

AESTHETIC JUDGMENT IN LAW

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ABSTRACT

Almost no one thinks the government should decide what counts as art or what has aesthetic value. But the government often does so, and often, it should. State actors—from judges and legislators down to customs officials and members of local zoning boards—make aesthetic judgments every day, in areas ranging from tax and tariff law to obscenity and public-funding decisions, from historic preservation and land-use regulations to copyright, trademark, and patent law.

This Article details the breadth and surprising philosophical depth of the law's engagement with aesthetic questions. And bucking conventional wisdom, it argues that in many areas of law, government should define artistic categories and promote aesthetic values. The usual reasons for treating aesthetic judgment as what Justice Holmes famously called a "dangerous undertaking" turn out to be bad ones. Arguments based on the expertise of judges or the subjectivity of aesthetic judgment are not just unconvincing, they are in tension with one another. And the one persuasive argument—derived from the First Amendment's prohibition on government-imposed orthodoxies—applies only as far as the First Amendment itself does. This Article offers a framework for deciding when the First Amendment limits aesthetic judgment in law. And in doing so, it also identifies appropriate sites of aesthetic judgment—places where we need more open debate about the substantive aesthetic values we want the law to endorse.

INTRODUCTION

Aesthetic judgment pervades the law. In the tax code and tariff system, in obscenity cases and public-funding choices, in connection with zoning, land use, and eminent domain, and throughout intellectual property law, judges and other government officials are constantly deciding what is art, or what counts as artistically or aesthetically valuable.

Yet it is almost universally said that aesthetic judgment has no place in the law. As Justice Holmes wrote over a century ago, and courts and scholars have never tired of repeating: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations."¹ Holmes's so-called

1. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903); *see also Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) ("For the law courts to decide 'What is Beauty' is a novelty even by today's standards.").

aesthetic neutrality² or nondiscrimination³ principle has now become dogma.

But the dogma is wrong. This Article takes it on, first, by showing that aesthetic judgments are far more common, and in more areas of law, than is generally acknowledged. Previous articles have made a start at this.⁴ But this Article goes significantly further by describing the deep contextual and even philosophical specificity of these judgments, and then by using this thickly descriptive account of *how* and *where* aesthetic judgments are made in law to support a normative claim: that, often, aesthetic judgments *should* be made.

The widespread aversion to aesthetic judgment rests on a misunderstanding of the kinds of judgments that actually get made, of the competence of various legal actors to make them, and of the nature of aesthetic judgment itself. By clearing away these misunderstandings, this Article focuses instead on the one important constraint that remains—the First Amendment—and aims to make space beyond its limits for debate about what substantive aesthetic values the law should endorse.

By “aesthetic judgment in law,” I am referring to all laws or governmental decisions that endorse particular aesthetic or artistic values or concepts. To be sure, this is a capacious understanding of both “aesthetic judgment” and “law.” In what follows, “law” describes the work not just of judges, but also of legislators, agency officials, and other state actors, from members of local zoning boards to government webpage designers; “aesthetic judgment,” meanwhile, refers to their resolution of any disputable question about what is art, or what constitutes or possesses aesthetic or artistic value.⁵

2. See John Tehranian, *Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY (Matthew David & Debora Halbert eds., 2014) (describing copyright jurisprudence as ostensibly committed to aesthetic neutrality principles); see also Andrew Tutt, *Blightened Scrutiny*, 47 U.C. DAVIS L. REV. 1807, 1825–26 (2014) (defining aesthetic neutrality as freedom from aesthetic judgments of the state).

3. See, e.g., *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 415 (2d Cir. 1985); Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 306–07 (1991); Brian L. Frye, *Aesthetic Nondiscrimination & Fair Use*, 3 BELMONT L. REV. 29 (2016); Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 1 (2001); Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1, 34 (2013); Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LITERATURE 20, 29 (2013) (“[N]ondiscrimination is a fundamental principle of modern copyright law: courts are not supposed to be art critics.”).

4. The most comprehensive of these are Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005) and P.H. Karlen, *What Is Art? A Sketch for a Legal Definition*, 94 L.Q. REV. 383 (1978). Most other articles focus only on aesthetic judgment in one particular area of law. These are cited in the relevant Subparts of Part I *infra*.

5. I am thus using “aesthetic judgment” to include, but go well beyond, the sort of judgments generally given that name in philosophy: i.e., judgments of the form “*x* is beautiful.” See, e.g., IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* (Paul Guyer ed., Paul Guyer & Eric

These aesthetic judgments include an endless stream of first-order, “retail” decisions about whether particular objects count as works of art or as aesthetically valuable. These are the kind of decisions made by the IRS every time it assesses the value of a donated or inherited artwork;⁶ by courts when they decide whether a work has serious enough artistic value to escape an obscenity charge;⁷ by customs officials when they decide whether a certain piece of metal is a sculpture;⁸ by the National Endowment for the Arts when it chooses what projects to fund;⁹ and by municipal historic preservation committees when they decide whether proposed renovations will disrupt the character of a neighborhood.¹⁰

But the law also makes aesthetic judgments at the “wholesale” level when it decides what constitutes art or aesthetic value in the first place. These judgments are often surprisingly nuanced—the kind of thing associated more with philosophers of art than with lawyers or legislators. Consider just the relatively obscure area of tariffs¹¹: there, the law not only draws distinctions among types of artworks—privileging paintings over ceramics, for example;¹² it also decides whether art is inherently representational,¹³ or expressive,¹⁴ or useless¹⁵—and if the latter, whether an object’s utility, and thus its status as art, stems from the intentions of its perceiver/user or its creator.¹⁶

What distinguishes law from aesthetic theory or the philosophy of art—the more expected sites for discussions like these—is the fact that law’s

Matthews trans., Cambridge Univ. Press 2000) (1790). Since I refer to *any* position taken on a substantive question regarding art or the aesthetic as an aesthetic judgment, I would include not only the judgment that *Othello* is a masterpiece, but also Kant’s claims that judgments of that sort must be disinterested and demand universal agreement. Each of these judgments—which I distinguish below as “retail” and “wholesale” judgments, respectively—stakes out a contestable position within aesthetics.

6. See *infra* Part I.B.1.

7. See *infra* Part I.D.

8. See *infra* Part I.B.2.

9. See *infra* Part I.A.

10. See *infra* Part I.C.

11. See generally *infra* Part I.B.2.

12. See, e.g., *United States v. Oberlaender*, 25 C.C.P.A. 24 (1937) (holding that painted porcelain plates did not qualify for duty-free status in the same way as paintings).

13. See, e.g., *United States v. Olivotti & Co.*, 7 Ct. Cust. 46, 48 (1916) (defining sculpture as art that represents objects “in their true proportions”). But see *Brancusi v. United States*, 54 Treas. Dec. 428, 430–31 (Cust. Ct. 1928) (holding that sculpture may also portray “abstract ideas rather than . . . imitate natural objects”).

14. See, e.g., *Mayers, Osterwald & Muhlfeld (Inc.) v. Bendler*, 18 C.C.P.A. 117, 126 (1930) (holding that “in order to be ‘artistic,’ . . . there must be in the . . . article a mental concept resulting in an aesthetic expression of the producer”).

15. See, e.g., *T.D. Downing Co. v. United States*, 66 Cust. Ct. 63, 69 (1971) (holding that bas-relief sculptural panels on a door were “articles of utility” ineligible for the tariff exemption then given to sculptures).

16. See, e.g., *United States v. J. E. Bernard & Co.*, 33 C.C.P.A. 166 (1946) (holding that a painting that is used for commercial purposes is a “useful” object not given duty-free status as art).

aesthetic judgments are always made within a particular statutory scheme, in service of a particular governmental aim. This matters.¹⁷ Abstracted from the contextual specificity in which it actually occurs, aesthetic judgment in law might seem almost self-evidently ill-advised. As Justice Scalia once scoffed: “For the law courts to decide ‘What is Beauty’ is a novelty even by today’s standards.”¹⁸ Even Justice Scalia, however, approved when the law, in the context of federal subsidies, took a stand on one of the most contentious topics in recent aesthetics¹⁹: the question of whether a work’s moral value contributes to its artistic worth.²⁰ Likewise, while most, on the Court and off, would probably recoil at the general idea of governmental limits on what counts as art, the decision to offer imported sculptures a tariff exemption not available to other “manufacture[s] . . . of metal” is likely to garner far more support.²¹ In fact, that exemption has been in place for over a century—despite the fact that providing it requires the government to define what counts as sculpture.²²

The point is, properly evaluating aesthetic judgment in law requires that we understand the contextual specificity in which it occurs. Part I of this Article canvases these contexts, describing the kinds of aesthetic judgments made in public-funding programs, in tax and tariff law, in zoning, historic preservation, and other land-use determinations, in obscenity prosecutions, and in intellectual property law, from patent and trademark, to copyright and moral rights laws.

The descriptive work of Part I reveals how much is at stake in the many aesthetic judgments the law so regularly makes. Much has been written on the long-standing debate about whether the law should embody or enforce moral values.²³ Yet the *aesthetic* values that shape our neighborhoods and public spaces, affect our tax burden, inform our First Amendment law,

17. Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617 (1986) (describing how in the legal context, unlike the literary one, interpretation “must be capable of transforming itself into action”).

18. *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring).

19. See generally Alessandro Giovannelli, *The Ethical Criticism of Art: A New Mapping of the Territory*, 35 PHILOSOPHIA 117, 117 (2007) (“offering a comprehensive mapping of the possible theoretical positions on the relationship between the ethical and the artistic value of a work of art”).

20. See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); cf. 20 U.S.C. § 954(d)(1) (2012) (establishing that “artistic excellence and artistic merit are the criteria by which applications [for funding by the National Endowment for the Arts] are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public”).

21. Stéphanie Giry, *An Odd Bird*, LEGAL AFFAIRS (Sept./Oct. 2002), http://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp.

22. See *infra* Part I.B.2.

23. Compare, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (“The law . . . is constantly based on notions of morality.”), and PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1968), with *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”), and H. L. A. HART, *LAW, LIBERTY AND MORALITY* (1963).

establish the boundaries of intellectual property, and cost the government billions to promote—these are hardly less important, or fraught, even though they are much less frequently discussed. In lieu of discussion, we have long had Justice Holmes’s blanket admonition against aesthetic judgment. Yet if Holmes’s aesthetic nondiscrimination principle is the rule, Part I shows just how thoroughly it is breached in practice.

Part II challenges the aesthetic nondiscrimination principle on a normative level. In light of the previous Part’s description of the many ways and places in which aesthetic judgment in law occurs, Part II asks why it is so widely thought that aesthetic judgment in law should *not* occur.

Two reasons are often given: first, that aesthetic judgment lies beyond courts’ expertise,²⁴ and second, that aesthetic judgment is hopelessly subjective, which is really to say unpredictable or relativist.²⁵ Neither reason justifies the prohibition. Aesthetic judgment is no more daunting than many of the other judgments—economic, technical, and historical ones, for example—that generalist courts are regularly called upon to make. And the relativity of aesthetic judgment is vastly overstated; in fact, much of the leading work in philosophical aesthetics in the past three centuries has been spent explaining the *universality* of our judgments of taste.²⁶ More to the point, acceding to relativism is itself a substantive aesthetic judgment, not an avoidance of such judgments, as Holmes’s followers seem to believe.

Instead of judicial incompetence or the subjectivity of taste, this Article demonstrates that aesthetic nondiscrimination is required solely on free speech grounds. The First Amendment prohibits state-enforced orthodoxy in aesthetics no less than in politics or religion. As the Supreme Court has put the matter: aesthetic judgments “are for the individual to make, not for the Government to decree.”²⁷

Simple as this point might seem, shifting focus to the First Amendment recasts the entire debate. For whereas the judicial competency and subjectivity rationales operate categorically, discouraging aesthetic judgment across the board, the First Amendment rationale for aesthetic neutrality extends only as far as the First Amendment itself does.

Properly grounded, the aesthetic neutrality requirement thus should vary in its force, and even its applicability, across the various areas of law in which aesthetic judgments are made. Holmes’s admonition should carry more force when aesthetic judgment in law serves to shut down

24. See sources cited *infra* Part II.A.

25. See sources cited *infra* Part II.B.

26. See, e.g., DAVID HUME, *Of the Standard of Taste*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* (Eugene F. Miller ed., rev. ed. 1987); KANT, *supra* note 5.

27. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000).

expression—as in obscenity law or blight determinations—as compared to instances where the government itself engages in or subsidizes expression, as in governmental-funding programs, tax and tariff exemptions, and, arguably, certain areas of intellectual property law.

Part III develops this framework. Turning from *whether* to *when* aesthetic judgment in law is appropriate, Part III takes the various legal contexts described in Part I and begins the work of identifying those in which aesthetic judgment should be permitted or even encouraged. Despite the conventional wisdom, Holmes’s nondiscrimination principle simply shouldn’t apply in cases involving governmental speech and many cases of government-subsidized speech; there, aesthetic judgment ought to be given free rein. Acknowledging this opens space within the political and judicial realms for more frank discussion, and contestation, about what aesthetic values and artistic categories we want the law to endorse. This Article aims to begin that discussion.

I. AESTHETICS THROUGHOUT THE LAW

When one of Constantin Brancusi’s bronze *Bird in Space* sculptures arrived in New York in 1926, customs officials refused to give it the standard exemption offered works of art—a category which, at the time, included only works “imitative of natural objects . . . and appealing to the emotions through the eye alone.”²⁸ In categorizing Brancusi’s work instead as a “manufactured object[] of metal” subject to a 40% duty, the customs appraiser relied in part on the opinion of an unnamed expert who thought Brancusi simply “left too much to the imagination.”²⁹

Brancusi appealed, and the resulting, highly publicized trial included testimony from eight artists, critics, and curators—six on Brancusi’s side and two on the government’s. His supporters emphasized *Bird in Space*’s “harmonious proportions” and “beautiful sense of workmanship.”³⁰ His opponents, meanwhile, testified to the work’s abstraction and its failure to represent a bird and (perhaps consequently) to arouse “any aesthetic emotional reaction.”³¹

The customs court sided with Brancusi. Departing from an earlier determination that “works of art,” for tariff purposes, referred only to representational works, the court acknowledged (without necessarily endorsing) a “new school of art, whose exponents attempt to portray

28. *United States v. Olivotti & Co.*, 7 Ct. Cust. 46, 46 (1916).

29. *Giry*, *supra* note 21.

30. *Id.*

31. *Id.*

abstract ideas rather than to imitate natural objects.”³² Swayed by the teaching of this “new school,” the court concluded that Brancusi’s work was:

beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it is nevertheless pleasing to look at and highly ornamental, and . . . we hold under the evidence that it is the original production of a professional sculptor and is in fact a piece of sculpture and a work of art.³³

The *Brancusi* case involves, at first glance, the most basic of aesthetic judgments: determining whether a given object is a work of art. But it goes beyond that. For one thing, the case asks the ontological question at both the retail and the wholesale level. In other words, it asks not just whether *Bird in Space* is an artwork (the “retail” question), but also (on the “wholesale” level) whether abstract objects can, at least for customs purposes, be considered art at all.

Moreover, in answering this broader question, the customs court relies on evaluative considerations, thereby taking a stand, at least implicitly, on the contested question of whether art is a normative or purely classificatory concept.³⁴ Insofar as the court is moved by the object’s beauty, its ornamental quality, and the fact that it was “pleasing to look at,”³⁵ the court intermingles two of the most basic questions in aesthetics: “Is this art?” and “Is this beautiful?” The *Brancusi* court bases the first of those judgments—the ontological or classificatory one—on the second, normative one.³⁶

With little guidance from Congress—the statutory language defined “works of art” for customs purposes as “[o]riginal paintings . . . , original drawings . . . , [and] original sculptures or statuary”³⁷—the customs court made each of the preceding aesthetic judgments on its own.³⁸ But this shouldn’t blind us to the substantive aesthetic judgments that were enshrined in the legislative text itself. The decision to provide a benefit to certain artforms, but not others, was one such judgment. But so too was the explicit requirement that sculpture, to qualify for the benefit, must “be

32. See *Brancusi v. United States*, 54 Treas. Dec. 428, 430–31 (Cust. Ct. 1928) (“Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the fact of their existence and their influence upon the art world as recognized by the courts must be considered.”).

33. *Id.* at 431.

34. See STEPHEN DAVIES, DEFINITIONS OF ART 42–47 (1991) (discussing and providing examples of philosophers’ “not uncommon . . . disagreement over whether the classificatory use of ‘artwork’ is essentially descriptive or evaluative”). The classificatory conception of art, unlike the evaluative one, allows for the possibility of *bad* art.

35. *Brancusi*, 54 Treas. Dec. at 431.

36. *Id.*

37. Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858, 933 ¶ 1704.

38. *Brancusi*, 54 Treas. Dec. at 430–31.

understood to include professional productions of sculptors only.”³⁹ Under the statute, being produced by a professional sculptor was a necessary condition of arthood but, notably, not a sufficient condition. The *Brancusi* opinion illustrates this point, for the court’s confidence that Brancusi was a *sculptor* failed to settle the question of whether the object he had produced was a *sculpture*.⁴⁰ The statutory definition of art rejected the idea that just anything produced by an artist in his or her professional capacity thereby counts as art. Although easy to miss, this was yet another substantive aesthetic judgment embodied in tariff law.

The *Brancusi* case shows a court and Congress squarely confronting the definition of art. And interestingly, what started as a question of statutory interpretation—a recognition of the aesthetic judgments written into law by Congress—ultimately got answered by judges relying on expert testimony about then-contemporary developments in the artworld. A question about ontology ramified into questions about beauty, form, representation, and aesthetic response. The *Brancusi* case thus exemplifies both the variety of aesthetic judgments government actors are sometimes called upon to make and the methods they (sometimes) use to make those judgments.

The following Subparts canvas many of the other, varied areas of law in which this takes place, beginning with public funding, turning to public subsidies of another sort—those offered through tariff and tax law, the context in which the *Brancusi* case arose—then moving on to land use, obscenity law, and, finally, intellectual property. The discussion that follows does not claim to be exhaustive or even fully original, though it does go well beyond the previous literature.⁴¹ The most important thing it adds, however, is a far richer account of the variety and, especially, the specificity of the aesthetic judgments found throughout the law. As the *Brancusi* case has already shown, “What is art?” is only the beginning.

A. Public Funding

Nearly every decision by the government to grant funding to an artist or arts organization involves an evaluative aesthetic judgment. These retail-

39. 42 Stat. at 933 ¶ 1704.

40. *Brancusi*, 54 Treas. Dec. at 431 (“[W]e hold under the evidence that it is the original production of a professional sculptor *and* is in fact a piece of sculpture and a work of art.” (emphasis added)).

41. A number of articles, cited below in this Part, focus on the aesthetic judgments that arise in particular areas of law, particularly intellectual property. The previous article with the broadest scope, tracing aesthetic judgment across areas of law beyond intellectual property, is Christine Haight Farley’s *Judging Art*, *supra* note 4. For an excellent treatise discussing many varied areas of art law, see LEONARD D. DUBOFF, CHRISTY O. KING & MICHAEL D. MURRAY, *THE DESKBOOK OF ART LAW* (2d ed. 2005).

level, case-by-case determinations by agencies like the National Endowment for the Arts (NEA) and its state and municipal counterparts are little different than those made by librarians, charged with buying books; humanities faculties at public universities who have to make syllabus, curriculum, and tenure decisions; or builders and architects tasked with the endless details of designing and constructing government buildings. (Aside from decisions about the buildings themselves, the General Services Administration's Art-in-Architecture program "reserves one-half of one percent of the estimated construction costs for federal buildings to commission American artists to create site-specific artworks"⁴²—thereby requiring an additional, highly visible set of aesthetic judgments.)

Some of these everyday decisions may spawn controversy or provoke public discussion about the state's aesthetic preferences.⁴³ This might even include discussion of whether agencies like the NEA should exist—hardly a foregone conclusion, given that the Endowment dates only to 1965.⁴⁴ These higher-order aesthetic judgments about what is worth funding and how funding decisions should be made are my chief concern here. But, before turning to the categorical aesthetic judgments that are embodied in legislation and court decisions, two points about case-by-case, retail-level judgments are worth noting.

First, their ubiquity: governments at every level across the United States subsidize and purchase art—or, more broadly, pay to promote aesthetics. The NEA is the usual focus of that activity. But its budget of \$146 million in Fiscal Year 2012 was dwarfed by the \$388 million dedicated to the nation's various military bands, not to mention the \$811.5 million given to the Smithsonian (which includes the Hirshhorn Museum, the National Portrait Gallery, and the Cooper-Hewitt Museum of

42. NAT'L ENDOWMENT FOR THE ARTS, HOW THE UNITED STATES FUNDS THE ARTS 15 (3d ed. 2012), <http://arts.gov/publications/how-united-states-funds-arts>; see also 41 C.F.R. § 102-77.10 (2005) ("Federal agencies must incorporate fine arts as an integral part of the total building concept when designing new Federal buildings, and when making substantial repairs and alterations to existing Federal buildings, as appropriate. The selected fine arts, including painting, sculpture, and artistic work in other media, must reflect the national cultural heritage and emphasize the work of living American artists."). So-called "percent-for-art ordinances" are common throughout the country; they generally require that somewhere between 0.5% to 2% of capital improvement budgets be devoted to art. See Asmara M. Tekle, *Rectifying These Mean Streets: Percent-for-Art Ordinances, Street Furniture, and the New Streetscape*, 104 KY. L.J. 409 (2016); see also Part I.C., *infra*.

43. For a description of controversies surrounding Art-in-Architecture projects, see Eleanor Heartney, *Introduction*, in GSA ART-IN-ARCHITECTURE: SELECTED ARTWORKS 1997–2008, at 7 (2008); see also *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988). For a fascinating account of the public deliberation that went into the production of one Art-in-Architecture work—Jenny Holzer's installation at the federal courthouse in Sacramento—see JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 189–91 (2011).

44. See DUBOFF ET AL., *supra* note 41, at I-9.

Decorative Arts and Design, among other arts-related institutions).⁴⁵ Add local museums and the arts programs run by public universities, lower schools, and park districts and these federal sums themselves look insignificant.⁴⁶ Then again, if the point is to consider the full breadth of government money devoted to aesthetic matters—and requiring aesthetic judgments—this has to include not just the library and building decisions already mentioned, but even matters like public signage, typography, and web design.⁴⁷ Aesthetic judgments are everywhere.

The second point is to note who makes these judgments. Most are made by professionals considered expert in their fields. Among these are architects, librarians, museum curators, professors, and the members of the National Council on the Arts, which reviews NEA applications and is made up of “private citizens . . . who . . . are widely recognized for their broad knowledge of, or expertise in, or for their profound interest in the arts.”⁴⁸

Relying on experts to make everyday aesthetic judgments sidesteps at least one of the worries that Justice Holmes expressed in *Bleistein*: that they be made by judges “trained only to the law.”⁴⁹ Using experts to insulate aesthetic judgment from pure politics even has constitutional salience, as in *Board of Education v. Pico*, where a decision to remove certain books from a school library was seen as potentially discriminatory in part because the Board of Education had “ignored ‘the advice of literary experts,’ [and] the views of ‘librarians and teachers within the . . . [s]chool system.’”⁵⁰ As we will see below in Part II.B, however, one thing the turn to experts does not do is assuage the concern, voiced in *Bleistein* and elsewhere, that aesthetic judgments are hopelessly subjective. In fact, this

45. NAT’L ENDOWMENT FOR THE ARTS, *supra* note 42, at 13–14.

46. Direct public funding at the state and municipal levels also far exceeds that given out through the NEA. In Fiscal Year 2016, the NEA was allotted \$147.9 million while state arts agencies received \$349 million in appropriations and local governments were estimated to have spent \$795 million on the arts. Ryan Stubbs, *Government Funding for the Arts, 2016*, 28 GIAREADER: IDEAS AND INFORMATION ON ARTS & CULTURE 9, 9 (2017), <http://www.giarts.org/sites/default/files/28-1-vital-signs.pdf>.

47. On the NEA-led design renaissance in the federal government in the 1970s, see Diana Budds, *Nixon, NASA, and How the Federal Government Got Design*, FAST CO.DESIGN (Mar. 6, 2017, 7:00 AM), <https://www.fastcodesign.com/3068659/nixon-nasa-and-how-the-federal-government-got-design>. Lest anyone think that courts are not involved in decisions like these—decisions regarding both aesthetic monuments and aesthetic minutia—compare the discussion of judges’ involvement in court building in RESNIK & CURTIS, *supra* note 43, at 160–61 (describing then-Judge Stephen Breyer’s role in building the Boston federal courthouse), with U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, REQUIREMENTS AND SUGGESTIONS FOR TYPOGRAPHY IN BRIEFS AND OTHER PAPERS, <http://www.ca7.uscourts.gov/forms/type.pdf> (offering surprisingly specific aesthetic guidance to litigants in the Seventh Circuit).

48. 20 U.S.C. § 955(b)(1)(C) (2012). The statute also requires that, in selecting members of the Council, the President is to “give due regard to equitable representation of women, minorities, and individuals with disabilities who are involved in the arts and shall make such appointments so as to represent equitably all geographical areas in the United States.” *Id.*

49. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

50. 457 U.S. 853, 874 (1982).

concern questions the very possibility of experts in the realm of aesthetics. If there are no standards, there can be no specialists particularly skilled in applying them.

Perhaps because of this suspicion, not all arts-funding decisions are made by putative experts in the field. In fact, the guidelines for the federal Art-in-Architecture program explicitly require a mix of arts professionals and representatives from the local community on the selection committee.⁵¹ More generally, some of the biggest decisions—broad categorical judgments about what kinds of things are worth funding—are made by legislators, who are hardly more likely than federal judges to be trained in aesthetics. At the big-picture level, then, the Holmesian worry returns in full force.

Interestingly, as to the first question—what counts as art?—Congress has responded much as Holmes himself did in *Bleistein*: with an aesthetic judgment that is as capacious (or perhaps watered down) as possible. The enabling legislation behind the NEA defines “the arts” to include:

music (instrumental and vocal), dance, drama, folk art, creative writing, architecture and allied fields, painting, sculpture, photography, graphic and craft arts, industrial design, costume and fashion design, motion pictures, television, radio, film, video, tape and sound recording, the arts related to the presentation, performance, execution, and exhibition of such major art forms, [and] all those traditional arts practiced by the diverse peoples of this country.⁵²

The statute even adds that its definition “is not limited to” the items on this lengthy list.⁵³

Where the NEA’s enabling legislation *is* more discriminating—arguably in both senses of the word—is in its congressionally-mandated selection criteria. In the wake of widespread controversy over an NEA-funded exhibition of Robert Mapplethorpe’s homoerotic photography and money that indirectly supported Andres Serrano’s “Piss Christ,”⁵⁴ Congress in 1990 dictated criteria the NEA must use in awarding grants.⁵⁵ The law now states that:

51. U.S. GEN. SERVS. ADMIN., GSA ART IN ARCHITECTURE POLICIES AND PROCEDURES § 2.3 (2010), <http://www.gsa.gov/portal/getMediaData?mediaId=208567>.

52. 20 U.S.C. § 952(b) (2012).

53. *Id.*

54. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 574 (1998); *see generally* CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS (Richard Bolton ed., 1992) (documenting the Mapplethorpe–Serrano controversy).

55. *See* Arts, Humanities, and Museums Amendments of 1990, Pub. L. No. 101-512, 104 Stat. 1960, 1963.

No payment shall be made under this section except . . . in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that . . . artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. . .*⁵⁶

Questions about whether, under the First Amendment, the decency clause constitutes impermissible viewpoint discrimination or is impermissibly vague were litigated—and the statute was ultimately upheld—in a case brought by Karen Finley and three other performance artists whose grant applications were rejected by the NEA.⁵⁷ Part III looks at how the government’s ability to discriminate in this way varies when funding, rather than censorship of private speech, is at stake. In the present context, however, where the aim is to catalog substantive aesthetic judgments made throughout different areas of the law, the crucial point is this: Congress, in its 1990 amendments, defined artistic excellence and merit to include a moral consideration: “decency.” Or, at least, it may have done so. In his concurring opinion in *Finley*, Justice Scalia noted that the added clause, with its dangling modifier (“taking into consideration . . .”), could be read “as either suggesting that decency and respect are elements of what Congress regards as artistic excellence and merit, or as suggesting that decency and respect are factors to be taken into account *in addition to* artistic excellence and merit.”⁵⁸ Majorities on both the Ninth Circuit and the Supreme Court—at least nine judges out of the thirteen who heard the case—read the statute in the former of the two ways.⁵⁹ What we have, then, is an aesthetic judgment, made through congressional legislation as interpreted by federal judges, that an artwork’s aesthetic value hinges at least in part on its moral worth.

56. 20 U.S.C. § 954(d) (2012) (emphasis added).

57. See *Finley v. Nat’l Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992) (*Finley I*), *aff’d*, 100 F.3d 671 (9th Cir. 1996) (*Finley II*), *rev’d*, 524 U.S. 569 (1998) (*Finley III*).

58. *Finley III*, 524 U.S. at 591 (Scalia, J., concurring in the judgment).

59. See *id.* at 582 (“[T]he criteria in § 954(d)(1) inform the assessment of artistic merit. . . .”); *id.* at 608 (Souter, J., dissenting) (“[A]s the cosponsor of the bill put it, ‘the decisions of artistic excellence must take into consideration general standards of decency and respect for the diverse beliefs and values of the American public.’” (quoting 136 Cong. Rec. 28624 (statement of Rep. Coleman) (1990))); *Finley II*, 100 F.3d at 676 (“Read together, these clauses instruct the Chairperson to ensure that standards of decency and respect for diverse values are considered when judging the artistic merit and excellence of an application.”). *But see Finley I*, 795 F. Supp. at 1471 (“[D]efendants’ alternative construction (*i.e.*, that ‘decency’ and ‘respect’ are factors only to the extent that they are implicit in the assessment of artistic merit) is also manifestly contrary to congressional intent. It defies logic to argue that explicit additions to the ‘artistic merit’ standard are merely implicit in the assessment of artistic merit. Had Congress believed that ‘decency’ and ‘respect for diverse views’ were naturally embedded in the concept of ‘artistic merit,’ there would be no need to elaborate on that standard.”).

In making this judgment, the law—which is to say, Congress and the federal courts—took a stand on one of the more hotly contested issues in contemporary philosophy of art: the relationship between aesthetic and moral value. A number of positions within this debate are possible; in recent years, in fact, the spectrum of conceptual possibilities has grown much more densely settled.⁶⁰ Broadly, one might argue (and some have) that to evaluate a work of art morally is to make a category mistake;⁶¹ that although artworks *can* be morally evaluated, their morality is irrelevant to their artistic value;⁶² that the previous claim is true of some genres of art but not others;⁶³ or that a work's morality systematically counts in favor of (and its immorality counts against) its artistic merit.⁶⁴ One might even be an immoralist, arguing that certain artworks are more artistically valuable because of, not in spite of, their immorality—perhaps because their immorality is what serves to deepen our understanding or imaginative capacity.⁶⁵

In amending 20 U.S.C. § 954(d)(1) in 1990, Congress, as interpreted by the *Finley* Court, inscribed what is often called *moralism* or *ethicism*—the belief in a systematic connection between moral and aesthetic value⁶⁶—into federal law. It made decency a component of artistic excellence. In fact, the *Finley* Court was even more precise, advancing a position philosophers refer to as *moderate moralism*: the claim that ethical value contributes to the artistic value of artworks only within particular genres.⁶⁷ Justice O'Connor suggested this in her majority opinion in *Finley*, where she claimed that “one could hardly anticipate how ‘decency’ or ‘respect’ would bear on grant applications in categories such as funding for symphony

60. For a compelling mapping of the conceptual terrain, see Giovannelli, *supra* note 19.

61. See, e.g., OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* xxiii (Modern Library ed., 2004) (1891) (“There is no such thing as a moral or an immoral book.”).

62. See, e.g., James C. Anderson & Jeffrey T. Dean, *Moderate Autonomism*, 38 *BRIT. J. OF AESTHETICS* 150 (1998).

63. See, e.g., Noël Carroll, *Moderate Moralism*, 36 *BRIT. J. OF AESTHETICS* 223, 229 (1996).

64. See, e.g., Berys Gaut, *The Ethical Criticism of Art*, in *AESTHETICS AND ETHICS: ESSAYS AT THE INTERSECTION* 182 (Jerrold Levinson ed., 1998). This position, sometimes referred to as “ethicism,” does not make moral worth a necessary condition for artistic success; as Gaut writes: “[T]here can be good, even great, works of art that are ethically flawed.” *Id.* at 182; cf. *Finley III*, 524 U.S. at 591 (Scalia, J., concurring in the judgment) (insisting that although decency and respect must always be considered in awarding NEA grants, “[t]his does not mean that those factors must always be dispositive”); *Finley II*, 100 F.3d at 689–90 (Kleinfeld, J., dissenting) (“[A]fter considering the indecency and offensiveness, the NEA could . . . decide for or against funding showings of . . . offensive works such as Leni Riefenstahl’s Nazi propaganda movie, *Triumph of the Will*. . .”).

65. See, e.g., Mathew Kieran, *Forbidden Knowledge: The Challenge of Immoralism*, in *ART AND MORALITY* 56, 63–71 (José Luis Bermúdez & Sebastian Gardner eds., 2003).

66. See, e.g., Gaut, *supra* note 64.

67. See Carroll, *supra* note 63, at 227 (“[W]ith some genres, moral considerations are pertinent, even though there may be other genres where they would be tantamount to category errors.”); Giovannelli, *supra* note 19, at 121 (defining moderate moralism).

orchestras.”⁶⁸ Writing in dissent, Justice Souter provided a seventh vote for this interpretation of the statute. “A reviewer may,” he allowed, “give varying weight to the [decency and respect] factors depending on the context, and in some categories of cases (such as the Court’s example of funding for symphony orchestras) the factors may rarely if ever affect the outcome.”⁶⁹

By embracing moderate moralism, the law adopted with surprising specificity one of the competing positions—which is to say, aesthetic judgments—on offer within contemporary philosophy of art. But despite their parallel answers, it is hardly clear that Congress and the Court are asking the same question as philosophers and other theorists. For while Congress and its judicial interpreters were tasked with deciding the relationship between moral and aesthetic value in the context of a governmental-funding scheme for the arts, philosophers ask about the relationship between moral and aesthetic value full stop. And the best decision in the former context might, but needn’t be, the right, or most desirable, or most widely agreed-upon answer outside of that (or any) context.

This is just to ask for the first of many times what relationship aesthetic judgment in law does or should have to the judgments offered within aesthetic theory. What does law have to teach the philosophy of art, and vice versa? To offer an example: dedicated immoralists believe that certain artworks are better *qua* art because of their moral defects.⁷⁰ But they needn’t also believe that certain works’ immorality makes them better *qua* candidates for NEA funding. The context in which law’s aesthetic judgments are made—a context always defined by particular governmental aims or interests—may or may not affect what judgment they would make (or recommend).⁷¹ They *might* continue to advocate for immoralism, but that would have to be because they thought that certain immoral artworks advanced the goals that led Congress to fund the NEA in the first place. They would have to argue for immoralism rather than, say, moderate moralism in light of Congress’s own objectives in this particular area of law. And Congress’s objectives in funding the arts might themselves be contested.

68. *Finley III*, 524 U.S. at 583.

69. *Id.* at 592 (Souter, J., dissenting) (internal citation omitted).

70. *See, e.g.*, Giovannelli, *supra* note 19, at 120 (“Extreme immoralism would hold that the only aesthetic merits of a work of art are its ethical flaws.” (quoting Berys Gaut, *Art and Ethics*, in *THE ROUTLEDGE COMPANION TO AESTHETICS* 341, 345 (Berys Gaut & Dominic M. Lopes eds., 2001))).

71. *Cf.* Farley, *supra* note 4, at 857 (“All that courts need concern themselves with is understanding what the purposes of the legal protections are. Once a court has determined this, it can seek to connect the law with the aesthetic theory that best aligns with that doctrinal purpose.”).

Regardless, in the 1990 NEA Amendments and the *Finley* litigation, immoralists as well as autonomists—those who deny a systematic connection between moral and aesthetic value⁷²—both lost. In regard to governmental funding for the arts, the law embraced a different aesthetic judgment instead: moderate moralism, the belief that in some genres of art, a work’s moral value adds to its aesthetic excellence. And this wholesale judgment, enshrined in law to this day, is more important, though less discussed, than the individual retail judgments (about the decency and aesthetic worth of Karen Finely’s art, for example) that have long been litigated.

B. Taxes and Tariffs

Discussing taxes and tariffs is, in a sense, just to continue the discussion of governmental funding for the arts. After all, the tax deductions the government offers for donations made to nonprofit arts organizations—and the waived taxes that those organizations themselves would otherwise pay—together “represent[] the most significant form of [governmental] arts support in the United States.”⁷³ And aesthetic judgment suffuses all of this.

The tax code not only identifies what kinds of arts organizations are eligible for tax-exempt status, it also struggles with the problem of valuing artworks when they are donated, and in determining when, or whether, their value depreciates over time.

Meanwhile, tariff law—as we have already seen in the *Brançusi* case—is littered with judgments about the kinds of objects that receive favored treatment with respect to import duties. Parts I.B.1 and I.B.2 canvas the rich array of aesthetic judgments made in these two areas of law.

1. Taxes

Just like direct governmental funding, tax law requires a constant stream of individual, “retail” level aesthetic judgments to be made, mostly by a combination of experts and agency officials, but sometimes also by

72. See, e.g., Carroll, *supra* note 63, at 224 (describing “radical autonomism” as the view that “it is inappropriate or even incoherent to assess artworks in terms of their consequences for cognition, morality and politics”); Giovannelli, *supra* note 19, at 122 (“Without denying that works of art may be subject to ethical evaluation, the radical autonomist claims that such an evaluation never has a bearing on the value of the work as art.”).

73. NAT’L ENDOWMENT FOR THE ARTS, *supra* note 42, at 18; see also Micah J. Burch, *National Funding for the Arts and Internal Revenue Code § 501(C)(3)*, 37 FLA. ST. U. L. REV. 303, 304 n.2 (2010) (estimating that, in 2006, arts-related charitable deductions cost the federal government “approximately \$3 billion—or roughly the same amount as all direct governmental support for the arts combined”).

courts. Every time a work of art is transferred—as an inheritance, a gift, a charitable donation, or a form of payment—it has to be valued for estate, gift, or income tax purposes.⁷⁴

Since 1968, the Internal Revenue Service has relied upon an Art Advisory Panel made up of dealers, curators, critics, and other experts to prevent the overvaluation of charitable donations and the undervaluation of artworks subject to gift or estate taxes.⁷⁵ (In Fiscal Year 2015, to give a recent example, the panel reviewed 446 items, adjusting the taxpayer's valuation 65% of the time.⁷⁶)

For this Article's purposes, these individual judgments are interesting mainly for their frequency and for the mix of governmental actors called upon to make them. (More on that below.) To be clear, these judgments cannot always be deemed aesthetic. Evaluating the fair market value of a work of art is often little different than determining the value of an old car, or George Washington's fake teeth. Indeed, the IRS's so-called Art Appraisal Services unit—the unit the Art Advisory Panel advises—offers “to provide appraisal service on works of art including paintings, drawings, prints, sculptures, antiques, ceramics, decorative arts, textiles, carpets, silver, rare manuscripts, antiquities, ethnographic art, collectibles, classic automobiles, and historical memorabilia.”⁷⁷ Factors considered when appraising a work include descriptions of the work's size, physical makeup and condition, history (including its creation and its previous ownership), as well as information about the price paid for similar works in the past.⁷⁸ None of these factors requires a specifically aesthetic judgment, although evaluations of the work's condition or the importance and skill of its creator certainly could, of course, be made based on connoisseurship, not just market data.

An especially vivid example of this distinction emerged in 2012 when the IRS was called upon to value Robert Rauschenberg's *Canyon* for estate tax purposes. (It was among the approximately one billion dollars worth of art that the dealer Ileana Sonnabend left to her heirs after her death in 2007.⁷⁹) The problem arose because *Canyon*, now in the collection of the

74. See Jeffrey C. McCarthy, *Federal Income Taxation of Fine Art*, 2 CARDOZO ARTS & ENT. L.J. 1, 8 n.34 (1983) (listing various sections of the Internal Revenue Code that require determinations of value).

75. See DUBOFF ET AL., *supra* note 41, at N-45–46.

76. THE ART ADVISORY PANEL OF THE COMM'R OF INTERNAL REVENUE, ANNUAL SUMMARY REPORT FOR FISCAL YEAR 2015 4 (2016), https://www.irs.gov/pub/irs-utl/art_adv_panel_annual_summary_report_fy15.pdf.

77. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 8.18.1.1.1 (2012), http://www.irs.gov/irm/part8/irm_08-018-001.html.

78. *Id.* § 8.18.1.1.1.1.

79. Patricia Cohen, *Art's Sale Value? Zero. The Tax Bill? \$29 Million*, N.Y. TIMES, July 22, 2012, at A1.

Museum of Modern Art, is a mixed media combine in which one of the “media” is a stuffed bald eagle.⁸⁰ Selling a bald eagle is a felony under federal law;⁸¹ since it couldn’t legally be sold, the heirs’ experts had thus determined the masterpiece’s fair market value as \$0.⁸² The IRS, meanwhile, appraised the work at \$65 million, demanding \$29.2 million in taxes.⁸³ The *New York Times* quoted a member of the Art Advisory Panel, curator Stephanie Barron, as saying that “the work’s value is defined by its artistic worth. ‘It’s a stunning work of art and we all just cringed at the idea of saying that this had zero value,’” she said.⁸⁴ “It just didn’t make any sense.”⁸⁵ In the end, the heirs settled with the IRS after agreeing to donate *Canyon* to the museum, thereby avoiding estate taxes, but also, consistent with their position on the work’s market value, receiving no charitable deduction.⁸⁶

Before moving on from individual tax appraisals—with their mix of aesthetic and economic considerations—to higher-order, more solidly aesthetic judgments within tax law, it is worth mentioning the challenges the former set of judgments pose specifically to courts. For not all disputes over individual appraisals are settled by experts from the artworld.

Consider, for example, a dispute over the value of twenty-one pieces of pre-Columbian art that were donated to Duke University’s art museum in the late 1970s.⁸⁷ Dueling experts testified at trial, after which the tax court was, in its own words, “called upon to exercise its judgment in an area totally foreign to the training and experience of a trial judge” in order to “value a relatively obscure collection of art objects.”⁸⁸ For all but three of the works, the tax court picked a price halfway between the median value offered by the taxpayers’ expert and the high estimate given by the government’s witness.⁸⁹ The Fourth Circuit later had to decide whether the tax court’s judgment was clearly erroneous.⁹⁰

80. *See id.*

81. *See* 16 U.S.C. § 668 (2012).

82. Cohen, *supra* note 79.

83. *Id.*; *see generally* Charlotte Melbinger, Note, *The Sonnabend Estate and Fair Market Valuation of Canyon*, 163 U. PA. L. REV. ONLINE 239 (2015), http://scholarship.law.upenn.edu/penn_law_review_online/vol163/iss1/11 (critically discussing the I.R.S.’s appraisal).

84. Cohen, *supra* note 79, at A4.

85. *Id.*

86. Melbinger, *supra* note 83, at 264.

87. *See Ferrari v. Comm’r*, 58 T.C.M. (CCH) 221 (1989), *aff’d*, 931 F.2d 54 (4th Cir. 1991).

88. *Id.*

89. *Id.*

90. *See Ferrari*, 931 F.2d at 54.

In this and similar cases,⁹¹ courts end up doing more or less what they ordinarily do when faced with experts who disagree: they judge the experts' relative experience, reliability, and possible biases;⁹² they evaluate, as best they can, whatever reasoning the experts offer; they bring their own judgment to bear on the question at hand; and, sometimes, they just split the difference. In the end, the sentiment expressed by the judge hearing the dispute over pre-Columbian artworks is surely a common one: "[I]t is astounding," he wrote, "that these parties would seek a court solution . . . rather than arbitration by another expert."⁹³

More interesting from a theoretical standpoint than the appraisals courts and agency officials are often required to make, say, when an artwork is donated to a charitable organization, are the judgments made in law about what arts-related organizations count as charities in the first place. Section 501(c) of the Internal Revenue Code exempts certain types of nonprofit organizations from federal income taxes; donations to these organizations are also tax deductible.⁹⁴ Arts organizations are not directly covered, however. Instead, they have to qualify as organizations "organized and operated exclusively for . . . literary[] or educational purposes."⁹⁵ Instead of being considered, in one scholar's description, as "an endeavor that is inherently charitable," organizations that promote the arts "are typically evaluated based upon whether or not they are sufficiently 'educational.'"⁹⁶

Shoehorning arts organizations—opera companies, symphonies, galleries, theaters, and so on—into the "educational" category can sometimes prove awkward.⁹⁷ In practice, the operative distinction separates "educative" arts organizations from those whose primary objective is

91. See, e.g., *Furstenberg v. United States*, 595 F.2d 603 (Cl. Ct. 1979) (setting the fair market value of a Corot painting). Both *Ferrari* and *Furstenberg* are reprinted in DUBOFF ET AL., *supra* note 41, at N-51–75.

92. An interesting example of the latter is discussed in *Furstenberg*, where the claims court held that an expert's testimony should not be discounted because he or she served on the I.R.S.'s Art Advisory Panel. Doing so, the court noted, "might unnecessarily discourage distinguished experts from participation on the panel, to the ultimate detriment of the Internal Revenue Service and the tax system." *Furstenberg*, 595 F.2d at 605.

93. *Ferrari v. Comm'r*, 58 T.C.M. (CCH) 221 (1989), *aff'd*, 931 F.2d 54 (4th Cir. 1991).

94. See I.R.C. § 170(c)(2)(B) (2012) (defining, in the same terms, the organizations that can receive tax-deductible charitable donations).

95. I.R.C. § 501(c)(3) (2012).

96. Burch, *supra* note 73, at 324.

97. See Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 58 n.16 (1981) ("The performing arts are not covered clearly—or, one might reasonably conclude, even remotely—by any of the various exempt purposes set forth in I.R.C. § 501(c). Nevertheless, rather than deny exemption to such a large and growing class of nonprofits, the Service chose to engage in [an] act of imaginative reinterpretation, ruling that the performing arts come within the category of 'educational' institutions covered by § 501(c)(3).").

deemed commercial.⁹⁸ So, for example, an art gallery that sold paintings to the public, keeping a 10% commission on the sale, was deemed educational because it also held art classes, exhibited art made by students, used a jury to select whose work would be shown and sold, and “foster[ed] community awareness and appreciation of contemporary artists” in an area with no other museums or galleries.⁹⁹ By contrast, a gallery run by artists to sell their own work was said to promote private, rather than charitable, interests.¹⁰⁰

The distinctions can become even more fine-grained when it comes to things such as gift shops run by tax exempt art museums. Sales there are tax exempt only if the museum’s primary purpose in selling something is substantially related to the museum’s exempt—which is to say, educative—purpose.¹⁰¹ (The museum’s purpose in selling the item, not the buyer’s purpose in purchasing it, is determinative.¹⁰²) Thus, “items that develop a child’s artistic ability” are tax exempt, while those that “increase knowledge in general but not necessarily one’s appreciation of art,” or “only generally develop a child’s motor skills,” are not.¹⁰³ In the former camp, the IRS has placed not just paint sets and coloring books, but also kaleidoscopes (which “show[] a child that simply by changing patterns, he or she can make pictures or artistic designs”).¹⁰⁴ To the latter category, the IRS has consigned “tot blocks and [a] baby play gym,” for “[a]lthough these items arguably teach children about shapes and colors, they primarily develop general knowledge and motor skills.”¹⁰⁵

In making these kinds of distinctions, the law—here a catchall term for the joint work of Congress, the IRS, and the courts—necessarily makes aesthetic judgments about what kinds of activities count as *arts* education. More fundamentally, it establishes the context in which such judgments become relevant. The law expresses a normative view about what kinds of arts-related activities are worth subsidizing through the tax code: not artmaking per se, but arts education.¹⁰⁶ This choice of aims colors

98. Burch, *supra* note 73, at 325; *see also, e.g.*, *Goldsboro Art League, Inc. v. Comm’r*, 75 T.C. 337 (1980) (measuring an art gallery’s sales commissions against its work in promoting art to determine whether the gallery’s primary purpose was commercial or educational); Treas. Reg. § 1.501(c)(3)-1(c) (2017) (stating that the test for exemptions is whether the organization primarily engages in activities that further goals such as education and also whether its net earnings benefit private shareholders or individuals).

99. *Goldsboro Art League*, 75 T.C. at 344.

100. Burch, *supra* note 73, at 328 (citing Rev. Rul. 71-395, 1971-2 C.B. 228).

101. I.R.S. Tech. Adv. Mem. 97-20-002 (May 16, 1997).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Professor Burch contrasts the I.R.S.’s treatment of the arts versus science, where research conducted on behalf of for-profit companies can still count as an activity that serves the public interest.

subsequent judgments about what arts-related activities are deemed valuable, or even what kinds of activities are considered arts-related rather than purely commercial. As Micah Burch has argued in an insightful article, focusing solely on art's educational value may privilege the discursive and rational at the expense of art's "more abstract nonsemantic properties."¹⁰⁷ It underscores the connection between aesthetic and cognitive value much as the previous Subpart showed the law endorsing the connection between aesthetic and moral value.

In the end, this is just another example of how aesthetic judgment in law always takes place within the context of a particular set of governmental interests—interests or aims which themselves might reflect a set of aesthetic judgments.

The tax code's focus on education is interesting for another reason as well. It provides another instance of displacement: law's attempt to avoid the difficult question "What is art?" (or "What is an arts organization?") by substituting a seemingly easier question—in this case, "What is educational?" We have seen this earlier in the list of objects the IRS's so-called Art Appraisal Service is prepared to appraise.¹⁰⁸ (Recall that the IRS manual somewhat curiously describes the Service as appraising "works of art *including* . . . collectibles, classic automobiles, and historical memorabilia."¹⁰⁹) We have also seen this kind of displacement in the unbounded list of "arts" the NEA is statutorily authorized to fund.¹¹⁰ Moves like these may seem to allow the law to avoid placing limits on what counts as art, but they do so either by punting—as with the NEA, where decisions about what specific activities or genres to fund must still be made—or by shoehorning the arts into a different set of definitional limits. By focusing on educational charities rather than artistic ones, the tax code may appear to avoid having to define art directly. But this choice isn't neutral in regard to the arts, for it privileges (and provides incentives to create) art that conforms to alternative criteria.

Nor is the tax code's attempt to avoid defining art fully successful, for tax law directly employs the term in one important way: by disallowing depreciation deductions for works of art.¹¹¹ As a 1968 Revenue Ruling succinctly puts it: "A valuable and treasured art piece does not have a

"[I]ncidental private benefit in the tax exempt scientific context does not create a presumption of ineligibility for exemption as it does in the educational context." Burch, *supra* note 73, at 329.

107. *Id.* at 332.

108. *See supra* note 77 and accompanying text.

109. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL 8.18.1.1.1 (2012), http://www.irs.gov/irm/part8/irm_08-018-001.html (emphasis added).

110. *See supra* note 52 and accompanying text.

111. *See* McCarthy, *supra* note 74, at 58–59 ("The unavailability of the depreciation deduction is arguably the single most important tax benefit denied works of art.").

determinable useful life. While the actual physical condition of the property may influence the value placed on the object, it will not ordinarily limit or determine the useful life. Accordingly, depreciation of works of art generally is not allowable.”¹¹² As one commentator has observed, “[T]he essence of the holding is that a work of art will rarely, if ever, have a physical life shorter than its economic life and that the economic life cannot be determined.”¹¹³ Translated into current statutory terms—which no longer speak in terms of “useful life”—the judgment is that art is generally not subject to “exhaustion,” “wear and tear,” or “obsolescence.”¹¹⁴ Is this an aesthetic judgment? That may depend on the extent to which we see the claim—that art does not suffer from obsolescence—as more normative than descriptive, partaking in the belief that art should be considered timeless.

What undoubtedly does involve an aesthetic judgment is the distinction suggested in Revenue Ruling 68-232 between art that is “valuable and treasured” and that which is not.¹¹⁵ The leading case on the subject, *Judge v. Commissioner*,¹¹⁶ calls into question whether art that is not valuable and treasured should even be called art at all.

Judge involved an Alabama pediatrician who spent several thousand dollars on paintings of “clowns, dogs, . . . and other subjects intended to be of interest to children” to hang in his office.¹¹⁷ The doctor had bought the paintings for “business use.”¹¹⁸ They “were by unknown artists.”¹¹⁹ The tax court concluded they “were not of the kind ordinarily considered ‘valuable and treasured’ works of art.”¹²⁰ In fact, the court found the paintings to be “more wall decorations than works of art.”¹²¹

Implicit in the court’s opinion is a substantive aesthetic judgment: that art is an evaluative category such that “bad art” is a contradiction in terms. Because Dr. Judge’s paintings were not valuable and treasured, they were deemed decorations, not artworks. Not much turns, however, on denying the paintings’ arthood. The operative distinction is not whether something

112. Rev. Rul. 68-232, 1968-1 C.B. 79; *see also* John R. Thompson Co. v. United States, 338 F. Supp. 770 (N.D. Ill. 1971) (disallowing a depreciation deduction for oil paintings that adorned a Chicago restaurant).

113. McCarthy, *supra* note 74, at 62.

114. *See* I.R.C. § 167(a) (2012).

115. *See* Rev. Rul. 68-232, 1968-1 C.B. 79.

116. 35 T.C.M. (CCH) 1264 (1976).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* Though he convinced the court that Revenue Ruling 68-232 did not apply, Judge lost nevertheless, having failed to establish either the useful lives of his paintings or their salvage value. *See id.*

121. *Id.* (“[W]e accept petitioner’s contention that the paintings were office decorations and not works of art . . .”).

is art or not, but whether it is *valuable and treasured* art—which, according to the IRS, does not depreciate¹²²—rather than art that is less inherently valuable. The latter—art with purely instrumental or decorative value—can at least potentially be depreciated.¹²³

This kind of high/low distinction, and the evaluative aesthetic judgments it requires, arises in a much different area of tax law as well: state sales taxes and the exemptions offered to some, but not all, of the arts. Turning, then, from pediatricians to pole dancers: the State of New York taxes tickets to “place[s] of amusement,”¹²⁴ but it exempts charges “paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.”¹²⁵ In recent years, an Albany-area “adult ‘juice bar’” named Nite Moves, known primarily for its nude pole dancers, has argued that the “choreographic performance” exemption should apply to its door fees and charges for private dances.¹²⁶

Divided four to three, New York’s highest court disagreed in 2012. The legislature, it said, had created the exemption “with the evident purpose of promoting cultural and artistic performances in local communities.”¹²⁷ The court continued: “[S]urely it was not irrational for the Tax Tribunal to conclude that a club presenting performances by women gyrating on a pole to music, however artistic or athletic their practiced moves are, was . . . not . . . entitled to exempt status.”¹²⁸

A vigorous dissenter upbraided the majority for making “a distinction between highbrow dance and lowbrow dance that is not to be found in the governing statute and raises significant constitutional problems.”¹²⁹ “The people who paid these admission charges paid to see women dancing,” he wrote.¹³⁰ “It does not matter if the dance was artistic or crude, boring or erotic. Under New York’s Tax Law, a dance is a dance.”¹³¹

The dissent wondered why the court’s distinction among types of dance was any less content-discriminatory than a decision to tax *Hustler* but not

122. See *supra* note 112 and accompanying text.

123. See William M. Speiller, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUM. L. REV. 214, 264 (1980) (“Notwithstanding the Service’s resistance to depreciation of art objects, interviews with members of ten large accounting firms suggest that the vast majority of art objects used in a trade or business are being depreciated. According to the interviewees, most art objects purchased by their business clients are placed in a furniture and fixture account and written off over a period that permits regular depreciation, additional first-year depreciation, and full investment credit.”).

124. N.Y. Tax Law § 1101(f)(1) (McKinney 2017).

125. *Id.* § 1101(d)(5); see *id.* § 1105(f)(1).

126. 677 New Loudon Corp. v. N.Y. Tax App. Trib., 979 N.E.2d 1121, 1122 (N.Y. 2012).

127. *Id.*

128. *Id.* at 1123.

129. *Id.* (Smith, J., dissenting).

130. *Id.*

131. *Id.* at 1124.

The New Yorker “on the ground that what appears in *Hustler* is insufficiently ‘cultural and artistic.’”¹³² Nite Moves subsequently pressed this constitutional argument in a cert petition to the United States Supreme Court, which declined the case.¹³³

As we will see in more detail in Part III, the First Amendment’s tolerance for content distinctions within the tax code depends in part on how those are characterized: whether as a subsidy or a penalty.¹³⁴ Surely New York State can provide funding to the New York City Ballet without also offering a grant to Nite Moves. The question is whether taxing Nite Moves while exempting the ballet is any different.

Putting aside, for now, this difficult constitutional question, the present point is just to show how a particular state’s tax code not only embodies a set of aesthetic preferences—privileging dramatic, choreographic, and musical performances over other kinds of arts and entertainment—but has been authoritatively read to require even more fine-grained aesthetic judgments: separating highbrow from lowbrow dance, as the dissenting judge in the Nite Moves case put it.¹³⁵ Instead of shying away from aesthetic judgment, the New York Court of Appeals read its state tax code in a way that affirmatively requires such judgment on the part of tax auditors, administrative law judges, and ultimately, courts.

2. Tariffs

The *Brancusi* case has already provided an example of how the arts are treated within tariff law, where courts are forced to fill in statutory gaps, exercising their aesthetic judgment along the way.

132. *Id.* at 1125 (citing *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987)).

133. 677 New Loudon Corp. v. N.Y. Tax App. Trib., 134 S. Ct. 422 (2013).

134. Compare, e.g., *Ark. Writers’ Project*, 481 U.S. at 234 (striking down Arkansas’s “selective, content-based taxation of certain magazines”) with *id.* at 236 (Scalia, J., dissenting) (“Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system, and the general rule that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right. . . .” (internal quotation marks omitted)).

135. See *supra* note 129. In West Virginia, state law makes the distinction among dancers explicit: artistic services or performances receive tax exemptions, but “nude dancers or strippers” are specifically excluded. W. VA. CODE ANN. § 11-15-9(a)(40) (LexisNexis 2017). The law makes clear that

artistic performance or artistic service means and is limited to the conscious use of creative power, imagination and skill in the creation of aesthetic experience for an audience present and in attendance and includes, and is limited to, stage plays, musical performances, poetry recitations and other readings, dance presentation, circuses and similar presentations and does not include the showing of any film or moving picture, gallery presentations of sculptural or pictorial art, [or] nude or strip show presentations.

Id.

The *Brancusi* court was grappling with a paragraph of the Tariff Act of 1922, which provided duty-free entry to “original sculptures or statuary, including not more than two replicas or reproductions of the same,” so long as they were the “professional productions of sculptors,” and were *not* “articles of utility, nor such as are made wholly or in part by stenciling or any other mechanical process.”¹³⁶ Since Brancusi’s metal crescent was clearly the work of a professional sculptor and lacked utility, the problem was not with the statutory language so much as prior courts’ understanding of the concept of sculpture itself. In other words, the customs court was being asked to judge whether it still made sense, in 1928, to think of sculpture as “that branch of the free fine arts which chisels or carves . . . or models . . . imitations of natural objects, chiefly the human form.”¹³⁷

The *Brancusi* court’s willingness to consider “the modern schools of art . . . whose exponents attempt to portray abstract ideas rather than to imitate natural objects” led it to a more liberal understanding of the concept “sculpture.”¹³⁸ But the statutory language it was interpreting had itself already been broadened through a series of legislative amendments, as Congress—prodded by artists, collectors, and dealers—sought to keep the law’s aesthetic judgments up to date with those of a rapidly evolving artworld.¹³⁹

Throughout most of the nineteenth century, U.S. tariff law made art duty-free.¹⁴⁰ That changed with the Tariff Act of 1897, which imposed a 20% duty.¹⁴¹ By the early twentieth century, the duty had spawned protests from a coalition of American artists.¹⁴² This might seem surprising. Tariffs, after all, are protectionist measures put in place “to protect American-made goods from directly competing with foreign made goods.”¹⁴³ We might expect collectors or curators to seek a tariff exemption for artworks, since any duties imposed would only increase their costs. But American *artists* seeking exemptions would seem akin to Detroit carmakers asking Congress to lower the duties on their Japanese and German competition.

Importantly, however, American artists argued that artworks are unlike other goods. As the American Free Art League claimed in testimony before

136. Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858, 933 ¶ 1704.

137. *United States v. Olivotti & Co.*, 7 Ct. Cust. 46, 48 (1916).

138. *Brancusi v. United States*, 54 Treas. Dec. 428, 430–31 (Cust. Ct. 1928). This is not to say that other courts agreed with the *Brancusi* decision, which commentators have said was “isolated and minimized” for “almost thirty years.” Walter J. Derenberg & Daniel J. Baum, *Congress Rehabilitates Modern Art*, 34 N.Y.U. L. REV. 1228, 1240 (1959).

139. See Derenberg & Baum, *supra* note 138, at 1229–32.

140. *Id.* at 1229.

141. *Id.*

142. *Id.* at 1229–30.

143. Leonard D. DuBoff, *What Is Art? Toward a Legal Definition*, 12 HASTINGS COMM. & ENT. L.J. 303, 327 (1990).

Congress in 1908: “Free art by multiplying the art objects of the country will develop an artistic taste among the people, which will in turn create a demand for artistic products, and so call into existence new domestic industries.”¹⁴⁴ Or as artist Kenyon Cox put it: “[A]rt is not a natural want that must be supplied; . . . in art the supply has always preceded and created the demand; . . . the artist depends for his livelihood on educating his public to want what he can give them.”¹⁴⁵

Responding to these arguments, Congress in 1909 reduced the general duty on art from 20% to 15% and completely removed duties on artworks over twenty years old, as well as those being imported for museums.¹⁴⁶ As a revenue-raising scheme, the remaining tariffs were not a success. Approximately \$250,000 was taken in per year, but dozens of examiners and other employees in New York spent most of their time, and occasionally that of outside experts, determining the age of imported works.¹⁴⁷ Pushed primarily by John Quinn—a collector and attorney who would go on to represent Joyce and Pound, among others¹⁴⁸—Congress relented in 1913, removing all remaining tariffs on original paintings, drawings, and sculptures, as well as etchings, engravings, and woodcuts.¹⁴⁹ These were the exempted art objects and definitions at issue fifteen years later in *Brancusi*.

It is worth underscoring the mixed nature of the aesthetic judgments that were made in the law during this period. In cases like *Brancusi*, the customs court was asking about the meaning of the term “sculpture” full stop. It was asking a definitional question no different from that asked within the philosophy of art—Is sculpture necessarily imitative?

The advocates before Congress, on the other hand, were defining art in reference to the specific aims of tariff law, not acontextually, as philosophers or other theorists might do.¹⁵⁰ Thus, for example, John Quinn urged Congress to define sculpture, for tariff purposes, to include the original and just three reproductions, since more would permit too much foreign competition with American molders and bronze foundries.¹⁵¹ The

144. H.R. DOC. NO. 60-1505, at 7209 (1908) (quoted in Derenberg & Baum, *supra* note 138, at 1230).

145. Derenberg & Baum, *supra* note 138, at 1230 n.12 (emphasis omitted) (quoting H.R. DOC. NO. 60-1505, at 7217–18 (1908)).

146. *Id.* at 1232.

147. *Id.* at 1232 & n.22.

148. See generally ROBERT SPOO, WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN (2013) (describing Quinn’s importance within literary modernism).

149. Tariff Act of 1913, Pub. L. No. 63-16, 38 Stat. 114, 165.

150. See Derenberg & Baum, *supra* note 138, at 1232–34. For the canonical account of how philosophers and other theorists came to identify certain art forms as among “the arts,” see Paul Oskar Kristeller, *The Modern System of the Arts (I)*, 12 J. HIST. IDEAS 496 (1951), and *The Modern System of the Arts (II)*, 13 J. HIST. IDEAS 17 (1952).

151. Derenberg & Baum, *supra* note 138, at 1233.

American Free Art League justified its proposed limits on reproductions in a similar way. In its words, artworks “are noncompetitive, because a work of art is a work of genius and not the product of a machine. There are no two alike, as in the case of manufactures, but each has its individuality.”¹⁵² Protectionist tariffs, in other words, would be useless since the objects in question were truly unique.¹⁵³ The corollary, however, is that reproductions—at least those beyond a certain number—would have to fall outside tariff law’s statutory definition of art.

In this, an aesthetic judgment about the inherent uniqueness of art objects was offered as a reason why, by tariff law’s own lights, artworks should be imported duty-free. But this argument, in turn, offered a basis for including some arts but not others within tariff law’s fine arts exemption. The result was another aesthetic judgment: tariff law’s selective definition of art.

A similar dynamic can be found in tariff law’s longstanding aesthetic judgment that art cannot be useful.¹⁵⁴ As early as 1892, the Supreme Court had divided “works of art” into four classes for tariff purposes.¹⁵⁵ “The fine arts, properly so called” were said to be those “intended solely for ornamental purposes.”¹⁵⁶ The Court distinguished from the fine arts not only “bric-a-brac, . . . susceptible of an indefinite reproduction from the original,” but also objects that serve a useful purpose whether incidentally (like stained glass windows) or by primary design (as with “ornamented clocks”).¹⁵⁷

The distinction between fine art and useful objects has remained ever since. The Tariff Acts of 1930 and 1959 both withheld the fine arts exemption from “any articles of utility or for industrial use.”¹⁵⁸ Interpreting this section of the Tariff Schedules in 1971, the customs court held that

152. *Id.* at 1231 (quoting H.R. DOC. NO. 60-1505, at 7213–14 (1908)).

153. See Leonard D. DuBoff, *Changing Art Customs: Removing the Tariff Barriers*, 10 COLUM.-VLA J.L. & ARTS 45, 48 (1985) (“If a foreign-produced item is unique . . . and there exists no domestically-produced substitute, then there is no reason to tax that article upon its importation. The imposition of a tariff upon a unique foreign good has the effect of increasing the price to domestic consumers for an otherwise unavailable article.”).

154. See Tariff Act of 1913 ¶ 652 (“[T]he words ‘painting’ and ‘sculpture’ and ‘statuary’ as used in this paragraph shall not be understood to include any articles of utility”); *United States v. Olivotti & Co.*, 7 Ct. Cust. 46, 50 (1916) (distinguishing “articles of utility produced by industrial art because of a sense of need or usefulness” from “sculptures or examples of fine art the activities of which are chiefly, if not wholly, called into play by sentiment and for the purpose of appealing to the emotions”).

155. *United States v. Perry*, 146 U.S. 71, 74–75 (1892).

156. *Id.* at 74.

157. *Id.* at 75.

158. Tariff Act of 1959, Pub. L. No. 86-262, sec. 2(b), ¶ 1807(a), 73 Stat. 549, 549 (“The terms ‘painting’, ‘mosaic’, ‘drawing’, ‘work of the free fine arts’, ‘sketch’, ‘sculpture’, and ‘statuary’, as used in this paragraph, shall not be understood to include any articles of utility or for industrial use”); Tariff Act of 1930, Pub. L. No. 71-361, ¶ 1807, 46 Stat. 590, 684.

“the phrase ‘articles of utility’ should be given a very liberal construction” so that free entry would be given “only such paintings as were designed in their creation to be used solely in such a way as to appeal to the esthetic sense in the observer.”¹⁵⁹ Importantly, it continued:

While it may seem incongruous to hold that things which are in fact works of art are not so in a tariff sense, the apparent reason therefor lies in the manifest intent of Congress to admit at a low rate of duty artistic works representative of the fine arts such as paintings and sculptures, and at the same time to protect the American producers of such articles as belong to the decorative and industrial arts.¹⁶⁰

The court’s important suggestion here is that something might be a work of art *tout court* without being a work of art “in a tariff sense.”¹⁶¹ The definition of the latter, unlike the former, is dependent on the particular governmental aims that the statutory scheme is meant to accomplish: here, protecting domestic industry while “encourag[ing] the study and development of the free fine arts.”¹⁶²

Notably, it is this second purpose—importing art to encourage domestic artmaking—that likely explains a further aesthetic judgment that the Court of Customs and Patent Appeals handed down in 1946. The case, *United States v. J. E. Bernard & Co.*, involved an oil painting that Abbott Laboratories imported to use on the cover of a magazine it distributed to physicians.¹⁶³ Tariff law had already enshrined the aesthetic judgment that artworks cannot be useful; the court was thus called upon to make a still higher-order judgment: Does utility stem only from an object’s design or also from the way it is treated—the use to which it is (or isn’t) put? The court chose the latter.¹⁶⁴ The language of the statutory restriction on “articles for industrial use,” it held, implied that objects could become useful, and thus face a tariff, even if they weren’t designed that way.¹⁶⁵

159. *T. D. Downing Co. v. United States*, 66 Cust. Ct. 63, 68 (1971) (quoting *Pitt & Scott v. United States*, 18 C.C.P.A. 326, 328–29 (1931)).

160. *Id.* (quoting *Frei Art Glass Co. v. United States*, 15 Ct. Cust. 132, 136–37 (1927)).

161. *Id.* (quoting *Frei Art Glass Co.*, 15 Ct. Cust. at 136).

162. *United States v. J. E. Bernard & Co.*, 33 C.C.P.A. 166, 172 (1946).

163. *Id.* at 167 (“[T]he painting is an original oil painting and considered to be a work of art and was created solely for its aesthetic value but was imported for the sole purpose of being reproduced as a cover page on a magazine . . .”).

164. *Id.* at 169. The court went on to note a variety of examples in which objects are subject to differing duties based on the way they are used. Leather imported to make shoes, musical instruments imported for installation in a church, and artworks imported for museums all faced a lower tariff than leather, instruments, and artworks imported for other reasons. *See id.* at 170.

165. *See id.* at 172–73 (emphasis omitted) (quoting H. COMM. ON WAYS AND MEANS, 71ST CONG., MEMORANDUM OF COURT DECISIONS AFFECTING THE TARIFF ACT OF 1922 66 (1929)).

Whenever they are put to use, artworks are considered useful—and thus, under tariff law, cannot be considered artworks. Note the three levels of aesthetic judgment at play here: first, whether a given object is useful; second, whether useful objects can be artworks; and third, whether an object's utility (or lack thereof) is defined in relation to its creator or user.

In 1989, the United States moved from the Tariff Schedules to an international standard known as the Harmonized Commodity Description and Coding System.¹⁶⁶ Chapter 97 of the Harmonized System applies to “works of art, collectors’ pieces and antiques” and provides duty-free entry to paintings, drawings, and pastels executed entirely by hand; collages, original engravings, prints, and lithographs; and original sculptures in any material—including the first twelve casts or reproductions.¹⁶⁷ The Harmonized System lacks the TSUS’s explicit restriction on “articles of utility.” But a note to Chapter 97 specifies that the sculpture category “does not apply to mass-produced reproductions or works of conventional craftsmanship of a commercial character, even if these articles are designed or created by artists.”¹⁶⁸ And when Sotheby’s imported bronze furniture made by Diego and Alberto Giacometti in 1999, a Customs Ruling held that the Harmonized System’s exclusion of “works of conventional craftsmanship . . . equates to the exclusion of articles of utility” found in the previous Tariff Schedules.¹⁶⁹ To qualify as sculpture, furniture—even furniture made by renowned, professional sculptors—cannot be “capable of any functional use.”¹⁷⁰

So what justifies tariff law’s longstanding requirement that works of art not be useful? Not much, according to one of the area’s leading commentators, Leonard DuBoff. Denying objects “free entry merely because they serve[] a functional purpose . . . does nothing to enhance the protection of domestic producers from foreign competition,” DuBoff

166. See DuBoff, *supra* note 143, at 324.

167. Harmonized Tariff Schedule of the United States (2017) – Revision 1, USITC Pub. 4706, ch. 97 (July 1, 2017). In 2015, imports of paintings, drawings, and pastels were valued at \$8.26 billion, while sculptures valued at \$1.24 billion were imported. See *U.S. Int’l Trade Comm’n, U.S. Imports for Consumption at Customs Value*, USITC TRADE DATABASE, <https://dataweb.usitc.gov/scripts/details.asp?Phase=HTS10&HTS8=97011000&DESC=> (last updated July 2017); <https://dataweb.usitc.gov/scripts/details.asp?Phase=HTS10&HTS8=97030000&DESC=> (last updated July 2017).

168. Harmonized Tariff Schedule of the United States (2017) – Revision 1, USITC Pub. 4706, ch. 97 (July 1, 2017); see also U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: WORKS OF ART, COLLECTOR’S PIECES, ANTIQUES, AND OTHER CULTURAL PROPERTY (2006), http://www.cbp.gov/sites/default/files/documents/icp061_3.pdf (“[I]f a professional artist produces a piece of jewelry (wearable) that is unique, it is not allowed under heading 9703, HTSUS, as it is a functional object. The same holds true for furniture such as the tables and chairs created by Diego Giacometti, a recognized professional artist. They are functional and useable as furniture and not within the guidelines of heading 9703, HTSUS.”).

169. U.S. Customs & Border Prot., Internal Advice Letter HQ 963158 (Jan. 14, 2000).

170. *Id.*

claims, for “[t]he usefulness of a work of art is irrelevant to its competitive effect.”¹⁷¹

DuBoff’s claim is surely right in regard to any number of individual cases. In one, a church in Vermont removed six panels from its wood doors and shipped them to England, where religious imagery was carved onto each.¹⁷² Upon return, the U.S. imposed a duty because the panels were deemed integral to the doors, which themselves had a utilitarian function.¹⁷³ It is hard to see what purpose the duty served in a case like that; surely domestic producers are not differently affected by foreign carvings that are incorporated into doors, as opposed to those that are not.

That said, the distinction between beauty and utility—between the fine arts and useful objects—is a venerable one within the history of aesthetics.¹⁷⁴ The philosopher Larry Shiner has described how the terms “artist” and “artisan” went from being interchangeable to, by the end of the eighteenth century, sharply opposed; artists were said to create works of fine art while artisans crafted useful objects.¹⁷⁵ Pleasure—particularly disinterested pleasure—was increasingly contrasted with utility as the goal or mark of aesthetic experience. And on the side of production (rather than reception), the artist’s genius was distinguished from the rule following said to be characteristic of the mechanical arts.¹⁷⁶ As Professor Shiner writes: “Both the separation of artist from artisan (genius vs. rule) and of the aesthetic from the instrumental (pleasure vs. utility) were implicated in the construction of the category of fine art from the beginning.”¹⁷⁷

This connection to genius is enshrined in U.S. tariff law as well. The customs court has written of “*the rare and special genius* Congress sought to protect in providing for free entry of original works of art.”¹⁷⁸ And a number of prominent cases hold that works of art require not just professional skill but “artistic imagination”;¹⁷⁹ to count as artistic, “there must be in the production of the article a mental concept resulting in an

171. DuBoff, *supra* note 143, at 326.

172. *T. D. Downing Co. v. United States*, 66 Cust. Ct. 63, 64 (1971).

173. *Id.* at 69.

174. See, e.g., Paul Guyer, *Beauty and Utility in Eighteenth-Century Aesthetics*, 35 EIGHTEENTH-CENTURY STUD. 439 (2002).

175. LARRY SHINER, *THE INVENTION OF ART: A CULTURAL HISTORY* 5 (2001).

176. *Id.* at 82.

177. *Id.* at 86.

178. *Seibert v. United States*, 65 Cust. Ct. 380, 380 (1970) (emphasis added).

179. See, e.g., *United States v. Oberlaender*, 25 C.C.P.A. 24, 28 (1937). *But see* *United States v. Ecclesiastical Art Works*, 139 F. 798, 799 (C.C.S.D.N.Y. 1904) (“Whether the design and construction show such originality of conception and perfection of execution as to mark it as the work of a genius is not the question herein. The work as an entirety confessedly falls within the accepted definition of a work of art. It represents the handiwork of an artist; it embodies something more than the mere labor of an artisan; it is a skillful production of the beautiful in visible form.”).

aesthetic expression of the producer.”¹⁸⁰ Considering further the role of the maker, the Court of Customs and Patent Appeals, in a case that questioned whether one of the world’s great diamonds counted as an “artistic antiquity,” concluded: “If his work was merely that of a cutter following well-established rules, and involving no aesthetic expression originating in his own mind and thought, it is not artistic, however beautiful it may be.”¹⁸¹ A “skilled craftsman,” the court held, can certainly make beautiful objects:

It is only, however, when he leaves the beaten paths of his trade, and, as a result of a mental concept, constructs something original with him, which appeals to the artistic eye and mind, that his work ceases to be that of an artisan and becomes that of an artist.¹⁸²

The language here is exactly that of eighteenth-century aesthetics. Art, imagination, and genius are set against rule-following, craftsmanship, and the production of useful objects.¹⁸³

This helps explain why tariff law has historically favored the former set of characteristics. If an object could be made by following some rule, there is little reason why that might not occur domestically rather than abroad. Protectionist tariffs could be effective in bringing that about. But if the fine arts, by contrast, cannot be produced by following rules, consumers have to depend on the spark of genius—wherever it can be found. Imposing tariffs in that situation would not shift production to the U.S.; it would simply make the unique artworks produced by geniuses abroad more expensive here.

Once again, a contested judgment about the arts is endorsed within the law, not as a general matter, but in reference to a particular governmental aim. A view of art’s creation which sees art as the product of rule-transcending genius is used to justify art’s special status within tariff law, with its goal of protecting domestic industry. This philosophical view about the creation of art, however, comes along with a concomitant view about art’s proper use—or rather, its lack of use. Limiting “art” to objects that are intended to provide only disinterested pleasure, tariff law ends up reinforcing the distinction between art and craft, beauty and utility—privileging the former over the latter. And if the duty-free importation of

180. *Mayers, Osterwald & Muhlfield (Inc.) v. Bendler*, 18 C.C.P.A. 117, 126 (1930) (interpreting the Tariff Act of 1922’s “artistic antiquities” provision).

181. *Id.*

182. *Id.* at 127.

183. See *SHINER*, *supra* note 175, at 86 (“By the 1770s, critical and theoretical discussion of the criteria for inclusion [among the fine arts] focused on either the production of the fine art work (genius vs. rule) or its reception (pleasure vs. utility.”); see *id.* at 148 (discussing how Immanuel Kant’s immensely influential aesthetic theory treated art as “the product of spontaneous genius and works of craft the product of diligence and rules”).

(this type of) art is meant to “encourage the study and development” of similar arts in the U.S.,¹⁸⁴ tariff law not only ends up adopting a particular view of what “art” is, it helps to propagate that view as well.

C. *Land Use*

In 1956, Marion and Webster Stover hung a clothesline draped with old clothes and rags in front of their house in Rye, New York.¹⁸⁵ Each year, they added another clothesline to protest Rye’s tax rates until the city, in 1961, passed a law banning clotheslines visible from the street.¹⁸⁶ The Stovers challenged the new law up to New York’s highest court, which was unimpressed by the public safety rationales the city offered. It held instead that “the statute, though based on what may be termed aesthetic considerations, proscribes conduct which offends sensibilities and tends to debase the community and reduce real estate values.”¹⁸⁷ This, it said, was a proper use of the police power; just as the state can regulate loud sounds or bad odors, so too can it “proscribe[] conduct which is unnecessarily offensive to the visual sensibilities of the average person.”¹⁸⁸

The *Stover* case provides an example of the everyday aesthetic judgments made by city councils, zoning boards, and historical preservation committees throughout the country. *Stover* is notable for frankly acknowledging the aesthetic interests motivating the city’s ordinance, rather than trying to mask them as safety, health, or economic concerns. Notable too is its acknowledgment that courts had long rejected such purely aesthetic values as legitimate governmental interests.¹⁸⁹ At the same time, the *Stover* court fails to acknowledge Rye’s other possible motivation: shutting down protest. Nor does it question the particular aesthetic value expressed by Rye’s law: that clotheslines are unsightly. Thus, although *Stover* shows how law’s aesthetic judgments can collide with First Amendment interests—here, neighborhood beautification versus political protest—*Stover* would have been a much harder case if it were Rye’s aesthetic judgment itself, and not its tax policy, that the Stovers were challenging. What if the couple just didn’t agree that clotheslines are

184. United States v. J. E. Bernard & Co., 33 C.C.P.A. 166, 172 (1946).

185. *People v. Stover*, 191 N.E.2d 272, 273 (N.Y. 1963).

186. *Id.*

187. *Id.* at 274.

188. *Id.* at 276.

189. *Id.* at 274–75; cf. 2 EDWARD H. ZIEGLER, JR., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 16:5 (4th ed. 2012) (calling *Stover* “one of the first state court decisions to indicate that aesthetic interests related to community appearance were entitled to full recognition as an independent public purpose for land use regulation”).

unsightly? Would it have been enough for the city to respond that their opinion is well out of the mainstream?

Questions like these are made more urgent by the sheer ubiquity of the aesthetic judgments made throughout land use law. In scope, these range from major national laws—such as the Federal Highway Beautification Act, which limits signs alongside nonurban interstate highways both to promote safety and “to preserve natural beauty”¹⁹⁰—to daily, case-by-case decisions made by local groups like West Palm Beach’s Art in Public Places Committee, a seven-member group of volunteers established to oversee the 1% of construction costs private developers are required to spend either installing art (made by a “professional of serious intent and ability”) or preserving “historically important or culturally significant elements in the project.”¹⁹¹

Requirements and committees like West Palm Beach’s are common throughout the country, and they are only one of many ways in which local governments engage in “a kind of aesthetic control.”¹⁹² In the Takings Clause case from which that last phrase derives, the California Supreme Court compared a law akin to West Palm Beach’s to “traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities”—regulations it referred to collectively as “aesthetic conditions.”¹⁹³ As the court noted, the U.S. Supreme Court has approved a broad array of such conditions, in cases ranging from outdoor advertising limits,¹⁹⁴ to zoning restrictions promoting “the enjoyment of scenic beauty,”¹⁹⁵ to historic preservation laws that give a Landmark Preservation Committee the ability to regulate “properties and areas that have . . . ‘special historical or aesthetic interest or value’”¹⁹⁶ in order to foster “civic pride in the beauty and noble accomplishments of the past.”¹⁹⁷

A few points in these cases are especially worth highlighting. First, in the Supreme Court’s landmarks case, *Penn Central*, it observed that by

190. 23 U.S.C. § 131 (2012). Note that like many, if not most, of the sign laws in force throughout the country, § 131 discriminates on the basis of content—exempting “free coffee” signs, for example—and thus may be unconstitutional, given the Supreme Court’s recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

191. WEST PALM BEACH, FLA., CODE OF ORDINANCES ch. 78, §§ 121–35 (2003).

192. *Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal. 1996).

193. *Id.* (emphasis omitted).

194. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981).

195. *Agins v. City of Tiburon*, 447 U.S. 255, 261 n.7 (1980) (quoting CAL. GOV’T CODE § 65561(a) (West 1979)).

196. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 110 (1978) (quoting N.Y.C. ADMIN. CODE ch. 8–A, § 207–1.0(n) (1976)).

197. *Id.* at 109 (quoting N.Y.C. ADMIN. CODE ch. 8–A, § 205–1.0(b) (1976)).

1978 “all 50 States and over 500 municipalities ha[d] enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance.”¹⁹⁸ This goes to the ubiquity point above: historic preservation laws, and the complex aesthetic judgments they demand, have swept the country.

Second, *Penn Central* illustrates what kind of people tend to make these aesthetic judgments. As it describes, New York City’s Landmark Preservation Committee was designed to include a mix of specialists and nonspecialists, including three architects, one city planner or landscape architect, one realtor, one local historian, and residents of all five boroughs.¹⁹⁹ Committee members are now supported by a staff of seventy preservationists and other experts.²⁰⁰ Given the makeup of the committee and its office, New York City might seem to be hedging its bets on whether aesthetic judgment is an area that admits of expertise, or whether it is hopelessly subjective, such that the best the city can do is to try to balance different people’s perspectives or biases.²⁰¹

The Supreme Court has shown a similar ambivalence about the objectivity of aesthetic judgment—and this is the third point that emerges from the cases above. In the Court’s billboard ban decision, *Metromedia*, Justice White claimed that “esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized.”²⁰² At the same time, his plurality opinion more confidently asserted that “[i]t is not speculative to recognize that billboards by their very nature . . . can be perceived as an ‘esthetic harm.’”²⁰³ Here aesthetic value is part of an object’s “nature”—not varying or subjective at all. Elsewhere in *Metromedia*, a side debate between Justices Brennan and Rehnquist turned on who should decide the substantiality of a city’s aesthetic interests. “Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics,” Rehnquist observed,²⁰⁴ while Brennan suggested that courts themselves should decide whether aesthetic interests may be more vital, and hence more permissible,

198. *Id.* at 107; *see also* National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915.

199. Harmon H. Goldstone, *Aesthetics in Historic Districts*, 36 LAW & CONTEMP. PROBS. 379, 384–85 (1971).

200. *See About LPC*, N.Y.C. LANDMARKS PRESERVATION COMMISSION, <http://www1.nyc.gov/site/lpc/about/about-lpc.page> (last visited Sept. 25, 2017).

201. *See infra* Part II.B (on the “subjectivity” of aesthetic judgment).

202. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion).

203. *Id.*

204. *Id.* at 570 (Rehnquist, J., dissenting).

in places like Williamsburg and Yellowstone than the industrial parts of San Diego.²⁰⁵

Notably, *all* of the Justices in *Metromedia* agreed that aesthetics formed a proper basis for governmental regulation.²⁰⁶ But it hasn't always been so. Commentators identify three historical stages in the judiciary's attitude towards aesthetic regulation.²⁰⁷ The early period can be summed up by a 1903 New Jersey state court opinion finding no case "which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Esthetic considerations are a matter of luxury and indulgence rather than of necessity," the court held, denying that anything but necessity gives rise to the state's police power.²⁰⁸ Early period courts worried not only about the frivolousness of aesthetics (particularly in comparison with rights to property or autonomy), but also its subjectivity: one court, afraid that legislatures might go from favoring limericks to Keats and back again, contrasted aesthetics with public health, on which all were said to agree.²⁰⁹

In the middle period, courts began upholding aesthetic regulations but only if they could be tied to some traditional state interest, such as health, safety, property values, or morality.²¹⁰ (Interestingly, morals legislation has since become more controversial even as aesthetic regulation has grown more widely accepted.²¹¹ Left largely unaddressed is why anyone would accept one as a legitimate state interest but not the other.²¹²) Middle period links to nonaesthetic interests were sometimes strained, however, as when bans on billboards were justified as measures meant to alleviate prostitution.²¹³

The third and current period—in which property can be regulated or taken for *purely* aesthetic reasons—finds canonic expression in Justice Douglas's opinion in *Berman v. Parker* in 1954. There, a unanimous

205. *Id.* at 530–34 (Brennan, J., concurring in the judgment). As he explains in more detail in his dissent in *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 818–31 (1984), Brennan's test would ask how comprehensively a city is advancing its aesthetic interests in order to ensure that particular aesthetic regulations are not being used pretextually to target expression.

206. *See Metromedia*, 453 U.S. at 502; *id.* at 525–28 (Brennan, J., concurring in the judgment); *id.* at 554–55 (Stevens, J., dissenting); *id.* at 557 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

207. *See ZIEGLER, supra* note 189, §§ 16:2–5 (providing cases); John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 373 n.46 (1982) (listing secondary sources).

208. *City of Passaic v. Paterson Bill Posting, Advert. & Sign Painting Co.*, 62 A. 267, 268 (N.J. 1905), *overruled in part by State v. Miller*, 416 A.2d 821 (N.J. 1980).

209. *City of Youngstown v. Kahn Bros. Bldg. Co.*, 148 N.E. 842, 844 (Ohio 1925).

210. *See Costonis, supra* note 207, at 374; ZIEGLER, *supra* note 189, § 16:4.

211. *See supra* note 23.

212. *But see* Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas*, 54 DEPAUL L. REV. 671, 692 (2005).

213. *See Costonis, supra* note 207, at 374 & n.52.

Supreme Court held that the public good encompasses values that “are spiritual as well as physical, aesthetic as well as monetary.”²¹⁴ Douglas continued: “It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”²¹⁵ Speaking of certain housing as “an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn,” the *Berman* Court made clear that the government could exercise eminent domain solely to replace a blighted area with a more attractive one.²¹⁶

A state-by-state study conducted in 2006 found that courts in twenty-three states and the District of Columbia had held explicitly that aesthetics alone justified use of the police power; only ten states say that aesthetics alone isn’t enough.²¹⁷ As California’s highest court has noted: “Present day city planning would be virtually impossible under a doctrine which denied a city authority to legislate for aesthetic purposes.”²¹⁸

Yet courts and commentators continue to worry that aesthetic regulation—whether in zoning, historic preservation, eminent domain, or nuisance law²¹⁹—is doomed by its subjectivity. How, they ask, can the government establish administrable standards if we can’t agree about what neighborhoods or buildings or architectural styles or paint colors or types of land use (e.g., a housing tract versus a cemetery) count as aesthetically valuable?²²⁰ This is the looming “wholesale” question about aesthetic judgment—the one big aesthetic meta-judgment—in an area of law that largely consists of innumerable “retail” judgments about design plans, paint colors, zoning variances, and so on.

Grasping for more objective standards, courts and legislatures often incorporate economic considerations, looking to the effect a building or particular use of land will have on surrounding property values or the community’s tax base. But estimating the likely change to property values is hardly an exact science.²²¹ As Stephen Williams has written: “When a house is sold, the contract ordinarily does not say, ‘Two thousand dollars

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

215. *Id.*

216. *Id.* at 32–33.

217. Kenneth Pearlman et al., *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119, 1181–82 (2006). The remaining states haven’t explicitly said whether aesthetic interests alone suffice, although twelve of them have hinted that they might.

218. *Id.* at 1124 (quoting *Metromedia, Inc. v. City of San Diego*, 592 P.2d 728, 736 (Cal. 1979), *rev’d*, 453 U.S. 490 (1981)).

219. See generally Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141 (1987).

220. See *id.* at 146–47.

221. Samuel E. Poole III, *Architectural Appearance Review Regulations and the First Amendment: The Good, the Bad, and the Consensus Ugly*, 19 URB. LAW. 287, 323 (1987).

has been marked off because the house next door is painted fuchsia.”²²² More fundamentally, economic effects are parasitic on aesthetic value judgments.²²³ To say that property values in a neighborhood will go down if a cemetery is built nearby, or if yard signs, or green exterior paint, or Tudor architecture is allowed is to say that potential buyers will be aesthetically displeased enough by these choices that their interest in living in the neighborhood will diminish. At best, reference to property values might serve as a check on attempts to impose overly elite or idiosyncratic aesthetic standards.²²⁴

What reference to property values also does is to underscore the contextual nature of many of the aesthetic judgments made in land use law. That is to say, most green paint jobs or Tudor-inspired architectural plans are rejected, when they are, not because those choices are found objectively ugly in and of themselves, but rather because they are found incongruent with their surroundings.²²⁵ Of course, some aesthetic regulations seek to prevent too much *similarity* instead of (or in addition to) too much difference within a neighborhood.²²⁶ But either way, the aesthetic judgment is a comparative one—a judgment about how a building or neighborhood or particular land use relates to those that surround it in space or have preceded it in time.

The contextual nature of these judgments suggests that, in land use law, aesthetics can't simply be equated with visual beauty. Instead, as John Costonis has influentially argued, “aesthetics connotes the pursuit of cultural stability, in which visual form plays a significant but not dispositive role.”²²⁷ In the words of another commentator: “[C]ontroversies about standards of ‘beauty’ in aesthetic regulation are in effect controversies over the impact of change[s to] . . . those features of the visual environment that are felt to play a socially integrative, identity-nurturing, and culturally stabilizing role within the community.”²²⁸ This is to say that the point of aesthetic judgment in land use law is generally not to decide on the level of first principles what types of buildings or uses of land are the prettiest. The point instead is to determine what aspects of a given visual environment contribute to the area's identity and social cohesion. Changes to the area's visual environment are regulated to help

222. Stephen F. Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 20 (1977).

223. 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* § 16:3 (rev. ed. 2003).

224. ZIEGLER, *supra* note 189, § 16:6; *see also* Costonis, *supra* note 207, at 406 n.166 (citing cases that distinguish legal and so-called “museum” standards of aesthetics).

225. 4 WILLIAMS & TAYLOR, *supra* note 223, § 76:1.

226. *Id.*

227. Costonis, *supra* note 207, at 377.

228. ZIEGLER, *supra* note 189, § 16:7.

maintain that identity and reinforce that cohesion—not simply to “keep up appearances.”

As Costonis argues in his subtle and important work, this cultural stability account of aesthetic judgment offers the possibility of drawing administrable standards from “intersubjective patterns of community preference.”²²⁹ These preferences may not be specific enough to justify the more particular details of some land-use regulations, particularly in designated historic districts.²³⁰ Nor will they be uncontested. There is always the danger that regulations aimed at cultural stability and identity maintenance will serve to exclude newcomers, or ignore members of the community already there.²³¹ As Costonis would be the first to admit, cultural stability just casts debates over aesthetic regulation in a new, clearer light; it doesn’t end them. But his “cultural stability–identity” account provides a response to those who worry that aesthetic regulation will vary hopelessly with the eye of every regulating beholder.

Costonis’s account offers another example of the way aesthetic values and categories often take on different meanings within different areas of law. As he notes, “Many landmarks and historic districts are not even described as ‘beautiful’ by their defenders.”²³² Here, as we saw before in the discussions of tariff law and government funding, aesthetic categories that get deployed within the law have to be understood in light of the governmental ends that area of law is meant to advance. According to Costonis, the end in land use law is cultural stability. Thus, aesthetic regulation really refers to rules maintaining appearances that nurture a given community’s identity and “stimulate a sense of civic pride.”²³³

Of course, none of this settles the question of what to do with those who disagree with their community’s governing aesthetic: the family committed to building a postmodern house in a Tudor neighborhood, for example.²³⁴ Even if aesthetic regulations can be drafted in administrable ways (thus avoiding due process concerns), it remains the case that some may resist their unambiguous commands for aesthetic reasons of their own (thus giving rise to First Amendment concerns): worries about a government-imposed aesthetic orthodoxy. I leave to Part III the discussion of how First Amendment collisions like these might be navigated.

229. Costonis, *supra* note 207, at 432.

230. *Id.* at 436–38.

231. See Lior Jacob Strahilevitz, *Historic Preservation and Its Even Less Authentic Alternative* 19 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 594, 2016), <https://ssrn.com/abstract=2838456>.

232. Costonis, *supra* note 207, at 406.

233. ZIEGLER, *supra* note 189, § 16:7 (quoting *State v. Miller*, 416 A.2d 821, 824 (N.J. 1980)).

234. See John Nivala, *Constitutional Architecture: The First Amendment and the Single Family House*, 33 SAN DIEGO L. REV. 291, 302 (1996).

D. Obscenity

Obscene material falls outside the protections of the First Amendment.²³⁵ Since the Supreme Court held this in 1957, distinguishing what does and doesn't count as obscene has become immensely important.²³⁶ But not until 1973, in *Miller v. California*, did the Court finally coalesce around a definition. In *Miller*, it said that a work's obscenity turns on:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²³⁷

The third prong of the *Miller* test, which remains good law, thus made aesthetic judgment a constitutional necessity in obscenity cases. Works of art charged as obscene are rescued by the First Amendment if they are found to have serious artistic value. As a result, since *Miller*, case-by-case, retail-level aesthetic value judgments have been part of every obscenity prosecution in the country.²³⁸

In addition to these proliferating retail judgments, the Supreme Court has also made an important higher-order aesthetic judgment of its own. In *Pope v. Illinois*, decided in 1987, the Court held that a work's artistic value is an objective matter—one which does not “vary from community to community based on the degree of local acceptance it has won.”²³⁹ In this, artistic value was said to differ from prurience and offensiveness—the first

235. *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

236. *See Miller v. California*, 413 U.S. 15, 22 n.3 (1973) (noting that the Court heard thirty-one obscenity cases in between its rulings in *Roth* and *Miller*).

237. *Id.* at 24 (citation omitted).

238. *See Jennifer M. Kinsley, The Myth of Obsolete Obscenity*, 33 *CARDOZO ARTS & ENT. L.J.* 607, 627–38 (2015) (detailing the dozens of federal and state obscenity prosecutions filed and resolved in recent years). Notably, a work's serious value is not a defense in cases involving child pornography. *See New York v. Ferber*, 458 U.S. 747, 761 (1982). *But see id.* at 776 (Brennan, J., concurring in the judgment) (arguing that “depictions of children that in themselves do have serious literary, artistic, scientific, or medical value” are protected by the First Amendment); *id.* at 777 (Stevens, J., concurring in the judgment) (declining to reach works that have “literary, artistic, scientific, or educational value”).

239. *Pope v. Illinois*, 481 U.S. 497, 500 (1987); *see also id.* at 500–01 (“The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.”).

two prongs of the *Miller* test—both of which are judged against local standards.²⁴⁰

Justice Scalia reluctantly concurred in *Pope* with what he called the Court's "'objective' or 'reasonable person' test of 'serious literary, artistic, political, or scientific value,'" as he thought it the most faithful interpretation of *Miller*.²⁴¹ For his own part, however, Justice Scalia offered a view of aesthetics diametrically opposed to the Court's objective stance.²⁴² "Since ratiocination has little to do with esthetics," he wrote, "the fabled 'reasonable man' is of little help in [judging aesthetic value], and would have to be replaced with, perhaps, the 'man of tolerably good taste'—a description that betrays the lack of an ascertainable standard."²⁴³ "Just as there is no use arguing about taste," Scalia concluded, "there is no use litigating about it."²⁴⁴

Similarly worried about the purported subjectivity of aesthetic judgment, Justice Stevens dissented in *Pope*, arguing that a work should receive First Amendment protection "if *some reasonable persons* could consider it as having serious literary artistic, political, or scientific value."²⁴⁵ His concern was with cases in which some viewers—perhaps experts²⁴⁶—might find artistic value while others, even a majority, do not. The First Amendment should not allow for art and literature to be leveled down to the lowest common denominator, Stevens argued.²⁴⁷

But whether juries ask if the "fabled 'reasonable man'"²⁴⁸ *would* find, or if "*some reasonable persons*"²⁴⁹ *could* find serious artistic and literary value, questions remain about what serious aesthetic value entails.²⁵⁰ And on that, courts and commentators are split.

240. *Id.* at 500.

241. *Id.* at 504 (Scalia, J., concurring).

242. *See id.* (Scalia, J., concurring) ("[I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value . . .").

243. *Id.* at 504–05 (Scalia, J., concurring).

244. *Id.* at 505 (Scalia, J., concurring).

245. *Id.* at 512 (Stevens, J., dissenting).

246. *See id.* at 512 n.5 (Stevens, J., dissenting) ("The problems with the Court's formulation are accentuated when expert evidence is adduced about the value that the material has to a discrete segment of the population—be they art scholars, scientists, or literary critics. Certainly a jury could conclude that although those people reasonably find value in the material, the ordinary 'reasonable person' would not.").

247. *Id.* at 512 (Stevens, J., dissenting); *cf.* FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 144 (1976) ("[I]f material has serious literary value for a significant portion of the population, then the fact that this portion is neither average nor in the majority is irrelevant.").

248. *Pope*, 481 U.S. at 505 (Scalia, J., concurring).

249. *Id.* at 512 (Stevens, J., dissenting).

250. Before *Miller*, the Court employed a more restrictive test, asking not whether a work had serious artistic value, but whether it was "utterly without redeeming social value." *See* *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion).

In a 1976 monograph on obscenity law, Professor Frederick Schauer argued that “[i]f a work is a serious literary endeavor, with the purpose of stimulating the mind, and if it has this effect on a significant number of people, then literary value exists and there can be no finding of obscenity.”²⁵¹ On Schauer’s definition, the seriousness of a work’s value turns on both the purpose of the artist and the quality of the work, measured in terms of the effects felt by its audience.²⁵² According to Schauer, questions about serious value “will be decided in most cases by an evaluation of expert testimony.”²⁵³

The purpose and value inquiries, conjoined in Schauer’s definition, have sometimes been treated as competing ways of understanding seriousness.²⁵⁴ According to one approach, “serious” refers to the magnitude of value, whether judged by the court’s own aesthetic sensibilities or by that of some audience, either broader or more specialized. Courts taking this approach have never made clear, however, exactly how much value is needed to overcome an obscenity charge.²⁵⁵ On the second approach, “serious” refers instead to a work’s sincerity or authenticity.²⁵⁶ The question here is whether the work’s intended audience

251. SCHAUER, *supra* note 247, at 144–45 (footnote omitted); *see also id.* at 145 (“The same kind of evaluation of seriousness of purpose and value that goes into the determination of literary merit is also applicable to assessments of artistic value.”).

252. *See id.* at 144–45. A recent example of Professor Schauer’s two-pronged approach comes from *United States v. McCoy*, 937 F. Supp. 2d 1374 (M.D. Ga. 2013). There, the court heard from a literature professor who testified that the defendant’s sexually explicit stories, distributed over the internet, deployed “complex literary techniques . . . including, interpolated tale (the use of competing narratives) and complex resonances.” *Id.* at 1381. Asked, however, whether he would teach any of the defendant’s stories in class, the professor answered no. *Id.* at 1381 n.10. The court ultimately found that the expert testimony could not “redeem” the work. As it concluded, “the Court can find *no literary value* within the murk of rape, incest, abuse, [etc.] . . . within Defendant’s work. Most importantly, notwithstanding [the expert’s] analysis and opinion, no evidence exists in the Record to support a finding that Defendant’s *purpose* was artistic, scientific or political.” *Id.* at 1381–82 (emphasis added). The work, said the court, “contains no serious literary value or even slight artistic value.” *Id.* at 1382. It is unclear what mattered more in *McCoy*: the defendant’s purpose, which was apparently to titillate, or simply the court’s own literary judgment, which took a dim view of the works despite the expert testimony.

253. SCHAUER, *supra* note 247, at 144. Some courts in fact *require* expert testimony. *See* *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138–39 (11th Cir. 1992) (“The Sheriff concedes that he has the burden of proof to show that the recording *is* obscene. Yet, he submitted no evidence to contradict the testimony that the work had artistic value. A work cannot be held obscene unless each element of the *Miller* test has been met. We reject the argument that simply by listening to this musical work, the judge could determine that it had no serious artistic value.”).

254. Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1854–58 (1975).

255. *See* SCHAUER, *supra* note 247, at 140 (“Under *Miller*, the value must be more predominant, more serious, and more pervasive throughout the entire work. It is, of course, difficult to describe in words an increase in amount or degree, but it is clear that some attempts at value which would have been sufficient under *Memoirs* will be rejected under *Miller*.”); *see also* Note, *supra* note 254, at 1854–55.

256. *See* Note, *supra* note 254, at 1855.

is likely to take it seriously as literature, art, politics, or science.²⁵⁷ As a commentator in the *Harvard Law Review* put it: “[T]he judgment should not be whether the work is successful by the standards of its claimed audience but whether the work is one to which the claimed audience could apply its standards.”²⁵⁸

The inquiry into purpose has sometimes been used to ferret out what courts have called “sham attempt[s] to insulate obscene material with non-obscene material.”²⁵⁹ As the Supreme Court famously said in *Kois v. Wisconsin*: “A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.”²⁶⁰ Or to take another example, from a well-known 1980 Fifth Circuit opinion, *Penthouse International v. McAuliffe*: “[I]f the most obscene items conceivable were inserted between each of the books of the Bible” the work taken as a whole would still be deemed obscene.²⁶¹ The purpose inquiry thus asks whether valuable material is being used merely to circumvent obscenity law. In this, the inquiry resembles familiar questions in other areas of law, like the sincerity test in the context of religious accommodations²⁶² or the pretext inquiry in discrimination cases.²⁶³ For this very reason, the seriousness (or sincerity) of purpose test is sometimes praised as more akin to ordinary judicial activities²⁶⁴ and, importantly, less dependent on an individual judge’s aesthetic sensibilities than the value-judgment approach.²⁶⁵

Although inquiries into purpose might allow courts to avoid making retail-level aesthetic value judgments, they still require a prior, wholesale judgment about aesthetics: namely, that authorial intention is relevant to the meaning or appraisal of a work of art.²⁶⁶ Here, obscenity cases part ways

257. See *id.* at 1855–58; see also SCHAUER, *supra* note 247, at 140 (“What the addition of the ‘serious’ element does is to allow the jury and the court to look . . . to the *intent* upon which the insertion of literary, artistic, political, or scientific material is based.”); Edward John Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political or Scientific Value*, 11 S. ILL. U. L.J. 1159, 1164 (1987) (“[T]he status of the work as serious art depends, not upon the level of merit actually achieved, but on the intent of the artist to produce a serious work.”).

258. See Note, *supra* note 254, at 1857–58.

259. *Penthouse Int’l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1368 (5th Cir. 1980).

260. 408 U.S. 229, 231 (1972).

261. 610 F.2d at 1368.

262. See, e.g., *Witmer v. United States*, 348 U.S. 375, 381 (1955) (“[T]he ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form.”).

263. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing a burden-shifting procedure in employment discrimination cases in which plaintiffs are given the chance to show that their employer’s stated nondiscriminatory motives were in fact pretextual).

264. See *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005) (“Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country.”).

265. See Note, *supra* note 254, at 1855.

266. See Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179, 189 (1982) (“[T]he claim that interpretation in this style is important depends on a highly controversial, normative theory of art, not a neutral observation preliminary to any coherent evaluation.”).

with the sincerity inquiry in religion accommodation cases or the question of pretext under Title VII. In those cases, the law specifically bases the need for accommodation or legal liability on the purpose with which some person acts.²⁶⁷ The serious artistic value prong in obscenity law, by contrast, presents a question about a *work*. Answering that question by reference to the intentions of the work's *creator* makes sense only if one adopts a substantive, and deeply contested, view about how intentions, meaning, and value interact in the context of art.²⁶⁸

Further, by insisting on taking the work "as a whole,"²⁶⁹ as *Miller* requires, courts trudge into another aesthetic minefield, in this case an ontological one. For, regardless of whether courts look to the purpose behind the work or judge a work's value directly, they still have to make a logically prior, sometimes fraught, aesthetic judgment about what counts as a work. And they also must endorse, even if implicitly, the idea that unified, integrated *works* are the proper objects of aesthetic experience and evaluation—an idea that is both historically and culturally situated.²⁷⁰

In the Fifth Circuit's *Penthouse* case, for example, the court grappled with the "as a whole" standard specifically as applied to magazines.²⁷¹ In the end, it determined that the relevant unit of analysis—the "whole"—was the magazine, not each individual "article and pictorial presentation" within the issue.²⁷² (The court, however, avoided answering whether this is true of magazines across the board, or just the three particular magazines scrutinized in that case.²⁷³)

Employing the magnitude of value test instead of the purposive approach, the Fifth Circuit went on to identify the seriously valuable material within each magazine—*Playboy*'s interview with Jean-Paul Sartre, for example, and *Penthouse*'s article about President Carter's foreign policy.²⁷⁴ One judge noted that "the 'as a whole' test cannot begin and end

267. See *Witmer*, 348 U.S. at 376; *McDonnell Douglas*, 411 U.S. at 802. In the religious accommodation context, the intentions of the plaintiff are what matter in determining whether an accommodation is merited; in discrimination cases, liability turns on the intentions of the defendant. See *Witmer*, 348 U.S. at 381; *McDonnell Douglas*, 411 U.S. at 804.

268. The debate on this topic is longstanding, and the literature on it is enormous. See generally PAISLEY LIVINGSTON, *ART AND INTENTION: A PHILOSOPHICAL STUDY* (2005).

269. *Miller v. California*, 413 U.S. 15, 24 (1973).

270. See, e.g., LYDIA GOEHR, *THE IMAGINARY MUSEUM OF MUSICAL WORKS* 176–242 (1992) (tracing the emergence, around 1800, of the "work" as a regulative concept in Western music); SHINER, *supra* note 175, at 123–26 (describing the emergence of the work concept in Western drama, visual art, music, and literature).

271. See *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1370–71 (5th Cir. 1980) ("While the parts of a magazine may not be interrelated in the same manner as a particular episode in a novel to the balance of the book, it is the interrelation between the various features or articles of a magazine and the magazine's basic editorial philosophy or purpose that is significant.").

272. *Id.* at 1367.

273. *Id.* at 1371.

274. *Id.* at 1371–72.

with a page count.”²⁷⁵ Instead, she said, the third *Miller* prong requires “quantitatively and qualitatively balancing the contents.”²⁷⁶ But while the quantitative part of the balancing proved straightforward—calculated in the opinion’s footnotes were the number of pages in each magazine on which sexually offensive material appeared²⁷⁷—*qualitative* balancing posed a harder challenge, which the court did little to meet. Writing separately, the three judges on the panel merely reported their conclusions as to whether each individual magazine, on balance, had or lacked serious value.²⁷⁸

The *Penthouse* court did, however, suggest one other way to appraise serious value without relying on the judges’ own aesthetic sensibilities. Following the lead of the Supreme Court—which, in *Jenkins v. Georgia*, had considered a movie’s critical and popular acclaim²⁷⁹—the Fifth Circuit considered awards *Penthouse* had received, advertising that it and the other magazines had attracted, and circulation numbers, which, at least for *Playboy*, included a significant number of library subscribers.²⁸⁰

This sort of approach was given a name—in fact, a misnomer—in an obscenity case arising out of Nebraska in the 1990s, *Tipp-It, Inc. v. Conboy*.²⁸¹ After an Omaha gay bar sought a declaratory judgment that three seized photographs of homoerotic drawings were not obscene, the longtime director of the Creighton University Art Gallery was called as an expert witness.²⁸² As the Nebraska Supreme Court later reported, the expert testified at trial that:

[W]hether a particular work has serious artistic value can be determined either under a subjective, “four-corners” test by evaluating such criteria as space, composition, design, color, harmony, and form and balance, or under an objective “Dickey” analysis, which considers where the art has been exhibited as well as whether the work, or the putative artist, has achieved a certain degree of respect and recognition in the artistic community.²⁸³

275. *Id.* at 1375 (Kravitch, J., concurring in part and dissenting in part). Another judge on the panel questioned this approach, however, asking how it was to be applied in practice. “[D]oes one brilliant article on the arts outweigh explicit pictures of a couple copulating[?]” he asked. *Id.* at 1374 (Clark, J., concurring).

276. *Id.* at 1377 (Kravitch, J., concurring in part and dissenting in part).

277. *Id.* at 1375 n.4 (Kravitch J., concurring in part and dissenting in part).

278. *See id.* at 1372 (majority opinion); *id.* at 1377 (Kravitch, J., concurring in part and dissenting in part).

279. 418 U.S. 153, 158–59 (1974).

280. *Penthouse*, 610 F.2d at 1372.

281. 596 N.W.2d 304 (Neb. 1999).

282. *Id.* at 314.

283. *Id.*

On neither test did the expert find the three works at issue in *Tipp-It* to have serious artistic value, and both the trial court and the Nebraska Supreme Court agreed.²⁸⁴

Somewhat curiously, this second, so-called Dickey analysis—asking whether works have been “displayed in a ‘serious venue’”—was attributed to “an aesthetics professor named George Dickey.”²⁸⁵ In reality, the trial expert must have been referring to George Dickie, a longtime philosophy professor at the University of Illinois-Chicago, best known for the institutional theory of art that he developed from the late 1960s onward.²⁸⁶ On Dickie’s theory—as described (or perhaps caricatured) by the bar owner in *Tipp-It*—the context in which a work is exhibited “is . . . an absolute index of a work’s artistic value.”²⁸⁷ “[U]ntil an art work [is] displayed in an appropriate venue, it never acquire[s] serious artistic value.”²⁸⁸

Professor Dickie’s institutional theory of art undoubtedly has advantages for courts faced with questions about serious artistic value. It allows them to outsource their decision, using the endorsement of artworld institutions as a proxy for quality, thereby avoiding value judgments of their own. On the other hand, Dickie’s theory is an awkward place to look for an account of value as he emphatically presents the institutional theory as a descriptive or classificatory account of art, not an evaluative one.²⁸⁹ Further, there is the obvious worry that the conservatism of artworld institutions might lead to less protection for works, like those in *Tipp-It*, produced by members of marginalized communities and artworld outsiders.

Part III returns to the question of whether any of these ways of understanding serious artistic value comports with the First Amendment.

284. *Id.* at 314–15.

285. Brief of Respondent in Opposition to Petition for a Writ of Certiorari at 5, *Tipp-It, Inc. v. Conboy*, 528 U.S. 1116 (2000) (No. 99-614); *see also* Petition for Writ of Certiorari at 11, *Tipp-It*, 528 U.S. 1116 (No. 99-614) (describing the trial expert’s reliance “on the Institutional Theory of Art espoused by George Dickey in 1975”).

286. *See, e.g.*, George Dickie, *Defining Art*, 6 AM. PHIL. Q. 253 (1969); GEORGE DICKIE, ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS (1974); GEORGE DICKIE, THE ART CIRCLE (1984); George Dickie, *A Tale of Two Artworlds*, in DANTO AND HIS CRITICS 111 (Mark Rollins ed., 2d ed. 2012).

287. Petition for Writ of Certiorari, *supra* note 285, at 12.

288. *Id.* at 13. *But see* Dickie, *Defining Art*, *supra* note 286, at 254 (“An artifact’s hanging in an art museum, a performance at a theater, and the like are sure signs that the status [of art] *has been conferred*. But many works of art never reach museum walls and some are never seen by anyone but the artist himself. The status, therefore, must be conferrable by a single person’s treating an artifact as a candidate for appreciation, usually the artist himself, although not always, because someone might create an artifact without ever considering it as a candidate for appreciation and the status be conferred by some other person or persons.”).

289. *See* Dickie, *Defining Art*, *supra* note 286, at 253 (“[I]t is, of course, the descriptive sense of ‘work of art’ which is at issue when the question of whether ‘art’ can be defined is raised.”); *id.* at 256 (insisting that the institutional theory “does not attempt to smuggle a conception of good art into the definition of ‘art’”).

For now, the point is just to show, yet again, the law engaging and endorsing a specific, substantive position within aesthetic theory: here, George Dickie's philosophy of art. Other judgments made within obscenity law are similarly substantive, including those made about what counts as a work, about the importance of holistic interpretation, about the relationships between artists' intentions and their works' value, and about community-specific versus "objective" standards of taste. With each of these judgments, courts applying the serious artistic value test are forced to stake a position within a philosophically fraught debate over aesthetics.

In a 1990 student note, Amy Adler, now a leading scholar in this area, canvassed the variety of ways serious artistic value had been interpreted and argued that all of them reflected the modernist era in which the Court's obscenity standard emerged.²⁹⁰ The doctrinal focus on seriousness itself, she alleged, constitutes a substantive aesthetic judgment—in fact, a historically situated one. "As an art critic wrote of Modernism," Adler noted, "the highest accolade that could be paid to any artist was this: 'serious.'"²⁹¹ According to Adler, the serious value requirement, a product of its modernist time, is simply unable to account for and protect later postmodern developments in art.²⁹² "In the end," she concluded, "we as a society are left with a choice: either we protect art as a whole or we protect ourselves from obscenity."²⁹³ In sum, aesthetic discrimination is the unavoidable cost of obscenity law.

E. Intellectual Property

Suffused as it is with aesthetic judgment, intellectual property (IP) law is also the area in which, at least recently, the law's aesthetic judgment has been most widely acknowledged and discussed. For that reason, instead of canvassing the countless cases within IP law in which judges have made aesthetic judgments (often while denying doing so²⁹⁴), this Subpart focuses on four areas in which aesthetic judgment has played the biggest role: in copyright infringement claims; in fair use defenses; in the beauty–utility

290. Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990). Adler identified and criticized "three plausible interpretations" of serious value: "(1) the artwork makes an important and original rather than a marginal and derivative contribution to art; (2) the artwork is 'serious' in that it reflects the sanctity and solemnity of high art; (3) the artist was serious and sincere in his attempt to make art (rather than obscenity), no matter how successful his ultimate achievement." *Id.* at 1365 (footnotes omitted).

291. *Id.* at 1364 (quoting Douglas Davis, *Post-Performancism*, 20 ARTFORUM 31, 39 (1981)).

292. *Id.* at 1378.

293. *Id.*

294. See Aoki, *supra* note 3, at 339 n.230 ("[W]henver the *Bleistein* non-discrimination principle is invoked, it inevitably serves as a justification for precisely the type of blatant judicial value discriminations that *Bleistein* warned against.").

distinction that cuts across copyright, patent, and trademark law; and in statutes like the Visual Artists Rights Act that protect the moral rights of artists.

Because intellectual property law scholars have recognized at least some of the aesthetic judgments made in these areas, this Subpart can both draw on their work and critically consider their proposed solutions to what most see as the *problem* of aesthetic judgment. Parts II and III will then reconsider the extent to which aesthetic judgment in law truly is a problem.

1. Copyright Infringement

U.S. copyright law largely avoids aesthetic judgment in determining which “original works of authorship” get protection.²⁹⁵ As Congress made clear when it passed the Copyright Act of 1976: “[T]he definition of ‘pictorial, graphic, and sculptural works’ carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality”; similarly, “[t]he term ‘literary works’ does not connote any criterion of literary merit or qualitative value.”²⁹⁶

The 1976 Act reinforced the judiciary’s longstanding avoidance of aesthetic judgment—one dating back at least to Justice Holmes’s decision in *Bleistein*, which held that even chromolithographs of circus scenes exhibit the “singularity” of their creator’s “personality”: “something irreducible, which is one man’s alone.”²⁹⁷ With the bar for originality, and hence copyrightability, set so low, little would fail to qualify and aesthetic discernment would seldom be needed. Lowering the bar still further, later courts would find that even *unintended* differences between a work in the

295. 17 U.S.C. § 102 (2012). Of course, an aesthetic judgment was made by Congress when it chose the categories of works included under U.S. copyright law. *See id.* The eighth of these, “architectural works,” was only added in 1990. In an insightful article, Anne Barron has drawn compelling “convergences” between the taxonomic approach of copyright law—which provides medium-specific definitions rather than an overarching definition of art—and the important tradition in aesthetic thought, spanning from Aristotle to Lessing to Clement Greenberg, that focuses on the boundaries between the arts. Anne Barron, *Copyright Law and the Claims of Art*, 4 INTEL. PROP. Q. 368, 398 (2002). “[T]he proposition that copyright law is the legal expression of a particular aesthetic theory is simply not sustainable,” she argues, *id.* at 379, but the effect of copyright’s enumerated categories “is certainly discriminatory” insofar as it “fail[s] to reflect the diversity of contemporary art,” *id.* at 374.

296. H.R. REP. NO. 94-1476, at 54 (1976); *see also* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (defining “original” to require only independent creation and “some minimal,” “extremely low” degree of creativity); Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 178–84 (1990).

297. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

public domain and a derivative work could provide the originality sufficient for copyright.²⁹⁸

According to Alfred Yen, courts have shifted back and forth in the substantive aesthetic theories they have implicitly employed in their discussions of originality.²⁹⁹ The intentionalism of *Bleistein*, which Yen claims “relied primarily on analysis of the creator’s behavior,”³⁰⁰ gave way to a more formalist, work-focused approach in later cases.³⁰¹ These moves were intended to sidestep retail-level aesthetic evaluation: questions about whether a given work is good enough for copyright. But as Yen correctly points out, these moves themselves involved higher order aesthetic judgments—conflicting ones, in fact, privileging formalism over authorial intentions and vice versa.³⁰² Importantly, though, this shifting, opportunistic approach to aesthetics prevented any one aesthetic theory from limiting what gets copyright protection. Courts’ approach was seemingly to choose whatever aesthetic theory would make copyright possible.

Despite these attempts at avoidance, aesthetic judgment becomes more necessary when the law turns from questions of copyrightability to infringement. As Amy Cohen has written, “the real test of copyright is not whether the plaintiff is considered to have created a work that is generally eligible for copyright protection, but whether the plaintiff will be able to obtain relief against someone who has allegedly infringed that copyright.”³⁰³ Here, aesthetic judgments proliferate.

First, as Cohen describes in detail,³⁰⁴ the law requires aesthetic judgment in determining the parts of a work that are protected by copyright: expression, as opposed to ideas. “[O]ften a court’s view of what constitutes the ‘idea’ is influenced by how novel or creative the court considers the works at issue to be,” Cohen writes; for example, visual artists seen as working in a less traditional style will get thicker protection.³⁰⁵

298. See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104–05 (2d Cir. 1951); see also Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 271–72 (1998).

299. Yen, *supra* note 298, at 273–75.

300. *Id.* at 274.

301. See, e.g., *id.* at 274–75 (discussing the formalist approach of the Second Circuit post-*Bleistein* in *Alfred Bell*).

302. See *id.* at 274–84.

303. Cohen, *supra* note 296, at 196. Cohen also notes, however, that the availability of statutory damages from infringers of registered works avoids aesthetic judgments that might be involved in proving actual damages. *Id.* at 183–84.

304. See *id.* at 196–230.

305. *Id.* at 212; see also *id.* at 228 (applying the point to literary works).

Second, in deciding whether improper appropriation has occurred, courts ask whether there is “substantial similarity” between the protected aspects of the plaintiff’s and defendant’s works.³⁰⁶ But this “notoriously confusing and confused”³⁰⁷ test takes various forms. Some courts have asked whether an *ordinary observer* of two works would “regard their aesthetic appeal as the same”³⁰⁸ or would find that they share a “total concept and feel.”³⁰⁹ The ordinary observer invoked here is “used in contrast to the perspective of an expert.”³¹⁰ Other courts, however, focus on the *intended audience* of the work, whether that be one with specialized skills (like the ability to read sheet music), or common characteristics, like children.³¹¹ An actual audience might also be consulted.³¹²

Several commentators have purported to find substantive aesthetic commitments lurking behind these varied choices.³¹³ Alfred Yen describes the move from an ordinary observer to an intended audience approach as a shift from formalist to intentionalist theories of interpretation.³¹⁴ And he links the actual audience test to what he describes as the unreliable relativism of reader-response theories.³¹⁵ Adopting Professor Yen’s tripartite classification of aesthetic theories, Robert Kirk Walker and Ben Depoorter have argued more recently that courts’ “total concept and feel” test for substantial similarity is not only unpredictable, but “evokes incompatible aesthetic views.”³¹⁶ “Feel,” they claim, “might come directly

306. *Id.* at 196–97. This two-step procedure may get blurred, either on principle, *see* Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 458–61 (S.D.N.Y. 2005) (rejecting the idea-expression distinction in the visual arts), or simply in practice, *see* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 718 (2012) (“In the same case, a court will caution that the relevant similarity has to be based on the protectable elements of a work and then immediately state that the factfinder can’t just compare the copyrightable elements in its evaluation.”).

307. Tushnet, *supra* note 306, at 716–17.

308. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

309. *See, e.g., Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003) (infringement may become “apparent only when numerous aesthetic decisions embodied in the plaintiff’s work of art—the excerpting, modifying, and arranging of public domain compositions, if any, together with the development and representation of wholly new motifs and the use of texture and color, etc.—are considered in relation to one another”).

310. 3 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 9:69, Westlaw (database updated Sept. 2017).

311. *See id.*; *see also* *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 209–10 (9th Cir. 1988) (examining video games from the perspective of “a discerning 17.5 year-old boy”).

312. *See, e.g., Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (suggesting that judges might “summon an advisory jury” even in a bench trial to decide substantial similarity).

313. *See* Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343, 374–75 (2015); Yen, *supra* note 298, at 284–97.

314. Yen, *supra* note 298, at 296 (“[T]he ordinary observer easily becomes a cover for formal analysis.”); *id.* at 297 (describing courts’ turn “to ideas associated with intentionalist criticism[; namely,] that an author is entitled to have his work interpreted by those people he intends to address”).

315. *Id.* at 296–97.

316. Walker & Depoorter, *supra* note 313, at 375.

from the work's aesthetic qualities (Formalism), or it could be influenced by the context in which the work is received (Reader-Response)."³¹⁷ "Concept," however, points to contextual factors like authorial intentions or social mores.³¹⁸ "Because of this, consideration of a work's concept necessitates the use of Intentionalism or Reader-Response theory (and most likely both)."³¹⁹

Yen's and Walker and Depoorter's articles are quite right to argue that retail aesthetic judgments ("these two works are substantially similar") generally entail wholesale judgments (e.g., "interpretation should be limited to the four corners of the work"). But in this particular case, it is not clear that they have described the wholesale judgments correctly. Courts often *purport* to determine a work's "concept" formalistically, looking only within the four corners of the work.³²⁰ And, more importantly, perceiving a work's "feel" may require knowledge of the work's creative context—the sort of thing Yen, Walker, and Depoorter lump under the heading "intentionalism."³²¹

The crucial point, however, is that wholesale judgments are unavoidable, even if they often go unnoticed. Take Walker and Depoorter's proposed solution to the problem of aesthetic judgment in copyright law:

317. *Id.* (footnotes omitted).

318. *See id.*

319. *Id.*

320. For example, in *Roth Greeting Cards*, the Ninth Circuit case—cited by Walker and Depoorter—that gave us the "concept and feel" test, the court looked only at the characters, words, lettering, color, and mood of two companies' greeting cards. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, § 411(a), 90 Stat. 2541, 2583 (codified as amended at 17 U.S.C. § 411(a) (2012)), *as recognized in* *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 616 n.5 (9th Cir. 2010); *see also* *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003) ("[A]esthetic decisions embodied in the plaintiff's work of art . . . are considered in relation to one another." (emphasis added)); *cf. id.* (insisting that the Second Circuit has avoided equating a work's "concept" with unprotected "ideas").

321. *See* Walker & Depoorter, *supra* note 313, at 355; Yen, *supra* note 298, at 256–57. The flatness of a painting or the stillness of a sculpture normally goes unnoticed—failing to generate any feelings at all—though flat sculpture or still figures in film would likely be experienced as minimalist or restrained or boring or perhaps provocative. (Andy Warhol's 1964 film *Empire*, with its eight hours of footage of a static Empire State Building at night, might not even meet the Copyright Act's definition of a motion picture: "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion." 17 U.S.C. § 101 (2012).) To use another example, a color photograph of a black and white scene might be identical to a black and white picture of a colorful scene, but their depiction and mood would differ enormously; only the former is likely to be seen as "gloomy." In each case, the difference in "feel" turns on knowledge of the *category* in which the works belong. *See generally* Kendall L. Walton, *Categories of Art*, 79 PHIL. REV. 334 (1970). For the aesthetic contextualist, there is just no "innocent eye" that sees aesthetic properties directly, without knowledge of their surrounding context and categories. The contextualist's claim against the formalist is that "aesthetic decisions embodied in the . . . work of art"—to use the Second Circuit's phrase—are always shaped by the atmosphere of aesthetic theory in which those decisions were made. *Tufenkian Imp./Exp. Ventures*, 338 F.3d at 134; *see* Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 580 (1964) ("To see something as art requires something the eye cannot de[s]cry—an atmosphere of artistic theory, a knowledge of the history of art: an artworld.").

seeking to sidestep court-imposed aesthetic judgment, they urge courts to interpret works using whatever aesthetic theory is most prevalent within the “community of artistic practice from which the works in question hail.”³²² But to draw on the community of practice in this way is itself to choose contextualism over formalism. To borrow one of Walker and Depoorter’s examples: a court “might offer a Formalist account of a work of twelve-tone music.”³²³ Following the community of practice model, it might do so because the Second Viennese School believed in formalism. But to employ formalism *for this reason* is to reject the formalist belief that interpreters need not ever go beyond the four corners of the work.

At issue here is what we might call a third-order aesthetic judgment. In the first-order judgment, we decide whether the notes of two twelve-tone works are similar enough for infringement. The second-order judgment, implicit in the first, holds that we should look only at the notes, not any extrinsic evidence, when judging substantial similarity. The third-order judgment is that we should look to the community of practice—to contextual evidence—in deciding what second-order judgment to make. Walker and Depoorter may have helped make aesthetic judgment in copyright law more predictable, which was their stated goal.³²⁴ (Though more on that in Part I.E.2.) What their solution does not do, unfortunately, is to avoid government-imposed aesthetic orthodoxy—what Part II identifies as the real problem with aesthetic judgment in law.

2. *Fair Use*

The Copyright Act provides an affirmative defense for infringement that occurs “for purposes such as criticism, comment, news reporting,” and scholarly reasons.³²⁵ This “fair use” defense, like copyright itself, is meant to promote creativity: where copyright incentivizes creativity by providing a limited monopoly, fair use provides a First Amendment safety valve³²⁶ that prevents copyright from shutting down expression that borrows from or builds on previous creative acts. To determine “fair use,” the Act provides a four-factor test.³²⁷ And arguably, all four of the factors call for aesthetic judgment.³²⁸

322. Walker & Depoorter, *supra* note 313, at 376.

323. *Id.*

324. *See id.* at 349.

325. 17 U.S.C. § 107 (2012).

326. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

327. 17 U.S.C. § 107.

328. *See generally* Gorman, *supra* note 3, at 14–18 (discussing aesthetic judgment in three of the four fair use factors).

The first factor looks to the “purpose and character of the use.”³²⁹ Since the Supreme Court’s 1994 opinion in *Campbell v. Acuff-Rose Music, Inc.*,³³⁰ this first factor has largely dominated fair use analysis, though understood in a particular way.³³¹ Thanks to a law review article by Judge Pierre Leval, the decisive question is now whether the secondary work is “transformative.”³³² According to Leval, fair use occurs when “the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.”³³³ For the Court in *Campbell*, a case about 2 Live Crew’s parody of Roy Orbison’s “Pretty Woman,” this meant privileging transformative genres like parody over satire—even though, quoting *Bleistein*, the Court cautioned against judging a parody’s quality or “good taste.”³³⁴

Amy Adler has recently detailed the shifting approaches courts have taken in applying the transformative-use test, which requires them to judge whether two works have different meanings.³³⁵ Adler shows that courts making this aesthetic judgment have looked variously—even in the same case—to artists’ intentions, to the works themselves, and to the “reasonable observer,” which itself could be a person on the street, an expert, a judge, or a consumer.³³⁶ (Note that these are basically the three second-order aesthetic judgments described by Yen and Walker and Depoorter in Part I.E.1.) I will return shortly to Adler’s criticisms of these three approaches to interpretation, at least as applied to contemporary art, and to Adler’s proposed solution.

But the first fair use factor is not the only place where aesthetic judgment is required to “separat[e] the fair use sheep from the infringing goats.”³³⁷ The second factor, unimportant as it may be in practice,³³⁸ looks to the “nature of the copyrighted work,” with creative works getting more protection from fair use than works deemed informational.³³⁹ This requires

329. 17 U.S.C. § 107(1).

330. 510 U.S. 569 (1994).

331. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 574 (2016).

332. Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990); see also *Campbell*, 510 U.S. at 579 (citing Leval and placing “transformative works” at “the heart of . . . fair use”).

333. Leval, *supra* note 332.

334. *Campbell*, 510 U.S. at 580–83.

335. Adler, *supra* note 331, at 576–84 (describing three approaches used in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013)).

336. *Id.* at 584–618.

337. *Campbell*, 510 U.S. at 586.

338. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (“The second factor has rarely played a significant role in the determination of a fair use dispute.”).

339. 17 U.S.C. § 107(2) (2012); 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:138, Westlaw (database updated Sept. 2017).

judgments about “the relative proportion of fact and fancy” within even so-called fact works.³⁴⁰

The third factor examines “the amount and substantiality of the portion” of the original work used by the derivative work.³⁴¹ While this differs from the substantial-similarity test for infringement insofar as it asks whether the “‘quantity and value of the materials used’ *are reasonable in relation to the purpose of the copying*,”³⁴² it still requires similar second-order judgments about what interpretive theory to use in deciding what parts of a work count as substantial.³⁴³

The fourth fair use factor, “the effect of the use upon the potential market for or value of the copyrighted work,”³⁴⁴ less obviously involves aesthetic judgment. In fact, Professor Adler has compellingly argued that a renewed emphasis on factor four, at least with regard to artworks, would allow courts to avoid the “doomed and unpredictable enterprise of adjudicating meaning”³⁴⁵—which is to say, aesthetic judgment. Adler’s argument is that in the current art market, where value derives from “the reputation or ‘brand’ of the artist,”³⁴⁶ “there is no possibility of market substitution of one artist for another.”³⁴⁷ Since the works of one artist cannot usurp the market of another, she claims, “the fourth factor should always weigh in favor of fair use in art cases.”³⁴⁸

Professor Adler candidly admits that her proposal does require one major aesthetic judgment: “delineat[ing] ‘art’ from other forms of visual expression”; after all, her “market substitution claim applies only to the former.”³⁴⁹ But there is a still deeper way in which her reliance on the fourth fair use factor fails to escape aesthetic judgment. Adler’s market-based approach rests on the fact that the contemporary art market has decidedly rejected formalism. Given the extent to which it ties value to the identity of the artist, the art market is contextualist through and through. Courts that rely on the market for their fair use analysis might be able to

340. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) (quoting Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC. 560, 561 (1982)).

341. 17 U.S.C. § 107(3).

342. *Campbell*, 510 U.S. at 586 (emphasis added) (citation omitted) (quoting *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)).

343. See *supra* Part I.E.1.

344. 17 U.S.C. § 107(4).

345. Adler, *supra* note 331, at 621.

346. *Id.* at 622.

347. *Id.* at 621.

348. *Id.*

349. *Id.* at 624.

outsource this second-order aesthetic judgment, but that does not make what they do aesthetically neutral.³⁵⁰

To see this, imagine that A is a formalist artist, concerned only with the visual composition of his work. To his mind, any derivative work that looks like his would have copied the heart of his art. Now imagine another artist, B, who makes a perceptibly indiscernible copy of A's work, but in service of a much different artistic project or meaning. (Perhaps B is an appropriation artist like Sherrie Levine, and A is Walker Evans.) Because of the visual similarities, Artist A would surely feel that his copyright had been infringed. And were the art market made up of formalists who judged art solely by its appearance, A's and B's works would be considered fungible. B's work would significantly affect the value of A's, a fact that would count against B's fair use defense. Of course, things would come out the other way in today's actual art market, which, as Adler rightly notes, assuredly does not value art solely on its appearance.³⁵¹

Courts applying the fourth fair use factor outsource to "the market" a wholesale aesthetic judgment: the decision about what properties should be considered when valuing a work of art. But my larger point is that this is only one of several moments within a fair use defense in which this sort of wholesale judgment must be made, whether by courts themselves or by artists, experts, the market, or the relevant "community of practice" (which may in itself be determined by consulting the artist or experts).

What are the other moments when this happens? As we have seen, the second and third factors—both of which focus on the original work—force courts to decide what portion of that work counts as fanciful (factor two) or substantial (factor three). As before, this requires a meta-judgment, a theory of interpretation, that determines which properties count as properties of the work. Here courts might impose their own aesthetic judgment or, I think preferably, they could take the artist's project on its own terms. In the example above, this would mean adopting Artist A's formalism and treating only the visible properties of his work as relevant in determining what is substantial.

By contrast, the first fair use factor focuses on the secondary work—that of Artist B above. Here again, courts might make their own second-order decisions about what to consider in judging the transformativeness of B's work, or they could take their cue from B (or her intended audience, or

350. Cf. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials . . . may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice.'" (quoting *Palmer v. Thompson*, 403 U.S. 217, 260–61 (1971) (White, J., dissenting))).

351. Adler, *supra* note 331, at 622.

experts on B) in deciding whether to look beyond the four corners of the work. On the latter approach, courts would have to acknowledge that B is a fervent contextualist; taking that second-order judgment as their own, they would have to look beyond her work's appearance in judging transformativeness.

The crucial point is that the second-order judgment made under factor one need not be the same as those made under factors two, three, or four. A contextualist approach to one factor could be paired with a formalist approach to another. But, however and by whomever they are made, aesthetic judgments like these are unavoidable in each of these places.

Realizing this casts previous scholarly discussions of aesthetic judgment in fair use cases in a new light. Take, for example, Walker and Depoorter and their "community of practice" approach. They expect that "when faced with a fair use question, the Community of Practice would almost always consider Intentionalism as a primary aesthetic theory because intent is central to the inquiry in the first factor of the fair use test."³⁵² But this cannot be the end of the story. For even if the first factor focuses on the derivative work and "the general community of artistic practice from which [it] hail[s],"³⁵³ the next two factors require courts to consider the community surrounding the original work. And importantly, the communities surrounding the respective works might not share a common approach to aesthetics. Wholesale judgments—judgments about what to consider when making retail judgments—very well might differ, and the fair use inquiry would have to take account of that.

Walker and Depoorter at least recognize that higher-order aesthetic judgments shape courts' retail judgments. Another recent commentator, Brian Frye, argues against what he sees as an inequitable asymmetry: that courts engage in aesthetic judgment when deciding fair use defenses but strive for *Bleistein's* aesthetic neutrality in determining what merits copyright protection in the first place.³⁵⁴ Frye's proposed solution is for courts to judge transformativeness by asking "only . . . whether the two works are different, not whether the defendant has added anything valuable."³⁵⁵ Unfortunately, deciding whether two works are different is not the "objective inquiry" Frye thinks it is.³⁵⁶ Discerning differences depends on a prior aesthetic judgment about which properties of the works are ripe

352. Walker & Depoorter, *supra* note 313, at 378 n.240.

353. *Id.* at 376.

354. See Frye, *supra* note 3.

355. *Id.* at 47.

356. *Id.* (equating "objective" judgments with those that adhere to the aesthetic nondiscrimination principle).

for comparison; it begs the question to assume that these properties are purely visual (or audible).³⁵⁷

Wholesale aesthetic judgments cannot be assumed, but they can be outsourced—by deferring, for example, to an artist’s statement of intentions. Yet even this is fraught, for as the discussion above indicates, treating artistic intent as relevant constitutes an aesthetic judgment of its own. In a perceptive student note, Monica Isia Jasiewicz observes that “when courts rely on artist-defendants’ testimony, they are not actually avoiding making an aesthetic judgment On the contrary, courts are actually taking sides in a debate in the art theoretical community about appropriate interpretative agents for contemporary art.”³⁵⁸ Jasiewicz and Professor Adler both also note that this pro-intentionalist judgment may be at odds with the “theoretical premises” of certain artists and movements.³⁵⁹

Jasiewicz and Adler both offer compelling reasons for outsourcing any necessary aesthetic judgments to experts rather than artists or ordinary observers. Adler argues that using experts to help decide transformativeness (under factor one) is likely to produce the same results as looking to the market (under factor four), given how expert-driven the contemporary art market is.³⁶⁰ And as one of the few scholars who have observed how aesthetic judgment in law extends beyond IP, Adler argues that—as with obscenity—relying on experts rather than ordinary viewers in fair use cases may help “protect the minority viewpoint.”³⁶¹

Interestingly, Adler also seems to think that, given the complexities of contemporary art, ordinary viewers are simply less likely to get the answers right.³⁶² (For example, they do not make the right meta-judgments: they just *look* at Duchamp’s *Fountain* when they should be considering its meaning.³⁶³) Here, Adler’s argument dovetails with that of Jasiewicz, who thinks that reliance on experts will widen the First Amendment “safety valve of fair use.”³⁶⁴ Jasiewicz envisions cases in which artists might even

357. Cf. Adler, *supra* note 331, at 599–608, 622 (describing how contemporary art’s meaning has become “unmoored from the visual”); *see generally* everything Arthur Danto ever wrote.

358. Monika Isia Jasiewicz, Note, “A Dangerous Undertaking”: *The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases*, 26 YALE J.L. & HUMAN. 143, 166 (2014).

359. *Id.* (discussing appropriation art); *see also* Adler, *supra* note 331, at 584–99 (same). Adler also worries about incentives intentionalism gives artists “to testify in a way that please[s] the court.” *Id.* at 582–83.

360. Adler, *supra* note 331, at 613 n.239.

361. *Id.* at 614–15. Adler recognizes, however, that this is an elite minority viewpoint; it is less likely to protect artworld outsiders. *Id.* at 616; *see also* Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355 (2016) (describing how fair use disfavors lesser known artists, women, and racial minorities).

362. Adler, *supra* note 331, at 610 (“Let’s face it: Contemporary art is an insider’s game.”).

363. *Id.* at 611.

364. Jasiewicz, *supra* note 358, at 178.

call experts to ascribe to their works meanings that they themselves would disclaim—or would refuse to discuss, perhaps because they reject intentionalism or prefer visual over verbal expression.³⁶⁵

Jasiewicz is unusually attuned to the First Amendment dangers posed by aesthetic judgment in law.³⁶⁶ But she is also unduly optimistic that expert testimony would allow courts to sidestep these dangers.³⁶⁷ Using experts may help courts avoid imposing their own aesthetic judgments about what to consider when making fair use determinations. Experts can help a court identify and defer to judgments embodied in the works themselves. But battles of the experts will no doubt ensue, either at the wholesale or retail level, and when they do, courts will have no choice but to reengage in the kind of aesthetic judgment that they so often claim to avoid.³⁶⁸

3. *Beauty Versus Utility*

The discussion of tariff law earlier in Part I³⁶⁹ described that field's longstanding distinction between the “purely ornamental”³⁷⁰ fine arts and objects that are useful. This divide cuts across intellectual property law as well, from copyright to patent to trademark. Like tariff law, IP cases repeatedly force courts to draw a line between aesthetics and utility—often defining the former by contrast to the latter.³⁷¹ The question is: why?

The Constitution gives power to Congress to “promote the Progress of Science and useful Arts,”³⁷² and this has given rise to bifurcated copyright and patent regimes. Together, these may “appear to have divided the realm of valuable new products into two distinct categories”: “aesthetic products—those expressing ideas or emotions” on the one hand, and “useful products—those functioning to improve some aspect of the quality of life” on the other.³⁷³ But the aesthetic–utility divide does not just separate copyright from patent; it recurs *within* each field as well.

365. *Id.* Allowing experts to demonstrate transformativeness in cases where artists would be unwilling to do so, for the reasons above, would expand the reach of fair use.

366. *See id.* at 168–71; *cf. infra* Part II.C.

367. *See* Jasiewicz, *supra* note 358, at 178 (using experts would help courts, who “wish to stay out of the business of making aesthetic judgments but are currently failing at this endeavor by pushing intentionalism to the fore”).

368. *See infra* note 442.

369. *See supra* notes 154–84 and accompanying text.

370. *United States v. Perry*, 146 U.S. 71, 75 (1892).

371. *See infra* notes 385–392 and accompanying text.

372. U.S. CONST. art. I, § 8, cl. 8.

373. Christopher Buccafusco, *Making Sense of Intellectual Property Law*, 97 CORNELL L. REV. 501, 511 (2012).

The Copyright Act defines a category of so-called useful articles: those “having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”³⁷⁴ The design of these articles is copyrightable “only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”³⁷⁵

Meanwhile, utility patents—twenty-year monopolies on “new and useful” objects and processes³⁷⁶—are not the only kind offered in the U.S. Patents are also available to inventors of “any new, original and ornamental design for an article of manufacture.”³⁷⁷ First authorized in 1842, design patents now last for fifteen years³⁷⁸ (compared to copyright protection, which continues seventy years beyond the life of the author). They are harder to obtain than copyright; getting one requires convincing the Patent and Trademark Office of the design’s originality, ornamentality, and nonobviousness.³⁷⁹ But once obtained, they provide strong protections: anyone who infringes the design is “liable . . . to the extent of his total profit.”³⁸⁰

Distinguishing utility from design patents, the D.C. Circuit explained nearly ninety years ago that both the useful and the ornamental provide pleasure. “That which is utilitarian, however, pleases because it meets the approval of reason, while that which is ornamental gratifies the senses, without reasoning out the why or the wherefore.”³⁸¹ Thus, patent law, like copyright with its useful article doctrine, distinguishes internally between the useful aspects of an object and its mere appearance—between functionality and aesthetics.

Enforcing these distinctions is what leads courts into the thicket of aesthetic theory—or so several commentators have claimed. Professor Yen,³⁸² among others,³⁸³ has described a series of copyright cases, mostly

374. 17 U.S.C. § 101 (2012). A similar distinction is made by the Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5133, which treats architecture differently than “mere construction.”

375. 17 U.S.C. § 101 (2012); *see also* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1008–13 (2017).

376. 35 U.S.C. § 101 (2012).

377. *Id.* § 171(a).

378. *Id.* § 173.

379. Peter Lee & Madhavi Sunder, *The Law of Look and Feel*, 90 S. CAL. L. REV. 529, 560 (2017).

380. 35 U.S.C. § 289 (2012); *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429, 432–34 (2016) (holding that liability can sometimes be limited to profit derived from the infringing component of a product rather than the product as a whole).

381. *In re Stimpson*, 24 F.2d 1012, 1012 (D.C. Cir. 1928) (quoted in Buccafusco, *supra* note 373, at 525).

382. Yen, *supra* note 298, at 275–84.

in the Second Circuit, that try out a variety of different aesthetic theories in their attempt to understand the “separability” of aesthetic features from utilitarian ones. Judges have focused variously on an object’s reception by art institutions;³⁸⁴ on its form, asking if it were dictated entirely by its function;³⁸⁵ on the concepts stimulated in the minds of perceivers;³⁸⁶ on the market, asking whether people would buy the object even if it were not useful;³⁸⁷ and on the mind of the creator—asking whether “design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences.”³⁸⁸

Darren Hudson Hick, a philosopher who works on IP issues, has written that this last test “hits upon an important issue in contemporary theories of art: that what the artist does *in creating* the work is critical to classifying the work (say, as art or some subset thereof, or as non-art).”³⁸⁹ Walker and Depoorter worry, however, that “by randomly switching between major aesthetic theories that are theoretically incompatible,” courts fail to give consistent or reliable guidance on what copyright law protects.³⁹⁰ The Supreme Court may have alleviated this concern last Term in *Star Athletica v. Varsity Brands*, where it rejected intentionalist and market-based approaches to separability and held that artistic features of useful objects need only be imaginable as (copyrightable) works of art separate from the useful article.³⁹¹

Interpretation of design patents has been hardly less variable over the years. Although the Supreme Court has said that a design, to be patentable, “must present an aesthetically pleasing appearance that is not dictated by function alone,”³⁹² lower courts—perhaps worried that “ornamentation is in

383. See, e.g., Aoki, *supra* note 3; Darren Hudson Hick, *Conceptual Problems of Conceptual Separability and the Non-Usefulness of the Useful Articles Distinction*, 57 J. COPYRIGHT SOC’Y USA 37 (2009); Walker & Depoorter, *supra* note 313, at 363–67.

384. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) (art nouveau-inspired belt buckles); see also Yen, *supra* note 298, at 281 (noting that the Metropolitan Museum “valued them for something besides buckling belts”).

385. *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 418–19 (2d Cir. 1985) (styrofoam mannequins).

386. *Id.* at 422 (Newman, J., dissenting) (“[T]he article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function.”).

387. Hick, *supra* note 383, at 41–42 (citing *Galiano v. Harrah’s Operating Co.*, 416 F.3d 411 (5th Cir. 2005) (casino uniforms)).

388. *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987).

389. Hick, *supra* note 383, at 45; see also Yen, *supra* note 298, at 284.

390. Walker & Depoorter, *supra* note 313, at 367. For better or worse, the Supreme Court has now stepped into the fray and held that parts “of the design of a useful article [are] eligible for copyright if, when identified and imagined apart from the useful article . . . for example, on a painter’s canvas—they would qualify as two-dimensional works of art.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 (2017) (internal quotation marks and ellipses omitted).

391. 137 S. Ct. at 1015–16.

392. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 148 (1989).

the eye of the beholder”³⁹³—have increasingly “focused on lack of functionality as a proxy for aesthetic merit.”³⁹⁴ Christopher Buccafusco traces this shift to the creation of the Federal Circuit, with its “technophile judges . . . anxious about the ‘subjective’ nature of visual pleasure.”³⁹⁵ In an empirical study of design patent infringement decisions between the Federal Circuit’s founding in 1982 and 2010, Andrew Torrance found that “[d]esign beauty [has] ceased to be a useful predictor of judicial outcome” in infringement cases.³⁹⁶ If attractiveness is dropped as a requirement, an object’s design, to be patentable, simply cannot be “‘dictated by’ the use or purpose of the article.”³⁹⁷ As Peter Lee and Madhavi Sunder point out, this reverses the default rule employed within copyright: “[I]n design patents, a design must be thoroughly dictated by function in order to be functional, while in copyright, *any* functional consideration renders an expression functional.”³⁹⁸ Separating the protectable aesthetic elements from the functional ones thus proves much more difficult in copyright than in patent.

Enter trademark law, which calls into question the very distinction between aesthetics and functionality. Trademark has a different purpose than copyright or patent: its protections “exist[] primarily to reduce consumer confusion, not to prevent reproduction more generally.”³⁹⁹ Trademarked words, symbols, and the so-called trade dress—the packaging or design of a product⁴⁰⁰—are protected because they signal the product’s source. Trademarked design cannot be functional, however.⁴⁰¹ And, importantly, trademark law “recognizes two kinds of functionality: utilitarian and aesthetic.”⁴⁰² The latter refers to aesthetic features that are not just indicators of source but are among the reasons “why people buy the product.”⁴⁰³ If the hexagonal end panels of plastic desk trays⁴⁰⁴ end up pleasing the tray-buying public—who favor hexagonal trays because they

393. *Best Lock Corp. v. Ilco Unican Corp.*, 94 F.3d 1563, 1567 (Fed. Cir. 1996) (Newman, J., dissenting).

394. Buccafusco, *supra* note 373, at 526.

395. *Id.* at 527.

396. Andrew W. Torrance, *Beauty Fades: An Experimental Study of Federal Court Design Patent Aesthetics*, 19 J. INTEL. PROP. L. 389, 392 (2012). Torrance favors this trend because he thinks—dubiously, in my view—that tests of novelty and distinctiveness are more objective than judgments about attractiveness. *See id.* at 407.

397. *See, e.g., L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123 (Fed. Cir. 1993).

398. Lee & Sunder, *supra* note 379, at 561. *But see* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1014 (2017) (rejecting the view that “the only [copyrightable] features [of a useful article] are those that play absolutely no role in an article’s function”).

399. Lee & Sunder, *supra* note 379, at 549.

400. *See* *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209 (2000).

401. *See* 15 U.S.C. § 1125(c)(4) (2012).

402. Lee & Sunder, *supra* note 379, at 549.

403. *Id.* at 562.

404. *W.T. Rogers Co. v. Keene*, 778 F.2d 334 (7th Cir. 1985).

like the shape, not because they like its maker—the aesthetic functionality bar will prevent the trays’ manufacturer from trademarking the design and thereby putting competitors at a “significant non-reputation-related disadvantage.”⁴⁰⁵ In cases like this, the object’s end is seen to be partly aesthetic. “Beauty is function.”⁴⁰⁶

The aesthetic functionality doctrine in trademark raises an important question for copyright and patent: Why do we not consider the aesthetic aspects of writings and objects to be functional? Do artworks not serve to provide pleasure or amusement or instruction, to disturb or offer escape, or to evoke particular feelings in their audience?⁴⁰⁷ And as Christopher Buccafusco observes, don’t many useful objects—ergonomic chairs or heat pads, for example—have a similar function: to make us feel a particular way?⁴⁰⁸

Buccafusco’s compelling claim is that “aesthetic” objects are distinguished from many “useful” objects not in their level of functionality, but in the *kinds* of feelings they are designed to evoke—more specifically, in the bodily senses they address.⁴⁰⁹ Noting the distinction philosophers have long drawn between the higher senses—sight and hearing—and the lower ones—taste, smell, and touch—Buccafusco claims that objects are deemed aesthetic if they address the former, but useful if they target the latter.⁴¹⁰ The sonata and the reclining chair might both relax us, but the sonata, unlike the chair, will qualify for copyright rather than a utility patent.

Most commentators who have written on aesthetic judgment in IP law have located it at the retail level—in courts’ fumbling attempts to conceptually separate the aesthetic from the useful aspects of certain objects.⁴¹¹ All too often, they have tried to distill the entirety of aesthetics into (usually three) theoretical approaches and then pigeonholed judicial opinions into them.⁴¹²

But as Buccafusco shows, there is a much deeper, wholesale aesthetic judgment at stake in all of this—and it is one that cannot be neatly categorized in one of the usual ways as “formalist,” “intentionalist,” et cetera. Buccafusco’s insight is that underlying the beauty–utility distinction that cuts across IP law is a conception of the aesthetic as limited to sights

405. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995).

406. *Keene*, 778 F.2d at 343.

407. Buccafusco, *supra* note 373, at 511; Hick, *supra* note 383, at 53.

408. Buccafusco, *supra* note 373, at 511.

409. *Id.* at 511–12.

410. *Id.*

411. *See supra* note 383.

412. *See, e.g.*, Farley, *supra* note 4, at 839–45; Walker & Depoorter, *supra* note 313, at 353–58; Yen, *supra* note 298, at 252–56.

and sounds.⁴¹³ This conception of the aesthetic is one that treats objects as useless only insofar as they provide purely visual and aural pleasures.⁴¹⁴ And importantly, it is a notion of the aesthetic that courts have treated as “subjective,” vague, and variable in ways that objects designed to produce tastes, smells, or “feels”—realms excluded from the aesthetic—are not.⁴¹⁵ This point will be worth recalling in Part II, when we ask what, exactly, is wrong with aesthetic judgment in law and find that many will answer: its subjectivity.⁴¹⁶

4. VARA

In 1990, Congress hurriedly passed the Visual Artists Rights Act,⁴¹⁷ amending copyright law with protections for the so-called moral rights of artists who create paintings, drawings, prints, sculpture, and photographs in editions of 200 or fewer signed and numbered copies.⁴¹⁸ Familiar in Europe and required under the Berne Convention (a multilateral copyright treaty to which the U.S. is a signatory),⁴¹⁹ these moral rights are “of a spiritual, non-economic and personal nature[,] . . . spring[ing] from a belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.”⁴²⁰

More specifically, VARA gives visual artists three sets of rights, all subject to fair use defenses: 1) integrity: the right “to prevent any intentional distortion, mutilation, or other modification” of their works if it “would be prejudicial to [their] honor or reputation”;⁴²¹ (2) attribution: the right to claim authorship of their works or disclaim authorship if their works are modified in reputation-harming ways;⁴²² and (3) the right to “prevent any destruction of a work of recognized stature.”⁴²³

413. Buccafusco, *supra* note 373, at 511.

414. *Id.*

415. *Id.* at 517–18, 523 (“Patent courts do not usually find terms referring to touch or taste, such as ‘comfortably’ or ‘smoky flavor,’ indefinite.”). For more on the historical reasons, including moral and political ones, for defining the aesthetic in this way, see Brian Soucek, *Resisting the Itch to Redefine Aesthetics: A Response to Sherri Irvin*, 67 J. AESTHETICS & ART CRITICISM 223 (2009).

416. See *infra* Part II.B.

417. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5089, 5128–33; see also Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 4 (1997) (discussing VARA’s legislative history).

418. 17 U.S.C. §§ 101, 106 (2012).

419. *Id.* § 101.

420. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

421. 17 U.S.C. § 106A(a)(3)(A) (2012).

422. *Id.* § 106A(a)(1)–(2).

423. *Id.* § 106A(a)(3)(B).

As Robert Bird has noted, academic articles about VARA far outpace the number of reported VARA cases.⁴²⁴ And yet those relatively few cases are enough to show courts struggling with, and struggling to avoid, aesthetic judgment in unusually explicit terms.

Courts do so, first, in deciding what kinds of art get VARA protection in the first place. Can a wildflower display count as painting or sculpture? Faced with this question, a district court worried that while the law “requires legislatures to taxonomize artistic creations,” “the evolution of ideas in modern or avant garde art . . . is occupied with expanding the definition of what we accept to be art.”⁴²⁵ On appeal, the Seventh Circuit was less sympathetic; it cautioned against employing “infinitely malleable” categories of art in which VARA’s explicit medium-based limitations would cease to do work.⁴²⁶ (The wildflower display lost.⁴²⁷)

Deflection has been a common strategy in VARA cases. Courts have sometimes found a way to avoid aesthetic judgment by looking to two of VARA’s specific exclusions: it does not protect “promotional” or “advertising” material, nor does it cover “applied art.”⁴²⁸ As the Second Circuit has written, invoking Justice Holmes and *Bleistein*: “We steer clear of an interpretation of VARA that would require courts to assess either the worth of a purported work of visual art, or the worth of the purpose for which the work was created.”⁴²⁹ Instead, the Second Circuit realized that if it could identify a promotional purpose, that would disqualify a work from VARA protections no matter its quality or its status as a painting.⁴³⁰ Those judgments would become unnecessary.

Similarly with the “applied art” exclusion: given that Congress, in VARA, made the now familiar aesthetic judgment to privilege art that lacks utility,⁴³¹ courts have tried to decide cases looking solely to a work’s usefulness, thereby avoiding questions about its art status. As the Second Circuit put it, “VARA may protect a sculpture that looks like a piece of

424. Robert C. Bird, *Of Geese, Ribbons, and Creative Destruction: Moral Rights and Its Consequences*, 90 TEX. L. REV. SEE ALSO 63, 64 n.8 (2011).

425. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *4 (N.D. Ill. Sept. 29, 2008).

426. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 300–02 (7th Cir. 2011); see also David E. Shipley, *The Empty Promise of VARA*, 83 MISS. L.J. 985, 1016–20 (2014).

427. *Kelley*, 635 F.3d at 308.

428. 17 U.S.C. § 101 (2012).

429. *Pollara v. Seymour*, 344 F.3d 265, 271 (2d Cir. 2003) (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)). The Second Circuit did note, however, that insofar as it might have to make aesthetic judgments, Congress had “instructed courts to ‘use common sense and generally accepted standards of the artistic community.’” *Id.* at 269 (quoting *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995) (quoting H.R. REP. NO. 101–514, at 9 (1990), reprinted in 1990 U.S.C.A.N. 6915, 6921)).

430. *Id.*

431. See *supra* Part I.E.3.

furniture, but it does not protect a piece of utilitarian furniture, whether or not it could arguably be called a sculpture.”⁴³² The Ninth Circuit too has tried to direct “attention away from assessments of an object’s artistic merit and instead toward the object’s practical utility”;⁴³³ its recently developed test brands a work as “applied art,” excluded from VARA, “both where a functional object incorporates a decorative design in its initial formulation, and where a functional object is decorated after manufacture but continues to serve a practical purpose.”⁴³⁴ Ironically, it was the panel’s concurring judge—whose proposed test would have required courts to decide whether a work’s “primary purpose” was “to be viewed and perceived as art”—who quoted *Bleistein*, admitted that “judicial attempts to categorize artistic creations are fraught with difficulties,” and claimed that “judges make terrible art critics.”⁴³⁵ None of that stopped her, however, from tracing a history of utilitarian art from the caryatids of the Acropolis to Tracey Emin’s bed at the Tate Britain.⁴³⁶

One place where VARA unavoidably demands aesthetic judgment is in its protection against the destruction of works “of recognized stature.”⁴³⁷ The leading decision on this remains a 1994 district court opinion—*Carter v. Helmsley-Spear, Inc.*⁴³⁸ There the court required that works have merit that is acknowledged by “art experts, other members of the artistic community, or by some cross-section of society.”⁴³⁹ The court cautioned, however—with the requisite citation to *Bleistein*—that judges needn’t “personally find the art to be aesthetically pleasing; indeed, courts have persistently shunned the role of art critic,” it claimed.⁴⁴⁰ To avoid that role, courts generally outsource aesthetic judgment to experts and other artworld

432. *Pollara*, 344 F.3d at 269.

433. *See* *Cheffins v. Stewart*, 825 F.3d 588, 594 (9th Cir. 2016) (“The analysis we adopt today directs the court’s attention away from assessments of an object’s artistic merit and instead toward the object’s practical utility.”).

434. *Id.*

435. *Id.* at 602, 599 (McKeown, J., concurring).

436. *Id.* at 600–02.

437. 17 U.S.C. § 106A(a)(3)(B) (2012).

438. 861 F. Supp. 303 (S.D.N.Y. 1994); *see also* *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999).

439. *Carter*, 861 F. Supp. at 325. For criticism of the test, *see* Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1968–70 (2000).

440. *Carter*, 861 F. Supp. at 325.

figures⁴⁴¹—though, as always, any resulting battle of the experts will draw courts right back in, making aesthetic judgment inescapable.⁴⁴²

VARA's explicit call for aesthetic value judgments has been heavily criticized, with many commentators claiming that the "recognized stature" standard is unique within copyright law.⁴⁴³ It should be clear by now that I disagree. While copyright law may not elsewhere require a judge to say "this is good art," many of the first-order aesthetic judgments discussed above require courts to judge what parts of a work are significant, or what kinds of transformations are valuable enough to protect under fair use. These kinds of judgments are not different in kind from those required under VARA.

A more fundamental critique—attacking VARA on its own terms—comes from Amy Adler, a leading commentator here again. According to Adler, VARA champions a conception of art that contemporary artists have largely worked to reject.⁴⁴⁴ Vesting rights in the artist to protect his or her authorial intentions, VARA endorses a notion of the artist as a solo, Romantic genius who creates works with stable, unchanging meaning.⁴⁴⁵ This, says Adler, is an outdated idea rooted in an artistic period prior to that whose works VARA covers.⁴⁴⁶ Preventing the distortion or mutilation of artworks, VARA obstructs the creative destructive tendencies that Adler claims to be "at the heart of contemporary art."⁴⁴⁷ And by distinguishing works of visual art from all other property, VARA reifies the very

441. *Id.* An earlier version of VARA had instructed courts to "take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art." S. 1619, 100th Cong. § 101 (1987).

442. For a terrific example involving experts clashing over whether peeling paint was a conservation defect or part of the work's commentary on decay in nature, see Robinson, *supra* note 439, at 1954 ("In evaluating expert evidence, the judge was ultimately forced to evaluate competing experts' testimony based on the credibility of their aesthetic theories.").

443. See, e.g., Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward A Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 955 (1990) ("Copyright law has traditionally eschewed judgments of quality, mainly because the courts are not especially competent to make this type of judgment."); Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 480 n.19 ("[R]esort to a merit criterion cuts against a long copyright tradition eschewing value or aesthetic judgments about works of authorship." (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903))); Robinson, *supra* note 439, at 1965 ("Perhaps the most controversial element of the recognized stature standard is that it requires courts for the first time in copyright law to make distinctions based on aesthetic considerations.").

444. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009) ("[T]he conception of 'art' embedded in moral rights law has become obsolete.").

445. *Id.* at 271.

446. *Id.* at 271–79.

447. *Id.* at 284. Adler distinguishes between artists' "creative destruction" and the "tragic destruction" of the Bamiyan Buddhas by the Taliban. *Id.* at 290. But the distinction arguably depends on the special status of art and the privileging of artists' intentions that Adler elsewhere decries.

boundary between art and ordinary objects that many contemporary artists aim to blur, if not obliterate.⁴⁴⁸

Adler's crucial point is that in enacting VARA, Congress enshrined particular aesthetic judgments or preferences into copyright law. Her claim is that VARA privileged a conception of art that many contemporary artists and critics would reject.⁴⁴⁹

The important question is whether there is anything wrong with the law picking and choosing aesthetic winners and losers in this way. And if so, what kind of wrong is it? Does Adler's critique amount to a policy disagreement about what aesthetic concepts and values the federal government should subsidize—in this case through special property rights awarded through copyright law? Or is the challenge she raises a more fundamental one: that the law shouldn't be deciding aesthetic controversies in the first place? Note that this latter worry could be directed either at Congress, which (as Adler shows) took a side on live aesthetic controversies in VARA, *or* at judges forced to take sides, and even act as art critics, in individual disputes. VARA, after all, both embodies a set of legislated aesthetic judgments and requires courts themselves to engage in aesthetic judgment.

Finding answers to these important questions requires figuring out what, exactly, is problematic about aesthetic judgment in law. Perhaps the problem is that courts and maybe other (but which?) state actors are ill-equipped to engage with aesthetics. Perhaps the problem is rooted instead in the subjective or unpredictable nature of aesthetic judgment itself. Or—as I will soon argue in Part II—perhaps the problem is one of censorship: worries about government-imposed aesthetic orthodoxy.

Part I has shown the breadth and depth of law's entanglement with aesthetic concepts and values. Now we're poised to consider whether and why and when the law should try to *disentangle* itself and strive for the aesthetic neutrality that it so often professes.

II. THREE ARGUMENTS AGAINST AESTHETIC JUDGMENT

Given the extent to which aesthetic judgments suffuse intellectual property law, there is some irony in the fact that this is the area in which Justice Holmes first voiced his warning against aesthetic judgment in law. The case, *Bleistein v. Donaldson Lithographing Co.*,⁴⁵⁰ was a copyright action between the designer of advertising posters for a traveling circus and

448. *Id.* at 295–99.

449. *Id.* at 295. Note that artists who disagree with VARA's conception of art could always waive their right to enforce its protections. *See* 17 U.S.C. § 106A(e) (2012).

450. 188 U.S. 239 (1903).

the lithographing company that copied the posters when the circus needed more.⁴⁵¹ At the time, copyright was available for prints only if they were “pictorial illustrations or works connected with the fine arts.”⁴⁵² By contrast, the district court in *Bleistein* considered the posters “frivolous” and “to some extent immoral.”⁴⁵³ The court of appeals went further, finding as a constitutional matter that advertisements like *Bleistein*’s were uncopyrightable, as they failed to contribute to the progress of science and useful arts—the basis of Congress’s power to establish copyright protections in the first place.⁴⁵⁴

In the Supreme Court, *Bleistein* argued that, whatever their purpose, the advertisements had an originality and aesthetic force that satisfied the constitutional purposes of copyright.⁴⁵⁵ But this was not the course taken by Justice Holmes, then in his second month on the Supreme Court. Instead, Holmes disclaimed aesthetic discrimination entirely, or nearly so. In his now famous words:

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. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.⁴⁵⁶

Despite the specific context in which these words were uttered, this part of *Bleistein* has long been applied well beyond the confines of

451. *Id.* at 248. More historical details about *Bleistein* are offered in Diane Leenheer Zimmerman, *The Story of Bleistein v. Donaldson Lithographing Company: Originality as a Vehicle for Copyright Inclusivity*, in *INTELLECTUAL PROPERTY STORIES 77* (Jane C. Ginsburg & Rochelle Cooper Dreyfuss, eds., 2006).

452. *Bleistein*, 188 U.S. at 250 (quoting Act of July 8, 1870, ch. 230, 86, 16 Stat. 198 (codified at Rev. Stat. § 4952 (1874)), amended by Act of Mar. 3, 1891, ch. 194, 28 Stat. 965); see also Zimmerman, *supra* note 451, at 87–88.

453. *Bleistein v. Donaldson Lithographing Co.*, 98 F. 608, 611 (C.C.D. Ky. 1899); see also Zimmerman, *supra* note 451, at 88.

454. Zimmerman, *supra* note 451, at 89–90.

455. *Id.* at 92–93.

456. *Bleistein*, 188 U.S. at 251–52.

copyright law. Holmes's admonition has been generalized as a general principle of aesthetic neutrality in law. And as the following Subparts discuss, three rationales have been offered to support this insistence on nondiscrimination in matters of aesthetics: (1) judges are not competent to make aesthetic judgments;⁴⁵⁷ (2) aesthetic judgments are unduly subjective or relative;⁴⁵⁸ and (3) neutrality in regard to aesthetics is necessary to avoid censorship.⁴⁵⁹

The most widely discussed rationales are the first two. But for reasons that follow, neither is convincing. And that leaves the third rationale, grounded in the First Amendment and thus limited—in ways that have never yet been fully explored—by the First Amendment's distinctive scope.

A. *Judicial Competence*

“We are not art critics, do not pretend to be and do not need to be to decide this case.”⁴⁶⁰ So begins a Seventh Circuit opinion that turns, in part, on whether a public sculpture was a “work of recognized stature” protectable under the Visual Artists Rights Act.⁴⁶¹ The sentiment is a common one,⁴⁶² and it echoes Justice Holmes's claim that “[i]t would be a dangerous undertaking for *persons trained only to the law*” to make aesthetic judgments.⁴⁶³

Academic discussions of *Bleistein* often invoke this idea of judicial competence—or incompetence—regarding aesthetics. “[T]he judiciary has no particular competence to assess artistic merit,” claims Christine Haight Farley, who observes further that Holmes's own disclaimer, paired as it is with references to artists ranging from Velasquez to Steinla, “sounds less like humility and more like an apology for a judge's philistine

457. See *infra* Part II.A.

458. See *infra* Part II.B.

459. See *infra* Part II.C.

460. *Martin v. City of Indianapolis*, 192 F.3d 608, 610 (7th Cir. 1999); see also *id.* at 615 (Manion, J., concurring in part and dissenting in part) (“Like my colleagues, I am not an art critic.”).

461. *Id.* at 612 (emphasis omitted) (quoting 17 U.S.C. § 106A(a)(3)(B)).

462. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413, 427 (1966) (Douglas, J., concurring in the judgment) (“We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens.”). Ned Snow traces this rationale from *Bleistein* back to “the specific warning” given in *Henderson v. Tompkins*, 60 F. 758, 763 (C.C.D. Mass. 1894), “that judges are incompetent at evaluating the worth of a work's content.” Snow, *supra* note 3, at 27. For a nice compilation of cases from the Second Circuit in which judges disclaim expertise in aesthetics, see James H. Carter, *They Know It When They See It: Copyright and Aesthetics in the Second Circuit*, 65 ST. JOHN'S L. REV. 773, 773 n.3 (1991).

463. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (emphasis added).

colleagues.”⁴⁶⁴ Robert Kirk Walker and Ben Depoorter note that “courts are not specifically ‘trained’ in artistic assessment” and that “time and again, courts declare that they must abstain from making aesthetic judgments on the basis that they are incompetent to do so.”⁴⁶⁵ Randall Bezanson distinguishes the “expertness and experience with aesthetic judgment[]” of professionals such as librarians, professors, and curators—specialists regularly entrusted with aesthetically fraught decisions regarding book purchases, tenure, and arts funding—from that of courts, which “regularly and quite explicitly disavow[] both the capacity and power to make such judgments.”⁴⁶⁶ Amy Sabrin agrees, arguing that, in contrast to arts professionals, “[e]ven if a particular judge has experience in the arts, . . . he or she is unlikely to have the breadth of exposure necessary to make comparative judgments of artistic merit.”⁴⁶⁷

“[J]udges can make fools of themselves pronouncing on aesthetic matters,” Richard Posner has pointedly written.⁴⁶⁸ But Judge Posner has also described how judges can make fools of themselves pronouncing on historical matters,⁴⁶⁹ or scientific and technological ones,⁴⁷⁰ or matters best understood in economic terms.⁴⁷¹ And he is not alone.⁴⁷²

464. Farley, *supra* note 4, at 814.

465. Walker & Depoorter, *supra* note 313, at 344–45; *see also id.* at 352–53 (citing cases in which “courts have pled incompetence in artistic assessment”). Walker and Depoorter go on to argue, however, that “although many courts have read *Bleistein* as mandating an avoidance of aesthetic questions, Holmes’s language in the case supports the opposite conclusion: courts may make aesthetic judgments so long as they are sufficiently well-informed.” *Id.* at 371.

466. Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 368, 377 (1998).

467. Amy Sabrin, Essay, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1231 (1993).

468. *Gracen v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983); *see also* *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003) (claiming that a stringent originality requirement in copyright law “would involve judges in making aesthetic judgments, which few judges are competent to make”).

469. “Judges are not competent historians.” Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

470. “The discomfort of the legal profession, including the judiciary, with science and technology is not a new phenomenon. . . . But it’s increasingly concerning.” *Jackson v. Pollion*, 733 F.3d 786, 788 (7th Cir. 2013) (citing statements by Chief Justice Rehnquist, Justices Scalia and Frankfurter, and Judges Hand and Friendly to the same effect); *see also* Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 4 (2010) (“As a general matter, lawyers and science don’t mix.”).

471. RICHARD A. POSNER, *HOW JUDGES THINK* 237 (2008) (claiming that, despite the success of economic analysis of law as a positive theory, “it would be odd to describe American judges as ‘economists’” since “[v]ery few of them have a substantial background in economics”).

472. *See, e.g.*, HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 156–57 (1973) (“[T]he courts must also deal today with a great number of patents in the higher reaches of electronics, chemistry, biochemistry, pharmacology, optics, harmonics and nuclear physics, which are quite beyond the ability of the usual judge to understand without the expenditure of an inordinate amount of educational effort by counsel and of attempted self-education by the judge, and in many instances, even with it.”); Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L.

This is precisely the problem with the judicial (in)competency argument for the aesthetic nondiscrimination principle: it is hard to understand why aesthetic judgments should be any harder to make than judgments involving, say, complex technology in patent disputes or judgments requiring deep familiarity with the economics of a particular industry in antitrust cases. Navigating such difficult waters is just one of the professional hazards of a system where judges are generalists by design. As in other areas, judges' ignorance about aesthetics could presumably be mitigated by good briefing and testimony from experts.

Unless, of course, there is no such thing as "experts" in aesthetics. Were that the case, there would then be no one to instruct generalist judges on the standards they should employ when making aesthetic judgments. A lack of standards, and thus experts, would make aesthetic judgments *different in kind* from judgments regarding history or science or economics. That, in fact, is the belief at the heart of the second rationale for the aesthetic nondiscrimination principle: the argument that aesthetic judgments are hopelessly subjective. Worries about expertise ultimately reduce, then, to the argument that there is just no disputing about taste.⁴⁷³

B. Relativism

The purported subjectivity or (more precisely)⁴⁷⁴ relativism of aesthetic judgments is—perhaps ironically—one of the near universals in discussions of law's aesthetic judgment.⁴⁷⁵ As Justice Scalia put it in *Pope v. Illinois*:

Since ratiocination has little to do with esthetics, . . . we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide "What is Beauty" is a novelty even by today's standards.⁴⁷⁶

Nearly every discussion of *Bleistein* and the aesthetic nondiscrimination principle traces it to the idea that "beauty is in the eye of

REV. 479 (2008); Jed Rakoff, Lecture, *Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 *FORDHAM J. CORP. & FIN. L.* 4 (2012).

473. As Justice Harlan famously wrote in *Cohen v. California*: "[O]ne man's vulgarity is another's lyric." 403 U.S. 15, 25 (1971).

474. See *infra* note 477.

475. See, e.g., *Hannegan v. Esquire*, 327 U.S. 146, 157 (1946) ("What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another.").

476. 481 U.S. 497, 504–05 (1987) (Scalia, J., concurring).

the beholder.”⁴⁷⁷ “[T]he inherent ambiguity of aesthetics is considered incompatible with the supposedly objective rules and principles that govern judicial opinions,” writes Alfred Yen.⁴⁷⁸ Professor Farley goes further in describing what she calls the law’s “unified stance”⁴⁷⁹: “[B]ecause taste is so subjective, any interpretation of art is as good as any other.”⁴⁸⁰ This makes aesthetic questions “particularly ill-suited for judicial resolution”;⁴⁸¹ art becomes “law’s other.”⁴⁸² Andrew Torrance says, incredibly, not only that “[c]ourts are rarely asked to judge beauty,” but that “[s]uch a subjective practice would normally be anathema to the ideal of objective legal standards.”⁴⁸³

Some root the opposition between art and law more in the nature of art than in the subjectivity of aesthetic judgment. Thus, Walker and Depoorter note the view that “law and art serve discordant cultural functions: law is concerned with providing social stability, whereas art is unpredictable and challenging to social conventions.”⁴⁸⁴ In work that is particularly sensitive to postmodern developments in the artworld, Amy Adler has similarly claimed that “[a]rt, by its nature, will call into question any definition that we ascribe to it. As soon as we put up a boundary, an artist will violate it, because that is what artists do.”⁴⁸⁵ Still, the result is the same as before. The claim that art will always outrun any standards we employ means, yet again, that in art, standards of judgment are of no use and the predictability and reliance so prized by law are impossible to attain.

And yet it is worth noting the limited range of aesthetic judgments that are said to be so hopelessly subjective and unpredictable. Talk of unbridled relativism almost always surrounds questions of value: those of the form,

477. This cliché helps show why “subjectivity” is not exactly the right word here. We might agree that beauty is in the eye (which is really to say, the mind) of the beholder instead of being a property of objects themselves. This means it is subjective rather than objective. Even so, a given object could be seen as beautiful in the eyes/minds of *all* beholders, or at least all disinterested or otherwise suitably situated beholders. Judgments of beauty would then be universal, rather than relative, even though they were also subjective—i.e., based in the faculties of perceiving subjects. Given the possibility of a subjective universality of taste—the central notion in Immanuel Kant’s aesthetic theory—subjectivity and relativism cannot be synonymous. Cf. KANT, *supra* note 5, §§ 6–9. In short, the maxim that there is no disputing about taste is ultimately an assertion of aesthetic *relativism*, not subjectivity.

478. Yen, *supra* note 298, at 248; *see also id.* at 249 (“Aesthetic reasoning is subjective and indeterminate, while legal reasoning is objective and rigorous.”).

479. Farley, *supra* note 4, at 811.

480. *Id.* at 813.

481. *Id.*

482. *Id.* at 811.

483. Torrance, *supra* note 396, at 391.

484. Walker & Depoorter, *supra* note 313, at 345.

485. Adler, *supra* note 290, at 1378; *see also* Amy Adler, *The Folly of Defining Art*, in *THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS* 91 (Christopher Hawthorne & András Szántó, eds., 2003).
2004).

“Is this artwork good?” Justice Scalia’s “What is Beauty” is a more traditional way of asking the same thing. But so too is the question that Professor Adler says we postmoderns can no longer answer. Though she writes of the impossibility of *defining* art, she does so in the context of obscenity law where, as we have seen, the relevant inquiry is whether a work, taken as a whole, has serious artistic *value*.⁴⁸⁶

Why does this matter? Because even if we were to grant the relativism of retail aesthetic value judgments, this might still leave untouched most of the other substantive aesthetic judgments canvassed in Part I. That is to say, even if beauty is in the eye of the beholder—though more on that below—must we also think that the *definition* of art is equally variable? Or what about the judgment that “art” is a purely classificatory rather than evaluative concept? Or the judgments that an artwork’s moral value can affect its artistic value, or that its utility cannot do so? These wholesale judgments needn’t be relativist even if retail judgments about any given work’s morality, utility, or beauty were to vary from person to person. Even those who think there is no disputing about taste might still feel comfortable disputing higher-order questions like these.

For that matter, even some of the retail questions encountered above likely admit of more objectivity—or at least intersubjective agreement—than generally recognized, especially when they arise within the highly specific contexts detailed in Part I. Tastes may differ on whether Brancusi’s *Bird in Space* is any good, but must they also differ as to whether it is a sculpture, or whether, perhaps more relevantly, it is the kind of thing Congress intended to count as a sculpture for tariff purposes? To claim that this last question cannot admit of an answer is to discredit far more than aesthetic judgment; it is to question the very possibility of intent-based statutory interpretation.

The point is that claims about the relativity of aesthetic judgment, widespread as they are, don’t themselves encompass a very wide array of aesthetic judgments. As Part I made clear, the law’s aesthetic judgment goes far beyond judgments about the quality of particular works. And significantly, even there—even in regard to judgments about the value of particular works—it is unclear how many people really believe the relativism they so often profess. Consider, for example, the distinction previously drawn between generalist judges “trained only to the law”⁴⁸⁷ and specialists such as librarians, curators, and professors. If there really were no disputing about taste, shouldn’t librarians choose books to buy, or curators select paintings to exhibit, more or less at random? Could

486. See Adler, *supra* note 485; see also *Miller v. California*, 413 U.S. 15, 24 (1973); *supra* Part I.D.

487. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

academics justify their curricular and tenure decisions if they truly hinged on utterly relativist aesthetic considerations?⁴⁸⁸

The idea that professionals like these are in a privileged position to judge aesthetic quality, at least compared to courts, is hard to square with claims that aesthetic quality is all relative. Those who believe the latter should be as dubious of a literature professor's syllabus choices as they are of federal judges who express views on aesthetic matters. To the true aesthetic relativist, Danielle Steele and Shakespeare cannot be ranked, except in regard to one's personal preferences.

If this last claim strikes us as false, then we are left with the dilemma that has occupied philosophers of art since at least the eighteenth century. As David Hume explained in his pathmarking essay "Of the Standard of Taste," we have two dueling intuitions. On the one hand, we believe that "[b]eauty is no quality in things themselves: It exists merely in the mind which contemplates them; and each mind perceives a different beauty."⁴⁸⁹ Yet on the other hand, we also think that anyone who "would assert an equality of genius and elegance between OGILBY and MILTON . . . would be thought to defend no less an extravagance, than if he had maintained a mole-hill to be as high as TENERIFFE, or a pond as extensive as the ocean."⁴⁹⁰ Thus, says Hume, we seek a standard: "a rule, by which the various sentiments of men may be reconciled; at least, a decision afforded, confirming one sentiment, and condemning another."⁴⁹¹ By the end of the eighteenth century, Kant had taken up this challenge and made "subjective universality" one of the defining elements of judgments of taste. For Kant, when we call something "beautiful," we are making a demand that everyone else agree.⁴⁹²

This is no place to defend or even expand further on the details of Kant's aesthetic theory. But it is worth noting how influential many of its elements remain in philosophy, and how much attention philosophers of art since Kant have devoted to the problem of aesthetic normativity. Suffice it to say that aesthetic relativism is hardly the default position in philosophy that it is or seems to be in law.⁴⁹³ When I presented an early version of this

488. Aesthetics could prove relevant to a tenure decision either because the person being evaluated worked in the arts or simply because evaluators cared about the aesthetics of an academic's prose.

489. HUME, *supra* note 26, at 8.

490. *Id.* at 9. Not knowing who John Ogilby is only proves Hume's point.

491. *Id.* at 6.

492. See KANT, *supra* note 5; cf. Nick Zangwill, *Aesthetic Judgment*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/archives/fall2014/entries/aesthetic-judgment/>.

493. As two philosophers of art have written:

Although it became fashionable in the 1970s and 1980s in certain cultural and intellectual circles either to try and sidestep all questions of value in the arts (notably in literary

project at a philosophy conference, a quotation from Judge Learned Hand—“We recognize that in aesthetics there are no standards”⁴⁹⁴—drew guffaws from the audience.

Rejecting relativism does not require that everyone converge on one single, universally agreed-upon interpretation and evaluation of every artwork. One might, for example, adopt the view of certain pluralists that some interpretations and evaluations of a work are better than others, even if multiple, incompatible interpretations (and corresponding evaluations) are merited.⁴⁹⁵ Alternatively, one might explain and justify interpretive and evaluative differences in terms of differences in the *aims* of those doing the interpretation and evaluation.⁴⁹⁶ This approach is consonant with the contextual specificity described in Part I, where often aesthetic judgments were made and justified in light of particular, program-specific governmental interests.

For present purposes, the crucial point is not to decide which of these positions is right. It is rather to notice that each of these positions, *aesthetic relativism included*, constitutes a substantive aesthetic judgment. Aesthetic relativism is not a retreat from aesthetic judgment, or a reason for claiming that aesthetic judgments in law are impossible or inadvisable. Aesthetic relativism is itself a substantive position within aesthetics. To affirm relativism is to make an aesthetic judgment.

In summary, the relativist rationale for the aesthetic nondiscrimination principle runs into a series of objections. It is at once narrower and more sweeping than its proponents often acknowledge: it only applies to a subset of the rich array of aesthetic judgments made in the law, yet within that subset—involving value judgments of particular works—aesthetic relativism questions the very notion that professionals like curators or

criticism) or to promote radical kinds of relativism, whereby values were deemed mere products of ideology, analytic philosophers have been reluctant to embrace either skepticism or relativism of this nature.

AESTHETICS AND THE PHILOSOPHY OF ART: THE ANALYTIC TRADITION 235 (Peter Lamarque & Stein Haugom Olsen eds., 2004); *see also* Zangwill, *supra* note 492 (“[I]f we are describing our thought as it is, not how some think it ought to be, then it is important that philosophers should be persistent and insist . . . that normativity is a necessary condition of the judgment of taste.”).

494. *H.C. White Co. v. Morton E. Converse & Son Co.*, 20 F.2d 311, 312 (2d Cir. 1927).

495. *See* Robert Stecker, *Relativism*, in 5 *ENCYCLOPEDIA OF AESTHETICS* 354, 356 (Michael Kelly ed., 2d ed. 2014) (describing as an example Joseph Margolis’s “robust relativism,” in which interpretive claims about artworks can be dismissed as false but affirmed only as apt or reasonable, not as true).

496. Professor Stecker provides an example:

[I]t would be wrong to apply the same standard to an interpretation that attempts to recover the intention of the artist and an interpretation that attempts to find significance in a work that would make it relevant to a particular contemporary audience. Success in these two cases involves very different things. Thus, it appears to be true that the acceptability of an interpretation is relative to its aim.

Id. at 358.

librarians are better situated than others to make such judgments.⁴⁹⁷ Furthermore, relativism is at best a contested view within the philosophy of art. And that, for present purposes, leads to the most decisive objection to the relativist argument for aesthetic nondiscrimination. Relativism *is* a substantive aesthetic judgment, not a basis for staying away from, or remaining neutral on, matters of aesthetics.

This is a point that seems to have been lost on most previous commentators, though not on the Supreme Court. Consider this, from Justice Kennedy's opinion for the Court in a case from 2000, *United States v. Playboy Entertainment Group*:

When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.⁴⁹⁸

So much is important, and useful, in this. First, the Court here confirms that it considers a "relativistic philosophy"—that is, a denial of "objective standards of . . . taste, . . . beauty, and esthetics"—to be itself an aesthetic judgment.⁴⁹⁹ Second, the Court makes clear that the Constitution does not decree that (or any other) aesthetic judgment. To the contrary, third, the First Amendment prohibits government from establishing "what shall be orthodox"⁵⁰⁰ in matters of aesthetics.

Pursuing this point, the following Subpart argues that the limits on the government's ability to make aesthetic judgment stems not from the incompetence of courts, or the nature of aesthetic judgment itself, but from another source entirely: the First Amendment.

497. *But see* Bd. of Educ. v. Pico, 457 U.S. 853, 874 (1982) (finding constitutionally relevant a school board's decision to ignore the advice of "literary experts").

498. 529 U.S. 803, 818 (2000).

499. *Id.*

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

C. Freedom of Expression

Justice Kennedy's opinion in *Playboy Entertainment* provides a third distinct rationale for the aesthetic nondiscrimination principle. On this account, judges should avoid aesthetic judgment not because they are bad at it, or because aesthetic judgment is hopelessly "subjective." Instead, the aesthetic nondiscrimination principle is motivated by the very same considerations that discourage government from engaging in viewpoint discrimination more generally. Under the First Amendment, the government is simply not supposed to dictate or limit what its citizens think or express.⁵⁰¹

Traces of this idea can be gleaned from Holmes's *Bleistein* opinion, particularly its insistence that "the taste of any public is not to be treated with contempt."⁵⁰² Holmes's worry that Goya's etchings and Manet's paintings might not originally have been seen for their true worth similarly resonates with the First Amendment.⁵⁰³ But when Holmes warns that those works might not "have been sure of protection when seen for the first time,"⁵⁰⁴ he is talking about copyright protection, not protection from censorship—the First Amendment's concern. And while he is careful to credit the taste of the masses alongside that of elites, it is hardly clear that he does so to avoid judicially imposed orthodoxy rather than mere judicial mistake or embarrassment.

Given such ambiguity, it becomes a little less surprising that First Amendment concerns haven't always been foregrounded in discussions of *Bleistein*. Even those who worry—as *Bleistein* itself clearly does—about "anointing a particular interpretation of art above others"⁵⁰⁵ sometimes treat neutrality more as a due process concern than one affecting freedom of expression. As Professor Farley writes, "[C]ourts should not serve as arbiters of taste because the law should remain neutral."⁵⁰⁶ The worry here

501. *Playboy Entertainment*, 529 U.S. at 817–18.

502. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).

503. *Cf. Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

504. *Bleistein*, 188 U.S. at 251.

505. Farley, *supra* note 4, at 813.

506. *Id.*; see also Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 *IND. L.J.* 175, 194 (1990) ("If determinations of artistic value reflect the background and identity of the individual decision maker and there is no objective test of artistic merit, then works created by those and for those whose background and values are different from those of the decision maker may not be appreciated by that decision maker."); Walker & Depoorter, *supra* note 313, at 352 ("[T]he principle of judicial neutrality has been evoked to forbid aesthetic decisionmaking, which would elevate particular aesthetic preferences and theories over other equally valid ideas." (citation omitted)).

is that judges will be seen to play favorites among litigants appearing before them. This could, of course, have First Amendment implications, but the immediate concern is less about censorship than about a fair trial by an impartial decisionmaker.

Admittedly, some authors do acknowledge the First Amendment rationale for *Bleistein*'s nondiscrimination principle more directly. Walker and Depoorter claim that "courts refuse to explicitly state aesthetic opinions" because doing so "could result in chilling effects on speech and a covert form of censorship."⁵⁰⁷ Andrew Tutt describes as a "corollary" of the First Amendment the idea "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."⁵⁰⁸ And Professor Yen writes that "even if judges could make 'objectively correct' aesthetic choices, judges should not impose these choices on society because such action suggests government censorship."⁵⁰⁹

But even authors like these fail to grapple fully with what it would mean to root the aesthetic nondiscrimination principle in the First Amendment. More than one author, worried that aesthetic judgment in law could lead to censorship, actually goes on to suggest that courts should simply vary the aesthetic theories they employ⁵¹⁰—as if the First Amendment would be satisfied elsewhere so long as judges varied or remained unpredictable in the viewpoints they discriminated against.

Previous authors have not fully confronted what a First Amendment limitation on aesthetic judgment in law would mean for courts and other state actors forced, as they so often are, to exercise their aesthetic judgment. In particular, they have failed to notice the distinctive scope of First Amendment-based limits. Importantly, if the aesthetic nondiscrimination principle has its basis in the First Amendment, it should extend only as far as the First Amendment itself does.

In this, the First Amendment rationale for aesthetic nondiscrimination—the argument Justice Kennedy offers in *Playboy Entertainment*—differs fundamentally from the institutional competency and aesthetic relativism arguments discussed in the previous Subparts. Both

507. Walker & Depoorter, *supra* note 313, at 346 (citation omitted).

508. Tutt, *supra* note 2, at 1827.

509. Yen, *supra* note 298, at 248. In addition, First Amendment scholars like Randall Bezanson have addressed the *Bleistein* constraint. *See, e.g.*, Bezanson, *supra* note 466, at 287–88. But because their concerns focus solely on the First Amendment, they don't consider the question here, namely, How does the First Amendment rationale for *Bleistein*'s aesthetic nondiscrimination principle differ—especially in its scope—from the other rationales on offer?

510. Walker & Depoorter, *supra* note 313, at 376–79; Yen, *supra* note 298, at 299 ("If courts always use the same aesthetic premises, then there really would be an officially sponsored and enforced authoritative perspective on art. By contrast, if copyright law is left in its presently ambiguous state, different judges will continue to make different aesthetic choices in different cases.").

of those rationales are categorical in nature. Were it true that courts were characteristically unsuited for making aesthetic judgments, or if aesthetic judgments were irredeemably relative, judges would never be justified in making them. But if the proscription on aesthetic judgment in law is motivated instead by First Amendment worries about government-imposed aesthetic orthodoxy, the proscription's scope and force should be that of the First Amendment itself. On this third rationale, the aesthetic nondiscrimination principle is seen not as a categorical bar, but one that varies by context, just as the First Amendment does.

Part III will describe a spectrum of First Amendment applicability that suggests which of the areas of law canvassed in Part I are ones where aesthetic judgment should be allowed. But first, a quick review of the argument that leads us here. The claim that courts lack expertise in aesthetics—and thus should refrain from making aesthetic judgments—proves unconvincing, for it is hard to distinguish aesthetics from all the other complex areas in which courts lack competence but plunge ahead anyway. Aesthetic judgment can only be distinguished from, say, economic or scientific judgment in this regard if there is something distinctive about aesthetics. Thus, the claim about institutional competence gives way to a claim about the nature of aesthetic judgment. But assertions about aesthetic relativism, however common, run up against problems of their own. They apply only to a subset of the aesthetic judgments made in law; they aren't made consistently, particularly in regard to those considered specialists; and they are the subject of longstanding critique by philosophers of art. Most importantly, relativism itself turns out to be a contestable, substantive position within aesthetics—the very thing the First Amendment prevents the government from prescribing (or proscribing). The relativism rationale for law's aesthetic neutrality thus gives way to the First Amendment rationale. And the latter requires governmental neutrality not just for a different reason than the alternative rationales; as the following Part explores, it requires neutrality in more limited contexts.

III. WHEN TO ALLOW AESTHETIC JUDGMENT

If the problem with aesthetic judgment in law is not a problem with judges or with aesthetics, but one that stems solely from the First Amendment, the solution to the problem begins to look a good deal different. In fact, not only will the solution differ, the *need* for a solution will prove different in important ways. On the one hand, the need will go well beyond the courtroom. Whereas the first argument against aesthetic judgment centered on judges' inexperience as art critics⁵¹¹—and thus could

511. See *supra* Part II.A.

be solved by shifting aesthetic judgment to those with more experience—the First Amendment’s limits on government-imposed aesthetic orthodoxy apply to all state actors: from judges and legislators down to customs officers, librarians, and municipal zoning board members. On the other hand, rooting the problem in the First Amendment demands a *narrower* solution insofar as the First Amendment only applies in certain contexts. In other words, the First Amendment problem with aesthetic judgment in law isn’t a categorical one, as were the expertise and subjectivity rationales described in the previous Part.

So where does and doesn’t the First Amendment impose its limits? We might imagine a spectrum of First Amendment applicability. On one end, the Free Speech Clause applies in fullest force whenever the state is trying to shut down expression that diverges from state orthodoxy. Here, the aesthetic nondiscrimination principle is needed to keep the government from encroaching on private beliefs about substantive aesthetic matters. When private aesthetic judgments are regulated or, worse, disallowed—as they are, for example, in blight determinations and obscenity law⁵¹²—aesthetic neutrality becomes essential. But as we move across the spectrum from government regulation toward government subsidy of speech, aesthetic judgment becomes less concerning. Here we find cases, like tax and tariff exemptions and many areas of intellectual property, where private aesthetic judgments are being endorsed or subsidized by the government. Finally, at the far end of the spectrum, we move from government subsidies for speech to government speech itself. There the Free Speech Clause imposes no limit at all and the aesthetic nondiscrimination principle should cease to apply.

Ultimately, deciding whether aesthetic judgment in a particular area of law is appropriate requires that we locate it along the spectrum just described. This may be easier said than done, but the remaining pages of this article make a start.

The permissive end of the First Amendment spectrum is anchored by the government speech doctrine. As the Supreme Court has said, “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”⁵¹³ The Court held this in a case about sculptural monuments a city had selected (and one it rejected) for display in its parks.⁵¹⁴ It is clear, then, that the government can make whatever aesthetic judgments it wants in designing its buildings and monuments, brochures and websites; in commissioning art, curating performance series,

512. See generally *Miller v. California*, 413 U.S. 15, 23–24 (1973); *Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

513. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

514. *Id.* at 465.

and running museums and military bands; and in honoring artists with awards like the Kennedy Center Honors. The Free Speech Clause places no limit on any of this.⁵¹⁵ It requires neither neutrality nor balance among competing aesthetic theories. The only limits on what the government can say (or sing, build, paint, or play) would have to come from elsewhere in the Constitution—the Establishment Clause, for example, or Equal Protection.⁵¹⁶

A similar, but not equal, permissiveness is allowed when the government pays private parties to speak for it or to otherwise participate in programs it runs. In cases like *Rust v. Sullivan*⁵¹⁷ and *USAID v. Alliance for Open Society International*,⁵¹⁸ the Court has made clear that the government can decline to subsidize certain speech far more freely than it can regulate or prohibit speech. Thus, in *Rust*, the government was allowed to decide what recipients of a federal family-planning services grant, Title X, could say and do using that grant money.⁵¹⁹ Title X-funded projects cannot engage in abortion counseling or referrals, “even upon specific request”; nor can they promote or lobby for abortion as a method of family planning.⁵²⁰ In *USAID*, the Court clarified that Congress can choose to selectively fund certain projects and place conditions on those who receive project funds, so long as the conditions are within the scope of the program and leave room for recipients to engage in constitutionally protected expression beyond its confines.⁵²¹ The idea is that the government cannot leverage its funding to do indirectly what it could not do directly: prohibit certain expression.⁵²² But nor need it subsidize all viewpoints just because it has chosen to spend money promoting one.⁵²³

Additional cases make clear that this principle extends beyond direct subsidies to “[b]oth tax exemptions and tax-deductibility.”⁵²⁴ Thus, the tax and tariff cases of Part I.B should fit comfortably within this part of the

515. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 987 n.73 (5th ed. 2015) (“[In] a government museum or playhouse or park, the government can make content-based choices because it is the speaker and the First Amendment does not apply at all.”). To be clear, the government is not as unconstrained when it simply leases out a publicly owned theater to private groups rather than curating its own programming. See, e.g., *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding that the First Amendment prevented a city from refusing to rent its auditorium to producers of the musical *Hair*).

516. See generally COREY BRETTSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? (2012).

517. 500 U.S. 173 (1991).

518. 133 S. Ct. 2321 (2013).

519. *Rust*, 500 U.S. at 196–98.

520. *Id.* at 179–80.

521. *USAID*, 133 S. Ct. at 2329–32.

522. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

523. *USAID*, 133 S. Ct. at 2328–29.

524. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983).

First Amendment spectrum. Like the government funding decisions discussed in Part I.A, the government's choices to privilege certain defined artistic categories or to subsidize certain aesthetic values over others is constitutionally permissible, at least as long as they leave room for private actors, including subsidy recipients, to define art and promote aesthetic value in their own way outside the bounds of the government subsidy program.

The copyright and patent protections discussed in Part I.E might also be included on the subsidy side of the spectrum—though here the notion of subsidy grows more metaphorical.⁵²⁵ Whereas the NEA hands out money and the tariff system reduces what importers of fine arts owe the government, copyright and patent law's subsidies consist of limited-term monopoly protections for creators and inventors. Providing these protections requires the government to define the bounds of the program using aesthetic judgments such as the beauty–utility distinction. Similarly, the Visual Artists Rights Act (VARA) provides protections to the creators of certain government-defined visual artworks not available to other artists, or to creators of non-art objects.⁵²⁶ In fact, as we saw in Part I.E, VARA offers additional protections against destruction to works of “recognized stature.”⁵²⁷ The upshot of locating VARA on the subsidy end of the First Amendment spectrum is that the government should have fairly free rein to make aesthetic judgments about what, for example, counts as artistic “stature.” Here the government is doing so as a means of promoting expression; it is not limiting the expression of those who define artistic stature in ways other than the government does.

Contrast this with cases on the other end of the spectrum, where the government is undeniably in the business of regulating expression, either limiting where or when or how it can occur or shutting it down entirely. The clearest instance of this comes from obscenity law. If a court fails to find serious artistic value in a work otherwise deemed obscene, the person who creates, imports, mails, or distributes the work can be fined and jailed, and copies of the work can be seized, along with any profits they generated and even any property used to create or distribute them.⁵²⁸ All of these consequences turn on the aesthetic judgments, both retail and wholesale, detailed in Part I.D. Here the danger of a state-imposed aesthetic orthodoxy is at its greatest: deviation from the orthodoxy is punishable as a crime.

525. The Supreme Court's important recent decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017) affects this analysis somewhat. Speaking for four members of the Court, Justice Alito distinguished programs involving cash subsidies or tax benefits from those that award nonmonetary benefits like federal trademark registration. *Id.* at 1761.

526. See 17 U.S.C. § 106 (2012).

527. See *supra* Part I.E.4.

528. See, e.g., 18 U.S.C. §§ 1460–1470 (2012); Kinsley, *supra* note 238.

Less severe, but also on this end of the First Amendment spectrum, are many of the land use and eminent domain cases described in Part I.C. When a local zoning or architectural review board refuses to approve a proposed land use or design because it finds it unsightly or aesthetically incongruous, the property owner's expression has been shut down by the state. Here the state is not just financially disadvantaging (or failing to subsidize) those with divergent aesthetic views; it is actively prohibiting them. So too if an owner's property is condemned as blighted, at least when it is condemned not for health or safety reasons, but because the state sees it as "an ugly sore, a blight on the community which robs it of charm."⁵²⁹

The First Amendment's prohibition of state-imposed aesthetic orthodoxy should apply in full force to cases like these. These are the cases where the conventional wisdom—wary of law's aesthetic judgment across the board—actually proves correct. What, then, does this mean for the countless aesthetic judgments described in the Subparts on land use and obscenity in Part I?

The problem is especially acute for obscenity law. Perhaps, as Amy Adler has argued, society simply has a choice: protect art—or, I might say, aesthetic neutrality—or protect itself from obscenity; it cannot do both.⁵³⁰ Adler's point is that any loophole in obscenity law for works with artistic value necessarily requires a substantive judgment about what constitutes value. Aesthetic discrimination is inevitable. Courts can minimize this, however, and some have, by shifting from community-based judgments of value to one based on the reasonable viewer,⁵³¹ or, better still, a test satisfied whenever "*some reasonable persons*" could find value in the work.⁵³² Insofar as artists themselves are included among the reasonable persons whose views courts consider, value- and intention-based tests might largely converge.⁵³³ At the very least, they might provide alternative routes to protection: the work would be found valuable if it was created to have artistic as opposed to prurient value *or* if someone might reasonably appreciate such value in it. A disjunctive test like this helps avoid judicial imposition of intentionalist theories of art, thus sidestepping one of Adler's worries.⁵³⁴ And it is far superior to a test derived from institutional theories of art that would look to a work's recognition within the artworld.⁵³⁵ My framework makes at least this clear: insofar as the worry about aesthetic

529. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

530. Adler, *supra* note 290, at 1378.

531. See *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

532. *Id.* at 512 (Stevens, J., dissenting).

533. See *supra* notes 251–69 and accompanying text.

534. Adler, *supra* note 290, at 1368–69.

535. See *supra* notes 279–89 and accompanying text.

judgment is based on the danger of government orthodoxy, outsourcing the judgment to elites is hardly a solution.

Aesthetic judgment in land use is far more common and may also be more constitutionally permissible, at least sometimes. This for a few reasons. First, as the “middle period” of aesthetic regulation emphasized, land-use regulations often serve multiple ends.⁵³⁶ Unlike obscenity law, which is a direct regulation of expression, land-use regulations often aim at health or safety or economic concerns—or, in historic preservation cases, even educational ones.⁵³⁷ Laws that only incidentally burden the discordant expression of an aesthetic minority merely have to clear the low bar for expressive conduct set by *United States v. O’Brien*.⁵³⁸ Second, even direct aesthetic control, if appropriately limited, could be allowed as time, place, or manner restrictions. These will be upheld if “narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication.”⁵³⁹ Aesthetic regulations confined to particular streets or neighborhoods will be more successful on this score, for then aesthetic dissenters only need to relocate; their aesthetic judgment isn’t precluded entirely. Finally, aesthetic regulation in the land-use context may be more acceptable because of the externalities involved in aesthetic dissent. First Amendment law is sensitive to “captive audiences,” particularly those held captive in their own homes.⁵⁴⁰ In the context of land use, someone with a discordant, minority aesthetic view can impose real costs on neighbors when that view is expressed in architecture, signs, or other publically visible uses of land.⁵⁴¹ The government’s interest in enforcing its own aesthetic judgments is thus greater here than it is in cases where expressions of minority aesthetic judgments are more easily avoidable.⁵⁴²

I have just described a spectrum with the aesthetic judgments entailed in government speech at one end and the aesthetic judgments that lead to obscenity convictions at the other end. In between, but nearer the former end, are aesthetic judgments made by the state in awarding subsidies, whether outright, as the NEA does; through exemptions, as in the tax and tariff codes; or (more controversially) through the monopolies of copyright and patent. On the other side of the spectrum, abutting obscenity, are blight

536. See *supra* notes 207–19 and accompanying text.

537. See Williams, *supra* note 222, at 34–35.

538. 391 U.S. 367, 377 (1968) (asking whether a law’s incidental burden is “no greater than is essential to the furtherance” of a legitimate governmental interest “unrelated to the suppression of free expression”).

539. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

540. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988).

541. See Williams, *supra* note 222, at 24, 28.

542. For sensitive discussions of First Amendment problems with land-use laws, see Costonis, *supra* note 207; Nivala, *supra* note 234; Williams, *supra* note 222.

determinations and zoning and historic preservation regulations that allow the state's aesthetic judgment to trump those of dissenting individuals. Insofar as these laws may still leave open alternative avenues for expression or can be justified in nonspeech terms, the government's aesthetic land-use regulations may be allowed. But because they shut down or limit expression rather than subsidize or encourage it, these are areas of law in which the aesthetic nondiscrimination principle should hold far more sway.

Summarizing the framework in this way underscores the gaps and questions that still remain open. But to avoid making a long article significantly longer, I will end by simply identifying three, leaving further discussion to future work.

First, the framework described largely turns on the distinction between subsidizing versus regulating or limiting. But the word "subsidy" is not some magic talisman that causes First Amendment worries to disappear. As Robert Post has pointed out, a law that withheld second-class mailing subsidies from certain magazines—whether because of the topics they addressed, because they were found indecent, or because they lacked aesthetic excellence—would surely fail First Amendment scrutiny.⁵⁴³ The line between subsidies and penalties can be difficult to draw, as both can prove equally coercive.⁵⁴⁴ But that is not to say that we can never distinguish carrots from sticks. To quote Seth Kreimer: "[A]n offer by the National Endowment for the Arts to provide grants to citizens who choose to write symphonies rather than jazz differs fundamentally from a threat to withdraw welfare payments if the citizen chooses jazz over symphonies."⁵⁴⁵ Kreimer's important criteria for sorting carrots from sticks look to baselines of historical practice, equality of treatment in light of governmental purposes, and predictions about what the government would chose to do were the condition on payment disallowed.⁵⁴⁶ Clearly some account of this sort is needed to justify the use of aesthetic judgment within particular subsidy programs—to distinguish, as Kreimer does, between arts grants that subsidize cubists but not pointillists from those that give awards to Democrats but not Republicans.⁵⁴⁷ The descriptive account of Part I provides material for replacing Kreimer's hypotheticals with actual examples of the aesthetic conditions made within various subsidy schemes.

The second, related, point is that the Supreme Court has placed limits—which I've so far ignored—on the types of discrimination the

543. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 158, 178, 182 (1996).

544. See Sullivan, *supra* note 522, at 1428–56.

545. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1301 (1984).

546. *Id.* at 1351–78.

547. *Id.* at 1374.

government is allowed even within its funding programs. Alongside cases like *Rust* and *USAID*, discussed above, is another line of precedent dealing with limited public forums created by state entities—not just physical spaces, but also funding programs like the student activity fund at issue in *Rosenberger v. University of Virginia*.⁵⁴⁸ *Rosenberger* is a subsidy case: the University did not want its funds used on publications that promote particular religious beliefs.⁵⁴⁹ Yet the Court held that when the government sets up a program to encourage private speech, it cannot engage in viewpoint discrimination even if it can reasonably limit the class of speakers or topics that it funds.⁵⁵⁰

As *Rosenberger* recognizes,⁵⁵¹ the distinction between content or speaker discrimination—permissible in setting up a limited public forum—and impermissible viewpoint discrimination is a fraught one. It gets still murkier when we turn from magazines, the expression subsidized in *Rosenberger*, to works of art, buildings, and other aesthetic objects. Deciding what is content, viewpoint, speaker, or medium discrimination⁵⁵² is especially difficult insofar as works of art make their use of medium a crucial part of their meaning—which is to say, their content. To give a few examples: Is a ban on Tudor houses more like a ban on billboards, or a ban on political billboards?⁵⁵³ Should a subsidy for painters but not choreographers be considered speaker–medium discrimination, while a subsidy for representational but not abstract artists is content discrimination? Or should the latter be considered discrimination on the basis of viewpoint? If retail aesthetic judgments in law are based on a particular wholesale judgment—endorsing formalism in the context of substantial similarity within copyright law, for example—what kind of discrimination is this? Were formalism endorsed in this way, devoted contextualists would be more likely to be found liable for infringement. Is this content or viewpoint discrimination?

These questions matter not just in the context of subsidy cases like *Rosenberger*, but also on the other end of the spectrum. Justifying architectural regulations as mere time, place, and manner restrictions, for example, depends on their being seen as content neutral. Much will turn, then, on how these doctrines, developed in the context of discursive

548. 515 U.S. 819 (1995).

549. *Id.* at 825.

550. *Id.* at 829–30, 833–34.

551. *Id.* at 831 (“[T]he distinction is not a precise one.”); *cf. id.* at 893–97 (Souter, J., dissenting) (characterizing the University’s regulations as discrimination based on subject matter, not viewpoint).

552. *Cf. Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645 (1994) (upholding speaker discrimination that was “based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry”).

553. *See, e.g., Costonis, supra* note 207, at 450 (arguing that land-use restrictions targeting particular architectural styles discriminate on the basis of content).

expression, translate to expression that lacks words or representational images—expression that is still clearly protected under the First Amendment.⁵⁵⁴

Third, and finally, in addition to questions like these *about* the framework, questions also remain about where to locate various areas of law *within* the framework. I’ve suggested that aesthetic judgments associated with copyrightability belong on the subsidy side of the spectrum.⁵⁵⁵ But what about fair use? Part I.E.3 showed how aesthetic judgment is required by all four prongs of the fair use test. And yet much more is at stake in a fair use defense than in a decision about whether a work is copyrightable. To lose the latter is to forgo a subsidy; to lose on fair use opens the infringing work to impoundment and destruction.⁵⁵⁶ When an artist’s fair use defense is rejected because her aesthetic judgments differ from the court’s, the result is much like that of an obscenity case: severe penalties are imposed for divergence from the government’s aesthetic orthodoxy. This suggests that fair use should be placed on the “restriction” end of the spectrum. But fair use also helps mark the boundary of copyright protection—the limits of the subsidy. Copyright is a carrot that requires a stick. Since copyright not only incents expression but does so by prohibiting the expression of others, finding its placement on the spectrum I have described is particularly complicated—and would surely benefit from future discussion by those working in this area of law.⁵⁵⁷

CONCLUSION

The dangerous undertaking that Justice Holmes described in 1903 is undertaken constantly, all across the country, not just by judges, but by officials in all branches and at all levels of government—aesthetic experts and amateurs both. This article has shown the surprising philosophical complexity of many of the aesthetic judgments they make. But it has also

554. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (describing as “unquestionably shielded” the “painting of Jackson Pollock, music of Arnold Schoenberg, [and] Jabberwocky verse of Lewis Carroll”); MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS* (2017).

555. *But see Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (making clear that registering a copyright does not transform a work into government speech); see also *id.* at 1761 (distinguishing copyright from the subsidy schemes at issue in *Rust* and *Finley*).

556. See, e.g., *Cariou v. Prince*, 714 F.3d 694, 704 (2d Cir. 2013) (noting the district court’s “sweeping injunctive relief” against an infringing work).

557. For an example of a scholar currently grappling with copyright law’s complicated relationship to the First Amendment, see Ned Snow, *Discrimination in the Copyright Clause*, 67 ALA. L. REV. 583 (2016).

shown the often unacknowledged specificity of the legal contexts in which they are made—and how those matter.

Contexts matter in part because they help shape the judgments, forcing us to define artistic concepts and aesthetic values in relation to the particular governmental interests advanced in different areas of law. Contexts also matter because they shape our intuitions—and our constitutional concerns—about whether and when aesthetic judgment in law is appropriate.

The framework developed here for deciding when aesthetic judgment in law is permissible is one that raises questions even as it answers others. But the questions it raises are ones that go to the real problem with aesthetic judgment in law—that of state-imposed aesthetic orthodoxy—not the distracting pseudo-problems of expertise and subjectivity that have preoccupied most of those writing in Holmes's wake. Deciding when aesthetic judgment is permissible is a matter for First Amendment doctrine. At the same time, First Amendment doctrine may well need to take account of just how many areas of law involve aesthetic judgment, how ubiquitous it is in some of those areas, and how seemingly unavoidable it is in others.

Whatever questions remain about this Article's framework, one thing it unquestionably does is to carve out space in law where, contrary to conventional wisdom, aesthetic judgment should be allowed—even encouraged. This is a space where more open discussion and contestation is needed about what aesthetic values and artistic categories we want the law to endorse. These are discussions that the law's uncritical acceptance of Holmes's aesthetic nondiscrimination principle has long kept us from having.