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Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment

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ARTICLES

ARTISTIC EXPRESSION AND AESTHETIC THEORY: THE BEAUTIFUL, THE SUBLIME AND THE FIRST AMENDMENT

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Traditional first amendment theory presents a hierarchy of constitutionally protected speech. In the view of many commentators, political discourse should be afforded the greatest degree of constitutional protection while the protection afforded to other forms of speech, including artistic expression, should be determined in accordance with their resemblance to political speech.

In this Article, Professor Sheldon H. Nahmod disputes this traditional theory of first amendment protection. Professor Nahmod argues that artistic expression should be granted independent status as constitutionally protected speech. In the course of developing his thesis, Professor Nahmod examines the aesthetic theories of Plato and Kant, in particular the Platonic and Kantian concepts of the "beautiful" and the "sublime." The author attributes the marginality of artistic expression in first amendment theory both to an unconscious acceptance of Plato's fears regarding the influence of art on society, and to the unsettling, disruptive nature of artistic representation of the Kantian sublime.

The Invention of Beauty by the Greeks, that is, their postulate of beauty as an ideal, has been the bugbear of [*European Art and European Aesthetic Philosophies*]. . . . *We Do Not Need* the obsolete props of an outmoded and antiquated legend. *We are Freeing* ourselves of the impediments of *Memory, Association, Nostalgia, Legend, Myth*, or what have you, that have been *The devices* of Western European *Painting*. Instead of making *Cathedrals* out of Christ, man, or "life," *We Are Making* it out of ourselves, out of *Our Own Feelings*. The image we *Produce* is the self-evident one of revelation, real and concrete, that can be understood by anyone who will look at it without the nostalgic glasses of *History*.¹

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This Article is dedicated to Maureen Sherlock, Visiting Associate Professor of Philosophy and Art Theory at the School of the Art Institute of Chicago, who inspired me to think about the beautiful and the sublime as well as Parmenides and Heraclitus.

1. Newman, *The Sublime is Now*, 6 *TIGER'S EYE* 52-53 (Dec. 15, 1948) (emphasis and capitalization in original).

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I. INTRODUCTION

Artistic expression² has been assigned a derivative and second class status in the views of many first amendment thinkers, the Supreme Court, and other courts. This relegation of artistic expression to second class status has been caused, in large measure, by the centrality of political expression in theories of the first amendment. For purposes of first amendment analysis, most commentators consider artistic expression as subservient to, and derivative of, political expression; they determine the first amendment value of artistic expression primarily, if not solely, by its resemblance to political expression.³

This description may be put more generally in hierarchical terms: from a first amendment perspective the ideal kind of expression is political discourse, and all other kinds of expression, including artistic expression, are accorded lower degrees of first amendment protection depending on their similarity to political expression. This kind of ranking

2. While this Article deals primarily with the visual arts of painting and sculpture, much of the analysis is applicable to architecture, music and literature.

3. See *infra* text accompanying notes 79-119.

approach, which has been frequently employed by the Supreme Court in recent years, requires a court to assign different values to different kinds of expression as determined by their content. For example, commercial speech is given less first amendment protection than political expression;⁴ vulgar and offensive speech is given little first amendment value;⁵ and obscenity is given no first amendment value whatsoever.⁶

Even those commentators who do not rank artistic expression solely by its similarity to political speech do not appreciate artistic expression, in all of its diversity, as having significant independent status under the first amendment.⁷ Although several appear to assume that the first amendment protects some forms of artistic expression, they provide no meaningful analysis of why this should be so. This is, of course, regrettable in its own right. But there is also the danger that the absence of such analysis will lead to unfortunate results in actual cases.⁸

Why artistic expression should be relegated to a marginal status in first amendment jurisprudence is somewhat puzzling in light of its characteristics. As Herbert Read observes, the visual artist, whatever the medium, expresses a view of the world.⁹ In a very real sense, the artist imposes her own order upon nature and the universe. When an artist creates, she is shaping a new reality, a form to signify a feeling, and a certain order among perceptions and sensations.¹⁰ Moreover, as Read asserts, from the perspective of the audience artistic expression functions to eliminate mankind's alienation from nature through communication by symbols.¹¹

4. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (advertising of drug prices protected by first amendment).

5. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (vulgar and offensive speech may be barred from radio during hours when children may hear it).

6. *Miller v. California*, 413 U.S. 15 (1973) (obscene speech not protected by first amendment; three-part definitional test set out).

7. See *infra* text accompanying notes 120-26.

8. See, e.g., *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), discussed *infra* at text accompanying notes 150-53.

9. H. READ, *ICON AND IDEA* (1955). Read also argues that artistic expression precedes philosophical expression and any coherent intellectual activity. Artistic creation gives form to feeling, it finds feeling's "objective correlative." Its social purpose is to reconcile man with nature and life. According to Read, new artistic images will ultimately create a new style of life, reflecting the "passionate world of the imagination." *Id.* at 135-36. The development of the aesthetic consciousness, which he characterizes as having been corroded in the present day, requires a great deal of perception and imagination.

10. *Id.* at 105. Kandinsky states that an artist need not follow so-called objective reality; rather, the artist's "inner life" must be reflected in the painting. Kandinsky, *Reminiscences*, in *MODERN ARTISTS ON ART* 19-44 (R. Herbert ed. 1964). Similarly, Malevich maintains that pure feeling is supreme in creative art; objective representation should not be the purpose of art. In his view, "[a]bsolute, true values arise only from artistic, subconscious, or superconscious creation." Malevich, *Suprematism*, in *id.* at 101.

11. H. READ, *ART AND ALIENATION* 162-64 (1967). In Read's view alienation, the progressive divorce of human faculties from natural processes, is characteristic of contemporary soci-

The slighting of artistic expression in first amendment jurisprudence is puzzling for another reason. Artistic expression, even nonrepresentational art, has a marked influence on society even where it does not present an overt political message. The philosophers who have dealt with aesthetic theory share this conviction regarding art's influence.¹² Furthermore, contemporary socialist societies, inspired by Karl Marx,¹³ are so convinced of art's influence that they view art as an appropriate subject for state control. These societies are concerned not only with the emotional force of art, but with its cognitive content as

ety. Art can help reduce alienation because "it deals with the mystery of existence in the human and metaphysical sense." *Id.* at 35.

Compare J. MARITAIN, *CREATIVE INTUITION IN ART AND POETRY* 21-34 (1953). Maritain also stresses the individual subjective nature of artistic expression. He traces a historical movement in art from an emphasis upon external form to be copied, through an emphasis upon external form to be interpreted, not copied literally, to the most recent stage, beginning in the 1850's, when in poetry and painting subjectivity reached the creative act itself and became the essence of the creative act. In short, Western art has progressively stressed the artist's self and the individual universe of creative subjectivity.

Maritain's emphasis is different from Read's, but their approaches to artistic expression are not inconsistent. Both focus on the artist's subjective view of the world and the use of artistic forms to communicate that view. Further, both emphasize the role of imagination in the creative act, with Maritain arguing that what he calls "intuitive reason" (in contrast with "logical reason") plays an especially significant artistic role with respect to modern, nonrepresentational art. *Id.* at 129-34.

12. Plato, for example, considered artists so powerful and influential that they were to be outlawed in his ideal Republic unless they served the state. His concern was their corrupting influence. PLATO, *REPUBLIC* 80-85 [Stephanus *392c-98b] (Cornford trans. 1941) [hereinafter PLATO, *REPUBLIC* (with Stephanus numbers in brackets preceded by an asterisk)]. Much later, when Kant freed artistic expression from cognition and desire, he ushered in an era of art for art's sake, when only that art which was devoid of purpose was truly art. But Kant contended that artistic freedom is necessary in order that art create the beautiful which will generate the feeling of community necessary for society's well-being. I. KANT, *CRITIQUE OF JUDGMENT* (Bernard trans. 1951). The aesthetic theories of Plato and Kant are discussed *infra* text accompanying notes 20-28 and 44-54.

The United States Supreme Court commented on "the subtle shaping of thought which characterizes all artistic expression" in *Burstyn v. Wilson*, 343 U.S. 495 (1952), a case holding that the first amendment applies to motion pictures. The Court went on to reject the argument that the presence of entertainment value does not lead to a different conclusion: "[w]hat is one man's amusement, teaches another's doctrine." For a case holding that entertainment value standing alone is covered by the first amendment, see *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985) (off-duty police officer who entertained in blackface could not be prohibited from doing so even though he expressed no political or social views thereby). See also *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (live nude dancing in adult bookstore protected by first amendment).

From the artist's perspective, Gleizes and Metzinger contend that the purpose of painting is to reach the masses, not in their own language, but rather in the artist's own language "so as to move, to dominate, to direct, and not in order to be understood." Gleizes and Metzinger, *Cubism*, in *MODERN ARTISTS ON ART*, *supra* note 10, at 18. Klee asserts that the modern artist is a philosopher who regards the present world as accidentally fixed in time and space. For him, modern art properly represents freedom, the right to develop as nature develops; it views man as he might be. Klee, *On Modern Art*, in *id.* at 75-91. And Gabo contends that the force of art, which is a vehicle of ideas and emotions, is "in its immediate influence on human psychology and in its active contagiousness." Gabo, *The Constructive Idea in Art*, in *id.* at 112.

13. See *infra* text accompanying notes 59-62.

well. In their view, art should serve only to reinforce socialist ideals and thereby inculcate appropriate behavior; nonrepresentational art is considered decadent, bourgeois and dangerous.¹⁴

At the other end of the political spectrum, Daniel Bell argues that the crises of developed Western societies are the result of a split between culture and society.¹⁵ While capitalist society demands a certain discipline, in his view the modernist artistic emphasis on subjectivity and individual gratification, together with its attacks on convention, has led to the erosion of both the Protestant work ethic and the moral basis of rational life.¹⁶ Whatever the merits of Marx's and Bell's different political approaches to the appropriate social functions of artistic expression, both certainly share the view that art is a powerful force.

The theoretical purposes of this Article emerge as a result of the marginal status of artistic expression in first amendment jurisprudence.¹⁷ The first purpose is to set out important themes in aesthetic theory that illuminate some of the first amendment issues implicated in artistic expression. As described in Section II, the aesthetic theories of Plato and Immanuel Kant will be emphasized because their positions highlight three central themes: artistic freedom, the beautiful and the sublime. In addition, their respective positions, which have had a tremendous influence on all aesthetic theories, provide an effective contrast to one another.

The second purpose is to discuss different theories of the first amendment and, as set out in Section III, to show how they either explicitly confer second class status on artistic expression, or otherwise minimize its significance by directing insufficient attention to it. The third purpose is to comment on relevant cases decided by the Supreme Court and other courts, considered in Section IV, that have implications for artistic expression. In the course of the discussion of different first amendment theories and these cases, it will turn out that many of the stated (and unstated) assumptions regarding artistic expression

14. "Socialist Realism is the fundamental method of Soviet Literature and criticism: it demands of the artists a true, historically concrete representation of reality in its revolutionary development. Further, it ought to contribute to the ideological transformation and education of the workers in the spirit of socialism." The Statute of the Union of Soviet Writers, *quoted in* M. BEARDSLEY, *AESTHETICS FROM CLASSICAL GREECE TO THE PRESENT* 360 (1st ed. 1966) [hereinafter M. BEARDSLEY, *AESTHETICS*]. See also Goodman, *The Artist and the Politician*, N.Y. Times, Apr. 24, 1977, § 2 at 1 ("Repression is the tribute the totalitarian mentality pays to the power of art") and Rothstein, *Musical Freedom and Why Dictators Fear It*, N.Y. Times, Aug. 23, 1981, § 2 at 1, 20. "[I]t seems important to recall what the Marxists have always taught—that music has concrete meanings in the midst of its abstractions; ideas are contained in its sound that demand the attention by more listeners than mere tyrants." *Id.*

15. See D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976).

16. *Id.* at 54-76.

17. As this Article demonstrates, the marginal status of artistic expression in first amendment jurisprudence tells us a great deal about the values of that jurisprudence.

have their counterparts in Platonic and Kantian approaches to visual art and to the beautiful and the sublime. These assumptions, when articulated, will demonstrate a clear preference for the beautiful and hostility toward the sublime. That preference amounts to approval of the narrative of the Enlightenment, the liberation of humanity.¹⁸ This helps to explain why, as suggested finally in Section V, the beautiful and the sublime have deep implications for the first amendment treatment of artistic expression.¹⁹

II. THE AESTHETIC THEORIES OF PLATO AND KANT; THE BEAUTIFUL AND THE SUBLIME

This Section focuses on the aesthetic theories of Plato and Kant, with limited discussion of the approaches of some intervening and subsequent theorists. In many respects, Plato and Kant provide a counterpoint to one another. They both deal with the same question of the extent to which art should serve the state or society, they both address the nature of beauty, and Kant, in addition, considers the nature of the sublime. The nature of the sublime, which has been ignored for a long time, is an increasingly important concept in aesthetic theory.

A. Plato²⁰

According to Plato, every living person is in the process of becoming, of moving toward the ideal. The further removed something is from the ideal by virtue of its sensual and temporal existence, the less value it has. Living temporally and sensually is comparable to living in a cave into which the ideal—true knowledge as modeled on geometry—

18. See the discussions of modernism and postmodernism *infra* Sections IV and V. This preference might also be seen as approval of the narrative of the philosophical unity of all knowledge, a narrative which, in its post-Kantian form, is German in origin. The narrative of the Enlightenment, in contrast, is English and French in origin.

19. I do not set out in this Article any new and comprehensive first amendment theory of my own for several reasons. First, my argument that artistic expression deserves full first amendment protection fits somewhat comfortably into either a modified marketplace of ideas theory or a self-fulfillment theory, both of which are discussed *infra* text accompanying notes 102-26. Second, while several theories assume that artistic expression is assumed to be fully protected by the first amendment, I argue that these theories do not adequately explain why this should be so. It is in this regard that aesthetic theory illuminates the first amendment significance of artistic expression. Consequently, this Article does not develop a new and comprehensive first amendment theory.

I suspect that no comprehensive first amendment theory, especially one which relies on unitary purpose, will ever be satisfactory. The purposes of the first amendment are multiple; they include the promotion of self-government, truth-seeking and self-fulfillment and may also include the promotion of culture.

20. See generally PLATO, REPUBLIC, *supra* note 12, and PLATO'S PHILOSOPHY OF ART, in R. COLLINGWOOD, ESSAYS IN THE PHILOSOPHY OF ART 157 (Donagan ed. 1964).

cannot enter.²¹ The philosopher-kings who rule Plato's ideal Republic with the goal of imitating the form of the good through meeting all of the demands of justice must make up noble lies to maintain order.²² The primary lie is that good persons are always rewarded and that evil persons are always punished.

Since Plato's ideal society is hierarchical, art must reflect the proper arrangement of society. Art belongs to the senses and is only remotely imitative of the form of beauty. It is, therefore, very distant from true knowledge, which is based on reason.²³ But because art is very powerful, the philosopher-kings must control art through the promotion of lies. If art is not controlled, society becomes a "psychological anarchy, an orgy of misrule."²⁴ Thus, according to Plato, the state must control art for the good of the society as a whole. Otherwise, art threatens the stability of the state. This willingness to control artistic expression is one of the major themes of Plato's aesthetic theory.²⁵

A second theme that emerges from Plato's aesthetic theory relates to his view of the form of beauty. Not surprisingly, according to Plato, what is truly beautiful derives from his concept of a transcendental beauty with rational, almost geometric, dimensions.²⁶ The truly beautiful possesses unity, regularity and simplicity.²⁷ The closest that art can get to true beauty—and the distance is far indeed—is through unified, harmonious and properly proportioned artistic creations which celebrate virtue.²⁸ Such art promotes the unified, harmonious and properly proportioned ideal society as determined by the standards of the philosopher-kings.

Tying the definition of true beauty to unity, harmony and proper proportion in this mathematical sense is another of the central themes of aesthetic theory. Indeed, this concept of beauty has been so central to aesthetic theory that despite some earlier attempts it was only many centuries after Plato that Burke and Kant directed attention to yet another major theme of aesthetic theory: the sublime.

21. PLATO, *REPUBLIC*, *supra* note 12, at 227-32 [*514-18], 238-44 [*523-27c], 252-55 [*531c-35]. This is not to suggest, though, that the physical world has no value for Plato. After all, the *REPUBLIC* describes and argues for Plato's vision of a just society.

22. *THE LAWS OF PLATO* 45 [*664a] (Pangle trans. 1980). *See also* PLATO, *REPUBLIC*, *supra* note 12, at 67-102 [*376e-411].

23. PLATO, *REPUBLIC*, *supra* note 12, at 326-27 [*597], 334-35 [*602].

24. R. COLLINGWOOD, *supra* note 20, at 160. *See also* PLATO, *REPUBLIC*, *supra* note 12, at 328-33 [*598-601].

25. PLATO, *REPUBLIC*, *supra* note 12, at 67-102 [*376e-411], 114-15 [*423-24]. The totalitarian aspects of Plato's philosophy are fully set out in K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966). *See also infra* text accompanying notes 208-17.

26. PLATO, *REPUBLIC*, *supra* note 12, at 183-84 [*476], 188 [*479].

27. PLATO, *PHILEBUS* (R. Hackforth trans.) in PLATO: *THE COLLECTED DIALOGUES* 1148 [*66ab] (E. Hamilton & H. Cairns ed. 1961).

28. PLATO, *REPUBLIC*, *supra* note 12, at 127 [*432].

*B. From Plato to Kant*²⁹

Developments in aesthetic theory that occurred between the ages of Plato and Kant will be only briefly described in this section. The Catholic Church, through Augustine, adapted Plato for its own purposes. Like Plato, Augustine conceives the ideal society to be hierarchical.³⁰ Augustine ranks the temporal, including the human body, low on the scale of values, and God, the Church and religious values at the top.³¹ Augustine thereby reconciles Plato with Christianity. Under Augustine's philosophy, moreover, the body and sexual love of women should be transcended because they keep man apart from God.³²

Aquinas attempted to reconcile Greek philosophy with Christianity³³ and to redeem the physical world and artistic expression.³⁴ According to Aquinas, beauty requires integrity, harmony and brightness or clarity; this, like Plato's aesthetic theory of beauty, is a geometric model of beauty.³⁵ To create beauty, the artist must model his work on the physical world with its order and proportion. Under Aquinas's theory, beauty could participate in the religious life. The doctrine of analogy, the Platonic-derived idea that everything in the physical universe has a counterpart in the invisible universe of God, played a crucial role in this development.³⁶ The result, not unexpectedly, is that evaluating art on religious terms is analogous to what Plato wanted in his Republic: art must conform to the cosmic order which dictates temporal rule.

Later developments began to remove art from the intellectual and political control of those in power. The rise of Protestantism with its emphasis on the individual's access to the divine was one such development. Protestantism was, and is, an inward looking religion which stressed both the individual as direct intermediary with God and the

29. On this intervening period see generally M. BEARDSLEY, *AESTHETICS*, *supra* note 14, at 54-208.

30. See *id.* at 92-98; ST. AUGUSTINE, *CITY OF GOD* XVII, xiv (Dods, Wilson & Smith trans.) in *BASIC WRITINGS OF ST. AUGUSTINE* (Oates ed. 1948).

31. AUGUSTINE, *DE ORDINE* I, ii, 3 (Russell trans. 1942); AUGUSTINE, *CONFESSIONS* I, iv; III, vi; IV, xvi (Pilkington trans.) in *BASIC WRITINGS OF ST. AUGUSTINE* (Oates ed. 1948).

32. "I know nothing which brings the manly mind down from the heights more than a woman's caresses and the joining of bodies without which one cannot have a wife." ST. AUGUSTINE, *Concerning the Nature of Good* (Newman trans.) in *BASIC WRITINGS OF ST. AUGUSTINE* 455 (Oates ed. 1948). See generally V. BULLOUGH, *THE SUBORDINATE SEX* 97-120 (1973) (on "Christianity, Sex, and Women").

33. Notably Aristotle. For example, the Aristotelian concept of being is basic to Aquinas's metaphysics. Aquinas, *SUMMA THEOLOGICA* Vol. 6, I, Q. 13, Art 5 (Dominican Fathers trans. 2d ed. 1927).

34. On Aquinas, see M. BEARDSLEY, *AESTHETICS*, *supra* note 14, at 98-105.

35. *Id.* at I, Q. 39, Art. 8.

36. See *id.*, where Aquinas asserts that "beauty has a likeness to the property of the Son [of the Trinity]."

individual conscience in making moral decisions.³⁷ Power and knowledge no longer were perceived to descend from God, as under the divine right of kings, or to be rigidly hierarchical. Instead, knowledge came to be perceived as ascending from the individual and delegated by the individual to others.³⁸

Another development leading in the same direction was Descartes'³⁹ *a priori*, abstract and individualistic approach to knowledge: I think, therefore I am.⁴⁰ Cartesian theory contends that knowledge is not based on empirical investigation of nature but is instead innate, premised upon distinctness and clarity and modeled on mathematics.⁴¹ Moreover, for Descartes, the individual is the source of all knowledge and therefore the philosophical center. Thus, the religious and philosophical changes brought about by the Reformation and the Renaissance began to break up the metaphysical value system theretofore dominant in Western civilization, and the domains of activity and knowledge—science, religion, and art—began to split off from one another.

Finally, the philosophy of empiricism, as developed by Bacon, Locke, Hobbes and Hume,⁴² also began to have an effect on aesthetic theory. By insisting that the psychological processes of art must be studied, empiricism freed art from aesthetic theories based on *a priori* reasoning. Locke in particular attempted to prove that all human understanding derived from sensation and reflection.⁴³

C. Kant⁴⁴

Kant's aesthetic theory was in part a response to the empiricists, whose approach tended to make artistic judgments entirely subjective and sensory in nature. Kant's theory was also a response to the increasing success of science. In comparison to science, art seemed unable to compete as a form of knowledge. Kant attempted to rescue art from purely subjective feelings and, in a sense, to make it the equal of science.

37. M. MARTY, PROTESTANTISM 110-11 (1972); E. LEONARD, A HISTORY OF PROTESTANTISM 57 (Rowley ed. 1968).

38. M. MARTY, *supra* note 37, at 121-28; E. LEONARD, *supra* note 37, at 64. For a discussion of how the arts have fared under Protestantism, see M. MARTY, *supra* note 37, at 227-40.

39. R. DESCARTES, DISCOURSE ON METHOD (Lafleur trans. 2d ed. 1956).

40. *Id.* at 21.

41. *Id.* at 13-14.

42. See F. BACON, NOVUM ORGANUM; J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING; T. HOBBS, LEVIATHAN; D. HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING, collected in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL (Burt ed. 1939).

43. J. LOCKE, in *id.* at 248-50.

44. I. KANT, CRITIQUE OF JUDGMENT 37-81 (analysis of the beautiful) and 82-121 (analysis of the sublime) (Bernard trans. 1951). See also 6 F. COPLESTON, A HISTORY OF PHILOSOPHY (1960).

Kant was thus engaged in finding a place for art in a society undergoing radical change.

By grounding knowledge, desire and feeling on different states of consciousness, Kant makes the human mind, rather than nature, the touchstone of his complex philosophy.⁴⁵ Knowledge comprehends science, desire comprehends morality and politics, and feeling comprehends art. In the realm of morality and politics,⁴⁶ the only absolute law is that man is his own end and not a means. This absolute law, however, to which man must submit, gives man no real pleasure. Rather, man derives pleasure from the feeling of the beautiful, a feeling that results from the free play of imagination which has no purpose (desire) and no concept (knowledge).⁴⁷

In Kant's view, the aesthetic judgment must be totally disinterested in and separated from knowledge and desire.⁴⁸ According to Kant, a piece of furniture or a vase is not art until and unless the viewer judges the object in a disinterested manner totally apart from its function. This means that the viewer can have no interest in possessing the object (no desire) and no interest in its existence (no cognition). Contemplating beautiful art results in a social experience that binds people together. The feeling of beauty is the feeling of harmony which serves as a bridge between knowledge and desire.⁴⁹ In contrast, the feeling of the sublime, as noted later,⁵⁰ is the feeling about the rupture between knowledge and desire which is at the heart of human existence and ultimately gives rise to despair.

Kant contends that aesthetic judgments are different from all other forms of judgment. Aesthetic judgments say nothing about their objects but refer only to the feelings of their subjects. The contemplative feeling of beauty generated by objects that are considered beautiful is different from the temporary emotions of pleasure and pain which are not related to aesthetic judgment. Even though the feeling of beauty is within the viewer, however, Kant insists that this feeling is characterized by a subjective universality. By this he means that all cultivated persons would agree that a particular work of art is beautiful.⁵¹

45. Kant's work began with the *CRITIQUE OF PURE REASON*, which was followed by the *CRITIQUE OF PRACTICAL REASON*. For a discussion of the relation between these works and the *CRITIQUE OF JUDGMENT*, see I. KANT, *supra* note 44, at xiii-xxxv (translator's introduction).

46. Morality and politics are governed by practical reason. For a discussion of practical reason in connection with republicanism, democratic theory and the role of the Supreme Court, see Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 22-36 (1986).

47. I. KANT, *supra* note 44, at 43-51.

48. *Id.* at 54-65.

49. *Id.* at 64-65.

50. See *infra* text accompanying notes 63-78.

51. I. KANT, *supra* note 44, at 74-81.

Because art is removed from knowledge and desire, it follows for Kant that art and the beautiful cannot express ideas or take positions. Otherwise it is not art and cannot be beautiful. In this regard, Kant's theory is very different from the Platonic view that art must express particular positions, as determined by the philosopher-kings, so as to promote the harmony of the ideal Republic. On the other hand, in freeing art from knowledge and desire, Kant frees the artist and viewer from their rules: he thus asserts that man is most free when creating and contemplating art. This freedom from cognition and desire also has the potential to free art from representation by attaching art to the imagination, and thereby to eliminate the Platonic standard of *mimesis* (or imitation).⁵²

Kant's views of art have had a remarkable influence on aesthetic theory and art criticism. For example, formalist art theory, consistent with Kant, and as exemplified by the art critic and theorist Clement Greenberg,⁵³ offers art as a combat-free and value-free zone removed from society. Formalism holds that art should be analyzed in its own terms and subject to its own rules. This approach, however, has tended to reduce the influence of art on society (especially in the United States) by removing it from everyday life and relegating it to the museums. Art has come to be treated as holy and separate, belonging only in "churches."⁵⁴

D. Some Post-Kantian Developments: Hegel and Marx

Georg Friedrich Hegel,⁵⁵ in marked contrast to Kant, attempted to understand everything from a unitary perspective.⁵⁶ For Hegel, all of

52. See *supra* text accompanying notes 20-28.

53. C. GREENBERG, *Modernist Painting*, in THE NEWART 67-68 (Battcock ed. 1973); C. GREENBERG, PERCEPTIONS AND JUDGMENTS, 1939-1944 (O'Brian ed. 1987); and C. GREENBERG, ARROGANT PURPOSE, 1945-1949 (O'Brian ed. 1987).

54. The 20th century avant-garde broke with formalism's view of art and, in order to get art back into everyday life and increase its influence, the avant garde contended that art must have ideas.

The concern with art's isolation from society also sounds in the following plaint: "Although we Americans are packing our theaters, concert halls and galleries in record numbers, why is it that as a matter of policy we accept the arts as neither an integral aspect of everyday living nor a legitimate part of public education?" Rockefeller, *Wanted: A New Policy for the Arts in Education*, N.Y. Times, May 22, 1977, § 1, at 16.

To the same effect is the following: "In the practical life of the nation, the arts are treated as 'frills'—pleasurable perhaps, and even illuminating, but essentially disposable." Kriegsman, *Is it Time for a Change in National Arts Education?* Washington Post, May 22, 1977, at L1.

55. G. HEGEL, PHILOSOPHY OF FINE ART (Osmaston trans. 1920). On Hegel, see generally M. BEARDSLEY, AESTHETICS, *supra* note 14, at 234-41.

56. In its various stages, spirit provides different perspectives. What is unitary is the teleology of spirit awakening to full self-consciousness. See, e.g., C. TAYLOR, HEGEL 76-124 *passim* (1975).

history is developing; spirit, which is the true reality, is developing into self-consciousness. The higher the level of self-consciousness, the closer self-consciousness is to the universal consciousness or Absolute Spirit. Spirit passes through various stages of self-consciousness: subjective mind (the individual), objective mind (the state), and absolute mind (the ultimate truth, the object of knowledge). The purpose of art is to reveal truth (a part of the Absolute Spirit) concretely through the material world; art thus involves a reconciliation of matter and content.⁵⁷

In terms of apprehending Absolute Spirit, Hegel ranks art at the bottom, followed in ascending order by religion and culminating in philosophy.⁵⁸ This view brings together man and nature as well as man and the divine. Thought itself is a sacred process. In a sense, Hegel resurrects the Platonic ideal in the concept of Absolute Spirit but with the crucial difference that Hegel's Absolute Spirit operates through history. Thus, history itself is moving inevitably toward the ideal of absolute mind. Hegel's views are a good example of the narratives of the liberation of humanity and the unity of all knowledge.

Having the same effect, ironically, is the principle of dialectical materialism developed by Karl Marx.⁵⁹ This principle, Marx observes, turns Hegel on his head and demonstrates that economic relationships, not Hegel's Absolute Spirit, are the dominant force through history. Economic relationships determine everything, including art and culture. Art belongs to the cultural superstructure which mirrors the dominant class ideology. In fact, culture equals ideology. Thus, every work of art theoretically reflects economic reality and to that extent is propagandistic.⁶⁰ Consequently, art is intimately related to society. Indeed, subsequent Marxist theorists asserted that where a socialist society has been established, art must accurately represent socialist reality and must promote socialist ideas and behavior. This position is termed socialist realism⁶¹ and bears a remarkable resemblance to Plato's insistence that art must serve the ideal Republic. But Marx's view also resembles Hegel's narratives of the liberation of humanity and the unity of all knowledge.⁶²

57. 1 G. HEGEL, *supra* note 55, at 15-16.

58. *Id.* at 8-9.

59. See K. MARX & F. ENGELS, *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* (Feuer ed. 1959); K. MARX & F. ENGELS, *LITERATURE AND ART: SELECTIONS FROM THEIR WRITINGS* (1947).

60. Although Marx acknowledged that there was often no simple one-to-one correspondence, see K. MARX & F. ENGELS, *LITERATURE AND ART: SELECTIONS FROM THEIR WRITINGS* 18 (1947), Marxists later insisted that such a correspondence existed. See M. BEARDSLEY, *AESTHETICS*, *supra* note 14, at 356-58.

61. See *supra* note 14.

62. Plato's ideal Republic, Hegel's Absolute Spirit and Marx's high state of communism all share the basic theme that the good is the common good and that individual wants and desires are secondary.

E. The Sublime

While other and subsequent philosophers are certainly important to aesthetic theory,⁶³ Plato and Kant bring into focus two major themes. The first theme is the extent to which art should serve the state or society.⁶⁴ The second theme is the concept of beauty as based in large measure on unity, harmony and proper proportion.⁶⁵ Indeed, for the most part aesthetic theory has concentrated on the concept of beauty. However, there were also early discussions of a third important theme, the sublime.

Longinus,⁶⁶ whose writings were rediscovered in the sixteenth century and were especially important in the late seventeenth and eighteenth centuries, wrote of the sublime that it produces not only pleasure but rapture as well. Thereafter, Burke,⁶⁷ in a very influential essay, spoke of the sublime as that which inspires terror, the fear of pain or death, in a person who in fact is not in danger and knows it.

It remained for Kant⁶⁸ to define the sublime very carefully and to distinguish it from Burke's predominantly sensory approach. According to Kant, while beauty is connected with form and thus with what is enclosed in boundaries, the sublime—which does not exist in nature but only in the mind—involves an experience of boundlessness, of formlessness. The mathematical sublime,⁶⁹ which relates to cognition, exists in the viewer but is generated by objects that impress the viewer as "absolutely great" beside which everything else is insignificant. Since the imagination cannot encompass such objects, they appear to be infinite. This inadequacy of the imagination, as compared with the demands of reason, makes the viewer feel joy and elevation through a sense of reason's greatness.

In contrast to the mathematical sublime, the feeling of dynamical sublimity,⁷⁰ relating to desire, arises in situations where, for example, nature overwhelms through lightning and thunder, but the viewer is secure. The subsequent feeling of physical impotence makes the viewer aware of his superiority as a moral being over nature. Together, the feeling of physical impotence and the viewer's superiority over nature

63. For a brief summary of subsequent developments in aesthetic theory, including consideration of Schopenhauer, Nietzsche, Tolstoy, Croce, Dewey, semiotics, phenomenology, existentialism, and empiricism, see M. BEARDSLEY, *AESTHETICS*, *supra* note 14, at 244-398.

64. See *supra* text accompanying notes 20-28 and 44-54.

65. *Id.*

66. LONGINUS, *ON THE SUBLIME* (Fyfe trans. 1953). See also M. BEARDSLEY, *AESTHETICS*, *supra* note 14, at 181.

67. E. BURKE, *A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL* (1757).

68. See I. KANT, *supra* note 44, at 82-120 (analysis of the sublime).

69. *Id.* at 86-99.

70. *Id.* at 99-120.

constitute this second kind of the sublime. While the dynamical sublime bears a resemblance to Burke's view of the sublime, Kant's view, unlike Burke's, claims universal validity because it rests on an *a priori* foundation regarding the relationship between imagination and reason and the existence of a universal moral feeling.⁷¹

Kant's definition of the sublime assumes an unbridgeable gulf between an idea and its representation.⁷² Whereas beauty mediates between knowledge and desire in an attempt to bridge that unbridgeable gulf, the sublime is the feeling generated by that very gulf. Additionally, while beauty is socially cohesive, the sublime is not. Indeed, the sublime inspires feelings of dissolution and disintegration.⁷³

The unbridgeable gulf exists not only in feeling (the domain of art) but also in science (the domain of knowledge) and in politics and morality (the domain of desire). For example, Kant sees a significant discrepancy between science and absolute truth because all measurement is subjectively determined.⁷⁴ Similarly, as discussed later,⁷⁵ a significant discrepancy exists between moral and political theory and what is, in fact, attainable.⁷⁶ That the Kantian concept of the sublime can be thus expanded beyond artistic expression⁷⁷ will turn out to be important in considering the first amendment value of artistic expression.⁷⁸

The above overview is admittedly very sketchy. It is intended, however, only to highlight three grand themes of aesthetic theory: the control of art, the concept of beauty and the concept of the sublime. These three themes are also present in different guises in various theories of the first amendment and in the case law of the Supreme Court and other courts. This Article does not claim historical causation for these aesthetic themes, but suggests more modestly that approaches to

71. *Id.* at 106, 118-20.

72. *Id.* at 88-89.

73. *Id.* at 82-85.

74. *Id.* at 86-89.

75. See Section V of this Article for a discussion of Jean-Francois Lyotard's view of the Kantian sublime, *infra* text accompanying notes 208-17.

76. I. KANT, *supra* note 44, at 87: the standard aesthetic judgment for greatness "may be a standard given *a priori* which, through the defects of the judging subject, is limited by the subjective conditions of presentation *in concreto*, as, e.g., in the practical sphere, the greatness of a certain virtue or of the public liberty and justice in a country, or, in the theoretical sphere, the greatness of the accuracy or the inaccuracy of an observation or measurement that has been made, etc." The feeling generated by this Kantian gulf is in part reminiscent of both Schopenhauer's philosophy that life is inherently evil and existentialism's claim that a person is alone in a world with no meaning. See M. BEARDSLEY, AESTHETICS, *supra* note 14, at 265-74 (for Schopenhauer, art is a means of escape from life) and 373-76 (for the existentialist, art contributes to the realization of authenticity in a person's existence).

77. I am sensitive to the danger of overloading an otherwise useful concept. However, based on Kant's own writing in the CRITIQUE OF JUDGMENT, it is appropriate to treat as the core concept of the Kantian sublime the unbridgeable gulf between an idea and its representation.

78. See *infra* text accompanying notes 160-217.

the role of artistic expression under the first amendment can be analyzed from the perspective of the aesthetic theories of Plato and Kant and that this analysis might provide some insights.

III. THE INADEQUACY OF FIRST AMENDMENT THEORY

Theoretical approaches to the functions of the first amendment typically subordinate artistic expression and predominantly focus on political expression. One such theory, which for purposes of this Article will be referred to as the self-government approach, contends that representative government depends on the ability of the governed to communicate freely with the government and with one another.⁷⁹ A second theory focuses on the discovery of truth, and is reflected by an emphasis on a "marketplace of ideas" in which ideas compete with one another for at least temporary supremacy.⁸⁰ Finally, the individual autonomy or self-fulfillment theory contends that the citizen should be free to express himself or herself on all matters in order to develop all of his or her intellectual faculties.⁸¹

While various commentators occasionally present other theories,⁸² the three theories noted above are the major focus of this Article. The relevance of these theories to political expression is clear. For the self-government theory, political expression is supreme. The marketplace of ideas theory admirably covers political ideas. Even the individual autonomy theory can be put in political terms: for the effective functioning of representative government, citizens may need to feel a sense of personal participation and involvement in the democratic process. What is not so clear is the relevance of these theories to artistic expression. Legal commentators have paid far too little attention to the nature and functions of artistic expression, and most have viewed artistic expression as largely incidental to political expression.⁸³ Even those who do not commit this error tend to pay scant attention to artistic expression.⁸⁴ Yet any first amendment theory that does not explicitly account for the nature and functions of artistic expression is to that extent inadequate.

79. See *infra* text accompanying notes 85-108.

80. See *infra* text accompanying notes 109-19.

81. See *infra* text accompanying notes 120-26.

82. E.g., Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (checking function) and T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970) (safety valve function).

83. See *infra* text accompanying notes 85-119.

84. See *infra* text accompanying notes 120-26.

A. The Self-Government Theory and the Primacy of Political Expression

The best known representative of the approach which gives primacy to political expression is Alexander Meiklejohn.⁸⁵ Meiklejohn argues that political expression is at the core of the first amendment because it is related to self-government. He deals with the protection of artistic expression as follows:

Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.⁸⁶

But protection of artistic expression is important for Meiklejohn only insofar as it relates to self-government:

[T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.⁸⁷

Meiklejohn includes literature and the arts as such "forms of thought and expression."⁸⁸

Even the late Harry Kalven, who applauded *New York Times Co. v. Sullivan*⁸⁹ as a "germinal decision" foreshadowing the Supreme Court's ultimate acceptance of Meiklejohn's approach, correctly perceived the uneasy relationship between self-government and artistic expression when he argued that Meiklejohn's approach does

not help much when the question is why the novel, the poem, the painting, the drama, or the piece of sculpture falls within the protection of the first amendment. . . . *Not all communications are relevant to the political process.* The people do not need novels or dramas or paintings or poems because they will be called upon to vote. Art and belles-lettres do not deal in such ideas—at least not good art or belles-lettres. . . .⁹⁰

Meiklejohn responded:

85. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

86. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257.

87. *Id.* at 256.

88. *Id.* at 257.

89. 376 U.S. 254 (1964).

90. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15-16 (emphasis added).

Moreover, as against Professor Kalven's interpretation, I believe, as a teacher, that the people do need novels and dramas and paintings and poems "because they will be called upon to vote." The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.⁹¹

Meiklejohn's self-government approach bears more than a passing resemblance to Plato's view of artistic expression. To be sure, Meiklejohn, unlike Plato, does not approve of censorship or control over artistic expression. Nevertheless, both Plato and Meiklejohn share a hierarchical view of artistic and other kinds of expression. For Plato, artistic expression has a lower value than reason or *logos*, which is at the center of his ideal Republic; for Meiklejohn, artistic expression has a lower value than political expression, which is at the core of representative government. Meiklejohn and Plato also have in common the related view that the value of artistic expression is derivative of and dependent upon the extent to which it serves the political system and its processes.⁹²

In contrast, Meiklejohn's view of the value and derivative status of artistic expression is fundamentally inconsistent with Kantian theory. Kant, it will be recalled, frees art from both the sphere of cognition—knowledge—and from the sphere of desire—politics and morality.⁹³ In so doing, he gives artistic expression a value and status independent of politics and any particular form of government. Kant also believes that to the extent art attempts to promote ideas, it is no longer art. Meiklejohn, together with Plato, is on the other side of both of these Kantian positions.⁹⁴

91. Meiklejohn, *supra* note 86, at 263.

92. PLATO, REPUBLIC, *supra* note 12, at 67-102 [*376e-411], 114-15 [*423-24].

93. See *supra* text accompanying note 48.

94. See *supra* text accompanying notes 85-94. Meiklejohn does not argue, as he might have, that representational art, even where devoid of explicit political content, is nevertheless political expression in the broader sense that it, like political expression, espouses views of society. The argument could comprehend all artistic expression, including nonrepresentational art, as being essentially political in nature. Indeed, in the early 1950s some politicians made the absurd claim that nonrepresentational art was communist-inspired. See *infra* text accompanying note 193.

There is considerable truth to the contention that all visual art, representational and nonrepresentational alike, expresses viewpoints about society that may be broadly characterized as political. Consequently, it might appear that had Meiklejohn followed his Platonic inclinations to their logical resting place, he would have avoided the strain of trying to find some sort of attenuated relationship between artistic expression and representative government. Instead, artistic expression might have been collapsed into political expression and thereby have posed no separate

While Meiklejohn may thus be guilty of slighting artistic expression from a theoretical perspective,⁹⁵ Robert Bork⁹⁶ would exclude artistic expression altogether from first amendment protection. Bork's position is far more drastic than Meiklejohn's. Indeed, as Marx turned Hegel on his head, so does Bork seem to turn Meiklejohn on his head. Bork views the first amendment as a means of protecting only explicitly political speech, thus completely excluding artistic expression from first amendment protection.⁹⁷

Bork arrives at this conclusion by deriving four possible functions of free speech from Brandeis's concurring opinion in *Whitney v. California*,⁹⁸ and discarding all but the fourth, namely, "the discovery and spread of political truth." Consequently, even though Bork recognizes that, for example, "the publication of a novel like *Ulysses* . . . may form attitudes that ultimately affect politics,"⁹⁹ he declines to extend first amendment protection either to artistic expression or to the sciences. His concern for line drawing and neutral principles leads him to this conclusion:

The category of protected speech should consist of speech concerned with governmental behavior, policy or person-

problem for his position. The difficulty with this hypothetical approach is that it proves too much. If Meiklejohn's theory is to have coherence, there must be some core meaning to political expression so as to distinguish it from other kinds of expression, including artistic expression.

95. Unfortunately, Zachariah Chafee provides no more a coherent first amendment role for artistic expression than does Meiklejohn. Chafee discusses the possible first amendment functions of artistic expression in novels and the theater from a different perspective. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1946). He first notes the value of novels and the theater as entertainment, mystery and romance. He then goes on to say that they can also provide for the criticism of life and for probing the framework of society. Thus, for example, Shakespeare's *KING LEAR* challenges the notion that rulers of society are always upright and Ibsen's *DOLL'S HOUSE* counters the idea that marriage is always worth preserving. *Id.* at 545-46. Chafee hints at something more when he earlier includes among the functions of the first amendment the protection of the individual interest of man in expressing opinions on matters vital to him if life is to be worth living. *Id.* at 33.

However, Chafee's view of the relation of artistic expression to the first amendment is marked by a lack of coherence. He seems to suggest that artistic expression is important instrumentally through its connection to political and social commentary. At the same time, he appears to speak of individual self-fulfillment as an important function of the first amendment. But he does not relate this individual interest to artistic expression. Nor does he deal with artistic expression from society's point of view, except insofar as what is expressed artistically can be verbalized as well. Hence, while it seems certain that Chafee is not a Platonist in his first amendment view of artistic expression, it is unclear just what his first amendment view of artistic expression is. All that is clear is his insistence that it is fully protected.

96. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

97. *Id.* at 27.

98. 274 U.S. 357 (1927). The four functions of free speech set out by Justice Brandeis are: the development of the faculties of the individual, the happiness derived from engaging in speech, the provision of a safety valve for society, and the discovery and spread of political truth. *Id.* at 375.

99. Bork, *supra* note 96, at 27.

nel. . . . Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expression as such.¹⁰⁰

Bork, as noted, proceeds from the Brandeis concurring opinion in *Whitney* with its reference to the four functions of the first amendment and ultimately focuses on "the discovery and spread of political truth"¹⁰¹ as the sole tenable function. Although Bork's argument follows from that function, his description of the first amendment's function is incomplete because it ignores other kinds of truth. Clearly, political truth is of major concern under the first amendment given our revolutionary origins. But surely political truth is not the only kind of truth: the artist perceives the world, and communicates that perception, differently than do other citizens or politicians.¹⁰²

Bork's discussion of political truth, like Meiklejohn's, is based in part on a distinction between public and private speech.¹⁰³ Public speech relates to the public good in self-government and is thus protected, while private speech is not directly related to the public good and is therefore unprotected. However, even assuming the validity of the public-private speech distinction, artistic expression is seldom if ever solely private speech. While the individualistic aspect of artistic expression is often emphasized—"art for art's sake" is a good example—the public aspect of artistic expression should not be ignored. In addition to the artist's communication of his view of the world to an audience, artistic expression sets a more general cultural tone.¹⁰⁴

100. *Id.* at 27-28. Bork should consequently have no "neutral" first amendment problem with *Sefick v. City of Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979), which held that a sculpture on display in the Daley Center in Chicago could not be removed because of its express political content.

101. Bork, *supra* note 96, at 25.

102. The Supreme Court's commercial speech cases demonstrate the improperly narrow scope of the self-government theory of the first amendment because that theory has no place for commercial speech. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). However, I do not suggest that artistic expression be accorded the same first amendment protection as commercial speech because the latter is given less first amendment protection than political expression. In contrast, this Article suggests that artistic expression should be accorded no less first amendment protection than political expression.

103. The public-private speech distinction was relied on by the Supreme Court in *Connick v. Meyers*, 461 U.S. 138 (1983), a case involving the scope of first amendment protection for government employees. According to the Court, speech dealing with matters of public concern merits more first amendment protection than speech dealing with matters of purely private concern.

104. Recall the Marxist view of artistic expression, *supra* text accompanying notes 59-62, and Daniel Bell's complaint that modern art has had a negative effect on capitalist society, *supra* text accompanying notes 15-16.

What is therefore needed is a theory of the first amendment that does not slight artistic expression.¹⁰⁵ Bork himself begins his discussion of the first amendment by noting the absence of a "tenable, internally consistent theory" of free speech.¹⁰⁶ Although Bork attempts to rectify this absence, he is unsuccessful for many reasons,¹⁰⁷ including the fact that he focuses on political speech alone. Artistic expression is neither derivative of political expression, as Meiklejohn suggests, nor is it unrelated to the public good, and therefore totally unprotected, as Bork contends.

Bork's view of artistic expression is closer to Plato's than is Meiklejohn's view.¹⁰⁸ Plato and Bork would agree that the state can control artistic expression for the state's own purposes. For Plato, artistic expression is a poor (and sometimes dangerous) imitation of true knowledge, and therefore is far removed from it. For Bork, artistic expression is similarly far removed from political speech because he considers artistic expression to be different in kind from political speech. Under Bork's view, artistic expression of the beautiful—let alone the sublime—is utterly unprotected by the first amendment.

B. The Theory of the Marketplace of Ideas and Truth-Seeking

The theory that the first amendment creates a marketplace of ideas in which the search for truth takes place is based in large measure on John Stuart Mill's *On Liberty*.¹⁰⁹ Justice Holmes provided the most famous judicial articulation of the marketplace of ideas theory in his famous dissent in *Abrams v. United States*,¹¹⁰ where he asserted that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Various arguments have been leveled against this theory, including the contentions that no real marketplace exists, that the truth can never be attained, and that even if it can, there is no assurance that truth will prevail in the market.¹¹¹ These critiques are not entirely persuasive for several reasons. First, while no perfect marketplace of ideas may exist, experience teaches that to a con-

105. See *supra* text accompanying notes 2-19.

106. Bork, *supra* note 96, at 20.

107. See M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 17-18 (1984) ("Judge Bork's conclusion that political speech should be protected is . . . inconsistent with his belief that any acceptable rationale for free speech must be logically unique to speech").

108. There is, of course, the important difference that for Bork artistic expression is not sufficiently important to merit first amendment protection while for Plato artistic expression which does not serve the state is too dangerous to be permitted.

109. J. MILL, *ON LIBERTY* (1st ed. 1859). Mill set out his free speech theory long after the first amendment was adopted.

110. 250 U.S. 616, 630 (1919).

111. See, e.g., Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

siderable extent such a marketplace does exist and function.¹¹² Second, the goal of a free market in ideas is not the attainment of truth as such—truth, or at least our way of seeing it, changes, after all¹¹³—but rather the attainment of that which is as close to the truth as possible at any particular time. Finally, history does teach that some kind of truth does ultimately prevail.¹¹⁴

At first blush, the marketplace of ideas theory seems eminently compatible with a position that grants artistic expression absolute protection under the first amendment. Unlike the views underlying the self-government theory, the marketplace of ideas theory does not distinguish between political and artistic expression. The theory's emphasis on *ideas*, however, is troubling, and has the potential for making the first amendment value of art derivative. To the extent that the concept of ideas refers to intellectual and cognitive processes, it does not take account of the noncognitive and emotional aspects of communication which often accompany artistic expression, especially of the nonrepresentational kind. This is not to say that nonrepresentational art cannot sometimes be explicated intellectually. But the effect of such art is not at all entirely cognitive; it has an emotional effect as well. This emotional effect has both a short-term and a long-term aspect insofar as artistic expression can ultimately affect the way in which we see and deal with the world. Indeed, as this Article demonstrates, nonrepresentational art of the sublime can be very unsettling and subversive of society, even though it is not overtly political.¹¹⁵

Additionally, focusing on a marketplace containing only ideas with cognitive content is inconsistent with both Plato's and Kant's views of artistic expression. While Plato and Kant differ as to the intrinsic nature of artistic expression, they at least agree that artistic expression deals with the noncognitive. Also, in his effort to give art independent status, Kant goes so far as to declare that that which is cognitive cannot be art.¹¹⁶ For Kant, because art is disinterested and separate from both cognition and desire, the marketplace of cognitive ideas excludes artistic expression.

Another drawback to a marketplace which protects cognitive ideas only is that it provides no room for the beautiful and the sublime. The

112. Consider the print and electronics media, for example.

113. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* (2d ed. 1970).

114. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979): "[i]n the long run, true ideas do tend to drive out false ones." However, Wellington criticizes this long-term characteristic of the victory of truth as frequently too little and too late: "The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas." *Id.*

115. See *infra* text accompanying notes 177-195.

116. See *supra* text accompanying note 48.

beautiful for Plato inheres in an object that is harmonious and unified,¹¹⁷ while for Kant it is the feeling in the viewer of harmony and unity inspired by certain works of art.¹¹⁸ For Kant in particular, the beautiful makes a person temporarily feel at one with nature and society. In contrast, the sublime for Kant comprehends the feeling in the viewer inspired by absolutely huge or overwhelmingly powerful objects. This feeling emphasizes the unbridgeable gulf between man and nature and, more generally, between the idea and reality.¹¹⁹ Yet the marketplace of ideas theory appears to ignore the beautiful and the sublime entirely.

Only if the marketplace includes ideas which are noncognitive will artistic expression, together with the beautiful and the sublime, be rescued from second-class status. However, there is little if any discussion by theorists of the place of artistic expression in the marketplace of ideas; there is at most only the unquestioned assumption that somehow it belongs there.

C. The Self-Fulfillment and Individual Autonomy Theory

Martin Redish¹²⁰ has argued that the function of the first amendment is to further individual autonomy and self-fulfillment. Like Meiklejohn and Bork, Redish begins with American democracy but, unlike them, he does not stop there. Instead he insists that the overriding purpose and ultimate value of American democracy is individual self-realization. To the argument made by Bork and others that individual self-realization does not, as an *a priori* matter, satisfactorily distinguish speech from other activities, Redish responds that the Framers themselves distinguished speech from other activities in the first amendment.¹²¹

Redish's theory of the first amendment appears on its face to include artistic expression as a means of individual self-realization. Nonetheless, some confusion, or at least ambiguity, inheres in Redish's statement of his theory. He unfortunately speaks of "the instrumental value in developing individuals' mental faculties so that they may reach their full *intellectual* potential."¹²² So stated, his view is reminiscent of the emphasis on the cognitive in the marketplace of ideas theory. While he also speaks of "the inherent value in allowing individuals to control

117. More particularly, the beautiful is a form in which an object "participates." See *supra* text accompanying notes 26-28.

118. See *supra* text accompanying notes 47-49.

119. *Id.*

120. M. REDISH, *supra* note 107.

121. *Id.* at 18.

122. *Id.* at 30 (emphasis added).

their own destiny,"¹²³ he does not appear to relate his view to artistic expression in any meaningful way.

On the other hand, after observing that music, art and dance do not necessarily develop a person's "intellectual" abilities, Redish goes on to assert that "[a]n individual's 'mental' processes cannot be limited to the receipt and digestion of cold, hard theories and facts, for there is also an emotional element that is uniquely human and that can be 'developed' by such 'nonrational' forms of communication."¹²⁴ Further, he speaks of "the use of the uniquely human mental or emotional processes" as one of the "touchstones of first amendment protection."¹²⁵ While these statements indicate that Redish, not surprisingly, does indeed consider artistic expression to be fully protected under his theory of the first amendment, regrettably he nowhere undertakes an in-depth analysis of the nature of artistic expression.¹²⁶

IV. SUPREME COURT CASE LAW AND AESTHETIC THEORY

Like the commentators, the Supreme Court has not adequately analyzed artistic expression from a first amendment perspective. Although the Court's obscenity decisions¹²⁷ discuss artistic value, the Court has given precious few guidelines as to what constitutes artistic value, whether "serious" or otherwise. The Court's offensive and profane speech cases¹²⁸ similarly do not present any analysis of artistic expression and its relation to such speech. Then there are the symbolic

123. *Id.*

124. *Id.* at 58.

125. *Id.* at 75.

126. Unfortunately, neither does Michael Perry in his article *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137 (1983). Perry criticizes Bork's exclusion of literature from first amendment protection. He contends that literature should be protected because it is moral in character, "by which I mean simply expression of ideas, values, or sensibilities, or, more broadly, of a particular understanding, vision or experience of the world and of our place in it." *Id.* at 1149. Characterizing artistic expression as moral does not advance the argument in the slightest. Perry's position merely amounts to the unsupported assertion that artistic expression should be protected. He even goes on to assert that every moral vision is ultimately a political vision. This undermines his morality-based argument and, as suggested in this Article, improperly makes the first amendment value of artistic expression entirely dependent on political expression.

For another morality-based theory, see Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

127. *E.g.*, *Miller v. California*, 413 U.S. 15 (1973) (obscene speech not protected by first amendment; three-part definitional test set out).

128. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (vulgar and offensive speech may be barred from radio during hours when children may hear it).

speech decisions, involving black arm bands,¹²⁹ draft card burning,¹³⁰ flag desecration¹³¹ and the like. However, the Court's analysis in these cases for the most part has centered on categorizing symbolic speech as pure speech, as speech "plus," or as conduct. More important, the Supreme Court has not considered artistic expression in its own right because all of these cases involve communications of a political nature. Similarly, the Court's aesthetic regulation cases¹³² do not deal meaningfully with artistic expression. Nevertheless, commenting on some of the Court's case law from an aesthetic theory perspective—interspersed with other relevant case law¹³³—may lead to interesting and useful insights about the first amendment.

A. Profane or Offensive Expression

Cohen v. California,¹³⁴ which deals on its face with political expression, in fact illuminates several crucial and often ignored characteristics of artistic expression. *Cohen* involved a defendant who was convicted under a California "disturbing the peace" statute because he had worn a jacket bearing the words "Fuck the Draft" in the courthouse corridor.¹³⁵ The defendant testified that, by wearing the jacket, he intended to inform the public of his feelings toward the Vietnam War and the draft. The Supreme Court, in a opinion by Justice Harlan, reversed the defendant's conviction, emphasizing that Cohen had been convicted not for his conduct, but rather for his "speech." Harlan reasoned that the language on the jacket was neither obscene nor "fighting language," and that the defendant did not invade any "substantial privacy interests" even though some unwilling viewers were present in the courthouse corridor.¹³⁶ Justice Harlan also found no evidence in support of anything more than an "undifferentiated fear or apprehension

129. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (first amendment protection for black arm bands worn by students protesting United States involvement in Vietnam).

130. *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction for burning draft card despite first amendment claim).

131. *E.g.*, *Street v. New York*, 394 U.S. 576 (1969) and *Spence v. Washington*, 418 U.S. 405 (1974) (convictions for desecrating flag violative of the first amendment).

132. *E.g.*, *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

133. This Article is not intended to include a comprehensive survey of all relevant case law bearing on artistic expression. The cases are chosen as vehicles for raising important issues of aesthetic theory and artistic expression.

134. 403 U.S. 15 (1971).

135. *Id.* at 16.

136. *Id.* at 21.

of disturbance [which] is not enough to overcome the right to freedom of expression."¹³⁷

Justice Harlan characterized the *Cohen* case as one in which California had attempted to "maintain a suitable level of discourse within the body politic."¹³⁸ Applying traditional notions of first amendment theory, Harlan rejected California's attempt, stating:

[W]hile the particular four letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.¹³⁹

More importantly for present purposes, Justice Harlan identified a crucial feature of artistic expression and found this feature worthy of first amendment protection. Harlan stated:

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that such linguistic expression serves a dual communicative function: *it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.* In fact, words are often chosen as much for their emotive as their cognitive force. *We cannot sanction the view that the Constitution, while solicitous of the cognitive context of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.*¹⁴⁰

Even though the Court used the above language in connection with the defendant's political expression, the Court's reasoning has significance for artistic expression as well. Very often, artistic communication is not capable of "relatively precise, detached explication." Indeed, if such an explication could be given, one might legitimately wonder why the painting had to be painted, or why the poem or novel had to be written. Rather, the very essence of much artistic communication involves expressing a certain feeling about the world.¹⁴¹ This feeling may

137. *Id.* at 23 (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969)).

138. *Id.*

139. *Id.* at 25.

140. *Id.* at 25-26 (emphasis added).

141. Baudelaire maintains that art can only be understood through feeling. C. BAUDELAIRE, *THE MIRROR OF ART* 39 (Mayne trans. 1956). He is not alone. See *supra* text accompanying notes 9-11.

have a cognitive aspect as well, in that the artist's creation expresses a personal view of the world. Yet, by definition, a cognitive declaratory statement cannot adequately express this feeling or view of the world. In this sense, visual artistic expression may be comparable to musical expression which by its very nature is even less capable of "relatively precise, detached explication."¹⁴² This is another way of saying that "the medium is the message,"¹⁴³ and that one cannot really separate the "what" from the "how," or the content from the vehicle of expression.

Justice Harlan's discussion in *Cohen* of the emotive function of communication might even be interpreted to stand for the proposition that the emotive function of expression has as much value as the cognitive.¹⁴⁴ Under this reading, the result in *Cohen* would have been the same had the defendant's jacket borne only the word "Fuck." Further, this interpretation would suggest that no satisfactory first amendment principle exists to distinguish between speech that is capable of "relatively precise, detached explication" and speech which is not. Such an implication is especially significant for artistic expression of the nonrepresentational kind. The lesson is that courts in first amendment cases must be sensitive to the "medium" as well as the "message"; otherwise, the message, whatever it might be, may well be lost by governmental regulation of the medium.¹⁴⁵

This broad reading of Justice Harlan's view of the emotive function of expression is consistent with the Platonic and Kantian views of artistic expression. All three consider the emotive function as powerful and, indeed, as inevitably intertwined with any kind of expression. In addition, the broad reading of Justice Harlan's position, insofar as it relates to the profanity involved in *Cohen*, indicates that an important place in first amendment jurisprudence exists both for the unsettling

142. See Note, *Musical Expression*, 24 DEPAUL L. REV. 143 (1974). See also Rothstein, *supra* note 14, at 20. "Music's strength, and its threat, is that its power does not depend upon understanding. We do not dissect music, we experience it, and we experience the effect of its meaning with a sensual force that no mere argument could equal. That experience is perhaps more communal and more immediately affecting than in any of the other arts. . . . That is why music is justly feared by the tyrant—not as an abstract art, but as a concrete one." *Id.*

143. See M. McLuhan, *UNDERSTANDING MEDIA* (2d ed. 1964), arguing that the total value of a communication is dependent upon the interaction of all the media it contains. In addition, communication in the electronic age causes psychic and social effects that cannot be explained solely in terms of language-based rationality.

144. This interpretation builds on Justice Harlan's reasoning but it goes beyond the facts in *Cohen* which involved political expression with a clear cognitive message.

145. It may also be suggested that first amendment sensitivity is owed the forum of communication as well as to the medium. Where expression occurs is often as significant as the vehicle of that expression, whether from the perspective of the "speaker" or from that of the audience. This holds equally for artistic expression and political expression.

sublime as well as for the harmonious and socially cohesive beautiful.¹⁴⁶

Since *Cohen*, the Court unfortunately has tended to ignore Justice Harlan's important observations about emotive expression. For example, the Court appears to have carved out a new category of lower level speech that may be characterized as either profane or offensive speech. Some of these cases may be rationalized in land use terms¹⁴⁷ but others cannot be.¹⁴⁸ From an aesthetic perspective, what these cases, as well as the Court's obscenity decisions, have in common is their hostile attitude toward profane or offensive expression with sexual content.¹⁴⁹ Such an attitude is comparable to the Augustinian position that one must transcend the body and sexual love of women because they keep man apart from God.

This judicial hostility pervades a First Circuit case¹⁵⁰ in which an art instructor's sexually controversial, but not obscene, paintings were removed from the walls of a corridor of a university's student union. In the court's words:

Several of the paintings were nudes, male or female, displaying the genitalia in what was described as 'clinical detail.' A skeleton was fleshed out only in this particular. One painting bore the title, "I'm only 12 and already my mother's lover wants me." Another, "I am the only virgin in my school."¹⁵¹

In response to the instructor's argument that the first amendment fully protects artistic expression, the court concluded without any meaningful analysis that the artist's constitutional interest was "minimal" because there was "no suggestion, unless in its cheap titles, that plaintiff's

146. However, Justice Harlan's actual position is that, as reaffirmed in *Cohen* itself, obscenity is unprotected by the first amendment. *Cohen v. California*, 403 U.S. at 20.

147. *E.g.*, *Young v. American-Mini Theatres*, 427 U.S. 50 (1976) (upholding zoning ordinance which restricted the location of new theaters showing sexuality explicit "adult" movies).

148. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (vulgar and offensive speech may be barred from the radio during hours when children may hear it).

149. Even though the relevant case law in the Supreme Court and the circuits involves profane or offensive expression with sexual content, the profane or offensive need not always be related to sexual matters. For example, the grotesque and horrible may also be profane or offensive. See M. BAKHTIN, *RABELAIS AND HIS WORLD* (Iswolesky trans. 1968), which analyzes the manner in which those ideas and emotions that were repressed in medieval society emerged through the carnival when the grotesque and the horrible were displayed. The grotesque and horrible include body parts that are not sexual organs. See Bataille, *The Big Toe*, in *VISIONS OF EXCESS—THE OTHER SIDE OF SURREALISM* 20-23 (1985), where the grotesque and horrible aspects of the big toe are considered. The points made later in this Article about judicial hostility toward, and social repression of, the sublime and what it implies about the subversive nature of artistic expression are equally valid for artistic expression dealing with the grotesque and the horrible.

150. *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970).

151. *Id.* at 990.

art was seeking to express political or social thought.”¹⁵² Incredibly, the First Circuit went on to add that “this is a case that should never have been brought.”¹⁵³

Similarly, in a Seventh Circuit case¹⁵⁴ involving the removal and relocation of the art department chairman’s paintings from the main floor of a college’s principal building to a less traveled fourth floor room, the court ruled against the plaintiff’s first amendment challenge. Again, the court’s description:

[Plaintiff] contributed eight stained glass windows. Five were abstract; three were representational and became the focus of controversy. One depicts the naked rump of a brown woman, and sticking out from (or into) it a white cylinder that resembles a finger but on careful inspection is seen to be a jet of gas. Another window shows a brown woman from the back, standing, naked, except for stockings, and apparently masturbating. In the third window another brown woman, also naked except for stockings and also seen from the rear, is crouching in a posture of veneration before a robed white male whose most prominent feature is a grotesquely outsized phallus (erect penis) that the woman is embracing.¹⁵⁵

The court noted that the plaintiff intended no political statement, no disparagement of women or blacks—the color of the women was the result of artistic choice—and no commentary on relations between men and women or the races. In short, his work was simply “art for art’s sake.”¹⁵⁶ In ruling against the plaintiff, the court further emphasized that the art was not suppressed but regulated, that plaintiff was not only a faculty member but an administrator, and that he had good alternative sites to display his work.¹⁵⁷ More important, the Seventh Circuit interpreted the content of the art as non-political,¹⁵⁸ racially offensive

152. *Id.*

153. *Id.* at 991.

154. *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir. 1985).

155. *Id.* at 627.

156. *Id.* at 628.

157. *Id.* at 632.

158. In contrast to *Piarowski* with its purported absence of political content, *U.S. ex rel. Radich v. Criminal Court of the City of New York*, 385 F. Supp. 165 (S.D.N.Y. 1974), involved the display by an art gallery of sculpture-like “constructions” created by an artist. Three of the forms were “an object resembling a gun caisson wrapped in a flag, a flag stuffed into the shape of a six-foot human form hanging by the neck from a yellow noose, and a seven-foot cross with a bishop’s miter on the head-piece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard.” *Id.* at 168. The court ruled that the proprietor’s conviction for violating a New York statute which prohibited casting contempt on the American flag violated the first amendment. Relying on *Spence v. Washington*, 418 U.S. 405 (1974), the court had little difficulty in determining that the forms were intended to convey a political message and that such a message was indeed understood by viewers. Though the

and sexually explicit. As a result, while not asserting, as the First Circuit had, that such art has no first amendment value whatsoever, the Seventh Circuit nevertheless improperly accorded plaintiff's unsettling work far less first amendment value than political expression, because it was offensive.¹⁵⁹

1. JUDICIAL HOSTILITY TOWARD MODERNISM

Such potentially subversive artistic expression with sexual content can be analyzed in relation to the modernist art movement which began to develop in the middle of the nineteenth century.¹⁶⁰ Modernism, which has hopes of liberating society, and which is in this respect a continuation of the narrative of the Enlightenment,¹⁶¹ represents an attempted break with tradition. Under the Enlightenment narrative, what is modern is not to be judged by the standards of the past. In the words of Jurgen Habermas:

Modernity revolts against the normalizing functions of tradition; modernity lives on the experience of rebelling against all that is normative. . . [It] continuously stages a dialectical play between secrecy and public scandal; it is addicted to a fascination with that horror which accompanies the act of profaning, and yet is always in flight from the trivial results of profanation.¹⁶²

Modernism led to the various avant-garde art movements with their attacks on the established order. At the same time it brought about an increasing preoccupation with the self: unlimited self-realization, authentic self-experience, and subjectivism.¹⁶³

Consequently, the judicial creation of the lower value speech category of profane or offensive speech, as well as the more dramatic judi-

court articulated its decision in symbolic speech terms related to the use of the American flag, the court stated that the case could readily have been dealt with as raising a "pure speech" issue in light of "the artistic, political and controversial significance of the sculptures." *Id.* at 174 n. 34.

159. Compare Justice Stevens' assertion in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), that even though erotic materials may have some artistic value, society's first amendment interest in them is wholly different from and less than it is in untrammelled political debate. He continues: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Id.* at 70.

160. Habermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 10 (Foster ed. 1983) [hereinafter *Modernity*].

161. *Id.* at 9: "[t]he project of modernity formulated in the 18th Century by the philosophers of the Enlightenment consisted in their efforts to develop objective science, universal morality and law, and autonomous art according to their inner logic. . . [The ultimate goal was] the rational organization of everyday social life."

162. *Id.* at 4.

163. *Id.* at 6. Modernism also set the stage for Freud, who directed attention to the subjective individual and the unconscious. See *infra* note 169.

cial declaration that obscenity is not covered by the first amendment,¹⁶⁴ constitutes a repudiation of subversion through modernism.¹⁶⁵ This repudiation of modernism is not necessarily the same as a repudiation of the Enlightenment narrative. Although the judiciary and modernist artists may disagree about the means of attaining the Enlightenment goal of a liberated and rationally organized society, they generally agree that that goal is both worthwhile and attainable.

These observations may also be put in terms of the Platonic and Kantian conceptions of the beautiful: a unified and harmonious society may be the shared goal of the judiciary and of modernism, even though the means of attaining it are disputed. Moreover, if one contemplates the narrative of the philosophical unity of all knowledge, the judicial rejection of modernism may even represent an attempt to return to an earlier, premodern period of tradition, social cohesion and civility, when there was one language or narrative of the beautiful which all understood. This earlier period is pre-Kantian because knowledge, desire and feeling—science, politics and morality, and art—were not then autonomous and unrelated institutions with their separate languages.¹⁶⁶

The prevailing judicial attitude toward profane or offensive artistic expression with sexual content is thus entirely consistent with Daniel Bell's attack on modernism for undermining the values necessary for the effective functioning of a highly organized and rationally bureaucratized capitalist society.¹⁶⁷ The judicial attitude and Bell's po-

164. *Roth v. United States*, 354 U.S. 476 (1957).

165. This is not to say, of course, that sacrilege, or profanation of the sacred, is an invention of modernism alone, since in some form it predated modernism. However, modernism institutionalized sacrilege in the arts.

166. In *Modernity*, *supra* note 160, at 9, Habermas describes the modern period as follows:

[C]ultural modernity [is] the separation of the substantive reason expressed in religion and metaphysics into three autonomous spheres. They are: science, morality and art. These came to be differentiated because the unified world-views of religion and metaphysics fell apart. Since the 18th century, the problems inherited from these older world-views could be arranged so far as to fall under specific aspects of validity: truth, normative rightness, authenticity and beauty. They could then be handled as questions of knowledge, or of justice and morality, or of taste. Scientific discourse, theories of morality, jurisprudence, and the production and criticism of art could in turn be institutionalized. Each domain of culture could be made to correspond to cultural professions in which problems could be dealt with as the concern of special experts. . . . As a result, the distance grows between the culture of the experts and that of the larger public.

167. D. BELL, *supra* note 15. Ernest Mandel, taking a Marxist perspective, characterizes "post-industrial society" as a third stage of capitalist development. In this third stage, capitalism, always looking for new markets, colonizes nature and the unconscious, including art. He asserts: "Late capitalism, far from representing a 'post-industrial society,' thus appears as the period in which all branches of the economy are fully industrialized for the first time; to which one could further add the increasing mechanization of the sphere of circulation (with the exception of pure

sition share a concern with the possible breakdown of society, a nostalgic desire for a common cultural and social language, and a preference for the beautiful over the Kantian sublime.

2. JUDICIAL HOSTILITY TOWARD POSTMODERNISM

The negative judicial attitude toward profane or offensive artistic expression with sexual content can additionally and more deeply be viewed as a rejection of the Kantian sublime and its implications for the social order. The Kantian view of contemplative and peaceful beauty emphasizes the bridge between knowledge and desire and the concomitant encouragement of social cohesion. In contrast, profane or offensive artistic expression with sexual content can function like the sublime to increase the gulf between knowledge and desire, and thus between man and nature. That is, sexually related artistic expression, alternately attractive and repulsive,¹⁶⁸ can increase the gulf between the individual and society by demonstrating that this gulf is unbridgeable.

From the perspective of the sublime, then, conferring lower first amendment value on such expression is an attempt by the Supreme Court, and by society through the legislative process, to *repress* such expression—the Freudian terminology is intentional and appropriate¹⁶⁹—because it is deeply subversive.¹⁷⁰ Indeed, art manifesting the Kantian sublime is even more dangerous to society than is modernist art, because the sublime has the potential for undermining entirely the Enlightenment narrative of a rationally organized social order.

The judicial repudiation of modernism therefore amounts to a repudiation of what has been characterized as the postmodern move-

repair services) and the increasing mechanization of the superstructure." E. MANDEL, *LATE CAPITALISM* 190-91 (1975).

168. I. KANT, *supra* note 44, at 83: The sublime "is incompatible with [physical] charm; and as the mind is not merely attracted by the object but is ever being alternately repelled, the satisfaction in the sublime does not so much involve a positive pleasure as admiration or respect, which rather deserves to be called negative pleasure." The grotesque and the horrible, which have a similar effect, can also be considered sublime for the purposes of this Article. *See supra* note 149.

169. *See* S. FREUD, *TOTEM AND TABOO*, in *THE BASIC WRITINGS OF SIGMUND FREUD* 807-930 (Brill trans. 1938). The Kantian feeling of the sublime appears to share certain characteristics of the Freudian unconscious such as terror, desire and instability.

170. The subversive potential of the Kantian sublime in connection with artistic expression is underscored by Jean-Francois Lyotard. He argues that painters were forced to ask self-conscious questions about the nature of painting after photography demonstrated its superiority in representation and in the development of socially cohesive values. Consequently, painting entered the domain of the Kantian sublime which is not governed by a consensus of taste in the way the Kantian beautiful is. In so doing, Lyotard maintains, avant-garde art feels no cultural responsibility to unify taste or to provide a sense of community through visual symbols. Lyotard, *Presenting the Unpresentable: The Sublime*, *ARTFORUM* Apr., 1982, at 64-69.

ment.¹⁷¹ This movement has philosophical roots in the Kantian sublime's gulf between the idea and its representation.¹⁷² Unlike modernism, which may still have the hope of some reconciliation between, or merger of, idea and representation, the postmodern does not. Postmodernism considers the gulf to be utterly unbridgeable, and it thereby entirely rejects the narrative of the Enlightenment and the narrative of the unity of all knowledge.¹⁷³ The result for the artist is disquieting: either total withdrawal accompanied by self-destruction or nihilism,¹⁷⁴ or engagement in artistic experimentation despite the unbridgeable gulf.

From the artist's perspective, Jean-Francois Lyotard maintains,¹⁷⁵ the Kantian sublime goes beyond modernism which, although allowing the unrepresentable to be put forward, still offers the viewer solace and pleasure because its form is recognizable and consistent. In contrast, the postmodern artist puts forward the unrepresentable in the presentation itself; he searches for new presentations so as to impart a stronger sense of the unrepresentable.¹⁷⁶ Aesthetically, according to Lyotard, the work of postmodern art deals with the totally unfamiliar and constitutes a search for rules and categories.¹⁷⁷ Nevertheless, the modern and the postmodern coexist and share the view that art must challenge tradition and subvert convention.

171. See J. LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 79-82 (Bennington and Massumi trans. 1984) [hereinafter J. LYOTARD, *THE POSTMODERN CONDITION*]. While Lyotard suggests a clear intellectual distinction between the modernist and postmodern movements, in the real world there is often a blurring of the two as well as occasional difficulty in placing an artist in one category or the other.

172. *Id.* at 77, 81.

173. See *infra* text accompanying notes 211-15.

174. The gulf between the idea and its representation may lead to the artist's self-destruction. See Freedman, *How Inner Torment Feeds the Creative Spirit*, N.Y. Times, Nov. 17, 1985, § 2, at 1. In this article, the Abstract Expressionist Robert Motherwell is quoted as follows:

One of my best friends is a psychiatrist and last summer I asked him, if he had to define psychoanalysis in a single sentence, how would he put it? And he said, 'Chris Hardman put it best—psychoanalysis is the study of self-deception.' And it may be that the deep necessity of art is the examination of self-deception. . . . Most painting in the European tradition was painting the mask. Modern art rejected all that. Our subject matter was the person behind the mask. And we all know genuine analysis like that is shattering to go through. There's a terrible price to be paid for the constant analysis, constant doubt.

Id. at 22.

This gulf may also lead to nihilism. For example, the architect Tafuri considers it impossible to engage in the attempt to represent his own architectural ideas because of what he considers the co-opting of his work by capitalism and the profit motive. His response has been to withdraw entirely from the architectural enterprise. M. TAFURI, *ARCHITECTURE AND UTOPIA* (La Penta trans. 1976).

175. J. LYOTARD, *THE POSTMODERN CONDITION*, *supra* note 171, at 81.

176. *Id.* The paintings of Mark Rothko and the photographs of Joel-Peter Witkin are examples of sublime art dealing with the unrepresentable.

177. *Id.*

While this discussion may seem far removed from *Cohen*, in reality it is not. The broad implications of Justice Harlan's insights about the emotive function of communication are supported and illuminated by aesthetic theories regarding the beautiful and the sublime, as well as the Kantian separation of different kinds of "knowledge" about the world. These insights from aesthetic theories reflect a view of the world that obviously disturbs the Supreme Court and various other courts in light of their rejection of it.¹⁷⁸ Increasingly, the judicial response to the emotive function and the sublime has allowed government to regulate profane and offensive speech as well as obscenity. As the next Section demonstrates, Justice Harlan's decision in *Cohen* is also useful in considering symbolic expression from an aesthetic perspective.

B. Symbolic Speech and Conduct

Justice Harlan's discussion of the emotive content of words is closely related to an analysis of expression involving symbols.¹⁷⁹ All civilizations have long known of the power of symbolism. Aesthetic theory, like semiotic theory in general,¹⁸⁰ recognizes the importance of symbols—including language itself—as ways of communicating both feelings and ideas. Not unexpectedly, this recognition is present in Supreme Court case law as well. For example, the Court has held that school children cannot be forced affirmatively to symbolize their allegiance to the government by a required flag salute.¹⁸¹ Similarly, the Court has upheld the right of students to wear black arm bands on school premises in protest of the Vietnam War.¹⁸² The Court also has upheld the right to use the American flag to protest governmental policies.¹⁸³

In these cases, all of which involve political expression, the Court has drawn an important first amendment line between symbolic *speech*,

178. Compare the insight provided by aesthetic theory into some of the reasons for negative reactions to the critical legal studies movement. Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986) (critical legal studies analogized to modernist, avant garde art).

179. A seminal work analyzing symbolic expression is C. OGDEN & I. RICHARDS, *THE MEANING OF MEANING* (8th ed. 1956), where the authors assert:

[W]e find that those signs which men use to communicate one with another and as instruments of thought, occupy a peculiar place. It is convenient to group these under a distinctive name; and for words, arrangements of words, images, gestures and such representations as drawings or mimetic sounds we use the term symbols.

For an aesthetic theory built upon the concept of art as symbol, see S. LANGER, *PHILOSOPHY IN A NEW KEY* (1942) and S. LANGER, *FEELING AND FORM* (1953). See also Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

180. See R. BARTHES, *ELEMENTS OF SEMIOLOGY* (1968).

181. *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943).

182. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

183. *Spence v. Washington*, 418 U.S. 405 (1974) (taping removable peace symbol onto flag displayed in window).

that kind of speech which has been called a "silent passive expression of opinion," and symbolic *conduct*. A black arm band, for example, can communicate a cognitive message regarding the Vietnam War as well as an emotive one. When both messages are communicated, the result is a conflation of the content of expression and the vehicle of expression. Further, because an arm band is an inherently non-disruptive vehicle of communication because it is both "silent" and "passive," it may be worn by students even in a public school classroom. Similarly, the burning of a draft card so as to declare both a cognitive position and a feeling about the Vietnam War can also constitute a symbol that communicates.¹⁸⁴ And yet, because so-called "conduct" aspects make up part of this symbolism, the Court has articulated a first amendment test different from, and more restrictive than, that used for silent, passive symbolic communication such as the wearing of a black arm band.¹⁸⁵

The Court is obviously worried about making the first amendment apply to a "limitless variety of conduct." Nevertheless, any attempt to distinguish sharply between symbolic speech and symbolic conduct seems improper in an artistic expression setting.¹⁸⁶ Artistic expression makes use not only of those vehicles of communication which are "passive," such as inanimate painting, sculpture and literature. It also employs conduct-implicating vehicles of communication such as plays and music.¹⁸⁷

While some aesthetic theorists assert that all meaningful life is art, or at least revolves around art,¹⁸⁸ it is not necessary to go that far in

184. *United States v. O'Brien*, 391 U.S. 367 (1968).

185. *Id.* at 378-80 (four-part test set out).

186. It is also questionable in non-artistic expression settings. See Note, *supra* note 179, at 1126 ("there can be no doubt that non-verbal expression is speech, both in fact and in law").

187. On the other hand, lumping poetry, painting and music together for all purposes under the word "art" is questionable because they are very different in important respects. This Article focuses on visual artistic expression even though much of the analysis is equally applicable to other kinds of artistic expression.

188. For example, Johann Schiller makes artistic expression the touchstone of his philosophy regarding the role of art in human life and culture. Influenced by Kant, he asserts that there are a natural, sensuous state and a state of reason in both individuals and the state. Art and beauty bridge this gap. "The impulse that combines both the sensuous and the formal impulses, in a synthesis . . . is what Schiller calls the play impulse. The sensuous impulse seeks out life. . . and the form impulse shape; the play impulse responds to 'living shape' or beauty." M. BEARDSLEY, *AESTHETICS*, *supra* note 14, at 228. Beauty is thus an objective quality through which man arrives at freedom. Only the perception of the beautiful can confer on man a social character because all other forms of perception are based on only one or the other of the impulses, while this perception combines both parts of man's nature.

Friedrich Schelling similarly places aesthetic concerns at the highest level in his systematic philosophy. He postulates that the forms found in nature are created by a creative process that, though unconscious, is the same creativity we find in ourselves. The inner harmony of nature and self can be made manifest to the self only through artistic intuition which combines the conscious deliberate element and the unconscious inspired element. For Schelling this is a systematic synthesis of the finite and the infinite. *Id.* at 231-34.

order to suggest that the characterization of certain kinds of artistic communication as symbolic conduct, as distinct from symbolic speech, can obscure meaningful analysis of the first amendment interests that are, in fact, implicated. Indeed, the Supreme Court has perhaps indicated as much in *Spence v. Washington*,¹⁸⁹ a case which involved the prosecution under a state's "improper use" statute of a person who had affixed to his flag peace symbols made from black masking tape and had displayed the flag upside down from his apartment window. Instead of focusing, as it might have, on a speech-conduct distinction, the Court, ruling for the defendant, emphasized the communicative intent of the defendant's conduct and the audience's understanding of his message.

Another important observation about symbolic communication is that some artistic expression may communicate feelings alone without communicating ideas. Indeed, for Kant, the very definition of art, including both the beautiful and the sublime, requires that art be devoid of all cognitive content. From a Kantian perspective, removing noncognitive art from first amendment protection would significantly reduce the socially cohesive effects of the beautiful and the unsettling effects of the sublime. It would also seriously interfere with artistic experimentation in connection with nonrepresentational art.

Melville Nimmer¹⁹⁰ reaches a comparable first amendment conclusion regarding symbolic expression that communicates feelings alone but not ideas. Unfortunately, he offers no coherent explanation for his position. After discussing *Cohen v. California*¹⁹¹ he states:

But even if a communication is substantially devoid of all cognitive content, its emotive content is surely protectable. It would be shocking to conclude that symphonic compositions or nonrepresentational art could be the subject of governmental censorship. Both are fully within the ambit of the first amendment notwithstanding their lack of both verbal and cognitive content.¹⁹²

Obviously, calling a contrary result "shocking" does not adequately justify a particular position. A contrary result, however, would indeed be inconsistent with aesthetic theory for several reasons. As

189. 418 U.S. 405 (1974) (per curiam). The Court later made a similar point about the performance arts in *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), a prior restraint case involving the musical *Hair*. It correctly ruled that live drama is protected by the first amendment despite the fact that theater "frequently mixes speech with live action and conduct." 420 U.S. at 558. See Comment, *The First Amendment: Blanket Protection for the Performance Arts?* 37 U. PITT. L. REV. 551 (1976). But cf. *United States v. O'Brien*, 391 U.S. 367 (1969).

190. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973).

191. 403 U.S. 15 (1971).

192. Nimmer, *supra* note 190, at 35.

mentioned, for Kant, nonrepresentational art can generate in the viewer either feelings of the beautiful or the sublime. In addition, most, if not all, nonrepresentational art can be viewed as communicating not only feelings but ideas as well, even if those ideas cannot be clearly articulated. For example, in 1949 Michigan Congressman George Dondero attacked modern art as communist-inspired because of the "depraved" and "destructive" nature of its forms. He claimed that:

Cubism aims to destroy by designed disorder. Futurism aims to destroy by the machine myth. Dadaism aims to destroy by ridicule. Expressionism aims to destroy by aping the primitive and insane. Abstractionism aims to destroy by the creation of brainstorm. Surrealism aims to destroy by the denial of reason. . . .¹⁹³

While the Congressman's motivation was regrettable, several important points that are relevant to this Article can be derived from his attack. First, he was correct in understanding that nonrepresentational art can and does have considerable influence on society's ideas and behavior. Second, the Congressman's emphasis on the allegedly destructive effects of different kinds of art is similar to judicial fear of modernism and postmodernism described earlier in connection with the judicial reaction to profane and offensive speech that has sexual content.¹⁹⁴

Moreover, while nonrepresentational art often involves the use of forms chosen by the artist to create a certain feeling in the viewer, these forms also reflect the artist's view of the world.¹⁹⁵ Consequently, it should not be surprising that even nonrepresentational art can be political in this broader, attenuated sense. This means that there probably can be no "bright line" distinction between art that communicates political ideas and art that does not. There is simply a distinction between art that overtly takes a political position and art that does so implicitly.¹⁹⁶ This view of art is, of course, non-Kantian. Rather, it is Platonic insofar as it recognizes that artistic expression communicates ideas that are relevant to the society.

193. Hauptmann, *The Suppression of Art in the McCarthy Decade*, ARTFORUM October, 1973 at 48-52.

194. See *supra* text accompanying notes 160-78.

195. It is for this reason that Harold Rosenberg attacks formal criticism for burying the emotional, moral, social and metaphysical content of modern art under line, color and form. In his view, form is not the key to artistic value; the key is the inseparability of form and content. New art must thus be evaluated in terms that relate the new works to the novelty in the works that preceded them. H. ROSENBERG, *The New as Value*, in *THE ANXIOUS OBJECT* 227-35 (1964).

196. This use of the word "political" is obviously considerably attenuated. See the discussion of Meiklejohn's first amendment theory in Section III, *supra* text accompanying notes 85-94.

There are at least three possible explanations why first amendment analysis typically has not included the subtle political content of nonrepresentational art. The first explanation is that nonrepresentational art, which does not obviously communicate an idea, is frequently and erroneously perceived as entirely noncognitive. Because ideas generated by nonrepresentational art are subtle at best—although the good Congressman did not think so—and require aesthetic contemplation to discover, nonrepresentational art appears to the casual viewer to be ideologically inoffensive. This is in clear contrast to the wearing of a black arm band or tearing up a draft card, activities which symbolize an anti-war position to virtually all viewers.

Another possible explanation for the relative neglect of the subtle political content of nonrepresentational art in first amendment analysis is that so many other vehicles of political communication are available in the United States. As a result, unless nonrepresentational art involves express political symbols such as the American flag or the swastika, the judiciary perceives it at best as politically marginal.

A third possible explanation arises from the observation that, since Kant, artistic expression has been governed by its own rules. As a result, challenging art has been increasingly removed from everyday life and sent to the museums, so that its visibility and effect in the real world have been reduced. Indeed, the prevalence of museums may have contributed to the perception of many that art's primary function is to entertain. This could be one reason for the development of "kitsch," that kind of visual art which, in Clement Greenberg's account, makes no demands on the viewer.¹⁹⁷

C. Aesthetic Regulation

Aesthetic regulation issues arise when the government attempts to regulate land use on the basis of aesthetic considerations. The history of aesthetic regulation suggests that only relatively recently have courts begun to feel comfortable in allowing governments to regulate land use on such grounds.¹⁹⁸ What is intriguing about aesthetic regulation is

197. C. GREENBERG, *Avant Garde and Kitsch*, in ART AND CULTURE 3-21 (1961). He contends that kitsch is part of the industrial revolution with its demand for new markets. That is, kitsch, as an integral part of the productive system, predigests art for the spectator and, by this short cut, spares him or her any aesthetic effort. For Greenberg, kitsch imitates the effects of art.

Jean-Francois Lyotard similarly deplores the "commoditization" of art and characterizes photography as emblematic of this process. Lyotard, *supra* note 170.

198. R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 510-12 (1981). The continuing unease with aesthetic regulation is reflected in the dissenting opinion in *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The Court upheld, on aesthetic grounds, an ordinance prohibiting the posting of all signs on public property as applied to political signs on public utility poles. Dissenting, Justice Brennan, joined by Justices Blackmun and Marshall, argued that aesthetic objectives should only be accepted when the government demonstrates that it is pursuing them

that the government is relying on aesthetic considerations, in opposition to a property owner's claim of some kind of right.

Where the property owner makes no competing first amendment-based artistic expression claim, a court's decision will probably turn on non-first amendment considerations.¹⁹⁹ But the first amendment is directly implicated where the property owner makes a competing first amendment claim based on a different view of what is beautiful. In such a case, the government's claim of promoting beauty should not override the individual's competing first amendment claim premised on a different view of beauty.²⁰⁰

The well-known case of *People v. Stover*²⁰¹ illustrates the extent to which a court will defer to a government's assertion of aesthetic interests despite a landowner's powerful competing first amendment claim. *Stover* involved landowners who regularly hung clotheslines with old clothes in their frontyard as a form of protest against high taxes imposed by a city. In response to the landowner's protest, the city enacted an ordinance which prohibited the hanging of clotheslines in a front yard abutting a street. Rejecting the landowners' free speech claim, the New York Court of Appeals held that the ordinance was constitutional on its face "as an attempt to preserve the residential appearance of the city and its property values . . . by banning unsightly clotheslines. . . ."²⁰² The ordinance was also constitutional as applied, even though the court apparently treated the clothesline as a form of speech intended to protest the landowners' tax assessment. The court reasoned that the ordinance had no necessary relation to the dissemination of ideas, but rather that "the value of their 'protest' lay not in its message but in its offensiveness."²⁰³

The court clearly erred in artificially separating the offensive aspect of the speech—its vehicle—from its content, especially in light of the court's admission that the ordinance was directed specifically at the landowners' political protest. More importantly, the court demonstrated an improper deference to the city in allowing the city's unsubstantiated claim of beauty to override the landowners' expression of a politi-

seriously and comprehensively. In the dissenters' view, stringent judicial scrutiny applies to a government's claim of aesthetic considerations. 466 U.S. at 821, 828.

199. However, where the government is attempting to force the landowner to express herself affirmatively, an important first amendment issue is raised. *Cf. West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943).

200. Costonis persuasively asserts that because architecture and other environmental features communicate "ideas" on both the cognitive and emotive levels, the first amendment should bar governments from regulating architecture on the ground of visual beauty. Costonis, *Law and Aesthetics*, 80 MICH. L. REV. 355, 411-13 (1982).

201. 12 N.Y.2d 462, 191 N.E.2d 272 (1963). *See also* Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81 (1964).

202. *Stover*, 12 N.Y. 2d at 466.

203. *Id.* at 470.

cal viewpoint. One can therefore surmise that the court's response would have been the same had the case involved, say, a sculpture that the landowners placed in their yard, only to be told by the city to remove it because of its alleged ugliness.

In a dissenting opinion, Judge Van Voorhis²⁰⁴ correctly described the case as involving a conflict between uniformity and diversity. Contending that the city was attempting to compel conformity "to what the neighbors like to look at," he asserted that "[t]heatre and entertainment, as well as other forms of music, art, philosophy and literature are closely involved in aesthetics, which are not a veneer but are fundamental to the human mind and spirit."²⁰⁵ Judge Van Voorhis's position should apply both when a difference of opinion exists regarding what is beautiful and when a property owner asserts a first amendment claim based on the sublime.

Significantly, some legal commentators have maintained that when governments purport to regulate on aesthetic grounds relating to the promotion of the beautiful, they act in reality to enhance cultural stability and to strengthen the social ties that bind a community together.²⁰⁶ This observation is entirely consistent with the analysis presented in this Article. The Platonic and Kantian views of beauty have in common the notions of harmony and unity. Also, that aesthetic regulation premised on a claim of beauty furthers social ties is obviously reminiscent of Kant's view that feelings of beauty bridge the gulf between knowledge and desire and thereby promote social cohesion.

In contrast to the beautiful, however, first amendment protection of the sublime is entirely excluded from aesthetic regulation case law.²⁰⁷ The governmental interest is in avoiding that which is unsettling and disruptive. Instead, the government views stability and predictability as essential in regulating land use. Judicial refusal to recognize the sublime in land use regulation is comparable to the negative judicial attitude toward the sublime in connection with the regulation of obscenity and profane and offensive speech. The implications of the judiciary's treatment of the sublime will be discussed next.

204. *Id.* (Van Voorhis, J., dissenting).

205. *Id.* at 472.

206. Costonis, *supra* note 200 (cultural stability); Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981) (historic preservation strengthens social ties).

207. Scholarly commentary on aesthetic regulation also excludes discussion of first amendment protection of the sublime.

V. THE DEEP SIGNIFICANCE OF THE BEAUTIFUL AND THE SUBLIME FOR FIRST AMENDMENT THEORY

Artistic expression and aesthetic theory must be given their due in first amendment theory and case law. Aesthetic theory raises considerations that are not artistic in the narrow and isolated museum sense; these considerations go well beyond to implicate the most fundamental human concerns. In a very real sense, much philosophical thought, including aesthetic theory, has dealt with the dispute between two pre-Socratic Greek philosophers regarding the nature of reality. Heraclitus viewed reality as constantly mutating and in a state of flux like a river; for him the process of change is the touchstone of reality.²⁰⁸ In contrast, Parmenides considered the essence of reality to be oneness and unity, rather than change.²⁰⁹

Until the twentieth century, Parmenides's concept of reality reigned supreme because philosophy, following a narrative of philosophical unity of all knowledge, continued to focus on the metaphysical search for such unity. That search for unity, however, had in fact begun to break down several centuries earlier as philosophers, following the lead of Kant and others, determined that no such metaphysical unity is possible. As a result, different domains of knowledge or "reality" began to develop, each of which became isolated from all the others.²¹⁰ Thus, to oversimplify, in his search for unity Plato is effectively a descendant of Parmenides, while Kant, in his emphasis on the distinctions among knowledge, desire and feeling, is effectively a descendant of Heraclitus.

The concepts of the beautiful and the sublime can similarly be analyzed from the perspectives of Parmenides and Heraclitus. Aesthetic theories typically characterize the beautiful as harmonious and unified. Indeed, Plato and Kant have this view in common, even though Plato considers the Form of beauty to exist in reality, while Kant speaks of

208. The following is attributed to Heraclitus: "Upon those that step into the same rivers different and different waters flow. . . . It scatters and . . . gathers . . . and it comes together and flows and flows away . . . approaches and departs." G. KIRK & J. RAVEN, *THE PRESOCRATIC PHILOSOPHERS* 196 (1957). Plato interprets Heraclitus as saying "that all things are in process and nothing stays still, and likening things to the stream of a river he says that you would not step twice into the same river." *Id.* at 197.

See also I. K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 11-17 (5th ed. 1966) "Heraclitus was the philosopher who discovered the idea of *change*. [Heraclitus claimed:] 'Everything is in flux and nothing is at rest. . . . The opposites belong to each other, the best harmony results from discord, and everything develops by strife. . . . The straight path and the crooked path are one and the same. . . . The good and the bad are identical' " (emphasis in original).

For the argument that this interpretation exaggerates the significance of change in the philosophy of Heraclitus, see G. KIRK & J. RAVEN, *supra* at 187-88.

209. See generally G. KIRK & J. RAVEN, *supra* note 208, at 263-85. For Parmenides, "Being . . . is like a sphere, single, indivisible, and homogeneous, timeless, changeless and, since motion is itself one form of change, motionless as well." *Id.* at 279.

210. See *supra* note 166.

objects that generate the feeling of beauty. The beautiful is thus comparable to Parmenidean unity. Kant surpasses Plato's conception of beauty, however, by emphasizing in his analysis of the sublime the unsettling and disruptive, pleasure-pain effect of the unbridgeable gulf between an idea and its representation.²¹¹ The sublime, with its unsettling effect, its boundlessness and its mutability, is thus comparable to the Heraclitan flux. Consequently, the distinction between the beautiful and the sublime is in this sense analogous to the different views of reality of Parmenides and Heraclitus.

An even deeper observation can be made, however, which, while premised on the distinction between the beautiful and the sublime, nevertheless goes considerably beyond aesthetic theory. The beautiful can be said to symbolize or represent the narrative of society as it might be: a harmonious, unified whole. The beautiful can also symbolize or represent the narrative of the philosophical unity of all knowledge. Thus, Plato's aesthetic theory of the beautiful is closely tied to his view of the ideal Republic and to knowledge. But society's reliance on this concept of the beautiful is not without danger. As Karl Popper has argued regarding Plato's Republic,²¹² when a society strives politically for the beautiful through the united and harmonious, the result may be a form of totalitarianism.

In contrast, an emphasis on the Kantian sublime may lead to dramatically different results for both art and society. The Kantian sublime, as implicated particularly in the postmodern, is significant at the aesthetic level because it promotes artistic experimentation.²¹³ But the Kantian sublime and the postmodern are also politically significant in rejecting the Enlightenment hope for the transformation of society, the narrative "in which the hero of knowledge works toward a good ethico-political end—universal peace."²¹⁴

Kant has been read by Jean-Francois Lyotard as anticipating postmodernism insofar as Kant maintains that the gulf between knowledge and desire is unbridgeable. Lyotard asserts:

[O]nly the transcendental illusion (that of Hegel) can hope to totalize them [knowledge and desire] into a real unity. But Kant also knew that the price to pay for such an illusion is terror. The nineteenth and twentieth centuries have given us

211. As Lyotard puts it, the artist who deals with the sublime is attempting to present the unrepresentable. That this cannot be accomplished is ungratifying; but the attempt to do so is gratifying. Painting for the painter is like thought for the philosopher. Thus, the artist is responsible to the undemonstrable; consumerism—seeing works of art as objects of desire—must be avoided at all cost. Lyotard, *supra* note 170.

212. K. POPPER, *supra* note 208.

213. J. LYOTARD, *THE POSTMODERN CONDITION*, *supra* note 171, at 81.

214. *Id.* at xxiii-xxiv.

as much terror as we can take. We have paid a high enough price for the nostalgia of the whole and the one. . . . Let us wage a war on totality; let us be witnesses to the unrepresentable; let us activate the differences and save the honor of the name.²¹⁵

Consequently, the Kantian sublime, when elaborated artistically, teaches us that the gulf between the idea of political and social unity and its representation in the world is unbridgeable. The Kantian sublime, therefore, mandates a posture of "incredulity" toward all narratives, including the narrative of the Enlightenment and modernism.²¹⁶

Every society, including our own, is justifiably afraid of the Kantian sublime and its subversive implications because the recognition of the Kantian sublime may lead to social chaos and even nihilism.²¹⁷ This fear is demonstrated in the various ways in which first amendment case law improperly tends to consider sublime expression as either lower level speech or as speech with no value, thereby repressing it. In addition, and more generally, the case law and current first amendment theory ignore or at the least seriously understate the first amendment significance of all artistic expression, whether that expression relates to the beautiful or to the sublime.

VI. CONCLUSION

The various attempts to develop a first amendment theory of self-government based on the centrality of political expression suffer from the defect of making the first amendment value of artistic expression primarily derivative in nature and therefore marginal in value. Further, the marketplace of ideas theory of the first amendment does not properly account for the noncognitive aspects of artistic expression. Even those theories which focus on individual self-fulfillment and autonomy pay scant attention to the nature and role of artistic expression, the beautiful and the sublime.

It is possible that the Platonic-like search for a unified theory or particular narrative of the first amendment must inevitably end in failure. If so, we must learn to live with a sublime first amendment which,

215. *Id.* at 81-82.

216. In this important respect Lyotard attacks Habermas, who argues that modernist goals should not be abandoned. *Modernity*, *supra* note 160. Lyotard contends that Habermas's position, and others like it, have been responsible for what he calls "the terror."

217. But even this fear can be overstated. Consider, for example, the view of the dangers of subversion reflected in *Dennis v. United States*, 341 U.S. 494 (1951) (pro-government statement of the clear and present danger test) and the subsequent more realistic assessment culminating in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*) (pro-first amendment modification of the clear and present danger test).

as unsettling as it may be, contains strands of different theories which are sometimes in tension with one another. But whatever the first amendment is or becomes, the time has long since passed in which the richness, diversity and importance of artistic expression and aesthetic theory can be ignored.

