Chapter 3

The Evolution of Law and Aesthetics

APPLICABLE LAW

As seen in Chapter 1, law comes from different origins, and there are several sources of law that have either directly or indirectly provided the foundation for aesthetic regulation. Powers inherent in the sovereign, the constitution, legislation, and court decisions have each had input into the body of aesthetic law.

Powers Inherent in the Sovereign

Eminent Domain
The sovereigns under American law, the federal and state governments, have the inherent power of eminent domain, that is, to condemn or take private property. The power did not arise from an express grant. It emanated from a legal philosophy that was formulated by scholars in England and the United States over the last several centuries.

The provisions in the Fifth Amendment to the federal Constitution, and similar clauses in the state constitutions, do not grant to the governments the power of eminent domain, but rather establish limitations on its exercise. The widely adopted limitations are that the taking of land must be for a public use, and that the landowner must be paid just compensation. The clearest example of a taking involves a physical invasion of the land by the government.

A recent U.S. Supreme Court case stated that public use is coterminous with the concept of public purpose under the police power. As a result, the power of eminent domain can be exercised for any public health, safety, or welfare reason. As will be discussed later, one public welfare reason for regulation in the land use area is aesthetic. If the government is willing to take land for aesthetic reasons, it must be willing to pay just compensation. Just compensation means paying fair-market value for the land. If the government perceives the land as important enough to pay fair-market value, it has the authority to take the land from the private owner. The problem is that governments are usually unwilling or unable to pay just compensation for land sought for aesthetic purposes.

Police Power
American legal theory holds that state governments have another inherent power, called the police power. They can regulate in order to protect the public health, safety, and welfare of their citizens. Through their constitutions or through legislation, states can delegate the police power to local governments. As stated above, the notion of public welfare is broad enough to encompass regulations for aesthetic purposes.

The federal government does not have the police power. Authority for federal regulations must be found in the enumerated powers of the Constitution, or it must be one of the so-called unenumerated or implied powers within the federal Constitution. All powers not expressly or implicitly granted to the federal government by the Constitution are reserved to the states by the Tenth Amendment. The police power is not granted expressly or implicitly in the federal Constitution.

Regulation under the police power is a more frequently used technique for preserving aesthetic quali-
ties than is eminent domain. Under police power regulations, governments do not physically take the land from its private owner. They merely restrict the use that a landowner can make of the property. As a result, the government does not have to pay just compensation, so that regulation is a much more financially attractive method than eminent domain for protecting the aesthetic qualities of the land.

Constitution

Although the federal Constitution does not address the issue of aesthetics, numerous state constitutions do have provisions that deal with it. Some state provisions are narrowly circumscribed and explicit, like Article 50 of the Massachusetts Constitution, which gives the legislature the express authority to regulate outdoor advertising based on aesthetics.

In a few states, whose economies rely heavily on tourism, the constitution may provide for protection of the natural beauty upon which tourism is based. The Hawaii Constitution gives the legislature the power to regulate in order “to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and physical good order.” This broad language justifies any reasonable regulation based on aesthetics.

Several other states, caught up in the winds of environmental protection in the early 1970s, amended their constitutions to grant their citizens a constitutionally protected right to an unpolluted environment. The Montana Constitution, Article II, Section 3, declares that every citizen has an inalienable right “to a clean and healthful environment.” This language is broad enough to include aesthetics, and provides a basis for state legislation passed in the name of protecting the aesthetic features of the physical environment. Similarly, in 1972 Massachusetts adopted a broad aesthetics-based provision to its constitution. The Massachusetts Constitution establishes as a state policy its citizens’ right to the “natural, scenic, historic and aesthetic qualities of their environment.”

Legislatures acting in any area must find authorization to do so either in the inherent powers of the state or in the state constitution. Legislation must be legitimated by one of these sources of law.

“to conserve the natural beauty of areas adjacent to highways, it is necessary to reasonably and effectively regulate . . . advertising devices.” The legislature can then set up specific criteria for regulating advertising devices along highways.

Alternatively, as is more often the case, the legislature merely frames the outline of a regulatory program and turns the specifics over to an administrative agency. The legislature may prohibit signs in some areas, but allow signs in “business areas.” It is up to the appropriate administrator to define “business areas” and thereby determine the exact extent of the prohibition on signs for aesthetic purposes. In this way, administrators participate in the business of aesthetic regulation.

Much land use regulation is done at the local, not the state level. State legislatures, through enabling legislation, delegate to local governments their police power to regulate land use. The enabling legislation is generally fairly inclusive so as to encompass aesthetics. The Massachusetts enabling legislation delegates authority to regulate in order to preserve and increase amenities. Language such as protecting amenities implicitly permits local governments to regulate for aesthetic reasons.

Common Law

The common law does not directly regulate aesthetics. Judges make law pertaining to aesthetics when they interpret and apply the constitution, legislation, administrative regulations, and the police power in cases raising aesthetic issues. However, the ties between the common law and aesthetics go deeper.

The legal remedy provided under the concept of nuisance has its origins in the common law. A nuisance is a substantial and unreasonable interference by a person with an owner’s use of land. A use can become a nuisance, or a noxious use, where it interferes with the orderly development of a healthy, safe, and attractive neighborhood — the proverbial pig in the parlor. Aesthetics, at least where it can be tied to a common law nuisance, has long been recognized as fodder for a lawsuit. It is, however, a bit of a stretch to relate occasional, individual private lawsuits to a systematic approach to land use regulation for aesthetic purposes. Even the concept of a public nuisance, which has criteria similar to a private nuisance but involves a wrong to the public, does not constitute a methodical regulatory system. It is important to note that most of the area of police power regulation historically, and to a lesser extent today, has its foundation in the notion of nuisance or prevention of harm. It would be useful at this point to examine the historical evolution of aesthetics as a basis for land use regulation.
JUDICIAL HISTORY OF
AESTHETICS-BASED REGULATION

The history of aesthetics-based regulation involves a movement in the courts from general skepticism to a search for theories to uphold expansions of this type of regulation into new areas. State legislatures have in some cases made the courts' task easier by enacting constitutional provisions expressly authorizing aesthetics-based regulation, but only a small minority of states has such provisions as yet. However, while courts have struggled with this type of regulation, its forms have proliferated both on the state and local levels.

The Birth and Infancy of Aesthetics
in Land Use Regulation

Until approximately the mid-1930s, aesthetics was considered an inappropriate basis for regulating land use under the police power. Despite the breadth of the concept of public health, safety, and welfare, courts held that there was no room for protecting aesthetics. Courts gave several reasons for invalidating regulation for aesthetic purposes. One reason was judicial concern for protecting private property rights from public invasion. An early case noted that, "aesthetic considerations are a matter of luxury, an indulgence rather than necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." The only recognized "necessity" was preventing a harm to members of society. Protection of aesthetic values was viewed not as preventing public harm but as a legislative attempt to confer a benefit on the public at the expense of a private landowner without paying for it.

An even more important reason for judicial hostility to regulation for aesthetic purposes was the subjective nature of aesthetics. It was argued that if aesthetics was kith and kin to beauty — an accepted premise prior to about 1925 — then regulation of it was too arbitrary. The importance and content of beauty are considered highly controversial matters, and the courts, demanding the comfort of objective criteria, found themselves without satisfactory standards when dealing with aesthetics-based regulations. Courts were not concerned about whether aesthetics was a more inclusive concept than simply visual beauty. They held that given its subjective nature, aesthetics was an invalid basis for regulation.

After about 1925, and until the mid-1960s, aesthetics was given infant status by the courts. It could be used as a basis for regulation, but could not stand alone as the sole purpose for it. Aesthetic purposes could only be upheld where the parental support of a traditionally accepted police power purpose was present. Coupled with traffic safety, maintaining property values, or protecting public health, aesthetics was viewed by the courts as a valid basis for exercising the police power.

The aesthetic purposes of a regulation were placed on the public interest side of the scale in the many cases challenging land use regulations that involved balancing the public interest in regulation against the detrimental impact on private landowners.

One can argue that during this period in the evolution of legal attitudes toward aesthetic regulation, aesthetics was a meaningless make-weight. Almost invariably, the regulation undergoing judicial scrutiny would have been upheld on the traditional basis given for it, such as traffic safety, to pick a common example, even if aesthetics had never been mentioned. However, it was also during this period that aesthetics gained legitimacy. Courts became increasingly comfortable with aesthetics as a basis for regulation, as long as it was coupled with a more traditional regulatory purpose.

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6See E. Zeigler, Jr., supra note 15, at 245 (citing cases).
8See E. Zeigler, Jr., supra note 15, at 241.
9Id. at 242. See also N. Williams, American Land Planning Law Sections 11.07-09 (1974 & Supp. 1988).
10See Costonis, supra note 3.
11See, e.g., St. Louis Gunning Advertising Co. v. City of St. Louis, 235 Mo. 99, 137, 145 S.W. 929, 942 (Mo. 1911).
As Chief Judge Pound stated, "[B]eauty may not be queen, but she is not an outcast beyond the pale of protection or respect."¹³

Beginning slowly in the 1960s, state courts began to develop a new approach to aesthetics regulations. Aesthetics came to be viewed as capable of standing alone as a basis for the exercise of the police power.¹⁴ This stage in the development of judicial views on regulation for aesthetic purposes, which continues today, started in 1954 with the Supreme Court’s decision in Berman v. Parker.¹⁵

The Supreme Court Decisions

Berman articulated a new interpretation of what could constitute regulation of the public welfare under the police power. The Supreme Court stated in Berman that "the concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."¹⁶ After Berman, regulations no longer had to be based solely on public health and safety. They could be based on a broader notion of public welfare encompassing the public’s desires for comfort, happiness, and an enhanced cultural life.¹⁷

Two other landmark Supreme Court decisions further emphasized the broad scope of the public welfare basis for regulation of land use under the police power. In Village of Belle Terre v. Boraas,¹⁸ the Court asserted that protection of “family values,” the “blessings of quiet seclusion,” and “clean air” are properly considered in regulation aimed at creating “a sanctuary for people.”¹⁹ In Penn Central Transportation Co. v. New York City,²⁰ the Court stated that a substantial body of precedent had “recognized, in a number of settings, that states and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”²¹

State Court Decisions

Most, but not all, state courts have followed the Supreme Court’s lead in treating aesthetics as a valid basis for regulation. A law review article in 1980 reported that the rule that aesthetics can stand alone as a basis for exercising the police power had become the majority rule.²² Yet beyond the fact that the state court decisions in this area confront similar questions about the validity of aesthetics-based regulation, they appear, at least on first examination, to have little in common. Their reasons for acceptance or rejection of aesthetics-based regulation are diverse. One clear grouping of cases separates states that have constitutional provisions that authorize aesthetics-based legislation from those that do not. A second grouping is according to the type of statute or ordinance involved in the case.

State Constitutions

One of the earliest cases allowing aesthetics to stand alone was based on a state constitutional provision. In the 1967 decision State v. Diamond Motors, Inc.,²³ the Hawaii Supreme Court reviewed a conviction for violation of size and height standards on outdoor signs in an industrial zone. The court upheld the aesthetic purpose of the ordinance based on the police power in spite of the fact that many courts at that time were reaching the opposite result. The Hawaii court felt comfortable in doing so because Hawaii has a constitutional provision stating that the "State shall have the power to conserve and develop its natural beauty, objects and places of historic and cultural interest, sightliness and physical good order."²⁴ The court found that protection of aesthetics was not confined to the mountain and beach areas, but could include less naturally beautiful areas like the industrial zone involved in the case.²⁵ even though the constitutional provision was primarily

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¹³Perlmutter v. Greene 259 N.Y. 327, 182 N.E. 5, 6 (1932).
¹⁶Id. at 33.
¹⁹Id. at 9.
²¹Id. at 129.
²²(See footnote 22 on page 24.)
²³50 Haw. 33, 429 P.2d 825 (1967).
²⁴Id. at 193, 429 P.2d at 827.
²⁵Id. at 194, 429 P.2d at 828.
aimed at protection of the mountains and beaches, which are central to Hawaii’s tradition and economy.

There are similar constitutional provisions in several other states whose heritage and economy are less closely tied to their natural beauty. For example, Montana’s Constitution declares that its citizens have an inalienable right to a “clean and healthful environment.”28 In State v. Bernard27 the Montana Supreme Court held that this constitutional provision authorized legislation for the purpose of preserving and enhancing the aesthetic values of its citizens. Likewise, the Pennsylvania Constitution states that the “people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”29 Although state constitutional provisions framed in such general language need legislative enactments to provide adequate standards,30 they clearly authorize aesthetics-based legislation.

Only a few states have the luxury of constitutional provisions clearly encompassing aesthetics. When such a constitutional provision exists the state’s legislature can pass aesthetics-based legislation directly on the basis of the provision. This makes it easier for a court to uphold aesthetics-based regulations. In states that do not have a constitutional provision, the state legislature must act on the basis of the general police power, and the courts must inquire into whether the legislation is for a legitimate police power purpose, whether it is reasonable given its purpose, and whether it satisfies substantive due process.31

**State Statutes**

State aesthetics-based statutes have taken many forms, most prominently, environmental impact requirements, state land use planning controls, and highway beautification regulations.32 For example, Washington, like many other states, requires that environmental impact analysis be done prior to approving major development projects.33 Such statutes are sometimes treated simply as minimal disclosure and consideration laws, mandating that an environmental impact statement be prepared and circulated, and that the decision-makers have and consider this environmental information. However, statutes requiring environmental impact analysis also uniformly contain language requiring attention to the aesthetic impact of the project.34

In Polygon Corp. v. City of Seattle34 the Washington Supreme Court reviewed the application of the law in a case denying a building permit. While the court waffled on the issue of whether or not aesthetics can stand alone as a police power purpose, it acknowledged that the most significant impacts of the project were aesthetic.35 It held that in addition to the procedural provisions of the law, which required disclosure and consideration, the law had substantive purposes as well, in that aesthetics, coupled with other factors, could be a basis for rejecting the proposed development. The court stated that reading the statute otherwise “would thwart the policies it establishes and would render the provision that environmental amenities and values will be given appropriate consideration in decision making a nullity.”36 In states in which courts have ruled that aesthetics can stand alone and which also have environmental impact analysis statutes, aesthetics is a relevant concern in development proposals since it may by itself afford a basis for rejecting a proposal.

Vermont is one of a small group of states in which the state has reclaimed land use powers from the localities.37 A state board reviews development proposals according to ten criteria.38 One criterion, number eight, asks whether the project would “have an undue adverse

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28Montana Const. art. II, § 3 (1972).
35Id. at 66, 578 P.2d at 1315.
36Id. at 63, 578 P.2d at 1312. This opinion may be more enlightened than its federal counterpart, Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835 (1989), in which the opposite conclusion was reached.
effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. 39 The state legislature recognized that any development activity interferes with scenic preservation, but required the decision-makers to perform a substantive due process analysis examining whether the interference was undue. 40

There are several other examples of a new breed of state environmental statutes that uniformly include aesthetic criteria. For example, Washington’s Shoreline Management Act41 has been interpreted as an expression of the state’s public policy supporting protection of aesthetic values. 42 Minnesota’s Wild and Scenic Rivers Act 43 asserts that its intent of preserving the “unique natural and scenic resources of the state does have an aesthetic purpose.” 44 Minnesota has a highway beautification law that declares a legislative policy to “conserve the natural beauty of areas adjacent to certain highways,” making it necessary to regulate advertising devices. 45 These types of statutes raise aesthetics, whatever its precise meaning, to the level of statewide importance in development issues involving certain natural resources.

Local Ordinances

Ordinances on signs and billboards are the most numerous form of regulation openly based on aesthetics. Outdoor advertising companies have not had a great deal of success recently in challenging this type of ordinance. In John Donnelly & Sons, Inc. v. Outdoor Advertising Board 46 the Massachusetts Supreme Judicial Court acknowledged that in the past sign restrictions were justified legislatively and judicially on the grounds of protecting property values and promoting highway safety. It stated that these grounds were a legal fiction designed to avoid recognizing aesthetics as the real purpose behind the law. 47 The court noted that due to changing community values, society demanded aesthetically pleasing cities and a visually satisfying environment. 48

Other courts have arrived at similar conclusions. The New Mexico Supreme Court upheld a city sign ordinance because it aided in creating or preserving a desirable ambience in the community. 49 The New Jersey Supreme Court, approving a limitation on signs in a residential area, sanctioned the “development and preservation of natural resources and clean, salubrious neighborhoods [that] contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride.” 50

Cases involving the review of junkyard regulations are the second largest category of cases in which aesthetic purposes are an issue. Even more than signs and billboards, junkyards arouse community ire. They are highly visible and often give visual notoriety to a municipality. As in the case of sign ordinances, owners of junkyards have seldom tasted victory when confronting their regulators.

The Oregon Supreme Court, in an early case examining aesthetic purposes, Oregon City v. Hartke 51 reviewed the regulation of a junkyard. The court found that such regulations were the product of a “change in attitude, a reflection of the refinement of our tastes and the growing appreciation of cultural values in a maturing society.” 52 It stated that it is “not irrational for those who live in a community . . . to plan their physical surroundings in such a way that unsightliness is minimized.” 53 Similarly, the North Carolina Supreme Court, in reviewing a decision involving a junkyard ordinance, referred, inter alia, to the benefits provided to the general community by such a law stemming from the “preservation of the character and integrity of the community, and promotion of comfort, happiness, and emotional stability of area residents.” 54 These benefits were placed in the due process calculation and weighed against the interests of the individual property owner to decide if the ordinance was reasonable. 55

44County of Pine v. State Dept. of Natural Resources, 280 N.W.2d 625, 629 (Minn. 1979).
45Minn. Stat. § 173.01 (1982).
47Id. at 217, 339 N.E.2d at 716.
48Id. at 218, 339 N.E.2d at 717.
51240 Or. 35, 400 P.2d 255 (1965).
52Id. at 47, 400 P.2d at 261.
53Id. at 50, 400 P.2d at 263.
55Id.
The language abstracted here from the sign and junkyard cases has implications for areas of regulation far beyond these obvious targets. One area in which the issue of aesthetic purposes has arisen is zoning. Zoning cases have differed from sign and junkyard cases, however, in that challenges to zoning regulations have been somewhat more successful. Yet aesthetic purposes have been upheld in many of these cases as well. For example, an Arizona Court of Appeals upheld zoning regulations that required development proposals to be approved by a city architectural review board. The court noted that both parties were in agreement that the great weight of precedent upheld regulations based on aesthetics and design.

The Colorado Supreme Court upheld a regulation limiting the height of buildings in order to preserve the mountain view from a city park. The court found that Denver’s “civic identity” was within the city’s police power. Similarly, the Idaho Supreme Court approved a zoning provision whose purpose was to maintain the rural character of the county and the Wood River Valley.

An interesting duo of cases arose in the New Hampshire Supreme Court. In 1975, in Sibson v. State, the Court reviewed the denial of a permit to fill a wetland. In 1981, in Burrows v. City of Keene, the court scrutinized a dispute involving the denial of subdivision approval on land the city wanted to preserve as open space. Both cases were found to involve regulatory takings, but in Sibson the court affirmed the denial of the permit to fill a wetland and in Burrows it rejected the denial of the subdivision approval. In Sibson the court singled out wetlands as unique areas entitled to protection even if substantial private property rights are enjoined. In Burrows, the court found that the Sibson decision was based on the need to prevent harm to a unique type of land, and refused to extend the decision to land lacking that characteristic of uniqueness.

Beyond signs and junkyards, aesthetics is the underlying rationale for protecting certain valuable features of the landscape, like spectacular mountain views, the rural character of an area, and wetlands. These features do not necessarily have to be endowed with any particular natural beauty. The wetlands involved in Sibson, for example, were considered valuable and worth preserving not for any visual attractiveness they may have had, but areas of great natural productivity.

THE EVOLUTION IN THE MEANING OF AESTHETICS

The question that remains open in cases involving aesthetics-based regulation is what courts mean today when they use the term “aesthetics.” Is the concept still generally confined to visual beauty, or to the prevention of nuisance-type harms? Is aesthetics a manifestation of shared human values, as posited by Professor Costonis, which envelops resources whether they are beautiful or not, harmful or not? Or, is aesthetics a concept indicating our movement beyond concern solely for human values to a broader definition of values, a definition that pertains to nonhuman values as well as human ones? There is case law supporting all four of the proposed meanings of aesthetics.

Visual Beauty

Early cases involving regulation for aesthetic purposes generally equated aesthetics with visual beauty. Many modern cases do as well. This definition of aesthetics has created much of the legal quicksand through which the concept has struggled. Critics of aesthetics-based regulation argue that beliefs about what is visually beautiful are matters of individual taste, and that regulation based on such beliefs lacks standards necessary to guide administrators in implementation or to allow meaningful judicial review.

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7Id. at 234, 564 P.2d at 923.
16See E. Zeigler, Jr., supra note 2, at 241.
18See E. Zeigler, Jr., supra note 2, at 245.
19See Costonis, supra note 5, at 377–378.
The United States Supreme Court rejected this line of criticism in *Metromedia, Inc. v. City of San Diego.* It agreed that "esthetic judgments are necessarily subjective, defying objective evaluation," but found that this did not mean that aesthetics-based regulations must be invalidated, but rather that they "must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." Thus, the Court resolved the problem of subjectivity by requiring careful scrutiny of aesthetics-based laws and regulations.

Some state courts have adopted similar reasoning. In upholding regulations concerning highway beautification, the Maine Supreme Court in *Finks v. Maine State Hvy. Comm.* stated that an adequate response to the impossibility of detailed, specific standards in aesthetic regulations is "the presence of adequate procedural safeguards to protect against an abuse of discretion by administrators." The Court also found that while natural scenic beauty can be an overly general, subjective concept, it connotes "a sufficiently definite concrete image" when considered in the context of highway beautification.

The New Jersey Supreme Court elaborated on the latter method of controlling subjectivity in *Wes Outdoor Advertising Co. v. Goldberg.* The Court found that the statute being reviewed contemplated a certain basic beauty in natural terrain and vegetation unspoiled by the hands of man, which it proposes to recapture or retain. Although the extent to which each individual finds a specific landscape beautiful must be determined by a subjective test, this does not denote that there is no catholic criterion for the ascertainment of whether any scenic beauty exists in a given panorama.

The court recognized that there may be variations in taste as to the outside dimensions of visual beauty, but that there is a core of universal acceptance of what is beautiful in a given setting.

Some courts have been less concerned about the subjective nature of regulations intended to preserve scenic beauty. The Arkansas Supreme Court, in *City of Fayetteville v. McIlroy Bank and Trust Co.*, contended that "If the inhabitants of a city or town want to make the surroundings in which they live and work more beautiful or more attractive or more charming, there is nothing in the constitution forbidding the adoption of reasonable measures to attain that goal." The court saw no need for any special constraints on legislative or administrative action in the area of aesthetics-based regulation.

On the other hand, the equation of aesthetics with visual beauty and the resulting apparent subjectivity of aesthetics has led a number of state courts to reject aesthetics-based regulation altogether. For example, the Oklahoma Supreme Court, in *State Dept. of Transp. v. Pile,* equated aesthetics with beauty and concluded that aesthetic standards are "indeterminate, incapable of concrete definition, fluid and everchanging." Likewise, in *Mayor and City Council of Baltimore v. Mano Swartz, Inc.* the Maryland Court of Appeals found that standards provided by the city of Baltimore in its regulations regarding the prevention of gaudiness and drabness to be invalid as an expression of individual taste and lacking in objectivity.

**Prevention of Harm**

Some cases reviewing aesthetics-based regulations describe them as attempts to prevent or eliminate nuisances. The bulk of these cases was decided in the 1960s, when exclusively aesthetics-based regulation

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44 Id. at 508-512.
45 Id.
46 Id. at 510.
47 328 A.2d 791 (Me. 1974).
48 Id. at 796.
49 Id.
51 Id. at 351, 262 A.2d at 202.
52 278 Ark. 500, 647 S.W.2d 439 (1983).
53 Id. at 503, 647 S.W.2d at 440.
56 Id. at 342.
57 268 Md. 73, 299 A.2d 828 (1973).
58 Id. at 83, 299 A.2d at 853.
was first being accepted as legitimate. They do not follow the lead of Berman v. Parker in replacing the traditional nuisance analysis for reviewing state land use regulations with a public welfare analysis.

In 1963, in the seminal New York case, People v. Stover, an ordinance against clotheslines in the front yard was upheld, on the ground that the law did not seek to establish an arbitrary standard of beauty, but “to proscribe conduct which is unnecessarily offensive to the visual sensibilities of the average person,” just as regulations in the past legislated against offenses to the senses of hearing and smell. In 1965, the Oregon Supreme Court spoke in terms of preventing or minimizing “discordant and unsightly surroundings.” In 1967, the Ohio Supreme Court, in approving a junkyard ordinance, indicated that the fencing requirement was based on aesthetics and was intended to prevent the “patent and gross.”

Not all the rationales based on harm prevention, however, are older cases. The Utah Supreme Court in Buhler v. Stone reviewed an ordinance that prohibited keeping property in an unclean and unsightly manner. The court held the ordinance valid, indicating that taking reasonable measures to minimize discordant, unsightly, and offensive surroundings was legitimate within the scope of public welfare. The court went on to state that the ordinance had a positive side, equally legitimate, of preserving beauty and the usefulness of the environment. The Supreme Court of Florida, in City of Lake Wales v. Lamar Advertising Ass’n of Lakeland, stated that “cities have the authority to take steps to minimize sight pollution.”

Shared Human Values

These modern aesthetics cases give strong credence to Professor Costonis’s position that shared human values are what actually underlie many courts’ perception of aesthetic regulations. In Sun Oil Co. v. City of Madison Heights, the Michigan Court of Appeals noted that “a community’s aesthetic well-being can contribute to urban man’s psychological and emotional stability,” and that “a visually satisfying city can stimulate an identity and pride which is the foundation for social responsibility and citizenship.” Though the case involves a sign ordinance and the court focuses its attention on the visual landscape, it speaks of what is “visually satisfying” rather than what is visually beautiful, and emphasizes the need for preserving the city’s “identity and pride.” These themes are consistent with the shared human values premise.

In Metromedia, Inc. v. City of San Diego, the California Supreme Court validated the purpose of protecting the community’s appearance in its review of a sign ordinance. The court discussed the interwoven nature of the concepts of economics, aesthetics, and quality of life. It stated that “economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future” and asserted that city planning would be virtually impossible without the power to regulate for “aesthetic purposes.” Then it declared that virtually every city in the state has regulated to improve the “appearance of the urban environment and the quality of metropolitan life.” The court’s language does not focus narrowly on visual beauty, but more broadly on the inseparable fabric of the city and the quality of urban life.

The “local” nature of these shared human values is indicated by the New Hampshire Supreme Court’s reference to protection “of the atmosphere of the town,” the Idaho Supreme Court’s sanctioning of zoning aimed at protecting the rural character of the county, the New York Court of Appeals holding that courts may look to the “setting” of the regulated community in deciding on the reasonableness of an aesthetic regu-

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52Id. at 466, 240 N.Y.S.2d at 739, 191 N.E.2d at 276.
55333 P.2d 292 (Utah 1975).
56Id. at 294.
57414 So.2d 1030, 1032 (Fla. 1982).
59Id. at 50, 199 N.W.2d at 529.
6023 Cal.3d 762, 154 Cal. Rptr. 212, 592, P.2d 728 (1979) (this part of the California Court’s opinion was subsequently affirmed by the U.S. Supreme Court, 453 U.S. 490, 1980).
61Id. at 769, 154 Cal. Rptr. 220, 592 P.2d at 735.
62Id. at 769, 154 Cal. Rptr. 220, 592 P.2d at 736.
The changeable character of these shared human values seems evident. In *Cromwell v. Ferrier*, the court in New York stated that “[c]ircumstances, surrounding conditions, changed social attitudes, newly-acquired knowledge . . . alter our view of what is reasonable” in reviewing an aesthetic regulation. The Michigan Supreme Court discussed how times had changed in *Robinson Township v. Knoll*. It stated that mobile homes can no longer be automatically confined to mobile home parks, but rather municipal decision-makers must decide on an ad hoc basis whether mobile homes meet normal community aesthetic standards.

If a community can adequately document that it is regulating to protect its historical heritage, courts generally have little trouble in upholding historic preservation regulations. The North Carolina Supreme Court in *A-S-P Associates v. City of Raleigh* reviewed an historic district overlay to a zoning code. The court comfortably affirmed the ordinance because the attempt to control the exterior appearance of structures had as its purpose “the preservation of the State’s legacy of historically significant structures.” The court found that this type of preservation provides a visual medium “for understanding our historic and cultural heritage.” That understanding gives a “valuable perspective on the social, cultural, and economic mores of past generations of Americans.”

**Environmental Harmony**

Recent decisions support the proposition that “aesthetics” is a term expressing the desire of decision-makers to blend development with its natural surroundings—that is, to seek environmental harmony. The Ohio Supreme Court upheld an ordinance creating environmental quality districts and imposing on those districts additional restrictions, that is, overlay zoning. It stated that the law was to assist “the development of land and structures to be compatible with the environment, and to protect the quality of the urban environment in those locations.” The court stated that the basis for the law was aesthetics.

The New York Court of Appeals, in reviewing a sign ordinance based on aesthetics, stated that in order to be found valid, regulation of signage must bear substantially on the economic, social, and cultural patterns of the community. The ordinance was upheld on the ground that it was intended to protect the cultural and natural resources values that derived from the village’s unique setting on a narrow spit of land between a bay and the ocean. The court spoke of adapting “use to fit” the cultural and natural features of the area.

The Minnesota Supreme Court upheld an ordinance, adopted pursuant to state enabling legislation, designating the Kettle River as a wild and scenic river. The court stated that “preserving the unique natural and scenic resources of this state does have an aesthetic purpose.” The court asserted that the ordinance presents “no radical departure from traditional zoning. It merely reflects the increasing complexity of society and the realization that property must be viewed more interdependently.”

The Ohio Supreme Court approved an aesthetics-based regulation because there was a right to prevent interference “with the natural aesthetics of the surrounding countryside caused by an unfenced or inadequately fenced junk yard.” Similarly, the Massachusetts Supreme Judicial Court has indicated that cities can adopt regulations designed to preserve and improve their physical environment.

Some key phrases in these cases supporting the premise that aesthetics is akin to environmental harmony are “compatible,” “use to fit,” “viewed more interdependently,” “natural aesthetics of the surrounding countryside,” and “preserve and improve the physical environment.” These phrases are excerpts of language used by courts to connote a concern for develop-
oping land in harmony with existing natural systems, shared human values, and visual beauty. These concerns travel through law today under the rubric of aesthetics.

Modern land use decision-making incorporates a weighing of values that come close to resembling Aldo Leopold's land ethic. For example, the Pennsylvania Constitution proclaims a right to "the preservation of the natural, scenic, historic and aesthetic values of the environment." What does the word "aesthetic" add to this list of values? Evidently the framers did not consider aesthetic values to be properly represented by natural, scenic, or historic values, but to reflect some other essence. "Natural," "scenic," and "historic" would appear to be sufficient for the protection of the shared human values in Professor Costonis's framework. The values represented by the word "aesthetic" could be something broader than shared human values: an overarching convergence of ecological, human, and visual concerns.

References