

SCENIC LANDSCAPE PROTECTION UNDER THE POLICE POWER

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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.

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

The landscape and the language
are the same
For we ourselves are landscape
and are land.

—Conrad Aiken, *A Letter from Li Po and Other Poems* (1955).¹

I. INTRODUCTION

Protection of visual resources has been an acknowledged goal of environmental management for at least a generation. For example, the National Environmental Policy Act (NEPA) requires federal agencies, in their decisionmaking processes, to “assure for all Americans safe, healthy, productive, and aesthetically and culturally pleasing surroundings.”² Many state environmental policy acts contain similar

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¹ Quoted in Alan Gussow, “Conserving the Magnitude of Uselessness: A Philosophical Perspective,” paper presented at the National Conference on Applied Techniques for Analysis and Management of the Visual Resource, Incline Village, Nevada, Apr. 23–25, 1979 at 10.

² National Environmental Policy Act of 1969 (NEPA), Pub. L. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4370d (1988 & Supp. V 1993)).

guidance.³ The protected visual resource may be a “viewshed”—a vista featuring mountains and hillsides, riverbanks and watercourses, villages and farms, or other areas of natural or cultural beauty. In a more urban setting, the visual resource may instead be a “view corridor”—an architectural opening or transportation corridor in the cityscape that frames a natural or cultural scenic feature. NEPA and its progeny operate on the assumption that such visual resources provide an opportunity for “aesthetic experiences,”⁴ which are highly valued by the public.⁵ Yet the visual landscape rightly has been called our “most maligned, ignored, [and] unappreciated natural resource.”⁶ This Article chronicles the efforts of local governments⁷ to protect their visual resources—and the judicial response to these efforts—since the 1954 Supreme Court decision in *Berman v. Parker*.⁸

Viewed from an historical perspective, protection of the visual resource is one of the last frontiers in local regulation of the environment. Beginning in the 1960s, local governments addressed one after another of their “critical” resources. First to be identified and protected

³ Some states include visual impact assessment as a part of their general environmental impact review procedures, and courts generally endorse this process on review. *See, e.g.*, *Save S.F. Bay Ass'n v. San Francisco Bay Conservation & Dev. Comm'n*, 13 Cal. Rptr.2d 117, 133 (Cal. Ct. App. 1992), *review denied* 1993 Cal. LEXIS 406 (Jan. 21, 1993) (view corridor analysis under California's Environmental Quality Act); *Steele v. Town of Salem Planning Bd.*, 606 N.Y.S.2d 810 (App. Div. 1994) (viewshed analysis required under New York's State Environmental Quality Review Act); *West Main Assocs. v. City of Bellevue*, 742 P.2d 1266 (Wash. Ct. App. 1987) (adverse impact on views proper finding under Washington's State Environmental Policy Act).

⁴ *See infra* notes 151–54 and accompanying text.

⁵ NEPA itself states, “it is the continuing responsibility of the Federal Government to use all practicable means . . . to . . . assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; . . . preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity.” NEPA, 42 U.S.C. § 4331(b) (1988).

⁶ Gussow, *supra* note 1, at 7.

⁷ The term “local governments” refers to those cities, towns, and counties invested with police power (particularly, zoning) to regulate the use of land. Of course, state governments have also acted to protect specific scenic resources. *See, e.g.*, Pinelands Protection Act, N.J. STAT. ANN. § 13:18A-2. The Supreme Court of New Jersey upheld the Act in *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991). *See also*, *Bel Mar Estates v. California Coastal Comm'n*, 115 Cal. App. 3d 936 (Cal. Ct. App. 1981) (denying subdivision on the basis of impact to view); *McCormick v. Lawrence*, 372 N.Y.S.2d 156 (N.Y. Sup. Ct. 1975) (upholding view regulations within New York's Adirondack Park); *Issuance of a CAMA Minor Dev. Permit v. Town of Bath*, 345 S.E.2d 699 (N.C. Ct. App. 1986) (upholding view restrictions within North Carolina's Coastal Area Management Act); *Scott v. State*, 541 P.2d 516 (Or. Ct. App. 1975) (upholding view provisions with Oregon's Scenic Waterways Act); *In re McShinsky*, 572 A.2d 916 (Vt. 1990) (denying campground under Act 250, in part, because of impacts to view); *Department of Ecology v. Pacesetter Constr. Co.*, 571 P.2d 196 (Wash. 1977) (en banc) (upholding view restrictions under Washington's Shoreline Management Act).

⁸ 348 U.S. 26 (1954).

were wetlands.⁹ In the same decade, local governments protected flood plains.¹⁰ With these models for action in place, local environmental protection was extended in the next generation to aquifers¹¹ and watersheds.¹² In shore areas, the potential for catastrophe has encouraged enactment of dune and barrier-beach protection ordinances.¹³ Diminishing agricultural lands have received special attention.¹⁴ Yet despite this plethora of often overlapping resource protection districts, some visual resources remain unguarded. According to the *Boston Globe*, "two-thirds of the most scenic five percent of the Massachusetts landscape remains unprotected."¹⁵ In taking steps to protect visual resources, cities and towns are simply moving to fulfill their responsibilities to the local environment.

Of course, the growth of the tourist industry has inspired local governments to take steps to protect scenic areas. Tourism now accounts for six to seven percent of the gross domestic product of the United States.¹⁶ Travel ranks as the third largest retail industry in terms of sales and the second largest in terms of private employment.¹⁷ Nationally, 1993 figures indicate that tourism accounted for a contribution of \$309 billion to the economy.¹⁸ In states renowned for

⁹ For example, Massachusetts adopted its wetlands statute in 1967. MASS. GEN. L. ch. 131, § 40 (1989). Oregon adopted its wetlands protection statute in 1973. OR. REV. STAT. §§ 196.800-.990 (1991).

¹⁰ The National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968), now codified as 42 U.S.C. §§ 4001-4128 (1988 & Supp. V 1993), required cities and towns to adopt flood plain ordinances as a precondition of flood plain insurance. 42 U.S.C. § 4012(c) (1988). The federal government thereafter began mapping flood plains, and provided the findings to local governments in the form of Flood Insurance Rate Maps (FIRMs). These resources proved useful in developing local controls. Approximately 3,000 communities had adopted local regulations by 1981. See ABA, MATERIALS ON FLOODPLAINS AND WETLANDS: LEGAL CONSTRAINTS AND OPTIONS, ABA (Robbins & Lagerroos eds., 1981).

¹¹ The protection of groundwater may be traced back to Section 208 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, 1256, 1288, 1313 (1988), which mandated that all state governments develop management plans to maintain or improve existing water quality, including groundwater.

¹² Watershed protection is largely a spinoff of aquifer protection. For a recent example of watershed protection on a regional basis, see 1993 Mass. Acts 495, which protects the watershed of the Wachusett Reservoir, one of Boston's sources for drinking water.

¹³ These local regulations were triggered by the federal Coastal Zone Management Act, 16 U.S.C. § 1451 (1988 & Supp. V 1993).

¹⁴ See *infra* note 98 and accompanying text.

¹⁵ Ronald Lee Fleming, *Suburban Sprawl Blights Cities, Too*, BOSTON GLOBE, Oct. 27, 1994.

¹⁶ Elizabeth Brabec and Kevin Kirby, *The Value of Nature and Scenery*, SCENIC AM. TECHNICAL BULL., Vol. 1, No. 3, at 2 (1992).

¹⁷ JOHN D. HUNT, TOURIST EXPENDITURES IN THE UNITED STATES, PRESIDENT'S COMMISSION ON AMERICANS OUTDOORS: A LITERATURE REVIEW (1986).

¹⁸ UNITED STATES TRAVEL DATA CENTER, NATIONAL TRAVEL SURVEY (1993). Over a billion person trips accounted for this total. *Id.*

beautiful vistas, the promotion of tourism has become public policy. For example, in 1993, the Wyoming Department of Tourism spent \$1.6 million to attract seven million visitors, who contributed an estimated \$1.5 billion to the state's economy.¹⁹ In Maine, the Office of Tourism spent \$1.6 million in 1991 to attract 8.7 million visitors, who contributed \$2.75 billion to the economy.²⁰ The figures for other tourist destinations such as New Hampshire,²¹ Vermont,²² Montana,²³ and Idaho²⁴ are comparable.

In order to protect the scenic landscape—and, not coincidentally, to attract tourists—local governments, acting under their police powers,²⁵ have employed a variety of devices. The enactment of these devices has occurred within the context of a long-running legal debate over the validity of “aesthetic” regulation.²⁶ Since *Berman*, the highest court in nearly every state has wrestled with the concept of

¹⁹ Telephone Interview with Chuck Coon, Public Information Manager, Wyoming Dep't of Tourism (Feb. 1, 1995).

²⁰ Telephone Interview with Marjorie Wright, Tourism Specialist, Maine Office of Tourism (Feb. 1, 1995).

²¹ New Hampshire estimates a total contribution to its economy from tourism of more than \$4 billion annually, as of 1994, compared with a figure of \$104 million for 1954, the year of the Supreme Court's *Berman* decision. Telephone Interview with Chris Jennings, Director, New Hampshire Office of Travel and Tourism Development (Feb. 1, 1995).

²² Vermont estimates a 1993 contribution of \$1.8 billion to the local economy from tourism, with 6.5 million visitors annually. Telephone Interview with Jed Guertin, Director of Travel Research, Vermont Department of Travel (Feb. 1, 1995).

²³ Montana's economy received a contribution of \$1.1 billion in 1993 from tourism, with 7.5 million visits. Telephone Interview with Janice Wannebo, Administrative Assistant to the Director, Travel Montana (Feb. 1, 1995).

²⁴ Idaho estimated, in 1993, that tourism contributed \$1.8 billion to the local economy, with 6.5 million visits. Telephone Interview with Mike Thuleen, Economic Development Analyst, Department of Commerce/Division of Tourism Development (Feb. 1, 1995).

²⁵ The term “police power” is a slippery concept, not susceptible to exact definition. See, e.g., *Commonwealth v. Alger*, 60 Mass. 53, 85 (1851) (“It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise.”). McQuillin's *The Law of Municipal Corporations* offers some guidance:

[T]he term “police power,” in its original and most comprehensive meaning, denotes the power of government in every sovereignty, that is to say, the power to govern men and things. It is an inherent attribute of sovereignty, necessary to the effective conduct and maintenance of government. It has been denominated as the public right to reasonable regulation for the common good and welfare. Moreover, it is the power to regulate the conduct of subjects toward each other and the manner in which each shall use his own property when regulation becomes necessary for the public good.

6A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §24.02, at 10 (Charles R.P. Keating ed., 3d ed. 1987).

²⁶ Simply put, a regulation promotes aesthetic objectives when it is designed to affect the appearance of a community. See, generally, ROBERT M. ANDERSON, *LAW OF ZONING AND PLANNING*, § 7.13 (3d ed. 1986); see also Frank Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 *THE PRACTICAL LAWYER* 36 (1969) (“An ‘aesthetic interest’ . . . has been invaded whenever a person is forced to look at what he would rather not see or prevented from looking at what he would rather see.”)

land-use regulation for aesthetic objectives. Without rehashing this oft-described controversy,²⁷ a brief summary may be useful.

A reviewing court assessing whether aesthetic regulation is permissible first must address the scope of the applicable enabling legislation. Typically, a municipality or county is authorized to use the police power to promote "the health, safety, morals, or the general welfare of the community."²⁸ All regulations, including those which further an aesthetic objective, must serve an enunciated purpose of the enabling legislation in order to pass constitutional muster. Traditionally, local land-use regulations have been rooted in promotion of public health and safety.²⁹ However, where a regulation furthers *only* an aesthetic objective,³⁰ such as protection of a scenic view, the traditional health and safety rationales are not germane. Thus, a reviewing court must broadly interpret the general welfare prong of the enabling legislation in order to accommodate a municipality's aesthetic goal.³¹ While the results have varied from state to state, there is a clear trend for courts to find aesthetic regulation solely for aesthetic purposes permissible under the general welfare prong.³²

Of course an aesthetic objective may be accomplished in conjunction with other legitimate police power objectives, or a legislature may choose to regulate solely to achieve aesthetic goals.

²⁷ The standard land-use treatises all contain thorough coverage of the issue. See ANDERSON, *supra* note 26, §§ 7.13–7.26; EDWARD H. ZIEGLER, RATHKOPF'S LAW OF ZONING AND PLANNING, §§ 14–1 to 14–45 (4th ed. 1982) [hereinafter RATHKOPF]; NORMAN WILLIAMS, AMERICAN LAND PLANNING LAW, §§ 11.01–11.19 (1974).

²⁸ See ANDERSON, *supra* note 26, § 7.13 ("[T]he restatement of the objectives of the police power, found in nearly every zoning enabling act, includes four distinct purposes which properly may be served through zoning regulations.") The Supreme Court endorsed this principle as to zoning in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (key inquiry is whether regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"). State courts have reiterated this prescription. See, e.g., *Corrigan v. City of Scottsdale*, 720 P.2d 528, 536 (Ariz. 1985); *Asselin v. Town of Conway*, 628 A.2d 247, 249 (N.H. 1993); *Hopewell Township v. Golla*, 452 A.2d 1337, 1341 (Pa. 1982).

²⁹ "Morals" have little to do with zoning issues other than adult entertainment. See ANDERSON, *supra* note 26, § 7.13.

³⁰ A workable litmus test to detect harm purely aesthetic in nature was stated in J.J. Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218, 223 (1955) ("While it is difficult to determine what is the primary offense of much land use, the simulation of blindness affords a simple rule-of-thumb: if a use is offensive to persons with sight but not offensive to a blind man in a similar position, the use is *primarily* offensive aesthetically."). A regulation targeting such a use would have a primarily aesthetic purpose. See Michelman, *supra* note 26, at 36.

³¹ The expansion of the concept of the general welfare is the subject of several commentaries, most notably, Beverly A. Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603 (1981); see also Norman Williams, *Scenic Protection as a Legitimate Goal of Public Regulation*, 38 WASH. U.J. URB. & CONTEMP. L. 3 (1990).

³² Tracking the majority position on this issue has become a cottage industry. See, e.g., RICHARD C. SMARDON & JAMES P. KARP, *THE LEGAL LANDSCAPE* 25, 26–27 (1993) (thirty

To cope with changing judicial attitudes, local governments have employed a host of tools and tactics to protect the scenic landscape. The handiest tool is the traditional zoning power, which has long been crucial in prohibiting or restricting eyesores. Zoning is also useful for defining and protecting valuable resource areas such as viewsheds and view corridors. In addition to the zoning power, local governments have enacted general police power ordinances to prohibit or limit eyesores.³³ Finally, and to a lesser extent, localities have made use of subdivision controls and environmental regulations to protect visual resources. The range of approaches employed in these ordinances and regulations reflect the history of the debate over aesthetic purposes: landscape protection has evolved from a secondary purpose, barely countenanced under the police power, to a consistent theme in environmental protection.

In jurisdictions adhering to what has come to be the minority position, aesthetics may not stand alone as a police power objective; localities must link protection of the visual resource to another, traditional goal of regulation. Section II of this Article discusses the protection of scenic resources as an ancillary objective, both before and after the Supreme Court's *Berman* decision. In majority position states, municipalities need not rely upon ancillary, traditional police power objectives to protect their visual resources; rather, municipalities may advance aesthetic goals as the primary or sole purpose of regulation. Section III examines protection of visual resources in such majority view states. Section III also explores links between protection of the scenic landscape and the "general welfare" prong of the police power, in an attempt to offer some explanation for the majority

states permit regulation for aesthetic purposes alone, five states do not, fifteen are undecided or have not considered the issue) (30/5/15). See generally Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013 (1990) (20/26/5); Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125 (1980) (16/16/9); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973) (14/23/14); Louis H. Massotti and Bruce I. Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URB. L. 773 (1969) (7/35/8). The major land-use treatises also review the debate. See RATHKOPF, *supra* note 27, § 14.02 (22 states allow aesthetic-based regulation standing alone); WILLIAMS, *supra* note 27, §§ 11.10–11.19 (validity of aesthetic-based regulation alone not the majority rule); ANDERSON, *supra* note 26, §§ 7.13–7.25 (validity of aesthetic-based regulation alone not the majority rule). The National Park Service has also weighed in on this issue. See NATIONAL PARK SERVICE & NATIONAL CENTER FOR PRESERVATION LAW, *PROPRIETY OF USING THE POLICE POWER FOR AESTHETIC REGULATION: A COMPREHENSIVE STATE-BY-STATE ANALYSIS* (1992). Even courts have gotten into the discussion. See, e.g., *State v. Jones*, 290 S.E.2d 675, 679–80 (N.C. 1982) (citing Bufford article and updating the statistics based on its own research).

³³ See, e.g., *Landmark Land Co. v. City and County of Denver*, 728 P.2d 1281, 1286–87 (Colo. 1986) (en banc) (endorsing the use of zoning or "nonzoning" devices). For a discussion of *Landmark*, see *infra* notes 273–79.

position's appreciation of our "most maligned" and "ignored" resource. Finally, Section IV suggests that protection of the visual resource is a defensible exercise of the police power. Local regulations may promote economic growth by enhancing tourism and preserving property values. Moreover, identification and protection of the scenic resource can help define valuable aspects of the community.

II. SCENIC LANDSCAPE PROTECTION AS AN ANCILLARY PURPOSE

A. *Pre-Berman History*

In the pre-*Berman* era,³⁴ regulations designed to promote aesthetic objectives were generally viewed with suspicion. This attitude was based on the belief that such regulations were inherently subjective. The courts' concern involved two concepts of due process embodied in the Fourteenth Amendment.³⁵ First, substantive due process was denied where the preferences of an elite few would be imposed on the general public.³⁶ The most famous expression of this view is undoubtedly that voiced by the Supreme Court of Ohio in *Youngstown v. Kahn Bros. Building Co.*:³⁷

[M]ere aesthetic considerations cannot justify the use of the police power. It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, . . . the public view as to what is necessary for aesthetic progress greatly varies. 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.³⁸

Since aesthetic preferences stated in regulations could not be verified,³⁹ courts often characterized the regulations as expressions of mere opinion.⁴⁰ Thus, ordinances promoting beauty could not constitute a legitimate exercise of the police power.

³⁴ See RATHKOFF, *supra* note 27, § 14.02[3] for a concise discussion of these "early and middle period" cases. See also ANDERSON, *supra* note 26, § 7.22; WILLIAMS, *supra* note 27, § 11.10.

³⁵ "[N]or shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

³⁶ For some thoughts on this aspect of the subjectivity issue, see Stephen F. Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977). The article suggests that this problem has been overcome by various methods to verify aesthetic choices. See *id.*

³⁷ 148 N.E. 842 (Ohio 1925).

³⁸ *Id.* at 844.

³⁹ See *infra* notes 159-75 and accompanying text (discussing potential resolution of the problem of verifiability of landscape preferences).

⁴⁰ See *Forbes v. Hubbard*, 180 N.E. 767, 773 (Ill. 1932), in which the court asserted:

It is generally recognized that aesthetic considerations, while not wholly without

The other consistently troubling aspect of aesthetic regulation in the pre-*Berman* era was the vagueness⁴¹ of regulatory standards, which may work a denial of procedural due process. Attempts to define "beauty" are inherently difficult;⁴² even where a community momentarily has reached a consensus as to an aesthetic preference, codification of the community's standards may prove elusive, if not impossible.⁴³ As the Supreme Court has noted, "aesthetic judgments . . . defy[] objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose."⁴⁴ Consequently, vagueness has been a consistent stumbling block in regulation for aesthetic objectives.⁴⁵

weight, do not of themselves afford sufficient basis for the invasion of property rights, and this for the more or less obvious reason that while public health, safety, and morals, which make for public welfare, submit to reasonable definition and delimitation, the realm of the aesthetic varies with the wide variation of tastes and culture.

Id. at 773.

⁴¹ The "void for vagueness" doctrine is constitutional in nature: "Vague laws violate due process because individuals do not receive fair notice of the conduct proscribed by a statute, . . . and because vague laws that do not limit the exercise of discretion by officials engender the possibility of arbitrary and discriminatory enforcement." *Commonwealth v. Jaffe*, 494 N.E.2d 1342, 1345 (Mass. 1986) (quoting *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922, 928 (Mass. 1983)).

⁴² Professor Williams has termed this the "essential difficulty" of aesthetic regulation. WILLIAMS, *supra* note 27, § 11.02.

⁴³ Professor John J. Costonis, in his article, *Land and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982), argues that aesthetic regulations cannot meet the vagueness-due process requirement of intelligible standards when based on a rationale of aesthetics as "visual beauty." See, particularly, the discussion at 377-78 and 410-11. For some competing thoughts on the vagueness issue, see J. J. Dukeminier, *supra* note 30, at 225-28.

⁴⁴ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981). *Metromedia* is notable in that the Court unanimously endorses the concept of regulation for aesthetic objectives by a municipality. Unlike *Berman*, which was founded in eminent domain, the ordinance in *Metromedia* was an exercise of the police power. *Metromedia*, 453 U.S. at 493; *Berman*, 348 U.S. at 28.

⁴⁵ In *Anderson v. City of Issaquah*, 851 P.2d 744 (Wash. 1993), the Court of Appeals of Washington used procedural due process to reject an ordinance setting building design requirements:

We note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of "appropriate proportions", its colors should be "harmonious" and seldom "bright" or "brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." . . . [W]e conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code.

Id. at 751. See also *Vanaman v. Town of Georgetown*, 648 A.2d 426 (Del. 1994) (unpublished opinion) (ordinance addressing unregulated growth of weeds); *City of Independence v. Richards*, 666 S.W.2d 1, 4 (Mo. Ct. App. 1983) (refuse accumulation ordinance); *Village of Deshler v. Hoops*, 196 N.E.2d 476, 477-78 (Ohio Ct. C.P., Henry County 1963) (ordinance regulating eyesores);

Despite these problems, local legislatures routinely advanced protection of the scenic landscape as a secondary goal of land-use regulation. In general, courts found aesthetic regulations permissible where the regulations also furthered an alternative, more traditional goal under the police power. The prevailing view was aptly summarized by Judge Pound in 1932: "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."⁴⁶

A leading case expressing the emergent judicial position is *General Outdoor Advertising Co. v. Department of Public Works*.⁴⁷ In this case, the Massachusetts Supreme Judicial Court upheld restrictions that applied to outdoor advertising within the public view.⁴⁸ The court rejected the claim that because the rules rested upon "aesthetic considerations" they were void: "Grandeur and beauty of scenery contribute highly important factors to the public welfare of a state. To preserve such landscape from defacement promotes the public welfare and is a public purpose."⁴⁹ The court endorsed the use of the police power to protect these aesthetic features.⁵⁰ However, the court was not prepared to let an aesthetic purpose stand alone:

The rules and regulations here in question have different aims. They do not rest primarily upon aesthetic considerations in the sense in which that phrase has been used to overturn legislative enactments. They are designed to promote safety of travel upon the highways, and enjoyment of resort to public parks and reservations, to shield travellers upon highways from the unwelcome obtrusion of business appeals, to protect property from depreciation, and to make the commonwealth attractive to visitors from other states and countries as well as to her own citizens.⁵¹

General Outdoor Advertising is a well-reasoned response to the limitations of the doctrine requiring ancillary objectives for aesthetic regulations.⁵²

Orwell Township Supervisors v. Jewett, 571 A.2d 1100, 1101 (Pa. 1990) (junkyard and refuse ordinance). Cf. *City of New Orleans v. Levy*, 64 So. 2d 798 (La. 1953). In *Levy*, the Louisiana Supreme Court reviewed a billboard ordinance designed to protect the "architectural and historical value" and the "quaint and distinctive character" of New Orleans' Vieux Carre section. The court was not persuaded in this instance: "No one . . . could possibly mistake the meaning of or be confused by the ordinance's references . . ." 64 So. 2d at 800.

⁴⁶ *Perlmutter v. Greene*, 182 N.E. 5, 6 (N.Y. 1932).

⁴⁷ 193 N.E. 799 (Mass. 1935).

⁴⁸ *Id.* at 816.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 815.

⁵² One can quibble as to whether the 1935 Supreme Judicial Court viewed the billboard rules

On the other hand, the need for an alternative rationale resulted in a host of regulations designed to protect visual resources under the camouflage of health and safety rationales. The billboard regulations upheld in the classic case of *St. Louis Gunning Advertising Co. v. City of St. Louis* are generally acknowledged as the epitome of this genre.⁵³ The city's purported reasons for adopting its ordinance were protection of pedestrians and others upon the streets from injury in periods of high winds, prevention of fire hazards associated with billboards, and elimination of hiding places for criminals.⁵⁴ The city produced little evidence to show a link between billboards and public health or safety. Nonetheless, the Missouri Supreme Court accepted these traditional rationales and, as a result, tolerated the ancillary objective of aesthetic enhancement. The court's ruling has won little but scorn from judges and commentators alike.⁵⁵ Ultimately, however, the use of contrived alternative rationales helped pave the way for judicial recognition of aesthetics, standing alone, as a legitimate police power objective.

B. *Post-Berman Developments*

In the post-*Berman* era, the nexus between aesthetic enhancement and an alternative rationale has remained important in those jurisdictions that have not accepted the majority "aesthetics alone" position. In reviewing police power ordinances protecting visual resources, courts generally apply the "minimal scrutiny rational relationship test."⁵⁶ This test is two-pronged. First, the government must show

in question as primarily nonaesthetic in nature, and subordinate to the health and safety rationale. In hindsight, it is apparent that the regulations were chiefly designed to enhance scenic views; when billboard controls were again put before the same court, albeit 40 years later, the legislative purpose of a similar town bylaw was characterized as "primarily or solely for aesthetic reasons" and upheld. See *John Donnelly & Sons, Inc. v. Outdoor Advertising Board*, 339 N.E.2d 709, 717 (Mass. 1975).

⁵³ 137 S.W. 929 (Mo. 1911).

⁵⁴ *Id.* at 938.

⁵⁵ See, e.g., *City of Independence v. Richards*, 666 S.W.2d 1, 5 (Mo. Ct. App. 1983); *Westfield Motor Sales Co. v. Town of Westfield*, 324 A.2d 113, 118 (N.J. Super. Ct. Law Div. 1974); *RATHKOPF*, *supra* note 27, § 14.02[3]; *Costonis*, *supra* note 43, at 374 n.52.

⁵⁶ The term is Justice Brennan's. See *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 528 n.7 (1981) (Brennan, J., concurring).

This test must be distinguished from the stricter scrutiny applied in recent billboard cases involving First Amendment rights. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech or of the press; . . ." U.S. CONST. amend. I. It is beyond the scope of this Article to discuss the relationship between protected speech and billboards. See *infra* note 61.

In the decisions discussed in this section, the First Amendment was not an issue. Nonetheless,

that the regulation bears a substantial relationship to the health, safety, morals, or general welfare of the community.⁵⁷ In minority position states, where aesthetic purposes cannot stand alone, the link between aesthetics and health or safety constitutes a necessary element in the protection of landscape aesthetics. Some state courts have taken an alternative approach, expanding their interpretation of the

a brief summary of recent developments is helpful. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), a divided Supreme Court reviewed the city's ordinance prohibiting outdoor advertising display signs. The stated goals of the ordinance were "to preserve and improve the appearance of the City," and "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays." *Id.* at 493. The Court quickly endorsed these purposes as legitimate police power objectives. *Id.* at 507-08. This aspect of the holding was later reaffirmed in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).

However, the ordinance had the effect of restricting commercial speech protected by the First Amendment. *Metromedia*, 453 U.S. at 509. Under the test announced by the Court in *Central Hudson Gas & Electric Corp. v. Public Health Service Commission of New York*, a regulation that restricts such speech must also "directly advance" the announced governmental objectives. 447 U.S. 577, 566 (1980). This provided an opening for challenge. The sign companies asserted that the record was inadequate to show any connection between billboards and traffic safety. *Metromedia*, 453 U.S. at 509. At stake was the sufficiency of evidence necessary to demonstrate the connection between billboards and traffic safety. *Id.*

For the plurality in *Metromedia*, relying heavily on the decision of the California Supreme Court, the advancement of traffic safety was self-evident. *Id.* The California Supreme Court noted that the record was meager on this point. *Id.* Nevertheless, the California court ruled that "as a matter of law" an ordinance eliminating billboards designed to be viewed from public ways reasonably relates to traffic safety. *Id.* Billboards are intended to divert a driver's attention from the roadway. Under the circumstances, the safety argument was proven: "We . . . hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable." *Id.* In essence, the Court placed the burden of proof on the challenger to show that the asserted connection was "palpably false." *Id.* (citing *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949)).

Justice Brennan, concurring in the judgment, was not satisfied with the sufficiency of the evidence connecting billboards with traffic safety. He pointed out two important aspects of this issue. First, "[n]ot 1 of the 11 cases cited by the plurality . . . stands for the proposition that 'billboards are real and substantial hazards to traffic safety.'" *Metromedia*, at 528, n.7 (Brennan, J., concurring). More telling, these eleven cases "merely applied the minimal scrutiny rational relationship test," which grants greater deference to legislative determinations. *Id.* Moreover, some of the decisions linking safety to billboards are suspect because of the requirements in minority position states, which have been widely manipulated since *St. Louis Gunning, Inc.* (citing *St. Louis Gunning*, 137 S.W. at 929).

Justice Brennan's concurrence has inspired several courts exploring billboard limitations within the context of the First Amendment to hone in on the asserted link to traffic safety. See *City of Chicago v. Gordon*, 497 N.E.2d 442, 446-47 (Ill. 1986); *Bell v. Township of Stafford*, 541 A.2d 692, 699 (N.J. 1988); *Collier v. City of Tacoma*, 854 P.2d 1046, 1057 (Wash. 1993) (en banc). Brennan's opinion has *not*, however, inspired courts applying the minimal scrutiny rational relationship test to reexamine the link between billboards and traffic safety. The legislative determination still retains its presumption of validity where the First Amendment is not invoked by the challenger.

⁵⁷ See *supra* note 29 and accompanying text.

general welfare prong to include new public purposes. In particular, the preservation of property values and the promotion of tourism have provided local governments with additional options for protection of the scenic landscape.

Second, courts applying the minimal scrutiny, rational relationship test balance the public benefits obtained through use of the police power against the harm caused to the individual challenging the ordinance.⁵⁸ In some jurisdictions, the courts have expressed the expectation that government will employ "less restrictive means," where available, to effect its goals.⁵⁹ Consequently, a clearly permissible objective may be violative of substantive due process where the methods chosen by the local government are arbitrary or capricious, or unduly restrictive.⁶⁰

C. Recent Developments

This section examines recent cases in which minority view courts have reviewed police power ordinances to protect visual resources. The alternative rationales validated by these courts have been entirely predictable: enhancement of public health and safety, protection of property values, and promotion of tourism have served as ancillary objectives. Each alternative rationale is explored in turn.

1. Health/Safety Nexus

In minority view states, a nexus to health or safety continues to be the chief underpinning for scenic view protection. Typically, courts have had occasion to validate this connection in the context of judicial review of eyesore regulations. The most common targets of these regulations are billboards⁶¹ and junkyards⁶² deemed offensive to scenic views from publicly accessible locations.

⁵⁸ See *Metromedia*, 453 U.S. at 528 (Brennan, J., concurring) (government must advance a sufficiently substantial purpose to justify ban on billboards).

⁵⁹ See, e.g., *Hopewell Township Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1343 (Pa. 1982).

⁶⁰ *Id.* at 1341. The same is true where the legitimate objective nonetheless results in a total deprivation of all economically viable use. See *infra* notes 260-65 and accompanying text (discussing 57 Ranch v. City of Yuma, 731 P.2d 113 (Ariz. Ct. App. 1986)).

⁶¹ Billboard and sign cases have been collected in RATHKOPF, *supra* note 27, § 14.02[4] at nn. 81 & 84. For the leading law review articles on billboard control, see *id.* § 14.01 at n.4.

⁶² See, e.g., *Chorzempa v. City of Huntsville*, 643 So. 2d 1021, 1024 (Ala. Crim. App. 1993) (upholding ordinance banning storage of junk); *Bachman v. State*, 359 S.W.2d 815, 817 (Ark. 1962) (holding automobile junkyard cannot be prevented solely upon aesthetic basis); *People v. Sevel*, 261 P.2d 359, 361 (Cal. App. Dep't Super. Ct. 1953) (upholding ordinance regulating junkyards and auto wrecking establishments); *Board of County Comm'rs of the County of Boulder v. Thompson*, 493 P.2d 1358, 1361-62 (Colo. 1972) (en banc) (upholding zoning provision barring automobile junkyard); *Murphy, Inc. v. Town of Westport*, 40 A.2d 177, 181-82 (Conn. 1944) (upholding ordinance affecting billboards); *Rotenberg v. City of Fort Pierce*, 202 So. 2d

For example, in *Pate v. City Council of Tuscaloosa*, a zoning ordinance restricting off-site billboards—billboards not located on the property they advertise—was upheld by the Court of Civil Appeals of Alabama.⁶³ The ordinance stated a primary purpose of traffic safety.⁶⁴ At trial, the city's planner and traffic engineer defended the safety nexus. The planner stated that "motorists, either intentionally or unintentionally, tend to take their eyes off traffic lights in an effort to see billboards."⁶⁵ According to the city engineer, "motorists can only process so much information as they drive, and other information which is unrelated to the operation of the vehicle can cause distractions, possibly reducing traffic safety."⁶⁶

782, 785 (Fla. Dist. Ct. App. 1967) (upholding regulation of junkyard on aesthetic basis alone); *Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 254 S.E.2d 846, 847 (Ga. 1979) (upholding ordinance regulating junkyards); *Jasper v. Commonwealth*, 375 S.W.2d 709, 711–12 (Ky. 1964) (upholding state's Junk Yard Act for a variety of reasons, including aesthetics); *City of Shreveport v. Brock*, 89 So. 2d 156, 158 (La. 1956) (upholding ordinance requiring fencing in of automobile junkyard); *Ace Tire Co. v. Municipal Officers of the City of Waterville*, 302 A.2d 90, 98–101 (Me. 1973) (upholding statute regulating junkyards in part); *Shifflett v. Baltimore County*, 230 A.2d 310, 315–16 (Md. 1967) (upholding ordinance requiring amortization of nonconforming junkyard); *National Used Cars, Inc. v. City of Kalamazoo*, 233 N.W.2d 64, 66 (Mich. Ct. App. 1975) (upholding ordinance requiring shielding of junkyards on aesthetic grounds alone); *City of St. Louis v. Friedman*, 216 S.W.2d 475, 478 (Mo. 1948) (upholding ordinance prohibiting junkyards in certain districts); *State v. Bernhard*, 568 P.2d 136, 138 (Mont. 1977) (upholding statute requiring shielding of junkyards on aesthetic grounds); *Village of Brady v. Melcher*, 502 N.W.2d 458, 462 (Neb. 1993) (upholding local ordinance regulating junkyards); *People v. Scott*, 258 N.E.2d 206, 210 (N.Y. 1970) (upholding junkyard regulation); *State v. Jones*, 290 S.E.2d 675 (N.C. 1982) (upholding county ordinance regulating junkyards on aesthetic grounds alone); *State v. Buckley*, 243 N.E.2d 66, 71 (Ohio 1968), (upholding statute requiring junkyard screening valid) *cert. denied*, 395 U.S. 163, 171 (1969); *Oregon City v. Hartke*, 400 P.2d 255, 261 (Ore. 1965) (*en banc*) (upholding zoning provision prohibiting auto wrecking yard from light industrial district on aesthetic grounds alone); *Cox v. Township of New Sewickley*, 284 A.2d 829, 833–34 (Pa. Commw. Ct. 1971) (upholding ordinance limiting junkyards); *State v. Smith*, 618 S.W.2d 474, 477 (Tenn. 1981) (upholding statute limiting junkyards on aesthetic and other grounds); *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 780 (Tex. Civ. App. 1972) (upholding ordinance regulating junkyards on aesthetic and other grounds); *Buhler v. Stone*, 533 P.2d 292, 294–95 (Utah 1975) (finding junkyard may be regulated by county ordinance on aesthetic grounds); *Town of Sandgate v. Colehamer*, 589 A.2d 1205, 1210–11 (Vt. 1990) (upholding zoning ordinance limiting junkyards for aesthetic reasons); *Lenci v. City of Seattle*, 388 P.2d 926, 934–35 (Wash. 1964) (*en banc*) (upholding ordinance limiting junkyards on aesthetic and other grounds); *Farley v. Graney*, 119 S.E.2d 833, 848 (W. Va. 1960) (upholding statute requiring the obstruction of highway travellers' views of junkyards); *Racine County v. Plourde*, 157 N.W.2d 591, 594–95 (Wis. 1968) (upholding regulation of junkyards based on aesthetics alone).

⁶³ 622 So. 2d 405 (Ala. Civ. App. 1993).

⁶⁴ The ordinance was enacted "to protect the safety and efficiency of the City's transportation network by reducing the confusion and distraction to motorists, reducing collision hazards and enhancing the motorists' ability to see pedestrians, obstacles, other vehicles and traffic signs." *Id.* at 407 (quoting ALA. CODE 1975 § 11-52-70).

⁶⁵ *Id.* at 408.

⁶⁶ *Id.*

The challenger, who was in the business of maintaining off-site billboards, asserted that this claim was "merely a 'smoke screen' used to veil the City's aesthetic pursuits."⁶⁷ The court rejected this claim: "Without addressing the propriety or impropriety of aesthetics as a purpose for zoning regulation by municipalities in Alabama, we hold that there is ample evidence regarding traffic safety concerns [to affirm the city's enforcement action]."⁶⁸

The Arizona Supreme Court,⁶⁹ in *Outdoor Systems, Inc. v. City of Mesa*, upheld a regulation on similar grounds.⁷⁰ The municipal zoning ordinance at issue restricted off-site billboards in order to "reduce advertising distractions, which may contribute to traffic accidents," and to "provide an improved visual environment for the citizens of and visitors to the City."⁷¹ The court was satisfied with the nexus to traffic safety: "We do not doubt that off-site billboards pose a significant threat to public safety and the general welfare. The sole purpose of such a structure is to occupy land and air space as conspicuously as possible to 'divert a driver's attention from the roadway.'"⁷² *Pate* and *Outdoor Systems* suggest that courts will defer to a municipality's assertion that there is a connection between billboards and traffic safety, even in the absence of detailed evidence.⁷³

Interestingly, billboard ordinances in states purportedly in the majority camp also continue to cite the link between aesthetic objectives and safety. For example, in *Goodman Toyota, Inc. v. City of Raleigh*, the North Carolina Court of Appeals examined an ordinance relating to windblown signs and blimps.⁷⁴ The ordinance's stated purposes were the promotion of traffic safety and fire protection.⁷⁵ The car dealer who challenged the ordinance claimed that the ordinance promoted primarily aesthetic objectives.⁷⁶ The court accepted this conclusion but upheld the measure: "A fortiori, when other worthwhile objectives are also realized, for example, improvement of traffic safety

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Arizona is firmly within the minority camp. See SMARDON & KARP, *supra* note 32, at 26.

⁷⁰ 819 P.2d 44, 53 (Ariz. 1991).

⁷¹ *Id.* at 49.

⁷² *Id.* (quoting *Metromedia, Inc. v. City of San Diego*, 26 Cal.3d 848, 859 (1980). The court ignored Justice Brennan's concerns with this link. See *supra* note 56.

⁷³ See *Pate v. City Council of Tuscaloosa*, 622 So. 2d 405, 410 (Ala. Civ. App. 1993); *Outdoor Systems*, 819 P.2d at 49; see also *Art Van Furniture Inc. v. City of Kentwood*, 437 N.W.2d 380, 384 (Mich. Ct. App. 1989).

⁷⁴ 306 S.E.2d 192, 193-95 (N.C. Ct. App. 1984).

⁷⁵ *Id.* at 194.

⁷⁶ This claim came despite the fact that aesthetic purposes, standing alone, had been endorsed by the state's supreme court one year earlier in *State v. Jones*, 290 S.E.2d 675, 681 (N.C. 1982).

and the protection of property values, the challenged regulation will be deemed to be within the range of permissible purposes properly achieved through use of the police power."⁷⁷

Courts also have upheld ordinances restricting other types of eyesores where a nexus between aesthetic goals and public safety exists. For example, in *Village of Brady v. Melcher*, the Nebraska Supreme Court reviewed an ordinance that deemed wrecked or junked vehicles a nuisance and authorized abatement after a thirty-day period.⁷⁸ The court characterized the measure as an ordinance to "define, regulate, suppress and prevent nuisance[]" and held that the restrictions "protect the public health and welfare."⁷⁹ The obvious enhancement of the village's visual character was a secondary benefit.⁸⁰ Courts have also had occasion to cite the health or safety rationale while upholding regulations addressed to such varied eyesores as antennae and towers,⁸¹ litter and debris,⁸² recreational⁸³ and business⁸⁴ vehicles, and mobile homes.⁸⁵

⁷⁷ *Goodman Toyota*, 306 S.E.2d at 194; see also *City of Hot Springs v. Carter*, 836 S.W.2d 863 (Ark. 1992); *Temple Baptist Church, Inc. v. City of Albuquerque*, 646 P.2d 565 (N.M. 1982).

⁷⁸ 502 N.W.2d 458 (Neb. 1993).

⁷⁹ *Id.* at 462.

⁸⁰ See *Chorzempa v. City of Huntsville*, 643 So. 2d 1021, 1023 (Ala. Crim. App. 1993) (ordinance banning storage of junk bears substantial relationship to public health and is not vague).

⁸¹ See, e.g., *Schroeder v. Municipal Court of Los Cerritos*, 141 Cal. Rptr. 85, 90 (Cal. Ct. App. 1977) (upholding ordinance limiting radio or television antenna over 40 feet in height); *Gouge v. City of Snellville*, 287 S.E.2d 539, 543 (Ga. 1982) (upholding ordinance prohibiting satellite dish antenna in front yard); *State ex rel. Columbia Tower v. Boone County*, 829 S.W.2d 534, 538 (Mo. Ct. App. 1992) (upholding denial of conditional use permit for 620 foot communication tower on aesthetic basis). But see *Nationwide Satellite Co. v. Zoning Bd. of Adjustment of Haddon Heights*, 578 A.2d 389, 395 (N.J. Super. Ct. App. Div. 1990) (holding satellite dish antenna ordinance must yield to federal power); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 590-93 (Pa. 1973) (holding 307-foot tower not proscribed by statute).

⁸² See, e.g., *City of Lebanon v. McClure*, 541 N.E.2d 1073, 1077 (Ohio Ct. App. 1988) (upholding municipal code provision addressing unsightly blight and deterioration). But see *Town of Georgetown v. Vanaman*, 648 A.2d 426 (Del. 1994) (holding ordinance addressing "unregulated growth" of weeds void for vagueness); *Village of Deshler v. Hoops*, 196 N.E.2d 476, 479-80 (Ohio 1963) (holding ordinance regulating eyesores void for vagueness).

⁸³ See, e.g., *City of Coral Gables v. Wood*, 305 So. 2d 261, 263-64 (Fla. Dist. Ct. App. 1974) (upholding ordinance banning storage of recreational vehicle on the basis of neighborhood aesthetics); *Johnson v. Village of Morton*, 352 N.E.2d 456, 457-58 (Ill. App. Ct. 1976) (upholding zoning provision barring parking of campers in residence district on various grounds); *Recreational Vehicle United Citizens Ass'n v. City of Sterling Heights*, 418 N.W.2d 702, 707 (Mich. Ct. App. 1987) (upholding ordinance banning parking of various recreational vehicles in residential area for aesthetic and other reasons).

⁸⁴ See, e.g., *People v. Tolman*, 168 Cal. Rptr. 328, 332 (Cal. App. Dep't Super. Ct. 1980) (upholding zoning provision limiting business vehicle parking in residence district); *Warren v. City of Marietta*, 288 S.E.2d 562, 564 (Ga. 1982) (upholding ordinance banning parking of business vehicles on aesthetic grounds).

⁸⁵ See, e.g., *City of Lewiston v. Knieriem*, 685 P.2d 821, *passim* (Idaho 1984) (upholding

2. Critical Resource Protection Districts

Health and safety rationales are also available where visual resource protection is achieved in conjunction with protection of other aspects of a critical resource area. Scenic areas generally overlap traditional natural resource areas. This overlap promotes an easy alliance between aesthetic and environmental protection. For example, regulations limiting development within flood plains or wetlands have the primary purpose of public health or safety; they also secondarily protect the scenic aspects of the resource area.

The nexus between protection of natural and scenic resources has proven useful regardless of a state's position on the "aesthetics alone" question. For example, in *Town of Freeport v. Brickyard Cove Associates*, the Supreme Judicial Court of Maine⁸⁶ upheld the town's zoning provision establishing a Resource Protection District.⁸⁷ The district was designed to limit development on the town's shoreline:

It is the intent of this District to protect the most fragile shoreline and natural areas, including flood plains, critical aquifer recharge areas and fresh and salt water wetlands, in which development would lower the water quality, significantly disturb essential natural plant and animal relationships, or general scenic and natural values, and to discourage development in unsafe or unhealthy areas.⁸⁸

The defendant was charged with a zoning violation after clearcutting a waterfront parcel.⁸⁹ The town's chief concern was the defendant's failure to employ erosion-control measures,⁹⁰ which were required by the performance standards of the bylaw. However, the clearcutting

ordinance banning mobile homes in farm zone on various grounds, including aesthetics); *Warren v. Municipal Officers of Gorham*, 431 A.2d 624, 628-30 (Me. 1980) (upholding zoning provision banning modular homes on aesthetic and other bases); *State v. Murray*, 471 S.W.2d 460, 463 (Mo. 1971) (upholding ordinance banning mobile homes in residence district); *Suddell v. Zoning Bd. of Appeals*, 327 N.E.2d 809, 811 (N.Y. 1975) (upholding zoning provision limiting location of mobile homes); *City of Pepper Pike v. Landskroner*, 371 N.E.2d 579, 587-88 (Ohio Ct. App. 1977) (upholding ordinance limiting house trailers based, in part, on aesthetics); *Mobile Home City of Chattanooga v. Hamilton County*, 552 S.W.2d 86, 89 (Tenn. Ct. App. 1977) (upholding mobile home limitations). *But see* *Town of Chesterfield v. Brooks*, 489 A.2d 600, 604-05 (N.H. 1985) (rejecting zoning regulation limiting mobile homes to certain locations); *White v. Union County*, 377 S.E.2d 93, 95-96 (N.C. Ct. App. 1989) (challenging county zoning regulation setting standards for mobile home use).

⁸⁶ Maine is in the majority camp. *See* SMARDON & KARP, *supra* note 32, at 26.

⁸⁷ 594 A.2d 556, 558 (Me. 1991).

⁸⁸ *Id.*

⁸⁹ The bylaw permitted "timber harvesting," which required a "well-distributed stand of trees" to be left intact after cutting. *Id.*

⁹⁰ *Id.* at 559. The silt from the site had entered off-shore mussel beds, which caught the attention of the town's shellfish warden. *Id.* at 557.

also opened a "hole" in the forest canopy larger than the 7,500 square feet permitted under the bylaw.⁹¹ The town's concern for shoreline views, although of secondary importance in this matter, clearly was addressed by its multi-purpose bylaw.

Scenic views have similarly been enhanced by districts designed to protect wetlands,⁹² flood plains,⁹³ aquifers,⁹⁴ watersheds,⁹⁵ steep slopes,⁹⁶ and shorelines⁹⁷ primarily on the grounds of public health or safety. Even districts only peripherally associated with these traditional police power objectives have promoted view protection as an ancillary purpose. Foremost in this category are agricultural protection districts. In *Kentview Properties, Inc. v. City of Kent*, the Court of Appeals of Washington upheld a zone change that placed certain lands into an agricultural district.⁹⁸ The court cited the farmland protection element of the city's comprehensive plan:

Farmlands are important to the local economy The value of farmlands, however, goes beyond economic considerations. Farmlands play an important role in the protection of fragile natural environments such as wetlands and streams, and contribute to certain wildlife habitat needs. In addition, farmlands function as a valuable scenic and open space resource⁹⁹

On similar reasoning, districts designed to protect forests¹⁰⁰ and other locally sensitive areas¹⁰¹ have worked to preserve scenic views.

⁹¹ *Id.* at 559.

⁹² *See, e.g., id.* at 558; 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n, 737 P.2d 607, 609 (Or. 1987).

⁹³ *See, e.g., Town of Freeport*, 594 A.2d at 558; *Just v. Marinette County*, 201 N.W.2d 761, *passim* (Wis. 1972).

⁹⁴ *See, e.g., Town of Freeport*, 594 A.2d at 558; 1000 Friends of Oregon, 737 P.2d at 609.

⁹⁵ *See, e.g., 1000 Friends of Oregon*, 737 P.2d at 607.

⁹⁶ *See, e.g., Beacon Hill Farm Assocs. II Ltd. Partnership v. Loudoun County Bd. of Supervisors*, 875 F.2d 1081, 1085 (4th Cir. 1989) (remanding facial challenge to ordinance with purposes including preservation of significant natural resource areas and proper development on slopes).

⁹⁷ *See, e.g., McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989); *Just*, 201 N.W.2d at 761 (lakefront).

⁹⁸ 795 P.2d 732, 736 (Wash. App. 1990); *see also Waker Assocs., Inc. v. Clackamas County*, 826 P.2d 20, 22-23 (Or. App. 1992) (affirming reversal of permit denial that had been based on conflict with agricultural preservation goal); *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981) (upholding zoning ordinance provision favoring those engaged in agriculture); *Board of Supervisors of Fauquier County v. Machnick*, 410 S.E.2d 607, 609 (Va. 1991) (upholding decision applying 85% open space requirement to all subdivisions in rural agricultural district).

⁹⁹ *Kentview Properties*, 795 P.2d at 736.

¹⁰⁰ *See, e.g., Dodd v. Hood River County*, 855 P.2d 608 (Or. 1993) (reviewing permit denials for construction in forest zone); 1000 Friends of Oregon, 737 P.2d at 607.

¹⁰¹ *See, e.g., 1000 Friends of Oregon*, 737 P.2d at 607.

3. Protection of Property Values

Localities in minority position states have used an expanded view of the general welfare prong to serve as the legal basis for regulation of visual resources. In particular, courts in these jurisdictions have endorsed the preservation of property values as a legitimate police power purpose. The property value rationale provides an additional nexus where aesthetic regulation cannot stand alone.

The link between aesthetic regulation and property values was endorsed in *Chorzempa v. City of Huntsville*.¹⁰² The municipal junkyard ordinance at issue in the case was designed, in part, to prevent unsightliness and the aggravation of urban blight.¹⁰³ The Alabama Court of Criminal Appeals upheld the ordinance based on the link to property values:

Current authorities recognize neighborhood aesthetics to be integrally bound to property values and to be relevant considerations in zoning when they bear in a substantial way upon land utilization We hold . . . : "It is apparent that the statutory grant of police powers to municipalities encompasses the authority to enact regulatory ordinances for the protection and preservation of property values affecting the general welfare of the community."¹⁰⁴

Similarly, in *State ex rel. Columbia Tower, Inc. v. Boone County*,¹⁰⁵ the Missouri Court of Appeals upheld the denial of a conditional use permit for construction of a 620-foot communications tower.¹⁰⁶ The

¹⁰² 643 So. 2d 1021 (Ala. Ct. App. 1993).

¹⁰³ *Id.* at 1022.

¹⁰⁴ *Id.* at 1024 (quoting *Township of Livingston v. Marchev*, 205 A.2d 65, 67 (N.J. Super. 1964)).

¹⁰⁵ 829 S.W.2d 534 (Mo. App. 1992). Missouri is in the majority camp. Several other majority states have embraced the rationale of property values. *See, e.g.,* *City of Lewiston v. Knieriem*, 685 P.2d 821, 824-25 (Idaho 1984); *City of Independence v. Richards*, 666 S.W.2d 1, 6 (Mo. App. 1983); *Village of Hudson v. Albrecht, Inc.*, 458 N.E.2d 852, 857 (Ohio 1984); *City of Kettering v. Lamar Outdoor Advertising, Inc.*, 525 N.E.2d 836, 838 (Ohio App. 1987).

¹⁰⁶ 829 S.W.2d at 535. In *Columbia Tower*, a local adjudicatory decision rather than the constitutionality of a local regulation is under review. Other courts have also sustained local adjudicatory decisions based on impacts to scenic resources. *See* *Pacifica Homeowners' Ass'n v. Wesley Palms Retirement Community*, 224 Cal. Rptr. 380, 383-84 (Cal. App. 4 Dist. 1986) (holding conditional use permit not violated when trees grow so as to obstruct ocean views); *Sharrett v. Campbell*, 440 N.E.2d 167, 172-73 (Ill. App. 1982) (despite impacts on view, landowners equitably estopped from demanding removal of building); *Boyle v. Kosciusko County*, 565 N.E.2d 1157 (Ind. Ct. App. 1991) (denial of variance affirmed where proposed changes impact views); *Forester v. City of Westbrook*, 604 A.2d 31, 32 (Me. 1992) (impact on views sufficient injury for standing purposes); *Burbridge v. Mine Hill Township*, 568 A.2d 527, 535-36 (N.J. 1990) (upholding variance where auto junkyard's appearance will be improved). *Cf.* *Conley v. Town of Brookhaven Zoning Bd. of Appeals*, 353 N.E.2d 594, 597 (N.Y. 1976) (award of variance upheld despite impacts to views); *Drulard v. LeTourneau*, 593 P.2d 1118, 1123-24 (Or. 1979) (despite impacts on view, house within height limitation); *Murray v. Columbia River Gorge*

criteria to be considered in the permitting process included the public's "comfort" and "general welfare," impacts on property in the immediate vicinity, and diminution of property values.¹⁰⁷ At the administrative hearing, abutting landowners presented evidence to the county commission concerning the visual impact of the tower upon surrounding property.¹⁰⁸ The court noted that such aesthetic considerations "are appropriate in zoning matters."¹⁰⁹ However, the court sustained the permit denial, chiefly because the aesthetic impacts were "inextricably intertwined with property values."¹¹⁰

Beverly A. Rowlett¹¹¹ has argued quite persuasively that the "newly discovered and much relied-on property values justification is merely derived from that old pariah, aesthetics."¹¹² In reviewing decisions through 1981, she noted:

In most cases it is probably true that aesthetic considerations and economics are "inextricably intertwined." 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.¹¹³

In this view, the property values rationale is but the latest in a series of ruses, in line with the regulations and decision in *St. Louis Gunning*, designed to camouflage the aesthetic purposes behind a local regulation.¹¹⁴

No recent case bears this view out more than *Coscan Washington, Inc. v. Maryland-National Capital Park & Planning Commission*, in which the "inextricable" link between landscape aesthetics and property values was granted considerable deference.¹¹⁵ In this case,

Comm'n, 865 P.2d 1319, 1320 (Or. App. 1993) (subdivision denied, in part, because of impacts to view).

¹⁰⁷ See *Columbia Tower*, 829 S.W.2d at 536.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Beverly A. Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603 (1981).

¹¹² *Id.* at 622.

¹¹³ *Id.* at 623.

¹¹⁴ Rowlett comments that "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." *Id.* at 624. She attributes this to two factors: "the presumption of constitutionality, and the difficulty of obtaining objective evidence on such speculative matters." *Id.*

¹¹⁵ 590 A.2d 1080 (Md. App. 1991).

the county planning board was empowered to consider in its subdivision review "sites, structures, areas, or settings of archeological, historical, architectural, cultural, or scenic value or significance."¹¹⁶ The underlying controversy arose when the board approved a residential subdivision plan but attached conditions requiring the use of specific building materials.¹¹⁷

The Maryland Court of Special Appeals rejected the county's contention that the conditions were valid even if they were devised solely to promote an aesthetic purpose. In Maryland, the court noted, this position is anathema.¹¹⁸ Instead, the court upheld the conditions on several alternative grounds. The conditions would, according to the testimony of the commission, improve the quality of the county's housing stock.¹¹⁹ This constituted an enhancement of property values.¹²⁰ Also crucial for the court was the benefit to the scenic area adjacent to the proposed subdivision, which was rolling farmland with "a little narrow one-lane country road with tall oak trees on each side."¹²¹

Without much comment, the court salvaged the county's decision by piggybacking one aesthetic objective—limitations on the use of vinyl siding—on another—preservation of scenic views—and by citing a rather weak nexus to enhanced property values. Unless one attaches paramount importance to the economic benefits of the board's permit conditions, it seems inescapable that the conditions were imposed for purposes patently and primarily aesthetic.

4. Promotion of Tourism

Local regulations to protect visual resources have been upheld based on a nexus to the promotion of tourism. In minority position states, the benefit to tourism provides the necessary rationale under the general welfare prong of the police power.¹²² Rowlett has similar qualms regarding this approach:

¹¹⁶ *Id.* at 1086.

¹¹⁷ The county mandated that 60% of the homes be constructed of brick, wood, stone, or stucco. Homes sided with aluminum or vinyl were to be kept distant from a neighboring historic location. The developer protested this condition. *Id.* at 1085.

¹¹⁸ The court sternly advised that it had no intention of modernizing its position: "To accept this argument would, in effect, validate all governmental attempts to regulate aesthetics as legitimate regulations for the general welfare. This would overrule [*City of Baltimore v. Mano Swartz*, 299 A.2d 828 (Md. App. 1973)] and a long line of cases." *Id.* at 1087.

¹¹⁹ This, in turn, would enhance the "image of the County as a good place to live and work," and assure "sound economic development and the expansion of the tax base." *Id.* at 1089.

¹²⁰ *Id.* at 1085 n.5.

¹²¹ *Id.* at 1089.

¹²² See, e.g., *Rotenberg v. City of Fort Pierce*, 202 So. 2d 782 (Fla. Dist. Ct. App. 1967). The

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 pretend is not present. . . . 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.¹²³

Notwithstanding the accuracy of Rowlett's observations regarding the aesthetic basis of the tourism rationale, courts repeatedly cite promotion of tourism as a primary or secondary purpose of local regulations to protect the scenic landscape. For example, in *Donrey Communications Co. v. City of Fayetteville*, the Supreme Court of Arkansas cited with approval the tourism goals of an ordinance that restricted billboards.¹²⁴ In adopting the measure, the city board of directors found that "a large and increasing number of tourists have been visiting the [c]ity . . . , and as a result the tourist industry is a direct source of income for citizens of [the] city, with an increasing number of persons directly or indirectly dependent upon the tourist industry for their livelihood."¹²⁵ The court ruled that the ordinance "directly advances the legitimate governmental interests in traffic safety, the aesthetic landscape and the tourism industry."¹²⁶ Courts in Maine,¹²⁷ Florida,¹²⁸ and North Carolina¹²⁹ have similarly endorsed this

decision came before Florida adopted its present stance following the majority "aesthetics alone" position. In *Rotenberg* the District Court of Appeal of Florida upheld the city's zoning provision calling for the screening of junkyards. The court held that aesthetics constituted a valid basis for zoning in Florida and linked this to the city's "attraction to tourists." *Id.* at 785-86. Other minority camp decisions endorse the connection between tourism and landscape aesthetics. See *Mississippi State Highway Comm'n v. Roberts Enter., Inc.*, 304 So. 2d 637, 640 (Miss. 1974) (state's natural beauty "attract[s] thousands of visitors annually"); In re Opinion of the Justices, 169 A.2d 762, 764 (N.H. 1961) ("[T]he general welfare of the State is enhanced when tourist business is good."). Both states have now embraced the majority position.

¹²³ Rowlett, *supra* note 111, at 634.

¹²⁴ 660 S.W.2d 900 (Ark. 1983).

¹²⁵ *Id.* at 903.

¹²⁶ *Id.* In reaching its conclusions the court cited *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 508-11 (1981), discussed *supra* notes 44, 56, and accompanying text. *Id.*

¹²⁷ See *John Donnelly & Sons v. Mallar*, 453 F. Supp. 1272, 1276 (D. Me. 1978).

¹²⁸ See *Lamar-Orlando Outdoor Advertising v. City of Ormond Beach*, 415 So. 2d 1312, 1315 (Fla. Ct. App. 1982).

¹²⁹ See *R.O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 388, 390 (N.C. Ct. App. 1982).

connection. Thus, despite their insistence on an alternative rationale, courts in the minority camp have demonstrated considerable tolerance for protection of the visual resource. The restriction of eyesores, protection of scenic areas, and use of aesthetic criteria in adjudicatory decisionmaking are all permissible local regulatory devices in these jurisdictions. As seen in *Coscan Washington* and similar decisions, minority position courts tend to loosely apply the requirement that aesthetic regulations be tied to an alternative rationale. In contrast, courts in the majority camp have addressed questions concerning the legitimacy of scenic protection more directly.

III. LANDSCAPE PROTECTION AS A PRIMARY OR SOLE PURPOSE

A. *The Absence of an Articulated Rationale for Landscape Protection*

As noted in Section I, aesthetic goals have been accepted in a majority of jurisdictions as a legitimate exercise of the police power, even when standing alone.¹³⁰ Without much fanfare, courts in these states have found that ordinances that seek “to protect the unique aesthetics” of an area¹³¹ or promote “the preservation or enhancement of the visual environment”¹³² promote objectives sufficiently related to the general welfare to fit within that prong of the police power. As these courts have made clear, judicial support for legislation promoting aesthetic objectives does not depend on the presence of ancillary purposes, whether the protection of health or safety, the preservation of property values, or the promotion of tourism.¹³³

But on what reasoning? Why is “beauty,” whether found in the landscape or in architecture, a worthy goal of government regulation? In endorsing the use of the police power to accomplish purely aesthetic goals, rarely does a reviewing court express its understanding of the nexus between aesthetics and the general welfare. Of course, courts embracing the pursuit of aesthetic goals sometimes acknowledge that beauty is preferable to blight.¹³⁴ But such statements hardly address those fundamental due process questions regarding the ex-

¹³⁰ See *supra* notes 30–32 and accompanying text.

¹³¹ See *Town of Hilton Head v. Fine Liquors, Ltd.*, 397 S.E.2d 662, 664 (S.C. Super Ct. 1990).

¹³² See *Town of Conway v. Cardiff & Co.*, 628 A.2d 247, 250 (N.H. 1993).

¹³³ See *infra* section III.D.

¹³⁴ See, e.g., *Metromedia, Inc. v. City of San Diego*, 592 P.2d 728, 748, (Cal. 1979), *reversed*, 610 P.2d 407 (Cal. 1980), in which the court’s analysis consists of a quote from Ogden Nash:

istence of cognizable public benefits of aesthetic regulation aptly summarized in *Youngstown v. Kahn Bros. Building Co.*¹³⁵

If there exists a rationale that supports aesthetic goals in landscape protection, then Justice Douglas's intuitive statement in *Berman v. Parker*—that the values representing the public welfare “are spiritual as well as physical, aesthetic as well as monetary”¹³⁶—will have turned out to be quite prescient. By equating spirituality and aesthetics, Justice Douglas anticipated work performed in a host of disciplines—including philosophy, psychology, geography, economics, regional planning, and landscape architecture—exploring the concept of landscape aesthetics. These disciplines have contributed greatly to our understanding of the role of the scenic resource in promoting the general welfare.

B. Visual Resources and the General Welfare

The chief contribution of the academic discussion of landscape aesthetics is acknowledgement of the scenic landscape as a valuable resource, much like the air or water resources already protected by regulation. In the landscape aestheticists' view,

the landscape is more than a passive backdrop. It is the stage on which we move. The events of life take place somewhere and that “whereness” affects the perception of the event. The visual landscape, the environment we see, gives shape to our character. The objects and forms in that landscape influence our actions, guide our choices, affect our values, restrict or enhance our freedom, determine where and with what quality we will mix with each other. The perceived landscape molds our dreams, locates our fantasies and in some mysterious way even predicts our future.¹³⁷

This conception of the scenic resource is obviously at odds with the sentiments expressed in *Youngstown v. Kahn Bros. Building Co.*¹³⁸ There, the Supreme Court of Ohio held that “[m]ere aesthetic considerations [are] commendable and desirable, but not essential to the

I think that I shall never see
A billboard lovely as a tree.
Indeed, unless the billboards fall,
I'll never see a tree at all.

This limerick is also cited approvingly in *Goodman Toyota, Inc. v. City of Raleigh*, 306 S.E.2d 192, 194 (N.C. Ct. App. 1983) (billboard regulation upheld).

¹³⁵ See *infra* notes 138–39 and accompanying text; see also *infra* note 159 and accompanying text.

¹³⁶ 348 U.S. 26, 33 (1954).

¹³⁷ Gussow, *supra* note 1, at 7.

¹³⁸ 148 N.E. 842 (Ohio 1925).

public need"¹³⁹ The study of landscape aesthetics, on the other hand, links aesthetic goals to the general welfare by emphasizing the crucial role of visual resources in various aspects of daily life.¹⁴⁰

Indeed, it can be argued that reverence for the landscape has always been an essential component of the American psyche.¹⁴¹ Pastoralism—exaltation of the beauty and simplicity of rural life—has been a recurring cultural theme throughout our history.¹⁴² As Peter G. Rowe argues in his recent work *Making a Middle Landscape*,¹⁴³ the pastoral theme can be traced to Ralph Waldo Emerson¹⁴⁴ and

¹³⁹ *Id.* at 842.

¹⁴⁰ See, e.g., D.W. Meinig, *The Beholding Eye—Ten Versions of the Same Scene*, 66 LANDSCAPE ARCHITECTURE 47 (1976). The author suggests that ten persons viewing the same landscape might avoid "the technical thickets of optics, psychology, epistemology, or culture to converse intelligently about the topic," which is "far too fascinating and important to be left fragmented and obscured in the jargon of such specialists." *Id.* at 47. The author then goes on to review the various ways the members of the group might describe the same scene: landscape as nature, habitat, artifact, system, problem, wealth, ideology, history, place, and aesthetic. *Id.* at 47–54.

¹⁴¹ Reverence for the landscape may in fact be an essential part of the human condition. Edward O. Wilson and others have suggested that the roots of landscape aesthetics may be evolutionary in nature. See generally EDWARD O. WILSON, *BIOPHILIA* (1984). This "biophilia hypothesis" asserts that our affinity with nature may be genetic in origin:

[T]he basic proposition is that certain rewards or advantages associated with natural settings during evolution were so critical for survival as to favor the selection of individuals with a disposition to acquire, and then retain, various adaptive positive/approach responses to unthreatening natural configurations and elements. From this it follows that as a remnant of evolution, modern humans might have a biologically prepared readiness to learn and persistently retain certain positive responses to nature but reveal no such preparedness for urban or modern elements and configurations.

Roger S. Ulrich, *Biophilia, Biophobia, and Natural Landscapes*, in *THE BIOPHILIA HYPOTHESIS* 73, 88 (Stephen R. Kellert & Edward O. Wilson eds., 1993).

¹⁴² See LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 3 (1964) ("[T]he pastoral ideal has been used to define the meaning of America ever since the age of discovery, and it has not yet lost its hold upon the native imagination.").

¹⁴³ See PETER ROWE, *MAKING A MIDDLE LANDSCAPE* 218–34 (1991) (discussing the American pastoral tradition).

¹⁴⁴ Rowe cites Emerson's tract *Nature*, written in 1836, as an early American expression of the pastoral ideal. *Id.* at 221. Emerson exalts nature as preferable to the city:

Here is the sanctity which shames our religions, and reality which discredits our heroes. Here we find Nature to be the circumstance which dwarfs every other circumstance, and judges like a god all men that come to her. We have crept out of our close and crowded houses into the night and morning, and we see what majestic beauties daily wrap us in their bosom. How willingly we would escape the barriers which render them comparatively impotent, escape the sophistication and second thought, and suffer nature to entice us. The tempered light of the woods is like a perpetual morning, and is stimulating and heroic. The anciently-reported spells of these places creep up on us. The stems of pines, hemlocks and oaks almost gleam like iron on the excited eye. The incommunicable trees begin to persuade us to live with them, and quit our life of solemn trifles. Here no history, or church, or state, is interpolated on the divine sky and the immortal year. How easily we might walk onward into the opening landscape, absorbed

Nathaniel Hawthorne¹⁴⁵ in literature and to Thomas Cole¹⁴⁶ in landscape painting.¹⁴⁷

Pastoralism is a cornerstone of American intellectual and artistic experience, particularly when it comes to location of appropriate grounds for human settlement. Although there are certain naive and simpleminded applications of the concept as an escape from civilization and urbanity, pastoralism is essentially a complex formulation. Although it never denies the self-enlightening and moral benefits to be gained by a rural existence, it does not deny technological developments either. In its most sophisticated forms, pastoralism continues to serve as a critical lens through which to mark human progress and as an optimistic source for dealing with threats encroaching from either a natural or an urban wilderness. It also serves to remind us of basic, honest social values, particularly during the times of considerable change.¹⁴⁸

Thus, for more than two hundred years, the pastoral ideal has shaped the national identity. Statistics suggest the breadth of America's attachment to the landscape. According to the 1994 National Environmental Forum Survey conducted by Roper Starch Worldwide, seventy-nine percent of Americans expressed concern for the

by new pictures and by thoughts fast succeeding each other, until by degrees the recollection of home was crowded out of the mind, all memory obliterated by the tyranny of the present, and we were led in triumph by nature.

RALPH WALDO EMERSON, *Nature*, in THE SELECTED WRITINGS OF RALPH WALDO EMERSON 406, 406-07 (Brooks Atkinson ed., 1968).

¹⁴⁵ Rowe notes that Marx cites Hawthorne's *Sleepy Hollow*, written in 1844, as an example of "imaginative and complex" pastoralism, in which the opposing forces of countryside and city form a dialectic. ROWE, *supra* note 143, at 219. The same theme occurs in many of Hawthorne's short stories, including *The New England Village*:

Some years ago it was my destiny to reside in a New England village. Nothing can be more pleasant than its situation. All that nature ever did for a place, she has done for this. It is sheltered on the north by high hills, and fringed on the south with forests of oaks and elms; it has waterfalls and cascades, and, what is more surprising, they are suffered to flow on through meadow and valley, without being condemned to the treadmill. In this country everything is compelled to do duty. Our forests are cut down for firewood; our rocks hewn into state prisons, and some of our modern speculators mean to make old Niagara, that has roared and bellowed so many hundred years for its own amusement, actually work for its living, and support cotton and woolen manufactures.

NATHANIEL HAWTHORNE, *The New England Village*, in THE COMPLETE SHORT STORIES OF NATHANIEL HAWTHORNE 584, 584 (1959). Of course, Hawthorne expressed similar sentiments in stories such as *The Great Stone Face* and other accounts of Franconia Notch in the White Mountains of New Hampshire. NATHANIEL HAWTHORNE, *THE GREAT STONE FACE* (1931).

¹⁴⁶ Rowe cites Cole's landscape paintings after 1827 as expressive of the pastoral theme, including *Expulsion from the Garden of Eden*, and *The Oxbow*. ROWE, *supra* note 143, at 222-23.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 226-27.

environment.¹⁴⁹ Forty-two percent of Americans say they have contributed to environmental organizations, and fifty-four percent say they are likely to do so.¹⁵⁰ An appreciation of scenic beauty and natural landscapes surely has become a part of our collective national psyche.

Why does this attraction to the scenic landscape persist? Much recent work concludes that there is an undeniable "aesthetic experience" connected to the landscape.¹⁵¹ The nature of this aesthetic experience "refers to the subjective thoughts, feelings, and emotions expressed by an individual during the course of an experience."¹⁵² The experience has both philosophical and psychological manifestations. In the philosophical realm, it has been asserted that,

aesthetic experiences have a completeness and coherence, a unity that makes them stand out from the experiences and flow of everyday life. The experience is said to be intrinsically gratifying in that the percipient derives a satisfying pleasure from merely beholding the object (in this case, a landscape). . . . [D]uring the aesthetic experience we behold an object without wanting to acquire it, possess it, use it, consume it, or in some other way regard it for its potential utility. Simply beholding the object gives us the special experience that we derive from objects that please us merely upon being seen.¹⁵³

In short, the benefit of the aesthetic experience—inherent pleasure—is invaluable.

Studies of landscape aesthetics have also pointed to the psychological aspects of the aesthetic experience. In assessing the nature of conscious experience—of which aesthetic experience is only a part—certain "peak" or "flow" experience has been isolated and characterized. One scholar has observed that such experience has

a richness otherwise not present in the experience of ordinary life events, a unity within itself, and a detachment from the normal flow of events. Although the experience is highly valued and desirable, it is not something one can force to happen. Instead, . . . the experience is a passive one that comes to the individual, who is in a properly responsive state of mind. . . . [T]he experience

¹⁴⁹ David B. Rockland & Gwyn L. Fletcher, *The Economy, the Environment, and Public Opinion*, 20 EPA J. 39 (Fall 1994).

¹⁵⁰ *Id.* at 40.

¹⁵¹ The concept of the "aesthetic experience" is discussed in Richard E. Chenoweth and Paul H. Gobster, *The Nature and Ecology of Aesthetic Experiences in the Landscape*, LANDSCAPE J., Spring 1990, at 1-8.

¹⁵² *Id.* at 2.

¹⁵³ *Id.*

may cause the percipient to feel disoriented in space and time and to have a sense of humility, unity, and introspection.¹⁵⁴

The natural landscape may also present psychologically valuable opportunities for leisure and recreation. While little research has been done on the link between landscape aesthetics and psychological well-being, "[a] large body of research on recreational experiences has shown convincingly that leisure activities in natural settings are important for helping people cope with stress as well as in meeting other needs unrelated to stress."¹⁵⁵ Furthermore, "there are indications in some recreation studies that part of the restoration benefit stems from exposure to natural surroundings."¹⁵⁶ In other words, recreational activities in the natural landscape may have a recuperative effect. This effect has been confirmed by studies which have shown that "viewing unthreatening natural landscapes tends to promote faster and more complete restoration from stress than does viewing unblighted urban or built environments lacking nature."¹⁵⁷ Taken together, these studies suggest that the scenic landscape plays a valuable role in our collective mental health.¹⁵⁸

¹⁵⁴ *Id.* at 2-3; see also Kenneth H. Craik, *The Comprehension of the Everyday Physical Environment*, LANDSCAPE J. 29 (1968).

¹⁵⁵ Ulrich, *supra* note 141, at 100-01.

¹⁵⁶ *Id.* at 101 (citation omitted).

¹⁵⁷ *Id.* at 102. These studies have involved prison inmates, psychiatric patients, and acutely stressed patients in health care settings. According to Ulrich, these populations "provide some of the best opportunities for scientific research in real environments on the effects of viewing nature" *Id.* at 106.

¹⁵⁸ At least one recent case takes seriously the nexus between psychological well-being and landscape aesthetics. In *Crown Motors v. City of Redding*, 283 Cal. Rptr. 356 (Cal. Ct. App. 1991), the Court of Appeals of California reviewed an ordinance prohibiting electronic reader boards. The ordinance was passed as an "urgency measure." *Id.* at 357. An urgency measure, unlike a run-of-the-mill ordinance, takes effect immediately. However, the ordinance must address the "immediate preservation of the public peace, health or safety" and contain "a declaration of the facts constituting the urgency." *Id.* at 359. The adoption of this ordinance as an urgency measure had the effect of eliminating any vested rights possessed by the advertiser.

The stated purposes of the ordinance included the prevention of hazards to life and property, the protection of property values, and the maintenance of the "attractiveness of the community." *Id.* at 358. In its declaration of facts supporting the ordinance, the city amplified its reasoning:

It is hereby found that the public health need of the community is met by the immediate imposition of a ban on electronic reader-board signs since such signs are aesthetically displeasing and out of harmony with the character of this community so as to constitute visual blight which reduces the quality of life within the community to the extent that the overall public health is detrimentally affected.

Id. The court noted that "public health" is a flexible term, which "must be interpreted according to the circumstances in which it is used." *Id.* at 359. In a novel ruling, the court equated aesthetics with mental health:

We see no reason to restrict from these broad powers, within the spectrum of public health, the power of the city council to advance the quality of life in the community by

Thus, there is ample support for the proposition that enhancement of the visual resource constitutes a valid public purpose. The historical, philosophical, and psychological literature of landscape aesthetics describes a link between the scenic visual resource and aesthetic experience. Aesthetic experience has intrinsic value; it is also a component of leisure, recreation, and stress-reduction. These contributions of the scenic landscape undoubtedly promote the general welfare. While few, if any, courts have acknowledged or described the exact dimensions of the connection between landscape aesthetics and the public welfare, the academic literature has established a solid foundation for the demonstration of such a connection.

C. *Visual Resources and Due Process*

The growth of landscape aesthetics as a cross-disciplinary field has also addressed the second problem identified in *Youngstown v. Kahn Bros. Building Co.*—the inherent subjectivity of regulatory objectives.¹⁵⁹ The court's chief concern in *Kahn* was that "the public view as to what is necessary for aesthetic progress greatly varies."¹⁶⁰ The notion that the legislature would impose its taste in matters of aesthetics has long influenced judicial review of statutes and regulations. However, the emergence of empirical studies that attempt to "verify" preferences in landscape aesthetics has tempered the strength of the *Kahn* court's objection.

During the last twenty years a large research literature, running to hundreds of studies internationally, has focused on affective responses to natural and urban landscapes. Virtually all of these studies made use of affective or emotion-laden rating scales to obtain data; among the most common have been preference (liking), pleasantness, and scenic beauty.¹⁶¹

The methodology of such studies usually involves the use of landscape photographs to elicit responses from members of the local community.

eliminating visual blight. Mental health is certainly included in the public health. . . . The broad definition of public health and the city council's broad powers to implement general policy to conclude aesthetics may properly be considered a public health matter under the circumstances of this case.

Id. It is unclear whether the court reached this conclusion based on the sufficiency of the evidence linking aesthetics with mental health, the elasticity of the statutory term, or the fact that the electronic reader-board that inspired the ordinance was 13 feet high and 23 feet wide, resting on a pedestal rising almost 37 feet. *Id.* at 358. The more tempting conclusion is the latter.

¹⁵⁹ See *supra* note 39–40 and accompanying text.

¹⁶⁰ *Youngstown v. Kahn Bros. Bldg. Co.*, 148 N.E. 842, 844 (Ohio 1925).

¹⁶¹ Ulrich, *supra* note 141, at 90–91.

By weighing these responses, the researcher is able to assign perceived values to various landscape features and thereby identify a degree of consensus over which visual resources merit protection. For example, researchers engaged in a study of the Lower Connecticut River Valley used fifty-six landscape photographs, selected from a pool of over 300, to assess the visual preferences of 407 subjects.¹⁶² The photographs depicted a variety of landscapes containing such features as second-growth forests, townscapes, open water, farmscapes, placid river valleys, flat fields, derelict landscapes, rushing water, and town commons. The subjects were given unlimited time to review the photographs. The subjects were then asked to grade the landscapes as to perceived scenic value.¹⁶³ The researchers provided detailed instructions in order to achieve a weighted sorting score for each landscape and to assess preferences.¹⁶⁴ The methodology of this study is similar to that routinely employed in landscape preference studies.¹⁶⁵

Although the use of empirical studies to "verify" scenic beauty has been the subject of some debate,¹⁶⁶ "[f]indings from these and other verbal scales usually are highly correlated."¹⁶⁷ For example, studies consistently show high preference for landscapes with water features.¹⁶⁸ In very general terms,

European, North American, and Japanese adult groups tend to respond to scenes as natural if the landscape is predominantly vegetation, water, and mountains, if artificial features such as buildings, automobiles, and advertising signs are absent or inconspicuous, and if the dominant visual contours or edges are curvilinear or irregular rather than starkly rectilinear or regular.¹⁶⁹

¹⁶² Douglas Amedeo et al, *Landscape Feature Classification as a Determinant of Perceived Scenic Value*, 8 LANDSCAPE J. 26 (1989).

¹⁶³ *Id.* at 38.

¹⁶⁴ *Id.* at 39-40. Several other studies are briefly described in Richard Brooks & Peter Lavigne, *Aesthetic Theory and Landscape Protection: The Many Meanings of Beauty and Their Implications for the Design, Control, and Protection of Vermont's Landscape*, 4 UCLA J. ENVTL. L. & POLICY 129, 144-53 (1985). See also Elwood L. Shafer Jr. & Robert O. Brush, *How to Measure Preferences for Photographs of Natural Landscapes*, 4 LANDSCAPE PLAN. 237-56 (1977).

¹⁶⁵ See, e.g., Robert G. Ribe, *A General Model for Understanding the Perception of Scenic Beauty in Northern Hardwood Forests*, LANDSCAPE J. 86 (1990).

¹⁶⁶ For a succinct point-counterpoint discussion of these issues, see A.A. Carlson, *On the Possibility of Quantifying Scenic Beauty*, 4 LANDSCAPE PLAN. 131 (1977), and Robert G. Ribe, *On the Possibility of Quantifying Scenic Beauty—A Response*, 9 LANDSCAPE PLAN. 61 (1982).

¹⁶⁷ Ulrich, *supra* note 141, at 91.

¹⁶⁸ *Id.* at 92.

¹⁶⁹ *Id.* at 95 (citations omitted).

As the preceding quotation suggests, results are consistent even when sociocultural factors are assessed.¹⁷⁰

[O]n balance, the pattern of findings that has emerged over the last two decades runs directly counter to the initial expectation of wide differences as a function of learning or experience-related variables. The overarching conclusion supported by this large body of research is that similarities in responses to natural scenes usually far outweigh the differences across individuals, groups, and diverse European, North American, and Asian cultures.¹⁷¹

There is, then, sufficient empirical evidence to suggest the existence of a communal concept of scenic beauty.¹⁷² Further, the verifiability of aesthetic preferences means that aesthetically based regulations can satisfy the requirements of due process.

Has the regulatory community latched onto empirical study to justify its rules? On the federal level, empirical assessment of visual resources has been ongoing for several decades. The National Forest Service of the United States Department of Agriculture has used a visual management system to supervise aspects of its domain since at least 1974.¹⁷³ Visual assessment techniques are also used in planning

¹⁷⁰ See Gary D. Hampe, *The Influence of Sociocultural Factors upon Scenic Preferences in VISUAL PREFERENCES OF TRAVELERS—ALONG THE BLUE RIDGE PARKWAY* 37 (Francis P. Noe & William E. Hammitt eds., 1987). Six social background variables were used in measuring responses: age, sex, residence until age 16, educational level, socioeconomic index (occupational SEI), and total (gross) household income. *Id.* at 38. In his summary, the author concluded that "[t]he consistency of preferring or not preferring the vistas was nothing short of remarkable." *Id.* at 49.

¹⁷¹ Ulrich, *supra* note 141, at 93 (citations omitted).

¹⁷² For a detailed discussion of the methods used to reach decision on landscapes worthy of protection see Richard Brooks & Peter Lavigne, *Aesthetic Theory and Landscape Protection: The Many Meanings of Beauty and Their Implications for the Design, Control, and Protection of Vermont's Landscape*, 4 UCLA J. ENVTL. L. & POLICY 129, 141-44 (1985). The authors identify four "philosophies of beauty." *Id.* *Extreme relativism* "holds that every individual determines beauty differently." *Id.* at 141. *Moderate relativism* "suggests that, even if humans are the measure of beauty, there are important cultural, class, community, or other similarities of views among groups of persons which permit them to agree on what is beautiful." *Id.* The authors opine that architectural controls are based on such consensus. *Id.* at 142. *Moral objectivism* holds that "although our perceptions of beauty may consist of emotional feelings or moral perceptions, these reactions are proper to all people, because of either a common human nature or human experience, or a common perception of the objects producing the reactions." *Id.* This position, no doubt, would be consistent with the biophilia hypothesis. See *supra* note 141. Finally, *cognitive objectivism* attempts to identify "those characteristics of a . . . natural scene which are associated with the judgment of the beautiful." Brooks & Lavigne, *supra*, at 143. Empirical studies are imperfect, but useful, tools in determining the factors important in identifying "beauty." *Id.* at 144.

The authors conclude that all four theories of beauty ought to be incorporated into any regulatory action. *Id.*

¹⁷³ See UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE, 1-2 NATIONAL

national parks¹⁷⁴ and administering federal lands.¹⁷⁵ Local regulations to protect the scenic resource, on the other hand, are rarely accompanied by preference studies or assessment techniques. If anything, local regulations frequently rest on a “seat-of-the-pants” consensus: the view is pretty, therefore it should be protected. Because the majority position has been rationalized on a rather superficial analysis—that beauty is preferable to blight—there is little incentive for localities to ground local scenic view ordinances in empirical research. The absence of sophisticated scenic-view analysis becomes apparent when one systematically surveys judicial review of local visual resource protection ordinances.

D. *Judicial Review of Ordinances in Majority Position States*

In majority view states, localities may advance protection of the visual resource as a sole regulatory objective. This judicial support has encouraged local governments to regulate both traditional and innovative targets. Such regulation generally takes several forms. Traditional eyesore regulations remain important. In addition, local governments have passed laws protecting viewsheds and view corridors. This section examines judicial review of each type of ordinance.

1. Eyesore Regulations

Ordinances intended to accomplish exclusively aesthetic objectives are often enacted in the form of eyesore regulations.¹⁷⁶ Where exclusively aesthetic regulation is permissible, the eyesore is targeted solely because of its aesthetic attributes. Upon judicial review, the eyesore’s effects on health or safety are unimportant.¹⁷⁷ It is the local

FOREST LANDSCAPE MANAGEMENT, (Agriculture Handbook Number 462) (1974); *see also* Robert E. Benson & James R. Ullrich, USDA, Forest Service, Visual Impacts of Forest Management Activities: Findings on Public Preferences (June 1981) (Research Paper INT-262).

¹⁷⁴ *See, e.g.*, Carl Steinitz, *Toward a Sustainable Landscape with High Visual Preference and High Ecological Integrity: The Loop Road in Acadia National Park, U.S.A.*, 19 LANDSCAPE & URBAN PLAN. 213 (1990).

¹⁷⁵ *See, e.g.*, BUREAU OF LAND MANAGEMENT, DEP’T OF THE INTERIOR, Pub. No. 024-011-00116-6, VISUAL RESOURCE MANAGEMENT PROGRAM 13 (n.d.). The Federal Land Policy and Management Act of 1976 requires the BLM to manage public lands “in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.” *Id.* at 8.

¹⁷⁶ *See supra* notes 61–85 and accompanying text (outlining the types of eyesores targeted by local regulations).

¹⁷⁷ Nonetheless, local governments in majority camp states continue to cite health or safety as an ancillary purpose of their ordinances, probably to promote greater judicial tolerance, and

government's aesthetic goal, standing alone, that the court endorses. One of the earliest decisions in this genre is *Oregon City v. Hartke*.¹⁷⁸ In this case, the city adopted an ordinance wholly excluding wrecking yards.¹⁷⁹ The Supreme Court of Oregon, in adopting the "aesthetics alone" position, strongly encouraged use of the police power to preserve the visual resource: "[T]here is a growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings."¹⁸⁰

In *John Donnelly & Sons, Inc. v. Outdoor Advertising Board*, the Supreme Judicial Court of Massachusetts reached the same conclusion.¹⁸¹ Here, the town of Brookline adopted a bylaw imposing various restrictions on off-site signs and billboards.¹⁸² The court found no need for any rationale but aesthetics:

[C]ourts have engaged in a reasoning process, often amounting to nothing more than legal fiction, in order to avoid recognizing aesthetics as an appropriate basis for the exercise of the police power. We feel that this approach . . . obscures the basic issues. . . . Although the town argues that its by-laws can be upheld on the basis of public safety and traffic control, our review of the authorities indicates, at best, conflicting support for this proposition. Therefore, the issue squarely before us is whether the town by-laws, enacted primarily or solely for aesthetic reasons, are within the scope of the police power. We conclude that aesthetics alone may justify the exercise of the police power¹⁸³

Courts have routinely upheld regulations designed to control other types of eyesores solely for aesthetic purposes.¹⁸⁴

For the most part, the "first-generation" view ordinances upheld in these cases focus on the eyesore, not the enhancement of a specific visual resource area. The ordinances in *Hartke*, *Donnelly*, and other decisions from the early post-*Berman* period are directed at a specific target, an object so universally scorned—so "ugly"—that the legisla-

probably out of habit. See, e.g., *City of Hot Springs v. Carter*, 836 S.W.2d 863 (Ark. 1992) (upholding ordinance regulating temporary attraction signs for traffic safety and aesthetic purposes).

¹⁷⁸ 400 P.2d 255 (Or. 1965).

¹⁷⁹ *Id.* at 258.

¹⁸⁰ *Id.* at 261.

¹⁸¹ 339 N.E.2d 709, 717 (Mass. 1975).

¹⁸² *Id.* at 711.

¹⁸³ *Id.* at 716–17 (citations omitted).

¹⁸⁴ See, e.g., *People v. Stover*, 191 N.E.2d 272 (N.Y. 1963) (upholding ordinance banning clothes lines in front or side yard on aesthetic grounds alone). For a more contemporary example, see *Warren v. City of Marietta*, 288 S.E.2d 562 (Ga. 1982) (upholding zoning ordinance prohibiting overnight school bus parking in residential area on aesthetic grounds alone). See also *supra*

ture presumes there is a consensus to regulate its location, appearance, or very existence. In fact, the eyesore is considered so objectionable that the requirement of a nexus to health or safety, long required before *Berman*, has been eliminated. To the extent that a sign or junkyard ordinance protects a "view," the specific view is of little or secondary importance. The regulation's primary purpose is to target the objectionable entity—there may have been, in fact, no view of any consequence impaired by the eyesore. In this regard, the focus of first-generation eyesore regulations is no different than regulations of the pre-*Berman* era, in which the scenic resource itself was relegated to a secondary purpose.

More recent eyesore regulations in "aesthetics alone" jurisdictions reflect a greater appreciation of the scenic resource. These ordinances represent a second generation in that they acknowledge and protect the landscape behind the eyesore. In essence, it is the eyesore's interference with the viewshed that justifies government regulation. The ordinance may identify the protected landscape generically, rather than delineating a specific part of the scenery that reflects the character of the area.¹⁸⁵ Alternatively, the regulation may precisely identify the protected landscape.¹⁸⁶

Typically, second-generation eyesore regulations based on aesthetic objectives alone are firmly rooted in the promotion of tourism. For example, the northern-tier states of New England are now unanimous in their view that the protection of scenic views serves the general welfare.¹⁸⁷ Moreover, the highest courts of these states have reached this consensus while highlighting the value of the scenic resource, not the ugliness of the eyesore.

Maine was the first of this group of states to recognize that protection of scenic views stands as a valid governmental purpose. In *John Donnelly & Sons v. Mallar*,¹⁸⁸ the United States District Court for the District of Maine¹⁸⁹ reviewed the provisions of a statute providing for the state-wide elimination of off-site billboard advertising.¹⁹⁰ The

notes 62, 81–85 (citing cases, some of which were decided in majority camp jurisdictions solely on aesthetic grounds).

¹⁸⁵ See *infra* notes 195–99 and accompanying text (discussing Sandgate, Vermont's ordinance protecting "the Vermont scene").

¹⁸⁶ See *infra* notes 200–05 and accompanying text (discussing the town of Conway's efforts to protect New Hampshire's Mt. Washington Valley).

¹⁸⁷ For the importance of the tourist trade to northern New England, see *supra* notes 16–24 and accompanying text.

¹⁸⁸ 453 F. Supp. 1272 (D. Me. 1978), *rev'd sub nom.* *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980).

¹⁸⁹ The district court had subject matter jurisdiction over the First Amendment claims raised by the advertising company.

¹⁹⁰ *John Donnelly & Sons*, 639 F.2d at 6.

legislature prefaced the act by stating that "scattered outdoor advertising throughout the State is detrimental to the preservation of the State's scenic resources"; furthermore, the act was intended "to preserve the State's scenic beauties not only for their aesthetic value but because the visual attractiveness of the State substantially promotes tourism, one of the State's major industries, as well as its general economic and cultural development."¹⁹¹ In upholding the statute, the court rejected the advertiser's argument that aesthetics could not stand alone:

The nation's recently-awakened and growing concern for the quality of its environment and the various and widespread steps taken by individuals, citizen groups, and governmental bodies to protect and enhance natural resources demonstrate beyond reasonable question that the Maine Act serves substantial governmental interests through the preservation of aesthetic values.¹⁹²

Although the decision was later reversed on First Amendment grounds, the principles enunciated by *Mallar* remain valid in Maine: aesthetic regulation, including the protection of scenic views, may stand alone. For example, in *Brophy v. Town of Castine*, a landowner challenged a zoning ordinance that required a waterfront setback of seventy-five feet.¹⁹³ The town had applied the ordinance to prevent the landowner from installing a satellite dish. The Supreme Judicial Court of Maine upheld the regulation on the sole rationale that the regulation promoted "the public's aesthetic welfare."¹⁹⁴

The Supreme Court of Vermont has also concluded that enhancement of the visual resource, broadly conceived, is a valid basis for local land-use regulation. In *Town of Sandgate v. Colehamer*, a property owner asserted that the town's zoning provision banning junkyards was based solely on aesthetic considerations, an allegedly unconstitutional exercise of the police power.¹⁹⁵ The court disagreed, noting that the Vermont Zoning Enabling Act had been modernized to acknowledge aesthetics as a valid purpose of zoning.¹⁹⁶ Specifically, municipalities had been authorized to "encourage and enhance the attractiveness of the Vermont scene."¹⁹⁷ The town's plan, which formed the basis for its zoning ordinance, attempted "to limit development, main-

¹⁹¹ *John Donnelly & Sons*, 453 F. Supp. at 1275-76.

¹⁹² *Id.* at 1278 (footnote omitted).

¹⁹³ 534 A.2d 663, 663 (Me. 1987).

¹⁹⁴ *Id.* at 664.

¹⁹⁵ 589 A.2d 1205, 1210 (Vt. 1990).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (quoting 24 VA. CODE ANN. § 4302(a)(4) (Michie 1992)).

tain open space, and achieve "the best possible quality of environment for the Town's residents."¹⁹⁸ The "Vermont scene" behind the Colehamer junkyard was not described by the court, nor were specific goals of scenic preservation stated in the ordinance. For the court, this was apparently inconsequential. The "Vermont scene," although not susceptible to exact description, was assuredly not promoted by a landscape featuring junkyards. The ordinance was ruled constitutional and the state joined the majority camp.¹⁹⁹

Of all the northern New England states, New Hampshire's courts have best enunciated an appreciation of the value and nature of scenic resources. In *Asselin v. Town of Conway*, the Supreme Court of New Hampshire reviewed a zoning ordinance that regulated sign illumination.²⁰⁰ The court found that the ordinance was adopted "solely to promote aesthetic values, including preserving scenic vistas, discouraging development from competing with the natural environment, and promoting the character of a 'country community.'"²⁰¹ The court noted that Conway is "[n]estled in the Mount Washington Valley,"²⁰² and that the highway upon which the challenger's proposed sign would have been located "offers striking views of the mountains and ledges to the west."²⁰³ Moreover, the court found that "[i]t is reasonable to infer that the scenic vistas sought to be preserved by the town include the splendor of mountains at twilight and the brilliance of stars at night."²⁰⁴ Relying on *Berman*, the court held that "municipalities may validly exercise zoning power *solely* to advance aesthetic values, because the preservation or enhancement of the visual environment may promote the general welfare."²⁰⁵ The court's ruling is a clear example of a court upholding an eyesore regulation, supported on aesthetic grounds alone, because a specific background view was protected by the local government.

¹⁹⁸ *Id.* at 1211. The town's goals were consistent with the enabling act. *Id.*

¹⁹⁹ *Id.*

²⁰⁰ 628 A.2d 247 (N.H. 1993).

²⁰¹ *Id.* at 249.

²⁰² *Id.* at 248.

²⁰³ *Id.* at 249. The highway in question, New Hampshire Route 16, is undoubtedly one of the state's most travelled tourist paths, with expansive views of the Presidential Range of the White Mountains available in many sections.

²⁰⁴ *Id.* at 250. The court seemed particularly impressed by the testimony of "an expert witness experienced in planning for the preservation and enhancement of visual environments." *Id.* The expert testified that "internally illuminated signs appear as 'disconnected squares of light' at dusk and at night, and that the 'overall effect' of 'an internally-lit sign is to create a visual block that is seen at some great distance sort of bobbing at the windshield,' while external lights 'soften the impact' of signs in the darkness." *Id.* (quotations from trial transcript).

²⁰⁵ *Asselin*, 628 A.2d at 250 (emphasis in original).

The tone of these decisions from northern New England is quite different from the approach taken in such first-generation cases as *Hartke*. Here, the judicial, if not regulatory, focus is the landscape—the scenic view shared by residents and travellers alike. There is in these decisions an implicit appreciation of Gussow's contention that "[t]he visual landscape, the environment we see, gives shape to our character."²⁰⁶ What, if not this, could the Vermont legislature—and its supreme court—have meant by endorsing regulatory enhancement of the "Vermont scene"? The courts of South Carolina,²⁰⁷ Alaska,²⁰⁸ and Arkansas²⁰⁹ have expressed similar sentiments in recent reviews of eyesore regulations.²¹⁰

Nonetheless, these second-generation eyesore ordinances remain primitive in their understanding of the scenic resource. The regulations do not, as they might, focus on eyesores that interfere with a specific viewshed—for example, an area containing a mountain, water scene, or townscape crucial to the community's character. Instead, the regulations banish eyesores that interfere with the generic landscape. It is the foreground, not the target viewshed, that provides the regulatory focus. In failing to manage or enhance a specific visual resource area, these modern eyesore regulations are little different in form from those of the pre-*Berman* era.²¹¹ Only in viewshed and view corridor ordinances do local governments incorporate theories of landscape aesthetics into protection of the scenic landscape.

²⁰⁶ See *supra* text accompanying note 137.

²⁰⁷ See *Hilton Head Island v. Fine Liquors, Ltd.*, 397 S.E.2d 662 (S.C. 1990). Here, the Supreme Court of South Carolina reviewed an ordinance banning internally illuminated signs visible from public rights of way and beaches. The court endorsed the regulation, solely on aesthetic grounds, because "it seeks to protect the unique aesthetics of Hilton Head Island." *Id.* at 664 (citations omitted).

²⁰⁸ See *Barber v. Municipality of Anchorage*, 776 P.2d 1035 (Alaska 1989). The Supreme Court of Alaska upheld Anchorage's ordinance prohibiting off-premises advertising signs. The rationale was chiefly borrowed from the United States Supreme Court's ruling in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984): billboards constitute a "visual assault on citizens . . . presented by an accumulation of signs." *Id.* at 1037 (quoting *Members of the City Council*, 466 U.S. at 807).

²⁰⁹ See *City of Fayetteville v. McIlroy Bank & Trust Co.*, 647 S.W.2d 439 (Ark. 1983).

²¹⁰ However, some states make no mention of the visual resource in reaching the "aesthetics alone" position. See, e.g., *City of Lake Wales v. Lamar Advertising Ass'n of Lakeland*, 414 So. 2d 1030 (Fla. 1982) (billboards); *Warren v. City of Marietta*, 288 S.E.2d 562 (Ga. 1982) (upholding ordinance banning overnight school bus parking in residence district); *Goodman Toyota, Inc. v. City of Raleigh*, 306 S.E.2d 192 (N.C. Ct. App. 1983) (windblown signs); *Temple Baptist Church, Inc. v. City of Albuquerque*, 646 P.2d 565 (N.M. 1982) (billboards).

²¹¹ See *supra* notes 178–84 and accompanying text.

2. Viewsheds

Local viewshed protection ordinances borrow regulatory concepts from resource protection overlay districts,²¹² from NEPA-style design regulations,²¹³ and from eyesore prohibitions. Viewshed ordinances generally take one of two forms. The first type of ordinance allows development, subject to design approval, within the protected area; under the second approach, the viewshed is delineated as a preservation district.

Under either approach, the visual resource area must first be defined.²¹⁴ As in other types of overlay districts, the visual resource must be measured, mapped, and reduced to comprehensible boundaries. Under the first, more flexible, approach, applicable rules may prohibit offensive land-use practices and mandate performance standards. Eyesores, long banned from the foreground, are likely to be banned from the viewshed itself. Other uses, whether available as of right or conditionally, are generally subject to design review or site-plan approval. This process shapes land uses within the viewshed area in order to minimize impact on the visual resource. Under the second, preservation-oriented approach, the goal is to prevent alteration of the visual resource area.²¹⁵

The establishment of boundaries for the viewshed district necessarily involves application of some of the principles developed in the study and assessment of landscape aesthetics. The view to be protected, as perceived from a specific location, must legislatively be deemed worthy of protection. This may involve nothing more than an unscientifically determined consensus. For example, the Massachusetts towns of Harvard, Ayer, and Shirley and the Massachusetts Land Bank recently adopted bylaws to regulate land uses in Fort Devens, a decommissioned army base.²¹⁶ The bylaws require developers of the Fort Devens site to consider the possible impact of development on views toward Mount Wachusett and Monadnock from the Prospect Hill Overlook in the town of Harvard.²¹⁷ No specific studies

²¹² See MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW 480 n.30 (1993).

²¹³ See *infra* note 238 for an example of an ordinance that adopts a design review approach.

²¹⁴ For a discussion of how viewsheds may be scientifically analyzed, see TADAHIKO HIGUCHI, THE VISUAL AND SPATIAL STRUCTURE OF LANDSCAPES (Charles S. Terry trans. 1983).

²¹⁵ See *infra* notes 242-66 and accompanying text.

²¹⁶ The author represented the town of Harvard in the negotiations to draft the bylaws.

²¹⁷ Devens Bylaws, § III.J (Nov. 18, 1994).

were done to delineate this viewshed; in any event, the viewshed is so vast as to defy local regulation.²¹⁸

In a more scientific approach, detailed studies of the viewshed may precede enactment of a local regulation. In *The Legal Landscape*, the authors provide a description of the methodology used in their study of a fifty-mile stretch of the Seaway Trail, a highway paralleling the St. Lawrence River in upstate New York.²¹⁹ The study involved black-and-white photography of all views from the highway to the river.²²⁰ The photographs were then spliced together to create 125 panoramas, which the authors submitted to local residents and students for visual preference testing.²²¹ Based on the results, local governments along the river were encouraged to protect the higher-quality views.²²² Included among the recommendations was “[d]evelopment of overlay zoning and site review mechanisms to restrict encroachment from private development on high-quality view areas.”²²³

Unfortunately, there are few, if any, appellate level decisions in which the validity of a viewshed ordinance is directly at issue. There are, however, several instances in which aspects of a viewshed ordinance have been litigated. For example, in *Wilkinson v. Board of County Commissioners of Pitkin County*, the Colorado Supreme Court upheld permit denials in part because of impacts upon scenic views.²²⁴ In this case, a developer sought and was denied county permits for a low-impact subdivision.²²⁵ On appeal, the developer chiefly asserted that the county’s land-use regulations, including ordinances protecting views, were inconsistent with the police power.²²⁶ The court rejected this argument, noting that Colorado’s Land Use Act²²⁷ provides local governments with extensive authority, including the power to “[p]re-serv[e] areas of historical and archeological importance”; to “[r]egulat[e] the use of land on the basis of the impact thereof on the community or surrounding areas”; and to “plan[] for and regulat[e] the

²¹⁸ Mount Wachusett is located in Westminster, Massachusetts, approximately 20 miles from the town of Harvard. Between Harvard and the mountain are the towns of Lancaster and Princeton and the city of Leominster. Mount Monadnock is nearly 40 miles northwest of Harvard in the state of New Hampshire.

²¹⁹ See SMARDON & KARP, *supra* note 32, at 106–20.

²²⁰ See *id.* at 114–15.

²²¹ See, e.g., *id.* at 116–20.

²²² See *id.* at 107.

²²³ *Id.*

²²⁴ 872 P.2d 1269, 1278 (Colo. Ct. App. 1993), *cert. denied*, 1994 Colo. LEXIS 473 (Colo. May 16, 1994).

²²⁵ See *id.* at 1272.

²²⁶ See *id.* at 1275.

²²⁷ Local Gov’t Land Use Control Enabling Act, COLO. REV. STAT. § 29-20-104(1) (1988).

use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights.”²²⁸

Furthermore, the court upheld the substantive decision of the county, particularly with regard to the scenic impacts of the proposed project.²²⁹ The court noted that the county’s land-use policy objectives included the following goals: “to prevent scenic degradation and to preserve and create scenic views from public places within the county,” and to “minimize adverse visual effects of roads and facilities by regulating the location and use of future development when new or increased roads and facilities would be required.”²³⁰ The court sustained the permit denial because the project would affect “scenic qualities of Smugglers Mountain as viewed from other locations in the county.”²³¹ In effect, the county policies amounted to a viewshed ordinance, or a county version of NEPA, with the entire jurisdiction serving as the protected visual resource area.

In *Arkules v. Board of Adjustment of Town of Paradise Valley*,²³² the Arizona Supreme Court reviewed a variance awarded from a building regulation that required construction to “blend with the mountain background and to be made from materials or colors which would not unduly reflect light.”²³³ The property owner had requested the variance because,

all of his life he had hoped to build a Mediterranean home and now he felt he was about to see it built. He said he specifically wanted a house with columns, and a white house. He hastened to say, he did not mean “hospital white” he meant offwhite. He said the architecture and the entire house was designed around his dream of a white house with columns.²³⁴

In this case, the validity of the building regulations, which amounted to viewshed constraints, was not directly at issue. In fact, the defendant conceded the validity of the aesthetic purposes promoted by the regulation.²³⁵ Without comment, the court endorsed the scope of view-

²²⁸ *Wilkinson*, 872 P.2d at 1276.

²²⁹ *See id.* at 1278.

²³⁰ *Id.*

²³¹ *Id.*

²³² 728 P.2d 657 (Ariz. Ct. App. 1986).

²³³ *Id.* at 658.

²³⁴ *Id.* at 660.

²³⁵ The court nullified the variance for failure to comply with statutory requirements. *See id.* at 661.

shed protection available to local governments, even in a state consistently within the minority camp.²³⁶

The most illustrative case reviewing viewshed ordinances is *Ross v. City of Rolling Hills Estates*.²³⁷ The city, acting to protect the views of its hillsides, enacted an ordinance that stands as a virtual model for local scenic-view regulation.²³⁸ In the purpose clause of the ordinance, the city offered the following rationale:

²³⁶ See *id.*

²³⁷ 238 Cal. Rptr. 561 (Cal. Ct. App.), *appeal dismissed*, 484 U.S. 983 (1987).

²³⁸ Footnote two of the California Court of Appeals opinion contains the entire relevant ordinance, which is a virtual model of a local scenic viewshed ordinance:

1951. EVALUATION AND REVIEW. To protect the visual quality of highly scenic areas and maintain the rural character of the City, new development should not degrade highly scenic natural historic or open areas and shall be visually subordinate to the scenic quality of these areas. New development within the various view sheds contained in the City that would have a significant visual impact to those living adjacent to the development, shall be subject to design review. This review shall ensure that development and its cumulative impact is consistent with the previously mentioned standards. The design procedures and standards employed in new developments, alterations and additions to existing structures and lots should include appropriate measures that are consistent with appearance and design goals of the View Protection Ordinance. Development proposals should be coordinated in order to:

- (a) Maximize open space preservation.
- (b) Protect view corridors, natural vegetation, land forms, and other features.
- (c) Minimize the appearance of visually intrusive structures.
- (d) Prevent the obstruction of property owners' views by requiring appropriate construction of new structures or additions to existing buildings or adjacent parcels.
- (e) Assess the potential view loss from public areas of any proposed major structures as well as alterations and additions to existing structures.
- (f) Determine whether other suitable design options are available to the property owner in order that view obstructions may be eliminated or lessened in severity.

1952. CLEARANCE PROCEDURES. Should it appear that a potential view impairment may result from a proposed development, addition or alteration, the site shall be subjected to a View Preservation Site Inspection. A fee shall be charged for such inspection as the City Council shall fix by resolution.

1953. INSPECTION. Upon such inspection, should the City zone clearance official determine that the proposed development addition or alteration will impair a view site, the matter shall be referred for hearing and review by the Planning Commission pursuant to sections 1954 and 1955 below.

1954. ADMINISTRATION AND REVIEW. It shall be the duty of the Planning Commission to administer the provisions of the View Protection Ordinance. Review of any site for such purposes shall be initiated by the City pursuant to a View Preservation Site Inspection or otherwise, or by any person aggrieved.

1955. POWERS AND DUTIES OF PLANNING COMMISSION. The Planning Commission shall hold a public meeting when complaint opposed to any pending development addition or alteration has been filed by a person aggrieved or referred by the City zone clearance official. In connection with the foregoing, the Planning Commission:

- (a) Shall hear and review such complaints or referrals regarding the proposed construction, alteration, or additions.

1950. PURPOSES. The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City and their potential for vista points and view lots. It is found that the public health, safety and welfare require prevention of needless destruction and impairment of views and promotion of the optimum utilization and discouragement of the blockage and misuse of such sites and view lots. The purpose of this ordinance is to promote the health, safety and general welfare of the public through:

(a) The protection, enhancement, perpetuation and use of sites and view lots that offer views to the residents because of the unique topographical features which the Palos Verdes Peninsula offers, or which provide unique and irreplaceable assets to the City and its neighboring communities or which provide for this and future generations examples of the unique physical surroundings which are characteristic of the city.

(b) The maintenance of settings which provide the amenity of a view.

(c) The establishment of a process of design review by which the City may render its assistance toward the objective that views enjoyed by residents of the City will not be significantly obstructed.²³⁹

In the underlying case, the city denied a landowner's application for a building permit because the landowner's proposal did not conform to the objectives of the ordinance. The landowner contested the findings of fact²⁴⁰ as insufficient to support the denial of the permit. The court affirmed the city commission's finding that "the proposal would have an adverse impact on existing views and that appellants had failed to provide design alterations to minimize the view impact of their proposal."²⁴¹ Again, in *Ross*, the ordinance itself was not challenged as beyond the scope of the general welfare prong of the police power;

(b) May request, following a public meeting, that proposed action on a particular site or plans to make any additions to existing structures or new accessory structures on the lot in question will meet the mitigation measures of the View Protection Ordinance as outlined by the Planning Commission.

(c) Coordinate and conciliate to the maximum extent possible the resolution of disputes among property owners concerning view obstructions.

1956. APPEAL. Any person aggrieved may appeal the Planning Commission decision to the City Council within twenty (20) days after determination of required view protection mitigation measures.

Id. at 562 n.2.

²³⁹ *Id.*

²⁴⁰ The landowner also challenged the ordinance on vagueness grounds, asserting that terms like "needless," "discourage," "significantly obstructed," and others failed to provide procedural due process. *See id.* at 562-63.

²⁴¹ *Id.* at 564.

the decision is most noteworthy for the creative ordinance adopted by the city.

In the second type of viewshed ordinance, the visual resource area is established as a preservation district. Instead of shaping the permissible land uses in the protected area, the ordinance permits few if any uses either as of right or conditionally. The point of such districts is not to shape land uses in the viewshed, but to prohibit any alteration.

The preservation approach to viewshed protection may raise takings implications. *Corrigan v. City of Scottsdale* is a leading decision on point.²⁴² In this case, the city amended its zoning ordinances by adding a Hillside District ordinance, in order to protect its undeveloped McDowell Mountains.²⁴³ Two districts were created, the Conservation and Development areas. A "no-development line" established the boundary between the districts. This line was located where any of the following conditions occurred: "unstable slopes subject to rolling rocks; rockfalls or landslides; bedrock areas; slopes of 15 percent or greater; and shallow, rocky mountain soils subject to severe erosion."²⁴⁴ The ordinance required that land within the Conservation Area be set aside for the permanent conservation of natural open space.²⁴⁵ However, the ordinance allowed for the transfer of development rights from the Conservation Area to the Development Area.²⁴⁶ Corrigan's land was approximately seventy-four percent within the Conservation Area.²⁴⁷

Corrigan illustrates the vulnerability of local governments to challenges based on a facial taking²⁴⁸ where viewsheds are protected by

²⁴² 720 P.2d 528 (Ariz. Ct. App. 1985), *aff'd in part, vacated in part*, 720 P.2d 513 (Ariz.), *cert. denied*, 479 U.S. 986 (1986).

²⁴³ *See id.* at 532 n.3 (reprinting text of city ordinance).

²⁴⁴ *Id.* at 531. These features identified where a mountain began. *See id.*

²⁴⁵ The ordinance stated that "[t]he land within the Hillside Conservation area shall be legally secured for the conservation of permanent natural open space through easements or dedication No grading, filling, clearing or excavation of any kind shall be allowed in the Hillside Conservation area." *Id.* at 532 n.3. Furthermore, "[n]o buildings, structures or impermeable surfaces are permitted in the Conservation Area." *Id.* at 532.

²⁴⁶ *See id.*

²⁴⁷ *Id.* The court also noted that:

A study of the ownership patterns within the Hillside District showed that the land remained in a few large ownerships. This study of the ownership patterns revealed that owners of property in the mountains, including Corrigan, had developable areas below the no-development line (within the so-called 'receiving area') sufficient in size to accommodate the transfer of density credits from the land above the no-development line

Id.

²⁴⁸ The Fifth Amendment to the United States Constitution states, in part, that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend.

ordinances leaving few, if any, uses available as of right.²⁴⁹ As the United States Supreme Court noted in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,²⁵⁰ land-use regulation effects a taking if it "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land."²⁵¹

The *Corrigan* trial court found that the Scottsdale ordinance reflected legitimate safety concerns by "minimizing the harm from the phenomenon known as rolling rock; preventing rock slides due to blasting; reducing the damages from washouts and landslides; and avoiding the difficulties of fighting fires in mountainous terrain."²⁵² Furthermore, the trial court noted that the McDowell Mountains, which are Scottsdale's only mountains, enhance property values in their natural state.²⁵³ Development in the mountains could result in unsightly scarring.²⁵⁴ Thus, on the coupled rationales of safety and aesthetics, the trial court upheld the ordinance.²⁵⁵

However, the purported nexus to health and safety was unconvincing to the Arizona Court of Appeals. The court characterized the ordinance as an "attempt to preserve scenic or ecologically sensitive areas."²⁵⁶ In the court's view, there was no "substantial threat to public safety without the ordinance."²⁵⁷ Because regulation for aesthetic objectives, standing alone, is not constitutional in Arizona, the court ruled that the ordinance was not a valid exercise of the police power.²⁵⁸

V. In a facial challenge, the landowner asserts that the regulation, as drafted, leaves no reasonable use of the property. The landowner must show that "mere enactment" of the restriction constitutes a taking. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The Supreme Court has characterized the burden on the plaintiff as "an uphill battle." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

²⁴⁹ It is unlikely that a takings challenge would succeed with regard to an eyesore or a view corridor ordinance. *See, e.g., Landmark Land Co. v. City & County of Denver*, 728 P.2d 1281, 1287 (Colo. 1986) (view corridor ordinance does not constitute taking); *Temple Baptist Church, Inc. v. City of Albuquerque*, 646 P.2d 565, 572 (N.M. 1982) (ordinance pertaining to amortization of signs does not constitute taking). Application of the *Agins/Keystone* test would reveal that the landowner is left with reasonable use in both of these circumstances. The eyesore prohibition allows for other uses; the view corridor ordinance merely shapes land uses, as to height or bulk, and does not prohibit construction altogether.

²⁵⁰ 480 U.S. 470, 481 (1987).

²⁵¹ *Id.* at 485 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

²⁵² *Corrigan*, 720 P.2d at 536.

²⁵³ *Id.* at 534.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 538.

²⁵⁷ *Id.* at 536-37. This position was later clarified in *Ranch 57 v. City of Yuma*, 731 P.2d 113, 118-19 n.3 (Ariz. Ct. App. 1986) (no "deplorable condition" required for municipal exercise of police power).

²⁵⁸ *Corrigan*, 720 P.2d at 540. It is worth noting that *Corrigan's* property was worth \$31,365,500 before enactment of the regulation and \$17,728,000 after enactment. *Id.* at 539.

To the extent that the ordinance accurately can be portrayed as an aesthetic regulation—one designed *primarily* to accomplish viewshed protection—the court was entitled to assign less weight to the benefits of the regulation in balancing the harm to individual landowners.²⁵⁹

Even where health or safety rationales are available, viewshed ordinances leaving few allowed uses are constitutionally suspect. For example, in *Ranch 57 v. City of Yuma*, the Arizona Court of Appeals reviewed the establishment of “clear zones” for airport operations.²⁶⁰ View protection was neither a direct nor an indirect beneficiary of the ordinance, but the clear zones allowed no permanent structures except for certain fencing.²⁶¹ Assessing the ordinance under the *Key-stone* formulation,²⁶² the court had little difficulty finding that the regulation addressed a valid safety concern.²⁶³ Nonetheless, the court remanded the matter to the trial court to determine if a total deprivation of all economically viable use had occurred.²⁶⁴ In such instances, application of the United States Supreme Court’s ruling in *Lucas v. South Carolina Coastal Commission*²⁶⁵ is likely to result in a finding for the landowner.²⁶⁶

²⁵⁹ A classic statement of the balancing test used by the courts is found in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 258 Cal. Rptr. 893, 904 (Cal. Ct. App. 1989) (citations omitted):

If there is a hierarchy of interests the police power serves—and both logic and prior cases suggest there is—then the preservation of life must rank at the top. Zoning restrictions seldom serve public interest so far up on the scale. More often these laws guard against things like “premature urbanization” . . . or “preserve open spaces” . . . or contribute to orderly development and the mitigation of environmental impacts When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights Nonetheless, it should be noted that even these lesser public interests have been deemed sufficient to justify zoning which diminishes—without compensation—the value of individual properties.

Id. at 904 (citations omitted).

²⁶⁰ 731 P.2d 113, 119 (Ariz. Ct. App. 1986), *review denied* (1987).

²⁶¹ *Id.* at 115.

²⁶² See *supra* notes 250–51 and accompanying text.

²⁶³ 731 P.2d at 119.

²⁶⁴ *Id.*

²⁶⁵ 112 S. Ct. 2886 (1992).

²⁶⁶ Justice Scalia, writing for the *Lucas* majority, reasoned that application of the *Agins/Key-stone* balancing test was rendered meaningless where a property owner forfeited all practical value by virtue of the regulation. *Id.* at 2893–94. For a more detailed discussion of *Lucas*, see generally AFTER LUCAS V. SOUTH CAROLINA COASTAL COUNCIL: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (David L. Callies ed., 1992).

3. View Corridors

An ordinance establishing a view corridor contains several elements common to eyesore and viewshed regulations. Like the eyesore regulation, the corridor ordinance is concerned with the foreground. Instead of controlling billboards or junkyards that interfere with the scenic vista, the corridor ordinance regulates the location and height of structures. Its purpose is to create an angle of vision for city dwellers that focuses on a scenic attribute, whether natural or cultural. Like the viewshed ordinance, the view corridor ultimately targets a specific, not generic, view for protection.

The most obvious ancestor of modern view corridor ordinances is a cap on the height of buildings. For example, Boston quite early imposed height limitations on buildings near Beacon Hill and the State House.²⁶⁷ Washington, D.C., has long maintained restrictions based on the height of the Capitol Building.²⁶⁸ Modern setback or height provisions with respect to capitol buildings are in place in Austin, Denver, Lincoln, Sacramento, and Tallahassee.²⁶⁹

Eyesore regulations and height restrictions are easily adapted to protect corridors and openings in the cityscape that focus on scenic resources. Some municipalities protect specific view corridors within the cityscape. For example, Rochester, New York, protects views of the Eastman Theater; Pittsburgh protects views from the urban core to its rivers; the cities of Denver, Portland, Seattle, and Burlington, Vermont, protect their mountain vistas; and Austin protects its hill-country views.²⁷⁰

Generally, view corridor ordinances require detailed assessment of the visual resource before adoption by the local legislature. One commentator has provided the following description of Austin's efforts in this regard:

[Austin] paid particular attention to the policies of the city's comprehensive plan, which placed emphasis on maintaining the unique character of the community. Sixty important view corridors were identified and broken down into four categories (stationary-parks; threshold-along entryways to the city; sustained; and dramatic glimpses). The study analyzed each view from the specific point

²⁶⁷ See *Parker v. Commonwealth*, 59 N.E. 634 (1901); see also *Welch v. Swasey*, 79 N.E. 745 (1907) (upholding the validity of Boston's more general regulation of building height), *aff'd*, 214 U.S. 91 (1909).

²⁶⁸ Building Height Limitation Act of 1910, 36 Stat. 452, ch. 263, § 3 (1910) (limiting a citywide cap at 110 feet, with some exceptions on Pennsylvania Avenue).

²⁶⁹ See SMARDON & KARP, *supra* note 32, at 100.

²⁷⁰ See *id.*

identified (e.g., was the dome obscured?) and land uses within the corridor. The overall economic impact of the proposal was analyzed along with the economic impact within each corridor.²⁷¹

"Less complicated formulas" for assessing view corridors have been used in Lincoln and Tallahassee to protect views of state capitol buildings.²⁷²

The leading case regarding view corridors is *Landmark Land Co. v. City and County of Denver*.²⁷³ Denver has, since 1968, used its Mountain View Ordinance²⁷⁴ to protect view corridors. The purpose of the nonzoning ordinance is purely aesthetic:

Section 10-56. Purpose.

Upon consideration of a recommendation that an ordinance be enacted for the purpose of preserving and protecting the health,

²⁷¹ Christopher J. Duerksen, *Aesthetics and Land-Use Controls: Beyond Ecology and Economics*, APA Planning Advisory Service Report No. 399, at 21 (1986).

²⁷² SMARDON & KARP, *supra* note 32, at 100.

²⁷³ 728 P.2d 1281 (Colo. 1986) (en banc), *appeal dismissed*, 483 U.S. 1001 (1987).

²⁷⁴ The ordinance is reprinted in its 1986 form in Duerksen, *supra* note 271, at 41 app. Pertinent provisions of the ordinance not set forth in the text follow:

Section 10-57. Prohibitions

No land shall be used or occupied and no structure shall be designed, erected, altered, used, or occupied except in conformity with all regulations established in this article and upon performance of all conditions herein set forth.

Section 10-58. Cranmer Park [There are eight sections similar to 10-58 covering about 14 square miles or 12.5% of the city.]

a. Adoption of map. The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and is hereby determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

b. Limitations on construction. No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand four hundred thirty-four (5,434) feet above mean sea level plus one foot for each one hundred (100) feet that the part of a structure is distant from the reference point. Whenever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

c. Reference point. Reference point is a point having an elevation of five thousand four hundred thirty-four (5,434) feet above mean sea level and established at the mountain view indicator in Cranmer Park, which point is identified on the attached map and which point is indicated in the aforesaid Cranmer Park by a cross set in the top step of the aforesaid mountain view indicator.

Section 10-63. Enforcement.

a. This article shall be enforced by the director of building inspection. The director is hereby empowered to enter into and cause any building, other structure, or tract of land to be inspected and examined and to order in writing the remedy of any condition found to exist thereon or thereat in violation of any provision of this article.

Duerksen, *supra* note 271, at 41 app.

safety, and general welfare of the people of the city and their property therein situate, the council finds:

1. That the protection and perpetuation of certain panoramic mountain views from various parks and public places within the city is required in the interests of the prosperity, civic pride and general welfare of the people;

2. That it is desirable to designate, preserve, and perpetuate certain existing panoramic mountain views for the enjoyment and environmental enrichment of the citizens of the community and visitors hereto;

3. That the preservation of such views will strengthen and preserve the municipality's unique environmental heritage and attributes as a city of the plains at the foot of the Rocky Mountains;

4. That the preservation of such views will foster civic pride in the beauty of the city;

5. That the preservation of such views will stabilize and enhance the aesthetic and economic vitality and values of the surrounding areas within which such views are preserved;

6. That the preservation of such views will protect and enhance the city's attraction to tourists and visitors;

7. That the preservation of such views will promote good urban design;

8. That regular specified areas constituting panoramic views should be established by protecting such panoramic views from encroachment and physical obstruction.²⁷⁵

The landowner in question planned to build a twenty-one-story office tower, a use available as a matter of right under Denver's zoning ordinance. Neighbors proposed an amendment to the view corridor ordinance that would have added the proposed office tower site to its coverage. The landowner then withdrew the office tower proposal and commenced a challenge to the ordinance. In court, the plaintiffs argued that the ordinance was an unconstitutional exercise of the police power.²⁷⁶ The Colorado Supreme Court had little sympathy for the claim that aesthetic purposes could not stand alone in Colorado:

It has been well established that protection of aesthetics is a legitimate function of a legislature. [*See Berman v. Parker*, 348 U.S. 26, 32–33 (1954).] Especially in the context of Denver—a city whose civic identity is associated with its connection with the mountains—preservation of the view of the mountains from a city park is within the city's police power.²⁷⁷

²⁷⁵ *See id.*

²⁷⁶ *See Landmark Land Co.*, 728 P.2d at 1286.

²⁷⁷ *Id.* at 1285.

The court was convinced that the ordinance was "directly related to preserving the mountain view,"²⁷⁸ and ruled that no taking resulted from the regulation.²⁷⁹

View corridor ordinances like Denver's blend technical innovation with legal theory: empirical preferences and visual assessment are key features of view corridor protection. As *Landmark* shows, this purely aesthetic device promotes the general welfare by preserving views that reflect the character of the city and its environs.

IV. CONCLUSION

The enhancement of the aesthetic landscape through local regulation is a goal reasonably related to the general welfare. The importance of visual resource protection, on several fronts, makes it a purpose that may stand alone as an exercise of the police power. First, the economic benefits of landscape protection cannot be disputed. The fact that tourism accounted for a \$309 billion contribution to the national economy in 1993 speaks for itself. Tourism is driven by an appreciation of beauty, among other factors. The protection of the visual resource is a necessary component in a successful tourist industry.

Second, protection of the visual resource is "inextricably linked" to preservation of property values.²⁸⁰ Scenic quality is an important consideration for prospective purchasers. Obstruction of views, and noxious or unaesthetic uses of land plainly decrease market value. As one commentary has noted, "[there is] no lack of data for making adjustments based on aesthetic factors. View and proximity to a noxious use are just other variables in the marketplace the measurement of which is no more subjective than many other factors commonly valued."²⁸¹ Thus regulations to protect the visual resource promote the general welfare by maintaining property values.

²⁷⁸ *Id.* at 1285–86.

²⁷⁹ *Id.* at 1286; see *Krawcheck v. Board of Adjustment of Charleston*, 443 S.E.2d 401 (1994). The city's view corridor ordinance stated: "In all the Old City Heights Districts, structures shall be spaced so that no street prolonged toward the Ashley or Cooper River would be blocked by a building, thereby preserving the vista from the East Bay Street, East Battery, Lockwood Drive, or Halsey Blvd." *Krawcheck*, 443 S.E.2d at 403 n.1. Landowners sought permission to raze a nonconforming structure and build a bridge across the street between two other structures. *Id.* at 403. The impact on the view was found to be less than the existing interference. *Id.* at 404. The court upheld approval of the plans, but did so based on the case law regarding nonconforming structures. *Id.* at 404–06.

²⁸⁰ See *supra* text accompanying notes 102–21.

²⁸¹ George P. Smith, II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 76 (1991).

In states that cling to the minority position, promotion of tourism or the protection of property values may serve as alternative rationales to justify regulations designed to accomplish primarily aesthetic objectives. This may make for a result which is patently illogical but practically effective. Counties, cities, and towns in states within the minority camp should take full advantage of these alternative rationales to complete their environmental goals. The link between aesthetics, tourism, and property values has rendered continued judicial insistence on a health or safety rationale outdated at best.

Finally, and most importantly, protection of the visual resource promotes the general welfare by furthering both communitarian and individualistic aims. Central to the theory of communitarianism is the idea that individuals draw their identities from the community of which they are a part. "For them, community describes not just what they have as fellow citizens but also what they are, not a relationship they choose . . . but an attachment they discover, not merely an attribute but a constituent of their identity."²⁸² This statement of communitarianism embodies many of the principles of the emerging theory of landscape aesthetics,²⁸³ which holds that the landscape is crucial in defining the community. Moreover, studies demonstrate that the landscape may help us define ourselves as individuals. Protection of the visual resource promotes greater opportunities for aesthetic experiences such as recreation and leisure. There is an apparent link between such aesthetic experience and psychological or philosophical well-being. Thus, landscape protection also promotes a more individualistic, liberal agenda.

In jurisdictions subscribing to the majority position that aesthetics can stand alone as a police power goal, the most prevalent form of local regulation is the outright prohibition of eyesores. Yet these primitive devices contain precious little in the way of appreciation of the visual resource, from a liberal or communitarian perspective. This does not make for inherently bad regulation; some eyesores are so objectionable that an individual preference or community consensus to banish them may be presumed. Furthermore, to the extent that eyesore regulations continue to restate our collective and intuitive preference for trees to billboards, they serve a valuable purpose.

Viewshed and view corridor ordinances have the potential to merge landscape aesthetics with a broad communitarian notion of the gen-

²⁸² MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (1992).

²⁸³ In this regard, it is instructive to recall Gussow's perspective. See Gussow, *supra* note 1 and text accompanying note 5.

eral welfare. Both viewshed and view corridor ordinances require some determination of visual preferences—some consensus as to what is beautiful. But the viewshed and view corridor ordinances reviewed in this Article protect more than static snapshots of scenic vistas. The cities and towns employing these devices—Denver; Charlestown; Rolling Hills, California; Scottsdale, Arizona—have preserved viewsheds and view corridors based upon shared, communitarian ideals. The specific protected view, in some locally understood way, helps to define the very core of the community. Denver's legislative findings—that its panoramic mountain views encourage civic pride and embody the city's "unique environmental heritage and attributes as a city of the plains at the foot of the Rocky Mountains"²⁸⁴—are a reflection of these communitarian ideals.

Judicial tolerance of aesthetic goals standing alone creates an atmosphere in which the visual resource, and the role it plays in shaping the community, is freely explored. It elevates the landscape to "more than a passive backdrop" and acknowledges that "[t]he visual landscape, the environment we see, . . . gives shape to our character,"²⁸⁵ as communities and as individuals.

²⁸⁴ See *supra* text accompanying note 275.

²⁸⁵ See Gussow, *supra* note 1, at 7.