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## Can a City Declare that All Pickup Trucks Are Legally Ugly? A Florida Case Tests the Limits of Aesthetic Regulation

Scott Andron \*

### INTRODUCTION

The best-selling car in America isn't a car at all; it's a pickup truck. In October 2012, for example, Ford sold more than 56,000 F-series pickups, or nearly twice as many units as the Toyota Camry, the top-selling passenger vehicle without an open cargo bed in the back.<sup>1</sup>

America has a love affair with the pickup truck. The City of Coral Gables, however, does not. Rather, what this South Florida municipality had, up until recently, was an unusual ordinance that prohibits parking of pickup trucks on city streets between 7 p.m. and 7 a.m.<sup>2</sup> Unlike most similar rules, this ordinance covered not only commercial vehicles marked with the name of a business, but also private trucks with no markings or special attachments.<sup>3</sup> Also, pickups were prohibited not only on public streets but also in private driveways.<sup>4</sup> The only place a pickup truck could be stored at night in the city was in a garage.<sup>5</sup>

Lowell Kuvin didn't have a garage, so he parked his F-150 in front of his Coral Gables home, and the city fined him \$50.<sup>6</sup> Kuvin sued the city in 2003, challenging the constitutionality of the pick-up truck ban. A panel of Florida's Third District Court of Appeal overturned the regulation as applied to Kuvin's pickup truck,<sup>7</sup> but after an *en banc* rehearing, the full court upheld the city ordinance as rationally related to the city's interest in maintaining an attractive community,<sup>8</sup> and the state Supreme Court denied

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<sup>1</sup> *Auto Sales*, WALL ST. J., [http://online.wsj.com/mdc/public/page/2\\_3022-autosales.html](http://online.wsj.com/mdc/public/page/2_3022-autosales.html) (last visited Nov. 1, 2012).

<sup>2</sup> CORAL GABLES, FLA., ZONING CODE §§ 8-11 and 8-12 (2003). Later renumbered to §§ 4-411 and 4-412.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at §§ 8-11.

<sup>5</sup> *Id.*

<sup>6</sup> Idy Fernandez, *Truck Owners Riled Over Ban*, MIAMI HERALD, Oct. 16, 2003, at 1E.

<sup>7</sup> *Kuvin v. City of Coral Gables*, 62 So. 3d 604, 608 (Fla. Dist. Ct. App. 2007).

<sup>8</sup> *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 640 (Fla. Dist. Ct. App. 2010).

certiorari.<sup>9</sup>

The *Kuvin* case illustrates the extreme breadth of the municipal power to regulate aesthetics. In most cases, municipal appearance rules are subject only to rational-basis review, “the most relaxed and tolerant form of judicial scrutiny” in equal protection claims.<sup>10</sup> Unless fundamental rights or suspect classes are implicated,<sup>11</sup> the only limitation is that the regulation’s connection to a legitimate governmental purpose must not be “so attenuated as to render the distinction arbitrary or irrational.”<sup>12</sup> But courts seldom strike down aesthetic regulations on this basis.<sup>13</sup>

The *Kuvin* case also illustrates an interesting tension between two competing policy considerations: the perceived right to be free, especially in one’s own home, from gratuitous government meddling in private lifestyle or economic choices, against the right of communities to choose elected officials who can respond as they see fit to their constituents’ wishes without gratuitous meddling from judges.<sup>14</sup>

These policy concerns divide not only judges, but also the Coral Gables community. In a November 2012 referendum, the ordinance was repealed by a vote of 57 to 43%.<sup>15</sup> Under the new rule, pickups are allowed provided they have no commercial markings or attachments and the beds are empty.<sup>16</sup>

This paper will review the history of local aesthetic regulations with an emphasis on Florida, before analyzing the competing views of the judges in

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<sup>9</sup> *Kuvin v. City of Coral Gables*, 64 So. 3d 118 (Fla. 2011).

<sup>10</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 20 (1989).

<sup>11</sup> *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 58-59 (1994) (holding that a ban on most signs in residential neighborhoods violates the First Amendment despite substantial state interest in aesthetics); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (holding that a city must treat similarly situated landowners similarly to avoid an equal protection claim). Also, a regulation must comply with Fifth Amendment limitations to avoid becoming a regulatory taking. For example, a regulation may not be so burdensome as to deprive a landowner of all economically beneficial use of his land. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (holding that a regulation may not be so burdensome as to deprive a landowner of all economically beneficial use of his land.).

<sup>12</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

<sup>13</sup> This point will be discussed throughout this paper, but illustrative cases include: *Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000) (holding that ordinance prohibiting homeless people from sleeping outdoors is rationally related to aesthetics); *Haves v. City of Miami*, 52 F.3d 918, 922 (11th Cir. 1995) (finding ban on houseboats in some areas of city is rationally related to aesthetics).

<sup>14</sup> As the trial judge put it: “This case involves the difficult task of balancing two competing interests: on the one hand, a community’s right to enact ordinances which promote and protect aesthetic considerations, and on the other hand, a citizen’s right to enjoy his property in the manner in which he or she desires to.” Order on Cross Motion for Summary Judgment, *Kuvin v. City of Coral Gables*, No. 03-08911-CA-24 (Fla. Cir. Ct. Oct. 14, 2005) (No. 23971-1588).

<sup>15</sup> Howard Cohen, *It’s Official: Pickup Trucks are Legal in Coral Gables at Night*, MIAMI HERALD (Nov. 9, 2012), [http://www.miamiherald.com/2012/11/09/3089815\\_its-official-pickup-trucks-are.html](http://www.miamiherald.com/2012/11/09/3089815_its-official-pickup-trucks-are.html).

<sup>16</sup> *Id.*

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*Kuvin* and considering other analyses they might have used. Based on the facts and arguments before them, the judges had little option but to uphold the Coral Gables ordinance, but this paper will argue that plaintiff *Kuvin* missed or failed to develop some strong arguments that might have changed the outcome. In the alternative, this paper will discuss changes in law that might limit state power over aesthetics.

Throughout this paper, a theme will appear repeatedly because it lies at the heart of the *Kuvin* case and rational-basis cases generally: Legislatures aren't precluded from passing silly laws, only irrational ones. And when reasonable people can disagree about whether a law is crazy, it isn't.

The question is whether there was any way for Lowell *Kuvin* to get around this principle – and, if not, whether there should have been.

#### LAND USE AND AESTHETICS UNDER THE POLICE POWER

A wide range of municipal zoning and land-use regulations have been upheld based on their rational relationship to a substantial government interest in aesthetics. This power over aesthetics may be seen as a specific case of the general holding of *Village of Euclid v. Ambler Realty Co.*,<sup>17</sup> that exclusion of some uses of land via zoning is a valid exercise of the police power. The *Euclid* Court prescribed what amounts to a rational-basis test to determine the validity of a land-use regulation: “If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control.”<sup>18</sup>

This principle was expressly extended to aesthetics in *Berman v. Parker*,<sup>19</sup> which found that zoning for aesthetic purposes is a valid exercise of the police power. In an oft-cited passage of the opinion, Justice Douglas wrote:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.<sup>20</sup>

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<sup>17</sup> 272 U.S. 365 (1926).

<sup>18</sup> *Id.* at 388 (emphasis added).

<sup>19</sup> 348 U.S. 26 (1954).

<sup>20</sup> *Id.* at 33.

Allowing aesthetic regulations under the police power marked a major shift in the law. For example, just two decades before *Berman*, a New Jersey appeals court struck down a limitation on billboards, declaring that “[a]esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.”<sup>21</sup> Later decisions began to allow aesthetics-based regulations provided that another public purpose was also served, but the modern rule in most states is that aesthetics alone are a sufficient basis for land-use regulation.<sup>22</sup>

Since *Berman*, numerous other types of aesthetic regulations have been upheld. Some examples include architectural regulations,<sup>23</sup> billboard bans,<sup>24</sup> historic regulations,<sup>25</sup> and restrictions on vehicles.<sup>26</sup>

Acceptance of regulations based purely on aesthetics has not been consistent across states, however. *Berman* acknowledged a state power to regulate for aesthetic purposes, but states have sometimes chosen to place their own limitations on this power.<sup>27</sup> For example, some states have imposed a balancing test, requiring courts to weigh the regulation’s benefits to the public against the harm to the property owner.<sup>28</sup> Other states stick to the old rule, that aesthetics alone are insufficient to justify use of the police power.<sup>29</sup> But in most jurisdictions, aesthetics alone are sufficient to support

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<sup>21</sup> *City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co.*, 62 A. 267, 268 (N.J. 1905) (cited in 2 ARDEN H. RATHKOPF ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 16:3 (4th ed. 2012)).

<sup>22</sup> 2 ARDEN H. RATHKOPF ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 16:4 (4th ed. 2012).

<sup>23</sup> *E.g.*, *Reid v. Architectural Bd. of Review of Cleveland Heights*, 192 N.E.2d 74 (Ohio 1963) (upholding decision of municipal board of architects, who rejected plaintiff’s proposed modern-style concrete-and-glass home in a neighborhood full of colonials).

<sup>24</sup> *E.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion) (holding that a municipality may ban billboards on aesthetic grounds, provided that it does not allow so many exceptions as to eviscerate the ban’s content-neutrality); *City of Lake Wales v. Lamar Adver. Ass’n of Lakeland*, 414 So. 2d 1030, 1032 (Fla. 1982) (“Cities have the authority to take steps to minimize sight pollution . . .”).

<sup>25</sup> *E.g.*, *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13, 18 (N.M. 1964) (upholding city regulation of the size of window panes to conform with ‘Old Santa Fe Style’ of architecture in historic district).

<sup>26</sup> 5 ARDEN H. RATHKOPF ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 83:37 (4th ed. 2012). Many specific cases are discussed in this paper, *infra*.

<sup>27</sup> For a more complete discussion of this point, see *id.* at § 16:6 (4th ed. 2012).

<sup>28</sup> *E.g.*, *State v. Jones*, 290 S.E.2d 675, 681 (N.C. 1982); *Chusud Realty Corp. v. Vill. of Kensington*, 243 N.Y.S.2d 149, 155 (Sup. Ct. 1963) (“On balance, the court deems this a case ‘in which the legislative body goes too far in the name of aesthetics.’”) *aff’d*, 255 N.Y.S.2d 411 (App. Div. 1964).

<sup>29</sup> *E.g.*, *Heck v. Z.H.B. for Harveys Lake Boro.*, 397 A.2d 15, 19 (Pa. Commw. Ct. 1979) (“[a]esthetics alone cannot support a determination that the general welfare of a community would be adversely affected by the granting of a special exception.”).

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land-use regulations.<sup>30</sup>

Florida was an early adopter of land-use regulation as permitted by *Euclid*, and the state's courts actually recognized aesthetics as a legitimate government interest before *Berman*. In *City of Miami Beach v. Ocean & Inland Co.*, the Florida Supreme Court noted *Euclid*'s "fairly debatable" standard, and upheld land-use restrictions in a city zoning ordinance based on aesthetics, at least for a beachfront community with a tourism-based economy.<sup>31</sup> Later cases extended the rule to other beachfront cities,<sup>32</sup> but by the early 1980s, the state's courts were no longer stating any such limitation.<sup>33</sup>

In Florida, Coral Gables is known for its strict land-use regulations. The community's nickname is "The City Beautiful," and its website is [citybeautiful.net](http://citybeautiful.net). Humor writer Dave Barry lives in Coral Gables and once described it as "a grit-free community that keeps property values up by making pretty much everything illegal. You get fined for painting your house a non-approved color; if you left a tire in your yard, you'd get the death penalty."<sup>34</sup> The city has a number of reported land-use cases to its credit, including *Gold Coast Publications, Inc. v. Corrigan*,<sup>35</sup> in which the Eleventh Circuit upheld a complex set of regulations governing the size, shape, color, placement and other features permitted on newspaper racks within the city limits. Back in the 1970s, the city also successfully defended a rule prohibiting the parking of trailers in residential neighborhoods.<sup>36</sup>

Land-use regulations commonly include limitations or outright bans on storage of certain types of vehicles in residential districts. Typically,

<sup>30</sup> 2 ARDEN H. RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 16:5 (4th ed.) (includes list of states with cases adopting this rule).

<sup>31</sup> *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364 (Fla. 1941). The court reaffirmed the principle in *City of Miami Beach v. First Trust Co.*, 45 So. 2d 681, 684 (Fla. 1949) ("[T]he peculiar characteristics and qualities of the City of Miami Beach justify zoning to perpetuate its aesthetic appeal, and that this is an exercise of the police power in the protection of public welfare.").

<sup>32</sup> *E.g.*, *Sunad, Inc. v. City of Sarasota*, 122 So. 2d 611, 615 (Fla. 1960) ("We agree that the City of Sarasota is reasonably placed in the same category as Miami Beach so far as its appeal on the ground of attractiveness is concerned."); *Rotenberg v. City of Fort Pierce*, 202 So. 2d 782, 786 (Fla. Dist. Ct. App. 1967) (upholding zoning rule against junkyard because the "City of Fort Pierce is no less an attraction to tourists for its aesthetic qualities than the cities of Miami Beach and Sarasota").

<sup>33</sup> *Campbell v. Monroe Cnty.*, 426 So. 2d 1158, 1160 (Fla. Dist. Ct. App. 1983) ("We agree that a Florida county may enforce zoning requirements which primarily regulate aesthetic appearances."); *City of Lake Wales v. Lamar Adver. Ass'n of Lakeland*, 414 So. 2d 1030, 1031 (Fla. 1982) (holding that "aesthetics alone" are sufficient justification for billboard regulations).

<sup>34</sup> Dave Barry, *Did Somebody Smell a Rat?*, MIAMI HERALD (Feb. 13, 2011), <http://www.miamiherald.com/2011/02/12/2062066/dave-barry-did-somebody-smell.html>.

<sup>35</sup> *Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994), *cert. denied*, 516 U.S. 931 (1995).

<sup>36</sup> *City of Coral Gables v. Wood*, 305 So. 2d 261 (Fla. Dist. Ct. App. 1974).

prohibited vehicles include vehicles that cannot move under their own power, trailers, recreational vehicles, boats, vehicles with more than two axles, and commercial vehicles, which are typically defined as those marked with a company name and other lettering, or those with special attachments such as tow trucks.<sup>37</sup> Such regulations are generally upheld.<sup>38</sup>

But few reported cases specifically address pickup trucks. In *Kuvin*, the trial court relied on *Coral Gables v. Wood*, which dealt with campers, but was binding authority in the Miami area's state appellate court district.<sup>39</sup> Nevertheless, the trial court noted that judges elsewhere had reached different conclusions.<sup>40</sup> For example, in *Proctor v. City of Coral Springs*,<sup>41</sup> an appellate court in a neighboring district found that a law prohibiting parking of trucks on residential property was

[u]nreasonable and unconstitutional as applied to pickup trucks. It restricts drivers of pickup trucks from visiting with friends or family by making it illegal to be parked in a residential driveway, or on the hosts' lawn, or in the street in front of the home after 9:00 p.m. even though the vehicle in question is not truly a commercial vehicle; i.e., without commercial markings of any nature and not used for commercial purposes.<sup>42</sup>

The court's rationale was somewhat confusing. On the one hand, the

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<sup>37</sup> An example of a relatively permissive ordinance is Section 33-124.1 of the Miami-Dade County Code of Ordinances, which allows homeowners to park up to two taxicabs, limousines, or commercially marked vehicles in a residential neighborhood without restriction. One of these vehicles may be a truck equipped with ladders or other equipment, provided that it is concealed behind an opaque fence, in a garage, or behind the house. An example of a more restrictive ordinance is Section 25-43 of the City of Plantation, Fla., Code of Ordinances, which requires that all taxicabs, limousines, commercially marked vehicles, tow trucks and the like be concealed in a garage or carport. Pickup trucks are allowed, but if any property is stored in the bed, that property must not be visible from the street.

<sup>38</sup> *E.g.*, *Township of Livingston v. Marchev*, 205 A.2d 65 (N.J. Super. Ct. App. Div. 1964) (camp trailers); *Village of Glenview v. Van Dyke*, 240 N.E.2d 354 (Ill. App. Ct. 1968) (camp trailers); *Disney v. City of Concord*, 194 Cal. App. 4th 1410 (Ct. App. 2011) (recreational vehicles); *Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 524 S.E.2d 404, 408 (S.C. 1999) (commercial vehicles, defined as those exceeding five tons in weight or eight feet in height, or having more than two axles); *People v. Tolman*, 168 Cal. Rptr. 328 (App. Dep't Super. Ct. 1980) (commercial vehicles exceeding three tons); *Recreational Vehicle United Citizens Ass'n v. City of Sterling Heights*, 418 N.W.2d 702 (Mich. Ct. App. 1987) (campers, boats, snowmobiles, and trailers). For a detailed discussion of such regulations, see 5 ARDEN H. RATHKOPF ET AL., *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 83:37 (4th ed. 2012).

<sup>39</sup> Order on Cross Motion for Summary Judgment at 6-7, *Kuvin v. City of Coral Gables*, No. 03-08911-CA-24 (Fla. Cir. Ct. Oct. 14, 2005) (No. 23971-1588).

<sup>40</sup> *Id.*

<sup>41</sup> Coral Springs is a suburban community about 40 miles north of Miami but in a different appellate district. Florida also has a third city with the word "coral" in its name, but fortunately, Cape Coral does not come into this story.

<sup>42</sup> 396 So. 2d 771, 772 (Fla. Dist. Ct. App. 1981).

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court suggested that the ordinance was unreasonable because of its effect on residents' ability to receive visitors or to park a non-commercial truck in front of the house. But on the other hand, the court also distinguished the case from *Wood*, because, unlike in *Wood*, the Coral Springs ordinance failed to allow owners to park their vehicles even in an enclosed garage. This led the trial court in *Kuvin* to believe that *Proctor* was inapt.<sup>43</sup> So *Proctor* could be read as holding that the Coral Springs law was unreasonable either because it lacked a garage exception, or because it failed to distinguish commercial from non-commercial pickup trucks, and perhaps infringed on freedom of association.

In a concurring opinion in *Proctor*, Judge Daniel T.K. Hurley expressly stated that he saw the ordinance as violating the right to association under the federal and state constitutions.<sup>44</sup> Judge Hurley noted that Proctor's truck had been ticketed while it was parked at the homes of his friends and his mother-in-law.<sup>45</sup> Judge Hurley also suggested that the ordinance might raise privacy issues under the state and federal constitutions because of the special protection that applies to the home.<sup>46</sup> He said that the ordinance should be subject to strict scrutiny pursuant to *NAACP v. Alabama*.<sup>47</sup>

In a dissenting opinion in *Proctor*, Judge John H. Moore II disagreed with the majority's opinion that the ordinance was unreasonable.<sup>48</sup> Judge Moore also said that he "fail[ed] to see how a violation of this relatively clear and simple parking ordinance rises to the level of such constitutional proportions as suggested by Judge Hurley."<sup>49</sup> Finally, Judge Moore chastised the court for substituting its judgment for that of Coral Springs' leaders absent a clear constitutional violation.<sup>50</sup>

In *City of Nichols Hills v. Richardson*,<sup>51</sup> an Oklahoma appellate court overturned a municipal ordinance prohibiting the overnight parking of pickup trucks in residential neighborhoods. The court recognized the

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<sup>43</sup> Order on Cross Motion for Summary Judgment, *supra* note 39, at 6.

<sup>44</sup> *Proctor*, 396 So. 2d at 772-73 (Hurley, J., concurring) ("It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . .") (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

<sup>45</sup> *Proctor*, 396 So. 2d at 773.

<sup>46</sup> *Id.* (stating that the U.S. Supreme Court had "declared the privacy of the homeplace to be virtually sacrosanct" in *Stanley v. Georgia*, 394 U.S. 557 (1969), and that Florida courts have held that the right of privacy "includes the right to be free from unreasonable restrictions on the use of the residence," citing *Foss v. Foss*, 392 So. 2d 606, 607 (Fla. Dist. Ct. App. 1981)).

<sup>47</sup> *Proctor*, 396 So. 2d 774.

<sup>48</sup> *Id.* (Moore, J., dissenting).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *City of Nichols Hills v. Richardson*, 939 P.2d 17 (Okla. Crim. App. 1997).



legitimate governmental interest in aesthetics, but found the ordinance both over- and under-inclusive.<sup>52</sup> The court, after citing *Proctor* as agreeing, wrote:

Any vehicle that meets the definition of a “private passenger vehicle,” no matter how ugly, rusted or offensive, may be parked in this municipality between the hours of 2:00 a.m. and 5:00 a.m. However, not a single pickup, no matter how new, expensive, or “pleasing to the eye,” may be parked in any driveway during these hours.<sup>53</sup>

Another pickup case was *Minx v. Village of Flossmoor*,<sup>54</sup> in which the plaintiff truck owner claimed an equal protection violation because the defendant municipality prohibited him from parking his non-commercial pick-up truck in his driveway, but allowed passenger cars. The court rejected the village’s motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), finding that the plaintiff had stated a valid claim.<sup>55</sup> While noting that equal-protection challenges to zoning rules seldom succeed,<sup>56</sup> the court, in a facetious footnote, pointed to a number of logical problems raised by the village’s ordinance:

While not pertinent to the present motion, the court wonders how pick-up owners in Flossmoor will fix flat tires. The court also is curious as to how Flossmoor’s pick-up owners will wash their trucks without flooding their garages. They supposedly could have someone drive their vehicles back and forth on their driveways or in front of their house, so as not to have the vehicle parked, while stationary persons wash the truck.<sup>57</sup>

That brings us to *Kuvin*. After losing in the trial court, *Kuvin* sought review in Florida’s Third District Court of Appeal, and a divided three-judge panel found the Coral Gables ordinance unconstitutional as applied to the plaintiff’s truck.<sup>58</sup> Applying rational-basis scrutiny,<sup>59</sup> the majority found that the ordinance was not rationally related to either of two possible governmental purposes.<sup>60</sup> The ordinance wasn’t rationally related to keeping commercial vehicles out of a residential neighborhood because

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<sup>52</sup> *Id.* at 19.

<sup>53</sup> *Id.*

<sup>54</sup> *Minx v. Vill. of Flossmoor*, 724 F. Supp. 592 (N.D. Ill. 1989).

<sup>55</sup> *Id.* at 594-95.

<sup>56</sup> *Id.* at 594.

<sup>57</sup> *Id.* at n.2.

<sup>58</sup> *Kuvin v. City of Coral Gables*, 62 So. 3d 604, 604-05 (Fla. Dist. Ct. App. 2007).

<sup>59</sup> *Id.* at 605.

<sup>60</sup> *Id.* at 605-06.

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Kuvin's truck was not commercial.<sup>61</sup> And the ordinance was not rationally related to aesthetics for the same reasons cited in *City of Nichols Hills*: the ordinance allows ugly cars but not attractive trucks.<sup>62</sup> Writing for the court, Senior Judge Alan R. Schwartz said "there is nothing to distinguish Kuvin's truck or others like it from what some might think are even more aesthetically displeasing cars or, even more plainly, from one of whatever make or model which is in obvious disrepair or just plain dirty."<sup>63</sup>

Judge Schwartz distinguished *Kuvin* from *Wood* in that different types of vehicles were involved, and in that plaintiff Kuvin had no garage in which to conceal his vehicle, unlike plaintiff Wood.<sup>64</sup>

Judge Schwartz also raised some privacy and associational issues similar to those in Judge Hurley's concurring opinion in *Proctor*.<sup>65</sup> Because the city's aesthetic rationale was implausible, Judge Schwartz reasoned, the city must be targeting pickup drivers for some reason related to their tastes or lifestyle.<sup>66</sup> The city "require[d] Kuvin to choose between owning and parking a personal vehicle of his choice in Coral Gables and leaving town (which is what Kuvin, taking his cursed truck with him, actually did). That is a decision that no government may require."<sup>67</sup> Judge Schwartz cited no case or legal proposition for this statement. Then he went further, declaring: "[T]here is a larger issue at stake here. Absent any legitimate basis for the ordinances, what remains is that the City Parents disapprove of a perhaps unorthodox vehicle and the possibly diverse taste and lifestyle which may be reflected by its ownership."<sup>68</sup> Citing Judge Hurley's opinion in *Proctor* and a U.S. Supreme Court case striking down a municipal attempt to define "family,"<sup>69</sup> Judge Schwartz wrote:

For a governmental decision to be based on such considerations is more than wrong; it is frightening. Perhaps Coral Gables can require that all its houses be made of ticky-tacky and that they all look just the same, but it cannot mandate that its people are, or do. Our nation and way of life are based on a treasured diversity, but Coral Gables punishes it. Such an action may not be upheld.<sup>70</sup>

As in *Proctor* before it, the *Kuvin* panel opinion included three

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<sup>61</sup> *Id.* at 606.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 608.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

<sup>70</sup> *Kuvin*, 62 So. 3d at 608.

separate opinions from as many judges.

In a concurring opinion, Judge Angel A. Cortiñas added that he saw a clear distinction between “commercial and/recreational vehicles,” on the one hand, and “personal use mainstream vehicles” on the other.<sup>71</sup> The former could rationally be kept out of residential neighborhoods, while the latter could not.<sup>72</sup> “Like Judge Schwartz, I find this distinction to be frightening,” Cortiñas wrote. “It would allow government to regulate the types of personal use vehicles its citizens drive simply based on their outward appearance. Such a holding embraces George Orwell’s dystopia, where personal rights are subverted by the government.”<sup>73</sup>

In a dissenting opinion, Judge Leslie B. Rothenberg suggested her colleagues get back to basics. Citing cases like *Euclid* and *Ocean & Inland Co.*, Judge Rothenberg pointed out that a zoning ordinance is subject only to rational-basis scrutiny and “must be upheld if reasonable persons could differ as to its propriety.”<sup>74</sup> Judge Rothenberg also noted that Florida allows zoning regulations supported solely on aesthetic grounds.<sup>75</sup> Bound by these precedents, Judge Rothenberg argued, the court was obliged to defer to Coral Gables and uphold the ordinance.<sup>76</sup>

Despite this call for deference to legislators, however, Judge Rothenberg went further and reached the affirmative conclusion that “opened pickup trucks parked in residential neighborhoods at night detract from their residential character”<sup>77</sup> because pickups are designed for commercial use.<sup>78</sup> Explaining the connection between aesthetics and pickup trucks, Judge Rothenberg wrote:

These ordinances make perfect sense and are rationally related to maintaining and enhancing the residential character of the City’s neighborhoods and the aesthetics of the City because any vehicle that was designed for commercial use, regardless of whether it is used for commercial purposes, looks the same and is likely to be used to store and carry bulk material exposed to public view.<sup>79</sup>

While acknowledging that the majority applied rational basis, albeit reaching the wrong result, Judge Rothenberg also considered and rejected

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<sup>71</sup> *Id.* at 609 (Cortiñas, J., concurring).

<sup>72</sup> *Id.* at 611 (citing *City of Nichols Hills v. Richardson*, 939 P.2d 17 (Okla. Crim. App. 1997), and *Proctor v. City of Coral Springs*, 396 So. 2d 771 (Fla. Dist. Ct. App. 1981)).

<sup>73</sup> *Kuvin*, 62 So. 3d at 611.

<sup>74</sup> *Id.* at 613 (Rothenberg, J., dissenting).

<sup>75</sup> *Id.* at 614-15.

<sup>76</sup> *Id.* at 615.

<sup>77</sup> *Id.* at 615.

<sup>78</sup> *Id.* at 617.

<sup>79</sup> *Id.* at 616.

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Kuvin's argument that the ordinance infringes on his fundamental right to freedom of association, and therefore, that strict scrutiny should apply.<sup>80</sup> Relying on cases such as *Roberts v. U.S. Jaycess*,<sup>81</sup> Judge Rothenberg delineated two types of freedom of association: intimate relationships and expressive association.<sup>82</sup> "Intimate relationships" refers to "marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives."<sup>83</sup> Kuvin's claim that the city ordinance prevented him from visiting close friends in the city after 7:00 p.m. in his truck would not prove an infringement of an intimate relationship because close friendships are not intimate relationships akin to marriage and parenthood, Judge Rothenberg argued.<sup>84</sup> As for expressive association, Judge Rothenberg pointed to cases where it has been held to include "service activities, transmitting values like the Boy Scouts of America . . . and 'civic, charitable, lobbying, fundraising, and other activities.'"<sup>85</sup> Kuvin's social meetings with friends are not analogous to these cases because they lack a real expressive element, Judge Rothenberg said.<sup>86</sup> Moreover, the city's ordinance did not impede these meetings because it did not stop him from owning a truck; it merely required him to keep it garaged.<sup>87</sup>

The city asked for a rehearing en banc, which was granted.<sup>88</sup> The en banc court reversed the panel decision by a vote of 6-2.<sup>89</sup> A modified version of Judge Rothenberg's panel dissent became the opinion of the court. Judge Frank A. Shepherd issued a concurring opinion,<sup>90</sup> while Judge Cortiñas issued a dissenting opinion, joined by Judge Vance E. Salter.<sup>91</sup>

In his concurring opinion, Judge Shepherd chides both the majority and the dissent for substituting their respective judgments for those of the Coral Gables City Commission.<sup>92</sup> He wrote: "I am more concerned by the enthusiasm with which the majority embraces these ordinances. I do not

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<sup>80</sup> *Id.* at 621-24.

<sup>81</sup> 468 U.S. 609 (1984).

<sup>82</sup> *Kuvin*, 62 So. 3d at 622-24 (Rothenberg, J., dissenting).

<sup>83</sup> *Id.* at 622.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 623 (internal citations omitted).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 623-24.

<sup>88</sup> *Kuvin v. City of Coral Gables*, 62 So. 3d 625 (Fla. Dist. Ct. App. 2010).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 641-42.

<sup>91</sup> *Id.* at 642-48. Note that Judge Schwartz did not participate in the en banc rehearing because he was a senior judge.

<sup>92</sup> *Id.* at 641 ("It is up to the Coral Gables City Commission to decide whether to make any change in their ordinances.").

believe the ordinances ‘make perfect sense.’ In fact, it is not our place to so decide. Aesthetic judgments necessarily are subjective in nature, defying objective evaluation.”<sup>93</sup> He concluded:

If I were a member of the Coral Gables City Commission, I might argue it is improvident to maintain the ordinances before us on the City’s books. As a member of this Court, I am not privileged to do so. However, under our system of government, it is our expectation as citizens that improvident decisions of local government, as distinguished from unlawful decisions, “will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” This is as it should be.<sup>94</sup>

In his dissent, Judge Cortiñas recaps his and Judge Schwartz’s arguments from their majority opinion in the panel decision.<sup>95</sup>

The *Kuvin* case reached its conclusion when the Florida Supreme Court refused to hear *Kuvin*’s appeal.<sup>96</sup>

#### ANALYSIS

*Kuvin* was a difficult case. It presented a situation in which the government was intruding into an unusual sphere of everyday life. While most people would not be surprised to learn of a local regulation prohibiting the parking of a camper or a box truck in a private driveway, a rule against an empty and unmarked pickup truck isn’t common. On the other hand, what right did the law interfere with? In the pickup cases discussed above, most judges did not see a fundamental right to free association being implicated. Plainly, *Kuvin*’s use of his property – both his land and his truck – was affected by the ordinance. But for substantive<sup>97</sup> due-process purposes, property rights are not fundamental and therefore may be infringed without triggering elevated scrutiny.<sup>98</sup>

As suggested by cases like *Euclid*, the U.S. Supreme Court has given legislative bodies wide leeway to limit the use of private property without effecting a taking. Justice Holmes explained the rationale ninety years ago

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<sup>93</sup> *Id.* at 642 (internal citation omitted).

<sup>94</sup> *Id.* (internal citations omitted).

<sup>95</sup> *Id.* at 642-48.

<sup>96</sup> *Kuvin v. City of Coral Gables*, 64 So. 3d 118 (Fla. 2011).

<sup>97</sup> Infringement of property rights do, of course, trigger *procedural* due process, ensuring the property owner gets notice and a hearing before the government infringes them. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). Procedural due process is not at issue here.

<sup>98</sup> *See, e.g.*, 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONST. L.* § 15.4(e) (5th ed. 2012) (“[A] majority of Justices continue to use the rational basis test to approve laws . . . restricting the use of property.”).

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in this famous passage from *Pennsylvania Coal Co. v. Mahon*:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.<sup>99</sup>

Kuvin never argued that the city was effecting a regulatory taking. Neither his house nor his truck were taken, and he did not argue that the city's action substantially diminished their value.

This brings us back to substantive due process. With no fundamental right at issue, Kuvin's only protection was rational-basis scrutiny. And, as Judge Rothenberg notes, rational basis "is the most relaxed and tolerant form of judicial scrutiny."<sup>100</sup> Since we already know that the state has a legitimate interest in aesthetics, Kuvin's only hope was that a court would find that the relationship between aesthetics and the blanket ban on pickups was "so attenuated as to render the distinction arbitrary or irrational."<sup>101</sup> And, just as he hoped, the panel majority found the ordinance both over- and under-inclusive.

Here we encounter a problem with the U.S. Supreme Court's rational-basis jurisprudence: it's not entirely clear when courts are supposed to examine the fit of a regulation to determine whether it is over- or under-inclusive.<sup>102</sup> Some commentators believe that fit is irrelevant to rational-basis analysis.<sup>103</sup> But, the Supreme Court has expressly considered fit while

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<sup>99</sup> 260 U.S. 393, 413 (1922).

<sup>100</sup> *Kuvin*, 62 So. 3d at 632 (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989)).

<sup>101</sup> *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

<sup>102</sup> See, e.g., 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONST. L.* § 18.3(b) (5th ed.) ("The rationality test is easy to state: the classification only has to have a rational relationship to any legitimate governmental interest in order to comply with the equal protection guarantee. However, the meaning of that test is not clear.")

<sup>103</sup> E.g., Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 *IND. L. REV.* 357, 374 (1999) (stating that "overinclusion and underinclusion" are "usually thought to be without significance under traditional rational basis deference"); Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 *UCLA L. REV.* 447, 478 (1989) ("Under the rational basis test, probably no amount of overinclusion or underinclusion

applying rational basis in some cases, such as in *Cleburne* and *U.S. Department of Agriculture v. Moreno*.<sup>104</sup> Many commentators, attempting to reconcile these cases with others involving rational-basis scrutiny, concluded that *Cleburne* and their ilk actually involved a different test.<sup>105</sup>

Interestingly, it's not clear that the majority in the en banc *Kuvin* decision considered fit irrelevant. Judge Rothenberg went beyond merely saying that she didn't think *Kuvin* had proved the Coral Gables ordinance irrational, and therefore that the court must defer to the City Commission. She went further, holding that the ordinance was indeed rational.

But if fit is not the measure of an ordinance's "rational relationship" to a legitimate governmental purpose, what is? Is there any way the pickup truck ordinance could have been struck down under a rational-basis analysis? And if not, is there some other rule that should apply to aesthetic regulations?

The following sections will examine theories under which ordinances like the one in *Kuvin* could be struck down. The first two theories, under the heading of "Roads Not Taken," are arguments available under current law, but that *Kuvin* did not fully develop or failed to use at all. The remaining theories, under the heading of "Removing Roadblocks," would require legislative or judicial action to implement.

#### ROADS NOT TAKEN

Based on the facts and legal issues presented, it's no surprise that the en banc court rejected *Kuvin*'s appeal. After all, as Judge Rothenberg pointed out, if reasonable people can disagree about whether an ordinance is irrational, it isn't. This point seems to dispose of the case by effectively taking further analysis out of the court's jurisdiction.

But, as in almost every area of law, the rational-basis rules have exceptions. Unfortunately for Lowell *Kuvin*, his briefs only hinted at, or missed altogether, some of the strongest arguments available to him.

That's not to say he necessarily would have won had he offered these arguments. After all, the en banc vote was 6-2. And the arguments discussed below may still strike many judges as too weak to overcome the heavy burden needed to strike down a law under rational basis.

But one has to imagine that at least some of the judges in this case were scratching their heads, as much as any lay observer, in trying to figure

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is too much."); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) ("[J]udicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp.").

<sup>104</sup> 413 U.S. 528 (1973).

<sup>105</sup> E.g., Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 795 (1987).

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out how Coral Gables could effectively tell Lowell Kuvin that he couldn't drive the nation's most popular vehicle. At least some of these judges had to be looking for an argument to overturn the ordinance, at least as applied to Kuvin, that would not get reversed by the Florida Supreme Court. Kuvin didn't give them that argument.

But that doesn't stop a Monday-morning quarterback. Here are some possibilities.

#### 1. Ordinances Based on Irrational Animus Fail on Rational Basis

The Coral Gables truck ordinance dates to 1960,<sup>106</sup> and several facts have been cited to support the theory that the original purpose of the ordinance was not aesthetics but the exclusion of working-class people from the city. While the modern pickup truck is a common substitute for a personal car, the pickup of the 1950s and 60s was a work vehicle. Moreover, Coral Gables represents the ordinance as grounded in aesthetics, but applies the law only at night, when the vehicles in question would be difficult to see.

Or, as resident Larry Horton told the city's Zoning Board at a public hearing:

This is ridiculous. If it's for aesthetics, you'd have to regulate it during the day. Now, my personal feeling is that really, this is not about pickup trucks. This is an attempt to keep working class people who own pickup trucks from purchasing and living in the City of Coral Gables. . . .<sup>107</sup>

This was a common refrain from critics of the ordinance. For example, Joel Hollander, a University of Miami art history professor, told the Miami Herald on election day: "It just seems like a class issue. When it was enacted decades ago, it was to keep the lower class out of Coral Gables."<sup>108</sup>

Finally, the ordinance was contemporaneous with a number of other laws with similar animus. For example, the 1967 edition of the Coral Gables City Code included a provision authorizing the officials to prevent "undesirable persons," such as paupers, from entering or remaining in the city.<sup>109</sup> The same code also mandated racial segregation of neighborhoods.<sup>110</sup> According to University of Miami law Professor

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<sup>106</sup> Transcript of Coral Gables Zoning Board Meeting at 11 (Oct. 12, 2011), *available at* <http://www.coralgables.com/modules/showdocument.aspx?documentid=9012>.

<sup>107</sup> *Id.* at 27.

<sup>108</sup> Howard Cohen, *50-Year-Old Ban on Pickups Likely Scrapped*, MIAMI HERALD, Nov. 7, 2012, at 4B.

<sup>109</sup> CORAL GABLES, FLA. CITY CODE, § 8 (1967).

<sup>110</sup> *Id.*



Anthony Alfieri and others, Coral Gables operated an incinerator called “Old Smokey” in a black neighborhood just outside the city during the 1960s, until the incinerator was closed as a public nuisance.<sup>111</sup> The city apparently also had laws prohibiting black people from being in the city after dark without permission, according to Professor Alfieri.<sup>112</sup>

In fact, Judges Hurley and Schwartz hinted that Coral Gables and Coral Springs might have had unspoken, nefarious motives for banning pickup trucks in their respective cities. Judge Hurley’s remark about elitism seems to imply an animus against people who are not wealthy. And indeed, Coral Gables is a wealthy city. The median home in Coral Gables was worth \$388,290 in 2012, more than triple the countywide average of \$122,871, according to the Miami-Dade County Property Appraiser.<sup>113</sup> For the five years ending in 2011, the median household income was \$88,167,<sup>114</sup> compared to a countywide average of \$43,957.<sup>115</sup> Kuvin was a waiter when he was first ticketed in 2003, but went to law school after the case began.<sup>116</sup>

These facts suggest several possible arguments, all of which come down to the same general idea: a regulation is irrational if motivated by animus against a particular group.

As a way to explain the Court’s equal-protection jurisprudence, at least one scholar, Susannah Pollvogt, has suggested that the underlying principle is one of “animus.”<sup>117</sup> In *Moreno*, for example, the Court found that rules aimed at denying welfare benefits to “hippies” lacked a rational basis because a “bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>118</sup> That’s an example of what Pollvogt means by “animus.” Pollvogt concludes that “animus is present where the public laws are harnessed to create and enforce

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<sup>111</sup> Anthony V. Alfieri, Zachary A. Lipshultz & Steven E. Lipshultz, *Find Somewhere Else to Park Those Trolleys*, MIAMI HERALD, Feb. 5, 2013, at 9A.

<sup>112</sup> Jenny Staletovich, *Trolley-Garage Fight Continuing*, MIAMI HERALD, Jan. 10, 2013, at 3B (“This is a community with a very deep, troubled racial history. In our lifetime, black workers in the West Grove could not be in Coral Gables after dark without the permission of a homeowner,” said Alfieri.”).

<sup>113</sup> *2012 Preliminary Average and Median Residential Values*, MIAMI-DADE CTY. PROP. APPRAISER (July 1, 2012), <http://www.miamidade.gov/pa/library/reports/2012-average-median-residential-values.pdf>.

<sup>114</sup> *State and County Quick Facts: Coral Gables, Fla.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12/1214250.html> (last updated Jan. 7, 2014, 10:50 AM).

<sup>115</sup> *State and County Quick Facts: Miami-Dade County, Fla.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12/12086.html> (last updated Jan. 6, 2014, 5:28 PM).

<sup>116</sup> Susannah A. Nesmith, *Overnight Truck Ban Ruled Out*, MIAMI HERALD, Aug. 23, 2007, at A1.

<sup>117</sup> Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

<sup>118</sup> *U.S. Dep’t. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

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distinctions between social groups — that is, groups of persons identified by status rather than conduct.”<sup>119</sup>

The U.S. Supreme Court mentioned animus in *Romer v. Evans*,<sup>120</sup> in which it overturned a Colorado constitutional amendment that would have prohibited the state from protecting gays from discrimination based on sexual orientation. Writing for the Court, Justice Kennedy said the amendment failed rational-basis scrutiny because it sought to disadvantage gays based on “animosity toward the class of persons affected.”<sup>121</sup> Quoting *Moreno*, Kennedy added: “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>122</sup>

It’s important to note that *Romer* was a rational-basis case. The Court did *not* hold that gays are a protected class subject to elevated scrutiny. Instead, the Court held that Colorado’s animus against gays made the constitutional amendment irrational.

In a sign that animus remains a valid doctrine, the Court again cited to *Moreno* in a major gay marriage case this year. *United States v. Windsor*<sup>123</sup> involved a lesbian couple that lived in New York but was legally married in Canada. New York recognized the couple’s marriage, but, pursuant to the Defense of Marriage Act (“DOMA”),<sup>124</sup> the IRS did not.<sup>125</sup> So when one of the spouses died, the other had to pay \$363,053 in federal estate tax.<sup>126</sup> If the IRS had recognized the marriage, the surviving spouse would have owed nothing.<sup>127</sup> The woman paid the tax and sued for a refund.<sup>128</sup> The Supreme Court, in a 5-4 decision, struck down DOMA’s definition of marriage, holding that it was based on an improper animus, or motivation to hurt an unpopular group, namely gays.<sup>129</sup>

Cases like *Moreno*, *Romer* and *Windsor* are relevant to *Kuvin* because they show that laws may be overturned when based on animus against a particular group, even if that group is not a “suspect class” entitled to

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<sup>119</sup> Pollvogt, *supra* note 117, at 926.

<sup>120</sup> 517 U.S. 620, 624 (1996).

<sup>121</sup> *Id.* at 634.

<sup>122</sup> *Id.* (emphasis in original).

<sup>123</sup> 133 S. Ct. 2675, 2683 (2013).

<sup>124</sup> Codified in relevant part at 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

<sup>125</sup> *Windsor*, 133 S. Ct. at 2683.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 2693 (citing U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973)).

elevated scrutiny. Poor people, like gays, are not a suspect class<sup>130</sup> but might still be entitled to protection from animus-based legislation. If Kuvin could have developed the evidence on the legislative history of the Coral Gables truck ordinance, he might have been able to show that it was grounded in an unconstitutional animus against blue-collar people.

This kind of argument already has an analogue in land-use law: exclusionary zoning. Exclusionary zoning “is the use of a local zoning ordinance to promote housing segregation,” typically based on income.<sup>131</sup> To some extent, all zoning is “exclusionary” in that it seeks to separate uses thought to be incompatible, such as homes and factories.<sup>132</sup> Moreover, land-use laws aimed at protecting aesthetics may naturally come into tension with the policy goal of ensuring that non-wealthy people have access to safe housing.<sup>133</sup> However, courts or legislatures sometimes invalidate or prohibit government actions that take an excessive toll on access to affordable housing.

The classic case is *Southern Burlington County NAACP v. Township of Mount Laurel*.<sup>134</sup> In that case, the defendant municipality had 4,121 acres zoned for industrial use, only 100 of which were occupied.<sup>135</sup> Nevertheless, the township refused to allow a nonprofit organization to build affordable housing unless it consisted of single-family homes on half-acre lots, which would have been impossible.<sup>136</sup> The plaintiff civil rights organization sued, claiming the township was trying to keep low and moderate-income families out.<sup>137</sup> The New Jersey Supreme Court, largely on state constitutional grounds, held that municipalities have a duty to provide a range of housing options and may not use restrictive zoning regulations to keep out less-wealthy families.<sup>138</sup> Moreover, the court held that when a municipality fails to provide a range of housing options, the normal presumption of validity is reversed, such that the ordinance will be presumed invalid until and unless the municipality can prove otherwise.<sup>139</sup>

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<sup>130</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>131</sup> Mandara Meyers, Comment, *(Un)equal Protection for the Poor: Exclusionary Zoning and the Need for Stricter Scrutiny*, 6 U. PA. J. CONST. L. 349, 354 (2003).

<sup>132</sup> See, e.g., 2 ARDEN H. RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 22:1 (4th ed. 2013) (“Practically all zoning restrictions have as a purpose and effect the exclusion of some activity or use.”).

<sup>133</sup> See, e.g., Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 293 (2002).

<sup>134</sup> 336 A.2d 713 (N.J. 1975).

<sup>135</sup> *Id.* at 719.

<sup>136</sup> *Id.* at 719-20.

<sup>137</sup> *Id.* at 716.

<sup>138</sup> *Id.* at 725, 728.

<sup>139</sup> *Id.* at 728.

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*Mount Laurel* was influential in bringing attention to the issue of exclusionary zoning,<sup>140</sup> but states vary widely in their approach to the problem, and New Jersey's approach probably is more aggressive than most. In Florida, state law requires municipalities to provide land zoned for affordable housing,<sup>141</sup> but enforcement is handled administratively with highly deferential judicial review.<sup>142</sup>

Nevertheless, exclusionary zoning could have served as a handy metaphor to show the *Kuvin* court that the principle of *Romer* can apply to land-use and that the Florida Legislature considers affordable housing a policy priority.

The exclusionary zoning concept aside, at least one reported case applied a kind of animus analysis in a land-use context. In *Marks v. City of Chesapeake*, the Fourth Circuit reversed a Virginia city's decision to deny a conditional-use permit for a palm reader's shop.<sup>143</sup> The city's planning staff and Planning Commission recommended approval of the permit.<sup>144</sup> But the City Council rejected the permit after a number of residents argued against it on religious grounds, with at least one person citing Bible verses in support of his arguments.<sup>145</sup> Marks filed a civil-rights suit under 42 U.S.C. § 1983, claiming the city's decision was "arbitrary and capricious" and therefore "a deprivation of property without due process of law."<sup>146</sup> The federal district court agreed, and the Fourth Circuit affirmed, holding that "irrational, arbitrary governmental measures taken against a politically unpopular target on the basis of complaining neighbors' fears or negative attitudes are repugnant to constitutional guarantees."<sup>147</sup> Citing *Cleburne*, the court added: "As a general matter, therefore, the public's 'negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases' for local officials' land

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<sup>140</sup> See, e.g., 3 PATRICIA E. SALKIN, AM. LAW ZONING § 22:5 (5th ed. 2013).

<sup>141</sup> FLA. STAT. § 163.3177 (2012).

<sup>142</sup> E.g., Fla. Wildlife Fed'n v. Collier Cnty., 819 So. 2d 200, 203 (Fla. Dist. Ct. App. 2002) ("In that the legislature delegated to the Department [of Community Affairs] the power to enforce section 163.3177, we note that we are required to be highly deferential to the agency's interpretation of such statute.").

<sup>143</sup> Marks v. City of Chesapeake, Va., 883 F.2d 308, 309 (4th Cir. 1989).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 309-10.

<sup>146</sup> *Id.* at 310. Although the complaint was cast as a substantive due-process matter governed by an arbitrary-and-capricious standard, the test is identical to the rational-basis standard applied in cases like *Kuvin*. See, e.g., Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1577 (11th Cir. 1989) (In evaluating a § 1983 complaint brought on substantive due-process grounds, the court held: "The relevant question for consideration is whether there existed a rational basis for the City's rejection of Greenbriar's plan, or, phrased in the alternative, whether the City's action bore no substantial relation to the general welfare.")

<sup>147</sup> *City of Chesapeake*, 883 F.2d at 310.

use decisions.”<sup>148</sup>

While a fascinating case, *City of Chesapeake* might not hold water in the Eleventh Circuit to the extent that it was based on arbitrary denial of a state-law property right. In the landmark<sup>149</sup> case of *McKinney v. Pate*,<sup>150</sup> the Eleventh Circuit held that while a government employee may have a state-law property right in his job, state abridgement of this right is not a violation of substantive due process because this property right is not “fundamental.”<sup>151</sup> McKinney was entitled to procedural due process such as notice and a fair hearing, but no more.<sup>152</sup> The Eleventh Circuit has not expressly extended this holding to cover land-use decisions, but trial courts within the circuit have done so. For example, in *Sullivan Properties, Inc. v. City of Winter Springs*, the Middle District of Florida found that even if the plaintiff developer could prove that the defendant municipality arbitrarily denied his land-use permit, *McKinney* precluded a claim for any substantive due-process violation.<sup>153</sup> Likewise in *Bowman v. Alabama Department of Human Resources*, the Middle District of Alabama dismissed a complaint under Federal Rule of Civil Procedure 12(b)(6) because even if state employees intentionally conspired to deprive the plaintiff of a day-care license by violating state rules, the plaintiff still failed to state a valid claim so long as the state correctly followed rules for a post-deprivation hearing.<sup>154</sup>

Even before *McKinney*, the Eleventh Circuit had held in *Greenbriar, Ltd. v. City of Alabaster*, that a land-use decision doesn’t necessarily violate substantive due process just because it is based on political or “parochial” interests, at least not if the record shows other justifications for the decision.<sup>155</sup> So when a Mormon church in Alabama was denied a zoning permit based, apparently, on the church’s political unpopularity, the frustrated trial judge said his hands were tied by *Greenbriar*:

Strain as it may, this court can find no avenue for the [plaintiffs] around *Greenbriar*, which clearly stands for the proposition that

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<sup>148</sup> *Id.* at 311 (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985)).

<sup>149</sup> Cited more than 3,500 times, including in 660 cases, according to Westlaw.

<sup>150</sup> 20 F.3d 1550 (11th Cir. 1994).

<sup>151</sup> *Id.* at 1561 (“[A]lthough we acknowledge that McKinney’s allegations—if true—would be lamentable, we nonetheless cannot find that . . . McKinney’s right to employment is so fundamental that our democratic society and its inherent freedoms would be lost if that right were to be violated. . . . As such, we likewise cannot find that McKinney’s state-created property right is deserving of substantive due process protection.”)

<sup>152</sup> *Id.*

<sup>153</sup> 899 F. Supp. 587, 596 (M.D. Fla. 1995) (“Sullivan may only bring a *procedural* due process claim for Winter Springs’ alleged violations of Sullivan’s rights.”) (emphasis added).

<sup>154</sup> 857 F. Supp. 1524, 1530 (M.D. Ala. 1994).

<sup>155</sup> 881 F.2d 1570, 1579 (11th Cir. 1989).

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elected officials who vote on zoning requests can act for purely political reasons, because partisan, political decision-making, even by unknowledgeable, close-minded politicians fearful of harm more than political, is automatically deemed rational and, therefore, *cannot* be arbitrary and capricious unless it is the product of corruption. . .<sup>156</sup>

*Greenbriar* was effectively mooted by the even more government-friendly decision in *McKinney*, but the former case shows just how reluctant some courts can be to over-rule local land-use decisions.

Nevertheless, Kuvin could have attempted to portray the ordinance as a holdover from a bygone era of economic discrimination, cut from the same cloth as Jim Crow laws.

The argument has its weaknesses. In particular, we have no evidence that current city officials were motivated by any animus against working-class people, and the evidence against the 1960s city leaders is somewhat circumstantial. In addition, pickup trucks no longer have an exclusively blue-collar association, as evidenced by the availability of a Cadillac model. But the evidence was sufficient to persuade judges like Hurley and Schwartz that there was class snobbery afoot, and that was without *Romer* to provide a legal framework to their intuitions. Perhaps with further development of the evidence and this additional legal argument, Kuvin might have persuaded others on the bench.

## 2. Ordinances that Ban Common, Harmless Activities Fail on Rational Basis

Despite the strong presumption of validity of a municipal ordinance, Florida appellate courts have occasionally struck down local ordinances under a state version of the rational-basis test.<sup>157</sup> On the one hand, these cases are not recent, generally dating to the 1970s or earlier, and they cover a variety of subjects, some having little relation to land use. But on the other hand, these cases have not been expressly overruled, and were based either on a clearly identifiable rational-basis test, or on a similar test of reasonableness.

It would be hard to characterize these cases as a whole, but Kuvin may have been on to something when he argued that “the complete prohibition of ordinary conduct should be viewed with great suspicion.”<sup>158</sup> To support

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<sup>156</sup> *Church of Jesus Christ of Latter-Day Saints v. Jefferson Cnty., Ala.*, 721 F. Supp. 1212, 1214 (N.D. Ala. 1989) (emphasis in original). First Amendment free-exercise complaints were allowed to proceed, however.

<sup>157</sup> See, e.g., 12A FLA. JUR. 2D *Counties* § 222 (2014) (listing four cases in which ordinances were found to be based on unreasonable classifications).

<sup>158</sup> Brief for Petitioner at 26, *Kuvin v. City of Coral Gables*, 62 So. 3d 604 (Fla. Dist. Ct. App. 2007) (No. 3D05–2845).

this proposition, Kuvin cites *Carter v. Town of Palm Beach*,<sup>159</sup> a 1970 case in which the Florida Supreme Court struck down a total ban on surfing. Although he did not do so, Kuvin also might have cited the 1957 case of *City of Miami v. Kayfetz*,<sup>160</sup> in which the state's highest court struck down an ordinance prohibiting bars from serving drinks to employees, even when off-duty.

While no lawyer would want to rely too heavily on two cases of that vintage, *Carter* and *Kayfetz* both stand clearly for the proposition that a municipal ordinance may be struck down under a rational-basis test if the relationship between the ordinance and the purported state interest is just too attenuated. And while Kuvin's argument that "the complete prohibition of ordinary conduct should be viewed with great suspicion" is just that—an argument and not the law—a good case can be made that he was right.

*Kayfetz* involved a City of Miami ordinance aimed at stopping a practice whereby female bar employees known as "B-girls" would ask male patrons to buy them drinks.<sup>161</sup> The B-girls received commissions for each drink a patron bought for them.<sup>162</sup> Sometimes the bars would provide the women with nonalcoholic beverages but charge the customer for a mixed drink.<sup>163</sup> The Miami ordinance contained several provisions, banning: (1) female bar employees from mingling or fraternizing with customers; (2) bar employees from soliciting drinks for themselves; (3) women from loitering in a bar for the purpose of soliciting drinks; and (4) bar employees from drinking liquor in their workplaces, or bar owners from serving them.<sup>164</sup>

The court carefully recited the presumptions in favor of the city and its ordinance. The court was bound to "assume that a valid ordinance was intended" and to "construe the ordinance to be legal, if possible."<sup>165</sup> "Further, the courts should be very cautious in declaring a municipal ordinance unreasonable," on the premise that the democratically elected city leaders know best what their community wants and needs.<sup>166</sup> And, the court said, "[i]f reasonable argument exists on the question of whether the ordinance is arbitrary or unreasonable, the legislative will must prevail."<sup>167</sup>

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<sup>159</sup> 237 So. 2d 130, 131-32 (Fla. 1970).

<sup>160</sup> 92 So. 2d 798, 803-04 (Fla. 1957).

<sup>161</sup> *Id.* at 800.

<sup>162</sup> *Id.* This practice evidently continues. At least a dozen people were convicted for a similar scam in Miami Beach in 2012. The women were still known as B-girls. The FBI handled the investigation, which reportedly involved as much as \$1 million in losses to victims. *E.g.*, Jay Weaver, 3 convicted in 'B-girls' rip-off case, MIAMI HERALD, Dec. 20, 2012, at B1.

<sup>163</sup> *Kayfetz*, 92 So. 2d at 800.

<sup>164</sup> *Id.* at 799-800.

<sup>165</sup> *Id.* at 801.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

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Explaining the purpose of the ordinance, Miami's mayor and city manager testified that the B-girls induce male patrons to buy drinks "by the visions, or promises, express or implied, of immoral relations with the girls," and that the practice also could facilitate prostitution.<sup>168</sup> Based on these facts, the court found that the city had articulated what we would now call a legitimate governmental interest in protecting the morals<sup>169</sup> of the citizens and visitors to Miami.<sup>170</sup>

The *Kayfetz* court then upheld three of the four challenged provisions in Miami's ordinance. To reach that conclusion, the court considered whether each provision was connected to stopping the immoral B-girl system. For instance, the court found "a rational relation" between the anti-mingling provision and the goal of stopping B-girls,<sup>171</sup> because a B-girl must mingle with a customer in order to entice him to buy her drinks. The court said the same about the provision banning employees from soliciting drinks from customers.<sup>172</sup> And, the court said, if the police power allows the city to stop bar employees from soliciting drinks, "it necessarily follows" that the rule against women<sup>173</sup> "loitering" in bars seeking drinks also must be valid.<sup>174</sup>

But the court struck down the provision banning bars from selling alcoholic beverages to their employees. The reason: the court said it saw "no more connection" between the city's stated interest in morality and *employees* drinking in bars than between the city's stated interest and *customers* drinking in bars.<sup>175</sup> The purpose of the ordinance was not to limit drinking but to limit the "mingling and fraternizing by the female employees" and solicitation of drinks that could amount to fraud and lead to immoral conduct.<sup>176</sup>

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<sup>168</sup> *Id.* at 800.

<sup>169</sup> Florida follows the standard formulation that the police power allows regulations intended to protect the public health, safety, morals or general welfare. *E.g.*, *Div. of Pari-Mutuel Wagering Dep't of Bus. Regulation v. Florida Horse Council, Inc.*, 464 So. 2d 128, 130 (Fla. 1985) (holding that a ban on Sunday horse-racing encourages people "to spend their weekend leisure time at non-gambling, presumably more healthy recreational pursuits and other activities"). Florida also is one of a small number of states that still has a criminal statute on the books banning non-marital cohabitation, FLA. STAT. § 798.02, although the validity of this law was cast into doubt by *Lawrence v. Texas*, 553 U.S. 558 (2003).

<sup>170</sup> *Kayfetz*, 92 So. 2d at 802.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 803.

<sup>173</sup> *Kayfetz* was decided long before the U.S. Supreme Court had articulated that classifications based on gender are subject to elevated scrutiny. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

<sup>174</sup> *Kayfetz*, 92 So. 2d at 804.

<sup>175</sup> *Id.* at 803.

<sup>176</sup> *Id.* at 803-04.



In *Carter*, the Florida Supreme Court struck down an absolute ban on surfing anywhere along the Town of Palm Beach's 13 miles of beachfront. The court cited a 1934 case, *Inglis v. Rymer*,<sup>177</sup> in which it held that a municipality could regulate skating rinks but not ban them altogether because they are not nuisances per se. Therefore, the court said, "the power to restrain and regulate does not include the power to prohibit an activity which is not a nuisance per se."<sup>178</sup> This statement appears to contradict the court's previous cases, discussed above, in which it declared aesthetics alone to be sufficient basis for a municipal regulation. Those cases said nothing about the severity of the aesthetic harm having to rise to the level of nuisance.

Nuisance in Florida is "using one's property as to injure the land or some incorporeal right of one's neighbor."<sup>179</sup> The *Carter* court referenced a specific category of nuisance, the "nuisance per se." Florida courts have tended to decide what is or is not a nuisance per se on a use-by-use basis,<sup>180</sup> but "[g]enerally, before a thing becomes a nuisance per se at common law, it must be either unlawful in itself or of such inherent qualities that its natural tendency, wherever located, is to produce injury."<sup>181</sup> So the *Carter* court seems to be saying that if a municipality wants to categorically ban something, then that something must be categorically obnoxious.

In other words, the absolute ban on surfing was so over-inclusive as to be irrational. If the town believed that surfing interfered with swimming or other activities on the beach, it could limit surfing to designated areas.<sup>182</sup> But "[t]here does not appear to be anything inherently obnoxious or illegal, per se, about surfing that requires or necessitates it being totally prohibited, anymore than it would be reasonable to prohibit fishing entirely along the shore of the ocean within the Town."<sup>183</sup> This sounds a lot like judges

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<sup>177</sup> 152 So. 4 (Fla. 1934).

<sup>178</sup> *Carter v. Town of Palm Beach*, 237 So. 2d 130, 131 (Fla. 1970). The court's language about nuisance could be seen as presaging *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), in which the federal Supreme Court would hold that a regulation that prevents all use of a piece of real property amounts to a taking unless the regulation merely prevents the owner from doing something he could not have done under the state law of nuisance.

<sup>179</sup> *Beckman v. Marshall*, 85 So. 2d 552, 554 (Fla. 1956) (adopting language from *Antonik v. Chamberlain*, 78 N.E.2d 752, 758 (Ohio Ct. App. 1947)) (internal citations omitted).

<sup>180</sup> *E.g.*, *State ex rel. Knight v. City of Miami*, 53 So. 2d 636, 637 (Fla. 1951) (holding garbage disposal plant not a nuisance per se); *Brooks v. Patterson*, 31 So. 2d 472, 474 (Fla. 1947) (holding airport is not a nuisance per se); *Fla. E. Coast Props., Inc. v. Metro. Dade Cnty.*, 572 F.2d 1108, 1112 (5th Cir. 1978) (holding jail/work release facility not a nuisance per se).

<sup>181</sup> *Fla. E. Coast Props., Inc.*, 572 F.2d at 1112 (citing 58 AM. JUR. 2D *Nuisances* § 13).

<sup>182</sup> *Carter v. Town of Palm Beach*, 237 So. 2d 130, 131 (Fla. 1970) (quoting an unpublished opinion of the local circuit court, which ordinarily is a trial court but in the case heard the first appeal from the municipal court).

<sup>183</sup> *Id.*

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Schwartz and Cortiñas' opinions in *Kuvin*. It also sounds like the court is calling for the municipality to factually justify its ordinance, which, as discussed above, most courts do not think municipalities should have to do in rational-basis cases.

Nonetheless, a strong argument can be made that the Florida Supreme Court got it right in both *Kayfetz* and *Carter*. Both cases acknowledge that the government exceeds its authority when it absolutely bans a harmless and commonplace activity — such as bar employees drinking in their workplace when off duty in *Kayfetz*, and surfing in *Carter*.

Nor are these cases unique. In *Delmonico v. State*,<sup>184</sup> the Florida Supreme Court struck down a state law banning possession of spearfishing equipment anywhere in Monroe County,<sup>185</sup> where the purpose of the statute was to help enforce a ban on spearfishing in some areas of the county. The statute had the effect of preventing spearfishing even in places where it was legal — in effect making it over-inclusive. “In order to meet constitutional limitations on police regulation, this prohibition, i.e. *against possession of objects having a common and widespread lawful use*, must under our previous decisions be reasonably ‘required as incidental to the accomplishment of the primary purpose of the Act.’”<sup>186</sup> In other words, if the State wanted to limit a commonplace activity, the terms of the regulation had to be rationally related to the State’s goals.

The Florida Supreme Court made the same point in *Inglis*, when it found that the state could limit roller-skating rinks, but not ban such a “harmless” activity otherwise permitted under state law.<sup>187</sup>

A number of points may be made in response to this argument.

First, the cases cited are few and old. It could be argued that they are outdated, harkening to a time when courts were more inclined to limit the police power. But *Kayfetz* and *Carter*, for example, both came *after* the U.S. Supreme Court held in *Berman* that the police power is broad enough to include the power to regulate aesthetics. *Kayfetz* and *Carter* also came after Florida adopted *Euclid*'s “fairly debatable” standard and applied it to aesthetics in *Ocean and Inland Co.* In other words, by the time of *Kayfetz* and *Carter*, the Florida Supreme Court already had given municipalities enormous leeway to regulate within the police power, but overturned the surfing and drinking ordinances anyway. One way to interpret this pattern of cases is to conclude that while the court recognized the power of municipalities to regulate aesthetics, it did not recognize a municipal power

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<sup>184</sup> 155 So. 2d 368, 370 (Fla. 1963).

<sup>185</sup> Monroe County contains the Florida Keys, a chain of islands and a popular fishing area.

<sup>186</sup> *Delmonico*, 155 So. 2d at 370 (emphasis added).

<sup>187</sup> *Inglis v. Rymer*, 152 So. 4, 5 (Fla. 1934).

to ban harmless and commonplace activities. Therefore, an aesthetic regulation is not “fairly debatable” or rationally related to aesthetics if it has the effect of banning a harmless and commonplace activity.

The syllogism is easily completed by adding that nighttime parking of a noncommercial pickup truck in a residential neighborhood, like surfing or adult drinking in a bar, is a commonplace and harmless activity that may not be absolutely banned. At the very least, this argument seems strong enough to overcome the presumption of legislative validity, and demand evidence from the municipality to show the harm created by pickup trucks.

Another criticism of this argument is that the cases discussed above are not about aesthetically based land-use regulations. Had the Florida Supreme Court never ruled on the specific question of whether aesthetics are a sufficient basis to support a land-use regulation, the *Kayfetz* line of cases would be more persuasive, but in light of cases like *Ocean and Inland Co.*, the more specific rule should prevail. This is a valid point, but still does nothing to explain the difference between *Ocean and Inland Co.* on the one hand and cases like *Carter* and *Inglis* on the other. Put another way, if a city can’t ban roller-rinks or surfing, how can it ban pickup trucks?

#### REMOVING ROADBLOCKS

The arguments above are available under current law. But it may be that these arguments are too tenuous, and that the *Kuvin* court was bound to uphold Coral Gables’s ordinance under rational-basis scrutiny. On the other hand, as discussed above, the fact that *Kuvin* was unable to keep a pickup truck in Coral Gables will strike many people, including many who think Judge Rothenberg was correct on the law, as anomalous or even absurd. When correct application of the law leads to such a result, the law may need to be tweaked.

The following sections suggest some relatively modest changes that might avoid anomalous results like the one in *Kuvin*.

##### 1. Limiting the Application of the Police Power to Aesthetics

As discussed above, *Berman v. Parker* and its progeny held that the police power permits states to regulate aesthetics. But just because the U.S. Supreme Court doesn’t limit state power to regulate aesthetics doesn’t mean that states can’t impose their own limits.

And indeed, the Florida Legislature has a demonstrated interest in limiting the state’s power over land use even when judges say the state could go further. A great example is the state’s reaction to *Kelo v. City of*

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*New London*,<sup>188</sup> in which the U.S. Supreme Court allowed the defendant city to take private homes and transfer them to a private company for redevelopment purposes even though the locality made no claim that the homes were blighted. Less than a year after the Court announced *Kelo*, the Florida Legislature passed a law<sup>189</sup> limiting the use of eminent domain to traditional purposes, such as highways and power lines, and expressly prohibiting its use for urban renewal even when blight is shown.<sup>190</sup> “We have eliminated the *Kelo* problem,” said state Representative Dwight Stansel, a Democrat, at the time.<sup>191</sup> But lawmakers went further, calling a referendum to enshrine an anti-*Kelo* provision in the state constitution. In November 2006, the amendment passed by a two-to-one margin.<sup>192</sup> The amendment created a new provision in the state constitution,<sup>193</sup> requiring a three-fifths majority for the Legislature to transfer condemned property to a private party.<sup>194</sup>

The Florida Legislature has responded similarly to state court decisions that limit compensation for regulatory takings to cases in which a regulation “deprives the owner of substantial economic use of his or her property.”<sup>195</sup> In response, the Legislature in 1995 passed the Bert J. Harris, Jr., Private Property Rights Protection Act,<sup>196</sup> which created a new cause of action for property owners against state agencies whose regulations “inordinately burden” a particular private tract.<sup>197</sup>

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<sup>188</sup> 545 U.S. 469 (2005).

<sup>189</sup> FLA. STAT. §§ 73.013-73.014 (2012).

<sup>190</sup> One of the noteworthy facts of *Kelo* was that the Court permitted the taking despite the absence of any showing of blight. *Kelo*, 545 U.S. at 483 (“Those who govern the City were not confronted with the need to remove blight . . . but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.”).

<sup>191</sup> Alex Leary, *Limits on Property Seizures Go to Governor*, ST. PETERSBURG TIMES, May 5, 2006, at 5B.

<sup>192</sup> Carrie Weimar, *Crimping Eminent Domain*, ST. PETERSBURG TIMES, Nov. 13, 2006, at 1B.

<sup>193</sup> FLA. CONST. art. X, § 6(c).

<sup>194</sup> Another oft-criticized aspect of the *Kelo* decision was the Court’s willingness to allow a city to take unblighted land from one private party and then transfer it to another private party. *E.g.*, *Kelo*, 545 U.S. at 500 (O’Connor, J., dissenting) (“[T]he Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use . . .”).

<sup>195</sup> *E.g.*, *Joint Ventures, Inc. v. Dep’t of Transp.*, 563 So. 2d 622, 625 (Fla. 1990) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978)).

<sup>196</sup> FLA. STAT. § 70.001 (2012).

<sup>197</sup> The Act’s actual effectiveness in aiding landowners seems to have been dubious at best. *E.g.*, Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, FLA. B.J., July/August 2004, at 61, 65 (calling the Act a “paper tiger”). Nevertheless, it illustrates the Florida Legislature’s interest in rebalancing the judicial scales away from the government and in favor of private property owners. *See, e.g.*, John T. Marshall, *The Property Rights Movement and Historic Preservation in Florida: The Impact of the Bert J. Harris, Jr. Private Property Protection Act*, 8 U. FLA. J.L. & PUB. POL’Y 283, 285 (1997) (“Florida shot to the forefront of

Florida could take similar steps to curb over-reaching aesthetic regulations. Several avenues could be used for this purpose.

For example, Florida could join those states that hold that aesthetics alone are insufficient to support a regulation.

But such a scheme would raise practical challenges. First, in the past, courts employing an “aesthetics plus” rule have often accepted dubious claims of an additional governmental interest to justify what appeared to be a wholly aesthetics-driven regulation. For example, in *St. Louis Gunning Advertisement Co. v. City of St. Louis*, the Missouri Supreme Court held that regulation of property on purely aesthetic grounds might be tantamount to a taking,<sup>198</sup> but a St. Louis billboard ordinance was nevertheless valid because billboards “constitute hiding places and retreats for criminals and all classes of miscreants.”<sup>199</sup> Professor Edward H. Ziegler, Jr. says this was a common “bootstrapping technique to circumvent the prohibition of early period aesthetic doctrine.”<sup>200</sup>

It seems hard to imagine a modern court accepting a sham public purpose for a billboard ordinance, but modern courts have often been willing to defer to localities on land-use decisions even at the expense of individual property rights. The prototypical case is *Kelo*,<sup>201</sup> in which the Supreme Court deferred to the defendant city’s judgment that transferring a private home to a business for a private development was a “public use.”<sup>202</sup>

Moreover, it’s easy for a locality to come up with a public purpose that purports to be “in addition to” aesthetics, but really just provides the same justification in different words. For example, a locality could say an aesthetic rule is needed to preserve property values or to protect the residential character of a neighborhood. So long as the state’s bare assertion of such an interest is sufficient, courts would have little choice but to defer to the government.

One obvious fix to the latter problem would be to use a burden-shifting regime, whereby if a plaintiff makes a prima facie case that an aesthetic

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the national property rights movement when Governor Lawton Chiles signed the Bert J. Harris, Jr. Private Property Protection Act.”)

<sup>198</sup> 137 S.W. 929, 952 (1911), *dismissed per stipulation sub nom.* *St. Louis Gunning Adver. Co v. City of St. Louis*, 231 U.S. 761 (1913).

<sup>199</sup> *Id.* at 942.

<sup>200</sup> 2 EDWARD H. ZIEGLER, JR., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 16:4 (4th ed. 2013).

<sup>201</sup> 545 U.S. 469 (2005).

<sup>202</sup> In criticizing the majority’s holding, Justice Thomas questioned why the court was so deferential to the city here when it would never defer to the city on other constitutional matters, such as whether a police search was unconstitutional. *Kelo*, 545 U.S. at 518 (“[T]here is no justification for the almost complete deference [the Court] grants to legislatures as to what” constitutes a public purpose.) (Thomas, J., dissenting).

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regulation is unrelated or only tenuously related to the asserted state interest, the burden then shifts to the state to show the rational relationship. But this is not how rational-basis is applied under current law. The U.S. Supreme Court has held:

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis* for the classification. Where there are “plausible reasons” for Congress’ action, “our inquiry is at an end.” This standard of review is a paradigm of judicial restraint. “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”<sup>203</sup>

Moreover, a state “has *no obligation to produce evidence* to sustain the rationality of a statutory classification.”<sup>204</sup> And “[t]he burden is on the one attacking the legislative arrangement to *negative every conceivable basis which might support it.*”<sup>205</sup> In theory, then, no matter how strong a case a plaintiff can make that a law is not rationally related to the state’s purported interest, the state need never marshal a shred of evidence to defend itself.<sup>206</sup>

This stands in contrast with elevated levels of scrutiny, where the state must show some degree of fit between its law and its purpose. That’s why in *Gold Coast Publications*, the City of Coral Gables crafted a detailed scheme of objectively quantifiable measurements and color palettes in its regulation of newspaper racks.<sup>207</sup> Knowing it would face elevated scrutiny because of First Amendment issues, the city made sure its regulations were tied as closely as possible to aesthetic uniformity (in terms of size, color and typeface) and safety (requiring placement of racks away from curb cuts, for example). That way, the city was able to prove its goals really were aesthetics and safety and not suppression of speech.

A burden-shifting scheme for aesthetic regulations might balance the

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<sup>203</sup> *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-14 (1993) (emphasis added) (internal citations omitted).

<sup>204</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993) (emphasis added).

<sup>205</sup> *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) (emphasis added).

<sup>206</sup> The presumption of validity of local ordinances is remarkably broad. *See, e.g.*, 6 MCQUILLIN MUN. CORP. § 20:7 (3d ed. 2013).

<sup>207</sup> *Gold Coast Publ’ns, Inc. v. Corrigan*, 42 F.3d 1336, 1346 (11th Cir. 1994) (“The Ordinance does not completely ban newsracks from public rights-of-way or prohibit the sale and distribution of newspapers. Similarly, publishers are permitted to display their name or logo in the color of their choice so long as the lettering is no larger than 1 ¾ inches.”).

interests of the government with those of plaintiffs like Kuvin. If plaintiffs show a weak connection between the regulation and aesthetics—for example, by showing that the law permits rusted cars but not Cadillac pickup trucks—the burden would shift to the city to show that the law is reasonably related to some state interest other than aesthetics. For instance, the city could show evidence that pick-up trucks harm property values. The government would not have to justify every aesthetic regulation, however, but only those in which a plaintiff with proper standing is able to make a case for irrationality. Local officials would nevertheless likely warn that the regulation would be onerous, and only time and experience would prove whether they are correct.<sup>208</sup>

Another way Florida could limit *Berman* would be to limit purely aesthetic regulations to those designed to protect the public from the most severe eyesores. This seems to be the law in Ohio. In that state, a land-use regulation may be based on aesthetics only if: (1) it also has a “real and substantial relationship” to another state interest;<sup>209</sup> or (2) the aesthetic harm would be “generally patent and gross, and not merely a matter of taste.”<sup>210</sup> This latter rule would have the advantage of protecting plaintiffs like Kuvin by exempting purely aesthetic regulations from *Euclid*’s “fairly debatable” standard. In effect, the second Ohio rule says that purely aesthetic regulations should be presumed *invalid*, rather than valid, if they are fairly debatable matters of taste. But where reasonable people would not likely disagree – as with an unfenced automobile junkyard – the regulation would be valid.

It is difficult to imagine that any court would find “patent and gross” aesthetic harm from a pickup truck, but an Ohio municipality might nevertheless be able to wedge through a Coral Gables-type ordinance under the state’s first rule, by arguing that it has a “real and substantial” relationship to separating commercial and residential uses.

But even if the first rule were omitted, Ohio’s scheme would be problematic. The government could simply refrain from citing aesthetics, and instead point to property values as the basis of its regulation. Moreover, judges would find themselves in the unenviable position of having to decide what aesthetic harm is “patent and gross.”

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<sup>208</sup> For example, the Florida League of Cities opposed the post-*Kelo* state constitutional amendment. Weimar, *supra* note 192, at 36.

<sup>209</sup> Edward H. Ziegler Jr., *Aesthetics in Ohio Land Use Law: Preserving Beauty in the Parlor and Keeping Pigs in the Barnyard*, 19 AKRON L. REV. 1, 32 (1985); *Ghaster Props., Inc. v. Preston*, 200 N.E.2d 328, 334 (Ohio 1964); *Vill. of Hudson v. Albrecht, Inc.*, 458 N.E.2d 852, 856 (Ohio 1984) (“The cases also reflect the thought that aesthetics is not a concern of the public health, safety or general welfare, but is, at most, an incidental or secondary reason for enacting legislation.”).

<sup>210</sup> *Ziegler, supra* note 209, at 13; *State v. Buckley*, 243 N.E.2d 66, 70 (Ohio 1968).

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Another option would be to adopt a balancing test that weighs the public benefits of an aesthetic regulation against the private burdens it creates. New York has at times employed such a rule, requiring “a proper balance between the welfare of the public and the rights of the private owner.”<sup>211</sup>

## 2. Allow Variances for Aesthetic Regulations

Strictly speaking, Coral Gables did not ban pickup trucks. As applied to Lowell Kivin, however, the city did ban *his* pickup truck because he had no garage in which to hide it.

The courts look with disfavor on zoning regulations that create needless hardship on individual property owners. In fact, when a land-use regulation lacks a procedure for making an exception, known as a variance, based on the limitations of a particular property, the regulation may be unenforceable as applied to the particular property.<sup>212</sup>

A variance is a form of relief from a land-use regulation limited to a single property. Variances were originally developed to help owners of property whose topography makes it impracticable to comply with a regulation, typically one pertaining to spacing. Because variances allow an owner to use land that otherwise might be rendered useless, they also help localities to avoid effecting a regulatory taking.<sup>213</sup>

The traditional standard for a variance is that complying with the regulation would create a hardship for the landowner, and that this hardship was not self-imposed. Increasingly, courts do not consider the fact that a landowner bought a home after the regulation was enacted to be conclusive proof that the hardship was self-created, even if the buyer knew of the rule.<sup>214</sup> However, Florida follows the old rule, which is that a variance generally does not lie when the owner bought the property knowing of the regulation.<sup>215</sup> Buyers of real property are charged with constructive knowledge of applicable zoning regulations.<sup>216</sup> Still, a variance may be

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<sup>211</sup> Shepard v. Vill. of Skaneateles, 89 N.E.2d 619, 620 (N.Y. 1949); *see also* 1 N.Y. ZONING LAW & PRAC. § 6:16 (2013).

<sup>212</sup> *E.g.*, Innkeepers Motor Lodge, Inc. v. City of New Smyrna Beach, 460 So. 2d 379, 380 (Fla. Dist. Ct. App. 1984) (citing 8 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25:50 (3d ed. 1983)).

<sup>213</sup> The government effects a regulatory taking when it enacts a regulation that denies a landowner all economically beneficial use of her property. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1015 (1992).

<sup>214</sup> 3 ARDEN H. RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 58:22 (4th ed. 2013).

<sup>215</sup> Josephson v. Autrey, 96 So. 2d 784, 789 (Fla. 1957).

<sup>216</sup> *E.g.*, Metro. Dade Cnty. v. Fontainebleau Gas & Wash, Inc., 570 So. 2d 1006, 1007 (Fla. Dist.



permissible if, regardless of the landowner's improvident decision, the property would have qualified for a variance before he bought it.<sup>217</sup> In Florida, the hardship should not be shared with other property owners in the area.<sup>218</sup>

Although variances are most commonly sought by property owners, on behalf of themselves or a prospective buyer, leaseholders also appear to have standing to seek a variance.<sup>219</sup>

Florida does not have a statewide statutory standard that an applicant must meet to support a variance.<sup>220</sup> As a result, different localities have different rules.<sup>221</sup> Nevertheless, "Florida courts have held that a legal hardship will be found to exist only in those cases where the property is virtually unusable or incapable of yielding a reasonable return when used pursuant to the applicable zoning regulations."<sup>222</sup>

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Ct. App. 1990) ("Owners are deemed to purchase property with constructive knowledge of applicable land use regulations.") (citing several cases establishing this rule). This rule is well-established in Florida law, but an argument could be made that an exception should be made in the case of a purchaser of a homestead seeking a variance from an unusual ordinance provision. The unusual ordinance provision becomes like a surprising term in a contract of adhesion. "An additional term included in a written confirmation is considered to be a material alteration which will not become part of the contract if the term's inclusion will result in surprise or hardship if incorporated without an express awareness by the other party." 67 AM. JUR. 2D *Sales* § 155 (2014). If an ordinance provision has a term a reasonable homebuyer would not expect, and in fact did not know about, and which other municipalities do not have, then the buyer should be allowed to apply for a variance without being charged with constructive knowledge of the provision. In support of this argument, note that the Florida Supreme Court has highlighted a commercial buyer's "full knowledge" of land-use rules in finding that a hardship was self-created. *Autrey*, 96 So. 2d at 789.

<sup>217</sup> *City of Coral Gables v. Geary*, 383 So. 2d 1127, 1128 (Fla. Dist. Ct. App. 1980).

<sup>218</sup> *Herrera v. City of Miami*, 600 So. 2d 561, 561 (Fla. Dist. Ct. App. 1992) (citing *Nance v. Town of Indialantic*, 419 So. 2d 1041 (Fla.1982)).

<sup>219</sup> See, e.g., *Vill. of Key Biscayne v. Dade Cnty.*, 627 So. 2d 1180, 1181 (Fla. Dist. Ct. App. 1993) (holding that an aquarium operator was allowed to seek variances on leased land); *Crossroads Lounge, Inc. v. City of Miami*, 195 So. 2d 232, 235 (Fla. Dist. Ct. App. 1967) (holding that a lessee was allowed to seek variance to permit alcohol sales) (rev'd other grounds). For a national survey of who has standing to seek a variance, see W.C. Crais III, Annotation, *Zoning: who may apply for variance, special exception, or use permit, or appeal from denial thereof*, 89 A.L.R.2d 663 (1963) ("While there is authority to the contrary, a lessee has been regarded as having sufficient standing to apply in his own right for a zoning variance as to the leased property, or to appeal from the denial thereof.")

<sup>220</sup> Patricia E. Salkin, *States whose statutes are silent on variances – Local jurisdictions determine variance standards*, 2 AM. LAW. ZONING § 13:13 (2013).

<sup>221</sup> E.g., compare TOWN OF CUTLER BAY, FLA., LAND DEVELOPMENT REGULATIONS § 3-36 ("Owners of lands or structures may apply to the Town Council for a variance from the requirements or restrictions of the Land Development Regulations; *except that no variance for use or density issues shall be considered.*") (emphasis added) with MIAMI-DADE COUNTY, FLA., CODE § 33-311(A)(4)(a) (specifying that use variances may be granted "as will not be contrary to the public interest, where owing to special conditions, a literal enforcement of the provisions thereof will result in unnecessary hardship, and so the spirit of the regulations shall be observed and substantial justice done; provided, that the use variance will be in harmony with the general purpose and intent of the regulation . . .").

<sup>222</sup> *Maturo v. City of Coral Gables*, 619 So. 2d 455, 456 (Fla. Dist. Ct. App. 1993).

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It's worth noting that municipalities are widely thought to misapply variance law much of the time, and to grant or deny variances for extralegal reasons.<sup>223</sup> The "boards of adjustment" that commonly hear variance cases are made up of laypeople.<sup>224</sup> Their opinions may or may not be placed in writing, and may not be indexed or published.<sup>225</sup> In short:

A conventional wisdom has developed that the zoning variance is widely abused – that it is used to quietly grant special favors to the politically connected, that uneducated lay boards apply their peculiar notion of justice rather than judiciously applying narrowly defined legal standards . . . .<sup>226</sup>

In general, variances ordinarily apply to real property. But one of the purposes of granting variances is to avoid effecting a regulatory taking, and the takings clause "applies equally to real and personal property, including motor vehicles."<sup>227</sup> Not so clear is whether a land-use regulation can effect a taking of a motor vehicle. Several past cases have hinted that a regulation

<sup>223</sup> E.g., Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 308 (1995) ("Local decisionmaking bodies have been found frequently to base decisions to grant or deny variances on inappropriate and substantially irrelevant factors."); Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969) ("Board decisions are frequently the product of improper considerations . . .").

<sup>224</sup> For example, variance requests in the Village of Miami Shores, Fla., are heard by the village's Planning Board, whose members are appointed by the Village Council, with no special skills or knowledge required. MIAMI SHORES, FLA., CODE OF ORDINANCES §§ 8.5-70, 19-16 et seq. (2013).

<sup>225</sup> As an example here is the entire record of a variance decision by the Miami Shores Planning Board, as found in the board's minutes. Meeting Minutes Miami Shores Village Planning Board (June 23, 2011), available at <http://miamishoresvillage.com/Planning/Zoning/Minutes/Minutes%202011/Minutes%20PZ-11-06-23.htm>.

PZ 3-11-2011232

Jose Castro (Owner)  
9701 Biscayne Blvd.

Article VII. Errors and Variances; Sec. 702 Hardship variances; Sec 518. Fences walls and hedges.

(a) Maximum height: (4) Variance to allow gate exceeding height limitation.

The Chairman summarized at the last hearing the applicant addressed the Board. The Board requested the applicant to provide documentation to back up his statements.

The applicant addressed the Board and provided pictures and applied applications for fences from his neighbors. The Board questioned the applicant about his knowledge of the surrounding homes being historic homes. After a discussion by the board, Mr. Abramitis moved to deny this application. Mr. Reese seconded the motion and the vote was unanimous in favor of the motion 5-0.

Additional background information might be available in the agenda packet, but it would shed light only on facts and not on the board's reasoning.

<sup>226</sup> David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of A Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 280 (2004).

<sup>227</sup> *In re* Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN 243340M, 576 So. 2d 261, 263 (Fla. 1990).

that entirely excludes a type of vehicle from residential districts might effect a taking.<sup>228</sup> Unfortunately, the language used in those decisions only made it clear that such a regulation might be unconstitutional, without spelling out whether the problem was a taking or over-breadth.

Kuvin might have sought a variance based on the premise that the ordinance unfairly burdened him, and that allowing him to park his truck on his property would have no effect on property values or aesthetics. His home had no garage, so he could not keep his pickup truck at his home, and comply with the city's requirement that it be kept in a garage. He rented his home, but even if he owned it, the cost of building a garage would likely have exceeded the value of his vehicle, assuming such a project was even possible given the size of his lot and city spacing regulations. Given the age of the housing stock in Coral Gables, Kuvin might have argued that his was a reasonable case for a variance. The city could have conditioned the variance by limiting where he could park and requiring him to keep the truck's bed empty.

#### CONCLUSION

The theory underlying rational-basis review is that it allows individual communities to create their own aesthetic regulations subject mainly to political, rather than judicial, accountability. Of course, whether this balance is satisfactory may depend on whether your ox is being gored.

The Equal Protection and Due Process clauses of the U.S. Constitution protect "insular minorities" and a few other groups from discrimination, and they provide some protection to everyone else when fundamental liberties are implicated.

But many—perhaps most—government actions neither target minorities nor affect such basic rights as speech or religion. In these cases, state police power is vast, and its limits hard to define, especially under the murky law of the rational-basis test.

The result is a case like *Kuvin*, which seems to defy common expectations of what the government can or can't do. Surely it can't tell us what kind of car we can drive, or whether we can park it in our own driveway?

As this paper shows, the answer depends on how judges see the limits of the police power under rational-basis scrutiny. If courts apply the test in

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<sup>228</sup> E.g., *City of Coral Gables v. Wood*, 305 So. 2d 261, 263 (Fla. Dist. Ct. App. 1974) (holding that the prohibition on parking campers in a residential district was reasonable in light of the exception allowing them in garages); *Proctor v. City of Coral Springs*, 396 So. 2d 771, 772 (Fla. Dist. Ct. App. 1981) (distinguishing *Wood* from other cases, saying "[s]torage of the vehicles was permitted within a garage or other structure, and therefore the ordinance did not unconstitutionally deprive the owners of a right to have camper-type vehicles").

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its simplest terms, Kuvin loses because laws of debatable rationality must be upheld.

But cases like *Romer*, *Cleburne*, *Moreno*, *Carter*, and *Kayfetz* suggest that state actions on the edge of rationality may call for a more nuanced approach. While stopping short of substituting their judgment for that of the legislature, courts must consider whether (1) the state action is motivated by irrational animus, and (2) whether the state seeks to ban some ordinary and harmless activity.

On the other hand, these arguments will not sway every judge, at least as applied to Lowell Kuvin's pickup truck. If that's the case, then a change or clarification in the law may be needed to define the outermost limits of the state's power to regulate aesthetics.

Otherwise, many courts may find ordinances like that of Coral Gables acceptable because, as Justice Thurgood Marshall was fond of saying, "[t]he Constitution does not prohibit legislatures from enacting stupid laws."<sup>229</sup>

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<sup>229</sup> *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring). Writing for the Court, Justice Scalia wrote that "[p]arty conventions, with their attendant 'smoke-filled rooms' and domination by party leaders, have long been an accepted manner of selecting party candidates . . . . While a State may determine it is not desirable and replace it, it is not unconstitutional." *Id.* at 206-07 (upholding New York State's byzantine system of allowing political-party delegates to select judicial candidates).