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I. INTRODUCTION

Governmentally imposed restrictions on the use of private property have grown greatly in both number and complexity in the more than half a century since modern zoning regulations first made their appearance in the United States.[1] As restrictions have burgeoned, the question of what are legitimate ends of such restrictions has become increasingly important. It is well understeod that the authority to regulate the use of land is based on the inherent police power of the sovereign states,[2] an authority that may validly be delegated to municipalities by state enabling legislation.[3] It is equally well understood that although the scope of the police power cannot be precisely defined—since it is subject to change in response to changing political, economic, and social conditions[4]—the purposes of police power regulation[5] that are univer-

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1. New York City enacted "[w]hat is generally regarded as the first modern zoning ordinance" in 1916. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 28, at 67 (1971).

2. *See* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 2.01 (4th ed. 1980).

3. Every state has enacted such legislation, which is generally modeled after a standard act published by the Department of Commerce in 1926. *See* ADVISORY COMMITTEE ON ZONING, A STANDARD STATE ZONING ENABLING ACT (Department of Commerce 1926), *reprinted in* 4 A. RATHKOPF, *supra* note 2, at 765.

4. State v. Houghton, 164 Minn. 146, 150, 204 N.W. 569, 570 (1925), *aff'd per curiam*, 273 U.S. 671 (1926); Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 226-27, 275 N.E.2d 585, 589, 325 N.Y.S.2d 933, 938 (1971).

5. The term "regulation" is used in this Article instead of "zoning" since some of the cases discussed involve land use restrictions other than zoning ordinances. The vast majority of the cases, however, do involve zoning ordinances.

sally recognized as legitimate are the promotion of health, safety, morals, and the general welfare.[6] While "health" and "safety" are relatively easy to define, and since the promotion of morals has rarely, if ever, been relied upon in recent cases to justify land use regulation,[7] the determination of what may be done in the name of the nebulous "general welfare" has proved an intractable problem for those courts called upon to assess the validity of regulations having no basis in health, safety, or morals. These general welfare regulations have become more prevalent as land use regulations have become more sophisticated, and they have primarily been designed to achieve aesthetic objectives. Hence, the question of whether the police power may be exercised solely or primarily for aesthetic purposes has been much litigated,[8] and the conflicting and confusing responses of the courts have been the subject of much commentary.[9]

To determine whether the purpose of a police power regulation is solely or primarily aesthetic, it is not necessary to inquire into the motives of the enacting body. Dukeminier[10] proposed a simple test: if the regulated land use would not be offensive to a blind man, then its primary offense—the reason for its regulation—is its "unaesthetic" nature.[11] In other words, if the regulated activity poses no real threat to the public health, safety, or morals, the reason for the regulation must be aesthetics. Of course, even a blind man may be offended by an unaesthetic land use if it happens to be the ugly house next door that depresses the value of his own property or an unsightly use that causes a thriving tourist industry to fail and thus harms the area's economy. These economic impacts of unaesthetic land uses, however, cannot be classified as the primary reasons for regulation, for as discussed below,[12] the

6. *See, e.g.*, City of Euclid v. Fitzthum, 48 Ohio App. 2d 297, 298-301, 357 N.E.2d 402, 404-05 (1976). *See also* A STANDARD STATE ZONING ENABLING ACT, *supra* note 3, at § 3.

7. *See* City of Pepper Pike v. Landskroner, 53 Ohio App. 2d 63, 70, 371 N.E.2d 579, 583 (1977). Regulations concerning sexually oriented commercial enterprises, which are arguably based in part on the promotion of morals, have been upheld by the courts in recent years. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Stansberry v. Holmes, 613 F.2d 1285 (5th Cir. 1980). The promotion of morals was relied upon as a justification for regulation in several early cases. *See* text accompanying notes 56-64 *infra*.

8. *See* cases collected at Annot., 21 A.L.R.3d 1222 (1968).

9. For an extensive bibliography of the literature, see 12 WAKE FOREST L. REV. 275 (1976).

10. Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955).

11. *Id.* at 223.

12. *See* text accompanying notes 48-50 *infra*.

economic impacts of aesthetic regulation[13] are purely derived from the aesthetic impact. The desirable economic benefit is attained only because the regulation tends to make the regulated area aesthetically pleasing, or at least pleasing in terms of the market's perception of beauty.

Ascertaining the primary purpose of a regulation is a necessary step in applying the well-recognized test of the constitutionality of police power regulations: a regulation is unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[14] Two basic inquiries must be addressed in applying this test: first, whether the purpose of the regulation is a permissible police power purpose; and second, whether the regulation is a reasonable means of furthering that purpose.[15] When a regulation is challenged as having aesthetics as its purpose, the first inquiry alone is often dispositive under the present majority rule. Nevertheless, while aesthetics alone will not justify an exercise of the police power, it may be a valid secondary objective if the regulation primarily serves one of the traditional police power purposes.[16]

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13. The terms "aesthetic regulation" and "primarily aesthetic regulation" are used interchangeably throughout this Article.

14. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

15. Courts frequently use the term "unreasonable" as a generic term to describe regulations that are arbitrary, confiscatory, or discriminatory. *See* 1 A. RATHKOPF, *supra* note 2, § 4.02, at 4-7. The basic constitutional issue in the aesthetic regulation cases is whether the regulation denies substantive due process. Rathkopf summarizes the instances in which such a denial may be found:

(1) The purpose of the restriction does not fall within the ambit of those purposes for which the zoning power has been conferred.
(2) The manner of achieving a permitted purpose has not been authorized.
(3) The restriction goes so far as to confiscate the most substantial part of the value of the property or deprives its owner of all reasonable use thereof.
(4) It is arbitrary in that it fails to achieve the purpose for which it was intended.

Id. at 4-3. Although (2) and (3) may be involved in some aesthetic regulation cases, (1) and (4) identify the problems basic to all such cases and are essentially the same as the two inquiries identified in text. The second inquiry, however, is somewhat broader than that identified in (4). A regulation may be an unreasonable means of furthering a permissible purpose not only if "it fails to achieve the purpose" but also if the public benefit of achieving the purpose is slight compared to the private burden imposed by the regulation. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.23 (2d ed. 1976).

16. *See generally* 1 A. RATHKOPF, *supra* note 2, § 14.01. It should be noted that some of the jurisdictions treated as following the majority rule—*i.e.*, that aesthetic considerations alone are not a legitimate objective of regulation—in this Article and in other collections of cases may have dealt with the "aesthetics alone" issue only in dicta. Moreover, the jurisdictions treated as following the minority rule in this Article do not include those in which the courts, although implying a willingness to uphold regulations based solely or primarily on aesthetic considerations, did not do so and instead stressed the economic benefits derived

The basic reasons for the refusal to accept aesthetics as a sole or primary justification for regulation are substantial. Unlike the protection of the public health, safety, and morals, the promotion of aesthetic values has been considered a matter of luxury and indulgence, rather than a necessity.[17] Furthermore, the aesthetic judgment is subjective; what one city council considers beautiful, the next may consider ugly.[18] The courts have been understandably reluctant to place themselves in the position of reviewing the reasonableness of decisions for which no objective criteria of reasonableness can be articulated. These considerations, coupled with the strong Anglo-American tradition of noninterference with the rights attendant to private property ownership, have provided sufficient reason for many courts to invalidate primarily aesthetic regulations.

Even though the rule that the police power may not be exercised to achieve aesthetic objectives is still followed in the majority of states, in the quarter century since the Supreme Court eloquently described the role of beauty in the promotion of the general welfare in *Berman v. Parker*[19] the courts have given expanded meaning to that "traditional" police power purpose; some courts have even held that aesthetics alone is a sufficient justification for an exercise of the police power.[20] More commonly, the courts have

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from aesthetics or incidental health and safety considerations. Because of the difficulties of interpreting some of the aesthetic regulation cases, some room exists for disagreement concerning whether certain jurisdictions follow the majority or minority rule. *See generally* Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 U. MO. KAN. CITY L. REV. 125 (1980), finding sixteen jurisdictions that have accepted the rationale that aesthetics alone may justify regulation, nine that have rejected it, sixteen in which it is an open issue, and ten in which there are no reported cases.

17. *See, e.g.*, City of Passaic v. Paterson Bill Posting, Ad. & Sign Painting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905).

18. *See* City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925):

> Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard entirely impractical as a standard for use restriction upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power.

19. 348 U.S. 26 (1954). *See* text accompanying notes 35-37 *infra*.

20. The leading case is People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), *appeal dismissed*, 375 U.S. 42 (1963). *See also* John Donnelly & Sons v. Mallar, 453 F. Supp. 1272 (D. Me. 1978); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); John Donnelly & Sons, Inc. v. Outdoor Ad. Bd., 369 Mass. 206, 339 N.E.2d 709 (1975); Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 324 A.2d 113 (1974); Sun Oil Co. v. City of Upper Arlington, 55 Ohio App. 2d 27, 379 N.E.2d 266 (1977)

maintained the traditional rule, but have nonetheless upheld primarily aesthetic regulation by reasoning that the general welfare is promoted because the regulation has a desirable economic impact; it tends either to protect property values[21] or to promote tourism.[22] In some cases, a health or safety justification may be relied upon, even though the regulation was enacted primarily to combat unaesthetic land uses and the incidental health or safety effects of the regulation are minimal or nonexistent.[23] In any event, the initial constitutional hurdle, the requirement of a permissible police power purpose, is usually overcome.

By finding that a primarily aesthetic regulation's economic impact furthers the general welfare, or that the regulation has beneficial health and safety effects, the courts avoid holding that aesthetics may be the sole or predominant objective of police power regulation. The refusal formally to accept this proposition, however, does not necessarily mean that it has not been accepted in fact, since any alleged economic impact of such a regulation arises from, and is wholly derived from, its aesthetic impact. Furthermore, the alleged economic, health, or safety benefits are often nonexistent or at least unproven. Because land use restrictions are presumed constitutional by the reviewing court,[24] the courts rarely require proof of the "nonaesthetic" economic, health, or safety justifications upon which they rely in upholding land use regulations. Even if the legislative body presents no evidence to establish that the "nonaesthetic" justification in fact exists, the regulation will be upheld on the basis of this alleged justification unless the contesting landowner meets a rather extraordinary burden of proof and shows that it does not exist.[25] The "nonaesthetic" justification, therefore, usually remains undemonstrated, and because any evidence on the matter, if presented, might be extremely speculative or conflicting,[26] a contesting landowner may find it quite difficult to believe the court that tells him that his land use is not being restricted on the basis of aesthetics alone.

If the court finds that the restriction is aimed at a permissible

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(aesthetic regulation valid when regulated use is in "gross contrast" to permitted uses and is "patently offensive"); Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255 (1965).

21. *See* text accompanying notes 93-143 *infra*.

22. *See* text accompanying notes 144-53 *infra*.

23. *See* text accompanying notes 154-72 *infra*.

24. *See generally* 1 R. ANDERSON, *supra* note 15, at § 3.14.

25. *See generally id.*, at § 3.16; note 53 *infra*, and accompanying text.

26. *See* text accompanying notes 98-109 *infra*, describing the difficulty of proving the "nonaesthetic" justification of protecting property values.

police power purpose by ascribing a "nonaesthetic" objective to the regulation, the second inquiry of the constitutional test is then accordingly misdirected. Instead of considering whether the regulation is a reasonable means of achieving the primary aesthetic objective, the courts inquire whether the regulation is a reasonable means of achieving the "nonaesthetic" objective of economic stability or the tangential objective of health and safety. In short, the refusal to recognize aesthetic regulation for what it is precludes fair review of the constitutionality of such regulation; both constitutional inquiries are addressed to fictional or insignificant issues.

This Article will examine the existing methods of analysis employed by courts in reviewing primarily aesthetic regulations, as well as the way in which those methods have been affected by the courts' continually evolving interpretation of the concept of general welfare. The Article argues that in many cases in which regulations based solely or primarily on aesthetic considerations have been upheld, the essential constitutional inquiries have been misdirected. This is because "nonaesthetic" justifications are asserted that either are wholly derived from aesthetic benefits, or have no basis in fact—and need none because of the presumption of constitutionality. Because the more recent interpretations of the general welfare provide new "nonaesthetic" justifications, the traditional rule that aesthetics alone is not a proper basis for regulation now has virtually no discernible effect on the outcome of the aesthetic regulation cases.

This Article suggests that, although the minority rule that a regulation may be based solely on aesthetics is laudable, the alternative, traditional rule is certainly not without merit. The purpose of this Article is not to criticize the traditional rule itself, but rather the manner in which it is applied by the courts. This Article argues that, under either rule, aesthetics should be taken into account in weighing the significance of the public interests in regulation against the private interests in freedom from regulation. This balancing test, however, is unduly weighted in favor of the validity of the regulation by the presumption of constitutionality—permitting a court to assume the existence of "nonaesthetic" economic, health or safety purposes for the regulations that may have little or no basis in fact. When such presumptions are indulged by a court whose formal rule is that aesthetics alone is insufficient, the rule becomes meaningless, and regulations based solely or predominantly on aesthetic considerations are inevitably held valid. This Article identifies some of the tenuous "nonaesthetic" considera-

tions that have been presumed in recent cases and suggests that unless the courts are willing to accept that aesthetics alone is sufficient, acceptance of tenuous "nonaesthetic" rationales must be avoided if the traditional rule is to have meaning.

Moreover, even if aesthetics alone is accepted as a sufficient basis for regulation, the presumption of constitutionality should not be allowed to obscure the fact that in some cases the governmental interest in aesthetics is insignificant compared to the competing interests of the regulated landowner. Many cases have shown that the presumption of constitutionality need not be blindly and rigidly applied; courts can and do refuse to accept governmental assertions on behalf of legislation that are unsupported by convincing evidence in the record.[27] The kinds of evidence that should be required by courts reviewing the validity of aesthetic regulations also will be examined.

II. Permissible Police Power Purposes: Emergence of the General Welfare

A. *The Concept of General Welfare*

Although currently the promotion of the general welfare is a convenient and frequently used vehicle for the promotion of aesthetics, in the early twentieth century the general welfare concept was rarely recognized as a justification for police power regulation independent of more traditional police power purposes. Many of the early aesthetic zoning decisions did not even mention the general welfare in their lists of permissible police power purposes, recognizing as valid only the promotion of health, safety, and morals.[28] Gradually the courts came to add general welfare to the list, perhaps partly in response to the Supreme Court's discussion of the police power in the landmark zoning case of *Village of Euclid v. Ambler Realty Co.*[29] In upholding the validity of comprehensive zoning regulations in general, the Court stated that "the ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare."[30] The Court went on to conclude that the particular ordinance in question could not be found to have "no substantial relation to the public health, safety, morals,

27. *See* notes 183-95 *infra*, and accompanying text.
28. *See, e.g.*, Pritz v. Messer, 112 Ohio St. 628, 639, 149 N.E. 30, 33 (1925).
29. 272 U.S. 365 (1926).
30. *Id.* at 387.

or general welfare."[31] Although it has been asserted that the Supreme Court in *Euclid* recognized the general welfare as an independent justification for the ordinance—since "[t]he promotion of health, safety, and morals will provide justification for only a primitive type of zoning"[32]—the reasons given by the Court for upholding the comprehensive ordinance clearly indicate that the Court was focusing on health and safety.[33] Indeed, the Court's mention of "public welfare" and "general welfare" seemed largely superfluous.

Likewise, although the state courts came regularly to name the general welfare as a permissible ground for exercise of the police power, the term remained largely undefined and seemingly not a creature independent of the traditional health, safety, and morals grounds. Whatever the *Euclid* Court meant by "general welfare," and whatever state courts meant when they routinely listed the general welfare as a permissible purpose of the police power, it clearly was not acceptable as a sole basis for regulation if promotion of the general welfare was nothing more than the promotion of aesthetics.[34]

Almost thirty years after the ambignous reference to public welfare in *Euclid,* the Supreme Court in *Berman v. Parker*[35] set forth a now-famous description of what is encompassed by the term. In upholding the validity of an urban renewal plan for the District of Columbia, the Court stated:

> 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.[36]

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31. *Id.* at 395.

32. 18 U. FLA. L. REV. 430, 430 (1965).

33. [T]he segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and inteusity of the development in each section; . . . it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervons disorders; preserve a more favorable environment in which to rear children, etc.

272 U.S. 365, 394 (1926).

34. All courts recognized, however, that the mere existence of a secondary aesthetic motive would not invalidate an ordinance: "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency." Perlmutter v. Greene, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932).

35. 348 U.S. 26 (1954).

36. *Id.* at 33.

Although it concerned eminent domain rather than zoning, *Berman* became extremely influential in aesthetic zoning cases.[37] Also of considerable influence has been the wealth of legal commentary critical of the early aesthetic zoning cases,[38] most notably a 1955 article by Professor Dukeminier,[39] who denounced the judicial technique of upholding predominantly aesthetic regulation on tenuous or fictional nonaesthetic grounds.[40] The effect of such commentary, as well as increased popular demand for some forms of aesthetic regulation, has been to shift dramatically judicial attitudes toward upholding these regulations in the post-*Berman* years.

1. Aesthetics and the General Welfare: Competing Judicial Theories

Although a few courts now hold that regulation solely or predominantly for aesthetic purposes is a valid use of the police power to promote the general welfare,[41] most courts upholding ostensibly aesthetic regulation link aesthetics to another permissible police power purpose. In doing so, these courts continue to adhere to the majority rule that aesthetics is a legitimate objective only if other, more traditional objectives are also present. Aesthetic regulation is said either to promote some other aspect of the general welfare—characterized broadly as producing an economic impact: protection of property values, promotion of economic growth, or preservation of an area's character[42]—or to further one of the other traditional health, safety, or morals goals. When the general welfare is involved, some cases treat the promotion of aesthetics and an accompanying economic impact as two indistinguishable and

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37. One observer recently stated:

> In recent years, the words "beautiful as well as healthy" have become something of a talisman for courts forced to decide the validity of regulations that serve solely or predominantly aesthetic purposes. Rather than inquire into the nature of the individual and community interests at stake, courts have used the discretion that *Berman* affords state and local governing bodies as a basis for upholding almost any aesthetic regulation.

Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 2 (1977) (citation omitted).

38. *See, e.g.*, 12 WAKE FOREST L. REV. 275 (1976).

39. Dukeminier, *supra* note 10.

40. Dukeminier's primary criticism was of the early billboard cases and cases dealing with the prohibition of overhanging signs in fashionable shopping areas. *Id.* at 219-23.

41. *See, e.g.*, cases cited at note 20, *supra*.

42. *See* 8 IND. L. REV. 1028, 1034-39 (1975), and cases cited therein.

mutually dependent aspects of the same general welfare goal.[43] In such cases the aesthetic considerations are held legitimate because to protect beauty *is* to stimulate the economy, to preserve the character of an area, or to protect property values. Other decisions view the aesthetic and economic purposes as entirely distinct categories within the general welfare concept, upholding regulations that happen to serve both goals while maintaining that the aesthetic considerations alone would be insufficient.[44] In these cases the aesthetic purpose is considered legitimate because beautification is merely an incidental objective of the regulation. The primary objective is, for example, to promote the general welfare by economic growth or residential character preservation.

An evaluation of the legitimacy of the two alternate ways in which courts have upheld aesthetic regulation—either by declaring aesthetics alone to be sufficient or by requiring the presence of some more traditional purpose—suggests two possible ways to analyze the decisions. The first theory is that while either class of decisions produces a sound result, the concept of aesthetics is not really necessary to the decisions, and the superfluous reference only confuses the issue. Since a regulation that promotes aesthetics either inevitably promotes some element of the general welfare or will in some manner further one of the more traditional police power purposes, it will be upheld for that reason alone.[45] Proponents of this theory would argue that courts need never consider

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43. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 861, 610 P.2d 407, 413, 164 Cal. Rptr. 510, 516 (1980) (*U.S. appeal pending*): "[A]ny distinction between aesthetic and economic grounds as a justification for billboard regulation must fail." The California Supreme Court also found as a matter of law that the prohibition of billboards promoted traffic safety, but held that even if such was not the case, the regulation was valid. *Id.* at 859, 610 P.2d at 412, 164 Cal. Rptr. at 515. Another class of cases closely related to these are those in which the court purports to accept aesthetics alone as a valid basis for regulation but then relies heavily on such factors as the protection of property values or the promotion of tourism. *See* 18 U. FLA. L. REV., *supra* note 32, at 435-36, and cases cited therein.

44. *E.g.*, City of Pepper Pike v. Landskroner, 53 Ohio App. 2d 63, 74-75, 371 N.E.2d 579, 586 (1977).

45. Hagman suggests that "unless the attorneys submit tbe case on an aesthetics alone basis, or the court chooses to limit its decision to that basis, it is perhaps never necessary to decide the issue on that ground alone." D. HAGMAN, *supra* note 1, § 48, at 94 (1971). *See also* 1 A. RATHKOPF, *supra* note 2, § 14.01, at 16-17 (citation omitted):

> It therefore appears of little moment whether a court reiterates the rule of the older cases that while a regulation may not be based upon aesthetics alone, aesthetics may be incidental to the otherwise valid use of the police power, since ordinarily a regulation which is found to provide for the appropriate use of property, or to furnish light and air, or to conserve the value of property, will be found to promote the appearance of the community and to be based, in substantial part, upon consideration of the aesthetic elements involved.

aesthetics to be a permissible police power purpose since some more traditional purpose is always present.

The second theory is that the decisions that appear to follow the traditional rule—either by treating aesthetic purposes and other general welfare purposes as synonymous or by finding the aesthetic justifications to be merely incidental to economic, health, or safety considerations—are unsound for either or both of the following reasons: (1) the economic or other general welfare impact of an aesthetic regulation is purely derived from the aesthetic impact, and therefore to fail to recognize the aesthetic objective as the primary or sole purpose of the regulation is to indulge in fiction;[46] or (2) the asserted "nonaesthetic" grounds for upholding a regulation are either tenuous or nonexistent, or in any event not provable with any degree of definiteness.[47] The contention, then, is that the purported independent purpose of the regulation is actually either entirely dependent on the aesthetic purpose or unprovable. A proponent of this theory would argue that the *only* legitimate way to uphold an aesthetic regulation is simply to find that aesthetics alone is a legitimate police power objective.

2. Applying the Theories: Two Typical Rationales

The validity of both theories depends upon the manner in which the constitutional standard is applied to the accompanying,

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46. Michelman argues quite forcefully that those cases which upheld a regulation because it protected property values and declared aesthetics merely incidental were based on escapist reasoning that evades the real issues. The effect on market value, after all, is derivative or symptomatic—not primary or of the essence. If the activities curbed by the regulation would otherwise make the surrounding property less valuable, it must be because those activities would radiate some kind of undesirable impact. If that impact is received and felt through visual sensibility, then the "economic" interest in question simply masks [the] "aesthetic" interest. In other words, without the aesthetic nuisance, there would be no market devaluation.

Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15-2 PRAC. LAW. 36, 37 (1969).

47. *See* Dukeminier, *supra* note 10, at 219-23. The courts in many recent cases that have held aesthetics alone to be a valid basis for regulation have been somewhat scornful of the opinions buttressed by nonaesthetic grounds:

An analysis of the foregoing cases indicates that aesthetic zoning has been given judicial approbation only when clothed with other legal raiment which masked its true purpose. . . . This court today holds that it is now appropriate to permit a municipality, under proper safeguard, to legally deal with the problem without subterfuge.

Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 539, 324 A.2d 113, 119 (1974). *See also* State v. Diamond Moters, Inc., 50 Hawaii 33, 36, 429 P.2d 825, 827 (1967); John Donnelly & Sons, Inc. v. Outdoor Ad. Bd., 369 Mass. 206, 216-17, 339 N.E.2d 709, 716 (1975).

more traditional purposes of the challenged regulation. How the manner in which courts apply the standard affects whether it finds a regulation valid is better seen by considering two hypothetical, but typical, rationales that might be contained in recent aesthetic regulation decisions. The first rationale is that although no health, safety, or morals grounds exist and aesthetics alone is insufficient, the regulation protects certain social goods, such as property values, and therefore promotes the general welfare. The second rationale relies on health or safety grounds rather than an economic general welfare justification.

The initial rationale contains at least two major flaws. First, the protection of property values is a purely derivative effect of the primary aesthetic impact of the regulation; as Michelman states, it is "derivative or symptomatic—not primary or of the essence."[48] This derivative nature is seen more clearly if compared to the health and safety effects of regulations that are not primarily aesthetic. For instance, basic zoning regulations such as setbacks, minimum lot size and floor area requirements, and maximum building height restrictions are clearly aesthetic regulations to a degree; yet there is no question that such regulations usually serve substantial health and safety purposes, for example, by controlling population density.[49] The health and safety effects of setback and minimum lot size regulations, however, are not derived from the aesthetic impact of such regulations. Whereas property values are protected only *because* a primarily aesthetic regulation beautifies, fire prevention is facilitated and traffic congestion is alleviated by density controls regardless of whether the controls also have a beautifying effect. In those cases in which the economic impact is entirely dependent on the aesthetic effect, it is that effect on aesthetics that must be the primary goal of the regulation. Hence, even in a case in which some fairly substantial general welfare benefit, such as economic growth, can be shown to result from an aesthetic regulation, it is misleading and erroneous to classify the reg-

48. Michelman, *supra* note 46.

49. Some restrictions of these types, however, clearly go "beyond the arguable range of health [and safety] demands." 1 R. ANDERSON, *supra* note 15, § 7.04, at 544.

> A health purpose undoubtedly justifies the imposition of reasonable density regulations, including minimum yard requirements which insure that some space will remain between buildings to admit light and air. Less clearly related to health are extravagant yard and setback restrictions, extremely large lot size requirements, [and] stringent floor size regulations . . . .

Id. at 543-44. Those density regulations that are clearly related to health and safety are the subject of the present discussion.

ulation as based primarily or solely on the "nonaesthetic" consideration.

The fact that in many cases an economic impact *cannot* be shown points up the second fault of those cases in which the courts rely on a "property values" rationale: usually, no convincing, objective evidence of an economic impact is presented,[50] and such evidence often might not be available if sought.[51] The possible evidence on behalf of the landowner is likely to be as speculative and inconclusive as any that might be obtained on behalf of the government.[52] Because the presumption of constitutionality casts the burden of proof on the landowner, the regulation will be upheld unless he can prove that the question of economic impact is not even "fairly debatable."[53] This focus on economic impact misdirects the constitutional inquiry, however, because even if the asserted economic impact exists, it is not the primary purpose of the

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50. *See* text accompanying notes 112-29, 134-37, *infra.*

51. *See* text accompanying notes 98-109, *infra.*

52. Admittedly, in most of the cases discussed in this Article the landowner contesting an aesthetic regulation failed to present evidence tending to show that the regulation did not achieve the alleged "nonaesthetic" objective. It is douhtful, however, whether such evidence as the landowner might have obtained would have been sufficient to have rebutted the presumption of constitutionality, particularly in those jurisdictions that require a very high degree of proof to overcome the presumption. *But cf.* Naegele Outdoor Ad. Co., v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968); City of Euclid v. Fitzthum, 48 Ohio App. 2d 297, 357 N.E.2d 402 (1976) (landowners in each case successfully proved failure of ordinances to achieve alleged safety objectives).

53. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926): "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." The "fairly debatable" test is the one most frequently applied to describe the degrec of proof necessary to overcome the presumption of validity, but the necessary proof has also been described as clear and convincing evidence, clear and affirmative evidence, a preponderance of the evidence, and proof beyond a reasonable douht. *See generally* 1 R. ANDERSON, *supra* note 15, §§ 3.16, 3.20-3.22.

The presumption of constitutionality is used by the courts not only to uphold primarily aesthetic regulation, but also in many cases to uphold regulations that serve purposes not primarily aesthetic, such as the density controls mentioned in the text accompanying note 49, *supra.* This Article criticizes the presumption of constitutionality as it is applied in those cases involving primarily aesthetic regulation, as determined by the blind man test, *see* text accompanying notes 10-13, *supra.* The application of the presumption in such cases leads to unjustifiable results in jurisdictions whose rule is that regulations may not be based solely or primarily on aesthetics, and also in jurisdictions that accept the premise that aesthetics alone may justify regulation, if the presumption is used to prevent careful assessment of the significance of that governmental interest. The broader question of whether the presumption of constitutionality may lead to unjustifiable results in cases involving any regulation, whether primarily aesthetic or not, is beyond the scope of this Article. *See* 59 NW. U.L. REV. 345 (1964). *See also* Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses,* 32 ME. L. REV. 29, 73-77 (1980), criticizing application of the presumption of coustitutionality in exclusionary zoning cases.

regulation.

The second hypothetical rationale for upholding primarily aesthetic regulation emphasizes health or safety rather than economic general welfare considerations: the regulation under review cannot be justified on the basis of aesthetics alone, but since it is "fairly debatable" that a health or safety objective is achieved in addition to the aesthetic objective, the regulation is upheld. Again, the presumption of constitutionality may make it impossible for the landowner to prove that the regulation is based solely or primarily on aesthetics, even though he may gather a much greater quantity of speculative evidence in support of his contention than the government. As a result, the constitutional inquiries of permissible purpose and reasonableness are again focused upon some tangential and perhaps nonexistent justification—here health or safety—rather than aesthetics.

Although discussion of these hypothetical rationales points up the difficulties with relying on a purported traditional police power purpose to uphold an aesthetic regulation, it does not, without more, disprove the first alternative theory; *i.e.*, it is never necessary for a court to decide an aesthetic regulation case on the basis of aesthetics alone. Given the manner in which recent decisions have applied the presumption of constitutionality, a bare assertion by the government that a primarily aesthetic regulation also has a desirable economic, health, or safety effect is sufficient to validate it, even though that assertion may be unsupported by evidence.[54] This situation may be the result of a policy decision by the courts about aesthetic regulations, but the desirability of such a result is questionable. Some perspective on the relative merits of the ways of treating this issue may be gained by examining several of the key pre- and post-*Berman* aesthetic regulation decisions. It is also useful to examine the way in which the *Berman*-inspired expansive definition of general welfare has affected the direction of the inquiry and outcome of these cases.

*B. Pre-*Berman *Cases*

Perhaps the best example of what has been characterized as the "legal fiction"[55] of upholding aesthetic regulations by relying on tenuous health, safety, or morals grounds is afforded by the

54. *See* cases discussed in text accompanying notes 112-33 *infra*.

55. John Donnelly & Sons, Inc. v. Outdoor Ad. Bd., 369 Mass. 206, 217, 339 N.E.2d 709, 716 (1975).

early billboard regulation cases. In *St. Louis Gunning Advertising Co. v. St. Louis*,[56] one of the most cited cases of this genre, the Missouri Supreme Court, while stating that "[p]roperty rights should never be subjected to such fickle standards of regulation"[57] as aesthetics, upheld an ordinance regulating the size and location of billboards. The court relied upon the more traditional police power objectives to make its decision. The court found that billboards

> endanger the public health, promote immorality, [and] constitute hiding places and retreats for criminals and all classes of miscreants. They are also inartistic and unsightly. In cases of fire they also cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure and broad surface, render them liable to be blown down . . . . [T]he ground in the rear thereof is constantly used as privies and dumping ground for all kinds of waste and deleterious matters . . . behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine and air, which are so conducive to health and comfort.[58]

The court's justification of billboard regulations as protecting health, safety, and morals often has been criticized on the ground that billboards, if properly constructed, simply do not have the undesirable effects described in *St. Louis Gunning*.[59] Billboards, however, usually are considered "inartistic and unsightly,"[60] a fact that suggests that billboard regulation is really designed to achieve aesthetic goals. The rationale of *St. Louis Gunning* and the cases which followed it[61] was especially remarkable in light of the many earlier billboard cases that had found such regulation to be based solely or primarily on aesthetics and therefore invalid.[62] One court

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56. 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed per stipulation*, 231 U.S. 761 (1913).

57. *Id.* at 203, 137 S.W. at 962.

58. *Id.* at 145, 137 S.W. at 942.

59. *See* General Outdoor Ad. Co. v. Department of Pub. Works, 289 Mass. 149, 170-71, 193 N.E. 799, 809 (1935), *appeal dismissed*, 297 U.S. 725 (1936) (a special master, after hearing voluminous evidence, was persuaded that the dangers enumerated in *St. Louis Gunning* were confined to "some isolated cases.").

60. St. Louis Gunning Ad. Co. v. St. Louis, 235 Mo. 99, 145, 137 S.W. 929, 942 (1911). *See* Dukeminier, *supra* note 10, at 220: "It seems plain that the primary offense of billboards is ugliness. Any jerry-built billboard may of course be a menace to safety and a fire hazard, but the billboard regulations are not limited to keeping the signboard screws tight."

61. *See, e.g.*, Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); Kansas City Gunning Ad. Co. v. Kansas City, 240 Mo. 659, 144 S.W. 1099 (1912); People v. Wolf, 220 A.D. 71, 220 N.Y.S. 656 (1927), *appeal dismissed*, 247 N.Y. 189 (1928).

62. *E.g.*, Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909), *overruled*, Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980)

described the phenomenon as follows:

> [T]he courts, somewhat sophistically . . . with many protestations against the use of aesthetic standards, urged with rather fantastic reasoning that what previously had no relationship to public safety had now developed into a public menace which an enlightened community not only had a right to regulate but, indeed, would be almost wayward in failing to control.[63]

Nonetheless, even the United States Supreme Court employed the *St. Louis Gunning* technique in upholding billboard regulation.[64]

Other types of regulations were upheld during this era on health, safety, and morals grounds, providing a subterfuge comparable to that employed in *St. Louis Gunning*. Ordinances prohibiting overhanging signs in fashionable shopping areas were sustained on somewhat questionable health and safety grounds,[65] although "[t]he city officials were pretty clearly not much concerned about safety, for if signs hanging from the best stores in town are really unsafe, reason demands that shabby ones hanging from stores in a low-price district also be prohibited."[66]

The health, safety, and morals justifications relied upon in the above billboard and overhanging sign cases were clearly either tenuous or nonexistent and at best patently subordinate to the aesthetic reasons for the regulations. This rather crude method of upholding primarily aesthetic regulation continues to be utilized in modern cases,[67] but is not so widely employed today as the more subtle technique of defining the general welfare in such a way that a derivative benefit of aesthetics, such as protecting property values or promoting tourism, can be relied upon.[68]

Despite this aversion to aesthetic regulation, some pre-*Berman* courts did recognize that aesthetics was legitimately part of the general welfare and thus could serve as a basis for land use restrictions. As early as 1923 the Supreme Court of Louisiana stated that aesthetic considerations are clearly a matter of general

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(U.S. appeal pending); City of Chicago v. Gunning Sys., 214 Ill. 628, 73 N.E. 1035 (1905); City of Passaic v. Paterson Bill Posting, Ad. & Sign Painting Co., 72 N.J.L. 285, 62 A. 267 (1905).

63. Murphy, Inc. v. Town of Westport, 12 Conn. Supp. 272, 275 (1943), *rev'd and remanded*, 131 Conn. 292, 40 A.2d 177 (1944).

64. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1917).

65. 1426 Woodward Ave. Corp. v. Wolff, 312 Mich. 352, 20 N.W.2d 217 (1945); Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1950). In *Woodward* it was conceded that the main, but not the sole, purpose of the ordinance was aesthetic. 312 Mich. at 364, 20 N.W.2d at 221.

66. Dukeminier, *supra* note 10, at 223.

67. *See* text accompanying notes 154-72, *infra*.

68. *See* text accompanying notes 93-153, *infra*.

welfare, inasmuch as they contribute to the happiness of residents and the protection of property values.[69] The same court later recognized general welfare as an independent and sufficient justification for the exercise of the police power in cases arising under the Vieux Carré Ordinance of New Orleans, which was enacted for the purpose of preserving the character of the French Quarter.[70] In *City of New Orleans v. Levy*,[71] the court stated that while aesthetic considerations alone perhaps would not justify the ordinance, the ordinance served to preserve the French Quarter "not only for its sentimental value but also for its commercial value,"[72]—that is, it promoted tourism and thus was valid. While the Louisiana cases and other historic preservation cases[73] illustrate a broadened interpretation of the general welfare term and generally a reliance on it alone[74] to uphold historic preservation regulations, it should be noted that the general welfare benefits of such regulations are not wholly derived from the aesthetic impact of the regulations in the sense that the term "derived from" is used in this Article. The aim of historic preservation is not merely to beautify, to protect property values or to promote tourism, but to preserve the unique character of areas or individual landmarks that are a part of our nation's cultural and historical heritage in order to orient[75] and educate present and future generations.[76] The

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69. State *ex rel.* Civello v. City of New Orleans, 154 La. 271, 284, 97 So. 440, 444 (1923). At issue was an ordinance prohibiting business establishments in residential districts, which the court recognized as sustainable on traditional health and safety grounds.

70. *See* LA. CONST. art. XIV, § 22A, which authorized the city to enact such an ordinance.

71. 223 La. 14, 64 So. 2d 798 (1953).

72. *Id.* at 29, 64 So. 2d at 803. *See also* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976) (a federal post-*Berman* case in which the constitutionality of the ordinance was again upheld); City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941); City of New Orleans v. Impastato, 198 La. 206, 3 So. 2d 559 (1941).

73. *E.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (Grand Central Terminal); Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 563 (1955) (Beacon Hill District of Boston); Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955) (Nantucket Island); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964) (historic district of Santa Fe).

74. For example, although the Supreme Judicial Court of Massachusetts realized that the laws enacted to preserve the historic character of Nantucket Island could "hardly be said in any ordinary sense to relate to the public safety, health, or morals," Opinion of the Justices to the Senate, 333 Mass. 773, 778, 128 N.E.2d 557, 561 (1955), the court approved the ordinance on general welfare grounds.

75. *See* The National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1970). "Congress finds and declares . . . that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give

orienting and educating effects of historic preservation regulations are independent of any aesthetic impact the regulation might have—that is, such regulations serve to orient and educate regardless of whether the regulations in fact have a beautifying effect.

The historic preservation cases were not the only pre-*Berman* decisions relying on the general welfare to uphold land use restrictions. None of the courts, however, went so far during that era as to recognize aesthetics alone as a valid basis for regulation. In *State* ex rel. *Carter v. Harper*,[77] for example, the Wisconsin Supreme Court observed that general welfare, as a justification for restricting the use of property, was "perhaps not so well understood" as health, safety, and morals justifications. The court upheld a comprehensive zoning ordinance on the general welfare grounds that it promoted the comfort and happiness of residents and stabilized property values, stating that such benefits "are material rather than aesthetic in their nature."[78] *Harper* was quoted at length by the Texas Court of Civil Appeals in upholding an ordinance that forbade business activity in a residential district.[79] The Texas court recognized that the preservation of property values promoted the general welfare[80] and that general welfare considerations were sufficient to support a regulation independently of any health, safety, or morals justification.[81] Nevertheless, it listed the prevention of street congestion and overcrowding when summarizing the purposes of the regulation.[82]

The protection of the tourist industry and the economic benefits derived therefrom was held to be a proper justification for primarily aesthetic regulation in other pre-*Berman* cases.[83] An ordinance excluding businesses from a certain area of Miami Beach was held valid in *City of Miami Beach v. Ocean & Inland Co.*,[84] in which the court stated that only the general welfare, and not

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a sense of orientation to the American people." *Id.* at § 470(b).

76. For a discussion of the educational and "legibility" interests protected by historic preservation regulation, and the manner in which those interests are unrelated to aesthetic concerns, see Williams, *supra* note 37, at 34-36.

77. 182 Wis. 148, 196 N.W. 451 (1923).

78. *Id.* at 159, 196 N.W. at 455.

79. Connor v. City of Univ. Park, 142 S.W.2d 706 (Tex. Civ. App. 1940).

80. *Id.* at 712.

81. *Id.*

82. *Id.* at 713.

83. Although tourism is often cited as a factor in the historic preservation cases, *see* text accompanying notes 70-76, *supra*, historic preservation regulation is not primarily aesthetic regulation. *See* note 149, *infra*.

84. 147 Fla. 480, 3 So. 2d 364 (1941).

health, safety, or morals, could be the basis for that particular ordinance.[85] The Florida court found the general welfare purpose of the ordinance to be primarily that of promoting tourism, and in its opinion recognized tourism as derived from the promotion of aesthetics. The court, however, did not go so far as to hold that aesthetics alone could be a valid basis for such regulation: "It is difficult to see how the success of Miami Beach could continue if its aesthetic appeal were ignored because the beauty of the community is a distinct lure to the winter traveler."[86] In a later decision the Florida court stated that aesthetic considerations alone were sufficient to justify a land use restriction[87] and relied on *City of Miami Beach* as supporting this proposition. As the preceding discussion indicates, however, *City of Miami Beach* did not go that far.[88]

The pre-*Berman* cases, in summary, illustrate both of the camouflaging techniques for upholding primarily aesthetic regulation on "nonaesthetic" grounds: (1) by relying on an economic or other general welfare impact of a regulation that is purely derived from the aesthetic impact, as in the Florida tourism cases; and (2) by relying on tenuous or nonexistent health and safety grounds, as in the early billboard regulation cases. While the latter technique is probably less popular today than in earlier times, the former technique of relying on one or more of the myriad elements of the expansive post-*Berman* concept of general welfare has been refined to an art.

C. *Post*-Berman *Cases*

In the quarter century since the Supreme Court declared that the public welfare may be promoted by legislation designed to make a community "beautiful as well as healthy,"[89] aesthetic regulations have enjoyed a more favorable reception in the courts. Although there has been no wholesale adoption of the proposition

85. *Id.* at 485-86, 3 So. 2d at 366. Only hotels and apartments were permitted in the restricted area.

86. *Id.* at 487, 3 So. 2d at 367.

87. Merritt v. Peters, 65 So. 2d 861, 862 (Fla. 1953).

88. For a critical analysis of these and other Florida cases, see 18 U. FLA. L. REV. 430, *supra* note 32, at 435-39. The author urged recognition of aesthetics alone as a sufficient basis for regulation: "[Such a position] removes the stress on the economic aspects of a pleasant community, and it admits that residents have as much right to pleasant surroundings as do tourists." *Id.* at 439.

89. Berman v. Parker, 348 U.S. 26, 33 (1954).

that aesthetics alone may be a valid basis for regulation,[90] the general welfare justification for police power regulation—which in many of the early zoning cases seemed to have little or no significance apart from the traditional health, safety, and morals grounds—has unmistakably come into its own.[91] Courts are more frequently relying on the "broad and inclusive"[92] nature of the general welfare in upholding restrictions on the use of property that cannot reasonably be based on the promotion of health, safety, or morals. Courts are also beginning to accept the view that the protection of beauty is an important part of the general welfare. The majority of these courts, however, emphasize that aesthetics is only one element of the general welfare, and in upholding primarily aesthetic regulation, they stress the economic benefits that will result from the regulation.

1. The Protection of Property Values

Protection of property values has become the favorite "nonaesthetic" general welfare justification of the post-*Berman* courts. If the court can discern a property values objective in the challenged restriction, then it can uphold what might otherwise be an invalid regulation; and it can do so without relying solely on the still questionable "aesthetics alone" rationale. The notion, however, that a regulation that tends to protect property values can be upheld on that ground, even though not solely on aesthetic grounds, has not been accepted by all courts.[93] Those decisions that find both economic and aesthetic grounds insufficient are in fact logically consistent, since the newly discovered and much relied-on property values justification is merely derived from that old pariah, aesthetics.[94] While most courts have not acknowledged

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90. *See* note 16, *supra*, and accompanying text.

91. Anderson notes that litigation involving minimum lot area requirements "produced the first consistent and articulate exposition by numerous and widely scattered courts of the view that the term 'welfare' included the community's interest in the effect of appearance upon the value of the property." 1 R. ANDERSON, *supra* note 15, § 7.20, at 574 (citation omitted).

92. Berman v. Parker, 348 U.S. 26, 33 (1954).

93. *See, e.g.*, Senefsky v. Lawler, 307 Mich. 728, 12 N.W.2d 387 (1943).

94. The status of the preservation of property values as a police power objective was questioned in 59 NW. U.L. REV. 372, 390 (1964):

> [T]he preservation of property values does not fit so comfortably as might be desired into the traditional formulation of the police power. Property values would have to fall both precipitously and widely in order seriously to threaten health, safety and morals. If the preservation of values is an aspect of the protection of welfare, it needs to be balanced, at least, against other interests which fall under the welfare heading.

that protection of property values is purely derived from aesthetic objectives, the relationship between property values and aesthetics has been recognized by commentators who have suggested that property values can be used as an objective gauge in assessing the reasonableness of necessarily subjective aesthetic judgments that restrict the use of property.[95] In most cases it is probably true that aesthetic considerations and economics are "inextricably intertwined."[96] Nevertheless, upholding the validity of a primarily aesthetic regulation on the ground that it will tend to protect property values, while asserting that aesthetics alone is an insufficient ground, is misleading. Property values will clearly not be enhanced by a regulation with no basis in health, safety, or morals unless beauty, as perceived by prospective purchasers, is enhanced by the regulation.

On the other hand, it is arguable that to protect property values a regulation need not necessarily promote aesthetics, but need merely forbid the introduction of property uses that do not conform to existing uses. By this reasoning, property values are preserved by forbidding uses that are different, but not necessarily ugly; hence the subjective aesthetic judgment is avoided. One court has stated that a zoning ordinance prohibiting mobile homes in a residential area protects property values in this manner:

> Quite apart from whether mobile homes are less beautiful or more attractive than conventional dwellings, they do not look like conventional homes. This

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See also R. BABCOCK, THE ZONING GAME 119-20 (1966); Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179, 191 n.64 (1975), noting that of the many factors that may affect property values—including, for example, the movement of persons of a different race or religion into a neighborhood—very few factors are now considered properly subject to zoning control. If the property values justification permits control of one factor, such as aesthetics, why does it not permit control of all factors that may affect property values?

95. *See, e.g.*, Michelman, *supra* note 46, at 37; Turnbull, *Aesthetic Zoning*, 7 WAKE FOREST L. REV. 230, 242-53 (1971); 8 IND. L. REV. 1028, *supra* note 42, at 1039. This suggestion is consistent with the position of this Article that the economic impact of a regulation is derivative from its aesthetic impact. Moreover, the suggestion that an aesthetic regulation should be held valid only if there is evidence of its beneficial economic impact is entirely appropriate in those jurisdictions that adhere to the majority rule that aesthetics alone may not justify regulation. The approach of Michelman and Turnbull, however, is inappropriate in majority-rule jurisdictions if a boneficial economic benefit is always presumed rather than proved, and would never allow the resnlt possible in a minority of jurisdictions that an aesthetic regulation with no provable economic impact may bo valid on the basis of aesthetics alone. It should also bo noted that the rule that the economic impact of a regulation is derivative from its aesthetic impact is not without exception. *See* note 210, *infra*, and accompanying text.

96. Napierkowski v. Township of Gloucester, 29 N.J. 481, 494, 150 A.2d 481, 487 (1959).

> difference in appearance has persuaded many municipalities that mobile homes in conventional home neighborhoods will depress property values . . . . [T]he very fact of structural difference may make mobile homes an architectual and economic depreciating factor in a conventional residential neighborhood . . . .[97]

By such an analysis, the aesthetic judgment is supposedly avoided since the regulated land use need not be classified as unaesthetic but merely as "different." In fact, however, the judgment that a particular use is undesirable because it is "different" is simply another kind of aesthetic judgment—a judgment that two uses, which might be attractive individually, are not attractive when placed side by side. In any event, regulations justified in this manner commonly do regulate land uses that are popularly perceived as unaesthetic, even though the courts may avoid using that label. One would be hard put to find a regulation that protects property values by forbidding beautiful uses in an ugly area because the beautiful use is "different." If the regulation under review were one that prohibited a conventional single-family residence in a mobile home area, rather than a regulation that prohibited a mobile home in a conventional housing area, it would seem exceedingly difficult to find that the regulation protected property values by prohibiting the "different" use.

Whether a regulation is said to protect property values because it prohibits unaesthetic uses or because it merely prohibits "different" uses, a major shortcoming of the cases that uphold regulations on these grounds is that usually little, if any, objective evidence exists of the regulation's impact on property values, on which the courts purport to rely so heavily. This lack of evidence is attributable to two factors: the presumption of constitutionality, and the difficulty of obtaining objective evidence on such speculative matters. The interaction of these two factors causes the landowner's burden of proof to be nearly insurmountable. The presumption of constitutionality places the burden of proof on the landowner, who must present proof sufficient to place the matter beyond the realm of fair debate in order to overcome the presumption. The unavailability of convincing, objective evidence on the speculative property values issue, however, is as much an obstacle to the landowner as it is to the government. The result is that usually the only evidence on the property values issue recited in the opinions, if any at all is recited, is the testimony of one or two real estate brokers or developers that, in their opinion, if the regulation

97. Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 29, 586 P.2d 860, 867 (1978).

were not enforced, property values would decline. The use of testimony of expert appraisers is very rare.[98] In describing the quality of the evidence relied upon to uphold one type of aesthetic regulation—architectural controls—Professor George Lefcoe observed: "Courts that have used property values testimony in sustaining an architectural control decision invariably rely on a sort of valuation testimony that would be stricken as incompetent in a condemnation suit, and in most other types of lawsuits for which property values really matter."[99]

Even if the courts demanded that the government produce objective evidence from professional appraisers on this issue, it is quite possible that such evidence would be unobtainable. Professor Lefcoe has summarized the problem of finding an evidentiary basis for property values in an architectural control context:

> It is nearly impossible to know whether a glass house located in a neighborhood of traditional homes will actually lower values. Consider how the measurement of property values would have to be taken if real objectivity were the goal. You locate two similar blocks of traditional houses, one with a modern house in its midst and the other without a contemporary structure. All other variables have to be excluded. We want, after all, a measure of the effect on neighboring values of the intrusive architectural style, and not changes in the school systems serving the two areas, new traffic patterns, the social class or wealth of incoming residents and the like. To the bost of my knowledge no such studies have boen done.[100]

An appraiser's determination of the market value of a given piece of property by examining the sale or rental prices of properties substantially similar is considered the most objective evidence of value,[101] but this "market approach" to value is impossible, as Pro-

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98. Even when expert appraisers give testimony on property values, their conflicting opinions may be useless to a landowner who must rebut the presumption of constitutionality. *See* Eustice v. Binsford, Chancery No. 19497 (Cir. Ct. of Arlington County, Va., Sept. 24, 1969) (three conflicting opinious on effect of proposed design), *discussed in* Turnbull, *supra* note 95, at 239-40. *See also* Ward v. County of Cook, 68 Ill. App. 3d 563, 386 N.E.2d 309 (1979), in which plaintiffs, who had been unsuccessful in obtaining a rezoning, challenged the validity of an ordinance placing the subject property in a more restrictive residential zone than they wished. Plaintiffs' two appraisers testified that plaintiffs' proposed residential development would have no detrimental effect on property values; defendant's appraiser testified that some nearby homes would suffer a depreciation in value of $10,000. *Id.* at 566-67, 386 N.E.2d at 312-13. The court applied the presumption of constitutionality and upheld the ordinance because, *inter alia,* it protected "the surrounding area against depreciation or economic loss." *Id.* at 572, 386 N.E.2d at 316.

99. G. LEFCOE, LAND DEVELOPMENT LAW: CASES & MATERIALS 969-70 (2d ed. 1974).

100. *Id.* at 969. This material is also found in a legal analysis of architectural control prepared by Professor Lefcoe in AMERICAN INSTITUTE OF ARCHITECTS COMMITTEE ON DESIGN, DESIGN REVIEW BOARDS: A HANDBOOK FOR COMMUNITIES 36 (1974).

101. *See* ENCYCLOPEDIA OF REAL ESTATE APPRAISING 8-9 (3d ed. E. Friedman 1978): "Primary evidence of value stems from recent sales or rentals of properties substantially

fessor Lefcoe suggests, if there are no substantially similar properties to compare to the subject property. In other words, the question whether an unaesthetic land use lowers, or would lower, the value of surrounding properties is best answered by ascertaining the values of properties in a substantially similar neighborhood in which a substantially similar unaesthetic use is located[102]—presuming such a neighborhood with such a use can be found. Of course, valuation approaches other than the "market approach" are available to appraisers, but these approaches are generally considered less satisfactory.[103] In any event, none of the possible approaches are currently employed in the aesthetic regulation cases, since many, if not most, courts seem willing to find that property values are protected by such regulations even without a trace of evidence to that effect.[104]

Professor Stephen F. Williams has suggested that the difficulty of correlating property values with aesthetic considerations is due to the extremely polycentric nature of the aesthetic judgment.[105] The polycentricity problem arises

> when three factors coincide: (1) a multiplicity of possible solutions; (2) an interdependency of relevant factors so that the outcome as to one feature of

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similar to the subject property. This is the most convincing type of evidence in an appraisal and is accorded the greatest weight in arriving at a final value estimate."

102. The lack of such evidence in Berg Agency v. Township of Maplewood, 163 N.J. Super. 542, 395 A.2d 261 (1978), discussed *infra* at text accompanying notes 189-95, caused the court to dismiss the governments' argument that the sign ordinances in question protected property values, even though the governments had presented opinion evidence on the issue.

> Although the real estate brokers, called as [the governments'] expert witnesses, were of the opinion that such signs were aesthetically displeasing and would, therefore, have a detrimental effect on property values, no objective evidence was submitted to corroborate such opinions, as, for example, the instability of property values in other communities that do not have restrictive sign ordinances.

Id. at 557, 395 A.2d at 269.

103. Other approaches include the "income approach" and the "cost approacb," neither of which is considered as reliable as the market approach. *See generally* ENCYCLOPEDIA OF REAL ESTATE APPRAISING, *supra* note 101, at 9-14.

104. In those situations in which the market data necessary for the most effective employment of any of the three approaches to finding market value is unavailable, the appraiser can at least employ "rationalization." "Rationalization" is

> the mental processes required in relating less pertinent market data to the problem at hand, data which leads to a reasonable or logically supportable conclusion more indirectly than transactions involving highly comparable properties . . . . If data available in the market is inconclusive or nonexistent, a studied rationalization of the problem would seem to be better than no rationalization at all, certainly better than pulling a figure out of the air.

ENCYCLOPEDIA OF REAL ESTATE APPRAISING, *supra* note 101, at 9.

105. Williams, *supra* note 37, at 18-20.

> the problem will affect the outcome as to other features; and (3) a multiplicity of relevant factors that make it difficult to trace one solution's superiority to any particular attribute or combination of attributes.[106]

The combination of these factors produces two results: the reasons for any given resolution of the polycentric problem are not amenable to articulation, and it is impossible to determine whether any series of resolutions of polycentric problems is consistent.[107] Since defining what is aesthetically pleasing is a polycentric problem, the computation of the economic impact allegedly resulting from the aesthetic judgment is also polycentric. "The polycentric character that prevents a legislature from articulating a rule of 'beauty' will also prevent real estate agents from articulating rules for computing an 'ugliness' discount"[108] when called upon to assess the impact that a regulated or prohibited use would have on the property values of the regulated area.[109]

The difficulty of obtaining objective evidence of the economic impact of aesthetic regulation is probably greatest in those cases involving architectural design review legislation, which authorizes a design review board to prevent construction of a building on the basis of its proposed design.[110] Although such legislation typically recites that one purpose of the review is to protect property values,[111] the extent to which economic considerations actually enter into the boards' decisions is debatable. Furthermore, when the decisions of the boards have been upheld by the courts, the courts have usually purported to rely very much on economic considerations; however, the absence in the opinions of any objective valua-

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106. *Id.* at 18. Professor Williams borrows the definition of polycentricity from L. Fuller, *Adjudication and the Rule of Law*, 1960 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 3-4.

107. *See* Williams, *supra* note 37, at 19.

108. *Id.* at 20.

109. One recent study has concluded that sophisticated statistical analysis provides a basis for estimating the value of "amenities," specifically the negative prices for aircraft noise, road traffic, planned road widening, and railway noise, and the positive prices for a good view, a spacious street, access to shops, and a high-quality neighborhood. The estimated values were concluded to be suitable for use in cost-benefit studies, but not necessarily reflective of average household willingness to pay prices. Abelson, *Property Prices and the Value of Amenities*, 6 J. ENVT'L. ECON. & MNGMT. 11 (1979).

110. A study by the American Institute of Architects begun in 1968 counted at least 221 such boards. AMERICAN INSTITUTE OF ARCHITECTS COMMITTEE ON DESIGN, *supra* note 100, at 7. It is likely that the number is much larger today. *See* J. BEUSCHER, R. WRIGHT & M. GITELMAN, CASES AND MATERIALS ON LAND USE 863 (2d ed. 1976).

111. *See, e.g.*, Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 68, 192 N.E.2d 74, 76 (1963) (quoting the challenged ordinance): "The purposes of the Architectural Board of Review are . . . to maintain the high character of community development, and to protect real estate . . . from impairment or destruction of value. . . ."

tion evidence is striking.

The first major post-*Berman* aesthetic regulation case was an architectural controls case, *State* ex rel. *Saveland Park Holding Corp. v. Wieland.*[112] Saveland Park Holding Corporation was denied a building permit to erect a residence because it had failed to obtain a finding by the local Building Board "that the exterior architectural appeal and functional plan of the proposed structure [would], when erected, not be so at variance with . . . the structures already constructed or in the course of construction . . . as to cause a substantial depreciation in the property values of said neighborhood."[113] The Wisconsin Supreme Court found the quoted architectural design review ordinance constitutional, stating that the protection of property values is valid even as the sole basis for a zoning ordinance.[114] Quoting *Berman,* the court concluded that it was "extremely doubtful" that the rule precluding aesthetics alone as a valid basis of a zoning ordinance was still the law.[115] Nevertheless, the court did not clearly reject the general rule, and in fact it discussed at length the relation of property values to general welfare. The opinion cited no evidence, however, on the question whether the proposed structure in fact would have depressed property values.[116]

The protection of property values was also accorded great importance in *State* ex rel. *Stoyanoff v. Berkeley,*[117] in which the Missouri Supreme Court upheld the architectural design review ordinance of the City of Ladue and the Architectural Board's decision rejecting Stoyanoff's proposed home design. The proposed residence was "of a pyramid shape, with a flat top, and with triangular shaped windows or doors at one or more corners."[118] Stoyanoff, an architect, had apparently designed the house and a

112. 269 Wis. 262, 69 N.W.2d 217 (1955).

113. *Id.* at 265, 69 N.W.2d at 219 (quoting challenged ordinance).

114. *Id.* at 270, 69 N.W.2d at 222.

115. *Id.* at 271, 69 N.W.2d at 222. This language from *Wieland* was referred to in Racine County v. Plourde, 38 Wis. 2d 403, 412, 157 N.W.2d 591, 595 (1968), in which the court, observing that the constitutionality of the ordinance involved in *Racine County* was not at issue, stated: "However, we are cognizant that aesthetic considerations alone may now be sufficient to justify a prohibited use in a zoning ordinance." *Id.* Thus, the Wisconsin Supreme Court has yet to rule clearly that aesthetic considerations alone are sufficient. *But see* Bufford, *supra* note 16, at 144.

116. It should be noted, however, that apparently the only issue on appeal was the facial constitutionality of the ordinance. 269 Wis. at 264, 69 N.W.2d at 218.

117. 458 S.W.2d 305 (Mo. 1970).

118. *Id.* at 308.

picture of its model had appeared in an architectural magazine.[119] Nevertheless, the city described the structure as "a monstrosity of grotesque design."[120] The evidence of the proposed design's effect on property values in the city, which was "composed principally of residences of the general types of Colonial, French Provincial and English Tudor,"[121] consisted of the affidavits of a real estate developer and a city planning and engineering consultant that, in their opinions, the proposed residence would have a "substantial adverse effect" on the market values of other homes in the area.[122] The court, emphasizing the language of the ordinance relating to property values, rejected Stoyanoff's contention that the ordinance was based entirely on aesthetic factors and that the denial of the building permit was arbitrary and unreasonable.

The "aesthetics alone" challenge was dismissed in a similar manner in *Reid v. Architectural Board of Review*,[123] the most notorious of the architectural design review cases. Mrs. Reid was denied a permit to build what she described as "a flat-roofed complex of twenty modules, each of which is ten feet high, twelve feet square and arranged in a loosely formed U which winds its way through a grove of trees"[124] in a neighborhood of, "in the main, dignified, stately and conventional structures, two and one-half stories high."[125] The ordinance stated that one of the purposes of architectural review was to protect property values. The court, stating *inter alia* that the proposed structure "does not preserve property values,"[126] concluded that there were many factors other than aesthetics that influenced the Board's decision.[127] The only

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119. *See* Mandelker, *Stoyanoff: Back to the Barricades!*, 22 ZONING DIG. 288a, 288b n.4 (1970). "[S]ome would argue that it was the surrounding area that was grotesque, and not the Stoyanoff's [*sic*] proposed home." *Id.* at 288b.

120. 458 S.W.2d at 307.

121. *Id.* at 309.

122. *Id.* at 307-08.

123. 119 Ohio App. 67, 192 N.E.2d 74 (1963).

124. *Id.* at 70, 192 N.E.2d at 77.

125. *Id.*

126. *Id.* at 71, 192 N.E.2d at 78.

127. The court listed the influencing factors as follows:

> The structure designed is a single-story home in a multi-story neighborhood; it does not conform to the general charactor of other houses; it would affect adjacent homes and three vacant lots; it is of such a radical concept that any design not conforming to the general character of the neigbborhood would have to bo thereafter approved; when viewed from the street, it could indicate a commercial building; it does not conform to [the] standards of the neighborhood; it does not preserve [the] high character of [the] neighborhood; it does not preserve property values; it would bo detrimental to [the] neighborhood on the lot where proposed; and it would bo detrimental to the future

reference to any evidence on property values came in the dissenting opinion, in which the testimony of a Board member was quoted:

> Q. Now the Board never took the position that this house would hurt property values along North Park Boulevard, did it?
> A. Our issue was the fact that it was a single story house in a multi-story neighborhood. . . .
> Q. In other words, you were concerned . . . .
> A. . . . and it did not conform to the aesthetics of the neighborhood.
> Q. Your objection was grounded upon the appearance of this house and not upon any market value depreciation possibility?
> A. There is no question that the house would be in a class cost-wise with those in the neighborhood. . . .[128]

In his dissent, Judge Corrigan asserted that the record "conclusively established"[129] that the decision of the Board was based on aesthetic considerations alone and therefore should be overturned.

It is difficult, if not impossible, to know whether the pyramid-shaped house proposed by Stoyanoff and the modular home proposed by Mrs. Reid, if built, actually would have depressed the market value of other homes in their respective areas. Certainly the evidence of the homes' probable effects on property values, at least as reviewed in the opinions, was less than convincing. As previously discussed,[130] perhaps it would have been impossible to obtain objective evidence of the detrimental impact on property values in these cases. Moreover, even if the best available opinion evidence were obtained, the contradictory testimony of three appraisers in one unreported architectural review case—that the proposed structure would harm property values, that the structure would enhance property values, and that it would not harm property values[131]—suggests that any proposed structure could "produce such a range of opinions if the litigants were willing to look

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development of the neighborhood.

Id. at 71, 192 N.E.2d at 77-78. It is submitted that each of these factors is based on either aesthetics or economics, and that the economic impact, if any, is purely derivative from the aesthetic impact.

128. *Id.* at 73, 192 N.E.2d at 79 (Corrigan, J., dissenting). One writer has suggested that "[f]rom the portions of the trial court record quoted in the dissent of Judge Corrigan, it appears that the possibility of a negative effect on neighboring property values might well have been considered only to find that it was nonexistent." Williams, *supra* note 37, at 30 n.105.

129. 119 Ohio App. at 73, 192 N.E.2d at 78 (Corrigan, J., dissenting).

130. *See* text at notes 99-109, *supra*.

131. Turnbull, *supra* note 95, at 239-40, citing the unreported opinion of Eustice v. Binsford, Chancery No. 19497 (Cir. Ct. of Arlington County, Va., Sept. 24, 1969).

hard enough for witnesses."[132] Even though both the government and the contesting landowner may face the problem of an absence of objective evidence, it is the landowner who has the burden of proof. Thus, the landowner almost invariably will lose out, and the court invariably will be able to reaffirm its position that a regulation may not be based on aesthetic objectives alone. The rub is that no one really knows whether there *was* something other than aesthetics involved.[133]

The protection of property values has been asserted as a justification for upholding many other types of aesthetic regulation in the post-*Berman* years, including requirements that recreational vehicles be housed in garages,[134] requirements that junkyards be fenced,[135] prohibitions of billboards from residential districts,[136] and city-wide prohibitions of billboards.[137] Even though the impact

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132. Williams, *supra* note 37, at 20 n.62.

133. Even if the regulations could be shown to have an economic impact, it should be recognized that the protection of property values is a derivative and possibly incidental goal. *See* Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975), in which an architectural control ordinance was held invalid because not authorized by the stata enabling statutes. In *Rowe* the court stated in dicta:

> Some jurisdictions have adopted the rule upholding architectural design regulations when it appears that the purpose of the ordinance was to protect property values within the zone. . . . We decline to follow this rule when, as here, it appears that the predominant purpose of the ordinance was to promote aesthetic values and the purpose recited in the ordinance to protect property values was merely an incidental goal.

Id. at 146, 216 S.E.2d at 213.

134. *See, e.g.*, Township of Livingston v. Marchev, 85 N.J. Super. 428, 205 A.2d 65 (1964), *appeal dismissed*, 382 U.S. 201 (1965) (opinion recited no evidence on property values issue; presumption of constitutionality applied); City of Pepper Pike v. Landskroner, 53 Ohio App. 2d 63, 371 N.E.2d 579 (1977). Cases in which the validity of such ordinances was discussed are collected at Annot., 95 A.L.R.3d 378 (1979). In *Landskroner*, the court did not rely on the protection of property values per se, but held that the ordinance promoted the general welfare by "preserving and protecting the orderly development, the character and the integrity of a single-family neighborhood." City of Pepper Pike v. Landskroner, 53 Ohio App. at 75, 371 N.E.2d at 586. How the banning of recreational vehicles in order to preserve the character and integrity of a neighberhood differs from banning recreational vehicles for aesthetic reasons was not elucidated. For a collection of other cases approving the preservation of the character of an area as a proper object of police power regulation, see 8 IND. L. REV. 1028, *supra* note 42, at 1035-36.

135. *E.g.*, Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960) (opinion recited no evidence on property values issue; presumption of constitutionality applied; regulation upheld also for health, safety, and aesthetic reasons).

136. Naegele Outdoor Ad. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968). In *Naegele*, the court found "clear evidence in the record that exclusively residential zoning enhances property values." *Id.* at 499, 162 N.W.2d at 212.

137. *E.g.*, United Ad. Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964). The court emphasized protection of property values even though the parties had stipulated that there would be no decrease in property values. *Id.* at 10, 198 A.2d at 451-52 (Hall, J., dissenting).

on property values in such cases is derivative, and usually is presumed rather than proven, there is an important difference between these and the architectural design review cases. Certain land uses may be so discordant in particular settings that their unaesthetic nature, at least as such is popularly perceived, is nearly indisputable—for example, billboards and junkyards in or near residential areas. Mrs. Reid's or Mr. Stoyanoff's disapproved house designs, however, very probably would not be condemned as ugly with nearly the degree of unanimity with which a junkyard would be condemned. The significance of the aesthetic interest of the community varies from case to case, and it is unrealistic to classify both junkyards and modernistic homes as unaesthetic without recognizing the obvious difference in the degree to which the respective uses are unaesthetic. Michelman deplored the enforcement of aesthetic regulation without compensation in those cases in which "the question of aesthetic improvement is . . . unobvious, debatable, and apparently idiosyncratic, so that the grudging acknowledgment of social desirability that might otherwise assuage the sense of injustice is likely to be absent."[138] The present rule in Ohio recognizes and addresses the problem identified by Michelman by permitting regulation based on aesthetics alone only as to property uses that "would be in such gross contrast to the surrounding area as to be patently offensive to the surrounding neighborhood, rather than merely a matter of taste."[139]

Just as the significance of a community's aesthetic interest may vary according to the kind of land use regulated, so should the significance of the economic impact of different uses vary. If a regulated use is so aesthetically displeasing that virtually everyone would agree that it is undesirable, presumably a definite correlation between such a use and a depreciation of property values would exist. Billboards were described as having such an economic effect in *United Advertising Corp. v. Borough of Metuchen*:[140]

> There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound. We refer not to some sensitive or exquisite preference but to concepts of con-

138. Michelman, *supra* note 46, at 42.

139. Sun Oil Co. v. City of Upper Arlington, 55 Ohio App. 2d 27, 31, 379 N.E.2d 266, 269 (1977) (sign regulation upheld). *See also* State v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968), *cert. denied*, 395 U.S. 163 (1969) (statutes requiring junkyards to be obscured from view of persons passing on highways upheld); P & S Inv. Co. v. Brown, 40 Ohio App. 2d 535, 320 N.E.2d 675 (1974) (prohibition of trailers for storage in business district upheld).

140. 42 N.J. 1, 198 A.2d 447 (1964).

gruity held so widely that they are inseparable from the enjoyment and hence the value of property.[141]

The danger in this position, however, is that every unaesthetic land use could be presumed to depress property values. Courts must be wary of taking this step. For instance, the New Jersey Superior Court has refused to indulge in such a presumption in cases involving political signs[142] and "for sale" and "sold" signs[143] in residential areas when no objective evidence of property value depreciation is present. Because of the presumption of constitutionality, however, most courts will presume the existence of an economic impact even though the corresponding aesthetic impact of the regulated use may be minimal. The community interests of aesthetics and economics should be recognized as varying in significance according to the type of land use regulated. As the aesthetic interest becomes less clear and significant, the presumption that an economic impact exists becomes more questionable.

2. The Promotion of Tourism

Many post-*Berman* decisions upholding primarily aesthetic regulations have done so by finding an economic benefit of the regulation other than the preservation of property values—namely the promotion of tourism. Most of the decisions relying on the tourism rationale have involved the prohibition or regulation of outdoor advertising signs.[144] Interestingly, such regulations are the kind most often upheld in recent cases on the basis of aesthetics alone.[145] In Florida, where promotion of the tourist industry has

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141. *Id.* at 5, 198 A.2d at 449.

142. Farrell v. Township of Teaneck, 126 N.J. Super. 460, 462, 315 A.2d 424, 425-26 (1974): "Although it is a generally accepted fact that the value of property is unextricably intertwined with aesthetic considerations, . . . we cannot assume that every tasteless choice of paint color or unartistic gardening effort results in a decrease of property values."

143. Berg Agency v. Township of Maplewood, 163 N.J. Super. 542, 557-58, 395 A.2d 261, 269 (1978).

144. *See, e.g.*, E.B. Elliott Ad. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir.), *cert. denied*, 400 U.S. 805 (1970); Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980) (*U.S. appeal pending*); Mississippi State Highway Comm'n. v. Roberts Enterprises, Inc., 304 So. 2d 637 (Miss. 1974); Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961). With the exception of the *Roberts Enterprises* case, the courts in each of these decisions relied partially on a finding that billboard regulation promoted traffic safety, a police power objective not derived from aesthetics.

145. *E.g.*, John Donnelly & Sous v. Mallar, 453 F. Supp. 1272 (D. Me. 1978); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); John Donnelly & Sons v. Outdoor Ad. Bd., 369 Mass. 206, 339 N.E.2d 709 (1975); Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 324 A.2d 113 (1974); Suffolk Outdoor Ad. Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978); Sun

long been accorded importance in aesthetic regulation cases,[146] tourism has been mentioned in upholding a requirement that junkyards be screened,[147] and by the Fifth Circuit Court of Appeals, approving prior Florida cases, in upholding regulation of the location of gasoline stations.[148]

Since logically tourism is promoted by a regulation only because the regulation fosters beauty, it is apparent that this economic general welfare justification is as much derived from aesthetics as is the property values justification. If the supposedly tourism-promoting regulation cannot reasonably be said to be based on health, safety, or morals, then the real issue in these cases is whether aesthetics alone is a proper basis for regulation—an issue that the courts contend is not present.[149] Not only is the general welfare benefit of tourism derived from aesthetics, but, again, there is often little or no objective evidence showing that the regulatory measure in fact tends to promote the economic objective. Instead, the courts indulge in syllogistic reasoning that could no doubt be repeated convincingly by almost any court in any jurisdiction in the United States: the tourist industry is important to this area; tourists come to enjoy our visually pleasing environment; this regulation enhances that environment; therefore it promotes tourism.[150]

Oil Co. v. City of Upper Arlington, 55 Ohio App. 2d 27, 379 N.E.2d 266 (1977) (aesthetic regulation valid when regulated use is in "gross contrast" to permitted uses and is "patently offensive").

146. *See* text accompanying notes 84-88 *supra*.

147. Rotenberg v. City of Fort Pierce, 202 So. 2d 782, 785-86 (Fla. Dist. Ct. App. 1967).

148. Stone v. City of Maitland, 446 F.2d 83, 89 (5th Cir. 1971).

149. This analysis does not necessarily apply, however, to those regulations that promote tourism by preserving the character of a historically significant area. *See, e.g.*, Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975) (French Quarter); Donnelly Ad. Corp. v. City of Baltimore, 279 Md. 660, 370 A.2d 1127 (1977) (Baltimore's Oldtown). Tourists would presumably visit historical areas whether those areas are beautiful or not; the educational and orienting benefits of preserving historical areas exist because the areas are historical, regardless of whether they are visually pleasing. Hence the general welfare benefits of historic preservation regulations, which may include the economic benefits of promoting tourism or protecting property values, are not wholly derived from the aesthetic impact of such regulations. *See* text accompanying notes 73-76 *supra*.

150. Finding constitutional state-wide restrictions on outdoor advertising, the New Hampshire Supreme Court stated:

> New Hampshire is peculiarly dependent upon its scenic beauty to attract the hosts of tourists, the income from whose presence is a vital factor in our economy. That the general welfare of the State is enhanced when tourist business is good and affected adversely when it is bad, is obvious. It may thus be found that whatever tends to promote the attractiveness of roadside scenery for visitors relates to "the benefit and wel-

The significance of the community interests in aesthetics and in promoting the tourist industry will of course vary from case to case. For instance, in regard to the regulation of billboard advertising particularly, the community interest in aesthetics is much greater when at issue is the regulation of billboards in residential areas as opposed to industrial areas.[151] Similarly, the governmental interest in tourism is surely insignificant to the extent that the regulation of billboards extends to areas of the city or state that are not regularly visited by tourists. Nevertheless, both city-wide[152] and state-wide[153] billboard regulations have been upheld on the ground that they promote the general welfare by protecting the tourist industry. The presumption of constitutionality protects this derivative and incidental justification from close scrutiny.

3. The Protection of Health and Safety

Even though courts in the post-*Berman* era have with increasing frequency relied upon the promotion of the general welfare—usually meaning the protection of a community's economic interests—to uphold restrictions on the use of land, the more traditional police power objectives of health and safety have also been cited to support many types of regulation. These regulations have included restrictions on chain link fences,[154] junkyards,[155]

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fare of this state" and may be held subject to the police power.
Opinion of the Justices, 103 N.H. 268, 270, 169 A.2d 762, 764 (1961).

151. *See* Lucking, *The Regulation of Outdoor Advertising: Past, Present and Future,* 6 ENVT'L AFF. 179 (1977). Lucking argues that the community interest in aesthetics should not outweigh the economic interests at stake where advertising signs in commercial areas are concerned; he criticizes John Donnelly & Sons v. Outdoor Ad. Bd., 369 Mass. 206, 339 N.E.2d 709 (1975), in which the court upheld a city-wide prohibition of billboards on the basis of aesthetics alone. Lucking, *supra,* at 184-89.

152. *E.g.,* Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980) (*U.S. appeal pending*).

153. *E.g.,* Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961).

154. *E.g.,* City of Smyrna v. Parks, 240 Ga. 699, 242 S.E.2d 73 (1978). The challenged ordinance prohibited chain link fences in certain residential areas where only wooden fences were allowed. Evidence adduced in the lower court included "testimony that a number of persons had been injured on the sharp ends of chain-link fences within the city . . . [and] testimony that it was easier for firefighters to gain access to burning houses through wooden fences." *Id.* at 705, 242 S.E.2d at 77. The court applied the presumption of constitutionality and held the ordinance valid. "Even if the ground of safety is deemed a tenuous one . . . the ordinance would not be an unwarranted exercise of police power based on aesthetics alone, provided there is a reasonable relationship between the regulation and the legitimate purposes of regulations, as enunciated by the legislature." *Id.*

155. *E.g.,* Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960); Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959).

mobile homes,[156] recreational vehicles,[157] gasoline stations,[158] and advertising signs.[159] Realistically, the enactment of these regulations, in most instances, could probably be said to have been motivated primarily by the desires of legislative bodies to promote aesthetics in particular areas and to reap the economic benefits derived from beauty. As noted by one observer, however, "upon a finding that health, safety, or moral considerations could have justified the zoning ordinance, many courts will assume that they did and fail to discuss further the aesthetics issue."[160]

Unlike the general welfare economic benefits of protection of property values and tourism, the protection of health and safety is not a benefit derived from aesthetics. For example, a requirement that junkyards be fenced may protect the health and safety of children who might otherwise be tempted to enter the junkyard;[161] this objective is accomplished regardless of whether the fencing requirement tends to make the area more visually pleasing. If a regulation has as one of its purposes the protection of health and safety, the initial constitutional inquiry of whether a permissible police power purpose is present need not focus upon whether aesthetics alone is permissible. If, however, the rule of the jurisdiction is that aesthetics may not be the sole *or predominant* purpose of a regulation,[162] perhaps even the initial inquiry cannot be answered in favor of the constitutionality of the regulation. The protection

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156. *E.g.*, State *ex rel.* Wilkerson v. Murray, 471 S.W.2d 460 (Mo.), *cert. denied*, 404 U.S. 851 (1971); Napierkowski v. Township of Gloucester, 29 N.J. 481, 150 A.2d 481 (1959).

157. *E.g.*, Village of Glenview v. Van Dyke, 98 Ill. App. 2d 118, 240 N.E.2d 354 (1968).

158. *E.g.*, Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971).

159. *E.g.*, Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980) (*U.S. appeal pending*) (holding regulation reasonably related to traffic safety; but even if principal purpose were aesthetics rather than traffic safety, such purpose is within city's authority); Veterans of Foreign Wars v. City of Steamboat Springs, 575 P.2d 835 (Colo.), *appeal dismissed*, 439 U.S. 809 (1978); Gosman v. Prince George's County, 41 Md. App. 479, 397 A.2d 630 (1979); Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 199 N.W.2d 525 (1972); Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969).

160. 8 IND. L. REV. 1028, *supra* note 42, at 1034. Of the cases cited in notes 154-59 *supra*, some evidence on the health and safety issues was mentioned in a few opinions; the presumption of constitutionality was applied in all.

161. *See, e.g.*, Farley v. Graney, 146 W. Va. 22, 47-48, 119 S.E.2d 833, 848 (1960).

162. *See* cases collected at Annot., 21 A.L.R.3d 1222, at § 3 (1968). As acceptance of aesthetics has grown, many courts have apparently abandoned attempts to ascertain whether aesthetics is a "predominant" or "incidental" purpose. *See, e.g.*, Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 64, 168 S.E.2d 117, 120 (1969): "Although aesthetic considerations alone may not justify police regulations, the fact that they enter into the reasons for the passage of an act or ordinance will not invalidate it if other elements within the scope of police power are present."

of health and safety is actually only a tangential objective of many regulations that are upheld on health and safety grounds. While it is conceivable, for example, that an unhoused recreational vehicle in a residential area makes fire-fighting more difficult,[163] the hypothetical blind man[164] would probably not be offended by open-air storage of such vehicles on the ground that it poses a threat to his health and safety. If he were, he would likely be just as offended by the garages required to house the vehicles, which may also create fire hazards.[165]

If the first inquiry is resolved in favor of the constitutionality of a regulation that is alleged to protect public health and safety, the next step is to determine whether the regulation is a reasonable means of furthering that objective. The regulation may be unreasonable if it fails to achieve the purpose for which it was intended, or if the public benefit from achieving the purpose is slight compared to the private burden imposed by the regulation.[166] If it is doubtful that the regulation actually promotes health and safety, the regulation should be found unreasonable, unless aesthetics alone is held to be a permissible purpose and the regulation is a reasonable means of achieving the aesthetic objective. The presumption of constitutionality, however, allows the courts to avoid the aesthetics issue and uphold regulations on attenuated, and possibly nonexistent, health and safety grounds.

The best examples of this subterfuge are cases in which the courts uphold city-wide or state-wide prohibitions of, or restrictions on, advertising signs on the ground that such regulations promote traffic safety.[167] Studies of the relationship of advertising signs to traffic safety have produced conflicting conclusions; some

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163. See City of Euclid v. Fitzthum, 48 Ohio App. 2d 297, 357 N.E.2d 402 (1976), in which the evidence of the city in support of such a regulation included fire prevention considerations. *Id.* at 301, 357 N.E.2d at 405. The regulation was held constitutional on its face, but unconstitutional as applied. *Id.* at 299-302, 357 N.W.2d at 404-06; *see* City of Pepper Pike v. Landskroner, 53 Ohio App. 2d 63, 71-72, 371 N.E.2d 579, 584 (1977).

164. *See* text accompanying notes 10-11 *supra.*

165. *See* City of Euclid v. Fitzthum, 48 Ohio App. 2d 297, 357 N.E.2d 402 (1976) (holding garage requirement unconstitutional as applied). "[I]t is clear beyond peradventure that enclosure may diminish health and safety factors by trapping sewage spillage from portable sanitary facilities . . . and collecting highly flammable escaping propane gas which would otherwise be dissipated in the air. . . ." *Id.* at 302, 357 N.E.2d at 406.

166. *See* note 15 *supra* and accompanying text.

167. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980) (*U.S. appeal pending*) (traffic safety an alternative ground for upholding regulation); Gosman v. Prince George's County, 41 Md. App. 479, 397 A.2d 630 (1979); Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961) (relying also on the promotion of tourism).

have shown that a relationship between signs and traffic accidents cannot be conclusively established, while others have found that such signs do pose a safety hazard.[168] Since the evidence on behalf of the contesting landowner, then, will be insufficient to take the issue beyond the realm of "fair debate" and thereby overcome the presumption of constitutionality, the courts will defer to the legislative determination, disturbing it only if it is "manifestly unreasonable."[169]

If the regulation of advertising signs is found to promote traffic safety, it should at least be acknowledged that the governmental interest in public safety, like the governmental interests in aesthetics and economic stability, varies in its significance from case to case. Although the relationship between sign regulation and traffic safety may be clear and supportable by convincing evidence in some cases—for example, when the signs regulated are near interchanges[170]—that relationship may not be so clear when the regulated signs are not in congested or dangerous areas.[171] For example, expert evidence that advertising signs in residential areas did not affect traffic safety was presented in *Naegele Outdoor Advertising Co. v. Village of Minnetonka,*[172] but the court upheld an ordinance prohibiting such signs solely on the ground that the regulation promoted the general welfare by protecting property values and ensuring aesthetically pleasing residential areas. Often, however, any expert evidence that the contesting landowner may present on health or safety grounds will be insufficient to place the issue beyond the realm of fair debate, and the presumption of constitutionality will cause the issue to be decided in favor of the government.

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168. *See generally* Price, *Billboard Regulation Along the Interstate Highway System,* 8 U. KAN. L. REV. 81, 87-88 (1959); 21 CLEV. ST. L. REV., 194, 200 (May, 1972); 47 CORNELL L.Q. 647, 648-49 (1962).

169. *E.g.,* Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 859, 610 P.2d 407, 412, 164 Cal. Rptr. 510, 515 (1980) (*U.S. appeal pending*). *But cf.* John Donnelly & Sons, Inc. v. Outdoor Ad. Bd., 369 Mass. 206, 339 N.E.2d 709 (1975), in which the court, finding "at best, conflicting support" for the proposition that sign regulation contributed to traffic safety, upheld the regulation on the basis of aesthetics alone. *Id.* at 217, 339 N.E.2d at 717.

170. *See, e.g.,* Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 199 N.W.2d 525 (1972) (denial of variance to erect sign more than twenty feet in height affirmed; evidence in record showed proposed sign near dangerous interstate exit would create traffic hazard).

171. *See* 21 CLEV. ST. L. REV., *supra* note 168.

172. 281 Minn. 492, 162 N.W.2d 206 (1968).

III. The Role of Aesthetics in Balancing the Public and Private Interests: Suggestions for Analysis

The foregoing discussion has identified two basic flaws in current analyses of the aesthetic regulation problem. First, the initial constitutional inquiry—whether the regulation is aimed at a valid police power purpose—is usually focused on an incidental and often tenuous health and safety benefit of the regulation, or an economic benefit that is wholly derived from aesthetics and also often tenuous. Second, the "fairly debatable" standard, creating a strong presumption that the regulation is reasonably related to the asserted purpose, impedes meaningful judicial review. As a result, the purpose inquiry has been misdirected, and the relationship between means and end is at best tenuous. The end result is that the contesting landowner faces an almost insurmountable burden of proof.

Undoubtedly the most significant factor presently affecting legislative and judicial treatment of aesthetic regulation is the broadening of the general welfare justification to include such purposes as the protection of property values, the promotion of tourism, the preservation of the character and integrity of an area, the promotion of the comfort and happiness of residents, and the like. Moreover, the general welfare is now recognized as a valid basis for regulation even if it is the sole basis. When such general welfare considerations constitute the only basis for regulation, those courts whose rule is that aesthetics may not be the sole or primary basis for regulation are forced to give only lip service to that rule—if it is to honor all the presumptions in favor of regulation and find it valid.

The presumption of constitutionality should not be equivalent to total abdication, however. Legislation was presumptively valid when the aesthetics issue was still in its infancy; yet aesthetic regulation was seldom sustained on "nonaesthetic" grounds. In fact, it is primarily the older cases that actually invalidated regulations on the basis of the traditional rule. One writer has observed that the attitude of early courts "almost amounted to a presumption of invalidity. . . ."[173] Even today, if the courts strictly required plaintiffs to meet the formal burden of proof, virtually no litigant could be successful. Litigants are sometimes successful, however, and courts do sometimes reject questionable justifications unsupported

173. Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. Cal. L. Rev. 149, 171 (1954).

by convincing evidence.[174] "[T]he incident of success in these challenges . . . is sufficient to suggest that the burden is less awesome than the language employed to describe it."[175] As long as judicial deference to legislative judgments is not complete abandonment of the judicial functions, responsibility for those judgments remains in part with the courts. "As long as judges do not fully and irrevocably repudiate the mission of *occasionally* rejecting majoritarian political choices, there is no honest way for them to escape the burdens of substantive judgment *in every case*."[176] Courts are more likely to reach proper substantive judgments in the aesthetic regulation cases if they take a less deferential approach to the legislative decision. Rather than abandon all inquiry because the restriction is presumed constitutional, courts should assess the constitutionality of regulations by weighing the public and private interests involved. A number of courts have employed the balancing test in assessing the validity of zoning legislation, particularly in cases in which the landowner has alleged that the restriction imposed an oppressive economic burden on his property.[177]

Since all jurisdictions today recognize aesthetics as a legitimate police power objective—whether alone or in conjunction with other purposes—it is only reasonable that the governmental interest in aesthetics be considered as a factor in favor of the validity of aesthetic regulations. Both those jurisdictions that follow the traditional rule and those that accept aesthetics alone as a valid basis for legislation should weigh this interest in the balancing process. Giving this interest weight, however, does not mean that the regulation should be *presumed* constitutional. This Article has argued that the governmental interests involved in primarily aesthetic regulation, including aesthetics, the protection of property values, the promotion of tourism, and incidental health or safety benefits, vary in significance from case to case, depending particularly on the nature and location of the regulated use. These variations must be taken into account in balancing the significance of the governmental interests furthered by the regulation against the significance of

174. *See* text accompanying notes 183-93 *infra*.

175. 1 R. ANDERSON, *supra* note 15, § 3.23 at 129.

176. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 454 (1978) (emphasis in original).

177. 1 R. ANDERSON, *supra* note 15, § 3.23. A difficulty exists, however, in following the approach suggested here and in note 53 *supra*—*i.e.*, refusing to apply the presumption in cases involving primarily aesthetic regulation. The difficulty is that a court must be willing to determine whether a regulation is primarily aesthetic as the threshold inquiry. All that should be required for this determination, however, is a common sense application of the simple blind man test, as described in the text accompanying notes 10-13 *supra*.

the private interests in freedom from regulation. When aesthetics and its derivative economic benefits are the only governmental interests at stake, those interests might be sufficient to justify regulating a junkyard—a use once classified by the Ohio courts as "patently offensive."[178] Conversely, the governmental interest in aesthetics, standing alone, is probably not significant enough to support a regulatory veto of a contemporary home in a neighborhood of traditional homes; the unaesthetic impact, quoting Michelman, is "unobvious, debatable, and apparently idiosyncratic."[179] Thus, even when aesthetics is concededly a valid police power purpose, it is not at all clear in the latter case that the challenged regulation is a reasonable means of furthering that end. Whether the regulation is a reasonable means of achieving the aesthetic objective becomes increasingly less certain as the unaesthetic impact of the regulated use becomes less obvious. Nevertheless, if the derivative economic benefit of the aesthetic regulation *is* significant, the governmental interests in the regulation should outweigh the landowner's interests. Similar reasoning should apply to aesthetic regulations that have incidental health and safety benefits.

The private interests will of course vary in significance from case to case as well. In addition to the landowner's interest in freedom from restrictions on the use of his property unless the restriction has a substantial relation to health, safety, morals, or general welfare,[180] the first amendment rights of the landowner are relevant if the regulated use is a protected mode of expression. Signs,[181] for example, and even architectural design[182] may enjoy

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178. *See also* text accompanying note 139 *supra*; State v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968).

179. Michelman, *supra* note 46, at 42.

180. This interest might be termed a right of privacy or autonomy. *See* note 204 *infra*.

181. It is now considered established that ordinances prohibiting off-site billboards do not violate the first amendment, since the United States Supreme Court dismissed the appeal in Suffolk Outdoor Ad. Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978), for want of a substantial federal question. The court in *Suffolk* had upheld a community-wide ban on off-site billboards. "Since the Supreme Court regards the dismissal of an appeal as a decision on the merits . . . the high court has resolved that a prohibition of off-site billhoards does not violate the [f]irst [a]mendment." Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 807, 610 P.2d 407, 417, 164 Cal. Rptr. 510, 520 (1980) (*U.S. appeal pending*) (citation omitted) (holding the Court's previous commercial speech cases [*e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975)] not inconsistent with ordinances prohibiting off-site billbeards). Aesthetic regulations extend to many other types of signs, however, such as political signs, Farrell v.

some measure of first amendment protection. The extent to which the regulation imposes an economic burden upon the private party should also be considered. Regulations that, for example, require a junkyard owner to build a fence undoubtedly raise the cost of doing business. In New York, where aesthetics is permissible as a sole purpose of regulation, the supreme court has held that if the economic burden to the landowner outweighs the governmental interest in aesthetics, the regulation is invalid.[183]

A condition to the accuracy of this balancing process is the willingness of courts to weigh carefully the actual significance of each factor rather than blindly assuming the existence of economic or health and safety justifications. A few courts have already rejected that assumption. In the landmark case of *People v. Stover*,[184] the city alleged that it had prohibited clotheslines in front and side yards in order to facilitate access for fire-fighting equipment and to promote traffic safety. The court, however, questioned whether the ordinance in fact served safety purposes and instead sustained it on aesthetic and economic grounds.[185] In *John Donnelly & Sons, Inc. v. Outdoor Advertising Board*,[186] the court rejected defendant's claim that its ban on off-premises advertising signs had been enacted for public safety and traffic control purposes.[187] The ordinance was nonetheless upheld because aesthetics alone justified this exercise of the police power. In *Farrell v. Township of Teaneck*,[188] the Superior Court of New Jersey refused to

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Township of Teaneck, 126 N.J. Super. 460, 315 A.2d 424 (1974), and "for sale" and "sold" signs, Berg Agency v. Township of Maplewood, 163 N.J. Super. 542, 395 A.2d 261 (1978).

182. For a thorough discussion of the problem of freedom of expression in the context of aesthetic regulation see Williams, *supra* note 37. Of course, many land uses that might be thought "unaesthetic" will not be modes of expression warranting first amendment protection, including, for example, solar collectors. *See* Jones, *Aesthetic Restriction and the Use of Solar Devices*, 8 ENVT'L AFF. 33 (1979).

183. *See* Chusud Realty Corp. v. Village of Kensington, 40 Misc. 2d 259, 243 N.Y.S.2d 149 (1963), *aff'd*, 22 App. Div. 2d 895, 255 N.Y.S.2d 411 (1964). The regulation in *Village of Kensington* restricted land to residential use in an area that was unsuitable for such purposes.

184. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

185. *Id.* at 466, 191 N.E.2d at 274, 240 N.Y.S.2d at 737:

> Although there may be considerable doubt whether there is a sufficiently reasonable relationship between clotheslines and traffic or fire safety to support an exercise of the police power, it is our opinion that the ordinance may be sustained as an attempt to preserve the residential appearance of the city and its property values by banning, insofar as practicable, unsightly clotheslines from yards abutting a public street.

186. 369 Mass. 206, 339 N.E.2d 709 (1975).

187. *Id.* at 217-18, 339 N.E.2d at 716-17.

188. 126 N.J. Super. 460, 462, 315 A.2d 424, 425-26 (1974).

assume that political signs in residential areas reduced property values in the absence of any objective evidence on the issue.

In *Berg Agency v. Township of Maplewood*,[189] the New Jersey Superior Court also rejected defendants' contention that a sign control ordinance protected property values. Plaintiffs, a real estate agency and a homeowner, challenged the constitutionality of the ordinances of three municipalities: one prohibited "for sale" and "sold" signs; the second regulated the size and location of such signs; and the third regulated the size and location of "for sale" signs and prohibited "sold" signs. Finding a first amendment right of free access to information implicated in the "for sale" signs,[190] the court considered the cities' contention that the governmental interests in aesthetics and the protection of property values outweighed the first amendment interest of plaintiffs. The cities also argned that, under New Jersey law, regulation for aesthetic purposes alone, even without an accompanying effect on property values, was valid.[191] In response, the court stated,

> It is not now necessary for the court to decide whether zoning legislation drafted to promote aesthetics must as well have the effect of preserving property values. Suffice it to say that if such legislation in fact preserves property values as it promotes aesthetics, this fact may be considered in weighing the significance of the legislation against the [f]irst [a]mendment infringement.[192]

The only evidence that the signs had a detrimental effect on property values was the testimony of the cities' expert witnesses, real estate brokers. The court found this evidence unconvincing, because "no objective evidence was submitted to corroborate such opinions, as, for example, the instability of property values in other communities that do not have restrictive sign ordinances."[193] Rather than concluding that an aesthetic regulation without economic impact is invalid, the court weighed the aesthetic interest alone against the first amendment interest and found all three ordinances invalid with regard to the "for sale" signs:

> In analyzing the sufficiency of aesthetic considerations alone, it must be kept in mind that although a governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifie the free flow of necessary truthful information when the legitimate end can be more narrowly achieved.[194]

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189. 163 N.J. Super. 542, 395 A.2d 261 (1978).
190. *Id.* at 549-55, 395 A.2d at 265-68.
191. *Id.* at 557, 395 A.2d at 269.
192. *Id.*
193. *Id.*
194. *Id.* at 558, 395 A.2d at 269.

The prohibition and regulation of "sold" signs, however, was found constitutional. Since the evidence showed that the principal purpose of such signs was to advertise the broker, rather than to impart valuable information to the public, the court found that the governmental interest in aesthetics outweighed any first amendment right.[195]

It is interesting to note the role that economic impact played in the *Berg Agency* decision. In the case of the "sold" signs, in which no significant first amendment interest was implicated, defendants were not required to show economic impact. The governmental interest in aesthetics was sufficient by itself to outweigh the landowner's interest in unrestricted use of his land.[196] Regarding the "for sale" signs, however, which did involve significant speech interests, the lack of evidence pertaining to property values may have been dispositive. Perhaps, if the cities had been able to add an economic interest to the aesthetic interest, the scales would have tipped in their favor, but aesthetics alone was not enough.

The balancing process employed by the *Berg Agency* court should be followed by all courts confronted with constitutional challenges to aesthetic regulations, regardless of whether they adhere to the majority or minority view on the sufficiency of aesthetic purposes. In majority rule jurisdictions, however—those that hold that aesthetics alone is not sufficient—courts should refuse to presume the validity of "nonaesthetic" regulations. Instead, these majority rule courts must critically examine the claimed purposes of challenged regulations. Otherwise, they will fail to identify those regulations based on aesthetics alone, unaccompanied by derivative economic benefits or health and safety benefits. Once the court recognizes that the actual aim of the restriction is aesthetic, the balancing process should end except in those jurisdictions that hold aesthetics alone to be sufficient. In these jurisdictions, the balancing test continues to determine whether the aesthetic interest alone is significant enough to outweigh the private interests.[197]

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195. *Id.* at 559, 395 A.2d at 270.

196. It should be noted that apparently the plaintiffs did not argue that the regulations would not have a beautifying effect. In fact, in 1972, in implementing a "MAKE AMERICA BEAUTIFUL" program, the local Board of Realtors had requested the cities to prohibit all signs in residential zones. *Id.* at 547, 395 A.2d at 264.

197. The governmental interest in aesthetics may be viewed as less significant than other possible governmental interests, although that fact alone will not preclude application of the balancing test. *See* De Sena v. Board of Zoning Appeals, 45 N.Y.2d 105, 109, 379 N.E.2d 1144, 1146, 408 N.Y.S.2d 14, 15-16 (1978) (citations omitted): "[W]hen denial of a variance is sought to be justified on aesthetic grounds, the public interest in regulation is

It is this necessary but difficult task of judging aesthetics from which the courts following the traditional rule have recoiled. A major reason has been the undeniably subjective nature of aesthetics. Whereas public health and safety "submit to reasonable definition and delimitation,"[198] no objective criteria are available to measure the reasonableness of the aesthetic judgment or the significance of the governmental interest in aesthetics in any particular case. The courts must rely either on what they perceive as aesthetic, on what they believe the community perceives as aesthetic,[199] or on evidence that has not heretofore been employed in any case—the testimony of "experts" on aesthetics.[200] Each measure has its shortcomings; the courts either are forced to become super art critics or risk misperceiving the communities' aesthetic values, or the "experts" may not reflect those values.[201]

Apart from the subjectivity issue, much concern has been expressed about the extent to which allowing the government to legislate aesthetics permits a sort of "big-brother" intrusion into private and personal matters. Some commentators have suggested that aesthetics is no more subjective than a number of other concepts with which the courts deal regularly, such as "justice," "fairness," or "reasonableness."[202] When the importance of those concepts is compared to the importance of aesthetics, however, the analogy is considerably less persuasive. The traditional police power purposes of protecting the public health, safety, and morals are central to our system of laws, whereas aesthetics *is* something of a "luxury" and an "indulgence."[203] In his dissent in *People v. Stover,* Judge Van Voorhis doubted that such indulgent motives

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not necessarily as strong as in those cases involving threats to the public safety . . . and care must be taken lest the State 'trespass through aesthetics on the human personality.' " The denial of the variance was overruled on other grounds.

198. Forbes v. Hubbard, 348 Ill. 166, 181, 180 N.E. 767, 773 (1932).

199. See Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process,* 35 Mo. L. REV. 176, 184 (1970), suggesting that community desires should be discovered, perhaps by survey and voting, prior to the enactment of aesthetic regulation.

200. This suggestion was considered and rejected in 13 HAST. L.J. 374, 376 (1962).

201. "[T]he opinion of the ["expert"] jury as to beauty might not represent the average person's viewpoint, which, in a final sense, is the essential principle in justifying aesthetics as a valid consideration under the police power." *Id.* at 376.

202. *See* Dukeminier, *supra* note 10, at 226-27. "Beauty cannot be any more precisely defined than wealth, property, malice, or a host of multiordinal words to which courts are accustomed." *Id. See also* Williams, *supra* note 37, at 16. "[I]t seems doubtful that any material difference exists between the verifiability of aesthetic as opposed to ethical or political values." *Id.*

203. *See* City of Passaic v. Paterson Bill Posting, Ad. & Sign Painting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905).

could justify governmental restrictions on the use of private property:

> The avoidance by courts, sometimes seemingly to the point of evasion, of sustaining the constitutionality of zoning solely on aesthetic grounds has had its origin in a wholesome fear of allowing government to trespass through aesthetics on the human personality. . . . [T]o prohibit [the Stovers' property use] by law upon the ground that it offends the aesthetic sensibilities of the neighbors or of the public officials of the municipality means . . . opening the door to the invasion by majority rule of a great deal of territory that belongs to the individual human being.[204]

The fact that so many jurisdictions continue to cling to the traditional rule indicates that most courts are genuinely concerned that aesthetic regulation constitutes interference into matters about which the government should have no say. This regulation is considered by some to be a "trespass . . . on the human personality,"[205] a discouragement of artistic nonconformity,[206] and a first step toward "a most highly regulated society . . . at the whim and caprice of individual officials without any proper measure for a

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204. 12 N.Y.2d 462, 472-73, 191 N.E.2d 272, 278, 240 N.Y.S.2d 734, 742 (Van Voorhis, J., dissenting), *appeal dismissed*, 375 U.S. 42 (1963).

The broader argument that government should not restrict any conduct except to prevent harm to others was made influentially by John Stuart Mill. J.S. MILL, ON LIBERTY (Oxford ed. 1947) (1st ed. London 1859). Using language that might be applied to describe governmental enforcement of a popular determination that a particular land use is "unaesthetic," Mill complained against proscriptions of conduct causing no harm to others on the basis of majoritarian views of morality: "[T]he strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly, and in the wrong place. . . . [T]he opinion of [the] majority, imposed as a law on the minority, on questions of self-regarding conduct, is quito as likely to be wrong as right. . . ." *Id.* at 74-75. In more concrete legal terms than those used by Judge Van Voorhis in *Stover*, it has been argued that the right of privacy, as developed in such cases as Roe v. Wade, 410 U.S. 113 (1973) and Griswold v. Counecticut, 381 U.S. 479 (1965), provides protection for the expression of one's personality via residential architecture. *See* Note, 28 STAN. L. REV. 179, *supra* note 94, at 184-85. *But see* Williams, *supra* note 37, at 50-57 (arguing that a landowner's rights of privacy and autonomy, at least at the present stage of the development of those rights, add little, if anything, to the protection afforded by the first amendment).

205. People v. Stover, 12 N.Y.2d 462, 472, 191 N.E.2d 272, 278, 240 N.Y.S.2d 734, 742 (Van Voorhis, J., dissenting), *appeal dismissed*, 375 U.S. 42 (1963).

206. Judge Corrigan expressed his disapproval of compelling conformity via aesthetic regulation in a series of rhetorical questions:

> Should the appellant be required to sacrifice her choice of architectural plan for her property under the official municipal juggernaut of conformity . . .? Should her aesthetic sensibilities in counection with her selection of desigu for her proposed home be stifled because of the apparent belief in this community of the group as a source of creativity? Is she to sublimate herself in this group and suffer the frustration of individual creative aspirations?

Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963) (Corrigan, J., dissenting).

limitation . . . ."[207]

Substantial reasons exist for disapproving regulations based on aesthetics alone, but if the courts are to give any effect to the rule they must at the same time avoid imprudent assumptions of "nonaesthetic" justifications. In cases in which the "nonaesthetic" justification is the protection of property values, the courts should require objective evidence of that asserted governmental interest, as did the court in *Berg Agency*. In cases in which such evidence might be impossible to obtain, as in the architectural design review cases,[208] the courts should at least require the best available evidence, such as the reactions of neighbors who might be likely to sell if the design is approved, and the testimony of objective appraisers.[209] It must also be recognized that although the likelihood of a detrimental impact on property values increases in proportion to the ugliness of a proposed structure, this is not always the case.

> It is axiomatic . . . that the most expensive house in an area suffers in relative market value while its less expensive neighbors gain. Thus, presumably, the construction of a monstrosity worth $200,000 on a street of $30,000 houses might well preserve or even enhance property values while destroying pleasant surroundings.[210]

In cases in which the asserted "nonaesthetic" justification is the promotion of tourism, the courts should consider the extent to which the regulation restricts unaesthetic property uses in areas that are not in fact benefited by tourist dollars. It should be noted that, at least in some commercial areas, "unaesthetic" uses such as outdoor advertising contribute to the urban "hustle and bustle," which in turn attracts tourists.[211]

Finally, the courts should not permit the presumption of constitutionality to foreclose inquiry into incidental and tenuous

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207. Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 57, 199 N.W.2d 525, 531 (1972) (Targonski, J., concurring).

208. *See* text accompanying notes 99-109 *supra*.

209. *See* Turnbull, *supra* note 95, at 245.

210. 59 Nw. U. L. Rev. 372, *supra* note 94, at 389. The supposed correlation of property values and aesthetics may be nonexistent in other situations, as when apartments, unaesthetic by some standards, are proposed to be built in a single-family residential area. While existing homes may decline in value, vacant land suitable for apartments may increase in value. *Id.* at 389-90. While such cases are clearly contrary to a major thesis of this paper—that the economic benefits of a regulation are wholly derived from the aesthetic benefits of the regulation—they must be recognized as aberrational.

211. *See* Lucking, *supra* note 151, at 188. "In a predominantly commercial zone, the billboard thrusts its message at an audience willing and eager to participate in the marketplace. Yet a broadly drawn ordinance could conceivably prohibit outdoor advertising in Times Square." *Id.*

health and safety justifications that may be asserted as the basis for aesthetic regulation. Defendants may assert, for example, that they restrict outdoor advertising in order to promote traffic safety, that they require solid fencing around junkyards to prevent injuries to trespassing children, and that they require recreational vehicles to be garaged rather than parked on the street in order to facilitate fire-fighting. Such assertions may have no factual basis in some cases, and even if some factual basis exists, the significance of the governmental interest in health and safety will obviously vary from case to case. For example, advertising signs located in residential or uncongested areas may have little or no effect on traffic safety;[212] chain link fences may protect children from the hazards of junkyards equally as well as fences that completely obscure public view of junkyards;[213] and a garage in which a recreational vehicle is housed may pose as great a fire hazard as the vehicle itself poses unhoused.[214] Regulations such as those mentioned, however, cannot be dealt with for what they are—that is, based solely or primarily on aesthetics—unless the courts refuse to presume the existence of alleged health and safety justifications and instead require that the validity of the justifications be proved by evidence.

Rigid adherence to the rule that aesthetics may not be the sole or primary justification for regulation would compel the courts to invalidate regulations whose only purpose is aesthetics, regardless

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212. *See, e.g.*, Naegele Outdoor Ad. Co. v. Village of Minnetonka, 281 Minn. 492, 495, 162 N.W.2d 206, 209-10 (1968), in which expert testimony showed that billboards in residential areas did not constitute safety or traffic hazards. *See also* 21 CLEV. ST. L. REV., *supra* note 168.

213. *See* the dissenting opinion of Judge Haymond in Farley v. Graney, 146 W. Va. 22, 50-77, 119 S.E.2d 833, 849-63 (1960). The majority held that a statute requiring that junkyards be enclosed by a fence "so constructed and maintained as to obscure the junk . . . from ordinary view to those persons passing upon the public highways," *id.* at 24, 119 S.E.2d at 835, was valid, basing its decision in part on health and safety reasons. The majority quoted statements from the defendant State Road Commissioner's brief: " 'It is established that disabled and junked automobiles most generally retain quantities of gasoline and oil which produce a fire hazard or a trap for children playing with fire. The old junked 'icebox' has made more than one headline as a death trap for a playful child.' " *Id.* at 47, 119 S.E.2d at 848. The majority also used several paragraphs to describe the presumption of constitutionality attached to legislative acts. *Id.* at 32-35, 119 S.E.2d at 840-41. The dissent, classifying the statute as one based on aesthetics alone, pointed out that there was "*nothing in the record* . . . that indicate[d] . . . that the junkyards [were] unsafe, immoral, or detrimental to the health or the general welfare. . . ." *Id.* at 56, 119 S.E.2d at 852 (Haymond, J., dissenting) (emphasis added).

214. *See* City of Euclid v. Fitzthum, 48 Ohio App. 2d 297, 302, 357 N.E.2d 402, 406 (1976), discussed *supra* at text accompanying notes 163-65.

of the significance of that interest in any particular case. Moreover, such adherence might also require invalidation in any case in which the governmental interests are only aesthetics and the derivative economic benefits of aesthetics, or aesthetics and secondary health and safety benefits, since in such cases the *primary* justification for regulation must be aesthetics.[215] If promotion of the general welfare is to have any meaning at all in jurisdictions following the majority rule, however, general welfare must be interpreted to include economic stability. This governmental interest can and should be recognized as legitimate, but the significance of the interest should be carefully examined rather than presumed.

An increasing number of jurisdictions recognize that even if the only governmental interest at stake is aesthetics, that interest may be significant enough to justify regulation. Sound arguments in favor of accepting aesthetics alone as a permissible police power purpose have been made by numerous writers[216] and need not be repeated here. Suffice it to say that the promotion of aesthetic values yields intangible benefits, such as furthering civic pride and the happiness and emotional stability of residents, that may be sufficient justification in themselves for regulation, even if not translatable into economic benefits.[217] The problems posed by assuming the existence of "nonaesthetic" grounds are not as great in jurisdictions following the rule that aesthetics alone may be a sufficient basis for regulation, since "nonaesthetic" grounds are not essential to the validity of the regulation. Those courts that recognize aesthetics alone as a permissible basis for regulation need never invalidate a regulation on the ground that it exceeds permissible police power purposes. Their focus instead should be on the reasonableness of the regulation, that is, whether the aesthetic purpose to which the regulation is reasonably related outweighs the private burdens imposed by the regulation.[218] During the reasonableness inquiry, however, imprudent application of the presumption of constitutionality must be avoided to ensure that the balancing process may be undertaken properly. As has been shown, the

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215. *See* Michelman, *supra* note 46, concerning the derivative nature of economic benefits.

216. *See, e.g.*, Dukeminier, *supra* note 10; 1 R. ANDERSON, *supra* note 15, § 7.25. *See also* Anderson, *Regulation of Land Use for Aesthetic Purposes—An Appraisal of* People v. Stover, 15 SYRACUSE L. REV. 33 (1963-64).

217. *See* Dukeminier, *supra* noto 10, at 231. *But cf.* Turnbull, *supra* note 95, at 248-53 (arguing, in essence, that all benefits of aesthetic regulation have economic underpinnings).

218. *See* note 15 *supra*.

significance of the governmental interest in aesthetics varies from case to case;[219] if aesthetics is not only the sole governmental interest served by a regulation but is also a relatively insignificant one, it will surely be outweighed by competing private interests in many cases.[220] In such cases, when it is clear that the governmental interest served is minor at best, a presumption of validity for the regulation in question is illogical and undesirable.

IV. CONCLUSION

Serious problems are presented by cases in which the courts uphold regulations based solely or primarily on aesthetics— without admitting it—by relying on presumed or even nonexistent "nonaesthetic" grounds. In such cases, the courts shirk their responsibility to deal with the real issues involved, and litigants are not afforded a fair review of their constitutional claims. As Dukeminier stated in his assessment of the problem in 1955: "Are not the defects of a legal system in which words do not match actions, in which the gap between myth and decision is great, many and patent?"[221] Since the time that Dukeminier wrote, the problem has grown to far greater proportions as the definition of the general welfare has expanded to provide convenient subterfuges for aesthetics. A new approach to the problem must be taken by the courts if this trend is to be halted. The courts should either accept aesthetics alone as a proper basis for police power regulation or give more than mere lip service to the rule that aesthetics alone is insufficient.

While the acceptance of an "aesthetics alone" rationale facilitates reasonable analysis and is an eminently sensible recognition of the importance of aesthetics, it has not been the purpose of this Article to condemn the traditional rule. Rather, it is conceded that courts may for sound reasons find that governmental regulation of the use of private property for aesthetic purposes alone is unwarranted. What is needed, however, is for those courts to examine more critically the governmental interests served by regulation and to refuse to presume the existence of "nonaesthetic" purposes when in fact none exists. Aesthetics has a proper role in the balancing process that should be employed under either the majority or minority rule, but unless that role is openly recognized and its

219. *See* text accompanying notes 138-39, 151, 178-79 *supra*.
220. *See, e.g.*, Lucking, *supra* note 151.
221. Dukeminier, *supra* note 10, at 232.

significance carefully assessed, any distinction between the two rules is meaningless.