one vision of beauty or good is superior to another — is to grant the State a profoundly intrusive power to reshape the lives of individuals in a fundamental way.¹²⁴ To break aesthetic neutrality with respect to the decisions of individuals in their homes is to mark an intrusion of an especially grave and pernicious kind.¹²⁵

There are two objections to the foregoing analysis, one of them fatal. The survivable objection concerns whether it is proper to equate aesthetics and morals. The two have been used rather interchangeably in the context of this piece, but if aesthetics and morals are not in fact closely tied then much of what has come before may be deeply flawed.¹²⁶ The fatal objection concerns the difficulty of constructing

¹²⁰ Rubinfeld, *Privacy*, *supra* note 2, at 740 ("The distinguishing feature of the laws struck down by the privacy cases has been their profound capacity to direct and to occupy individuals' lives through their affirmative consequences.").

¹²¹ *Roe v. Wade*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

¹²² *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

¹²³ *Roe*, 410 U.S. at 211 (Douglas, J., concurring).

¹²⁴ See Costonis, *supra* note 73, at 358 (contending that aesthetics are not about beauty but about culture and identity, and that aesthetic configurations "are compelling because they signify values that stabilize cultural, group, or individual identity, not because their visual qualities conform to the canons of one or another school of aesthetic formalism").

¹²⁵ See Rubinfeld, *Privacy*, *supra* note 2120, at 792 ("The structure of institutions and relations that form the home are without question among the most fundamental with respect to the formation of identity and character — not only of individuals, but also of the different cultures within our society.").

¹²⁶ See Bettman, *supra* note 34, at 857 ("Aesthetic is a word which needs more clear-cut, precise definition, if it is to be used as a term of constitutional law.").

and enforcing a judicially manageable understanding of aesthetic neutrality from within the privacy right's absolutist framework.

First, however, the survivable objection. This Article treats aesthetic judgments and moral judgments as interchangeable because art and morality have been treated as linked for as long as they have been identified as concepts.¹²⁷ "Moralists and philosophers agree rather generally that there is a moral element in aesthetics and an aesthetic element in morals."¹²⁸ A moment's reflection reveals why. Art — plays, books, movies, paintings, video games — can help us to reflect on our values, and arrive at conclusions regarding the proper means of conducting our own lives. Its creation alone can stir the soul. Arguments that aesthetic judgments are indistinguishable from moral ones have been made by some of history's most esteemed philosophers. David Hume thought the equivalence self-evident. In *An Enquiry Concerning the Principles of Morals* he explained that while "Reason" conveys "the Knowledge of Truth and Falsehood" matters of "Beauty and Deformity, Vice and Virtue" are fundamentally matters of "Taste."¹²⁹ Wittgenstein in *Tractatus* concluded "[e]thics and aesthetics are one."¹³⁰ At mid-century Paul Sayre attempted to argue that *because* aesthetics are bound-up with morals, aesthetic regulation should be allowed as morals legislation.¹³¹ A little more than thirty years ago, John Costonis sought to argue that candid acknowledgement that aesthetic regulation is really *cultural* regulation could aid courts in ordering and rationalizing legal limitations on aesthetic regulation.¹³²

An important objection arises immediately from establishing this equivalence. If it truly is "doubtful that any material difference exists between . . . aesthetic as opposed to ethical or political values" then on what basis can an aesthetic neutrality principle be justified any more than, say, a political neutrality principle?¹³³ But this superficially devastating objection is really no objection at all. For just as we would not permit our polity to enact political orthodoxy into positive law —

¹²⁷ See ARISTOTLE, *Poetics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 2316-40 (Jonathan Barnes ed., 1984); PLATO, THE LAWS 45-50 (A.E. Taylor trans., 1960); PLATO, *Phaedrus*, in THE COLLECTED DIALOGUES OF PLATO 522-23 (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., 1961); PLATO, THE REPUBLIC 277-91 (Allan Bloom trans., 1968); PLATO, THE SYMPOSIUM 92-95 (W. Hamilton trans., 1980).

¹²⁸ Sayre, *supra* note 49, at 471.

¹²⁹ DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 211 (1751).

¹³⁰ LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 182 (1922).

¹³¹ See Sayre, *supra* note 49, at 471.

¹³² See Costonis, *supra* note 73, at 358, 363-71.

¹³³ Williams, *supra* note 68, at 16.

to decide that individuals must now ascribe to certain beliefs about politics as a condition of participation in civic and community life — so too the aesthetic neutrality principle promises that the State will take no particular position with respect to the propriety of any individual vision of beauty or grace. While it is right that matters of aesthetics can be debated and even decided much like moral and political matters — it is the *ends* to which aesthetic deliberations are put that reflect the principle of aesthetic neutrality. It is not that aesthetic questions cannot be raised or decided, only that aesthetics cannot be legislated.

But this formulation reveals the fatal objection to rooting any right to aesthetic neutrality in the autonomy strand of the right to privacy. For certainly there are innumerable instances in which aesthetic decisions are either unavoidable or wholly unobjectionable.¹³⁴ Government buildings must be built with some vision of beauty in mind. So too must parks, historic sites, military uniforms, and draft cards. Moreover, much aesthetic regulation — even of buildings and billboards — does not strike us as impinging a right as fundamental as the ability to decide one's own "interests, tastes, and personality."¹³⁵ In other words, not all aesthetic regulations seem to impinge on individuality in a manner that deeply threatens an individual's right to realize her own potential and personality. We seem to demand some nexus between the break from aesthetic neutrality and the importance to the individual of the breach. But if this is so, it seems fair to say that the right is not an *absolute* right, in the same way other rights protected by the autonomy strand of the right to privacy are absolute.¹³⁶

The right to freedom from animus — the second strand of the right to privacy — therefore provides a firmer grounding for the aesthetic neutrality principle. If morals legislation without a more substantial purpose cannot survive, then bare aesthetic legislation should fare no better. Legislation that is directed toward a legitimate harm or public

¹³⁴ See Costonis, *supra* note 73, at 429 ("[P]ure' forms of anything are seldom encountered in nature and even less so in a reality of social constructs. Even if policy-makers might wish to do so, it is virtually impossible to regulate the environment based on functions and functional associations without impinging on nonfunctional associations as well.").

¹³⁵ *Roe v. Wade*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

¹³⁶ First Amendment jurisprudence resolves this tension by distinguishing between content-based and content-neutral regulations. In content-neutral regulations, the impact on speech is incidental to the law at issue. But in the privacy context, even an incidental restraint would still transgress, thus making those rights protected by the autonomy strand of the right to privacy special in a way even speech is not.

good, rationally related to that end, on the other hand, should survive even if it has the incidental consequence of favoring one conception of beauty over another. It is worth noting that this was the doctrine of the common law for a thousand generations, though justified through other words and other theories.

The question is whether the right to freedom from animus is vital enough to justify heightened scrutiny in the context of blight designations. The answer would seem to have to be yes. Blight designations — unless founded on objective criteria related to health and safety — are nearly the definition of bare aesthetic judgments. Those whose homes, businesses, churches, and schools are condemned are, by definition, not members of the group or groups seeking condemnation. If their neighborhoods are not unsanitary or unsafe but merely alien, different, and distinct, then it is hard to fathom how blight condemnations are not the definition of bare aesthetic judgments that violate the right to freedom from animus, and the aesthetic neutrality principle embedded within it.

C. *Aesthetic Neutrality as an Interpretive Principle*

While the First Amendment and the Right to Privacy each provide foundations for the aesthetic neutrality principle located explicitly in the Constitution, the principle flows within and around the Constitution, and pulses in the veins of the common law. The aesthetic neutrality principle is an interpretive principle that appears across an enormous number of substantive areas of law, and in a variety of facades. This section briefly mentions some of them.

For the intellectual property scholar, “the general irrelevance of aesthetics has become a cornerstone of copyright jurisprudence.”¹³⁷ The aesthetic neutrality principle appears in the doctrine that courts won’t judge the artistic quality of art,¹³⁸ in the principle that courts will allow enormous amounts of copying free from the restraints of the copyright laws where the use is “transformative,” or the purpose is the “lethal parody . . . [that] aim[s] at garroting the original,”¹³⁹ and in the

¹³⁷ Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 249 (1998).

¹³⁸ See *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (“Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.”); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”); Yen, *supra* note 137, at 271.

¹³⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-92 (1994) (quoting

view that courts should not probe too deeply into the aesthetics of “useful articles.”¹⁴⁰

Aesthetic neutrality also saturates traditional common law doctrines. In the field of contracts, courts will not inquire into the adequacy of consideration,¹⁴¹ or motives for a contract breach,¹⁴² or the artistic merit of a commissioned work of art.¹⁴³ They will enforce the perfect tender rule to the letter,¹⁴⁴ will not allow delegation of performance where personal performance is called for,¹⁴⁵ will indulge specific

BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967)).

¹⁴⁰ Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 303 n.1 (1991) (quoting J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1146 n.7); see Valerie V. Flugge, Note, *Works of Applied Art: An Expansion of Copyright Protection*, 56 S. CAL. L. REV. 241, 247-48 (1982); Gary S. Raskin, Comment, *Copyright Protection for Useful Articles: Can the Design of an Object Be Conceptually Separated from the Object's Function?*, 33 SANTA CLARA L. REV. 171, 174 (1993).

¹⁴¹ See RESTATEMENT (SECOND) OF CONTRACTS § 79 & cmt. c (1981); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1075-76 & n.325 (1985). While most contracts scholars view the doctrine that courts will not inquire into adequacy from *within* the domain of contract, it seems clear that allowing any person to accept anything they value as consideration vindicates the aesthetic neutrality principle.

¹⁴² See RESTATEMENT (SECOND) OF CONTRACTS ch. 16 intro. note; Sandra Chutorian, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 378 (1986) (“The motive behind a promisor’s breach of contract is irrelevant”). The neutrality of contract toward breach allows courts to avoid passing on the adequacy of the reason for breach, thereby vindicating aesthetic autonomy in those instances where an individual does not want to perform because they would deem performance aesthetically repugnant.

¹⁴³ See RESTATEMENT (SECOND) OF CONTRACTS § 228 & cmt. b, illus. 4; Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the “Law of Satisfaction” — A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 399-401 (1995). Though courts prefer to judge satisfaction by an objective standard if possible, the *Restatement (Second)* notes that “it is not practicable to apply an objective test” to a promisee’s satisfaction with a commissioned portrait. RESTATEMENT (SECOND) OF CONTRACTS § 228 cmt. b, illus. 4.

¹⁴⁴ See U.C.C. § 2-601 (1990). The “rigid ‘perfect tender rule’” was “adopted from the common law.” George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 969 (1978). As Professor Priest has noted, “[t]his rule may be inefficient because the presence or absence of a defect is not directly related to costs.” *Id.* at 969 n.17. However, it powerfully vindicates the aesthetic neutrality principle by vindicating a purchaser’s right to judge the aesthetic merit of the purchased goods.

¹⁴⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 318. This embodies the aesthetic neutrality principle since a court cannot possibly judge what aesthetic considerations are valued by the contracting parties.

performance where the contracted good is “unique,”¹⁴⁶ and will excuse performance where a specific venue or individual becomes suddenly and unexpectedly unavailable.¹⁴⁷ In torts, courts have long refused to recognize the concept of an aesthetic nuisance.¹⁴⁸ In the law of real property itself, specific performance is routinely awarded for the sale of land,¹⁴⁹ while an individual holding a mere life estate is barred from “improving” property under the doctrine of “ameliorative waste.”¹⁵⁰ Above all, the right to destroy one’s property remains an inviolable incident of the right to own it; the ultimate expression of aesthetic autonomy.¹⁵¹

Each of these doctrines expresses to a greater or lesser extent a web of relations that reflect a general sense that it is improper for courts — and the agents of the government more generally — to intervene to decide disputes involving fundamentally aesthetic judgments. This neutrality has significant consequences. It shapes commercial

¹⁴⁶ See U.C.C. § 2-716 (“Specific performance may be decreed where the goods are unique . . .”); RESTATEMENT (SECOND) OF CONTRACTS § 360 & cmt. c.

¹⁴⁷ See RESTATEMENT (SECOND) OF CONTRACTS §§ 261-63. When considered from the “internal” perspective of contract, these rules are justified on the grounds that there is an implied term in the contract conditioning its enforcement on the non-occurrence of the event. But one easily sees that it vindicates aesthetic neutrality since it is almost impossible to value substitute performance for something so aesthetically particular as performance by a particular person or at a particular venue.

¹⁴⁸ See *People v. Rubinfeld*, 172 N.E. 485, 486-87 (N.Y. 1930) (Cardozo, J.) (“One of the unsettled questions of the law is the extent to which the concept of nuisance may be enlarged by legislation so as to give protection to sensibilities that are merely cultural or aesthetic.”); Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141, 141 (1987).

¹⁴⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (“A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money.”); Radin, *supra* note 74, at 1013 n.202 (describing the nexus between this doctrine and the importance of aesthetic valuation in the form of personhood interests).

¹⁵⁰ See Radin, *supra* note 74, at 1013 n.202 (“The doctrine of ameliorative waste probably now rests implicitly on the assumption that the reversioner or remainderman has personhood interests at stake that are irrelevant to the valuations of the marketplace.”); Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1900 (2007) (“[T]he doctrine of ‘ameliorative waste’ may make a tenant liable for altering an owner’s property even if the alteration adds to the property’s value.”).

¹⁵¹ See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 824-30 (2005) (describing the expressive value of destruction); see also *id.* at 794 (“The right to destroy is an extreme version of the right to exclude; by destroying a vase, I permanently exclude third parties from using it. The right to destroy is also an extreme version of the right to use; by destroying a piece of jewelry, I do not merely use it — I use it up By destroying property, the owner can prevent it from ever being resold or used in a manner that displeases her . . .”).

doctrines, structures the landscape of intellectual property, and alters the nature of our civil relations with one another. It is a commitment that is profound indeed. Yet, courts in announcing these doctrines have not fled to the Constitution to plant their roots. Aesthetic neutrality seems to stem from an extra-constitutional commitment to liberty with no specific constitutional mooring.

III. BLIGHT AND SCRUTINY

The principle of aesthetic neutrality is so pervasive it is difficult to argue it does not rise to the level of a constitutional commitment. Yet, even its strongest constitutional foundations — in the right to privacy’s anti-animus principle — still lays a remarkably weak brick. This sets a complex puzzle. For here we find a notion that seems to emerge pathologically in the law, an entitlement to aesthetic autonomy that courts for centuries have tacitly and explicitly delegated to individuals and planted firmly beyond the reach of the State.¹⁵² Yet, in our current age — which knows only of rights — it stands bereft of constitutional status because it cannot fit squarely within an explicit constitutional commitment. It is not a small question, then, whether heightened scrutiny for blight condemnations can be justified.

The First Amendment cannot be the source of such scrutiny, for to expand its coverage to property would threaten to open First Amendment coverage to nearly any species of conduct that is also possibly incidentally expressive, something the Supreme Court has sought to avoid with great care.¹⁵³ Even if brought within the scope of the First Amendment, however, blight condemnations would receive the same blighted scrutiny under the Supreme Court’s *O’Brien* test.¹⁵⁴ According to *O’Brien*, where expressive conduct is incidentally suppressed pursuant to a permissible government purpose, only minimal scrutiny is warranted.¹⁵⁵ Yet, blight designations are nearly always accompanied by at least a semblance of a legitimating purpose — ordinarily the need for urban revitalization. Therefore, contrary to the hopes of scholars nearly three decades ago who thought perhaps

¹⁵² See Note, 13 LAW Q. REV. 337, 338 (1897) (declaring that common law courts do not adjudicate aesthetic disputes).

¹⁵³ See, e.g., *Spence v. Washington*, 418 U.S. 405, 409 (1974) (“[W]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968))).

¹⁵⁴ *United States v. O’Brien*, 391 U.S. 367 (1968).

¹⁵⁵ *Id.* at 377.

the First Amendment might prove an adequate means of protecting the aesthetic interests of property owners,¹⁵⁶ both as a matter of coverage and protection the First Amendment is unlikely to provide a source of heightened scrutiny against blight condemnations.¹⁵⁷

Neither really does either strand of the right to privacy seem well-equipped to provide the foundation for heightened scrutiny in the context of blight. The absolute privileges carved out by cases like *Lawrence* and *Griswold* are simply too strong. While aesthetic autonomy is important, it is not so important as to stand alongside these rights, which receive absolute constitutional protection. And while the right to freedom from animus seems like a potential avenue for heightened scrutiny, the kind of scrutiny it provides is merely rational basis with “bite.” While such an approach would prove welcome — and more searching — than the analysis courts presently undertake, it seems insufficiently protective given the magnitude of the harms and the importance of the interests at stake.

Ironically, then, the most powerful means of enforcing what appears on its face to be a profound constitutional commitment is through re-examination of the background interpretive principles courts employ when interpreting their States’ blight statutes. While scholars have complained vehemently that many of these statutes are so loosely worded they would allow almost anything to be condemned as blight,¹⁵⁸ courts are quite capable of narrowing statutory construction to bring it into conformity with powerful constitutional norms, a process some scholars have termed “constitutional mainstreaming.”¹⁵⁹ Judicial recognition of the aesthetic neutrality principle as firmly rooted in the history and traditions of the common law may bring about an interpretive shift that largely elevates the judicial scrutiny brought to bear in analyzing blight condemnations.

¹⁵⁶ See, e.g., Williams, *supra* note 68, 24-50 (“[S]uggest[ing] some limits that the first amendment might impose upon various types of aesthetic regulation.”).

¹⁵⁷ See Costonis, *supra* note 73, at 447-51.

¹⁵⁸ See Somin, *Limits of Backlash*, *supra* note 20, at 2123-24.

¹⁵⁹ See, e.g., Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1206 (2011) (“Constitutional mainstreaming reflects the efforts of the Court to read a statute so that it fits more comfortably within a zone of constitutional jurisprudence — a zone constructed from a reasonably consistent set of decisions in the Court’s constitutional cases — that evidence the extent to which the Court itself has privileged one competing constitutional value over another.”); see also Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309, 344-48 (2013) (terming interpretive commitments that shape statutes to conform to important normative commitments “integrative interpretation”).

Of course, the most honest and straightforward course would be to recognize that the principles of the *Lochner*-era were not all terrible, and that for all the good that came of the New Deal revolution, some old doctrines that should not have been forgotten were lost. With respect to blight, *Berman v. Parker* may have set the bar for judicial review too low. Justice Douglas, the same justice who wrote *Berman*, also wrote *Griswold* and the powerful concurrence in *Roe* affirming the potent place of the right to develop and express “one’s intellect, interests, tastes, and personality.”¹⁶⁰ Had he known that *Berman* might so profoundly conflict with *Roe* along this narrow band, he might have chosen his words differently, and perhaps a different balance might have been struck between blight and scrutiny.

At least, isn’t it pretty to think so?

¹⁶⁰ *Roe v. Wade*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).