

(Un)Official Cityscapes: The Battle Over Urban Narratives

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PREFACE

This paper is about the narratives embedded in urban landscapes (“cityscapes”). Our goal is to identify these narratives and reveal the struggles behind them. There are myriad ways of listening to and documenting the narratives of cityscapes. One can observe and film cityscapes, learn about them from interviews with inhabitants, or study local authorities’ planning decisions. Moreover, the narratives of cityscapes tell countless stories, and

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any attempt to build these stories into a coherent picture inevitably involves a selective focus. Thus, one can tell the stories of cityscapes focusing on the historical events witnessed by the city,² on urban spaces dedicated to sports,³ on parks systems,⁴ on the city's compatibility with children's needs,⁵ and so on. So, to tell stories of cityscapes, one always has to choose the methods of listening to cities and documenting them, as well as decide which stories will build the plot.

We have chosen two different ways of listening to cityscapes and telling their stories. The first way focuses on analyzing legal conflicts revolving around expressive visual elements of urban public spaces. These conflicts unveil the battles fought over cityscapes, allowing a glimpse into the different narratives that seek their way into our visual environment. Their outcomes point to the narratives that enjoy a dominant position in our cityscapes, to the exclusion of alternative voices.

The second way looks at photography. Rather than illustrating the text, the photographs relate to the discussed topics in their own way, complementing the discussion with visual tours through urban public spaces. Text and photographs tell two related, but by no means identical, stories. We have chosen this method to avoid redundancy and create a larger and richer picture of visual urban narratives. Our observations and insights about the narratives of cityscapes are general ones; they are largely applicable to most contemporary western cities. We decided to focus our study on two locations—while the text refers to the United States legal system, the photographs depict European cityscapes. By splitting the focus of textual and visual discussion in this way, this paper points out the general, rather than localized, nature of our study.

INTRODUCTION

Every city has large public spaces. City life is what happens in these spaces; they are where a city's spirit emerges and evolves. Urban public spaces tend to develop their own rules of conduct, dynamics, and atmosphere. Recognizing their central role in cities, courts identify urban public spaces as quintessential "public fora."⁶

² E.g., Ebru Erbas Gurler & Basak Ozer, *The Effects of Public Memorials on Social Memory and Urban Identity*, 82 *PROCEDIA - SOCIAL AND BEHAVIORAL SCIENCES* 858 (2013).

³ E.g., Madeleine Orr & Timothy Kellison, *Sport Facilities as Sites of Environmental and Social Resilience*, *MANAGING SPORT AND LEISURE* (2020), DOI: 10.1080/23750472.2020.18550813ABLic85U1fiQ3m1-t2hqwk2Vcuxm832Raf7KNQm8dknmT2ggKiaQu8VrdqpPzMAfOtin3On2_EFD0-A, archived at <https://perma.cc/R7KV-DRMH>.

⁴ E.g., Sonja Duempelmann, *Creating Order with Nature: Transatlantic Transfer of Ideas in Park System Planning in Twentieth-Century Washington D.C., Chicago, Berlin and Rome*, 24 *PLANNING PERSPECTIVES* 143 (2008).

⁵ E.g., Roger Hart, *Containing Children: Some Lessons on Planning for Play from New York City*, 14 *ENVIRONMENT AND URBANIZATION* 135 (2002).

⁶ See, e.g., *United States v. Grace*, 461 U.S. 171, 171 (1983).

The visual design of urban public spaces (“cityscape”) has an important impact on city life—it can channel interpersonal communication in certain directions while excluding others; it can powerfully communicate notions of what is important, what is acceptable, and what is the right order of society.⁷ While everyone may access urban public spaces, cityscapes are created by a limited social group that predominantly consists of property owners, city planners, politicians, and commercial enterprises. Real estate developers and municipal authorities decide which entities will occupy the key locations in a city, what information city billboards will communicate, and what kind of public art one will encounter on a daily basis. Unsurprisingly, this results in cityscapes highlighting the power of property, the importance of mainstream politics (such as elections), and the dominance of consumption in our lives. Art adorning urban spaces largely conforms to widespread aesthetic values and accepted social norms.⁸

These hegemonic cityscapes confront tireless resistance. Graffiti—unsolicited painting and writing on city surfaces—disrupts the integrity of official visual narratives, relentlessly claiming its own right to the city and offering alternative, unofficial cityscapes.

The legal system fights back. Local authorities remove graffiti and restore the official cityscapes. They define graffiti as a serious epidemic⁹ and declare “wars” against it.¹⁰ Legislators toughen the “war on graffiti” by increasing existing penalties and introducing new ones, extending police search powers, and restricting graffiti-related activities. Courts frequently issue remarkably high penalties for graffiti, expressing their dismay with what they see as a meaningless attack on property.¹¹

These legal players are joined by property owners, who may report graffiti to the police, remove the painting themselves, or take private measures to prevent it. An additional force in this arena is a media that usually describes graffiti writers as “vandals” and “hooligans,” creating and fortifying social hostility toward them.

This “war on graffiti” is commonly framed in terms of protecting property against paint. Yet, as this paper will reveal, the actual war is fought on the battleground of narratives. Not all graffiti pieces are treated alike. Messages that conform to the dominant narratives are usually met with sympathy and not punished. For instance, during the current COVID-19 out-

⁷ See, e.g., JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 14 (1961); CLARE COOPER MARCUS, *EASTER HILL VILLAGE: SOME SOCIAL IMPLICATIONS OF DESIGN* 198–201 (1975).

⁸ TOM FINKELPEARL, *DIALOGUES IN PUBLIC ART* 54–59 (2000).

⁹ Tim Cresswell, *The Crucial ‘Where’ of Graffiti: A Geographical Analysis of Reactions to Graffiti in New York*, 10 *ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE* 329, 331 (1992).

¹⁰ Cameron McAuliffe & Kurt Iveson, *Art and Crime (and Other Things Besides . . .): Conceptualising Graffiti in the City*, 5 *GEOGRAPHY COMPASS* 128, 128 (2011).

¹¹ Alison Young, *Criminal Images: The Affective Judgment of Graffiti and Street Art*, 8(3) *CRIME MEDIA CULTURE* 297, 306–07 (2012).

break, the media has praised graffiti messages promoting hand-washing or thanking medical staff, and property owners and local authorities frequently choose not to remove such pieces. At the same time, non-conformist messages, such as “corona will kill us,” are quickly removed, severely condemned by the press, and reported to the police.¹²

The same is true for paintings: pieces that conform to prevailing aesthetic standards are usually welcome, especially if made by famous artists. Illegal works by renowned graffiti artists are sometimes safeguarded by protective casing, and even restored by local authorities if “vandalized” by subsequent writers.

In other words, the real war is fought over urban narratives. Property owners and public authorities put great efforts into preserving the official cityscapes from disruptive messages but readily accept graffiti that conforms to their preferred narratives. This reinforces the hegemony of the official urban narratives and suppresses alternative voices. In this paper, we will identify the narratives that enjoy a privileged position in the cityscape and are constant winners in the battlefield over our shared visual environment. We will argue that these one-sided cityscapes latently obstruct efforts to make cities more inclusive, democratic, and multi-voiced.

This paper proceeds as follows. Part I describes legal conflicts over the placement of expressive elements into cityscapes and their removal therefrom. Analyzing these conflicts, we will identify the narratives that constantly prevail: these permanent winners are the official narratives conveyed by cityscapes. Part II focuses on unofficial cityscapes created by graffiti. It demonstrates that the legal treatment of graffiti greatly depends on the narratives conveyed, whereas pieces that conform to the official narratives enjoy a privileged position. Part III criticizes the current state of affairs. It concludes the discussion with a vision of an alternative legal order, one in which urban narratives can emerge in a free and uncontrolled social discourse.

I. OFFICIAL CITYSCAPES CONSTRUCTED

What are cityscapes made of? They consist of the various visible surfaces that surround city inhabitants in public spaces. These are external walls of buildings, sidewalks, parks, plazas, billboards, public art, trains, buses, etc. All the elements of cityscapes are usually publicly or privately owned, which gives public authorities and property owners considerable freedom to determine their appearance. For instance, government authorities may place a monument in a park or choose murals that will be displayed on the external walls of public property; railway companies can decide what messages the trains will take across the city; and construction companies may sometimes

¹² Harry Rutter, *‘It’s Gonna Kill Us’: Coronavirus Graffiti Appears on Wall Overnight amid COVID-19 Pandemic*, CAMBS TIMES (Oct. 31, 2020), <https://www.cambstimes.co.uk/news/coronavirus-graffiti-in-march-4912762>, archived at <https://perma.cc/PQB5-G4Y3>.

shape a whole neighborhood according to their own aesthetic vision. While designing external elements of their property, public and private actors create the official cityscape—the legally accepted and protected appearance of urban spaces.

The legal system assigns and regulates rights to design cityscapes. For instance, it determines whether a sculpture in a public plaza is the artist's protected speech or government speech¹³ and whether the landlord or the renter should decide which signs may be placed on a home.¹⁴ Legal rules stipulate whether constitutional principles, such as freedom of religion, may prevent public entities from placing certain types of expressions on their property while rejecting others.¹⁵

Studying these rules, we can identify groups that enjoy the right to display their messages in the cityscape and those who remain invisible. Jurisprudence revolving around these rules shows the conflicts over messages that build up the cityscape. The outcomes of these conflicts determine which stories will be heard and which will remain untold. Our analysis will be divided according to types of property as follows: (a) public property; (b) residential property; (c) commercial property; and (d) public transport.

A. Public Property

Many urban locations may constitute public property. These include freely accessible public spaces—such as parks, plazas, and sidewalks—as well as central buildings of the city—such as city halls. The law has classified these spaces as different kinds of “fora”: public, limited public, and nonpublic.¹⁶ These categories differ in the scope of leeway the government has while imposing restrictions on free speech.

Sidewalks, parks, streets, and plazas are recognized as “traditional” or “quintessential” public fora, entitled to the highest degree of First Amendment protection.¹⁷ Yet, this status has practical significance only in the field of temporal speech, such as demonstrations, rallies, and the distribution of handbills.¹⁸ Restrictions on such activities must withstand strict judicial scru-

¹³ *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048–49 (2d Cir. 1988).

¹⁴ See discussion *infra*, Section I(B)(1).

¹⁵ See, e.g., *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1136 (10th Cir. 2001); *Comite Pro-Celebracion v. Claypool*, 863 F. Supp. 682, 686–89 (N.D. Ill. 1994).

¹⁶ William M. Howard, Annotation, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or other Public Forum—Characteristics of Forum*, 70 A.L.R. 6th 513 (2011, updated 2021).

¹⁷ See, e.g., *Cannon v. City and Cnty. of Denver*, 998 F.2d 867, 871 (10th Cir. 1993) (holding that sidewalks are “traditional public fora”); *United States v. Marcavage*, 609 F.3d 264, 275 (3d Cir. 2010) (holding that parks and sidewalks are “traditional public fora”); *Swagler v. Sheridan*, 837 F. Supp. 2d 509, 525 (D. Md. 2011) (holding that streets are “public fora”); *Pindak v. Dart*, 125 F. Supp. 3d 720, 727 (N.D. Ill. 2015) (holding that a city plaza is a “public forum”).

¹⁸ Howard, *supra* note 17; see, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428–30 (1993).

tiny: they must be content-neutral, be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication.¹⁹ Important as they may be, these types of speech do not leave any lasting marks on cityscapes and, consequently, do not have the same effect as permanent elements, such as sculptures or murals. These elements are designed by governmental bodies, and private initiatives adding permanent new elements to the cityscape or altering the existing ones are forbidden.²⁰ Even chalking a political message in the street in front of the White House—a traditional and most important public forum—has been considered “defacement.”²¹ In reaching this conclusion, the D.C. Circuit found no realistic danger that the defacement statute chills constitutionally protected speech.²²

A notable exception is a “designated forum”—a public place that the government has dedicated to speech activities.²³ This might be a “limited public forum” if it is dedicated to a specific purpose or a specific class of people,²⁴ or a “public forum” if it is open for the general public and all expressive purposes.²⁵ This means that although public authorities may impose an absolute ban on the posting of signs on public property,²⁶ if they choose to open a specific space for free speech—for example, allowing the posting of signs on billboards or lampposts—they cannot exclude speech because of its content, unless a compelling state interest requires that.²⁷ Indeed, this kind of public forum allows some space for interlacing individual expressions into the fabric of urban design. Yet, these occasional small interventions usually have a limited imprint on cityscapes because of the limited space they inhabit (See Fig. 1).

¹⁹ *E.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989).

²⁰ *See, e.g.*, 18 U.S.C. § 1361; D.C. CODE § 22-3312.01.

²¹ *Mahoney v. Doe*, 642 F.3d 1112, 1120 (D.C. Cir. 2011).

²² *Id.*

²³ *See* Francis C. Amendola, Joseph Bassano, John Bourdeau, M. Elaine Buccieri, James Buchwalter, Michael N. Giuliano, Lonnie E. Griffith, Jr., Eleanor L. Grossman, Jill Gustafson, Glenda K. Harnad, Alan J. Jacobs, John Kimpflen, Amy L. Kruse, Sonja Larsen, Stephen Lease, Robert B. McKinney, Anne E. Melley, Mary Babb Morris, Kristina E. Music Biro, Thomas Muskus, Sally J.T. Necheles, Karl Oakes, & Eric C. Surette, *Designated forum status; limited purpose*, 16B C.J.S. Constitutional Law § 988 (updated 2021).

²⁴ *See, e.g.*, *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 134 (2d Cir. 2004); *Bowman v. White*, 444 F.3d 967, 969 (8th Cir. 2006).

²⁵ *See, e.g.*, *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 878–79 (8th Cir. 2020); *Bowman* 444 F.3d at 969.

²⁶ *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 789 (1984).

²⁷ *See, e.g.*, *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 750–52 (1988); *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc’y Freedom Found. v. D.C.*, 846 F.3d 391, 393 (D.C. Cir. 2017).

FIGURE 1—A *Free Workers Union's* sticker reading “Stop capitalism before it ruins us.” Berlin 2021.



Meanwhile, sculptures and murals on public property are usually categorized as “government speech.”²⁸ The “government speech doctrine” exempts this type of speech from judicial scrutiny altogether. This allows public authorities to exercise control over expressions displayed on public property, placing messages it wishes to convey and excluding dissonant speech.²⁹ Since many significant urban locations—parks, plazas, and central buildings of the city—constitute public property, the doctrine grants public authorities a right to shape key elements of the cityscape. Legal conflicts around these elements sometimes arise when authorities accept some private contributions while rejecting others or remove a previously accepted contribution. The following discussion will analyze these conflicts, focusing first on political and ideological, and then on artistic, expressions.

²⁸ See Joyce Fernandez, *The Politics of Dis-Belonging*, SHELTERFORCE (Sep. 21, 2016), <https://shelterforce.org/2016/09/21/the-politics-of-dis-belonging/>, archived at <https://perma.cc/RHW8-TUUD>.

²⁹ See, e.g., *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1044 (5th Cir. 1982) (“[T]he First Amendment does not preclude the government from exercising editorial control over its own medium of expression.”); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000), cert. denied, 532 U.S. 994 (2001) (“Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.”). See also *Rust v. Sullivan*, 500 U.S. 173, 173–175 (1991).

1. *Political and ideological expressions.*

From time to time, social and political groups challenge the decisions made to accept or reject symbolic messages in central sites of cityscapes. Each decision allows a glimpse into the battleground over symbolic presences in urban public spaces.

Several decisions have dealt with monuments in public parks. In 1992, Chicago's Puerto Rican community applied for permission to erect a statue of Dr. Pedro Albizu Campos, a political leader who advocated Puerto Rican independence. It aspired to place the statue in Humboldt Park, where German and Norwegian communities had already erected statues of their notable compatriots.³⁰ The city rejected the statue, explaining that it wished to avoid the controversy of Puerto Rican independence, and the Puerto Rican community sued.³¹ In a preliminary decision, the District Court for the Northern District of Illinois found that the city's rejection might run contrary to the First Amendment and refused to dismiss the suit.³² However, the community discontinued the legal battle: it may be that it stopped litigation due to the complexity and costs of such proceedings. Residents, instead, opted to place the monument in a vacant lot inside a Puerto Rican neighborhood.³³

In another case, decided in 2009, the Supreme Court dealt with a religious organization that asked the city of Pleasant Grove to place a monument containing the Seven Aphorisms of Summum in a public park, where a donated Ten Commandments monument already stood.³⁴ Declining this request, the city explained that it limited park monuments to those directly related to the city's history or donated by groups with longstanding community ties. The Summums claimed that the city violated their rights to free speech and equal treatment.³⁵ Rejecting these arguments, the Court held that permanent monuments in public parks typically constitute government speech.³⁶ A government is entitled to choose the views that it wants to express *inter alia* by choosing donations that would best deliver the desired messages.³⁷

In both cases, minority groups holding dissenting views tried to embed their narratives into the mosaic of cityscapes. Both sought representation in highly symbolic urban spaces. Such representation could lend a feeling of belonging and social acceptance. It could give both groups a chance to mark their presence and share their views with a larger urban community. Yet, in both Chicago and in Pleasant Grove, local authorities denied the desired rep-

³⁰ Fernandez, *supra* note 29.

³¹ *Comite Pro-Celebracion v. Claypool*, 863 F. Supp. 682, 691 (N.D. Ill. 1994).

³² *Id.* at 690–91.

³³ Fernandez, *supra* note 29.

³⁴ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464–65 (2009).

³⁵ *Id.* at 466.

³⁶ *Id.* at 470; *contra Summum v. City of Ogden*, 297 F.3d 995, 1011 (10th Cir. 2002).

³⁷ *Id.* at 480–81.

resentation. Symbolic exclusion of this kind is associated with feelings of rejection, alienation, and dis-belonging (See Fig. 2).³⁸

FIGURE 2 – *A monument in Berlin commemorating “comfort women,” Korean victims of Japanese sexual violence during World War II. Municipal authorities decided to remove the memorial in response to pressure on from the Japanese government. However, local activists resisted the removal, and it was temporarily halted. Berlin 2020.*³⁹



The same is true for groups holding non-conformist ideological views. In 2001, the Tenth Circuit dealt with a Christmas display erected by the City of Denver on the steps leading up to the City Hall. The display included a crèche, Christmas trees, a Santa Claus, and a large sign thanking six corporate sponsors.⁴⁰ The Freedom From Religion Foundation (“FFRF”) requested permission to place its own sign next to this display, reading “The Winter Solstice. May reason prevail. There are no gods, no devils, no angels, no heaven or hell. There is only our natural world. . . . The city of Denver should not promote religion.”⁴¹ Having received no response to its request,

³⁸ James Michael Buckley, *People in Place: Local Planning to Preserve Diverse Cultures*, in *THE OXFORD HANDBOOK OF PUBLIC HERITAGE THEORY AND PRACTICE* (Angela M. Labrador & Neil Asher Silberman eds., 2018). For discussion see TOVI FENSTER & HAIM YACOBI (eds.), *REMEMBERING, FORGETTING AND City Builders* (2010).

³⁹ *Berlin halts hemolition of ‘comfort women’ memorial amid diplomatic row with Japan*, DW, (Oct. 14, 2020) <https://www.dw.com/en/comfort-women-memorial-berlin/a-55272887>, archived at <https://perma.cc/WD52-XRVQ>.

⁴⁰ *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1136 (10th Cir. 2001).

⁴¹ *Id.* at 1137.

FFRF placed its sign next to the official display. The city removed it, and FFRF sought legal remedy.⁴²

Concluding that the holiday display was government speech, the court held that the City of Denver was entitled to present its message without having to incorporate the messages of others.⁴³ It declined FFRF's argument that the message thanking the sponsors was corporate speech, rather than government speech.⁴⁴ While acknowledging the benefits the sponsors may receive from the message, the court nevertheless held that this was the city's message: "Indeed, any benefit that accrues to the sponsors ultimately serves the City's interests by providing current and putative sponsors with an incentive to contribute to the [City]."⁴⁵

In another case, a court addressed the Governor of Maine's decision to remove a mural depicting Maine's labor history.⁴⁶ The decision was taken in response to opposition from the business community and anonymous complaints claiming that the mural constituted propaganda of the Union Movement. A group of residents argued that the decision to remove the mural was based on the Governor's disagreement with its "pro-Union" and "anti-business" views, and hence, amounted to content-based speech regulation. Applying the government speech doctrine, the court exempted the Governor's decision from free speech scrutiny and recognized his authority to decide what the State of Maine says or does not say about itself.⁴⁷

These cases offer a glimpse into the ideological battles over narratives shaping cityscapes. Using their power to design public spaces, urban authorities white out expressions that do not conform to the mainstream, such as those questioning Christmas or advocating a union-led labor market. Another significant component of cityscapes is their tendency to side with capitalist ideology.⁴⁸ Thus, while a message thanking commercial sponsors may occupy a central site in a city, a pro-union message cannot.

⁴² *Id.*

⁴³ *Id.* at 1143. But note that government speech incorporating religious messages is occasionally challenged as violating the Establishment Clause. The legal practice dealing with such claims is somewhat inconsistent: compare, *e.g.*, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 578 (1989) (display of crèche violated establishment clause); *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 121 (7th Cir. 1987) ("placement of nativity scene in city hall unavoidably fostered identification of city with Christianity and violated establishment clause."); *American Civil Liberties Union of Florida Inc. v. Dixie County Fla.*, 797 F. Supp. 2d 1280, 1280–81 (N.D. Fla. 2011) (public display of granite monument of Ten Commandments on front steps of county courthouse violates Establishment Clause) with, *e.g.*, *Doe v. Small*, 964 F.2d 611, 612 (7th Cir. 1992) (allowing display of religious paintings in public park); *American Civil Liberties Union v. City of Florissant*, 186 F.3d 1095, 1096 (8th Cir. 1999) (city's seasonal display of crèche did not violate Establishment Clause).

⁴⁴ *Wells*, 257 F.3d at 1143.

⁴⁵ *Id.* at 1142.

⁴⁶ *Newton v. LePage*, 849 F. Supp. 2d 82, 82 (D. Me.), *aff'd*, 700 F.3d 595 (1st Cir. 2012).

⁴⁷ *Id.* at 129–30.

⁴⁸ For a discussion of capitalist ideology and the legal system, see generally Katya Assaf, *Capitalism against Freedom*, 38 N.Y.U. R. L. & SOC. CHANGE 201 (2014).

To make a short summary of the battles over city narratives described in this section: Christian and Judeo-Christian motifs prevailed over non-religious and Summum themes, a Puerto Rican narrative had to recede because of its incompatibility with the American national narrative, and pro-business speech found its way to cityscapes while pro-union expressions remained in the realm of untold stories.

2. *Artistic expressions.*

Most artistic works displayed in urban public spaces are sponsored by the state. Acting as a patron of the arts,⁴⁹ the state may commission artists to create works for urban spaces or announce competitions whose winners will get to display their works in such spaces. Legal conflicts in this context may arise when local authorities wish to remove a previously chosen work or decline a piece for seemingly ideological reasons.

In 1979, the U.S. General Services Administration (“GSA”) selected Richard Serra, an internationally renowned American artist, to create a sculpture for the Federal Plaza in New York.⁵⁰ Soon after its emergence, Serra’s sculpture “Tilted Arc” became the object of intense public debate. GSA received hundreds of letters from community residents and federal employees complaining about the sculpture’s obstruction of the Federal Plaza and its unappealing aesthetic qualities. Voices against removal of the work tended to be artists and art critics who pointed to the work’s significance in twentieth century sculpture.⁵¹ To conciliate the opponents of “Tilted Arc,” GSA decided to remove it. Since the work was created specifically for the Federal Plaza and had no meaning outside of it, its removal equaled destruction.⁵² Serra sued, claiming that GSA violated his free speech rights.

Dismissing Serra’s arguments, the court maintained that “Tilted Arc” was entirely owned by the government and displayed on governmental property. Hence, the sculpture constituted government speech, and not Serra’s speech. Accordingly, Serra was not entitled to free speech protection.⁵³ The court further noted that even if Serra were protected by the First Amendment, the restriction on his free speech was permissible and content-neutral:

[T]he decision to remove “Tilted Arc” was not impermissibly content-based. . . . At the very most, Serra suggests that [GSA] thought that “Tilted Arc” was ugly. That is surely an assessment

⁴⁹ *E.g.*, *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1051 (2d Cir. 1988) (“Government can be a significant patron of the arts.”); *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 30 (D.C. Cir. 2005) (“As a speaker, and as a patron of the arts, the government is free to communicate some viewpoints while disfavoring others”); *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 254 (D.D.C. 2017); *Raven v. Sajet*, 334 F. Supp. 3d 22, 30–32 (D.D.C. 2018).

⁵⁰ *Serra*, 847 F.2d at 1046–47.

⁵¹ *Id.* at 1047.

⁵² *Id.*

⁵³ *Id.* at 1049–50.

of the work's content, but . . . there is no assertion of facts to indicate that GSA officials understood the sculpture to be expressing any particular idea, much less that they sought to remove the sculpture to restrict such expression or convey their own disapproval of the sculptor's message. Indeed, Serra is unable to identify any particular message conveyed by "Tilted Arc" that he believes may have led to its removal. . . . To the extent that GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible.⁵⁴

The *Serra* case reveals a central characteristic of public art policy: the aspiration to have widely accepted and non-controversial art.⁵⁵ This policy is highly questionable. In the field of art, social acceptance is not a reliable proxy of artistic quality. Popular taste is, to a large extent, the result of what people are used to seeing. For example, although impressionism seemed ugly to most of its contemporaries, now it is predominantly perceived as beautiful. Holding that the decision to remove a piece of art because of "lack of aesthetic appeal" was content-neutral, the court turned a blind eye to the dynamics of visual arts. Although Serra was "unable to identify any particular message conveyed by 'Tilted Arc,'" its aesthetic message is no less expressive just because it cannot be put it into words.⁵⁶

The government's aspiration to display only socially accepted aesthetics in urban public spaces takes away one of the most essential components of art: its ability to question the accepted standards, to dare, to revolutionize. This policy turns public art into mere repetitions of the same well-known styles, depriving city inhabitants of everyday encounters with genuine artistic creativity (See Fig. 3–4).

⁵⁴ *Id.* at 1050–51.

⁵⁵ See, e.g., Hena Sharma, *New York City's most famous murals and the origin stories behind them*, CNN STYLE (Nov. 19 2020), <https://edition.cnn.com/style/article/new-york-famous-murals/index.html>, archived at <https://perma.cc/28PZ-6AWJ> (describing public art created by famous artists in New York City).

⁵⁶ See *Serra*, 847 F.2d at 1050.

FIGURES 3 and 4 – *Examples of official public art adorning the streets of Berlin.*



Another aspect of the *Serra* case is the GSA's decision to commission a famous artist to create a work for a central site in the city. Although we can safely assume that this reflects the general strategy in this field, it hardly makes a good policy. Art, by its very nature, is a dynamic field, with vague

and constantly changing standards. Fame and recognition often come after years, if not an entire life, of namelessness and rejection. Although art is often about innovation and experimenting, working outside established canons is often met with harsh opposition. Art institutions enjoy significant hegemony over the question of what art is and which works should be valued. This hegemony results in a very small group of people doing art being singled out as “real artists” to the exclusion of all the rest.⁵⁷ Commissioning famous and widely-accepted artists to adorn cityscapes with their works reinforces this hegemony and precludes a real artistic discourse—one that would allow experiment and innovation—in our shared public spaces.

A year after the *Serra* decision, in 1990, the Visual Artists Rights Act (“VARA”) was enacted as an amendment to the Copyright Act, to provide “moral rights” to artists.⁵⁸ VARA secures the inalienable right to preserve an artistic work against destruction, but only if the work is of “recognized stature.”⁵⁹ This provision could theoretically protect an artist like Serra, whose work is about to be removed from a cityscape because of controversy. Yet, courts interpreted the term “recognized stature” to mean broad recognition by the artistic community,⁶⁰ supported by extensive evidence of art experts.⁶¹ This interpretation turns VARA into another brick in the wall protecting the hegemony of established art. Hence, VARA can offer little help to controversial artworks. Moreover, removing an artwork from its location is not in itself considered a cognizable harm under VARA.⁶² Likewise, courts have found that hiding an artwork from public view does not violate VARA,⁶³ and that VARA does not protect site-specific works, whose integrity is compromised when they are removed from their location.⁶⁴ Jointly, these judicial rules make it plainly impossible to use VARA to prevent the disappearance of controversial art from cityscapes.

Two further decisions about art in urban public spaces revolved around works created by the animal rights organization People for Ethical Treatment of Animals (“PETA”). The first case focused on CowParade—a public art event that took place in New York City in 2000 as part of the millennial

⁵⁷ Katya Assaf-Zakharov & Tim Schnetgöke, *Reading the Illegible: Can Law Understand Graffiti?*, 53 CONN. L. REV. 117, 151 (2021)e, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576465, archived at <https://perma.cc/AAB3-7AL3>.

⁵⁸ *English v. BFC&R. E. 11th St. LLC.*, 1997 WL 746444, at *1–2 (S.D.N.Y. 1997).

⁵⁹ 17 U.S.C. § 106A.

⁶⁰ See, e.g., *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324–25 (S.D.N.Y.1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2nd Cir. 1995). *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999).

⁶¹ *Id.*; *Holbrook v. City of Pittsburgh*, No. CV 18-539, 2019 WL 4409694, at *3 (W.D. Pa. 2019) (a failure to present such evidence led to a denial of VARA protection).

⁶² *Baird v. Town of Normal*, No. 1:19-CV-1141, 2020 WL 234622, at *5 (C.D. Ill. Jan. 15, 2020).

⁶³ *English*, 1997 WL 746444, at *15.

⁶⁴ *Phillips v. Pembroke Real Est., Inc.*, 459 F.3d 128, 129 (1st Cir. 2006); *Kelley v. Chi. Park Dist.*, No. 04 C 7715, 2012 WL 13208055, at *1 (N.D. Ill. 2012); *Urbain Pottier v. Hotel Plaza Las Delicias, Inc.*, 379 F. Supp. 3d 130, 133 (D.P.R. 2019).

celebrations. Municipal authorities co-hosted this event with private entities.⁶⁵ CowParade was planned as an event that would bring financial benefits to the City and its businesses.⁶⁶ It consisted of approximately 500 artistically designed sculptures of cows which were displayed in highly visible locations throughout the city, including parks, sidewalks, plazas, and train stations. CowParade organizers invited individuals, groups, and corporations to submit their designs of cows. The event's committee reviewed the designs and selected cows that would be included in CowParade.⁶⁷

PETA proposed two designs. The first consisted of a cow covered with imitation leather products and bearing the words "buy fake for the COW'S sake." The committee approved it. The second design divided the cow into sections in a manner of a butcher shop chart, with each section containing a statement about the health and ethical problems associated with the killing of cows, for instance, "Cattle are castrated and dehorned without anesthesia" and "Meat Eaters die from heart disease 3 times more frequently than vegetarians."⁶⁸ This design was excluded for being inappropriate, overtly and aggressively political, and too graphic and violent for a display where the public at large of all ages would encounter it without having sought it out. It did not comport with the spirit of festive, whimsical and decorous entertainment envisioned for the exhibit.⁶⁹

PETA sued, arguing that the City had no authority to transform traditional public fora, like parks or sidewalks, for purposes of limited expressive activities without allowing everyone to participate on an equal basis.⁷⁰ Declining this argument, the court held that the forum from which PETA's cow was excluded was not a particular corner of a sidewalk or park, but only the CowParade:

PETA ordinarily would not be entitled to place a permanent structure, even an artwork, on a public sidewalk or park. And while PETA may have First Amendment freedom to use public forum property for protected speech, that right is not accompanied by an unlimited license to place a statue or other structure indefinitely on public open spaces, any more than the right to address an audience from the platform of a public monument would confer upon a speaker the freedom to paint a message on it, or to readorn with graffiti property owned by the government or by another person. . . . [T]he denial of access to PETA to sponsor a cow in the exhibit does not in any way implicate or interfere with PETA's ability . . . to carry out its mission, giving free expression to its entire mes-

⁶⁵ *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294, 297 (S.D.N.Y. 2000).

⁶⁶ *Id.* at 299.

⁶⁷ *Id.* at 298–99.

⁶⁸ *Id.* at 300–01.

⁶⁹ *Id.* at 301.

⁷⁰ *Id.* at 311.

sage on any other public street, park or sidewalk space in the City. . . PETA's ability to express its message, while limited within the CowParade forum, is not unreasonably foreclosed by the City's excluding a portion of PETA's proposed design from the exhibit[.] [A]mple alternatives exist for PETA to convey its full message to the same or a larger audience.⁷¹

Less than two years after the CowParade, PETA decided to participate again in an outdoor art exhibit, this time in Washington D.C.⁷² The event, called "Party Animals," consisted of sculptures of donkeys and elephants, and was planned as the "largest public art project in the history of the District of Columbia." It was intended to showcase local artists, attract tourists and enliven the streets "with creative, humorous art."⁷³ PETA submitted one happy circus elephant and several sad designs, with shackled and crying elephants, with a trainer poking a sharp stick and signs stating: "The CIRCUS is Coming. See: Torture Starvation Humiliation All Under the Big Top" and "The Circus is coming. See SHACKLES—BULL HOOKS—LONELINESS. All under the 'Big Top.'"⁷⁴

The event's committee accepted the happy elephants, but rejected the sad ones, explaining that "Party Animals" was intended to be festive and whimsical, reach a broad-based audience and foster an atmosphere of enjoyment and amusement. PETA's sad elephants were contrary to the event's expressive, economic, aesthetic, and civic purpose.

Remarkably, the committee did not accept only lighthearted designs. It did approve tributes to heroes and victims of the September 11 terrorist attacks, as well as designs commemorating civil rights leaders.⁷⁵ It was the specific message communicated by PETA's sad elephants that it found to be incompatible with "Party Animals." According to its own statement, the committee rejected PETA's designs because they "conveyed controversial messages."

PETA went to court again, and lost again. Applying a slightly different analysis than in the CowParade case, the judge found that "Party Animals" constituted government speech, and was exempt from free speech scrutiny:

As a speaker, and as a patron of the arts, the government is free to communicate some viewpoints while disfavoring others, even if it is engaging—to use PETA's words—in "utter arbitrariness" in choosing which side to defend and which side to renounce. The First Amendment's Free Speech Clause does not apply to the gov-

⁷¹ *Id.* at 317–18, citing *Kaplan v. City of Burlington*, 891 F.2d 1024, 1024 (2d Cir. 1989) (upholding denial of a permit to a group seeking to erect a menorah in a city park).

⁷² *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 25 (D.C. Cir. 2005).

⁷³ *Id.* at 26.

⁷⁴ *Id.*

⁷⁵ *Id.* at 27.

ernment as communicator, and it did not restrict the Commission in its decisions about PETA's elephants.⁷⁶

The two cases can teach us a lot about the vision of public authorities as to the proper role of art in urban spaces. Two important and large-scale events—millennial celebrations and the “largest public art project in the history of the District of Columbia”—were both organized in cooperation with commercial sponsors and intended to bring financial benefits to their cities. Both envisioned amusing entertainment with an atmosphere of enjoyment and fun. PETA's cow promoting faux leather products and its happy elephant could easily fit in, but not its designs referring to animal abuse. And this is not only because this topic is not cheerful or entertaining, but mainly because it is controversial. Thus, while animals commemorating victims of the September 11 attacks or civil rights leaders hardly promote whimsical entertainment, they nevertheless do not spoil it. Because of the broad social consensus around these topics, they usually do not provoke objection. But this also means that they do not provoke critical thinking, do not give rise to debates, and cannot inspire social or political activism. Though people may become sad or pensive for a moment while observing the less cheerful animal displays, this should not prevent them from continuing to enjoy the atmosphere of amusement after this moment passes.

Things are different with animal abuse and torture, which are highly controversial. PETA's messages are antithetical to many people's lifestyle. Accepting them would mean changing one's everyday habits or even becoming more socially active. Rejecting PETA's messages means expending energy on finding arguments that would refute these claims, which is often associated with feeling uneasy and getting angry. Giving PETA's arguments some weight, while not changing one's lifestyle leads to discomfort associated with cognitive dissonance. All of these reactions are indeed most prone to spoil the fun and sweep away the shopping mood.

We disagree with the court's holding that the rejection of PETA's cow does not interfere with its ability to carry out its mission in public streets, parks or sidewalks. As the court itself noted, the right to free speech is not accompanied by a license to place a statue on public open spaces or to readorn public or private property. It is only accompanied by a right to temporary expressions, such as distribution of handbills or demonstrations. These activities are relatively easy to ignore—much easier than ignoring a large sculpture placed in a prominent city location. Public authorities enjoy the right to control permanent elements of cityscapes. They use this right to design cityscapes conveying a cheerful, entertaining and consumption-promoting atmosphere, while suppressing genuinely critical and dissenting voices. Because of the power of cityscapes over our perception of reality and

⁷⁶ *Id.* at 30–31.

ourselves,⁷⁷ this policy significantly contributes to the more general tendency of capitalist societies to educate people towards passive consumption instead of engaged citizenship.⁷⁸ Thus, the “expressive, economic, aesthetic, and civic purpose” of large public events is obviously not to encourage democratic debate on socially important issues, but “to bring financial benefits to the city and its businesses.”⁷⁹ If courts were more willing to require officials to permit works like PETA’s cows, then viewers would be forced to confront and invited to engage with these messages.

The last point we would like to address in this context is the concern that PETA’s exhibit could be displayed “where the public at large . . . would encounter it without having sought it out.” It is a general feature of cityscapes that people encounter them without having sought them out. Yet, the downpour of commercial messages that reaches us everywhere is not considered problematic. Since they are perceived as ideologically neutral, their presence in the public space is not questioned.⁸⁰ But, in fact, commercial messages are far from being ideologically neutral. They advocate a very specific ideology—one that promotes consumption as the ultimate human activity and favors contentedness with the existing social order over critical thinking.⁸¹ Note that PETA’s cow advocating consumption (of faux leather) as a way to contribute to animal welfare was accepted, while its cow denouncing another type of consumption (of meat) as objectionable was denied. This is consistent with commercial ideology that promotes only one way of contributing to socially important issues: consumption.

The commercial ideology has a strong hold on our social and personal lives, but this does not make it neutral. This ideology should not enjoy any privileged position in the democratic discourse generally, or in cityscapes specifically. If advertising can reach people who have not “sought it out,” other ideologies should also be given this right. Favoring “cheerfully entertaining” expressions over controversial ones results in cityscapes that reinforce this commercial ideology (See Fig. 5–6).

⁷⁷ See JACOBS, *supra* note 8, at 5–11, 13–15, 24–25; COOPER MARCUS, *supra* note 8, at 186, 198–201.

⁷⁸ See, e.g., BENJAMIN BARBER, CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE 36–37 (1995).

⁷⁹ *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294, 299 (S.D.N.Y. 2000).

⁸⁰ Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1, 28 (2008).

⁸¹ *Id.* at 80–81; Assaf, *supra* note 49, at 203–06.

FIGURES 5 and 6—*Examples of narratives similar to PETA’s resorting to cityscapes’ margins as unofficial contributions.*



To conclude the discussion on art on public property, we would like to refer to the *Pulphus* case.⁸² This case dealt with a painting intended to be displayed inside a public building rather than outdoors. Yet, since the legal practice applies similar rules to all art on public property, be it an indoor or an outdoor display, this case can shed some more light on the dynamics of legal battles over public art.

In 2016, David Pulphus submitted a painting for the Congressional Art Competition. His work depicted a protest in which two police officers, with guns drawn, faced a young man, as a crowd of protesters looked on in the background. The officers were pictured with the heads of pigs or warhogs, and the young man had the head of a wolf and a long tail. Another police officer was leading a protester away; above them hovered “a young black man, crucified on the scales of justice.”⁸³ The protesters held signs stating: “Racism Kills,” “Stop Killing,” and “History.”⁸⁴ Pulphus’ painting was intended as a comment on social injustice, the tragic events in Ferguson, Missouri, and the lingering elements of inequality in modern American society.⁸⁵

The work was unanimously accepted by the selecting commission, but received many critical comments following its appearance at the exhibition. Press releases complained that the work was “depicting police officers as pigs with guns terrorizing a black neighborhood,” described the picture as an “offensive and inaccurate caricature,” “hate masquerading as art,” “reprehensible” and “disgusting.”⁸⁶ Several public figures urged taking the work down. Notably, the presidents of six police unions sent a joint letter asking to “immediately remove the reprehensible and repugnant ‘art.’”⁸⁷

Following these complaints, the painting was removed as being inconsistent with the competition’s guidelines that prohibited works “depicting subjects of contemporary political controversy.”⁸⁸ Pulphus sued, but lost the case. Categorizing his painting as government speech, the court held that the artist was not entitled to First Amendment protection.⁸⁹

As this case demonstrates, some public authorities may wish to avoid any kind of controversy around public art. Thus, in a similar context of an exhibition in a city hall, a city official stated: “my greatest fear is bringing [an artistic] program to council and having various citizens with a conservative ‘bent’ raise issues that have caused trouble for the National Endowment for the Arts, *i.e.* [sic] offensive or politically motivated art. Through our discussions, I feel assured that the Arts Council will not use the City Hall

⁸² *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 238 (D.D.C. 2017).

⁸³ *Id.* at 241.

⁸⁴ *Id.* at 241–42.

⁸⁵ *Id.* at 242.

⁸⁶ *Id.* at 243.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 247–50.

Gallery as a venue for controversy.”⁹⁰ This policy enjoys broad judicial support.

The idea that public art should be a sterile medium, expressing only socially accepted ideas and avoiding any debatable issues reduces it to mere entertainment, taking away one of the central goals of art—provoking thought and calling for a change.⁹¹ The *Pulphus* case provides a good illustration of this point: in 2016, the discourse about police brutality toward the Black community was still outside of the mainstream, and provoked angry reactions. We believe that the exhibition would have been met with a different reaction if placed today. After George Floyd’s murder by a police officer, art protested the tragic event and broader police brutality. Mayors have adorned city sidewalks with the words “Black Lives Matter”⁹² and commercial companies adopt this slogan of resistance to improve their image.⁹³ In a time where the issues of systemic racism and police brutality are commonly discussed, David Pulphus’s painting would hardly have met the same serious opposition as it did in 2016. Even if the art did have some opponents, it is difficult to imagine such a piece removed today.

Yet, in a sense, this means that it would have been too late for Pulphus’s picture to do what it aspired to—call attention to a great social injustice and inspire a change. The angry reactions over the picture only proved that the narrative of the Black community suffering from violence and injustice had not yet been heard at the time the exhibition took place. Therefore, it was the perfect time for voicing this narrative and making people hear it even if they were predisposed against it. The era when Pulphus’s picture gained the epithets of “reprehensible, disgusting and repugnant ‘art’” was just the right time for it to be publicly displayed and to be given a chance of awakening the social consciousness.

This, of course, is not to say that the narrative represented by Pulphus’s picture has been heard enough by now. But now that this narrative has been accepted into the mainstream and even embraced by the world of commerce, its message has been somewhat diluted. We believe that, today, Pulphus’s

⁹⁰ *Hopper v. City of Pasco*, 241 F.3d 1067, 1071 (9th Cir. 2001) (the exclusion of the controversial work was ultimately found to violate the First Amendment, because the city did not provide clear guidelines for its policy).

⁹¹ See, e.g., *Can Art Change Society?*, TATE, <https://www.tate.org.uk/art/tate-exchange/can-art-change-society> (last visited Sept. 26, 2021), archived at <https://perma.cc/DCZ6-LQLU>.

⁹² See, e.g., *New York City Mayor Helps Paint Black Lives Matter Mural Outside Trump Tower – Video*, THE GUARDIAN (July 10, 2020), <https://www.theguardian.com/us-news/video/2020/jul/10/new-york-city-mayor-bill-de-blasio-paint-black-lives-matter-mural-outside-trump-tower-video>, archived at <https://perma.cc/SV3N-Y3HQ>; Abby Cruz, *DC Mayor Unveils ‘Black Lives Matter’ Painted on Streets of Capital*, ABC NEWS (June 5, 2020), <https://abcnews.go.com/Politics/dc-mayor-unveils-black-lives-matter-painted-streets/story?id=71088808>, archived at <https://perma.cc/87X3-KQG7>.

⁹³ *Black Lives Matter Themed Ads See Success*, ACE METRIX (July 14th, 2020), available at <https://www.acemetrix.com/insights/blog/black-lives-matter-themed-ads-see-success/> <https://www.acemetrix.com/insights/blog/black-lives-matter-themed-ads-see-success/>, archived at <https://perma.cc/3FZ6-D6VF>.

picture would hardly shock or anger many people—and this is a sign of diminished sensitivity associated with “mainstreaming” and commercializing narratives of resistance.⁹⁴ Once “Black Lives Matter” becomes a common element of cityscapes and of our everyday life, people may get used to it and be less prone to participate in any social or political activity that could bring about a genuine change.⁹⁵ Perhaps subconsciously, one can get the wrong feeling that this narrative is already getting enough attention and the right treatment. Under this constellation, occasionally purchasing goods or services of companies supporting the movement may give enough comfort so as to preclude real actions. Of course, becoming mainstream is also a great achievement for the narrative opposing police brutality against Black people. This is a promising start that gives much hope for greater justice in the future. But this narrative should have been heard and given significant space in American cityscapes much earlier. Having allowed its representation before it became widely accepted could have provoked anger, but could also have accelerated the social changes we are witnessing now (See Fig. 7–8).

FIGURE 7 – *Lolie Darko, a piece advocating justice for the Black community before the “Black Lives Matter” movement entered the mainstream discourse. Paris 2016.*



⁹⁴ Assaf, *supra* note 81, at 26–27.

⁹⁵ *Id.* at 27.

FIGURE 8 – *Sozi36*, a message in support of “Black Lives Matter” displayed shortly after George Floyd’s death, as the movement became part of the mainstream discourse. Berlin 2020.



To sum up the conflicts over narratives of public art: a piece that did not fit into widely accepted aesthetic standards—was not perceived as “beautiful”—was removed from the cityscape. Narratives of opposition to animal abuse had to give way to the narratives of contentedness and consumption embedded in “festive and whimsical entertainment.” Even the narrative of resistance to police brutality against Black people was excluded in 2016 from the public sphere because of angry reactions.

While choosing art for cityscapes, public authorities do their best to avoid any conflict or controversy, turning our shared urban spaces into sites of repetitive mainstream messages and driving away aesthetic innovation and ideological dissent. The courts routinely hold that the speaker behind art in public space is the government rather than the artist, revealing the hegemonic character of public art. This art communicates the narrative of social

consensus promoted by public authorities rather than voicing multiple narratives of their creators.

B. Residential Property

Large parts of modern cityscapes are often shaped by private residential property. This itself can be very expressive: for instance, a street that looks like a public path between private houses, wide enough just to let cars and pedestrians comfortably pass through, silently tells us about the role played by economic power in our society (See Fig. 9). Owning a private home gives the proprietor significant symbolic presence in public space, sending a message of economic and social status.⁹⁶

FIGURE 9 – *Riverside luxury condos and a message of hate directed at the rich. Berlin 2020.*



Many cases revolve around the validity of local ordinances regulating residential signs. Courts recognize that while cities have the power to regulate signs in order to enhance aesthetics and traffic safety, these interests must be balanced against First Amendment rights.⁹⁷

A consistent line of jurisprudence holds that displaying a sign from one's own residence constitutes an important medium of expression. This

⁹⁶ *Burns v. Town of Palm Beach*, 343 F. Supp. 3d 1258, 1266 (S.D. Fla. 2018).

⁹⁷ *E.g.*, *Bowden v. Town of Cary*, 754 F. Supp. 2d 794, 808 (E.D.N.C. 2010); *Reed v. Town of Gilbert*, 576 U.S. 155, 171–72 (2015).

medium carries a message quite distinct from placing the same sign someplace else, or conveying it by other means, such as “hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.”⁹⁸ Cities’ interests in aesthetics,⁹⁹ minimizing visual clutter¹⁰⁰ and traffic safety¹⁰¹ cannot justify foreclosing the possibility to display messages from one’s home altogether. Courts note that residential signs are an unusually cheap and convenient form of communication, allowing virtually anyone to participate in public debate, including those of modest means who could not otherwise afford to communicate with large audiences as well as those who cannot afford the time required to distribute leaflets or stand on their lawns with handheld signs.¹⁰²

This judicial view is somewhat inaccurate, to say the least. Two large groups of Americans—renters and homeowners living in communities governed by homeowner associations—cannot fully enjoy the right to express themselves via residential signs. Moreover, as will be shown below, even homeowners living outside of any communal arrangements do not enjoy full freedom while sending expressive messages from their homes since some messages are treated less favorably than others. These three groups—renters, homeowners living under homeowner associations and homeowners living outside communal arrangements—will be discussed separately.

I. Renters

Participating in the public debate by posting a residential sign—such as a mural on the outer wall of a house¹⁰³—would normally require owning the home one lives in. Yet, as of 2019, only 65.1% of residences in America are occupied by their owners.¹⁰⁴ Renters already comprise over forty-three million American households, and their number is constantly on the rise.¹⁰⁵ Renters’ right to display signs from their residence is largely dependent on the landlord’s consent. The First Amendment does not extend its protection

⁹⁸ *City of Ladue v. Gilleo*, 512 U.S. 43, 43–44, 56 (1994); *WW Westwood, LP v. City of Los Angeles*, No. SA CV 01-294 DOC (ANx), 2001 WL 36399458, at *7 (C.D. Cal. Dec. 4, 2001); *Bowden v. Town of Cary*, 754 F. Supp. 2d 794, 797 (E.D.N.C. 2010), *rev’d and remanded sub nom. Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013).

⁹⁹ *E.g.*, *WW Westwood*, 2001 WL 36399458, at *7.

¹⁰⁰ *E.g.*, *City of Ladue*, 512 U.S. at 58.

¹⁰¹ *E.g.*, *Bowden*, 754 F. Supp. 2d at 797.

¹⁰² *City of Ladue*, 512 U.S. at 56–57; *Bowden*, 754 F. Supp. 2d at 797.

¹⁰³ *E.g.*, *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 731 (8th Cir. 2011).

¹⁰⁴ *Homeownership Rate in the United States from 1990 to 2020*, STATISTA <https://www.statista.com/statistics/184902/homeownership-rate-in-the-us-since-2003/> (last visited Sept. 26, 2021), archived at <https://perma.cc/HRR4-QLKB>.

¹⁰⁵ *Id.*; *Number of Renter Occupied Housing Units in the United States from 1975 to 2020*, STATISTA, <https://www.statista.com/statistics/187577/housing-units-occupied-by-renter-in-the-us-since-1975/> (last visited Sept. 26, 2021), archived at <https://perma.cc/27QP-D64E>.

into the realm of landlord-tenant relations.¹⁰⁶ Although several state constitutions restrict the ability of private property owners to ban speech on their premises,¹⁰⁷ these restrictions apply only to property accessible to everyone, such as a mall, and do not prevent landlords in residential houses from censoring tenants' speech.¹⁰⁸ Meanwhile, residential lease contracts routinely include provisions prohibiting the display of any kind of signage.¹⁰⁹ Even in the absence of such contract provisions, landlords frequently ask the renters to remove signs they choose to display from their residence. Since landlords are free to increase the rent or refuse to renew the lease, failing to comply with such requests may cost the renter her home.¹¹⁰ For this reason, perhaps, legal cases involving renters who claim that the landlord violated their free speech rights are extremely rare. Another reason for the scarce jurisprudence around this issue probably lies in renters' small chances of success.¹¹¹

Although residential signs are indeed a cheap and convenient form of communication, they are far from "allowing virtually anyone to participate in public debate, including those of modest means." This medium of communication is accessible only to homeowners, as opposed to people who rent their homes—not to mention those who have no home. Statistically, homeownership is strongly associated with factors such as race, income, and social status.¹¹² Undoubtedly, white, educated, and wealthy Americans already enjoy significant privileges in most spheres of life. By establishing a right to use one's private home for expression, courts give this privileged group an

¹⁰⁶ *Watchtower Bible & Tract Soc'y v. Metro. Life Ins. Co.*, 79 N.E.2d 433, 436 (N.Y. 1948) (holding that a landlord's regulation prohibiting door-to-door religious solicitation did not violate the First Amendment); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567–70 (1972) ("[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property[.]"); *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976) (holding that there is no First Amendment right to picket at a shopping center); see also *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1303 (2010).

¹⁰⁷ *E.g.*, *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 342 (Cal. 1979) (holding that the owner of a shopping center cannot prevent signature collection campaigns on its premises under California State Constitution).

¹⁰⁸ *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 810 (Cal. 2001) (noting that "the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public" and holding that an apartment complex did not constitute such property); see also Stephen E. Mortellaro, *Equalizing the Political Rights of Renters and Homeowners*, 34 J.L. & POL. 165, 175–76 (2019).

¹⁰⁹ James E. Lobsenz & Timothy M. Swanson, *The Residential Tenant's Right to Freedom of Political Expression*, 10 U. PUGET SOUND L. REV. 1, 4 (1986).

¹¹⁰ Mortellaro, *supra* note 109, at 166–67.

¹¹¹ *See, e.g.*, *Corwin v. B'Nai B'Rith Senior Citizen Hous., Inc.*, 489 F. Supp. 2d 405 (D. Del. 2007) (holding that banning the display of small American flags does not violate free speech rights of the renters).

¹¹² *See, e.g.*, U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, SECOND QUARTER 2021 9–10 (July 27, 2021) <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>, archived at <https://perma.cc/5VWU-NW73> (noting that homeownership rates in the second quarter of 2021 were 74.2% for non-Hispanic White Americans but only 44.6% for Black Americans, and 78.9% for households with family incomes above the national median but only 51.9% for those with incomes below the national median).

other advantage in the form of an effective and accessible means to participate in public debates. People who do not own a home cannot enjoy any comparable right to partake in the discourse taking place in the shared visual environment (See Fig. 10).¹¹³ For instance, courts note that while the right to express oneself using one's property is highly important, there is no similar right to use public property for expressive purposes.¹¹⁴

FIGURE 10 – *A building owned by Deutsche Wohnen, a German property company and one of the biggest landlords in Berlin. Faced with public controversy and threats of eminent domain, the company commissioned various artists to paint on several residential buildings in Berlin.¹¹⁵ This photo shows the work of the graffiti crew IUP. Note the contrast between the silent uniform facades with no signs of renters' expressions and the bold artwork commissioned by the landlord. Berlin 2021.*



¹¹³ See also Hannah J. Wiseman, *Rethinking the Renter/Owner Divide in Private Governance*, 2012 UTAH L. REV. 2067, 2117 (2012) (“A tenant who may not place a political sign or religious symbol in her window, for example, is barred from engaging in an essential expressive act.”).

¹¹⁴ *W Westwood, LP v. City of Los Angeles*, No. SA CV 01-294 DOC (ANx), 2001 WL 36399458, at *8 (C.D. Cal. Dec. 4, 2001) (“The important distinguishing fact of these two cases is that in *Ladue*, the homeowner sought to display a sign on her own property, while in *Taxpayers for Vincent*, the candidate sought to display signs on public utility poles.”).

¹¹⁵ *Berlin Mural Fest 2019*, DEUTSCHE WOHNEN, <https://www.deutsche-wohnen.com/en/about-us/outreach/art-and-culture/neighbourhood-art/berlin-mural-fest-2019> (last visited Sept. 26, 2021), archived at <https://perma.cc/2RSS-YCR4>.

Notably, California and Hawaii state laws prohibit landlords from banning the display of political signs by their tenants.¹¹⁶ Yet, these local regulations are an exception rather than the rule. Moreover, rather than putting the renters in a similar position to homeowners, these provisions provide them with a very limited right to display signs—the size should not exceed six square feet; in a condominium, the signs may only be placed on doors or windows of one’s apartment. By way of comparison, owners of private homes have successfully asserted rights to place 363- and 375-square-foot signs, for example, on their lawns.¹¹⁷

Furthermore, California and Hawaii state laws only allow signs related to an election or a legislative vote, and in California, this is permitted only ninety days before and fifteen days after these events take place.¹¹⁸ This severe restriction of the range of issues open for renters puts them in an entirely different position than homeowners, who are not confined to any specific topics and may use their property to express their wish “For Peace in the Gulf,”¹¹⁹ or to depict scenes reflecting Mexican heritage.¹²⁰ Allowing only signs in support of political candidates reduces the freedom of speech granted to renters to the ability to tick off an item from an existing list. This right has little to do with real *freedom* of expression—one that allows self-expression, imagination, and creativity.¹²¹

Apart from not achieving genuine equality between renters and homeowners, these regulations favor a particular narrative—the one of mainstream politics. This narrative—taking the form of election posters, messages and imagery displayed by political parties and the government—already enjoys a prominent position in our shared cityscapes (See Fig. 11–12). This position reflects and reinforces the dominance of mainstream politics—such as elections, legislative processes, and activities of political parties—in the social discourse. Mainstream politics are already perceived as, perhaps, *the* most important topic in the public debate. This hegemony instills the social perception that most things in our society depend on the acts of political leaders. The other side of this coin is the feeling of one’s

¹¹⁶ Cal. Civ. Code § 1940.4; Haw. Rev. Stat. § 521-52(c). The Washington State Constitution was also interpreted in this sense in one summary judgment. See Paulsen v. Seamark Props., Inc., No. 84-2-15311-3 (King Cnty. Sup. Ct. Apr. 9, 1985); see also discussion in Lobsenz & Swanson, *supra* note 110, at 4, and Suni Li Alexander, *Chapter 383: Expanding Freedom of Expression for California Renters?*, 43 McGEORGE L. REV. 553, 554 (2012).

¹¹⁷ *E.g.*, Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 731 (8th Cir. 2011); Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 630 (4th Cir. 2016).

¹¹⁸ Cal. Civ. Code § 1940.4(d); Haw. Rev. Stat. § 521-52(c).

¹¹⁹ *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

¹²⁰ *City of Indio v. Arroyo*, 143 Cal. App. 3d 151, 154 (Cal. Ct. App. 1983).

¹²¹ A similar idea was expressed in the German movie NEVER LOOK AWAY [WERK OHNE AUTOR] directed by Florian Henckel von Donnersmarck (Pergamon Film 2018). The respective segment is available online. Werk ohne Autor, *WERK OHNE AUTOR - Filmclip: Vorlesung van Verten*, YOUTUBE (Aug. 31, 2018), <https://www.youtube.com/watch?v=BZUYw9c9sr0>, archived at <https://perma.cc/7SYU-USU4>.

powerlessness and the belief that very little depends on us, private individuals.¹²²

FIGURE 11 – Advertising for a political candidate with a sticker stating “Hypocrite!” Berlin 2017.



¹²² Roy Kemmers, *Channelling Discontent? Non-Voters, Populist Party Voters, and Their Meaningful Political Agency*, 4 EUR. J. CULTURAL & POL. SOCIO. 381, 394–95 (2017).

FIGURE 12 – A government advertising campaign seeking to encourage immigrants to return to their homelands,¹²³ modified with paint and a contrary statement, welcoming refugees. Berlin 2018.



A good example of this hegemony of politics is the discourse around the current COVID-19 pandemic. Mass media extensively discuss the political measures different countries undertake to cope with the spread of the virus, such as lockdowns, tests, vaccination policies, and the mandatory use of masks. Meanwhile, little is said about how people in different countries react to these regulations, what precautionary measures they undertake privately, and how they manage the different challenges of this new reality. The only private behavior often discussed in this context is to what extent people comply with the official rules. Meanwhile, it might well be the case that private behavior accounts for a great deal of a country's success or failure in coping with the pandemic in all its aspects.

The focus on politics as the decisive factor in most spheres of social life underplays individual influence, thereby reinforcing the social perception of political power—which, in turn, enhances this power. Similarly, legal rules allowing renters to display signs related to elections and legislative votes, but not on any other topic, imply that politics is the most important issue on which they could choose to express themselves publicly. At the same time, once rented houses bear only political messages and no others, the public

¹²³ *Information Portal on Voluntary Return and Reintegration*, GER. FED. OFF. FOR MIGRATION & REFUGEES, <https://www.returningfromgermany.de/en/> (last visited Sept. 26, 2021), archived at <https://perma.cc/J9DC-A7SB>.

perception of politics as the most important area of social debate is reinforced, along with the actual social power of politicians.

To sum up this section, the legal system hardly allows renters to use their homes as platforms for displaying expressive messages in cityscapes, thus excluding their voices from the shared public space. Exceptions are the rights existing in California and Hawaii to post messages related to elections or legislative votes. This limited right reinforces one of the most dominant narratives of our cityscapes—the one of mainstream politics.

2. *Homeowners living in communities governed by homeowner associations.*

Along with renters, there is another large group of people who cannot fully enjoy the privilege of using one's home to display expressive messages. Over 53% of American homeowners live in so-called "homeowner associations" ("HOAs")¹²⁴—privately controlled communities of proprietors. Agreements governing these communities include such details as the precise architectural design and the color of one's home, the color of the shutters and drapes, and the design of doghouses.¹²⁵ Posting signs is usually prohibited.¹²⁶ Deviating from these regulations may lead to "fines, costly litigation, and even foreclosure."¹²⁷ Like landlords, HOAs are regarded as private actors and exempted from constitutional scrutiny.¹²⁸ Many scholars have criticized HOAs as private systems of autocratic and intrusive rules extensively policing people's private lives.¹²⁹

¹²⁴ *About HOA-USA*, HOA-USA, <https://hoa-usa.com/about/> (last visited Sept. 26, 2021), archived at <https://perma.cc/TY7B-E7HQ>.

¹²⁵ Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "the Nice,"* 37 *URB. LAW.* 335, 335–37 (2005); see generally Todd Brower, *Communities within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 *J. LAND USE & ENV'T. L.* 203, 204 (1992).

¹²⁶ Franzese, *supra* note 126, at 339; DENNIS R. JUDD, *The Rise of the New Walled Cities, in SPATIAL PRACTICES: CRITICAL EXPLORATIONS IN SOCIAL/SPATIAL THEORY* 144, 144 (Helen Liggett & David C. Perry eds., 1995); Brian Jason Fleming, Note, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 *VAND. L. REV.* 571, 573–74 (2006); Monique C.M. Leahy, *Homeowners' Association Defense: Free Speech*, 93 *AM. JUR. TRIALS* 293 § 7 (2004).

¹²⁷ Franzese, *supra* note 126, at 338.

¹²⁸ *Brock v. Watergate Mobile Home Park Ass'n, Inc.*, 502 So. 2d 1380, 1382–83 (Fla. Dist. Ct. App. 1987) (finding that mobile home park homeowners' association lacked municipal character and thus did not stand in position of government so as to subject its conduct to constitutional limitations).

¹²⁹ *Id.*; Judd, *supra* note 127, at 158; Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 *WAKE FOREST L. REV.* 345, 349 (1992); JAMES L. WINOKUR, *Choice, Consent, and Citizenship, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST* 87, 99 (Stephen E. Barton & Carol J. Silverman eds., 1994); Laura Castro Trognitz, "Yes, It's My Castle": *Suits by Unhappy Residents Against Homeowners' Associations Grow*, 86 *A.B.A. J.* 30 (2000); Tim Vanderpool, *But Isn't This My Yard? Revolt Against Neighborhood Rules*, *CHRISTIAN SCI. MONITOR*, AUG. 18, 1999, at 2; Angela C. Carmella, *Religion-Free Environments in Common Interest*

As Franzese notes, extensive regulations of architecture, color, composition, and landscaping design creates “nice-looking” living communities, clean, orderly, controlled, and predictable.¹³⁰ All the houses look the same, communicating the message of “niceness”—standard property with stable prices and no room for expression of individuality. As another commentator notes, “[t]he prohibitions maintain the attractiveness of the community, help avoid negative community connotations, and prevent detrimental impact on property values.”¹³¹ Indeed, any deviations from the uniform appearance, such as a sculpture on one’s lawn, may have unpredictable effects on the prices of the neighbors’ property, and hence are forbidden for the sake of financial stability.¹³² Even clothing lines or a deviating color of shades disclose more personal information than is allowed into this reign of order and sterility.

As of today, there are already more than 350,000 HOAs in the US, and their number is constantly growing.¹³³ Hence, the narratives communicated by these standardized living communities have significant presence in the shared cityscapes. Listening to these narratives, we can hear the stories of social control exerted by capital and private property, of the power to sterilize people’s living environment, outlawing all expressions of creativity, spontaneity, and individuality (see Fig. 10).

Unlike renters, homeowners living under HOAs do occasionally appeal to courts in attempts to invalidate restrictive covenants curtailing their ability to display messages on their property. This difference between the two groups probably has to do with the fact that homeowners enjoy much greater legal protection and thus may try to enhance their free speech rights without risking their homes. Still, so far, such attempts have predominantly failed.¹³⁴

A notable exception is the *Cashio* case, decided in 1986.¹³⁵ In this case, several landowners in a community regulated by a HOA displayed small signs in their yards, reading “We Have a Right to Clean Water,” contrary to their contract with the HOA, which banned almost all signs.¹³⁶ The trial and the appellate courts found the signs to violate contract terms, but the Supreme Court of Louisiana reversed, basing its holding on contract interpreta-

Communities, 38 PEPP. L. REV. 57, 58, 89 (2010); Hannah J. Wiseman, *Rethinking the Renter/Owner Divide in Private Governance*, 2012 UTAH L. REV. 2067, 2067–69 (2012); Mark Cantora, *Increasing Freedom by Restricting Speech: Why the First Amendment Does Not and Should Not Apply in Common Interest Communities*, 39 REAL EST. L.J. 409, 410 (2011).

¹³⁰ Franzese, *supra* note 126, at 341–42.

¹³¹ Leahy, *supra* note 127, § 7.

¹³² *Id.*

¹³³ See HOA Statistics, Property Management (Sept. 26, 2021, 10:28 AM), <https://ipropertymanagement.com/research/hoa-statistics#:~:text=since%20the%201970s%2C%20American%20neighborhoods,associations%20in%20the%20United%20States,archived%20at%20https://perma.cc/KRU8-UWWV>.

¹³⁴ *E.g.*, Comm. For A Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 192 N.J. 344, 351–52 (N.J. 2007); Linn Valley Lakes Prop. Owners Ass’n v. Brockway, 824 P.2d 948, 948–49 (Kan. 1992); Loren v. Sasser, 309 F.3d 1296, 1296–97 (11th Cir. 2002).

¹³⁵ *Cashio v. Shoriak*, 481 So. 2d 1013 (La. 1986).

¹³⁶ *Id.* at 1014.

tion.¹³⁷ The court found that the restrictive covenant was not intended to apply to small political yard signs, but only to commercial signs: “If interpreted literally, this provision would ban all signs, [and the] residents would have to remove Season’s Greetings signs, Merry Christmas signs, Beware of Dog signs, political candidate signs, and residents’ name signs.”¹³⁸ Should the intention have been to restrict the use of all such signs, it would have been stated in unmistakable terms.¹³⁹ Although allowing the signs in the particular case, this decision did not advance the right of homeowners living under HOAs to post signs in any significant way. Since the decision is based on contract interpretation, HOAs can easily escape its precedent by using covenants clearly excluding political and other signs.

Indeed, since the *Cashio* decision, clearly formulated restrictive covenants have been consistently upheld. Severe restrictions,¹⁴⁰ and even complete bans on all residential signs,¹⁴¹ have been found to be reasonable exercises of the freedom of contract, especially given the HOAs’ purpose of preserving the aesthetic value of property.¹⁴² Courts have repeatedly held that HOAs are private organizations, and as such, cannot be held to have abridged free speech rights.¹⁴³ Homeowners who willingly consent to restrictive covenants cannot later claim that their constitutional rights have been violated.¹⁴⁴ Scholars have criticized this line of jurisprudence as unrealistic—indeed, looking for a home, most people face so many financial and geographical restrictions that they would accept any restrictive covenants if other requirements are met.¹⁴⁵ In addition, most people do not read every single paragraph of the contract when buying a home, and are often sur-

¹³⁷ *Id.* at 1014–16.

¹³⁸ *Id.* at 1016.

¹³⁹ *Id.* at 1016–17.

¹⁴⁰ *Comm. For A Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 192 N.J. 344, 351–52 (N.J. 2007) (holding that a provision allowing only very small signs on windows or in flower beds unreasonably restricts expressional activities).

¹⁴¹ *Linn Valley Lakes Property Owners Ass’n v. Brockway*, 824 P.2d 948, 948-49 (1992); *Loren v. Sasser*, 309 F.3d 1296, 1299 (11th Cir. 2002).

¹⁴² *Comm. For A Better Twin Rivers*, 192 N.J. at 351; *Linn Valley Lakes Property Owners Ass’n*, 824 P.2d at 948-49; *Loren*, 309 F.3d at 1299.

¹⁴³ *E.g.*, *Big Boulder Lake, Condo. Ass’n v. Cappuccio*, 673 A.2d 340, 342 (Pa. Super. Ct. 1996).

¹⁴⁴ *See Brock v. Watergate Mobile Home Park Ass’n, Inc.*, 502 So. 2d 1380, 1382–83 (Fla. Dist. Ct. App. 1987) (finding that mobile home park homeowners’ association lacked municipal character and thus did not stand in position of government so as to subject its conduct to constitutional limitations); *Judd*, *supra* note 127, at 158; *French*, *supra* note 130, at 349; *Winokur*, *supra* note 130, at 99; *Trognitz*, *supra* note 130, at 30; *Vanderpool*, *supra* note 130, at 2; *Carmella*, *supra* note 130, at 89; *Wiseman*, *supra* note 130, at 2067–69; *Cantora*, *supra* note 130, at 410.

¹⁴⁵ *See Brock*, 502 So. 2d at 1382–83 (Fla. Dist. Ct. App. 1987); *Judd*, *supra* note 127, at 158; *French*, *supra* note 130, at 349; *Winokur*, *supra* note 130, at 99; *Trognitz*, *supra* note 130, at 30; *Vanderpool*, *supra* note 130, at 2; *Carmella*, *supra* note 130, at 89; *Wiseman*, *supra* note 130, at 2067–69; *Cantora*, *supra* note 130, at 410.

prised to discover that their free speech rights are severely restricted by HOAs.¹⁴⁶

While HOAs often ban or extensively restrict the display of any signs or decorations, such rules are not evenly enforced. Thus, Christmas decorations, wreaths, and even large sculptures of the Virgin Mary are often displayed in violation of HOAs' rules, unless a neighbor complains about them.¹⁴⁷ Cases in which HOAs do appeal to courts in an attempt to enforce bans on signs reveal what kind of narratives are most severely suppressed in this context.

Unsurprisingly, HOAs act to enforce sign bans against messages that criticize them. Thus, in one case, a HOA did nothing against various decals and other decorations the residents placed on their doors and windows for years.¹⁴⁸ But once the defendants affixed to their windows a hand-written banner expressing their dissatisfaction with the HOA, it sued, claiming breach of contract.¹⁴⁹ Indeed, the contract stated: "the architectural integrity of the Building and the Units shall be preserved without modification . . . no sign, banner or other device . . . shall be erected or placed upon or attached to any such Unit or any part thereof."¹⁵⁰ The fact that the HOA did not see any danger to "architectural integrity" in other types of signs and decorations displayed by the residents did not convince the court that it was estopped from objecting to the defendants' critical banner.¹⁵¹ Adopting a notably narrow interpretation to the estoppel defense, the court held:

[T]here has been no showing that signs, such as the ones posted by the defendants, have been posted by others without objection by the plaintiffs. Without any such evidence, this court cannot find that the defendants reasonably relied to their detriment on the plaintiffs' tolerance.¹⁵²

In a similar case, Skyler Bryan, a resident in a newly built house, hung a handwritten sign from the front of his house facing the subdivision sales office and stating: "Before You Buy a Home in Here PLEASE See US."¹⁵³ As in the previous case, the HOA sued, claiming that the resident violated aesthetic contract restrictions.¹⁵⁴ While recognizing that the Bryan's attempt

¹⁴⁶ See *Brock*, 502 So. 2d at 1382–83 (Fla. Dist. Ct. App. 1987); Judd, *supra* note 126, at 158; French, *supra* note 130, at 349; Winokur, *supra* note 130, at 99; Trognitz, *supra* note 130, at 30; Vanderpool, *supra* note 130, at 2; Carmella, *supra* note 130, at 89; Wiseman, *supra* note 130, at 2067–69; Cantora, *supra* note 130, at 410.

¹⁴⁷ Angela C. Carmella, *Religion-Free Environments in Common Interest Communities*, 38 PEPP. L. REV. 57, 69, n. 52 (2010).

¹⁴⁸ *Devine v. Fischer*, No. 941808B, 1996 WL 1249885, at *1 (Mass. Super. Mar. 29, 1996).

¹⁴⁹ *Id.* at *1.

¹⁵⁰ *Id.* at *1.

¹⁵¹ *Id.* at *3.

¹⁵² *Id.* at *3.

¹⁵³ *Bryan v. MBC Partners, L.P.*, 541 S.E.2d 124, 125 (Ga Ct. App. 2000).

¹⁵⁴ *Id.* at 124.

to invite prospective buyers to engage in a discussion was constitutionally protected speech, the court nevertheless dismissed his claim to the First Amendment protection:

[A] person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest. This ancient rule applies to all the private relations in which persons may place themselves toward each other, and includes the waiver of constitutional rights.¹⁵⁵

Bryan claimed that the HOA was estopped from enforcing the ban on signs against him, because it did not object to holiday and seasonal decorations, or to multiple “under contract” signs placed by the building company.¹⁵⁶ Declining the estoppel defense, the court simply noted: “[HOA’s] failure to enforce the restriction against these signs did not waive its right to enforce the restriction against Bryan’s sign.”¹⁵⁷

These decisions give HOAs unparalleled control over the speech of their residents. Using their economic power, HOAs are able to impose extensive restrictive covenants on their residents. Meanwhile, being private entities, they are exempt from constitutional scrutiny and are thus at liberty to discriminate between different types of speech. By denying the estoppel defense, courts have given their explicit permission to a most far-reaching practice of suppressing speech: allowing cheerful holiday decoration and messages attracting prospective buyers while, at the same time, suppressing critical speech and messages warning such buyers. Apart from the implications of this judicial policy on the residents’ right to free expression, it has a significant detrimental effect on the other side of the freedom of speech—the right to hear.¹⁵⁸ Unlike the court, we do not believe that waiving one’s right to warn prospective buyers “does not injure others or affect the public interest.”¹⁵⁹ In fact, “under construction” signs and cheerful decoration may positively impress a prospective buyer of a home in a problematic building project, while “Before You Buy a Home in Here PLEASE See US” provides her with invaluable information, one that may shield her from a disastrous economic decision. Yet, here, as with PETA’s cases discussed above, messages favoring cheerfulness and consumption easily found their way into the cityscape while a message that advocated refraining from consumption was expelled. HOAs jurisprudence is thus another instance where courts al-

¹⁵⁵ *Id.* at 124.

¹⁵⁶ *Id.* at 125.

¹⁵⁷ *Id.*

¹⁵⁸ *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 806 (1978) (“The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas.”).

¹⁵⁹ *Bryan v. MBC Partners, L.P.*, 541 S.E.2d 124, 125 (Ga Ct. App. 2000).

low commercial narratives to spread their merry consumption-inducing cloak over cityscapes, concealing voices of opposition and discontent.

In addition to critical messages, HOAs frequently enforce restrictive covenants against “for sale” signs.¹⁶⁰ The reason why HOAs find such signs disturbing is obvious—they may implicitly signal discontent with the HOA, especially if they proliferate. “For sale” signs communicate the message that someone is leaving the HOA, as opposed to “under contract” signs, signaling that someone is joining. Accordingly, HOAs reject the former, but not the latter.

This policy of suppressing discontent is very much in tune with the “niceness” narrative HOAs strive to communicate: tidy homes, where everyone is happy and new members are joining. Signs of dissatisfaction and messages expressing the wish to leave are certainly out of place here. This “niceness” narrative is very reminiscent of dictatorial regimes that attempt to give the impression that their citizens are contented and happy, and constantly joined by new compatriots. Such regimes go to great lengths to conceal all signs of dissatisfaction and attempts to leave. While dictatorships do this for the sake of the regime’s stability, HOAs do it for the sake of financial stability. Both achieve similar results of creating universes of superficial contentedness by suppressing critical and creative expression. To borrow a quote from *Brave New World*, “universal happiness keeps the wheels steadily turning; truth and beauty can’t.”¹⁶¹

A further notable topic in the context of HOAs is political speech. As with renters, a few states safeguard a limited right of homeowners to display political signs,¹⁶² but most do not. Meanwhile, a vast number of HOAs completely ban the display of all types of signs and flags, including political signs.¹⁶³ As with other signs, courts upheld such bans, reasoning that HOAs are private entities and do not act under the color of law.¹⁶⁴ Contrary to this general tendency, the *Mazdabrook* decision recognized a right of a political candidate to display signs in support of his own candidacy, despite a HOA’s

¹⁶⁰ *E.g.*, *Tansey-Warner, Inc. v. E. Coast Resorts, Inc.*, 1978 WL 22460, at *1 (Del. Ch. 1978); *Quail Creek Prop. Owners Ass’n, Inc. v. Hunter*, 538 So. 2d 1288, 1288 (Fla. Dist. Ct. App. 1989); *Linn Valley Lakes Prop. Owners Ass’n v. Brockway*, 824 P.2d 948, 949 (Kan. 1992); *Midlake on Big Boulder Lake, Condominium Ass’n v. Cappuccio*, 673 A.2d 340, 341 (Pa. Super. 1996); *Anelli v. Arrowhead Lakes Community Ass’n, Inc.*, 689 A.2d 357, 362 (Pa. Commw. Ct. 1997); *Loren v. Sasser*, 309 F.3d 1296, 1296 (11th Cir. 2002); *Barr v. Camelot Forest Conservation Ass’n, Inc.*, 153 Fed. Appx. 860, 862 (3rd Cir. 2005); *Godley Park Homeowners Ass’n, Inc. v. Bowen*, 649 S.E.2d 308, 309 (Ga. Ct. App. 2007).

¹⁶¹ ALDOUS HUXLEY, *BRAVE NEW WORLD* 273 (Doubleday, Doran & company, inc. ed., 1st ed. 1932).

¹⁶² Cal. Civ. Code, Ch. 383, § 1353.6. For discussion of the differences in the scope of this right as related to renters and as related homeowners see Alexander, *supra* note 116.

¹⁶³ Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 234 (2006).

¹⁶⁴ *E.g.*, *Goldberg v. 400 E. Ohio Condo. Ass’n*, 12 F. Supp. 2d 820, 821 (N.D. Ill. 1998).

contradicting sign policy.¹⁶⁵ Stating that “[p]olitical speech in support of one’s candidacy for public office is fundamental to a democratic society,” the court found that the HOA violated the politician’s free speech rights.¹⁶⁶ This contradictory jurisprudence is somewhat puzzling. If HOAs’ sign bans do not violate free speech as long as non-politicians are concerned, why should they be found unconstitutional when applied against politicians? The *Mazdabrook* ruling reinforces the power of politicians over cityscapes: not only does political discourse itself enjoy a privileged position,¹⁶⁷ but individual politicians are entitled to a further privilege in the form of an inalienable right to display self-promotional messages on their property.

The last and perhaps the most curious topic in the context of HOAs is the American flag. A significant number of decisions revolve around the desire of homeowners to fly the national flag in spite of HOA’s restrictive covenants.¹⁶⁸

In the *Gerber* case decided in 1991, the court unmistakably sided with the resident. The patriotic tone in the first paragraphs leaves no doubt about the conclusion it would arrive at later:

At the center of the dispute stands one American who seeks to display the flag of our nation in defiance of condominium documents which forbid such display except on designated occasions. Plaintiff, an Air Force Veteran, will not have the Defendant determine the occasions on which he expresses his deep love and respect for America.¹⁶⁹

To further stress the importance it ascribed to the national ethos as opposed to alternative narratives, the court remarked:

It is a curious ordering of values, and a questionable jurisprudence, which would forbid a man from displaying the symbol of his country while staunchly defending the rights of others to deface, desecrate, and destroy that same symbol. Had Mr. Gerber chosen to burn his flag rather than display it in a dignified manner, public spirited lawyers would have appeared to help him protect his constitutional right to burn old glory. But to proudly display the

¹⁶⁵ *Mazdabrook Commons Homeowners’ Ass’n v. Khan*, 46 A.3d 507 (N.J. 2012); *see also* *Sabghir v. Eagle Trace Community Ass’n, Inc.*, 1997 WL 33635315 (S.D. Fla. 1997).

¹⁶⁶ *Mazdabrook*, 46 A.3d at 486.

¹⁶⁷ *Id.* at 488–90.

¹⁶⁸ *Gerber v. Longboat Harbour N. Condo., Inc.*, 724 F. Supp. 884, 884 (M.D. Fla. 1989), *vacated in part on reconsideration*, 757 F. Supp. 1339 (M.D. Fla. 1991); *Stone Hill Community Ass’n v. Norpel*, 492 N.W.2d 409, 409 (Iowa 1992); *Corwin v. B’Nai B’Rith Senior Citizen Hous., Inc.*, 489 F. Supp. 2d 405, 406–07 (D. Del. 2007); *Murphree v. Tides Condo. at Sweetwater by Del Webb Master Homeowners’ Ass’n, Inc.*, No. 3:13-CV-713-J-34MCR, 2014 WL 1293863, at *1–3 (M.D. Fla. Mar. 31, 2014).

¹⁶⁹ *Gerber*, 724 F. Supp. at 885.

United States Flag Mr. Gerber was forced to commence a federal lawsuit at his own expense.¹⁷⁰

Rather than establishing a broad right to free speech for HOA residents, the court in *Gerber* recognized a specific right to fly the national flag in front of one's own home in a "respectful manner":

The government of the United States derives its powers from the people, in whom such power is inherent. It is the people of the United States who are the true sovereigns, and it is the sovereignty of the people that is represented by the white stars in a blue field on our nation's flag. This Court will not countenance such treading upon the rights of those who would respectfully display the flag in front of their own home.¹⁷¹

Yet, the *Gerber* precedent was not followed by other courts. Only a year later, another court held that a restrictive covenant effectively prevented a war veteran from erecting a flag pole for the American flag.¹⁷² "By buying their property, the [defendants] agreed to abide by the restrictive covenants that came with it," it concluded.¹⁷³ In 1998, *Gerber* was described by another court as "old-fashioned patriotism" and "not good law."¹⁷⁴

Things have changed since the September 11, 2001, terrorist attacks. As patriotic feelings grew stronger, federal and state legislators became concerned with complaints of property owners who wished to display the American flag, but were prevented from doing so by HOAs' restrictive covenants.¹⁷⁵ In 2005, Congress enacted the Freedom to Display the American Flag Act.¹⁷⁶ Signing the Act, President George W. Bush noted: "Congress has passed an important measure to protect our citizens' right to express their patriotism here at home without burdensome restrictions."¹⁷⁷ The Act prescribes appropriate and respectful display of the flag.¹⁷⁸ At least twenty states enacted similar laws.¹⁷⁹ Thus, the legal state of affairs seems to

¹⁷⁰ *Id.* at 887.

¹⁷¹ *Id.*

¹⁷² *Stone Hill Cmty. Ass'n v. Norpel*, 492 N.W.2d 409, 409 (Iowa 1992).

¹⁷³ *Id.* at 410.

¹⁷⁴ *Goldberg v. 400 E. Ohio Condo. Ass'n*, 12 F. Supp. 2d 820, 822–23 (N.D. Ill. 1998).

¹⁷⁵ Genelle I. Belmas, *Pushing Patriotism: Why Flag Encouragement Doesn't Fly*, 14 COMM. L. & POL'Y 341, 341–42 (2009); see also *Corwin v. B'Nai B'Rith Senior Citizen Hous., Inc.*, 489 F. Supp. 2d 405, 406–07 (D. Del. 2007) (dismissing homeowners' claim to a right to display the American flag after 9/11).

¹⁷⁶ Freedom to Display the American Flag Act of 2005, 4 U.S.C. 5 note, Pub. L. 109-243 (2005).

¹⁷⁷ President Bush, President's Statement on Signing of the Freedom to Display the American Flag Act of 2005, Press Release, July 24, 2006 (Sept. 26, 2021, 12:13PM), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060724-6.html>, archived at <https://perma.cc/6UYK-7NWT>; see also Belmas, *supra* note 176, at 341.

¹⁷⁸ Freedom to Display the American Flag Act of 2005, 4 U.S.C. 5 note, Pub. L. 109-243, § 3 (2005); see also Belmas, *supra* note 176, at 349–50.

¹⁷⁹ Belmas, *supra* note 176, at 349.

be that *Gerber's* precedent establishing a right to respectfully display the American flag is “good law” again.

Scholars have pointed out that although the flag legislation seeks to protect homeowners’ expressive rights, in fact, it only protects one specific type of expression: a respectful display of the national flag.¹⁸⁰ Such content-based regulation would have been unimaginable if imposed by a state actor in, for instance, a zoning ordinance. Yet, in an attempt to extend the homeowners’ freedom of expression, the flag laws create a privilege to a specific type of speech, to the exclusion of all others. Borrowing Henry Ford’s famous quote,¹⁸¹ one may say that homeowners living under HOAs can display whatever expressive symbol they want, as long as it is the American flag (See Fig. 13).¹⁸²

FIGURE 13 – *Various & Gould, Stars and Bricks, Critical displays of the American flag may be found as illegal contributions to the cityscape. Berlin 2017.*



To summarize, this section has identified several winners and losers of narrative battles in the context of HOAs. The winners are the narratives of “niceness,” order, tidiness, uniformity, contentedness, consumerism and the power of property, along with the narratives of Christianity and patriotism.

¹⁸⁰ See, e.g., *id.* at 352–53; Note, *Speech Exceptions*, 118 HARV. L. REV. 1709, 1725–26 (2005).

¹⁸¹ “Any customer can have a car painted any color that he wants so long as it is black.”

¹⁸² *But see* *Murphree v. Tides Condo. at Sweetwater by Del Webb Master Homeowners’ Ass’n, Inc.*, No. 3:13-CV-713-J-34MCR, 2014 WL 1293863 (M.D. Fla. Mar. 31, 2014). In this curious decision, the court held that the Freedom to Display the American Flag Act does not create a private right of action against HOAs.

The losers are the narratives of creativity, individuality, spontaneity, discontent and criticism.

3. *Homeowners living outside communal arrangements.*

Homeowners living outside of communal arrangements, that is, owners of private homes, naturally enjoy the most extensive freedom to use their homes as platforms for messages. Yet, this freedom can be restricted by local zoning ordinances. As already mentioned, courts consistently hold that sending messages from one's home is an important and distinct medium of communication. Hence, zoning regulations that result in foreclosing this medium altogether are deemed unconstitutional under the First Amendment.¹⁸³

For less restrictive local ordinances, two different levels of scrutiny apply. If the regulation is content-based, it must withstand strict scrutiny, which means that it must further *compelling* governmental interests and be narrowly tailored to achieve them.¹⁸⁴ If the regulation is content-neutral, it is examined according to a less demanding standard of intermediate scrutiny, which means that it must advance *substantial* governmental interests and must not restrict more speech than necessary to further these interests.¹⁸⁵ In practice, classifying a zoning regulation as content-based usually means that it will be held to be unconstitutional. This is because most zoning regulations aim at promoting aesthetics and traffic safety—interests that have been recognized as *substantial*, but not *compelling*, and consequently, not sufficient to withstand strict scrutiny.¹⁸⁶

Homeowners prevail in the vast majority of cases involving owners of private homes wishing to display expressive messages, despite zoning regulations banning this type of sign. Courts routinely find the regulations in question too drastic,¹⁸⁷ content-based,¹⁸⁸ or too vague.¹⁸⁹ In other words, unlike renters and homeowners living under HOAs, owners of private homes enjoy substantial freedom to embed their messages into the cityscape.

¹⁸³ See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); *WW Westwood, LP v. City of Los Angeles*, No. SA CV 01-294 DOC ANX, 2001 WL 36399458, at *7 (C.D. Cal. Dec. 4, 2001); *Bowden v. Town of Cary*, 754 F. Supp. 2d 794, 806–07 (E.D.N.C. 2010), *rev'd and remanded sub nom. Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013) (holding the regulation was, in fact, constitutional).

¹⁸⁴ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015).

¹⁸⁵ See, e.g., *Turner*, 512 U.S. at 642; *Wag More Dogs Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359, 360 (4th Cir. 2012).

¹⁸⁶ See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981); *Savago v. Vill. of New Paltz*, 214 F. Supp. 2d 252, 259 (N.D.N.Y. 2002).

¹⁸⁷ See, e.g., *Martin v. Wray*, 473 F. Supp. 1131, 1138 (E.D. Wis. 1979); *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994).

¹⁸⁸ See, e.g., *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015).

¹⁸⁹ See, e.g., *Lusk v. Village of Cold Spring*, 475 F.3d 480, 492 (2d Cir. 2007).

Granting one group a privilege while denying another group the same privilege without a sufficient reason always creates injustice.¹⁹⁰ And owning a private home is not grounds enough to be entitled to a superior position in the social discourse. As courts note, people of modest means cannot afford the expenditures associated with communication with larger audiences or the time required to distribute leaflets.¹⁹¹ But it is also people with modest means who cannot participate in the public discourse by displaying messages on their property. This result is unjustified. The injustice caused by the highly unequal distribution of property does not have to project itself into the realm of expression (See above, Fig. 10).¹⁹²

To illustrate this point, consider three decisions that dealt with property owners opposed to planning programs that could negatively affect the fiscal value of their property. In the first case, a resident of the historic district of Cold Spring, New York, protested against a real estate development on the Cold Spring waterfront. He displayed large signs reading “Think that building is big,” “Why does local government change zoning laws for condos?” and “Help save the waterfront from 40’-foot high monster condos.”¹⁹³ These signs violated the local zoning regulations that aimed to preserve the historic character of the district.¹⁹⁴ Finding that the provision authorizing the city to decide whether the signs were “visually compatible” with the district or “historically appropriate” was too imprecise, the court struck it down.¹⁹⁵

Two further cases dealt with homeowners opposed to eminent domain programs planned by their cities, St. Louis, Missouri, in the first case and Norfolk, Virginia, in the second.¹⁹⁶ Both erected large signs—363 and 375 square feet—stating “End Eminent Domain Abuse” and “50 Years on this street / 78 Years in Norfolk / Threatened by / EMINENT DOMAIN!” In both cases, the signs violated local zoning codes and the cities ordered their removal. Both property owners contested these decisions, and both courts found the respective zoning codes to be content-based.¹⁹⁷ In St. Louis, the zoning code restricted the size of residential signs, but exempted national, state, and religious symbols, along with some other signs.¹⁹⁸ Similarly, the Norfolk regulation did not extend to governmental or religious flags and

¹⁹⁰ See generally CARLA SHEDD, *UNEQUAL CITY: RACE, SCHOOLS, AND PERCEPTIONS OF INJUSTICE* (2015).

¹⁹¹ E.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994).

¹⁹² See also Mortellaro, *supra* note 109, at 179 *et seq.* (proposing legislation aimed at ending the political inequalities between homeowners and renters).

¹⁹³ *Lusk*, 475 F.3d at 482.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 495–96.

¹⁹⁶ *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 728–29 (8th Cir. 2011); *Cent. Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 625 (4th Cir. 2016).

¹⁹⁷ *Neighborhood Enterprises*, 644 F.3d at 736–37; *Cent. Radio*, 811 F.3d at 628.

¹⁹⁸ *Neighborhood Enterprises*, 644 F.3d at 739.

emblems.¹⁹⁹ Subjecting these regulations to strict scrutiny, both courts invalidated them, allowing the signs to remain.²⁰⁰

Note that opposite opinions, favoring the plan to build large condos or siding with the local eminent domain policy, did not have the same chance of contributing to public discourse taking place on the streets of Cold Spring, St. Louis, and Norfolk: while owners of private homes could hardly support such policies, non-owners had no adequate platform to display their messages in the cityscape. (See Fig. 14-16). In other words, imbuing private homeownership with free speech privileges has the practical effect of allowing narratives that support the current property distribution into cityscapes, while excluding contesting voices.

FIGURE 14 – *SP38, Evicted with Love, Berlin 2017. This and the following two figures illustrate the narratives of non-homeowners, excluded from the official cityscapes.*



¹⁹⁹ *Cent. Radio*, 811 F.3d at 633.

²⁰⁰ *Neighborhood Enterprises*, 644 F.3d at 737–38; *Cent. Radio*, 811 F.3d at 634.

FIGURE 15 – No Hostel!, Berlin 2019.



FIGURE 16 – Berlin 2020.



Naturally, messages related to homeownership are not the only ones private homeowners wish to convey. The right to use one's property to embed expressive messages into cityscapes gives homeowners a significant advantage in the "marketplace of ideas." For instance, in 1992, while running

for sheriff of Gladstone, Missouri, Larry Whitton challenged the constitutional validity of Gladstone's Sign Ordinance that permitted the display of political signs only 30 days before the elections and 8 days after them.²⁰¹ Mr. Whitton owned residential and commercial property, which he wished to use as a platform to promote his candidacy. Analyzing the sign code, the court noted that it permitted "For Sale" or "For Rent" signs and allowed advertising in commercial zones. The time limitation applied to political signs but not to other type of signs. Based on this finding, the court invalidated the code as a content-based restriction on free speech.²⁰²

Accordingly, Mr. Whitton acquired the right to promote himself indefinitely on all of his residential and commercial properties. This case provides another illustration of the power of property owners to imbue cityscapes with narratives of their choice. Notably, numerous additional cases upheld the right of politicians to display signs in support of their candidacy on their property, striking down local ordinances that stood in the way of this right.²⁰³ The same is true for voting-related messages displayed by non-politicians in support of their favorite candidates,²⁰⁴ or their views related to a referendum.²⁰⁵ Time restrictions on such signs have been consistently held to be unconstitutional,²⁰⁶ along with size limits²⁰⁷ and location-related confinements.²⁰⁸

In addition to this broad freedom to post political signs, owners of private homes also enjoy extensive freedom as to the content of these signs. Examples include signs reading "Say No to War in the Persian Gulf. Call Congress now!"²⁰⁹ and "Dubya—End the occupation. Stop murdering the poor in Iraq and help the poor in New Orleans!",²¹⁰ as well as a mural quoting a comment made by Donald Trump, recorded in a 2005 "Access

²⁰¹ *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1401 (8th Cir. 1995).

²⁰² *Id.* at 1403.

²⁰³ *See, e.g., Sabghir v. Eagle Trace Cmty. Ass'n, Inc.*, 1997 WL 33635315 (S.D. Fla. Apr. 30, 1997) (denying City's motion to dismiss); *Sugarman v. Vill. of Chester*, 192 F. Supp. 2d 282, 302 (S.D.N.Y. 2002); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1219 (11th Cir. 2006); *Iocovozzi v. Vill. of Herkimer*, 2010 WL 11681613, at *3 (N.D.N.Y. July 13, 2010) (granting preliminary injunction restraining Village from enforcing law); *Breden Koetter v. City of Florissant*, 2012 WL 639710, at *1 (E.D. Mo. Feb. 27, 2012) (granting summary judgment after City repealed ordinance).

²⁰⁴ *Martin v. Wray*, 473 F. Supp. 1131, 1132 (E.D. Wis. 1979); *Matthews v. Town of Needham*, 764 F.2d 58, 58 (1st Cir. 1985).

²⁰⁵ *Fiedorowicz v. City of Pewaukee*, 2004 WL 6338545, at *1 (E.D. Wis. Apr. 9, 2004).

²⁰⁶ *See, e.g., id.*; *Fehribach v. City of Troy*, 341 F. Supp. 2d 727, 730–31 (E.D. Mich. 2004); *Auspro Enterprises, LP v. Texas Dep't of Transportation*, 506 S.W.3d 688 (Tex. App. 2016); *Street v. City of Harrisonville*, 2018 WL 4088083, at *1 (W.D. Mo. Aug. 27, 2018) (enjoining City from enforcing ordinance).

²⁰⁷ *O'Boyle v. Town of Gulf Stream*, 667 F. App'x 767, 768 (11th Cir. 2016) (remanding in light of *Reed*); *Quinly v. City of Prairie Vill., Kan.*, 446 F. Supp. 2d 1233 (D. Kan. 2006) (granting preliminary injunction).

²⁰⁸ *Clark v. City of Williamsburg, Kansas*, 388 F. Supp. 3d 1346, 1346 (D. Kan. 2019) (holding ban on the placement of signs in city's right-of-way unconstitutional).

²⁰⁹ *City of Ladue v. Gilleo*, 512 U.S. 43, 45 (1994).

²¹⁰ *Quinly*, 446 F. Supp. 2d at 1234.

Hollywood” segment, and replacing with pictograms two vulgar words uttered by him.²¹¹

Thus, while renters or homeowners living under HOAs are most often deprived of the right to post political messages altogether, and even within the most protective state jurisdictions enjoy only a limited right to post small election-related signs for short periods of time, owners of private homes may use their property to display any political messages of any size for any period of time. Put simply, owning a private home gives one significant power to communicate one’s message in our shared visual environment. And the more real property one owns, and the larger this property is, the greater this power. Yet, it is hard to think of a philosophical argument that would justify assigning speech rights according to the real property assets one owns.

Despite the broad freedom to display expressive messages enjoyed by owners of private homes, courts occasionally do exclude some of their messages from cityscapes. Thus, in two cases, courts dismissed free speech claims of residents who were ordered by local authorities to take their signs down. In one of them, a homeowner was prevented from displaying political messages contrary to the political ideology espoused by county officials.²¹² In the other, the local authorities of Pittsburg issued fines against a Black homeowner and ultimately made him remove a sign reading “YOU CAN HANG A NIGGER FROM A TREE EQUAL RIGHTS HE’LL NEVER SEE,” which he posted in protest of the lawsuits brought against him.²¹³ In both cases, courts applied sophisticated judicial doctrines, such as *res judicata*, lack of substantive merit,²¹⁴ lack of adequate notice of the claim, and failure to state any claims to uphold the officials’ decisions.²¹⁵

Reasonable and neutral as these doctrines may be, it is striking that they have been applied only against the most controversial types of speech. In contrast, courts have consistently shown great willingness to enable messages conforming to the dominant narratives. This is especially true for patriotic and national messages, including tributes to American heroes,²¹⁶ such as a sign depicting two American flags and proclaiming, “Keep looking over your shoulder terrorists—we’re coming for you. God bless America,”²¹⁷ as well as signs supporting U.S. Olympic teams.²¹⁸ The language of judicial decisions leaves no doubt that the courts know what the right outcome is and will choose the proper legal way to arrive at this out-

²¹¹ *Morris v. City of New Orleans*, 350 F. Supp. 3d 544, 548 (E.D. La. 2018).

²¹² *Citizens for Free Speech, LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 976 (N.D. Cal. 2016).

²¹³ *Parker v. City of Pittsburg*, 2017 WL 2986225, at *1 (N.D. Cal. July 13, 2017).

²¹⁴ *Citizens for Free Speech*, 338 F. Supp. 3d at 995.

²¹⁵ *Parker*, 2017 WL 2986225, at *1.

²¹⁶ *WW Westwood, LP v. City of Los Angeles*, No. SA CV 01-294 DOC ANX, 2001 WL 36399458, at *1 (C.D. Cal. Dec. 4, 2001) (sign depicting Statue of Liberty).

²¹⁷ *Savago v. Vill. of New Paltz*, 214 F. Supp. 2d 252, 253–54 (N.D.N.Y. 2002).

²¹⁸ *See, e.g., Thomas v. Schroer*, 248 F. Supp. 3d 868, 880 (W.D. Tenn. 2017); *Thomas v. Bright*, 937 F.3d 721, 724 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 194 (2020).

come. Consider, for instance, the first words of the decision on tributes to American heroes:

This case involves the ideals of local governance, patriotism, and free speech, all of which are hallmarks of our national identity. Resolution of this case is therefore highly charged, especially at a time when our nation has been under attack at home and its ideals challenged across the globe. Fortunately, the rule of law, another of our country's great traditions, provides a simple framework to adjudicate this dispute through the application of familiar and firmly-rooted precedents.²¹⁹

And now compare this passage to the closing words of the *Parker* case, in which a homeowner was forced to remove a sign relating to racial discrimination: “Mr. Parker’s complaint fails to state any claims, and the court dismisses the complaint without prejudice[.]”

This radical difference in the courts’ rhetoric—the first compassionate and goal-oriented, the second formal and distanced—makes clear that courts do tend to treat different narratives differently, and that those conforming to the mainstream are treated far more favorably than those challenging it.

A further example to illustrate this point is the *Willson* legal saga. In 2015, following the unrest in Ferguson, Lawrence Willson, a homeowner in the City of Bel-Nor, Missouri, put the sign “Black Lives Matter” in his yard, along with several other political signs. The city demanded removal of these signs because they violated the local sign ordinance, and the parties went to court. Willson argued that the ordinance was content-based, since it exempted flags. He himself had a flag in his yard, reading “Irish for a day,” which had never been opposed by the city.²²⁰ In the first decision, issued in 2018, the District Court for the Eastern District of Missouri dismissed Willson’s argument, maintaining that the distinction between flags and other signs was content-neutral.²²¹ “[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections. . . . Plaintiff has failed to establish that such a danger exists,” the court concluded.²²² Note that Pulphus’ painting discussed above was also created as a commentary on the violent events in Ferguson, which contained roughly the same political message—“Racism Kills”—and was banned from the public view just a year before.²²³

In 2019, the Court of Appeals reversed the first *Willson* judgement, finding the distinction between flags and signs to be content-based.²²⁴ On remand, the District Court found that “Bel-Nor’s sign Ordinance is an un-

²¹⁹ *WW Westwood*, 2001 WL 36399458, at *1.

²²⁰ *Willson v. City of Bel-Nor, Mo.*, 298 F. Supp. 3d 1213, 1220 (E.D. Mo. 2018).

²²¹ *Id.* at 1220–21.

²²² *Id.* at 1221.

²²³ *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 241 (D.D.C. 2017).

²²⁴ *Willson v. City of Bel-Nor, Mo.*, 924 F.3d 995, 1001–04 (8th Cir. 2019).

constitutional restraint on [Willson’s] free speech rights.”²²⁵ Indeed, the question whether distinguishing between flags and signs is or is not content-based allows much room for interpretation. The change of legal position seems to have much to do with the “Black Lives Matter” movement entering mainstream discourse at the time the legal proceedings took place. As already noted, by allowing critical views into the cityscape only after these views become widely accepted, courts close a significant avenue for a most important type of expression—one that seeks to reveal injustices and promote changes—thereby obstructing the respective social and political processes (See Fig. 17).

FIGURE 17 – “Calm down, I said NIGGA and not NIGGER.” Part of a graffiti campaign seeking to bring attention to everyday racism.²²⁶ Berlin 2020.



Finally, many people likely would not go to court if local authorities demanded that they remove signs displayed on their property and issued fines, but would simply take the signs down. Therefore, enforcement policy plays an important role in this context. As some decisions reveal, local authorities do not treat all expressive messages equally. For instance, while the City of Bel-Nor fought against Mr. Willson’s “Black Lives Matter” sign, it did not object to signs with less controversial messages, such as those sup-

²²⁵ Willson v. City of Bel-Nor, Mo., 470 F. Supp. 3d 994, 1011 (E.D. Mo. 2020).

²²⁶ #myskinmyproblem, Daniel Ihrke, <https://www.daniel-ihrke.de/myskinmyproblem>, archived at <https://perma.cc/HP93-SYY9>.

porting a political candidate.²²⁷ In another case, the city ordered a resident to take down signs reading “Occupy Wall Street” and bearing similar anti-capitalist messages, while at the same time doing nothing against a banner reading “We Support Our Troops” that violated the very same ordinance.²²⁸ Another city tolerated non-political murals, but requested taking down the already mentioned mural with Donald Trump’s vulgar words.²²⁹ Finally, many cases demonstrate that cities frequently apply responsive enforcement policy, taking action against illegal signs in response to complaints.²³⁰ This enforcement policy is another mechanism of reinforcing mainstream narratives in our shared cityscapes, while putting socially controversial issues out of sight (See Fig. 1 above, and Fig. 18-19).

FIGURE 18 – *Gonzoe, “Capitalism Kills,” Berlin 2020. This and the following figure are examples of non-mainstream narratives finding their way into unofficial cityscapes.*



²²⁷ *Willson v. City of Bel-Nor, Mo.*, 298 F. Supp. 3d 1213 (E.D. Mo. 2018), *rev'd and remanded*, 924 F.3d 995 (8th Cir. 2019).

²²⁸ *Hensel v. City of Little Falls, Minn.*, 992 F. Supp. 2d 916, 919 (D. Minn. 2014).

²²⁹ *Morris v. City of New Orleans*, 350 F. Supp. 3d 544, 548 (E.D. La. 2018).

²³⁰ *See, e.g., Hensel*, 992 F. Supp. 2d at 919; *Morris*, 350 F. Supp. 3d at 548.

FIGURE 19 – “*Brave Migrants,*” Berlin 2020.

To recapitulate the narrative battles in the context of privately owned homes: one significant narrative that cityscapes communicate is the importance of economic power and the privileged social position of those with wealth and property. Relatedly, we have identified narratives supporting the current property distribution and opposing changes of the status quo, such as building condos in a primarily private residence-owned neighborhood. Other narratives allowed into the cityscape were nationalism, patriotism, and support for the war on terrorism, as well as for other wars. At the same time, an anti-capitalist message and a claim of judicial injustice towards the Black community were excluded from the cityscape. Notably, the narrative opposing violence towards the Black community was first excluded from and then allowed into the cityscape, as the “Black Lives Matter” movement joined the mainstream discourse.

C. Commercial Property

Commercial property often entertains commercial speech, which is not considered to be a highly valuable type of expression,²³¹ and enjoys less protection under the First Amendment than political or artistic speech.²³² Nevertheless, commercial speech is the very type of expression that has the most dominant imprint on our shared cityscapes. This situation, in which the least valuable and the least protected speech is at the same time the most

²³¹ Fla. Bar v. Went for It, Inc., 515 U.S. 618, 623 (1995).

²³² *Id.*; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 563 (1980).

prevalent one, has everything to do with the power of property rights. Indeed, courts recognize that not only individuals, but also corporations enjoy the right to put expressive messages on their property.²³³

Meanwhile, many premises, especially in the most central and significant parts of cities, are owned by various commercial enterprises. This ownership, coupled with the right to put messages on one's property, results in cityscapes dominated by commercial messages. Store signs, showcases, prominently displayed trademarks, as well as advertising billboards, all relentlessly narrate the central role of business in our society and the importance of consumption in our lives (See Fig. 20-21).²³⁴ The commercialization of cityscapes grows ever stronger because of the recent trend of creating "privately owned public spaces" ("POPS").²³⁵ Indeed, many cities across the globe increasingly privatize significant urban spaces, including plazas, arcades, parks, squares, gardens, and atriums. POPS redefine public spaces as sites primarily designed for consumption, thus further reinforcing the hegemony of commerce over cityscapes.²³⁶

FIGURE 20 – *Street view in Berlin, 2020.*



²³³ *WW Westwood, LP v. City of Los Angeles*, 2001 WL 36399458, at *1 (C.D. Cal. Dec. 4, 2001).

²³⁴ Assaf, *supra* note 81, at 15.

²³⁵ Bradley L. Garrett, *Squares for Sale! Cashing Out on Public Space*, in *THE RIGHT TO THE CITY: A VERSO REPORT*, Ch. 6 (David Adler ed., 2017). Another trend is leasing public spaces to commercial corporations. See, e.g., *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 129 (1st Cir. 2006).

²³⁶ Assaf-Zakharov & Schnetgöke, *supra* note 58, at 27–28.

FIGURE 21 – A plaza in Berlin, 2020.



Notably, local sign codes restricting commercial speech need only withstand intermediate, rather than strict scrutiny.²³⁷ Hence, even if content-based, these codes must further *substantial*, rather than compelling, governmental interests. Since such regulations usually promote aesthetics and traffic safety—which have been recognized as substantial interests—one might expect that local sign codes may effectively regulate messages posted by commercial enterprises without implicating the First Amendment. Indeed, cities do enjoy significant leeway when regulating advertising on billboards.²³⁸

Yet not all speech originating with a commercial entity is classified as commercial. Notably, in many cases, courts found that murals adorning the walls of various commercial establishments did not constitute commercial speech.²³⁹ Courts identified them as either ideological or artistic speech, both entitled to the highest degree of First Amendment protection. Consequently, courts allowed the murals to stay, striking down local regulations that

²³⁷ *Wag More Dogs Liab. Corp. v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012); *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 377 F. Supp. 3d 670, 682–83 (W.D. Tex. 2019).

²³⁸ *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 493 (1981) (upholding ban on off-premises advertising); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 98 (2d Cir. 2010) (same).

²³⁹ *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1332 (M.D. Fla. 2009); *City of Indio v. Arroyo*, 143 Cal. App. 3d 151, 158 (Cal. Ct. App. 1983); *Mahaney v. City of Englewood*, 226 P.3d 1214, 1217 (Colo. App. 2009), *as modified on denial of reh'g* (Jan. 21, 2010).

banned them.²⁴⁰ Not surprisingly, commercial enterprises do not strive to display art challenging mainstream aesthetic canons or social conventions. Indeed, all these cases describe murals painted in realistic style. In one case, a mural portrayed some aspects of Mexican heritage, social advancements of Mexican people in contemporary society, as well as today's youth viewing the future.²⁴¹ In another, a mural pictured a sea scene with a dolphin, a snook, a redfish, a tarpon, and some other fish species.²⁴² In a third case, one mural depicted Bob Marley, Jimi Hendrix, Janis Joplin, and some other deceased rock stars, while another portrayed a scene from Lewis Carroll's "Alice's Adventures in Wonderland."²⁴³ In other words, allowing commercial enterprises to adorn their external walls with murals is another way to imbue our shared urban spaces with conventional and non-controversial art.

Cases involving commercial corporations wishing to display controversial art are notably scarce, which is understandable given the interest in avoiding topics that may alienate potential consumers. Nevertheless, we have found one such decision, in which a restaurant owner in the City of Charleston, impressed by an exhibition of the painter Robert Burke, commissioned him to create a mural on an external wall of his restaurant.²⁴⁴ Burke painted a piece depicting an imaginary cartoon creature world. Through the mural, Burke attempted to convey a message of tolerance for diversity by showing different creatures co-existing peacefully.²⁴⁵ Burke's mural generated public controversy and extensive media attention. Many city residents opposed the mural, but others were favorably impressed and even tried to commission him to paint on their own property.²⁴⁶ The city ordered the owner to remove the mural because it violated the local sign ordinance. The restaurant owner did not sue. Instead, Burke himself went to court, alleging that the ordinance violated his free speech rights. Similarly to cases involving artists whose works were commissioned by local authorities but later removed because of controversial reactions, the *Burke* court held that the artist had no standing, since he had suffered no "injury in fact":

The speech being regulated or infringed upon in this case is the speech of the owner of [the restaurant]; only that person or entity might elect whether to "express" Burke's fantasy, as depicted in the creature world mural, by displaying it in the District. Burke relinquished his First Amendment rights embodied in the mural

²⁴⁰ *Mahaney*, 226 P.3d at 1217. *But see* *Tipp City v. Dakin*, 186 Ohio App. 3d 558, 573 (2010) (finding that a "mad scientist" mural constituted commercial speech and upholding the sign ordinance that banned it); *Carpenter v. City of Snohomish*, 2007 WL 1742161, at *1 (W.D. Wash. June 13, 2007) (upholding the local regulation of a historical district demanding all murals be "sympathetic to historical context").

²⁴¹ *City of Indio*, 143 Cal. App. 3d at 154.

²⁴² *Complete Angler*, 607 F. Supp. 2d at 1329.

²⁴³ *Mahaney*, 226 P.3d at 1216.

²⁴⁴ *Burke v. City of Charleston*, 139 F.3d 401, 403 (4th Cir. 1998).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 404.

when he effectively sold it to [the restaurant owner], by creating it on [his] real property . . . We fail to discern how the operation of the ordinance in respect to Burke's right to artistic expression amounts to a concrete injury, rather than a mere tangential effect, at best. [The restaurant owner] commissioned Burke to create a work of art, and had little, if any input, into the creative process. Nevertheless, the legally cognizable injury arising from the Charleston ordinance falls upon the party who alone has the right to display the work, not the person who creates it.²⁴⁷

This judicial position is another instance in which the legal system disempowers the real speaker—the artist—and vests all the power in the hands of the property owner. Since commercial corporations own much property, they have significant freedom to decide about art adorning the cityscape. In addition, in many cases, local ordinances oblige developers to acquire art for the public spaces in the neighborhoods, in which they build, in order to improve the aesthetics within the city and bolster real property values.²⁴⁸ All this commercially motivated art—murals on stores and public art put by developers—obviously seeks to please and amuse the observer and make the businesses and neighborhoods more attractive. Understandable as this goal may be, it reduces public art to mere entertainment (See Fig. 22).

²⁴⁷ *Id.* at 405–06.

²⁴⁸ See discussion of such rules in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 862 (1996); *Bldg. Indus. Ass'n-Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1056 (N.D. Cal. 2018).

FIGURE 22 – *One Truth Crew and Akte One. A commissioned mural, Berlin 2020.*



Several cases have dealt with artists who painted murals on commercial buildings and sought to protect their works against destruction under VARA. As already mentioned, VARA protects only artistic works of “recognized stature,” which has proved to be a significant hurdle, excluding many artworks from the scope of VARA’s protection.²⁴⁹ Yet, in several cases, courts did recognize that the works in question were prominent masterpieces worthy of preservation.

The *Hanrahan* case, decided in 1998, dealt with a curious factual background.²⁵⁰ The Ventura County Department of Alcohol and Drug Programs funded a community mural project. Curiously, it requested and received the permission of a liquor store owner to paint the mural on a side of his store. The project was carried out by a professional artist, who collaborated with about 300 young community members in the creation of the mural.²⁵¹ The mural included three youths of different racial backgrounds painting over a billboard featuring a couple smoking and drinking. The youth incorporated the word “Cool” from the billboard, adding words so that the message reads “It’s Not Cool to Target Kids.”²⁵² The mural was embraced by the community, received national acclaim, won awards, and was featured in a book.²⁵³

²⁴⁹ See, e.g., *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995).

²⁵⁰ *Hanrahan v. Ramirez*, 1998 WL 34369997, at *1–2 (C.D. Cal. June 3, 1998).

²⁵¹ *Id.* at *1.

²⁵² *Id.*

²⁵³ *Id.* at *5.

Yet, three years later, the store owner decided to whitewash it and cover the area with a message more conforming to the spirit of its business: a picture of the American flag and the message “Fourth of July Independence Day, Welcome to Avenue Liquor.”²⁵⁴ He had covered one-third of the mural when the case reached the court. Meanwhile, the partial destruction of the famous artwork received press coverage, and Ventura residents held a rally to express support for the remaining portion of the mural.²⁵⁵

Confirming the importance of the artwork and its status as “recognized stature,” the court emphasized:

The Avenue area of Westside Venture is reportedly the most economically depressed and racially diverse area of Ventura. The Avenue Liquor mural was the first mural on the Avenue, designed and created by people of that neighborhood.²⁵⁶

The court ultimately recognized the right of the artist, who carried out the project, to protect the artwork against destruction under VARA. It ordered the owner to restore the mural at his expense.²⁵⁷

The *Hanrahan* decision demonstrates that another concept of property is possible: one that would restrict the control of real estate owners over the walls that shape our shared visual environment. Like in the *Hanrahan* case, the right to design these walls can be given to community members. Notably, the facts of this case were rather exceptional: the mural was initially painted with the owner’s permission, the work of the community members was coordinated by a professional artist who could be regarded as the copyright owner, and the mural received much acclaim. The circumstances in most cases, in which someone paints on someone else’s property, are different. Nevertheless, the *Hanrahan* case is a good reference point for imagining an alternative legal order.

Another case in which artworks on commercial property were protected under VARA concerned the story of 5Pointz, a site located in Long Island City, New York, which became a “graffiti mecca” in 2002, attracting artists from all over the world.²⁵⁸ The paintings were made with the consent of the property owner, who appointed a curator to supervise the artistic activity.²⁵⁹ Yet, all the paintings were made without any economic compensation.²⁶⁰ In 2013, the owner of the buildings decided to tear them down to make way for “high-rise luxury condos.”²⁶¹ The artists applied to the District Court for the

²⁵⁴ *Id.* at *2.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at *4.

²⁵⁷ *Id.* at *7. A somewhat similar decision was reached in *Williams v. City of Atlanta, Ga.*, 2018 WL 2284374, at *10 (N.D. Ga. Mar. 30, 2018). Yet, this case dealt with a single famous artist: the court ordered preserving and reinstalling his work on a private building.

²⁵⁸ *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 224 (E.D.N.Y. 2013).

²⁵⁹ *Id.* at 218–19.

²⁶⁰ *Id.* at 227.

²⁶¹ *Id.* at 220.

Eastern District of New York for a preliminary injunction prohibiting the planned demolition.²⁶²

To establish whether the works in question were of “recognized stature,” the court relied upon testimonies of art professors, well-known gallerists, and private art collectors.²⁶³ It found that only works of world-renowned artists, whose paintings had been acquired by museums, featured in movies, discussed on TV, written about in newspapers, or mentioned in scholarly articles, satisfied the requirement of “recognized stature.”²⁶⁴ The court ultimately refused to grant an injunction preventing the destruction of the artworks, reasoning that any damage caused by their destruction could be later compensated with money, and hence, there was no reason to prevent the owner from exercising his right to demolish the buildings.²⁶⁵

After the owner of the 5Pointz whitewashed the paintings, artists applied again to the same court, this time seeking economic compensation for the works that could no longer be restored.²⁶⁶ The court ordered the owner to pay the highest possible sum of statutory damages for each work, amounting in total to almost seven million dollars.²⁶⁷ In February 2020, the Court of Appeals for the Second Circuit affirmed this decision in all aspects.²⁶⁸ Much of the discussion revolved around the question of whether the District Court correctly identified works that deserve the status of “recognized stature.” Confirming these findings, the Court of Appeals emphasized that since lawyers cannot judge the artistic quality of a work, courts should rely on the opinions of the artistic community, comprising art critics, museum curators, gallerists, prominent artists, and other experts.²⁶⁹ The court noted that the artist’s fame may play a crucial role here, so that even “a ‘poor’ work by a highly regarded artist merits protection from destruction under VARA.”²⁷⁰

Although these holdings were made in the context of compensation, this precedent is also applicable to cases dealing with the question of whether artworks should be protected against destruction or may be removed from the cityscape.

The *5Pointz* decision confirms the hegemony of mainstream art institutions over the question which artworks may adorn our shared cityscapes. But the decision goes one step further, declaring fame and success of the artists as decisive factors, which would allow them to protect their works against removal even if these works are “poor.” This holding is consistent with the general social tendency to admire fame and marvel at every creation of a famous person. Yet, given the capriciousness of fame, its loose connection to

²⁶² *Id.* at 212.

²⁶³ *Id.* at 220–23.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 226–27 (emphasis added).

²⁶⁶ *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 426 (E.D.N.Y. 2018).

²⁶⁷ *Id.* at 447.

²⁶⁸ *Castillo v. G & M Realty L.P.*, 950 F.3d 155, 173 (2d Cir. 2020).

²⁶⁹ *Id.* at 166.

²⁷⁰ *Id.*

quality,²⁷¹ and its frequent temporality, this can hardly be regarded as good policy. Indeed, it is hard to understand why a famous artist should be able to preserve even her poor works as part of our shared visual environment while unknown artists receive no protection.

To sum up this section, commercial property powerfully communicates narratives about the central role of business and consumption in urban life. An additional conspicuous storyline reads that urban spaces are places suitable for easily understandable, conventional, entertaining, and widely accepted artistic expression, and that famous artists have priority in our shared public spaces over those less well-known. Artistic pieces raising public controversy are out of place in cityscapes.

D. *Public Transport*

Public transport presents a special case for our study for two reasons. First, buses, trains and other means of public transportation are both intensively used and moving elements of cityscapes, which makes them especially effective in delivering expressive messages to broad audiences. Second, entities operating public transportation have both private and public elements: although operating as commercial companies, they are usually managed by local authorities.²⁷² Even if privately incorporated, transit authorities are regarded as “quasi-governmental” entities.²⁷³ This means that, regardless of their incorporation type, transit authorities must withstand constitutional standards applied to state actors on the one hand, but have the right to pursue their economic interests on the other. The interplay between these two factors results in rather peculiar rules of speech regulation.

In many cities, transit authorities lease spaces on trains, buses, and stations as platforms for expressive messages. This has naturally raised the question of how far these authorities may regulate speech appearing on their property. In 1974, the Supreme Court upheld the policy of a transit authority that allowed commercial advertising on its buses while banning political messages of any kind.²⁷⁴ Although the buses were operated by the city itself, the court emphasized the commercial nature of this venture, holding that the city did not create a public forum on its buses.²⁷⁵ It ultimately found that commercial interests justify allowing advertising while banning political speech:

²⁷¹ See Michal Shur-Ofry, *Popularity as a Factor in Copyright Law*, 59 U.T.L.J. 525, 526 (2009).

²⁷² See, e.g., *Penthouse Int'l, Ltd. v. Koch*, 599 F. Supp. 1338, 1340 (S.D.N.Y. 1984).

²⁷³ See, e.g., *In re Latchaw*, 24 B.R. 457, 458 (Bankr. N.D. Ohio 1982); *Banneker Ventures, LLC v. Graham*, 20 F. Supp. 3d 184, 192 (D.D.C. 2013), *aff'd in part, rev'd in part*, 798 F.3d 1119 (D.C. Cir. 2015).

²⁷⁴ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299 (1974).

²⁷⁵ *Id.* at 303.

Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda . . . [T]he managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. These are reasonable legislative objectives advanced by the city in a proprietary capacity.²⁷⁶

In subsequent cases, courts have consistently upheld similar schemes of allowing only commercial advertising on public transport.²⁷⁷ These decisions give decisive weight to the commercial nature of transit authorities: state actors may never treat commercial speech more favorably than non-commercial speech.²⁷⁸ Indeed, many transit authorities have chosen the ads-only model to avoid controversy,²⁷⁹ or have switched to it after having encountered complaints about political messages.²⁸⁰ The practical result of this policy is granting a privileged status to commercial speech. Although commercial speech enjoys the lowest level of legal protection, it will be frequently the only type of speech found on one of the most effective mediums of expression: public transport (See Fig. 23).

²⁷⁶ *Id.* at 304.

²⁷⁷ *See, e.g.*, *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 972 (9th Cir. 1998); *Am. Freedom Def. Initiative v. Washington Metro. Area Transit Auth., WMATA*, 901 F.3d 356, 373 (D.C. Cir. 2018); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 109 F. Supp. 3d 626, 626 (S.D.N.Y. 2015).

²⁷⁸ *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 47 (1994).

²⁷⁹ *Infra* note 294.

²⁸⁰ *See, e.g.*, *Amalgamated Transit Union Local 1015 v. Spokane Transit Auth.*, 2017 WL 4322406, at *10 (E.D. Wash. Sept. 28, 2017), *aff'd*, 929 F.3d 643 (9th Cir. 2019); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 109 F. Supp. 3d 626, 626 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105 (2d Cir. 2016).

FIGURE 23 – A bus in Berlin, 2020.



The *Amalgamated* case decided in 2017 illustrates the absurdity of this situation.²⁸¹ In this case, Amalgamated Transit Union (ATU)—a labor union—wished to publish its messages on buses in the city of Spokane. These included the following slogans: “Get the wages, healthcare, and safe working conditions you deserve, for a happier home life;” “Stand up & have a voice in your workplace;” and “You Have the Right to Organize!”²⁸² The Spokane Transit Authority refused to run these messages, reasoning that it only accepts commercial advertisements and suggesting that ATU could advertise its services instead of promoting the general idea of joining a union or organizing.²⁸³ Following this advice, ATU submitted the following message: “Do you drive: Uber? Lyft? Charter Bus? School Bus? You have the Right to Organize! Contact ATU Today.” This time, the Spokane Transit Authority agreed to run the message on its buses.²⁸⁴

This case demonstrates how less valuable speech—promoting services of a specific organization—may supersede more important speech—making workers aware of their rights. It also offers a glimpse into the ideological dimension of commercial speech. Although the Supreme Court finds commercial speech “innocuous,” as opposed to “the blare of political propaganda,” in fact, commercial speech does have a very specific ideological

²⁸¹ *Amalgamated Transit Union*, 2017 WL 4322406, at *1.

²⁸² *Id.* at *3–4.

²⁸³ *Id.* at *3.

²⁸⁴ *Id.* at *4.

content. The difference between the declined messages and the accepted one in *Amalgamated* reveals one aspect of the commercial ideology: while messages calling one to take action, get organized, and stand up for one's rights contradict this ideology, the message calling to hire someone else's services to improve one's working conditions conforms to it. In other words, commercial speech teaches us to be passive consumers of products or services, rather than engaged citizens (See Fig. 24).

FIGURE 24 – An advertisement for Ritter Sport chocolate: “100g. It has never been so easy (light) to bear responsibility.” Berlin 2021



Another example revealing the ideological dimension of commercial speech is the *Lebron* case decided in 1995.²⁸⁵ The artist Michael Lebron and Amtrak, National Railroad Passenger Corporation, entered into a leasing agreement, according to which Lebron rented for two months the Spectacular, “a curved back-lit display space approximately 103 feet wide by ten feet high . . . [which] dominates the west wall of the rotunda on the upper level of Penn Station, where thousands of passengers pass each day.” Although Lebron did not specify the precise nature of his display, he did inform Amtrak that his work was generally political. Lebron himself characterized the display he created as “an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community

²⁸⁵ *Lebron v. Nat'l R.R. Passenger Corp. (Amtrak)*, 69 F.3d 650, 650 (2d Cir. 1993), *opinion amended on denial of reh'g*, 89 F.3d 39 (2d Cir. 1995).

based, family-oriented and religious cultures.” The court described it as follows:

The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the “Right Beer,” Lebron’s piece is captioned “Is it the Right’s Beer Now?” It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors’ advertising which uses the slogan of “Silver Bullet” for its beer cans, the text proclaims that Coors is “The Silver Bullet that aims The Far Right’s political agenda at the heart of America.”²⁸⁶

When Amtrak saw Lebron’s display, it offered him 500 alternative billboard sites in New York City, but he rejected them all. Lebron explained:

The very size of the Spectacular allowed me to design and visualize this work with an effectiveness and clarity that would have been otherwise impossible to achieve. Its size and shape make it one of the largest advertising display spaces in New York City, and its prominent location in Pennsylvania Station means that it is visible to a large segment of the traveling public, providing an excellent opportunity to reach exactly the kind of audience I hope to engage with the subject matter of this piece.²⁸⁷

Shortly thereafter, Amtrak rejected Lebron’s display, stating that its policy did not allow political advertising on the Spectacular.²⁸⁸ This policy was not written, and Amtrak allowed political advertising on other stations. Nevertheless, the court accepted Amtrak’s argument that it never allowed anything but commercial advertising on the Spectacular and thus did not create a public forum.²⁸⁹ Although Amtrak was aware of the political nature of Lebron’s display before entering into the lease agreement with him, the court rejected Lebron’s argument that Amtrak’s policy was content-based and dismissed his First Amendment claims.²⁹⁰ Emphasizing that Amtrak acted in this case in its proprietary capacity, the court found its advertising policy reasonable, since

²⁸⁶ *Id.* at 653 (citing the district court).

²⁸⁷ *Id.* at 653–54.

²⁸⁸ *Id.* at 654.

²⁸⁹ *Id.* at 656.

²⁹⁰ *Id.*

it is “highly advisable to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view.”²⁹¹

What escaped the court’s attention here is the ideological nature of commercial advertising itself. Lebron’s work could not be displayed on such a prominent advertising spot precisely because of its anti-commercial message, a message that could chill off potential advertisers. To put it simply, the Coors Brewing Company itself would probably have no problem whatsoever placing its advertising on the Spectacular. To understand the ideological content of such an advertisement, we just have to take a closer look at Lebron’s display: Coors’ message would be exactly the opposite: something like “just enjoy our beer, don’t think about any political issues.” This message is shared by most advertising—consume, enjoy, indulge, do not think about the political consequences of our production.²⁹² Considering the severe consequences of most of today’s production processes—in terms of human and animal rights, as well as ecological concerns²⁹³—this message cannot be considered “innocuous,” as the Supreme Court described it. Although not stated as directly as Lebron’s, the advertising message is nonetheless just as ideological as his (See Fig. 25). Accepting advertising but rejecting Lebron’s display thus runs counter to the basic First Amendment rule that once a public actor allows speech on a certain subject, it must accept all viewpoints, including unpopular ones.²⁹⁴

²⁹¹ *Id.* at 658.

²⁹² *See, e.g.*, <https://www.youtube.com/watch?v=ioZDeER-s>, archived at <https://perma.cc/3XSQ-Y4FS>; <https://www.youtube.com/watch?v=6333iiSkHLQ>, archived at <https://perma.cc/J74N-U86H>.

²⁹³ For discussion, see Katya Assaf, *Buying Goods and Doing Good: Trademarks and Social Competition*, 67 ALA. L. REV. 979, 987–94 (2016).

²⁹⁴ *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829–30 (1995); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

FIGURE 25 – *Fight the Power / Do What Moves You, Berlin 2019.*

Viewed more broadly, advertising promotes consumerist ideology—ideology that envisions consumption as the most significant human activity, an indispensable factor of love, success, happiness, and any other aspirations one might strive to achieve.²⁹⁵ In this sense, any message designed to awaken awareness and encourage active political behavior clashes with the message of advertising that promotes passive consumption. Similarly, messages promoting organized labor implicitly dispute the centrality of consumption and emphasize the centrality of work instead. The same is true for religious appeals. Indeed, many transit authorities banned all these types of messages while allowing commercial advertising.²⁹⁶

As courts correctly note, commercial messages are undoubtedly less controversial than political ones. This has to do with two major factors. First, the consumerist ideology is *implied* in advertising rather than stated directly, which makes the messages more subtle and hence, more difficult to reject.²⁹⁷ Second, the consumerist ideology is so deeply ingrained into our culture that its messages seem neutral, innocuous, non-ideological, and undisputable. The privileged position granted to the consumerist narrative thereby further

²⁹⁵ Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 *IDEA* 1, 15 (2008).

²⁹⁶ See, e.g., *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., WMATA*, 901 F.3d 356 (D.C. Cir. 2018); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105 (2d Cir. 2016).

²⁹⁷ Katya Assaf, *Magical Thinking in Trademark Law*, 37 *LAW & SOCIAL INQUIRY* 595, 598–600 (2012).

reinforces the dominant position of this ideology. Meanwhile, an important function of free speech is challenging widely accepted views and encouraging critical thinking:

[A] principal function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.²⁹⁸

In other words, precisely because commercial ideology is so dominant, it is important to allow alternative voices to enter our shared cityscapes.

So far, we have discussed cases in which transit authorities banned non-commercial messages on public transport. Some other transit authorities have opened their advertising spaces for both commercial and non-commercial messages. Courts are bitterly divided as to the question of what kind of First Amendment scrutiny applies in such cases. In some circuits, allowing political messages effectively creates a designated public forum. This means that the transit authority cannot engage in content-based speech regulation.²⁹⁹ In other circuits, the same policy does not lead courts to conclude that a public forum was created, and transit authorities enjoy much more leeway to regulate speech.³⁰⁰ In 2016, this issue reached the Supreme Court in a petition for writ of certiorari.³⁰¹ Yet, although the dissenting opinion saw this as a chance to resolve the circuit split, the majority denied the petition.³⁰²

Decisions that uphold selective exclusion of political messages provide another glimpse into the battle of narratives taking place on public transport. Thus, in one case, the transit authority rejected messages opposing religion, while routinely allowing Catholic messages.³⁰³ Similarly, in another case, an advertisement stating “Christians in the Bible never observed ‘Christmas’ neither did they believe in lies about Santa Claus, flying reindeer elves and drunken parties. How can you honor Jesus with lies?” was turned down as disparaging to the Christian religion.³⁰⁴ In two further instances, transit authorities rejected messages calling for political change—in one case, for the protection of workers’ rights,³⁰⁵ and in the other, for the legalization of marijuana.³⁰⁶ Finally, several courts upheld bans on critical messages related to the United States’ role in the Israeli-Palestinian conflict, finding that the pol-

²⁹⁸ *Texas v. Johnson*, 491 U.S. 397, 408–409 (1989) (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)) (internal quotations omitted).

²⁹⁹ This is the legal position of the Second, Sixth, Seventh, and D.C. Circuits. For discussion, see *Am. Freedom Def. Initiative v. King Cty.*, Wash., 136 S. Ct. 1022, 1024–25 (2016).

³⁰⁰ This is the legal position of the First and Ninth Circuits. See *id.*

³⁰¹ *Am. Freedom Def. Initiative*, 136 S. Ct. at 1022.

³⁰² *Id.* at 1025.

³⁰³ *Archdiocese of Washington v. Wash. Metro. Area Transit Auth.*, 281 F. Supp. 3d 88 (D.D.C. 2017), *aff’d*, 897 F.3d 314 (D.C. Cir. 2018).

³⁰⁴ *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 73–74 (1st Cir. 2004).

³⁰⁵ *Working Washington v. Cent. Puget Sound Reg’l Transit Auth.*, 2012 WL 12916362, at *1 (W.D. Wash. June 29, 2012), *aff’d*, 533 F. App’x 716 (9th Cir. 2013).

³⁰⁶ *Ridley*, 390 F.3d at 69.

icy of avoiding controversial advertisements on public transport was reasonable.³⁰⁷ In other cases, however, courts have found similar bans unconstitutional and ordered the transit authorities to accept the advertisements.³⁰⁸ This led the respective authorities to switch to schemes of commercial advertising only, so as to stifle the hot debates the advertisements kindled.³⁰⁹

These decisions add another tile in the monochrome mosaic of official cityscapes. Similarly to decisions made in other contexts, mainstream Christian narratives were accepted, while anti-religious messages and an alternative interpretation of Christianity were stifled. Likewise, appeals to act for a political change were enjoined from entering this reign of uncontroversial speech. This policy turns public transport—a medium that could powerfully engage citizens in social debates—into vehicles carrying largely worthless speech. Although commercial interests of transit authorities may make it “highly advisable to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view,” the public interest in developing a meaningful democratic debate would be much better served if such displays were carried by buses and trains through the cities (See Fig. 26-27).

³⁰⁷ See, e.g., *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 495 (9th Cir. 2015); *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 574–75 (1st Cir. 2015).

³⁰⁸ *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 76 (D.D.C. 2012); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572, 575 (S.D.N.Y. 2015).

³⁰⁹ *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., WMATA*, 901 F.3d 356, 361 (D.C. Cir. 2018); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105, 107–08 (2d Cir. 2016).

FIGURE 26 – *No Nation, No Border, Berlin 2019.*FIGURE 27 – *Free Palestine, Berlin 2019.*

An interesting case reached the Eastern District of Pennsylvania in 2018. A nonprofit investigative journalism organization created a comic strip entitled “A Stacked Deck” that illustrated the results of its investiga-

tion into racial discrimination in mortgage policies.³¹⁰ Its first lines stated, “Today in America, people of color are regularly being DENIED the dream of homeownership.” The organization sought to display its comic strip on buses, but the local transit authority rejected its application, reasoning that its policy was to avoid any advertisements on “matters of public debate.” The court found this policy viewpoint neutral and reasonable.³¹¹ The organization pointed out that the transit authority accepted bank advertisements depicting both white and non-white customers and stating, as required by law, that they are equal opportunity lenders. In doing so, the authority arguably engaged in content-based speech regulation, favoring one side of the debate on discriminatory lending. Rejecting this argument, the court noted that while the comic strip reflects a viewpoint on discriminatory lending, bank advertisements do not advocate any viewpoint, but only seek to promote their commercial business.³¹² Hence, accepting the advertisements and rejecting the comics does not amount to viewpoint discrimination.³¹³ This reasoning illustrates the difficulty to extract the ideological message of advertising: indeed, the bank advertisements did not express explicitly any specific view. Showing Black and white people in their advertising, the banks simply let the viewers understand that they would treat all customers equally. Although this message indeed directly contradicted the findings presented in the comic strip, its more elusive and implicit nature immunized it from being labeled as political speech, thus paving its way into the cityscape.

In 2020, the case reached the U.S. Court of Appeals for the Third Circuit.³¹⁴ During the two years that passed since the District Court’s decision, the transit authority had accepted an advertisement depicting a Black youth wearing a T-shirt that said “My Life Matters.”³¹⁵ Noting that although Black Lives Matter campaigns became “a lightning rod in the media,” the court pointed out that they are nevertheless political. Hence, the authority applied its policy in an arbitrary matter that undermined its legitimacy and must therefore accept the comic strip, it concluded.³¹⁶ Remarkably, the transit authority did not perceive Black Lives Matter slogans as political anymore, but continued its opposition to a message of economic discrimination. This demonstrates how similar narratives—one opposing violence against the Black community and the other opposing its economic oppression—may be subject to very different treatment only because one narrative managed to enter

³¹⁰ *Ctr. for Investigative Reporting v. Se. Pa. Transp. Auth.*, 337 F. Supp. 3d 562, 570 (E.D. Pa. 2018).

³¹¹ *Id.* at 615.

³¹² *Id.* at 616.

³¹³ *Id.* at 618–20.

³¹⁴ *Ctr. for Investigative Reporting v. Se. Pa. Transp. Auth.*, 975 F.3d 300, 300 (3d Cir. 2020).

³¹⁵ *Id.* at 316–17.

³¹⁶ *Id.* at 317.

the mainstream discourse and the other did not. This further highlights the importance of allowing dissenting voices to be heard in the public space—in 2020, the message of economic oppression was less socially accepted and hence, in more dire need of a public stage than the message of violence.

This brings us to the final point—as the cases above show, transit authorities have a natural inclination toward selective enforcement, favoring established narratives over voices that challenge mainstream views. Another example of such a practice is a case that dealt with highway overpasses in the Bay Area controlled by the California Transit Authority.³¹⁷ Following the September 11th terrorist attacks, American flags appeared on these overpasses. These flags were hung without the consent of the Transit Authority but were nevertheless tolerated. Yet, when messages of protest against the war on terrorism appeared on the same overpasses—stating “Are You Buying This War?” and “At What Cost?”—they were quickly removed.³¹⁸ In a decision that showed much understanding for the “upwelling of public displays of patriotism, nationalism, and sympathy for the victims of the terrorists’ acts,”³¹⁹ the court somewhat halfheartedly held that the policy of removing anything but the American flag was content-based:

The American flag is a potent symbol of our nation and our national unity. In view of the outpouring of patriotism and the spontaneous appearance of American flags, CalTrans’ reluctance to remove such a potent symbol from highway overpasses is understandable. Yet ironically, it is the very potency of the symbol that causes CalTrans’ practice to run afoul of the Constitution.³²⁰

This is another instance in which a public authority favored the narrative of patriotism over voices questioning the wisdom of national politics. As in other contexts, it is safe to assume that most of those wishing to display their messages on places controlled by a transport authority will accept a rejection or a removal rather than engage in lengthy and costly litigation. Thus, in many cases, transit authorities will be able to engage in selective enforcement, favoring the hegemonic narratives and expelling alternative voices (See Fig. 28–29).

³¹⁷ *Brown v. Cal. Dep’t of Transp.*, 2002 WL 32088665, at *1 (N.D. Cal. Jan. 29, 2002), *order aff’d and remanded*, 321 F.3d 1217 (9th Cir. 2003).

³¹⁸ *Id.* at *9–10.

³¹⁹ *Id.* at *1.

³²⁰ *Id.* at *9.

FIGURES 28 AND 29 – A graffiti message “Stop Wars” stayed on a building in Berlin for many years. In 2018, someone added “On Migration!!” to the already faded “Stop Wars.” This additional contribution was quickly removed, although the original graffiti remained intact.



To sum up this section, the consumerist narrative of advertising is the most prominent winner in the battle over public transport. Messages opposing this narrative—one criticizing capitalism and targeting a specific company, and another pointing out the discriminatory mortgage policy of U.S. banks—were both banned from cityscapes. Narratives favored by transit authorities included patriotism, Catholicism and, recently, a “Black Lives Matter” slogan. Expelled narratives included appeals for political changes in various contexts—workers’ rights, marijuana legalization, the war on terrorism, and the United States’ role in the Israeli-Palestinian conflict. Anti-religious messages and those questioning the mainstream practicing of Christianity remained in the realm of the invisible.

II. OFFICIAL CITYSCAPES DECONSTRUCTED—GRAFFITI AND THE BATTLE OVER URBAN NARRATIVES

The hegemony of official cityscapes is confronted by relentless resistance. Graffiti and other non-commissioned expressive interventions interrupt and deconstruct the integrity of official cityscapes, claiming their own right to the city and offering an alternative, unofficial vision of the shared visual environment (See Fig. 30-31).

FIGURE 30 – *Unknown Artist. Paris, 2017.*



FIGURE 31 – *Clet Abraham, Naples 2019.*

The legal system suppresses such attempts, fighting graffiti with remarkable vigor. Thus, legislators toughen the “war on graffiti,” increasing existing criminal penalties and introducing new ones—*e.g.*, suspension of a driving license—extending police search powers, and restricting various graffiti-related activities, such as the selling of paint.³²¹ Similarly, judges frequently express utmost dismay with “graffiti vandalism,” sometimes issuing especially high penalties to deter others from painting graffiti.³²² Consider, for instance, the following passage:

Graffiti vandalism—the outrageous scarring of real property both public and private with unintelligible markings made by irresponsible persons—plagues . . . cities in the United States and Europe.³²³

In the vast majority of cases, the judicial analysis of graffiti does not refer to its expressive content, choosing instead the narrative of numbers: how many pieces were painted, what was their size, and how much would it

³²¹ Faye Docuyanana, *Governing Graffiti in Contested Urban Spaces*, 23 *POLITICAL & LEGAL ANTHROPOLOGY REVIEW* 103, 109 (2000); Alison Young, *Criminal Images: The Affective Judgment of Graffiti and Street Art*, 8(3) *CRIME MEDIA CULTURE* 297, 303–04 (2012).

³²² Young, *supra* note 322, at 306–07.

³²³ *Sherwin-Williams Co. v. City & Cnty. of San Francisco*, 857 F. Supp. 1355, 1357 (N.D. Cal. 1994).

cost to remove them.³²⁴ Reading the description of the factual background of these decisions leaves the impression that the content of the writings or paintings was intentionally left outside the legal discussion, to make it clear that the case at stake deals with dirt, contaminants, and has nothing to do with expressive activity.³²⁵ Here is a typical judicial description of graffiti: “[T]he graffiti was between 12 and 18 feet in length, necessitating the cleaning of a 300 square foot area of wall . . . The invoice listed a price of \$475 for each location, for a total of \$950.”³²⁶

The content of graffiti is sometimes mentioned in order to attribute multiple pieces to the same person in absence of direct evidence.³²⁷ In such cases, courts sometimes even go beyond the mere question of whether the same letters were painted, comparing the expressive content of the different messages³²⁸ and learning from experts’ testimonies whether different pieces were created with the same artistic ability.³²⁹ Courts also refer to graffiti’s expressive content when the content is especially objectionable in the court’s eyes: profane, anti-police, or anti-establishment.³³⁰ In other words, graffiti is usually pictured as non-expressive activity or activity expressing objectionable messages.

Interestingly, when referring to graffiti only incidentally, courts sometimes do recognize its expressive value. For instance, in one case, wishing to illustrate the idea that the legislator has the power to ban a whole channel of communication, the court observed:

[Graffiti] is an inexpensive means of communicating political, commercial, and frivolous messages to large numbers of people; some creators of graffiti have no effective alternative means of publicly expressing themselves.³³¹

Similarly, while considering the constitutionality of the means of combating graffiti—such as restricting the selling of paint—courts do make an effort to understand the expressive content of graffiti in order to assess the effectiveness of such measures. Consider, for instance, the following judicial statement:

³²⁴ See, e.g., *People v. Santori*, 196 Cal. Rptr. 3d 500, 501 (Ct. App. 2015); *In re A.W.*, 252 Cal. Rptr. 3d 370, 372 (Ct. App. 2019); see also *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 835 F.Supp. 421, 427 (N.D. Ill. 1993); *Vincenty v. Bloomberg*, 476 F.3d 74, 80 (2d Cir. 2007).

³²⁵ *Id.*

³²⁶ *People v. Quezada*, 2016 WL 2627042, at *1 (Cal. Ct. App. May 5, 2016).

³²⁷ See, e.g., *State v. Foxhoven*, 132 Wash. App. 1053 (Ct. App. 2006); *In re D.H.*, 2014 WL 1356591, at *2 (Cal. Ct. App. Apr. 4, 2014); *People v. Lopez*, 2014 WL 68267, at *1 (Cal. Ct. App. Jan. 8, 2014); *In re Steve A.*, 2015 WL 8843818, at *1 (Cal. Ct. App. Dec. 15, 2015).

³²⁸ *In re T.P.*, 2007 WL 118346, at *1 (Cal. Ct. App. Jan. 18, 2007).

³²⁹ *People v. Lopez*, 2014 WL 68267, at *1.

³³⁰ *In re T.P.*, 2007 WL 118346, at *1; *People v. Aguilar*, 209 Cal. Rptr. 3d 313, 314 (Ct. App. 2016).

³³¹ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 550 (1981).

[W]e believe that an accurate description must provide that “graffiti” is in fact intended as an expression of ideas, information and culture, as opposed to a product of carelessness and neglect.³³²

Moreover, when graffiti plays an incidental role in the case, courts sometimes recognize that it does not actually cause serious damage. For instance, in one case, in which the defendant asked to apply a certain defense available in graffiti crimes to another criminal context, the court refused to do so, noting:

While vandalism and graffiti are frequently unsightly, the damage resulting from a vandalism or graffiti offense often does not even prevent the property owner from continuing to use the damaged property . . . [V]andalism and graffiti offenses rarely harm people and are less likely than other offenses to result in the destruction of property.³³³

Similarly, in two cases, courts held that the painting of graffiti by a tenant did not cause serious damage and was not grounds enough to terminate the lease.³³⁴

On the other hand, when dealing directly with graffiti claims, courts do not question whether the graffiti caused any damage. For example, one case involved graffiti painted under the Locust Street Bridge in the City of Milwaukee. Evidence showed that this area was marked with a “substantial amount of graffiti,” which stayed there for years without the city abating it.³³⁵ Moreover, the city did not remove the graffiti painted by the accused during the two years that passed between the act of painting and the court’s decision.³³⁶ Nevertheless, the court accepted the city’s assessment that restitution costs for the graffiti were \$1000.³³⁷ This holding begs the question: what is the real damage behind graffiti?

Indeed, the inconsistent legal attitude—recognizing that graffiti is an expressive activity that does not cause serious damage while discussing it incidentally, but treating it as mere dirt to be cleaned and damage to be restored while dealing with it directly—is puzzling. The answer to this puzzle should be sought in the realm of narratives. Indeed, much of graffiti conveys one common message. This message reveals and challenges the hegemonic power of property, commerce, and politics that dominate our cityscapes. It rejects the authority of art institutions and the market to decide

³³² Nat’l Paint & Coatings Ass’n v. City of Chicago, 835 F. Supp. 421, 425 (N.D. Ill. 1993), *rev’d*, 45 F.3d 1124 (7th Cir. 1995).

³³³ *In re F.C.*, 2011 WL 2001888, at *5 (Cal. Ct. App. May 24, 2011).

³³⁴ *Sumet I Assocs., L.P. v. Irizarry*, 933 N.Y.S.2d 799, 800 (N.Y. App. Term 2011); *Marbar, Inc. v. Katz*, 701 N.Y.S.2d 884, 888 (N.Y. Civ. Ct. 2000).

³³⁵ *State v. Lawhorn*, 2007 WL 1468801, at *3 (Ct. App. 2007).

³³⁶ *Id.* at *2–3.

³³⁷ *Id.* at *5 n.8.

what “real” art is (See Fig. 32).³³⁸ In addition, graffiti resists the confinement of art within specifically designated spaces, such as museums and galleries, and opposes the isolation of art from everyday life (See Fig. 33).³³⁹ This is a message of a personal presence and individual placemaking.³⁴⁰ This message runs sharply contrary to the narratives conveyed by the official cityscapes: tidiness and niceness, consensus and content, the power of property and the dominance of consumption.

FIGURE 32 – *Gonzoe. Graffiti referring Jerry Saltz calling “99% of graffiti . . . generic crap”³⁴¹ as well as to an artistic exhibit of a taped banana at Art Basel in Miami peeled and eaten by a visitor. Berlin 2020.³⁴²*



³³⁸ Assaf-Zakharov & Schnetgöke, *supra* note 58, at 36–38.

³³⁹ Compare Nicholas Alden Riggle, *Street Art: The Transfiguration of the Commonplaces*, 68 J. AESTHETICS & ART CRITICISM 243, 243–44, 246 (2010) (explaining how graffiti, a form of street art, “requires . . . taking art out of the museum, gallery, and private collection—ultimately, out of the artworld—and putting it into the fractured stream of everyday life” and therefore, “street art does not exist in a designated ‘artspace’—a place like a museum or gallery specially reserved for art”), with Andrea Baldini, *Street Art: A Reply to Riggle*, 74 J. AESTHETICS & ART CRITICISM 187, 190 (2016) (arguing that street art “does not merely take art out of the museum, as Riggle claims. It rebelliously carves a space for art within our daily lives”).

³⁴⁰ Jamison Davies, *Art Crimes?: Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art*, 65 ME. L. REV. 27, 47–48 (2012).

³⁴¹ Jerry Saltz (@jerrysaltz), TWITTER (Jan. 2, 2020, 4:17 PM), <https://twitter.com/jerrysaltz/status/1212845297656840192?>, archived at <https://perma.cc/B2QY-EGLC>.

³⁴² Hannah Yasharoff, *A Man Ate \$120,000 Duct-taped Banana Art: “I Really Love This Installation. It’s Very Delicious”*, YAHOO (Dec. 9, 2019), <https://eu.usatoday.com/story/life/>

FIGURE 33 – *Berlin 2020.*

This counter-narrative of graffiti is easily understood on an intuitive level, although it might be difficult to put it into words. Hence, judges often refer to graffiti as “unintelligible,”³⁴³ and state that they do not “get the message.”³⁴⁴ Yet, even without identifying the messages of graffiti, the legal system reacts to them with fierce protection of the official narratives conveyed by cityscapes. Indeed, several scholars point out that the legal system greatly overreacts to graffiti, exaggerating its damages and creating a “moral panic.”³⁴⁵ Jakob Kimvall has even suggested that the “war” on graffiti is a form of iconoclasm—an ideological destruction of visual images.³⁴⁶ Indeed, graffiti is often distorted without restoring the original paint, in acts that are more reminiscent of an irate teacher striking through incorrect answers in an exercise book than a public authority concerned about urban aesthetics (see Fig. 34-37).

2019/12/09/banana-priced-120000-exhibit-art-basel-eaten/2628306001/, archived at <https://perma.cc/5NXV-SWUS>.

³⁴³ *Sherwin-Williams Co. v. City & Cty. of San Francisco*, 857 F. Supp. 1355, 1357 (N.D. Cal. 1994).

³⁴⁴ *Jones v Sadler* [No. 2] (2010) WASC 53, ¶ 18 (Austl.).

³⁴⁵ JEFF FERRELL, CRIMES OF STYLE: URBAN GRAFFITI AND THE POLITICS OF CRIMINALITY 134–45 (Garland Publishing 1993); Ronald Kramer, *Straight from the Underground: New York City’s Legal Graffiti Writing Culture*, in ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART 113, 116 (Jeffrey Ian Ross ed., 2016).

³⁴⁶ Jacob Kimvall, *Bad Graffiti Gone Good Street Art*, Paper Presented at Konstfack Univ. Coll. of Arts, Craft and Design Symp.: Placing Art in the Public Realms (Sep. 28, 2007).

FIGURES 34 through 36 – *Examples of graffiti defaced by local authorities without restoring the surfaces. Berlin 2020–21.*

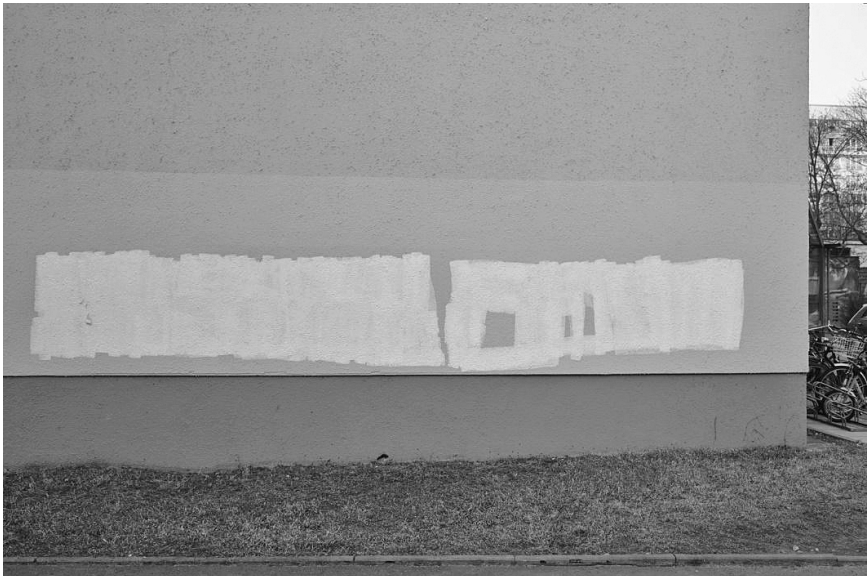
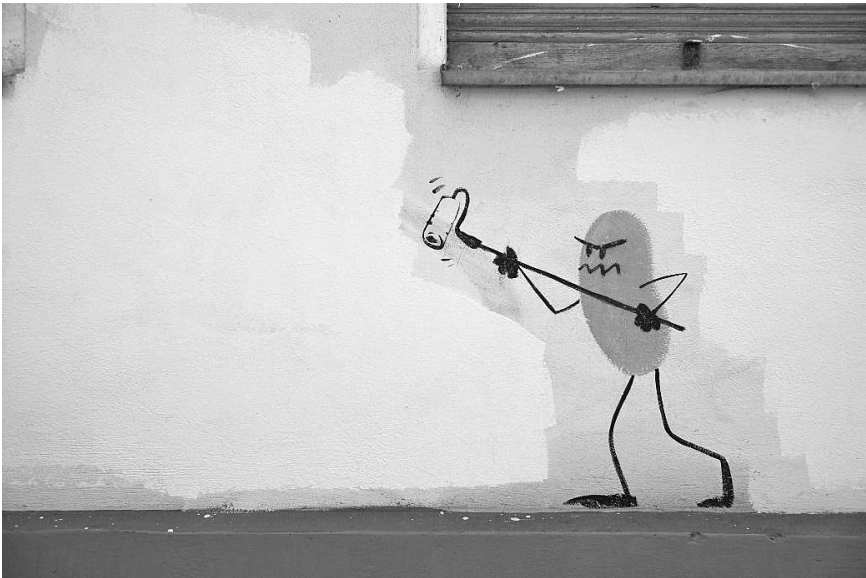




FIGURE 37 – *Dave the Chimp*, a graffiti entering a dialogue with the half-hearted attempts of cleaning the wall. Berlin, 2017.



Thus, the war on graffiti is not a contest between expression and lack thereof, but between two conflicting types of expression—one official, mon-

olithic and authoritative, the other unofficial, polyphonic and personal.³⁴⁷ Consequently, courts adjudicating criminal accusations of graffiti actually adjudicate conflicts over narratives expressed in cityscapes. Refusing to recognize the expressive content of graffiti is a complete and uncompromised rejection of its narratives, the ultimate exclusion of these narratives from the scope of the legal debate.

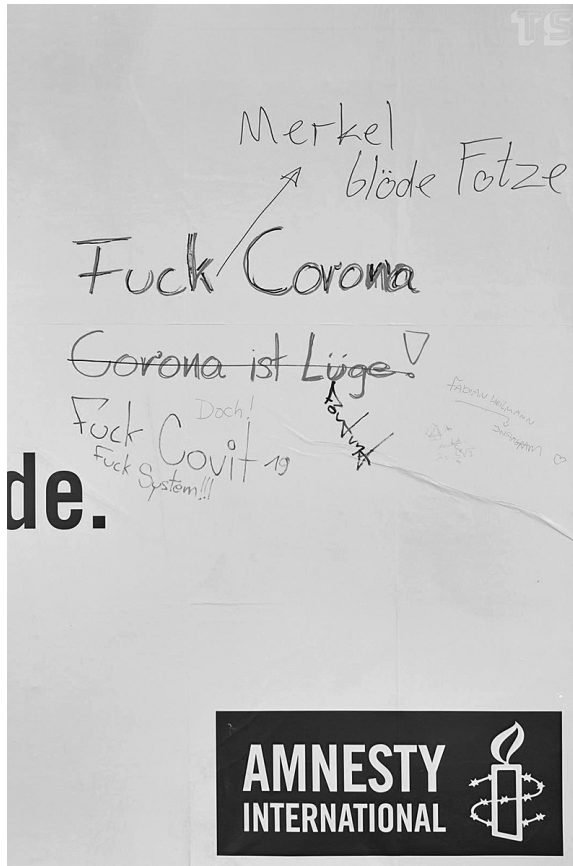
Notably, some illegally painted pieces express understandable messages that conform to mainstream narratives. Studying media releases over the last year, we have found that such pieces are usually celebrated rather than condemned. For instance, many articles have admired graffiti conforming to the mainstream discourse on the Covid-19 pandemic, such as pieces calling on individuals to wear masks and wash hands, paying tribute to physicians and nurses, and bearing other positive and encouraging messages.³⁴⁸ Reading these articles makes clear that the pieces were most probably left intact and no complaints were filed with the police against the artists. On the other hand, the media severely condemned pieces with messages dissenting from the mainstream discourse, such as “corona will kill us.”³⁴⁹ Such pieces were labelled as “vandalism” and reported to the police (See Fig. 38).

³⁴⁷ Assaf-Zakharov & Schnetgöke, *supra* note 58, at 27–28.

³⁴⁸ See, e.g., Adam Jeffery, *Coronavirus-Themed Murals from around the World*, CNBC (Apr. 6, 2020), <https://www.cnn.com/2020/04/06/coronavirus-themed-murals-from-around-the-world.html>, archived at <https://perma.cc/A7SS-R4DC>; Charu Suri, *Street Art Confronts the Pandemic*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/2020/05/01/travel/coronavirus-street-art.html>, archived at <https://perma.cc/SW82-EHH6>.

³⁴⁹ Harry Rutter, *‘It’s Gonna Kill Us’: Coronavirus Graffiti Appears on Wall Overnight amid COVID-19 Pandemic*, CAMBS TIMES (Oct. 31, 2020), <https://www.cambsimes.co.uk/news/coronavirus-graffiti-in-march-4912762>, archived at <https://perma.cc/N5BF-JHM8>.

FIGURE 38 – Discussion on Covid-19 on a wall in Berlin, 2021.



Another example is the Black Lives Matter movement, whose messages on various city surfaces have been unanimously welcomed by the media since 2020.³⁵⁰ Moreover, mayors of several cities have themselves written “Black Lives Matter” with solid paint on city streets³⁵¹—actions that formally fulfill the elements of the graffiti crime. At the same time, chalking

³⁵⁰ See, e.g., Rani Boyer, *How Graffiti Artists Are Propelling the Vision of the Black Lives Matter Movement*, ARTSY (Jul. 20, 2020), <https://www.artsy.net/article/artsy-editorial-graffiti-artists-propelling-vision-black-lives-matter-movement>, archived at <https://perma.cc/2V63-T963>.

³⁵¹ See, e.g., *New York City Mayor Helps Paint Black Lives Matter Mural Outside Trump Tower*, THE GUARDIAN (Jul. 10, 2020), <https://www.theguardian.com/us-news/video/2020/jul/10/new-york-city-mayor-bill-de-blasio-paint-black-lives-matter-mural-outside-trump-tower-video>, archived at <https://perma.cc/9JAE-MTWX>; Abby Cruz, *DC Mayor Unveils ‘Black Lives Matter’ Painted on Streets of Capital*, ABC NEWS (Jun. 5, 2020), <https://abcnews.go.com/Politics/dc-mayor-unveils-black-lives-matter-painted-streets/story?id=71088808>, archived at <https://perma.cc/7ZYL-CZU2>.

messages on sidewalks criticizing a local police department has led to a criminal conviction with graffiti.³⁵² This highly selective enforcement reveals that the war on graffiti is much more about preserving the official cityscapes' narratives against rebellious voices rather than protecting property against damage.

The same discriminatory policy is evident in the realm of aesthetic expression as well. Illegal pieces that are deemed “beautiful” according to accepted popular standards are celebrated as “contributions” to the city,³⁵³ while “ugly” pieces are condemned and punished.³⁵⁴ Unsurprisingly, “beautiful” pieces almost never reach the courts since they are not reported to the police in the first place (See Fig. 39).

FIGURE 39 – *An example of an illegal paste-up that local authorities do not quickly remove. Paris 2020.*



Nevertheless, one such case did receive legal treatment, allowing an inquiry into the judicial position on illegal, but beautiful graffiti. This case dealt with an illegal painting featuring a pink fairy in front of a school in the

³⁵² *Ballentine v. Las Vegas Metro. Police Dep't*, 772 F. App'x 584 (9th Cir. 2019).

³⁵³ See, e.g., Vitaly Friedman, *Tribute to Graffiti Art: 50 Beautiful Street Artworks*, SMASHING MAGAZINE (Sep. 14, 2008), <https://www.smashingmagazine.com/2008/09/tribute-to-graffiti-50-beautiful-graffiti-artworks/>, archived at <https://perma.cc/52FD-CXK3>.

³⁵⁴ See, e.g., Daniel Angelini, *Blast for Vandals as Town Centre Graffiti Problem Rockets in Lockdown*, SWINDON ADVERTISER (Jan. 27, 2021), <https://www.swindonadvertiser.co.uk/news/19040023.shop-owner-hits-vandals-cover-town-centre-graffiti-lockdown/>, archived at <https://perma.cc/GST8-RF3E>.

City of Ithaca.³⁵⁵ The judicial rhetoric of this case offers a glimpse into the real issue with most graffiti—its content. First, the court referred to the general case of graffiti—one that would probably have been decided applying the narrative of dirt to be cleaned:

Defacement of property (private or public) by graffiti is certainly a serious matter. This Court takes judicial notice that several years ago many properties within Ithaca were regularly defaced with *ugly* graffiti, and the blight was reaching near epidemic proportions (emphasis added).³⁵⁶

Then, in an unprecedented move, the court openly acknowledged that graffiti might deserve differentiated legal treatment, depending on its expressive message:

Where the purpose of graffiti is not to deface, but to convey a social, political or artistic message, and such graffiti does not cause either actual or more than nominal damage to the public or private property, then the particular graffiti offense may be of such a *de minimis* nature that continued prosecution is unwarranted.³⁵⁷

The court then came to discuss the subject matter of the trial—the pink fairy, which it obviously liked, finding that the public property was not defaced, “but, in fact, a sprinkle of joyous whimsy was added.”³⁵⁸

The Court can only imagine the laughs ringing musically through the late Spring morning air as children were welcomed by this spritely visage as they entered their school on one of those painstakingly long June days before the start of summer vacation.

The court then referred to the fact that the fairy had already been wiped away:

And the fairy—her pink flame is extinguished. She delighted Ithaca’s children for just a moment and now like Lenore, she is nevermore. Her ephemeral existence is now only a distant memory like that of childhood days long gone. There is no bringing back this pink fairy of youth . . . How sad the children must have been when they looked for their little pink fairy, but only to discover her departed.³⁵⁹

Comparing these lines with a typical judicial discussion on graffiti removal—the cleaning of dirt—reveals how much depends on the *content* of the messages. While most cases on graffiti do not even mention its content,

³⁵⁵ *People v. Thomas*, 47 Misc. 3d 473, 474 (City Ct. 2014).

³⁵⁶ *Id.* at 476.

³⁵⁷ *Id.* at 476–77.

³⁵⁸ *Id.* at 477.

³⁵⁹ *Id.* at 477, 480.

here the whole decision is an extensive tribute to the pink fairy. Most cases of graffiti refer to it in terms of the number of pieces and the cost of their removal, but here the judicial discussion referred to many literary masterpiece on fairies, magic, and the sadness of loss, including “The Land of Heart’s Desire,” “The Raven,” “The Wonderful Wizard of Oz,” “Peter Pan,” and “Mary Poppins.” Recognizing that graffiti constitutes a criminal act, the court nevertheless refused to convict the accused. It reasoned that doing otherwise would constitute a grave injustice, and “the story of the criminal court system must be the story about justice and the inherent goodness of humanity.”³⁶⁰

Another factor that weighs heavily in favor of accepting illegal graffiti rather than punishing it is fame. Pieces made by famous artists are celebrated by the media, local authorities, and homeowners.³⁶¹ The well-known British artist Banksy paints on whatever surfaces he deems appropriate, including private houses and medical clinics, without asking anyone’s permission. His works are highly appreciated, sometimes safeguarded by protective casting, and restored by local authorities when needed (See Fig. 40).³⁶² “Vandals” painting over his works are severely condemned in mass media and punished as criminals, while politicians express deep regret for not having done more to preserve the masterpieces on time.³⁶³

³⁶⁰ *Id.* at 479.

³⁶¹ See, e.g., Aidan Barlow, *Banksy in Sussex: Could Newhaven A259 Stencil be Latest Work?*, THE ARGUS (Feb. 12, 2021), <https://www.theargus.co.uk/news/19083694.banksy-sussex-newhaven-a259-stencil-latest-work/>, archived at <https://perma.cc/5979-LWZQ>.

³⁶² This practice bears an interesting contradiction to jurisprudence holding that VARA cannot protect works illegally made. See *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130, 1138 (Cal. Ct. App. 1991); *English v. BFC&R East 11th Street LLC*, 1997 WL 746444, at *5 (S.D.N.Y. 1997).

³⁶³ See, e.g., Kate Brown, *Banksy’s Famous Brexit Mural Has Mysteriously Disappeared From the Side of a Building in a British Seaside Town*, ARTNET NEWS (Aug. 27, 2019), <https://news.artnet.com/art-world/banksy-mural-disappeared-1636069>, archived at <https://perma.cc/F7R9-QWGG>; Matt Hutson, *Bristol Valentine’s Day Banksy Mural Vandalised*, BBC (Feb. 15, 2020), <https://www.bbc.com/news/uk-england-bristol-51515557>, archived at <https://perma.cc/26YW-99MD>.

FIGURE 40 – *Banksy's tribute to Jean-Michel Basquiat on Barbican Centre, protected by Plexiglas. London 2019.*



Naturally, famous artists rarely face criminal charges for painting graffiti.³⁶⁴ Yet, we were able to identify one such case.³⁶⁵ In 2015, the famous artist Frank Shepard Fairey was invited by a real estate firm to create murals on its buildings in Detroit. In an interview, Fairey admitted, “I still do stuff on the street without permission. I’ll be doing stuff on the street when I’m in Detroit.”³⁶⁶ Following this confession, the police looked for and found illegally attached posters bearing Fairey’s motifs on various locations in Detroit and accused him of making graffiti. The very first lines of the decision unmistakably identify the judge’s admiration for Fairey’s works:

Frank Shepard Fairey is an internationally acclaimed artist best known for creating a red, white, and blue poster of then presidential candidate Barack Obama, entitled Hope . . . Fairey’s work combines elements of graffiti and pop culture; his themes often thumb a nose at authority and champion dissent.³⁶⁷

³⁶⁴ There are exceptions to this rule, however. In 2011, a well-known graffiti artist, Revok, was sentenced to 180 days imprisonment for vandalism. While he was serving his time, his works were exhibited at the Museum of Contemporary Art in Los Angeles. *See Young, supra* note 321, at 308; *see also* Assaf-Zakharov & Schnetgöke, *supra* note 57, at 11.

³⁶⁵ *People v. Fairey*, 928 N.W.2d 705, 705 (Mich. Ct. App. 2018).

³⁶⁶ *Id.* at 707.

³⁶⁷ *Id.* at 706.

Turning to the actions of the police officer, McKay, the judge described them as follows:

On May 22, 2015, McKay went on a hunt for illegal art containing the Obey Giant or other Shepard Fairey-esque images. She found posters harboring the icon . . . in 14 places around the city . . . McKay decided that Fairey must have put up the illegal posters while he was in town.³⁶⁸

This language, ridiculing the police officer's actions and admiring the artist, leaves no doubt about the outcome of the case. Indeed, noting that "[s]everal holes in the prosecution's evidentiary canvas doom its case," the court found that there was insufficient evidence that Fairey himself pasted the posters onto the buildings.³⁶⁹ Unlike in cases with "ugly" graffiti, in which artists are routinely accused of painting all tags similar to theirs,³⁷⁰ here the court insisted on direct evidence linking Fairey with the respective posters. Referring to his statement to the press, the court remarked:

"[D]oing stuff on the street without permission" sounds like an artist playing a street-smart scoundrel . . . It is not a crime to fantasize (even publicly) about putting up posters on property that does not belong to you. Vincent van Gogh said, "I dream of painting and then I paint my dream." Fairey dreamed aloud, but no evidence exists that Fairey's hands painted his dreams or even touched the 14 tagged buildings.³⁷¹

Although Fairey was acquitted because of insufficient evidence, the judicial rhetoric plainly reveals how the judge saw him: as a genius artist hunted by a not-so-intelligent police officer.

The stories of the pink fairy and Shepard Fairey reveal once again the preferential legal treatment of artistic pieces conforming to commonly accepted standards of beauty and those created by famous artists. This time the distinction is made in the context of criminal law, which is especially disturbing. Just think that bearing criminal liability or escaping it may depend on factors such as how beautiful the illegal piece is in the judge's eyes and how famous its painter is (See Fig. 41-42).

³⁶⁸ *Id.* at 707.

³⁶⁹ *Id.* at 708.

³⁷⁰ *See, e.g.*, State v. Foxhoven, 132 Wash. App. 1053 (Ct. App. 2006); In re D.H., 2014 WL 1356591, at *5 (Cal. Ct. App. Apr. 4, 2014); People v. Lopez, 2014 WL 68267, at *5 (Cal. Ct. App. Jan. 8, 2014); In re Steve A., 2015 WL 8843818, at *1 (Cal. Ct. App. Dec. 15, 2015).

³⁷¹ *Fairey*, 928 N.W.2d at 708.

FIGURE 41 – *Frank Shepard Fairey, a commissioned work. Paris 2020.*



FIGURE 42 – *Frank Shepard Fairey, an uncommissioned work. Paris 2020.*



To sum up, while some forms of graffiti are condemned as “vandalism” and “property destruction,” others are perceived as art or important social commentary. Depending on the style and the content of a message, its crea-

tor may be imprisoned or praised, while the works themselves may be either immediately whitewashed, left untouched, or carefully preserved, sometimes even under Plexiglass. Our research of media releases in the recent year identified narratives that found their way into cityscapes, including narratives that were in tune with the mainstream discourse on the Covid-19 pandemic and the “Black Lives Matter” movement. In addition, artistic expressions meeting the mainstream aesthetic standards and creations of famous artists are not punished and sometimes preserved in the cityscape. Narratives barred from cityscapes included pieces critical of the police, as well as anti-establishment messages, and expressions on Covid-19 that deviated from the mainstream discourse. And, of course, the sheer amount of forbidden graffiti constitutes expressions that are “unintelligible” and “ugly” in the courts’ eyes (See Fig. 43-44).

FIGURE 43 – *IUP and Berlin Kidz, Berlin 2017.*



FIGURE 44 – *Revok, Naples 2019.*

CONCLUSION: IMAGINE A CITY OF FREE NARRATIVES

We have now completed our journey through the cityscape. It is time to look back and reflect on the stories urban public spaces tell and the stories they conceal. Our discussion has focused on very different legal contexts—government speech, individual freedom of speech vis-à-vis private contracts and vis-à-vis zoning ordinances, advertisement policies of transit authorities, and finally, criminal prosecution of graffiti. As we have seen, some narratives systematically prevail across different legal fields, while others constantly lose. Hence, we can conclude that while dealing with conflicts over the cityscape, the legal system shows a strong tendency to side with specific narratives and disadvantage others. Let us briefly overview the balance of power our study has revealed.

The most conspicuous narrative of cityscapes is the tale of wealth and property. Uniformly looking “nice” living communities with no signs of individuality contrasted with huge signs displayed by owners of private homes makes us understand the privileges of economic power in the discourse taking place in our shared visual environment. Messages opposing changes that would allow more people to buy homes vis-à-vis the lack of contradictory expressions reinforce this impression.

Another powerful narrative cityscapes communicate is consumerist ideology. Although commercial speech enjoys only limited protection under the First Amendment, it is the very type of speech that enjoys significant dominance over our shared visual environment. Because of the strong hold of consumerist ideology on our cultural discourse, speech favoring this ideology—promoting consumption or endorsing business—is perceived as neutral and non-ideological. Hence, public authorities striving to avoid controversy often favor this kind of speech over alternative voices. Thus, a city would rather have a Christmas display thanking the sponsors than one questioning religious views; a city-sponsored event would rather accept an exhibit promoting the consumption of faux leather than one opposing animal torture; and a transit authority would rather have its buses carry advertising than political speech. Expressions critical of commerce, advertising, consumption, capitalism, as well as messages promoting workers' rights are frequent losers in the conflicts over urban narratives.

Another important battlefield of narratives is politics. Messages referring to elections and legislative votes enjoy a much-privileged position in the cityscape, which reflects and reinforces the dominant status of mainstream politics in the social discourse. Furthermore, the legal system tends to favor widely accepted political views over dissenting voices. American flags, patriotic messages, tributes to the U.S. Army and its Olympic teams, as well as graffiti supporting government policies during the Covid-19 outbreak have all proved winners in the battles over cityscapes. By contrast, messages dissenting from mainstream views—those favoring Puerto Rican independence, questioning the wisdom of the war on terrorism and the United States' role in the Israeli-Palestinian conflict, criticizing national policies, opposing Covid-19 measures, and calling for legislative changes—have all lost these battles.

Voices of resistance in the Black community present a most interesting case here. For many years, the legal system consistently wiped these voices out of the shared cityscapes. Yet, since the “Black Lives Matter” movement became part of the mainstream discourse, messages condemning violence against the Black community are readily accepted into the cityscape. Meanwhile, messages critical of other aspects of social life—such as economic oppression or judicial injustice towards the Black community—are still denied entry.

Another important area of conflicts over cityscapes is (anti)religious views. While common Christian motifs usually have no difficulty entering shared visual spaces, expressions challenging the widespread practicing of Christianity, opposing religion, and suggesting alternative (Summum) religious views were all banned from public view.

Last but not least, the legal system envisions cityscapes adorned by easily understandable, non-controversial, preferably cheerful and entertaining art conforming to widespread aesthetic standards. Pieces that gain wide social acceptance and recognition by the established art institutions sometimes enjoy the highest form of protection—preservation and legal protec-

tion against destruction—especially if made by famous artists. By contrast, pieces raising public controversy—due to their expressive message or aesthetic qualities—are routinely expelled from cityscapes.

All in all, our inquiry has revealed cityscapes as powerful sites of reinforcing dominant social voices and silencing dissent. Moreover, owners of real estate enjoy a very privileged position in the social discourse taking place in our shared visual space. More property and larger assets provide greater possibilities of expression. Since property ownership is associated with race, income, and status, the right to shape our shared cityscapes unjustifiably rests with powerful social groups. Cityscapes are a most influential site of public discourse. Their visual messages deeply impress social perceptions of what is important, what is acceptable, and what the right order of things is. This important medium of communication must be used to develop a meaningful democratic discourse rather than to buttress widespread views and fortify the existing balance of power.

We suggest redefining the boundaries of physical property so as to restrict—with certain exceptions—private and public owners' control over surfaces that shape our urban landscape. These surfaces will then be used as a medium of free visual expression, subject to general limitations on free speech, such as libel, incitement, and obscenity. This will reconceptualize the shared spaces as a public "forum" in its classic sense; that is, a place of discussion, opinion exchange, and purely aesthetic or even entirely incomprehensible expression. It will grant city residents the right to design their urban spaces as an ever-changing collage of their expressions (See Fig. 45-46).³⁷²

³⁷² See also Assaf-Zakharov & Schnetgöke, *supra* note 58, at 25–29.

FIGURES 45 and 46 – *Street views in Berlin, 2020, 2018.*

The idea of taking external surfaces out of the owner's control might sound radical. Yet, property is actually a bundle of privileges established by law; the content of this bundle undergoes changes from time to time.³⁷³ Consider, for instance, that at the time of the first sit-ins, it was unimaginable that grocery shop owners would be obliged to open their stores to African

³⁷³ Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1100 (2007).

Americans. But the Civil Rights Act of 1964 did just that, redefining the boundaries of property so as to take away a portion of the owners' control over their property for the sake of advancing equality in the field of goods and services.³⁷⁴ In a sense, we propose a similar move—removing part of the owners' control for the sake of advancing equality in the field of free speech. Our proposal seeks to grant equal speech rights in cityscapes to everyone, regardless of social status or economic power.

As discussed above, VARA includes a provision that preserves works of “recognized stature” against destruction. As the *Hanrahan* case demonstrates, this provision may prevent a property owner from redesigning his property so as to replace an artwork with another expression. Although VARA only protects works that were initially created with the owner's consent, this consent relates only to the creation of work, and not its preservation. Meanwhile, it is difficult to predict which artwork will acquire “recognized stature”—the liquor store owner in the *Hanrahan* case could probably not have foreseen a scenario in which he would no longer be able to remove the work. Yet, his right to control the external surface of his property was expropriated for the sake of preserving the artwork. That is, although our suggestion is different in its scope of application, the basic mechanism for the suggested move is already part of the existing legal toolkit. As decisions dealing incidentally with graffiti recognize, writings and paintings on external walls do not cause any serious damage and do not interfere with the use of property.

Our inquiry has shown that the real opposition to graffiti has everything to do with its content: while pieces conforming to official urban narratives are positively received and sometimes even preserved, dissenting expressions are whitewashed, condemned, and punished. Our proposal seeks to undermine this hegemony of the official narratives. Our shared visual environment should bear a great variety of voices and stories, rather than display the same authoritarian narratives—of economic power, consumerism, nationalism, widely accepted political views, Christianity, and non-controversial art—over and over again. The suggested legal change will make the discourse taking place in our shared cityscapes genuinely egalitarian, inclusive, and multi-voiced. This will give a chance to various social groups—and not only those owning real property—to voice their views, beliefs, and concerns (See Fig. 46-47). As our discussion of “Black Lives Matter” has demonstrated, the narrative opposing violence against the Black community was allowed into cityscapes only after it had entered the mainstream discourse. During the long years of struggle, the cityscape remained out of reach of this movement. Had this significant medium of expression been freely accessible, the voice of “Black Lives Matter” could have been heard

³⁷⁴ *Id.* at 1121–22.

much earlier, contributing to discourse that would accelerate social change.³⁷⁵

FIGURE 47 – *Sozi36, Berlin 2019.*



³⁷⁵ See GREGORY SHOLETTE, DELIRIUM AND RESISTANCE: ACTIVIST ART AND THE CRISIS OF CAPITALISM 127, 151–234 (Kim Charnley ed., 2017) (discussing the role of art in social and political movements); Gregory Sholette, *Merciless Aesthetic: Activist Art as the Return of Institutional Critique. A Response to Boris Groys*, FIELD, <http://field-journal.com/issue-4/merciless-aesthetic-activist-art-as-the-return-of-institutional-critique-a-response-to-boris-groys> (last visited Feb. 7, 2021), archived at <https://perma.cc/76R2-PQFC>; Gregory Sholette, *Do We Need a Turing Test for Activist Art in a Bare Art World?*, 3 ASAP J. 221, 221–22, 226–27 (2018); see also Assaf-Zakharov & Schnetgöke, *supra* note 57, at 31–32.

FIGURE 48 – *Paris 2020.*

Last but not least, our proposal seeks to open up the playground of visual art, undermining the dominance of experts, official institutions, market value, and fame. The field of visual artistic expression needs space for free and uncontrolled creative discourse, space that would provide opportunity for various voices, especially those that have not yet been heard. Our society provides enough room for art that fits into the existing standards and norms, and too little space for art created without seeking to meet the popular taste or to gain positive critique: art for the sake of art (See Fig. 48). Pieces that look ugly or unintelligible today may later be understood and valued if given the chance to participate in artistic discourse. Notably, with some portion of art, this will never happen. But this is no reason to wipe away artistic expression seeking its way into our shared spaces.

FIGURE 49 – *Huskies, Berlin 2019.*

