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Cover Page Footnote
Juris Doctor Candidate, 2021, University of Pennsylvania Law School; Doctor of Fine Arts, Dramaturgy and Dramatic Criticism, Yale School of Drama. I am most grateful to Seth Kreimer and Tobias Wolff for helpful comments and conversations about previous drafts. All errors are my own.

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FEDERAL ARCHITECTURE AND FIRST AMENDMENT LIMITS

Jessica Rizzo *


ABSTRACT

In December of 2020, President Trump issued an executive order on “Promoting Beautiful Federal Civic Architecture,” a draft of which was leaked to the press in February under the title, “Making Federal Buildings Beautiful Again.” The order provided for updating the Guiding Principles of the General Services Administration’s Design Excellence Program to promote the use of “classical and traditional architectural styles,” which “have proven their ability to inspire...respect for our system of self-government.” According to the order, there would have been a presumption against the use of such modern architectural styles as Brutalism and Deconstructivism in the construction of new federal public buildings, as these styles, according to Trump, fail to convey “the dignity, enterprise, vigor, and stability of America’s system of self-government.” The order was troubling in that it proposed an official style that would have amounted to a censorship regime. Had it not been quickly rescinded by President Biden, the order would have deprived many architects and other interested parties of their First Amendment rights. One can also imagine a follow-up order calling for all new federal buildings—which belong to the public—to be decorated in twenty-four karat

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gold leaf and marble. The Supreme Court has not ruled on the question of whether architecture can be considered a form of constitutionally protected “speech.” However, as an expressive art, architecture should without question be among the forms protected by the First Amendment. In this article, I explore the First Amendment implications of Trump’s proposed order, the limits on the public’s ability to use the First Amendment to contest offensive government speech, and the ways in which existing law fails to reckon with the unique limitations and possibilities of architecture.

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I. INTRODUCTION

During President Trump’s first Senate impeachment trial, a draft of an executive order under consideration was leaked to the press. Titled “Making Federal Buildings Beautiful Again,” the draft proposed updating the Guiding Principles of the General Services Administration’s Design Excellence Program to promote the use of “classical and traditional architectural styles,” which “have proven their ability to inspire…respect for our system of self-government.”1 According to the draft, modern architectural styles such as Brutalism and Deconstructivism, which fail to “convey[]

the dignity, enterprise, vigor, and stability of America’s system of self-government…shall not be used” in the construction of any federal buildings going forward. When holding design competitions for new public buildings, the General Services Administration would henceforth, according to the draft, convene panels “composed of the public” to evaluate proposed designs. Among those to be expressly excluded from these panels were “artists, architects, engineers, [and] art or architecture critics.”

The General Services Administration (“GSA”) is an executive agency that is likely entirely subject to these kinds of presidential whims. Proponents of a weaker unitary executive theory believe that the framers did not constitutionalize presidential control over all that we now think of as administration, and that Congress may insulate certain functions from the President by protecting agency officials with a “good cause” discharge standard, but until 2020, the GSA has seldom been seen as the kind of agency that required insulation from presidential control. The GSA is responsible for managing and supporting the basic functioning of federal infrastructure, facilitating everything from government agencies’ paperclip purchases to the construction of new federal courthouses. Many Americans only became aware of the awesome power wielded by this agency when Administrator Emily Murphy delayed the GSA’s ascertainment of the 2020 presidential election, preventing President-Elect Joe Biden’s administration from beginning its transition for several weeks over the objections of Congress.

The Guiding Principles for Federal Architecture that have controlled at the GSA for the past half century were derived from a

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2 Id. at 3.
3 Id.
1962 report written by Senator Daniel Moynihan. In his capacity as Chair of the Ad Hoc Committee on Federal Office Space, Moynihan wrote to then-President Kennedy that it should be the policy of the federal government “to provide requisite and adequate facilities in an architectural style and form which is distinguished and which will reflect the dignity, enterprise, vigor, and stability of the American National Government.”

Trump appropriated this quartet of venerable, unobjectionable nouns for his executive order, but it is there that the similarities between his vision and Moynihan’s end. According to Senator Moynihan, “[i]t should be our object to meet the test of Pericles’ evocation to the Athenians, which the President commended to the Massachusetts legislature in his address of January 9, 1961: ‘We do not imitate—for we are a model to others.’” Moynihan called for major emphasis to be placed on “the choice of designs that embody the finest contemporary American architectural thought.”

Exuding early-’60s optimism, the report is confidently forward-looking, urging the government to embrace cutting-edge developments in both architecture and art by calling for the work of living American artists to be incorporated into the design schemes of federal buildings whenever possible. Moynihan proposes that federal architecture celebrate diversity by incorporating design elements that reflect “the regional architectural traditions of that part of the Nation in which buildings are located.” Perhaps most importantly, to realize this goal, Moynihan wrote that “[t]he development of an official style must be avoided. Design must flow from the architectural profession to the Government, and not vice versa.”

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8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
government to the architectural profession. It also explicitly favored the regional architectural traditions of some parts of the country, calling for “the Spanish colonial and other Mediterranean styles generally found in Florida and the American Southwest” to be adopted nationwide. This sounded suspiciously like a call for all new federal buildings to look like the President’s “winter White House,” Mar-a-Lago. While the private Palm Beach club may be the President’s “happy place,” it is difficult to imagine this style being suitable for, say, a courthouse in Minneapolis.

While the Republican-controlled Senate acquitted Trump, his administration was soon forced to confront the spread of COVID-19 to the United States. Perhaps due to the unprecedented social and economic disruptions brought on by the pandemic, the “beautification” of America’s buildings ceased to be an immediate federal priority. The draft nevertheless drew immediate criticism from artists, architects, engineers, and art and architecture critics concerned about the order’s eventual implementation. The draft

14 See Draft Executive Order supra note 1.
16 See Press Release, Am. Inst. of Architects, AIA opposes uniform style mandates (Feb. 4, 2020) (https://www.aia.org/press-releases/6263517-aia-opposes-uniform-style-mandates-) (“The AIA strongly opposes uniform style mandates for federal architecture. Architecture should be designed for the specific communities that it serves, reflecting our rich nation’s diverse places, thought, culture and climates. Architects are committed to honoring our past as well as reflecting our future progress, protecting the freedom of thought and expression that are central to democracy.”), Letter from the Soc’y of Architectural Historians to President Trump (Feb. 10, 2020) (https://www.sah.org/about-sah/news/sah-news/news-detail/2020/02/06/society-of-architectural-historians-letter-in-opposition-to-proposed-executive-order-making-federal-buildings-beautiful-again?_zs=O89gX&_zl=Fe6w1) (“As an organization whose members have observed, recorded, and analyzed both historic and contemporary architecture since our inception in 1940, we have come to understand that most significant public architecture in the United States has resulted from the intersection of monumentality, permanence, and aesthetic significance and the specific local demands of site and community...the dictation of style—any style—is not the path to excellence in civic architecture.”); Statement, National Trust for Historic Preservation (Feb. 6, 2020)
order’s specification that they be excluded from future conversations about federal building projects suggested that, by virtue of their special expertise, members of their professions are not part of “the public.”\(^{17}\) The alternative vision of “the public” promoted by the draft order was a populist one, embodying the hostility towards real or imagined “elites” that characterized much of the Trump administration’s rhetoric.\(^{18}\)

The order was not officially signed until 10 months later.\(^{19}\) By then, Trump had lost his bid for reelection to Biden but was refusing to concede, spending his dwindling days in office tweeting about voter fraud, raising money to—ostensibly—fund a series of doomed lawsuits aimed at overturning the election results, and issuing controversial pardons for his friends and other criminals. When the order was published, it bore the slightly more dignified title “Executive Order on Promoting Beautiful Federal Civic Architecture,” but remained substantively suffused in MAGA nostalgia.\(^{20}\) Where the draft order explicitly prohibited the construction of new Brutalist and Deconstructivist buildings, the

\(^{17}\) See supra note 1 at 3.

\(^{18}\) Id.


\(^{20}\) Id.
published order merely introduced a number of requirements designed to make it especially onerous to build such buildings, including the submission of “a detailed explanation of why the [General Services] Administrator believes selecting such design is justified, with particular focus on whether such design is as beautiful and reflective of the dignity, enterprise, vigor, and stability of the American system of self-government as alternative designs of comparable cost using preferred architecture.” Where the draft called for panels composed of the non-specialist public in addition to a sitting President’s Committee for the Re-Beautification of Federal Architecture to evaluate new building designs, the published order only called for a President’s Council on Improving Federal Civic Architecture. As described in the draft, the only Committee seat reserved for someone with any relevant expertise was to be occupied by a member of the U.S. Commission of the Fine Arts designated by the President. The published order held that the Council was to include all seven members of the U.S. Commission of the Fine Arts, the Secretary of the Commission of Fine Arts, the Architect of the Capitol, and the Chief Architect of the GSA. The Council was also to include “up to 20 additional members appointed by the President from among citizens outside the Federal Government.” The published order did away with much of the draft’s populist rhetoric, though it added one curious sentence about ensuring “that architects designing Federal buildings serve their clients, the American people.”

The significant difference between the draft order and published order is that the published order largely dropped the

21 Id.
22 Id.
24 Id.
25 Id.
26 Id.
pretense that architectural “beauty” is in the eye of any beholder who is not Trump himself. Members of the U.S. Commission of Fine Arts are appointed by the President.\textsuperscript{27} Members appointed by Trump have all been outspoken advocates of the “timelessness” of classical architecture.\textsuperscript{28} The order cleared the way for Trump to anoint surrogates who would impose the President’s own much-maligned taste on the country even after he has gone back to being a private citizen.\textsuperscript{29}

By effectively silencing the vast majority of architects, the order also raises freedom of speech concerns. As one commentator has argued, “the First Amendment stands as a bulwark against the imposition of the subjective tastes of the majority on the minority.”\textsuperscript{30} Trump’s order bust through this bulwark, threatening to impose the subjective taste of a very small minority indeed—Trump alone—on the majority. One can imagine a follow-up proclamation calling for all new federal buildings to be decorated in twenty-four karat gold leaf.

Unfortunately, any First Amendment challenge to the architecture order would face serious obstacles. As a threshold issue, the idea that architecture should qualify as protectable speech under the First Amendment is not itself uncontentious. Even if courts found architecture to be protectable in principle, Trump’s order, as government speech, would arguably not be subject to any First Amendment restrictions. The Supreme Court has held that the “[g]overnment is not restrained by the First


\textsuperscript{29} See, e.g., David Owen, The Psychological Insights of Trump Tower, NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-psychological-insights-of-trump-tower (describing the marble tiles covering the atrium of Trump Tower on Fifth Avenue as “the color of gastrointestinal inflammation”).

Amendment from controlling its own expression."\textsuperscript{31} Because the federal government cannot invite every architect to build its courthouses, it must make choices regarding whom to commission and whom not to commission. So long as the government does not make its hiring determinations based on impermissible criteria—race, sex, religion, etc.—the government would likely be considered free to use whatever aesthetic criteria it likes for selecting architectural proposals. The Supreme Court has held that the government is not prohibited from engaging in viewpoint discrimination regarding expressive permanent structures installed on public property, even those installed on the grounds of traditional public fora.\textsuperscript{32} Accordingly, existing doctrine would seem to lend support to the proposition that a building erected on public property—even one constructed for the purpose of accommodating a public forum—is not itself a public forum, and that the government would not therefore be prohibited from engaging in viewpoint discrimination regarding the building’s style and expressive content.\textsuperscript{33}

This lack of a clear First Amendment remedy is unsatisfying. The government, after all, has a monopoly on the authority to erect courthouses, statehouses, and many other buildings which should properly be considered the common property of all citizens, the people’s houses. These buildings house our organs of justice and mechanisms for making our voices heard. Even the least glamorous among them—the buildings that house our social security administration offices come to mind—host those doing the righteous and essential work of ensuring that the most vulnerable members of our society are cared for when unable to support themselves. Federal architecture should reflect this seriousness of purpose. It should reflect the fact that public service is a high calling. Most importantly, it should be made apparent by our federal architecture that our government is one constituted by the people and for the people. As anyone who has spent an

\textsuperscript{31} Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).
\textsuperscript{33} Id.
interminable afternoon at the DMV waiting for one’s number to be called knows, when the physical manifestation of state bureaucracy is especially unprepossessing, compulsory interactions with government officials are unlikely to bolster one’s sense of civic pride and “respect.” The dropped ceilings, fluorescent lighting, and stained, gray carpeting of such offices embody a certain set of values, even if no designer would claim to be making any kind of aesthetic statement by utilizing these materials. Nevertheless, such choices do speak. They say that we value efficiency above all things. They say that the government, as our fiduciary, is not spending our hard-earned tax dollars on anything extraneous. They say that anything about the nature and quality of our shared built environment that is not strictly utilitarian represents waste, a decadent expenditure. They say that your money should be in your pocket, or being put to work making improvements to your personal home on your personal property, not enhancing communal spaces. That would be socialist, and (still, apparently) nothing could be more un-American than that.

While this is not the sort of speech the First Amendment typically protects, a stronger argument can be made for the protection of architecture proper as speech. The Supreme Court has not specifically ruled on the question of whether architecture should be treated as speech for First Amendment purposes, but architecture is without question a form of art, a form that many commentators believe deserves protection. As John Costonis puts it, “[f]or many, architecture and other environmental features communicate ideas more effectively than does language.” It is also important to note that any restriction on architectural speech would constitute prior restraint, which has traditionally been able to survive a First Amendment challenge “only in exceptional

34 See John J. Costonis, Law and Aesthetics: A Critique and a Reformulation of the Dilemmas, 80 Mich. L. Rev. 355, 448 (“If nude barroom-type dancing, black armbands, and flags sewn on pants seats may at times be protected as ‘speech,’ it is unclear why the creative expression of one of the twentieth century’s most influential architects is not.”).
35 Id. at 411.
circumstances.”36 The censorship of architectural speech will virtually always occur \( \textit{ex ante} \), when the plans are being approved, rather than \( \textit{ex post} \), by tearing down freshly-built structures deemed offensive after the completion of construction. “Any system of prior restraints of expression” bears “a heavy presumption against its constitutional validity.”37

Like so many of his executive actions, Trump’s architecture order pushed the boundaries of presidential power.38 These boundaries were always underspecified and have always been governed more by norms than by laws.39 While Biden has now, mercifully, rescinded the order, a president who promulgated an order like “Promoting Beautiful Federal Civic Architecture” at the beginning of two terms in office rather than at the very end of his one and only term could do incalculable damage to the aesthetic and intellectual life of the country.40 While it is no longer an imminent threat to the architectural profession and to the public, Trump’s order presents a much-needed occasion to examine the contours of presidential authority and to reflect upon whether more constraints on that authority in this particular area of the law are needed.

II. ARCHITECTURE AS ART

The architect is “a poet who uses not words but building materials as a medium of expression.”41 In 1965, the critic Ada Louise Huxtable called architecture “the most vital and meaningful art of our time.”42 While human beings have been practicing the art

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39 \textit{Id}.
41 JOHN J. COSTONIS, \textsc{Icons and Aliens: Law, Aesthetics, and Environmental Change} 94 (1989).
42 ADA LOUISE HUXTABLE, \textit{On Architecture: Collected Reflections on a
of architecture since we left the caves, the twentieth and twenty-first centuries have been an exceptionally dynamic period. The early twentieth century saw the birth of modernism, which emphasized a break with tradition, scorn for the decorative, and a preference for clean lines and streamlined, functional spaces that would improve the quality of life for those who spent time inside them. Many modern architects were explicitly motivated by the desire to uplift the working classes through better urban planning and design. Prominent modernists including Walter Gropius, Le Corbusier, Ludwig Mies van der Rohe, and Philip Johnson came together to create what came to be known as the “International Style,” which favored inexpensive materials that could be mass-produced in order to provide, among other things, as much affordable housing as possible.

Brutalism, which Trump singles out for opprobrium in his executive order, is a species of modernism characterized by large, block-like, geometric structures built using raw materials, most commonly exposed concrete. Notable Brutalist buildings include Rudolph Hall, which houses the Yale School of Architecture in New Haven, the J. Edgar Hoover Building in Washington D.C., and Boston City Hall. The style, according to one scholar “incorporates a radical aesthetic of anti-beauty,” which comes across to Trump (and, to be fair, plenty of others) as ugliness. Brutalist architects did not, of course, set out in pursuit of ugliness, but rather in pursuit of an honest approach to materials that revealed the means of a building’s production. Finished concrete Brutalist buildings often still bear the imprints of the plywood

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47 *Id.* at 704.
casing used in their construction, openly and permanently confessing to the labor that went into the building process. In a similarly Marxian vein, Brutalist structures are more likely to be squat and earthbound than soaring, and have for this reason been charged with “denying the spiritual in Man.” Where the vaulted ceilings of Gothic cathedrals force those who enter to direct their attentions upward, heavenward, Brutalist buildings recall us to the material world, its limits, inequities, and changeability.

In the latter part of the twentieth century, modernism gave way to postmodernism, which lacked the coherence and ideological consistency of modernism. Postmodern architecture embraced pluralism—its instigators were scavengers and pastiche-artists, borrowing from historical forms to create new hybrid styles. As compared with modernism, writes one scholar, “[t]he contrast is between perfection and violated perfection.” Postmodern architecture is more likely to allow its seams and contradictions to remain visible, to emphasize the distance predecessors have fallen short in their quest for utopia. More formalist than functionalist, postmodern architecture has also been seen as more concerned with interrogating its own aesthetic language than with creating structures amenable to the flourishing of flesh-and-blood human beings.

The most recent postmodern leap forward may be best exemplified by the late, great Iraqi architect Zaha Hadid, whose dramatically canted buildings often dispense with right angles altogether, and are made possible by new digital technologies and advanced building delivery systems that were not available to

48 Id.
51 HUXTABLE, supra note 38 at 311.
52 JOHNSON & WIGLEY, supra note 44 at 8.
53 Id.
previous generations. Together with colleagues including Peter Eisenman, Rem Koolhaas, and Frank Gehry, Hadid developed what came to be known as “Deconstructivism.” Characterized by, as Huxtable put it, “[s]tructures that defy gravity and common sense by looking as if they are about to fall down or fly apart” Deconstructivism is the other architectural style that now finds itself in the crosshairs of Trump’s order. Some scholars see Deconstructivism as a response to Constructivism, the technophilic communist architectural movement that flourished in the Soviet Union in the 1920s and 1930s. Others understand Deconstructivism to be spiritually allied with deconstruction, the roughly contemporaneous mode of philosophical critique inaugurated by Jacques Derrida. Highly influential, if controversial, deconstruction is not a synonym for demolition. Rather, deconstruction was fashioned as a rejoinder to Western philosophy’s historical overemphasis on what Derrida called the “metaphysics of presence.” To engage in deconstruction is to take apart hitherto uninterrogated unitary concepts such as truth, presence, essence, identity, and origin to see how they are constructed, to determine what held them together in the first place, and to emphasize the crucial role played by absence and difference. Derrida was a philosopher who drew inspiration from linguistics and semiotics, but the political implications of his project were significant; deconstruction works to expose the ideological assumptions undergirding our lives and helped inaugurate a shift in focus from the visible to the invisible, the marginal, the silenced, and the erased.

55 See generally JOHNSON & WIGLEY, supra, at (page number).
56 HUXTABLE, supra, at 32.
57 See generally JOHNSON & WIGLEY, supra, at 8.
58 See generally JACQUES DERRIDA, OF GRAMMATOLOGY (1974).
59 Id. at 49.
60 See, e.g., DERRIDA, supra note 58.
American academy via literary criticism, and helped launch such fields as cultural studies, feminist studies, gender and sexuality studies, and postcolonial studies. Obviously, this intellectual tradition would not necessarily be legible to someone walking by a Deconstructivist building, but it seems unlikely to be purely coincidental that the two disfavored architectural styles named by name in Trump’s order happen to be historically identified with attempts to uplift the poor and otherwise disenfranchised.

Lest there be any question that architecture is “expressive,” the twentieth century also saw the form being pressed into service by totalitarian regimes with very particular agendas and very specific messages they hoped to send with their state architecture. After Trump’s draft order leaked, architectural historians wasted no time in pointing out that the neoclassicism Trump favors was the style of choice for Albert Speer, official architect of the Nazi government. Some Trump apologists attacked this line of criticism, accusing the left of making yet another knee-jerk Hitler comparison. In this case, however, the comparison seemed strikingly unexaggerated. Linking the Aryan race with the heroic legacy of Hellenism was an important theme in much National politics-of-jacques-derrida/.

62 Id.
Socialist cultural production; Leni Riefenstahl’s *Triumph of the Will* begins with a long shot of the ruins and statuary of ancient Greece rising up out of the mists of time.\(^65\) The 1936 Olympic games in Berlin were stage-managed to suggest the torch being passed from the ancient Greeks to the Germans in Riefenstahl’s *Olympia*. The 1937 opening of the *Haus der Deutschen Kunst* (House of German Art) was marked with a procession featuring “2000 years of German Culture” going back to the classical era in which “the past was reinvented as myth, and as an endorsement of the racist ideologies of the present.”\(^66\) Nazi architects scorned modernism as “degenerate” and opted instead for Doric columns and cornices. They built monuments to their “martyrs” modeled on ancient Greek tombs, embracing the tragic view of life articulated in Attic drama.\(^67\) National Socialist architecture was “an architecture that found its ultimate meaning in the celebration of death and sacrifice.”\(^68\) Hitler himself, dreaming of the thousand-year Reich, was partial to Roman architecture and its associations with empire.\(^69\) Like any art form, architecture can convey meaning and embody values. Architecture can trace visions of utopia or reflect unfathomable hate.

The American legal system recognizes architectural works as one of eight categories of “works of authorship” under the 1990 Architectural Works Copyright Protection Act (“AWCPA”).\(^70\) The statutory definition of an architectural work is “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”\(^71\) The AWCPA amended the

\(^{65}\) *Triumph of the Will* (Reichsparteitag-Film 1935).

\(^{66}\) Ian Boyd Whyte, *National Socialism, Classicism, and Architecture*, in *BRILL’S COMPANION TO THE CLASSICS, FASCIST ITALY AND NAZI GERMANY* 404, 417 (Helen Roche & Kyriakos Demetrious, eds., 2018).

\(^{67}\) *Id.* at 408.

\(^{68}\) *Id.* at 407.

\(^{69}\) *Id.* at 425.


Copyright Act of 1976, which contained no special provision for architecture, only a general “pictorial, graphic, and sculptural works” category.\(^{72}\) This was found by Congress to be insufficient.\(^{73}\) The legislative history reveals that Congress passed the AWCPA because it found architecture to be “a form of artistic expression that performs a significant societal purpose, domestically and internationally.”\(^{74}\) Creating a dedicated category for architecture also brought the United States into compliance with the terms of the Berne Convention for the Protection of Literary and Artistic Works, the “world’s most important copyright convention,” which today has 179 signatory countries.\(^{75}\) The House Report on the AWCPA states that the purpose of making architectural works protectible was to promote “the progress of architectural innovation,”\(^{76}\) a goal consistent with copyright law’s constitutional mandate to “promote the progress of science and the useful arts.”\(^{77}\) The House Report further states that “[a]rchitecture plays a central role in our daily lives, not only as a form of shelter or as an investment, but also as a work of art. It is an art form that performs a very public, social purpose. As Winston Churchill is reputed to have once remarked,” the Report continues, “‘We shape our buildings and our buildings shape us.’”\(^{78}\)

III. ART AS SPEECH

While among laypeople it is generally accepted, even taken as self-evident, that art is unique in its expressive capacities, art is not special in the realm of First Amendment law. Amy Adler finds the status of art as speech under the First Amendment to be “surprisingly uncertain.”\(^{79}\) As Ramon Maroz puts it, “while the

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\(^{73}\) See id.


\(^{77}\) U.S. CONST. art. I, §8, cl. 8.


freedom of artistic creativity has indeed received constitutional protection, the U.S. Supreme Court has neither distinguished artistic freedom from other forms of expression nor given any meaning to the term ‘art speech.’”80 While different circuits and different judges may be more or less attuned to the singular role artistic expression plays in social development, there is no official consensus that all art should receive stricter protection than any other type of speech under the First Amendment, leading some to argue that “the role of artistic expression under the First Amendment appears to be undervalued.”81

Some of the Supreme Court’s most useful pseudo-definitions of “art speech” are negative formulations; the Court has on occasion held that such-and-such expression or behavior is not entitled to First Amendment protection because it is not art, which unquestionably is entitled to First Amendment protection.82

In Miller v. California, for example, the Court essentially defined art speech as that which is not obscene, or that which does not portray “hard-core sexual conduct for its own sake, and for the ensuing commercial gain.”83 Marvin Miller had been convicted of violating a California obscenity law for conducting a mass mailing campaign of brochures advertising books consisting of pornographic images.84 He brought an action alleging that the law violated the First Amendment. The Court upheld the conviction, finding that “obscene material is unprotected by the First Amendment,” but confining the scope of obscenity regulation to “works which depict or describe sexual conduct.”85 The Court further clarified that “[a] state offense must also be limited to

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81 Id.
83 Miller, 413 U.S. at 35.
84 Id. at 18.
85 Id. at 23–24.
works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” To determine whether the work in question satisfied these three highly subjective criteria, the Court advised future triers of fact to consider “the average person, applying contemporary community standards.” The “lacking serious literary, artistic, political, or scientific value” formulation replaced the “utterly without redeeming social value” test advanced in the 1966 case, Memoirs v. Massachusetts. According to Miller, work that has artistic value, but perhaps only “serious” artistic value, whatever that means, is entitled to First Amendment protection.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston addressed art speech in somewhat greater specificity, and with considerably more nuance. The case concerned a Saint Patrick’s Day parade organized by a private veterans group that refused to allow the Gay, Lesbian and Bisexual Group of Boston (“GLIB”) to march with them. GLIB responded by bringing an action alleging a violation of the state public accommodations law, which prohibited discrimination on the basis of sexual orientation. The parade’s organizers replied that compelling them to accept GLIB’s participation in the parade would constitute a violation of their right to the free freedom of speech. The lower court sided with GLIB, finding impermissible discrimination in the group’s exclusion. The Supreme Court reversed, concluding that the parade constituted protectible expression, and that applying Massachusetts’s law to such expressive activity would “require speakers to modify the content of their expression to whatever

86 Id. at 24.
87 Id.
88 Id. at 24–25.
89 Id.
90 See Hurley, 515 U.S. at 557.
91 Id. at 559.
92 Id. at 561.
93 Id. at 564.
94 Id. at 565.
extent beneficiaries of the law choose to alter it with messages of their own.\(^{95}\) The Court reasoned that, especially on a public street—since time immemorial a place where people have gathered to express their views—people should be free from state interference in the content of their speech.\(^{96}\)

In analyzing the status of the parade as expression entitled to First Amendment protection, the Court said that “[t]he protected expression that inheres in a parade is not limited to its banners and songs...for the Constitution looks beyond written or spoken words as mediums of expression.”\(^{97}\) Various kinds of symbolism, the Court noted, could also convey ideas.\(^{98}\) “[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.”\(^{99}\) What these three examples have in common is their medium-specificity.\(^{100}\) These works or bodies of work all reject the notion that art can be translated across media, into discursive language. Pollock’s painting is concerned with the nature of paint and gesture; all “meaning” flows from this primary exploration. The language of “Jabberwocky” is sensuous, playful, intuitive; the words signify not by indexing to familiar dictionary definitions, but through rhythm, assonance, and rhyme. Fortunately for art, if unfortunately for GLIB, the \textit{Hurley} holding made it clear that the First Amendment protects even so-called “art for art’s sake.”\(^{101}\) Art speech is not, or is not necessarily, message-driven.

\(^{95}\) \textit{Id.} at 578.
\(^{96}\) \textit{Id.} at 579.
\(^{97}\) \textit{Id.} at 569.
\(^{98}\) \textit{Id.}.
\(^{99}\) \textit{Id.}.
\(^{101}\) \textit{Hurley}, 515 U.S. at 569.
speech.

Lacking a more extensive general jurisprudence of art speech, we can look to judicial pronouncements on the First Amendment’s interaction with individual works of art and, more rarely, judicial pronouncements on particular media or categories of artistic expression.

In Kaplan v. California, the Supreme Court acknowledged that the visual arts have First Amendment protection. The case concerned the proprietor of an adult book store’s challenge to a California obscenity ordinance that made the sale of pornographic books a misdemeanor. The book that occasioned the action contained no pictures, only “repetitive descriptions of physical, sexual conduct, ‘clinically’ explicit to the point of being nauseous,” according to Justice Burger. The Court hesitated to classify the book as obscene and therefore not entitled to First Amendment protection under Miller v. California because “[a] book seems to have a different and preferred place in our hierarchy of values.” Ultimately, however, the Court did find that the “commercial exposure and sale of obscene materials to anyone, including consenting adults, is subject to state regulation.” In arriving at this conclusion, the Court noted that, like non-obscene books, non-obscene “pictures, paintings, drawings, and engravings” are protected by the First Amendment.

In Massachusetts v. Oakes, the Court entertains the idea of modeling as protectable First Amendment speech. The case

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102 Kaplan v. California, 413 U.S. 115, 119-120 (1973); see also Hoepker v. Kruger, 200 F. Supp. 2d 340, 349 (S.D.N.Y. 2002) (“visual art is protected speech”); see also Berry v. New York, 97 F.3d 689, 695 (2d Cir. 1996) (“Visual artwork is as much an embodiment of the artist’s expression as is a written text, and the two cannot always be readily distinguished.”).
103 Kaplan, 413 U.S. at 116.
104 Id. at 116–117.
105 Id. at 119.
106 Id. at 120.
107 Id. at 119.
concerned a First Amendment challenge to a Massachusetts law making it a crime to encourage or permit a child under eighteen years of age to pose or perform nude in any book, magazine, pamphlet, film, photograph, or picture.\textsuperscript{109} The plaintiff was facing ten years in prison for taking ten photographs of his “partially nude and physically mature” fourteen-year old stepdaughter, who was attending modeling school at the time of the incident.\textsuperscript{110} The photographs depicted the teenager “sitting, lying, and reclining on top of a bar, clad only in a red and white striped bikini panty and a red scarf,” which left her breasts fully exposed in all of the photographs.\textsuperscript{111} While the Court remanded the case without reaching the substantive First Amendment issues presented, Justice Brennan wrote in dissent that “[p]hotography, painting, and other two-dimensional forms of artistic reproduction…are plainly expressive activities that ordinarily qualify for First Amendment protection…And modeling, both independently and by virtue of its close association with those activities, enjoys like shelter under the First Amendment.”\textsuperscript{112}

In \textit{Ward v. Rock Against Racism}, the Court made it clear that “[m]usic, as a form of expression and communication, is protected under the First Amendment.”\textsuperscript{113} The plaintiff in the case was an antiracist group (“RAR”) that sponsored an annual program of speeches and rock music at the Central Park bandshell in Manhattan to promote their cause.\textsuperscript{114} The bandshell happens to abut some of the priciest real estate in the world, and over the years the city had received numerous complaints from residents that RAR used excessive sound amplification during their concerts.\textsuperscript{115} RAR also had a history of failing to cooperate with city officials to find a volume level that would be an acceptable compromise for

\begin{thebibliography}{11}
\bibitem{109} \textit{Id.} at 578–579.
\bibitem{110} \textit{Id.} at 580.
\bibitem{111} \textit{Id.}
\bibitem{112} \textit{Id.} at 590.
\bibitem{114} \textit{Id.} at 784-785.
\bibitem{115} \textit{Id.} at 785.
\end{thebibliography}
all. In advance of their 1984 concert, city officials warned RAR that their permit would be revoked if specified volume limits were exceeded. The limits were exceeded and the following year, RAR was denied a permit. The city adopted guidelines stating that anyone using the bandshell for performances would have to use high-quality sound equipment newly purchased by the city, as well as a city-employed sound technician. RAR found these guidelines objectionable, and filed an action against various city officials. The Court found the bandshell guidelines to be a reasonable time, place, or manner restriction, and clarified that the city need not prove that its regulation was the least intrusive means of furthering its legitimate government interest in noise control. In coming to this conclusion, however, the Court opined extensively on the importance of music, “one of the oldest forms of human expression.” Rulers from those imagined in “Plato’s discourse in the Republic to the totalitarian state in our own times,” Justice Kennedy wrote for the Court, “have known [music’s] capacity to appeal to the intellect and to the emotions and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order.”

Upholding a “fairness doctrine” requirement that opposing views of matters of public concern be given equal time on the radio in *Red Lion Broadcasting Co. v. F.C.C.*, the Court found that “broadcasting is clearly a medium affected by a First Amendment interest.” Between 1949 and 1987, the Federal Communications Commission (“FCC”) imposed on radio and television

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116 Id.
117 Id.
118 Id.
119 Id.
120 Id. at 786–787.
121 Id. at 788.
122 Id. at 789-790.
123 Id. at 790.
124 Id.
125 Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 386 (1969). *But see* F.C.C. v. Pacifica Found., 438 U.S. 726, 748 (1978) (“of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”).
broadcasters the requirement “that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.” This included the requirement that if particular individuals or groups were personally attacked on a particular program, they must be given the opportunity to respond on air. When the FCC attempted to compel Red Lion Broadcasting to give author Fred Cook an opportunity to respond to a personal attack that had been leveled against him on one of its radio stations, Red Lion brought an action against the FCC, alleging that the regulations abridged their freedom of speech and press. They argued that the First Amendment protected their desire to use their frequencies to broadcast whatever they chose, and to exclude whomever they chose from ever using that frequency. While acknowledging that radio and television were entitled to First Amendment protection, the Court found that “differences in the new media justify differences in the First Amendment standards applied to them.” Such newly-available technologies as television and radio were capable of producing an ever-present cacophony that would “drown[] out civilized private speech.” Accordingly, “[t]he right of free speech of a broadcaster” the Court said, “does not embrace a right to snuff out the free speech of others,” and fairness doctrine regulations were therefore necessary and appropriate.

The Court recognized that film is entitled to protection as speech in *Joseph Burstyn v. Wilson*. In that case, the Court struck down a New York ordinance permitting the banning of motion pictures deemed “sacreligious” on First Amendment grounds. Notwithstanding the respondent’s urging that “motion pictures possess a greater capacity for evil, particularly among the

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127 *Id.*
128 *Id.* at 386.
129 *Id.*
130 *Id.*
131 *Id.* at 387
132 *Id.*
134 *Id.*
youth of a community, than other modes of expression,” the court held that motion pictures are “a form of expression whose liberty is safeguarded by the First Amendment.”

Exhibiting unusual sensitivity to the complex ways in which art may “speak,” Justice Clark wrote that “[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”

_Southeastern Promotions v. Conrad_ established that theater can claim First Amendment protection. The case involved a challenge to a municipal theater in Tennessee’s refusal to permit a production of the musical _Hair_ to be staged. An anthem of 1960s counterculture, _Hair_ expressed contempt for the Vietnam War, sexual repression, and the suffocating conformity of mainstream American life with scenes incorporating simulated sex acts, drug use, and such glib, yet accurate, denunciations of U.S. foreign policy as “[t]he War is White people sending Black people to fight Yellow people to defend the land they stole from the Red people.”

There was also the famous “nude scene.” Before its Broadway opening, the _New York Times_ sent a critic for the express purpose of sussing out just exactly how much nudity _Hair_ contained. “The first act of the rock musical ends with several healthy young men facing front and center in the altogether,” she reported. “Just how many stark naked males there are and whether the girl hippies are equally unclothed has been the subject of urgent dispute among those who have been attending previews of ‘Hair’ during the last few weeks.” Alas, the nude scene was staged in semi-darkness, with different cast members disrobing or

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135 _Id._ at 501
136 _Id._
137 _Id._
138 _Id._
140 _Id._
keeping their clothes on as the spirit moved them from one evening to the next, so a definitive answer could not be given. Some community members found it all rather shocking and distasteful when the show came to Chattanooga in 1971. So did Chief Justice Burger, who would sneer in posing a hypothetical while dissenting from a different opinion the year the case was decided, “assuming arguendo that there could be a play performed in a theater by nude actors involving genuine communication of ideas,” as if live nudity and ideas are self-evidently incompatible. Nevertheless, the Southeastern Court held the city venue’s denial of permission to be unconstitutional prior restraint, and in doing so affirmed that theater is entitled to First Amendment protection.

More sweepingly, in Schad v. Mount Ephraim, which dealt with a municipal zoning ordinance banning live nude dancing, the Court found that “[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment’s guarantee.” Though not all art is entertainment, and not all entertainment is art, the two terms are conflated often enough to suggest that the Court’s endorsement of protection here might reasonably be interpreted as broadly applicable to the arts in general. This is the position of numerous commentators who believe that “art speech should be presumptively protected expression and generally immune from regulation.” Perhaps if so many of our key free speech cases were not occasioned by disputes involving pornography and nude erotic dancing, which “falls within the outer ambit of the First Amendment’s protection,” the Court’s jurisprudence in this area would be more robust and the

141 Id.
status of art as a type of speech uniquely deserving of protection more clear.\textsuperscript{146}

IV. ARCHITECTURE AS SPEECH

Even assuming that architecture is art, and that art is entitled to protection as speech for the purposes of the First Amendment, there is nothing talismanic about this status. “Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”\textsuperscript{147} While architecture is a form of visual art, is it plainly more than merely visual. Like the examples of non-representational art cited in \textit{Hurley}, architecture, and particularly modern architecture, is untranslatable. What a building “says” cannot be communicated by a drawing, or a film, or a concerto. Huxtable observed that architects of the late twentieth century in particular added a fourth dimension to architecture’s conventional definition as a three-dimensional, spatial art: “an aesthetic of experiences in time, of responses dependent on the passage from one part of the building to another.”\textsuperscript{148} While any full experience of a work of architecture will be time-based, architecture has little in common with “live entertainment.” To succeed, a building must also “address fundamental concerns—the needs and pleasures of the body and spirit—that all great architecture serves and turns into art.”\textsuperscript{149} Because of the basic duty to not only address but protect the human body, architects are also accustomed to working within the confines of government restrictions on things like travel distance to the nearest exit, height and bulk in designated historic areas, and earthquake-readiness. Buildings are both functional and aesthetic objects, and the most salient feature of any building is always going to be whether or not it is able to keep from collapsing

\textsuperscript{146} City of Erie v. Pap’s A.M., 529 U.S. 277, 278 (2000).
\textsuperscript{147} Conrad, 420 U.S. at 557; \textit{see also} F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748 (“We have long recognized that each medium of expression presents special First Amendment problems.”).
\textsuperscript{149} \textit{Id.} at 28.
around the heads of the people inside it. For these reasons, and because architecture requires so much in the way of resources, partnerships with government have long been a crucial part of the development of the medium itself. One could even say that state sponsorship is the vital, beating heart of architecture. This makes architecture quite different from other art forms. As a result, architecture is not at all well-served by existing art law doctrine, and this is a problem.

It is within the police power of the state to promote the “general welfare,” and as the aesthetic character of a locality has been treated as an element of the “general welfare,” architectural aesthetics have not infrequently been held to fall within the scope of states’ and cities’ police power. This treatment of aesthetics is a relatively recent phenomenon. Commentators have identified three historical stages in judicial treatment of aesthetic regulation, the first of which is exemplified by the opinion of a New Jersey judge who in 1903 wrote that he could find 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.” During this period, courts were wary of the idea that the government’s police power extended to aesthetic initiatives. During the second period, courts upheld aesthetic regulations if they could be tied to such traditional state interests as health, safety, or property values. The third period, in which we find ourselves today, is characterized by the greater willingness of courts to uphold regulations issued for aesthetic reasons alone. Writing for a unanimous Supreme Court in Berman v. Parker, Justice Douglas captured the ethos of this period in declaring that the values

153 Id.
154 Id.
represented by the concept of the public welfare “are spiritual as well as physical, aesthetic as well as monetary.”155 It is within the legislature’s power, he wrote, “to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”156

The uninterrogated assumption of Justice Douglas’s opinion is that “beauty” is a stable and transcendent virtue. In subsequent opinions, the Supreme Court has cautioned that “esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized.”157 While lower courts have readily upheld as constitutional laws that regulate architecture on aesthetic grounds alone, jurisprudence in this area has been criticized as incoherent.158 “The judiciary has failed to discipline the aesthetic regulation system by clearly articulating principles of court-applied law as a check on abusive or misguided aesthetic initiatives,” Costonis argues.159

As a result, when the government’s conception of beauty comes into conflict with an individual’s, the government tends to prevail. Homeowners have discovered this when their plans to construct avant-garde dream homes run afoul of local government ordinances or the determinations of architectural boards.160

In State ex rel. Stoyanoff v. Berkeley, for example, the Stoyanoffs brought an action alleging that they were deprived of their property without due process of law when they were refused a building permit for the construction of their proposed “ultramodern” residence.161 Their building plan was rejected by the Architectural Board of the City of Ladue, which was established to

156 Id.
159 Id.
foster “appropriate standards of beauty and conformity” in the city, and to ensure that “unsightly, grotesque and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures and residents, and to the general welfare and happiness of the community, be avoided.” The lot where the Stoyanoffs sought to build their house was in a neighborhood where “virtually all” of the existing houses were “two-story houses of conventional architectural design, such as Colonial, French Provincial or English.” According to the city, the Stoyanoff’s proposed house was “a monstrosity of grotesque design, which would seriously impair the value of property in the neighborhood.” According to the court, it was “to be of a pyramid shape, with a flat top, and with triangular shaped windows or doors at one or more corners.” The Stoyanoffs argued that the ordinance establishing the Architectural Board was unconstitutional because it empowered the board to permit or deny uses of personal property based on impermissible aesthetic criteria.

Since it was within the police power of a state to pass regulations designed to promote the general welfare, the city prevailed on the grounds that “[t]he character of the district, its suitability for particular uses, and the conservation of the values of buildings therein” are “directly related to the general welfare of the community.” The ordinance establishing the Architectural Board was deemed constitutional. Most homeowners who seek to distinguish themselves in similar ways fail for similar reasons, but overly vague or arbitrary ordinances calling for architectural or aesthetic uniformity have been struck down by courts under rational basis review.

162 Id. at 306-307.
163 Id. at 307.
164 Id.
165 Id. at 308.
166 Id. at 309.
V. GOVERNMENT SPEECH AND FEDERAL ARCHITECTURE

Should the federal government undertake to build a neoclassical courthouse in the style called for by Trump’s executive order, would the government be “speaking” through architecture “on its own behalf[?]”\(^{168}\) Or would the government be engaging in “viewpoint discrimination in the exercise of public authority over expressive activity[?]”\(^{169}\) I believe it would be doing both, and in so doing, implicating two bodies of First Amendment doctrine that prove imperfectly compatible in the context of architectural expression.

A. Government Speech

A Trump-style courthouse could be interpreted as a kind of government monument, which would render it essentially exempt from First Amendment scrutiny as “government speech.”\(^{170}\) As the Supreme Court observed in *Pleasant Grove City v. Summum*, “[g]overnments have long used monuments to speak to the public…A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.”\(^{171}\) The issue in *Summum* was whether the Free Speech Clause entitles a private group to insist that a municipality permit it to place a monument in a city park alongside other donated monuments. The park in question had eleven privately donated permanent displays, including a Ten Commandments monument.

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Summum, a religious organization that, most notably, practices Modern Mummification™, attempted to donate their own monument. Summum’s president wrote to the mayor of Pleasant Grove requesting permission to erect a stone monument “which would contain the Seven Aphorisms of Summum and be similar in size and nature to the Ten Commandments monument” already on display in the park. The City denied the request, explaining that it only accepted monuments that “either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.” Summum filed an action alleging that the City had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument, but rejecting Summum’s.

The Court found for the City, concluding that, like “government-commissioned and government-financed monument[s]” installed on public property, “privately financed and donated monuments that the government accepts and displays to the public on government land” constitute “government speech.” Because in curating these monuments, the City was effectively speaking on its own behalf, the First Amendment was not implicated. “If governments must maintain viewpoint neutrality in selecting donated monuments,” Justice Alito wrote for the plurality, “they must either prepare for cluttered parks or face pressure to remove longstanding and cherished monuments.” From a purely practical perspective, since the government cannot in all situations be expected to say “yes” to everyone, the government must be able to say “no” without triggering the First

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173 Summum, 555 U.S. at 1129.
174 Id. at 1129-30.
175 Id. at 1130.
176 Id.
177 Id. at 1133.
178 Id.
179 Id. at 1128.
Amendment’s restrictions on viewpoint discrimination. 180

This permissive government speech doctrine congealed in \textit{Walker v. Texas Div., Sons of Confederate Veterans}, a 2015 case in which the Texas Divisions of the Sons of Confederate Veterans filed suit against the chairman of the board of the Texas Department of Motor Vehicles over its refusal to accept a proposed specialty license plate design featuring a Confederate flag. 181 The Court held that Texas’s specialty license plates were government speech, the content of which the state was free to restrict as it saw fit. 182 “When government speaks,” Justice Breyer wrote for the majority, “it is not barred by the Free Speech Clause from determining the content of what it says.” 183 If the Free Speech Clause were interpreted as barring government from making such determinations, “it is not easy to imagine how government would function,” said the Court. 184

The Second Circuit’s lamentable opinion in \textit{Serra v. United States General Services Administration} suggests that architects would be virtually powerless to prevent the destruction of their works should the GSA have taken Trump’s order as a cue to begin demolishing modern buildings like the San Francisco Federal Building or United States courthouses in Buffalo, Austin, or Cleveland and replacing them with antebellum architecture that reminds us all of when America was truly “great.” 185 A few years after the GSA had installed artist Richard Serra’s commissioned, site-specific sculpture \textit{Tilted Arc} in Manhattan’s Federal Plaza, the agency caved to public pressure and announced that the sculpture would be removed. 186 \textit{Tilted Arc} was a 12-foot high and 120-foot

\begin{thebibliography}{99}

182 \textit{Id.} at 2245.
183 \textit{Id.}
184 \textit{Id.} at 2242 (citing \textit{Summum}, 555 U.S. at 460).
186 \textit{Id.} at 1047.
\end{thebibliography}
long, gently-bending arc of steel. The monumental sculpture bisected the Plaza, and some federal employees who worked in the adjacent offices were annoyed that they had to walk around it on their lunch breaks. Serra brought suit, alleging that the sculpture’s removal would violate his freedom of expression under the First Amendment. To move the sculpture, Serra explained, would be to destroy it, to mutilate its meaning. As a site-specific work, Titled Arc had been “conceived and created in relation to the particular conditions of a specific site.” In an opinion that does not bode well for the protectability of architectural speech, the Second Circuit effectively held that site-specific work is not entitled to First Amendment protection. All architecture, after all, is site-specific art.

Applying reasoning that would likely not be accepted post-Hurley, the Serra court said that relocating Titled Arc would not preclude Serra from communicating his ideas in other ways: “Notwithstanding that the sculpture is site-specific and may lose its artistic value if relocated, Serra is free to express his artistic and political views through the press and through other means that do not entail obstructing the Plaza.” The court also determined that since Serra had “already had six years to convey his message through the sculpture’s presence in the Plaza” and since “the First Amendment protects the freedom to express one’s views, not the freedom to continue speaking forever, the relocation of the sculpture after a lengthy period of initial display does not significantly impair Serra’s right to free speech.” This conclusion shows how sorely in need American jurisprudence is of a coherent art speech doctrine, for while it might be appropriate to

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187 Id.
189 Serra, 847 F.2d at 1048.
190 Id. at 1047.
191 Id.
192 Id. at 1050.
193 Id.
194 Id.
say to protestors occupying a public space night and day for weeks on end that the First Amendment does not entitle them to go on speaking forever, art like Serra’s is built to last, to “speak” as its steel rusts and changes color over time, as it alters pedestrians’ relationships to surrounding streets and structures, as it shades people in the summer and shelters them from wind and sleet in the winter.\textsuperscript{195}

The second rationale offered by the Second Circuit, however, has only been buttressed by \textit{Summum}, \textit{Walker}, and other recent government speech cases.\textsuperscript{196} The \textit{Serra} court said that, even if site-specific work were entitled to protection, “the First Amendment has only limited application in a case like the present one where the artistic expression belongs to the Government rather than a private individual.”\textsuperscript{197} Since \textit{Tilted Arc} was federal property, commissioned by the GSA and sited on federal property, the GSA was free to dispose of it as it saw fit.\textsuperscript{198} The “GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable for particular locations.”\textsuperscript{199} The government’s interest in controlling its property prevailed over the First Amendment rights of artists like Serra.\textsuperscript{200}

All of this suggests that artists or architects commissioned to create work on federal land do so at their own risk. The \textit{Serra} court did leave open the possibility for a viewpoint discrimination challenge when it came to government-commissioned works of art, noting that “[e]ven where, as here, the removal of an artwork does not restrict the artist's free speech because the work is owned by the Government, it is still possible that the Government's broad

\textsuperscript{197} \textit{Serra}, 847 F.2d at 1048.
\textsuperscript{198} \textit{Id.} at 1051.
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{Id.} at 1049.
discretion to dispose of its property could be exercised in an impermissibly repressive partisan or political manner."\textsuperscript{201} However, unless a work of art openly and explicitly communicated its “message,” and that meaning or message was unmistakably partisan or political, it is difficult to imagine such a viewpoint discrimination challenge being successful on these terms. Since most works of art and architecture, particularly modern art and architecture, are more coy than this, they stand or fall at the pleasure of the General Services Administration.

\textit{B. Censoring Architects}

The Court wrestled with the problem of viewpoint discrimination vis-à-vis arts funding in \textit{National Endowment for the Arts v. Finley}, when four performance artists brought an action alleging that the National Endowment for the Arts (“NEA”) had violated their First Amendment rights by denying them grants.\textsuperscript{202} The artists challenged the law that directed the Chairperson of the NEA to “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public” in adjudicating grant applications.\textsuperscript{203} “Decent” and “respectful,” would not be among the words anyone familiar with the work of the named plaintiff Karen Finley would use to describe her performances. In her aggressively feminist one-woman shows, Finley often took her clothes off and smeared food on her body to represent the violation of women.\textsuperscript{204} Conservative lawmakers objected to the idea of taxpayer dollars funding such “obscenity.”\textsuperscript{205} Most of those leading the culture war against Finley’s work—prominently Republican Senator Jesse Helms from

\textsuperscript{201} \textit{Id.} at 1050.
\textsuperscript{203} \textit{Id.}
North Carolina—had never seen it. Had they, it would had to have become clear that the last thing Finley wanted to do was appeal to any prurient interest in sex. *We Keep Our Victims Ready*, one of the performances that earned Finley her notoriety, was inspired by the story of Tawana Brawley, a sixteen-year-old African-American girl who was found in a trash bag in upstate New York, dazed, semi-conscious and covered in human excrement after having been, she said, raped by a group of white police officers.\(^{206}\) In the piece that grew out of her distress at hearing Brawley’s story, Finley smeared her body with chocolate because, as she said reflecting on the piece years later, “I’m a woman and women are usually treated like shit.”\(^{207}\) Then Finley covered herself with red candy hearts because, she explained, “after a woman is treated like shit, she becomes more loveable.”\(^{208}\) After the hearts, Finley covered herself with bean sprouts, “which smelled like semen and looked like semen—because after a woman is treated like shit, and loved for it, she is jacked off on.”\(^{209}\) Finally, she spread tinsel all over her body, “like a Cher dress—because,” she said, “no matter how badly a woman has been treated, she’ll still get it together to dress for dinner.”\(^{210}\) The performance was confrontational, upsetting, and explicit, but if it invited a sexual gaze, it did so only to indict the impulse to sexualize a woman in pain, to sexualize women’s pain generally. The NEA’s “decency” requirement was a convenient mask for misogyny. It also gave cover to homophobia—the other three members of the “NEA Four” were gay and their work frequently dealt with issues of queer identity.\(^{211}\)

Regrettably, the Court sided with the NEA, finding no substantial risk that the application of the “decency” law would lead to the suppression of speech, and observing that “when the

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\(^{207}\) *Id.* at 84.

\(^{208}\) *Id.*

\(^{209}\) *Id.*

\(^{210}\) *Id.*

Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.”

The Government “may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake,” the Court held.

Prefiguring the logic of *Summum*, Justice O’Connor wrote for the majority that “it would be impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression...absolute neutrality is simply inconceivable.” However, she continued, “if subsidy were ‘manipulated’ to have a ‘coercive effect,’ then relief could be appropriate.”

In his concurring opinion, Justice Scalia took the position that manipulating the criteria for subsidy to have a coercive effect would in fact be just fine. “Congress,” after all, “did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech.” He continued, “[t]hose who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. *Avant-garde artistes* such as respondents remain entirely free to *epater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it.”

Reserving judgment on whether Scalia’s assessment reflects an accurate understanding of the material conditions of performance artists’ lives, it is clear that this argument cannot be translated for architects. While it is true that a performance artist could, in theory, perform a scrappy, jerry-built version of her show in a public park or a bar with no costumes, props, lights, or amplified sound, all of which cost money, architects cannot engage

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213 Id. at 587-88.
214 Id. at 585.
215 Id. at 587.
216 Id. at 598 (Scalia, J., Concurring).
217 Id. at 598-99 (Scalia, J., Concurring).
in the same sort of guerilla art-making. Large-scale architectural projects cannot happen without the government getting involved—architects cannot create without the government issuing the appropriate building permits. An architect also requires far more in the way of resources to perform the basic work of creation than a performance artist who uses her body as medium or a writer who requires only a pen and paper.

This is true for both privately-commissioned projects and government-commissioned ones. The architect cannot create without the funding for workers, glass, and steel. Frank Lloyd Wright lamented this necessary entwinement with the apparatus of commerce, saying that because of the practical compromises he is required to make in order to create, the architect “is not quite like his brother the artist,” who can be quite prolific while simultaneously existing in a state of perpetual hostility towards commerce. Instead, “the architect, the master of creative effort whose province it was to make imperishable record of the noblest in the life of his race in his time...has been caught in the commercial rush and whirl...He has dragged his ancient monuments to the market places...He has degenerated to a fakir.” When it comes to federal buildings, the government of course holds all the cards. Even a stratospherically wealthy architect cannot build a courthouse that will serve as anything other than a ghostly, full-size diorama without the endorsement of the government.

VI. Conclusion

Architects require government subsidy in order to create public buildings, which are the property of the public, but also works of art that constitute the expressive speech of individual artists. The creation of an official architectural style is tantamount to the manipulation of subsidy to have a “coercive effect,” which the Supreme Court has indicated could be grounds for relief in

219 Id.
First Amendment challenges.\textsuperscript{220} Notwithstanding Biden’s recision of “Promoting Beautiful Federal Civic Architecture,” the order’s First Amendment implications are disturbing. The president should not have the power to hold an entire major art form hostage, and no nation’s shared built environment should be so vulnerable to the passing fancies of any single individual.

\textsuperscript{220} Finley, 524 U.S. at 587.