NOTE

THE RIGHT THING IN THE WRONG PLACE? UNSTABLE DICTA AND AESTHETICS' GRADUAL INCURSION INTO THE TRADITIONAL POLICE POWER JUSTIFICATIONS

*Nimrita K. Singh**

Aesthetic regulation is fast becoming a pervasive feature of many cities' and states' zoning regimes. While aesthetics are often used in conjunction with other justifications for zoning—itself an exercise of the well-recognized but somewhat nebulously defined police power—the constitutional basis for aesthetics' use as the sole justification for zoning decisions has not been closely examined by courts or academics. Over the past seventy years, the Supreme Court has steadily bolstered the legitimacy of solely aesthetic zoning by suggesting that it should be included among the other traditional police power justifications. Though most of the cases falling within this doctrinal trend look to dicta from the well-known Berman v. Parker *for support, their approaches have largely failed to critically engage with the* Berman *Court's justifications for aesthetic regulation. Current scholarship also takes the genesis of this doctrine for granted, appearing more interested in examining the conflicts that arise when aesthetic regulation brushes up against other areas of the law, such as the First Amendment's guarantee of free expression or the disproportionate impacts that aesthetic regulation and restrictive zoning have on certain communities, than in examining the doctrine's origins. This Note attempts to probe the instability of this growing doctrine's foundations by examining solely aesthetic regulation's complicated historicity and constitutionality. Ultimately, this Note suggests that recent trends indicate a new willingness by the Supreme Court to reexamine troubled*

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dicta and tackle head-on the question of whether aesthetics may stand on their own as a legitimate justification for exercises of the police power.

"A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[1]

INTRODUCTION

This Note discusses aesthetic regulation's entry into the traditional justifications for exercises of the police power, which include the health, safety, morals, and general welfare of the populace.[2] Though it is not contested that aesthetics may be part of a valid justification for regulatory exercises of the police power, especially when combined with one of the traditional justifications just listed, a more difficult question arises when one asks whether aesthetics *alone* may serve as a valid justification for exercises of this power, such as zoning.

[1] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

[2] See id. at 395 ("[B]efore the ordinance can be declared unconstitutional, [it must be said] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (first citing Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 530–31 (1917); and then citing Jacobson v. Massachusetts, 197 U.S. 11, 30–31 (1905))). Over one hundred years earlier, William Blackstone described the police power as

> the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.

4 William Blackstone, Commentaries *162.

As the slightly oxymoronic "gradual incursion" may suggest,[3] the history of aesthetics' entry into the pantheon of police powers was a convoluted one—at least before now-famous dicta in *Berman v. Parker* abruptly ushered aesthetics into the company of its police power predecessors.[4] While widespread acceptance of this dicta over the past seventy years has led to steadily increasing support for aesthetics alone as a valid justification for exercises of the police power,[5] this Note examines how the Supreme Court's treatment of this question has scarcely yielded definitive answers, and how largely uncritical interpretations of this dicta and the history behind it have produced a doctrine that is troubled and persistent in equal measure. In other words, this Note explores how aesthetic zoning—a sly cousin to the traditional justifications for exercises of the police power, developed largely through dicta rather than on its own merits—could be aptly described as a "right thing in the wrong place."[6]

Property rights were never absolutely free from government regulation, even before much of the doctrine concerning police powers had fully developed. Rather than being hyper-focused on the triumph of the individual over the encroaching powers of the State, early American states often subordinated individual rights to the pursuit of the common welfare.[7] Two common law maxims, *salus populi suprema est lex* ("the welfare of the people is the supreme law") and *sic utere tuo ut alienum*

[3] Incursion, Oxford English Dictionary, https://www.oed.com/dictionary/incursion_n?tab=meaning_and_use (last visited Mar. 6, 2025) ("A hostile inroad or invasion; esp. one of *sudden and hasty character*; a sudden attack." (emphasis added)).

[4] To be discussed in greater depth in Part II, these dicta in context state that

> [t]he 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) (emphasis added) (citing Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952)).

[5] See discussion infra Section II.C; infra Part III.

[6] *Euclid*, 272 U.S. at 388.

[7] See, e.g., Georgette C. Poindexter, Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development, 78 B.U. L. Rev. 445, 470 (1998). For the proposition that the public good took precedence over individual concerns throughout the eighteenth century, Professor Poindexter cites to John Jay's 1790 Charge to the Grand Juries that "'civil liberty consists, not in a right to every man to do just what he pleases,' but only to do that which 'the equal and constitutional laws of the county admit to be consistent with the public good.'" Id. at 470 n.177 (quoting Barry Alan Shain, The Myth of American Individualism: The Protestant Origins of American Political Thought 32 (1994)).

non laedas ("use your own right so as to not injure the right of others"), were pillars of American jurists' vision of a well-regulated society and promoted a multitude of government restrictions on property rights.[8] The Supreme Court recognized the common law tradition of police power regulation as early as 1824 when Chief Justice Marshall declared that "[t]he right to use all property, must be subject to modification by municipal law. *Sic utere tuo ut alienum non l[a]edas*, is a fundamental maxim. It belongs exclusively to the local State Legislatures, to determine how a man may use his own, without injuring his neighbour."[9] Other cases from this period also recognized limitations on property rights and offered sweeping, absolute statements in support of such regulation. For example, an early Massachusetts case stated that

> [a]ll property in this commonwealth . . . [is] held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment . . . as the legislature . . . may think necessary and expedient.[10]

The police power has long been thought of as a living, evolving concept, unburdened by strict rules or specific criteria.[11] Indeed, in *Village of Euclid v. Ambler Realty Co.*, the Court stated that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."[12] Thus, neither the brief, pre-twentieth-century review above, nor the more in-depth historical review to follow in Part II, is meant to

[8] See William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America 42, 47 (1996).

[9] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 53–54 (1824).

[10] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851); see also Novak, supra note 8, at 21 (arguing that *Alger* was "firmly entrenched in the intellectual, political, and legal traditions of nineteenth-century America").

[11] See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) ("The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria."); see also Douglas W. Kmiec, Inserting the Last Remaining Pieces into the Takings Puzzle, 38 Wm. & Mary L. Rev. 995, 1011 n.78 (1997) (stating that "[n]either property nor police power is an absolute right; each evolves contextually and over time").

[12] 272 U.S. 365, 387 (1926).

suggest that even if aesthetics alone were historically a suspect candidate for the police power, they can never be a valid justification. Rather, the question is whether aesthetics, either alone or in combination with the other traditional justifications for exercises of the police power, are properly included in the category of "the general welfare" considering the latter's broad judicial recognition at the time the doctrine was first being formed. Put differently, are aesthetics—then or now—a compelling enough contribution to the people's welfare to justify diminutions in property rights?

Despite extensive study of the practical consequences of urban renewal programs and aesthetic regulation,[13] and strong scholarly censure of the Supreme Court's interpretation of the Fifth Amendment's "Public Use" Clause to justify economic regulation and urban renewal programs in decisions like *Berman* and *Hawaii Housing Authority v. Midkiff*,[14] few authors have turned their attention specifically toward aesthetic regulation's suspect historicity and constitutionality. This Note attempts to fill that analytical gap by examining the development of aesthetic regulation within the police powers doctrine from the pre-*Berman* era to the present, post-*Berman* age. It proceeds in four parts: Part I provides a brief grounding in the real-world impacts that aesthetic regulation has on the ongoing housing availability and affordability crisis as a form of restrictive zoning. Part II examines the development of aesthetics as a possible addition to the traditional police power justifications, dividing the inquiry into three distinct periods. The first period, discussed in Section II.A, focuses on early doctrinal trends in what this author terms the "pre-*Berman* period." It posits that although courts initially found

[13] See, e.g., Herbert J. Gans, The Failure of Urban Renewal, Comment. (Apr. 1965), https://www.commentary.org/articles/herbert-gans/the-failure-of-urban-renewal/ [https://perma.cc/P49G-MENC] (noting the displacement caused by urban renewal programs); Vanessa Brown Calder, Zoning, Land-Use Planning, and Housing Affordability, 823 Cato Inst. Pol'y Analysis, Oct. 18, 2017, at 1, 1–2, https://www.cato.org/policy-analysis/zoning-land-use-planning-housing-affordability [https://perma.cc/UZM4-CGRU] (concluding that the rise in aesthetic regulations has caused many cities to face housing affordability challenges).

[14] For a few representative works discussing the Supreme Court's Public Use Clause jurisprudence, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 178–79 (1985) (arguing that the Supreme Court's interpretation of the public use standard in *Berman* did not fall under traditional conceptions of the public use requirement and that its necessity argument merely belied the "state's desire to transfer property between private parties"); Margaret Jane Radin, Reinterpreting Property 136 (1993) (arguing that "the term 'public use' has recently been interpreted as broadly as possible" in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984)).

aesthetically motivated regulation inimical to proper exercises of the police power, the Supreme Court became comfortable accepting post hoc aesthetic justifications for exercises of the police power when the highest court of a state would do so. This tentative comfort was far from universally accepted, however, as other courts during this time insisted that exercises of the police power were to be reserved for necessitous circumstances, holding that such necessity did not include cities' desire to regulate property to achieve aesthetic goals.

The second period, discussed in Section II.B, focuses on two decisions that ushered aesthetics further into the family of police power justifications, *Euclid*[15] and *Berman*.[16] While these cases have been used by the Supreme Court to justify the constitutionality of aesthetic regulation and to hint at the possible constitutionality of purely aesthetic zoning (though such a case has not yet reached the Court), a close reading of *Euclid* and *Berman* suggests that aesthetic zoning was to be used in only a very narrow set of circumstances. Section II.C discusses *Berman*'s progeny and examines how extensively its dicta have been distorted as more cases involving aesthetic regulation have reached the Court. Part III briefly discusses trends at the state level toward an acceptance of aesthetic and purely aesthetic regulation. Finally, Part IV examines recent trends in the Supreme Court that may suggest an awakening to the faltering legal foundations of aesthetics as a valid police power justification.

I. THE REAL-WORLD IMPACT OF AESTHETIC REGULATION

Aesthetic regulation is not always as benign as it may sound. Though not the focus of this Note, much of the scholarship concerning aesthetic regulation has highlighted its tension with the First Amendment's guarantee of free expression.[17] In addition, aesthetic regulation can be

[15] 272 U.S. at 388.

[16] 348 U.S. 26, 33 (1954).

[17] See, e.g., City Council v. Taxpayers for Vincent, 466 U.S. 789, 818 (1984) (Brennan, J., dissenting) ("Because the Court's lenient approach towards the restriction of speech for reasons of aesthetics threatens seriously to undermine the protections of the First Amendment, I dissent."); see also Darrel C. Menthe, Aesthetic Regulation and the Development of First Amendment Jurisprudence, 19 B.U. Pub. Int. L.J. 225, 229 (2010) (noting that common justifications for aesthetic regulation sometimes exist in direct conflict with the First Amendment when a person's right to communicate conflicts with another person's right to avoid communication); Shawn G. Rice, Comment, Zoning Law: Architectural Appearance Ordinances and the First Amendment, 76 Marq. L. Rev. 439, 453–54 (1993) (querying whether architectural design choices, described as a form of self-expression, could be a

vague and extraordinarily capacious. Aesthetic zoning and architectural design controls are often based on subjective factors that resist clear definition, which may lead to abuses of discretion or corruption at the implementation stage.[18] Architectural review ordinances also come in a variety of forms, granting review boards the power to approve or deny building permits pursuant to inscrutable standards such as a building's similarity, dissimilarity, or even inappropriateness to the area.[19] Henrico County, Virginia's zoning districts, for example, establish "overlay districts," which "provide supplemental standards with respect to special areas, land uses, or environmental features, that supersede the standards of the underlying base zoning district or planned development district."[20] Its West Broad Street overlay district "establishes additional requirements for development in the West Broad Street corridor in order to reduce traffic congestion, protect landowners from potential adverse impacts of adjoining development, avoid distracting visual clutter, and enhance the appearance and environment of western Henrico County *consistent with the aesthetic values of the district*."[21] Other overlay district provisions use terms like "visual clutter," "desired character," and "convenient, attractive, and harmonious community" to set the development parameters for certain areas of the county.[22]

recognized form of speech protected under the First Amendment); Galina Krasilovsky, A Sculpture Is Worth a Thousand Words: The First Amendment Rights of Homeowners Publicly Displaying Art on Private Property, 20 Colum.-VLA J.L. & Arts 521, 541–46 (1996) (examining whether outdoor artistic displays on private property should be considered speech, and thus what level of protection they should receive under a First Amendment framework); William M. Sunkel, *City of Renton v. Playtime Theatres, Inc.*: Court-Approved Censorship Through Zoning, 7 Pace L. Rev. 251, 253 (1986) (warning that the *Renton* decision constitutes "little more than tacit Court approval of governmental censorship through manipulation of a municipality's zoning power").

[18] See, e.g., Kenneth Regan, Note, You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review, 58 Fordham L. Rev. 1013, 1020 (1990); Julie A. Tappendorf, Architectural Design Regulations: What Can a Municipality Do to Protect Against Unattractive, Inappropriate, and Just Plain Ugly Structures?, 34 Urb. Law. 961, 965 (2002) (describing the inherent subjectivity of architectural design controls imposed by architectural review boards).

[19] Regan, supra note 18, at 1019–20; Rice, supra note 17, at 446 (noting that while some zoning boards require that architectural designs not be too similar to others in the area, others require conformity or harmony with the community's existing or even desired architecture).

[20] Zoning Districts and Uses, Henrico Cnty., Va., https://henrico.gov/planning/planning-commission-rezoning-provisional-use-permits/zoningdistrictsuses/ [https://perma.cc/J8JD-SSYY] (last visited Mar. 6, 2025).

[21] Id. (emphasis added).

[22] Id.

Such appeals to the aesthetic also appear in broader-reaching regulations, such as the Virginia Administrative Code. The Virginia Housing Development Authority, which provides rules and regulations for single-family housing developments, requires developers to demonstrate that "[t]he design of the proposed development and the units therein is *attractive and esthetically appealing*, will contribute to the marketability of the proposed development[,] . . . and will otherwise provide safe, habitable and *pleasant* living accommodations and environment for such residents."[23]

Unsurprisingly, litigation abounds over whether such standards are adequate guides for administrative decision-making.[24] And while some placate these concerns by pointing out that aesthetic zoning validates a people's collective, democratic choice for a cohesive community vision,[25] others retort that full and fair participation in this process cannot be ensured due to a variety of complicating factors.[26] Finally, aesthetic regulation achieved under the police power is done without recompense to the owner, unlike when the state uses eminent domain to take property for a public purpose.[27]

[23] 13 Va. Admin. Code § 10-30-50 (1989) (emphasis added); Va. Code Ann. § 36-55.27:1 (2024); 13 Va. Admin. Code § 10-30-10 (1989).

[24] See Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law § 12:3, at 516–21 (3d ed. 2013) (cataloguing cases relating to aesthetic regulation in various specific areas); see also State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 222 (Wis. 1955) (involving a vagueness due process challenge); Pacesetter Homes, Inc. v. Village of Olympia Fields, 244 N.E.2d 369, 370–73 (Ill. App. Ct. 1968) (striking down a vague architectural review ordinance where the broad standards—including excessive similarity or dissimilarity, substantially identical size and arrangement, and inappropriateness in relation to adjoining properties—conferred too much discretion on the administrative body); Morristown Rd. Assocs. v. Mayor of Bernardsville, 394 A.2d 157, 163 (N.J. Super. Ct. Law Div. 1978) (striking down an ordinance on the grounds that its standards were too vague). But see Nadelson v. Township of Millburn, 688 A.2d 672, 679 (N.J. Super. Ct. Law Div. 1996) (holding that such an ordinance was not unconstitutionally vague).

[25] Poindexter, supra note 7, at 488.

[26] Id. at 489 (listing "(1) the influence of narrow interest groups; (2) limitations on democracy imposed by collective decision making processes; and (3) bureaucratic self-interest" as three such impediments (footnotes omitted)).

[27] See Commonwealth v. Alger, 61 Mass (7 Cush.) 53, 86 (1851) (stating that regulation achieved through the police power "is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain"); Block v. Hirsh, 256 U.S. 135, 155–56 (1921) (stating that under the police power, "property rights may be cut down, and to that extent taken, without pay. . . . [A] public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation").

It is not just doctrinal concerns regarding the First Amendment, overbreadth, vagueness, and discriminatory enforcement that make aesthetic zoning potentially problematic. Serious practical consequences result when states and municipalities decide what to allow and what to keep out of their environs on the basis of aesthetic considerations. The United States is in the midst of an affordable housing crisis: adjusted for inflation, housing prices have risen roughly 60% over the past decade.[28] About a quarter of renters, accounting for roughly 12 million households, spend more than half of their paychecks on rent.[29] Other studies have estimated that there is a shortage of over 7 million affordable homes for the 10.8 million-plus American families classified as "extremely low-income."[30] Rents have also risen significantly in Virginia. From January 2017 to December 2023, rents rose over 30% in 9 Virginia counties.[31]

Generally, many of these trends can be attributed, at least in part, to restrictive zoning.[32] Aesthetic regulation and zoning also play a part in increasing housing prices and the widespread dearth of affordable housing. Placing aesthetic requirements on new construction so as to preserve the character or similarity of a neighborhood can result in significant price increases for builders, who may then pass along higher costs to those seeking housing.[33] Even the most common of aesthetic

[28] Conor Dougherty, America's Affordable Housing Crisis, N.Y. Times (Mar. 27, 2024), https://www.nytimes.com/2024/03/27/briefing/affordable-housing-crisis.html.

[29] Id.

[30] The Problem, Nat'l Low Income Hous. Coal., https://nlihc.org/explore-issues/why-we-care/problem [https://perma.cc/WYX2-SKTX] (last visited Mar. 6, 2025); see also id. ("Seventy percent of all extremely low-income families . . . pay[] more than half their income on rent."); Out of Reach: The High Cost of Housing, Nat'l Low Income Hous. Coal., https://nlihc.org/oor [https://perma.cc/WD3Y-M7G9] (last visited Mar. 6, 2025) (providing an interactive map displaying the hourly wages required to afford a two-bedroom rental home in each state).

[31] See Alex Horowitz & Chase Hatchett, How Restrictive Zoning in Virginia Has Hurt Housing Affordability, Pew Charitable Trs. (Jan. 22, 2024), https://www.pewtrusts.org/en/research-and-analysis/articles/2024/01/22/how-restrictive-zoning-in-virginia-has-hurt-housing-affordability [https://perma.cc/2TUG-R59Z]. The article discusses rent increases in the following counties and cities: "Prince William County (34%), York County (37%), Chesapeake (38%), Stafford County (39%), Ashburn (37%), Virginia Beach (39%), Manassas (45%), Short Pump (46%), and Fredericksburg (48%)." Id.

[32] See id. ("Research shows that jurisdictions that allow more housing, especially apartments, tend to see much slower rent growth, while those with restrictive zoning that allows little housing see faster rent growth—amounting to thousands of dollars per household annually.").

[33] Affordability Roadblocks: Aesthetic Mandates, Hous. Affordability Inst., https://www.housingaffordabilityinstitute.org/policy-center/aesthetic-mandates/ [https://perma.cc/L3UJ-XZ

mandates—vinyl siding bans—can prevent construction of more affordable housing by requiring builders to use more expensive materials on those projects.[34] "Four-Sided Aesthetic Mandates," for example, which require partial stone façades in place of vinyl siding, can increase the cost of a housing unit by as much as $20,000.[35]

Aesthetic considerations also arise explicitly in conversations about building more affordable housing. In Marion, a small town in Massachusetts, the Zoning Board of Appeals debated the construction of a ninety-six-unit housing development, which "would significantly add to Marion's available and affordable housing."[36] At the time, only 8.04% of Marion's housing was considered affordable, while only 2.59% and 0.43% of the housing in the surrounding towns of Mattapoisett and Rochester, respectively, were considered affordable.[37] The Board discussed two problems: waste management and aesthetic concerns. On the latter, the Board's chair said that the development "did not look like coastal New England. It looks like anywhere in America."[38]

Aesthetic regulation's disproportionate impact on low-income communities is also well documented. Justice Thomas, dissenting from the majority's decision in *Kelo v. City of New London*, noted that the consequences of urban renewal programs would "fall disproportionately on poor communities," which also have traditionally held the least political power.[39] He went on to note that "[o]ver 97[%] of the individuals forcibly removed from their homes by the 'slum-clearance' project upheld by this Court in *Berman* were black," and that between 1949 and 1963, 63% of those displaced by urban renewal programs were people of color.[40] Indeed, urban renewal projects enjoyed only a brief period of acceptance after *Berman v. Parker*, with many recognizing the disproportionate impact that such programs had on low-income

AD] (last visited Mar. 6, 2025); see also Calder, supra note 13, at 2 (explaining how design requirements can increase housing costs by affecting the construction process).

[34] Affordability Roadblocks: Aesthetic Mandates, supra note 33.

[35] Id.

[36] Grace Ballenger, Marion Zoning Board Brings Up Septic, Aesthetic Concerns on Development, Sippican Week (July 24, 2020), https://sippican.theweektoday.com/article/marion-zoning-board-brings-septic-aesthetic-concerns-development/48985 [https://perma.cc/N22V-6V7K].

[37] Id.

[38] Id.

[39] 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

[40] Id. at 522 (citations omitted).

communities by the 1960s.[41] Critics recognized that urban renewal programs not only created dubious economic returns (at best) and wasted government resources (at worst), but that they also created *more* slums through displacement of established low-income communities and amplified racial discrimination.[42]

II. DEVELOPMENT OF THE DOCTRINE

*A. The Pre-*Berman *Period*

Very early treatment of aesthetics was generally negative.[43] Even if an ordinance was explicitly designed around an unproblematic justification for exercise of the police power, such as fire safety, it risked being found impermissible if a court discovered a hidden aesthetic purpose. In *City of Newton v. Belger*, for instance, the Massachusetts Supreme Judicial Court struck down a building permit ordinance designed to prevent fire hazards.[44] The court noted that because the ordinance did not require the city aldermen to find that buildings posed a fire hazard before denying permits, it effectively authorized them to decide that only "handsome dwelling-houses" could be constructed in the city.[45]

Around the same time, however, there began to arise a greater appreciation for aesthetics in city planning and urban life. The importance of aesthetic considerations in city planning finds its origins in a grassroots movement called the City Beautiful Movement, which appears to have taken off at the Chicago World's Fair of 1893.[46] The Movement was at first concerned with public health and sanitation—an unsurprising result of the era's many overpopulated, clustered, and disease-prone cities, which were largely the product of unplanned and "unrestrained private enterprise."[47] The Movement's proponents believed that if sanitary

[41] See Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003).

[42] Id. at 47–48.

[43] Meg Stevenson, Aesthetic Regulations: A History, 35 Real Est. L.J. 519, 520 (2007) ("Aesthetics, the early courts maintained, did not fall under these categories; these considerations were superficial and subjective and the courts could not justify their inclusion under the police power." (citation omitted)).

[44] 10 N.E. 464, 467 (Mass. 1887).

[45] Id.

[46] Juergensmeyer & Roberts, supra note 24, § 2:4, at 19–20.

[47] Id.

reform could be planned, then so too could aesthetic reform.[48] These two goals—public health and aesthetics—were also joined in the American League for Civic Improvement, founded in 1901, which created advisory panels of experts in municipal art and sanitation.[49] By 1901, the village improvement associations the Movement inspired had grown in number to over one thousand.[50] Despite this early attention, aesthetics were still closely associated with other traditional justifications for exercises of the police power and were not yet being used alone as a justification for urban reform.[51]

This tentative comfort with aesthetics appeared to spill somewhat into courts' treatment of aesthetic regulation during the early twentieth century, at which time the scope of the police power was no less broad than it had been in the eighteenth and nineteenth centuries. This comfort appeared, however, less of a wholesale acceptance of aesthetics-motivated regulation and more of a laissez-faire approach to local legislation. For example, although the Supreme Court in *Buchanan v. Warley* noted that states' exercise of the police power must have "for their object the promotion of the public health, safety and welfare," it also recognized that "the exercise of this power, embracing *nearly all* legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose."[52]

But what constitutes a lawful purpose? Could aesthetics constitute a lawful purpose only when buoyed by another police power justification, or could they alone stand as a valid justification for exercises of the police power? Taking the opposite tack, would only a hint of aesthetics render an ordinance impermissible, even if it could have been conceivably based on a health or safety justification?

Even as more aesthetics-oriented cases began to arrive at courts' doorsteps, answers remained elusive. Cases such as *Welch v. Swasey*[53] presented artfully crafted ordinances that appeared to be premised on traditional police power justifications, but in reality hid aesthetics-oriented intentions. At issue in *Welch* was a zoning ordinance that

[48] Id.
[49] Id.
[50] Id.
[51] Stevenson, supra note 43, at 523–24.
[52] 245 U.S. 60, 74 (1917) (emphasis added).
[53] 214 U.S. 91 (1909).

imposed various building height restrictions throughout different parts of Boston.[54] The plaintiff argued that while his building proposal did exceed the height limit for his zone, the 1904 Height Restriction Act could not be upheld as a valid exercise of the state's police power because its true purpose was of an "aesthetic nature," designed only to preserve pleasing skylines.[55] Indeed, he argued, this aesthetic purpose tainted the regulation so acutely that its infringement upon property rights had become "unreasonable and disproportioned to any public necessity."[56] Neatly sidestepping the issue of aesthetics, however, the Court held instead on the basis of fire risk.[57] "[F]eel[ing] the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law," the Court adopted the Massachusetts Supreme Judicial Court's holding that the ordinance was constitutional because fire safety "*may have* entered into the purpose of the commissioners," though the state court had recently held in another case that the police power could not be exercised for a merely or solely aesthetic purpose.[58] The Court would only reverse if the state court's finding on the purposes behind an act was "plainly wrong."[59]

Some scholars understand this opinion's significance to lie mainly in its insistence that if "considerations of an aesthetic nature also entered into the reasons for [an act's] passage, [it] would not invalidate them."[60] After *Welch*, states could thus exercise the police power for aesthetic concerns if they also cited another one of the more traditional justifications.[61] That would not seem a very noteworthy conclusion had the Act been explicit about its fire-safety goals. But the Court appeared to accept fire risk, just as the Massachusetts court had done, as a post hoc

[54] Id. at 93–95.

[55] Id. at 104.

[56] Id.

[57] Id. at 107.

[58] Id. at 106–07 (emphasis added). For a similar state court stance, see Abbey Land & Improvement Co. v. San Mateo County, 139 P. 1068, 1070 (Cal. 1914) (holding that an ordinance would be invalid if based solely on the effect of community appearance).

[59] *Welch*, 214 U.S. at 106.

[60] Id. at 108; see also infra note 61 and accompanying text.

[61] See, e.g., Stevenson, supra note 43, at 528–29. For a case that more clearly espoused such reasoning, see St. Louis Poster Advert. Co. v. City of St. Louis, 249 U.S. 269, 274 (1919) (holding that while "[p]ossibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else," the ordinance should not be denied because of these "relatively trifling requirements").

justification.[62] The Act itself made only one mention of fire, in specifying that it should not apply to structures such as "steeples, domes, towers or cupolas erected for strictly ornamental purposes" that were made "of fireproof material."[63] The additional concerns about fire safety that the Court mentioned were cited from the city's brief and not mentioned in the Act itself.[64] In giving deference to state courts, the Supreme Court seemed willing at this time to turn a blind eye to legislatures' poor or unsubtle drafting. Failing to mention any police power justification could be forgiven in the face of an accusation of aesthetic purpose, as this was not, apparently, "plainly wrong."

The above discussion does not attempt to discount the possibility that the Court was simply applying an early form of rational basis review and, as such, did not need to closely examine the legislation because there was a rational, means-end fit between fire safety and height restrictions on buildings in heavily populated areas. However, the opinion appears to answer only one of the questions posed at the beginning of this discussion: contrary to earlier decisions such as *City of Newton v. Belger*,[65] aesthetic intentions would not necessarily render a regulation impermissible.[66] But what should one make of the Court's reference to the earlier Massachusetts decision that held aesthetics alone could not serve as a valid police power justification?[67] Was the Court adopting this sentiment, or merely noting it in dicta while intending no binding effect? If courts could just as readily accept post hoc justifications for exercises of the police power, and if cities or states could easily tie aesthetic motivations to one of the more acceptable police power justifications without receiving any meaningful form of scrutiny, then in what situations would courts realistically find that aesthetics alone had motivated the regulation?

To other courts at the time, aesthetics still presented a ruinous defect to property regulation no matter what other valid purposes a regulation might be found to have. States other than Massachusetts still required necessity for the exercise of the police power and did not see aesthetics

[62] See *Welch*, 214 U.S. at 107; Welch v. Swasey, 79 N.E. 745, 747 (Mass. 1907), *aff'd*, 214 U.S. 91 (1909).

[63] *Welch*, 214 U.S. at 92–93 n.1 (quoting 1904 Mass. Acts 284).

[64] Id. at 107–08 (citing Brief for Defendants in Error at 11, *Welch*, 214 U.S. 91 (No. 153)).

[65] 10 N.E. 464, 466–67 (Mass. 1887).

[66] *Welch*, 214 U.S. at 108.

[67] Id. at 106–07.

as a proper necessity.[68] Their review was accordingly much more searching than that of the Massachusetts Supreme Judicial Court or the United States Supreme Court. In *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, for instance, the Supreme Court of New Jersey held invalid a billboard regulation that prescribed the height and placement of billboards a certain distance away from streets.[69] In asking whether the regulation was "reasonably necessary for the public safety," the court was highly skeptical of the city's proffered justification of protecting motorists from billboards falling into roads.[70] It observed that "[t]he very fact that this ordinance is directed against sign and billboards only, and not against fences, indicates that some consideration other than the public safety led to its passage."[71] It also noted that, as no evidence was offered as to billboards' danger to public safety at the time of its passage, it was "probable that the enactment of section 1 of the ordinance was due rather to aesthetic considerations than to considerations of the public safety."[72] In a resounding indictment of aesthetic regulation, the court declared that

> [n]o case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. *Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power* to take private property without compensation.[73]

[68] See, e.g., City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 844 (Ohio 1925) (holding that because "[t]here must be an essential public need for the exercise of the [police] power in order to justify its use," mere aesthetics could not justify the use of the police power as they were "not essential to the public need").

[69] 62 A. 267, 267 (N.J. 1905).

[70] Id. at 268.

[71] Id.

[72] Id.

[73] Id. (emphasis added). For similar state court treatment of billboard regulations, see also Crawford v. City of Topeka, 33 P. 476, 477 (Kan. 1893), which struck down a billboard regulation for holding no relation to the safety, health, or comfort of the public. It added that "a secure structure, which is not an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat, and then prohibited." Id. (citing Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870)).

B. Euclid *and* Berman*: Aesthetics as Necessitous Circumstances*

Cases such as *Passaic* and *City of Youngstown v. Kahn Bros. Building Co.* reveal a general sentiment among the states at the time that aesthetics could be used as a justification, if they could be used at all, only when there was some other necessitous circumstance to justify an exercise of the police power.[74] And there are few more necessitous circumstances a legislature could find than preventing a harm—or even better, an emergency.

We now turn to *Village of Euclid v. Ambler Realty Co*.[75] At first glance, the case appears to have little or nothing to do with aesthetics. But while aesthetics themselves are never mentioned in the opinion, they were nevertheless lurking in the background. The zoning ordinance raised the specter of an aesthetic purpose, as the lower court recognized, by keeping wealthier—and thus, as went the rationale, more beautiful—parts of the village separate from the poorer and more industrial ones.[76] These arguments reached the Supreme Court through the advocacy of Ambler Realty Company's legal counsel, Newton D. Baker, who wrote the following about the case: "Even if the world could agree by unanimous consent upon what is beautiful and desirable . . . it could not, under our constitutional theory, enforce its decision by prohibiting a land owner, who refuses to accept the world's view of beauty, from making otherwise safe and innocent uses of his land."[77]

Though the Supreme Court understood and endorsed this separation, it skirted the language of aesthetics. Instead, the Court found other justifications for the zoning ordinance, including more efficient fire control, the safety and security of homes, traffic reduction (which itself would protect resident children), and better health outcomes ensured through increased sunlight and air circulation.[78] Apart from these traditional health, safety, and general welfare justifications, the Court also

[74] *Passaic*, 62 A. at 268; City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 844 (Ohio 1925).

[75] 272 U.S. 365 (1926).

[76] Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924) ("Aside from contributing to these results and furthering such class tendencies, *the ordinance has also an esthetic purpose*; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful." (emphasis added)), *rev'd*, 272 U.S. 365 (1926).

[77] Michael Allan Wolf, The Zoning of America: *Euclid v. Ambler* 150 (2008).

[78] *Euclid*, 272 U.S. at 394.

looked to nuisance law as providing "a fairly helpful clew."[79] Legislatures could already regulate individual structures likely to create nuisances,[80] and after *Euclid*, they could also extend their regulation to categories of uses that were likely to inflict a nuisance upon the preferred uses designated for a certain zone.[81] Aside from offensive trades and industries, the Court targeted apartments as presenting such a nuisance.[82] It viewed these "mere parasite[s]" as destructive forces, taking advantage of and destroying the "attractive surroundings" intended "for private house purposes."[83]

This justification—that multifamily apartments imposed a nuisance on certain zones by destroying attractive surroundings—appeared in the opinion before the justifications relating to the free circulation of light and air.[84] In its extensive review of state court treatment of zoning, the Court also quoted at length a passage from *State ex rel. Civello v. City of New Orleans*.[85] In determining that businesses were rightly segregated from residential zones because the former presented a variety of nuisances, the Louisiana Supreme Court noted that "[p]laces of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are *unsightly*; some are apt to breed rats, mice, roaches, flies, ants, etc."[86] Both *Euclid* and *Civello* mentioned potential aesthetic justifications for zoning in connection with the traditional justifications of health and safety.[87] In doing so, it appears that each court attempted to temper the formerly invidious nature of aesthetics by fortifying it with more palatable bases for exercises of the police power.[88]

[79] Id. at 387.
[80] Id. at 388.
[81] Id.
[82] Id. at 394–95.
[83] Id. at 394.
[84] Id.
[85] Id. at 393 (quoting State ex rel. Civello v. City of New Orleans, 97 So. 440, 444 (La. 1923)).
[86] Id. (emphasis added) (quoting *Civello*, 97 So. at 444).
[87] Id. at 394; *Civello*, 97 So. at 444.
[88] Earlier in this discussion, *Euclid* also cited *State ex rel. Carter v. Harper*, 196 N.W. 451 (Wis. 1923), as a case that embraced comprehensive zoning regimes. 272 U.S. at 369–70. While the Supreme Court did not include a quote from *Carter*, it is interesting to note that *Carter* also mused on aesthetics' potential valence as a nuisance, stating that "[t]he rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to *plague* the average or dominant human sensibilities well may be pondered." *Carter*, 196 N.W. at 455 (emphasis added). The use of the word "plague" is interesting, as it suggests a connection between aesthetics and public health. See Christos

Much like the Court's decision in *Welch*, *Euclid*'s oblique treatment of aesthetics presents more questions than answers. It appears from the Court's careful inclusion of the traditional health and safety justifications in its rationale that aesthetics were not the only motive behind the ordinance.[89] And even if aesthetics had been one of the explicit motivations, they would not have rendered the zoning ordinance impermissible on its face. The Court set a very low standard of review for zoning ordinances, stating that they must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" before being declared unconstitutional.[90] To be sure, there was no suggestion that the aforementioned aesthetic goals of the ordinance in *Euclid* were clearly arbitrary or unreasonable. But by making explicit mention of attractive surroundings, was the Court suggesting that unattractive buildings could themselves present a nuisance? Was there a right to be free from unattractiveness,[91] enforceable by the far-reaching arm of state zoning law? Furthermore, could that right be a sole justification for exercises of the police power, or have itself a substantial relation to the public health, safety, morals, or general welfare?[92]

When it once again came time for the Supreme Court to consider aesthetics, it did not do so in terms of nuisance. Rather, *Berman v. Parker* dealt with aesthetics on two grounds: first, as an auxiliary to the other police power justifications (that is, permitting aesthetics to be used as a justification for regulatory action when cited alongside at least one of the more traditional police power justifications),[93] and second, in terms of

Lynteris, Visual Plague: The Emergence of Epidemic Photography 59–63 (2022) (discussing the relationships throughout history between the plague, urban spaces, and sanitation, as well as efforts to shape the image of epidemic risk and hygienic improvement through aesthetics of cleanliness and propriety).

[89] *Euclid*, 272 U.S. at 394.

[90] Id. at 395 (first citing Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 530–31 (1917); and then citing Jacobson v. Massachusetts, 197 U.S. 11, 30–31 (1905)).

[91] See, e.g., Menthe, supra note 17, at 225 ("The questions posed by aesthetic regulations are both descriptive and normative: Is there a freedom to be ugly? Is there a right to be free *from* ugliness?").

[92] Such questions were not considered frivolous even before more explicit dicta in *Berman* thrust them further into the mainstream. In 1939, one commentator suggested that "freedom from unsightliness" should be a valid justification for aesthetic regulation and argued that "the time has now come when the law of nuisance should definitely be expanded to protect, in many cases, this growing interest in freedom from unsightliness." Dix W. Noel, Unaesthetic Sights as Nuisances, 25 Cornell L.Q. 1, 4–5, 17 (1939).

[93] 348 U.S. 26, 32–33 (1954).

emergency.[94] The following oft-quoted dicta are illustrative of the first category:

> 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. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[95]

Courts and scholars alike have read the above passage as an overt statement in favor of the validity of solely aesthetic regulation for the past seventy years.[96] Perhaps the most serious problem with these interpretations is that this passage can be read as mere dicta, not a binding holding. There are several ways to distinguish holdings from dicta that are relevant here.[97] First, *Berman* was not decided on aesthetics alone: the Court also cited various health and safety emergencies—two traditional police power justifications—that established the exercise of eminent domain.[98] Indeed, the portion of the District of Columbia Redevelopment

[94] Id. at 34.

[95] Id. at 33 (citing Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952)).

[96] See, e.g., Regan, supra note 18, at 1025 & nn.81–82 (discussing cases that have used the above-quoted dicta to support the conclusion that solely aesthetic zoning is permissible); Theodore Guberman, Aesthetic Zoning, 11 Urb. L. Ann. 295, 301–02, 301 n.44 (1976) (first citing J.J. Dukeminier, Jr., Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemp. Probs. 218, 219 (1955); then citing Theodore M. Norton, Police Power, Planning and Aesthetics, 7 Santa Clara Law. 171, 182, 187 (1967); and then citing Sheldon Elliot Steinbach, Aesthetic Zoning: Property Values and the Judicial Decision Process, 35 Mo. L. Rev. 176, 186 (1970)).

[97] For a general overview of the different holding theories, see Lawrence B. Solum, Legal Theory Lexicon 005: Holdings, Legal Theory Lexicon (Nov. 10, 2024), https://lsolum.typepad.com/legal_theory_lexicon/2003/10/legal_theory_le_2.html [https://perma.cc/M9BT-Q2UM]. In short summary, a ratio decidendi holding is a holding that stems from the reasoning or logic necessary to reach the outcome that a case reached. Id. A legislative holding is typically introduced with a statement such as "[w]e hold that" and is often the most easily identifiable of the three holding types, though Professor Solum warns that the legislative holding may "go[] far beyond the facts of the case presented." Id. A legally salient facts holding is a holding generated by the specific facts of the particular case at hand, which can imply "that a single case cannot generate a broad holding; because in any one case, there will be a large number of legally salient facts." Id.

[98] *Berman*, 348 U.S. at 30, 33; see also Regan, supra note 18, at 1026 ("A proper reading of *Berman v. Parker* does not support zoning based solely on aesthetics. First, *Berman* was not

Act of 1945 the Court cited in its opinion specified that the substandard and blighted housing conditions were "injurious to the public health, safety, morals, and welfare," but was silent on aesthetics.[99] As the Court's addition about aesthetics was not part of the logic strictly necessary to reach its holding (because it could have done so on the basis of health or safety), the passage arguably does not constitute a ratio decidendi holding.[100] Secondly, aesthetic considerations also did not constitute a significant part of the factual basis that the Court used to come to its decision,[101] so the passage does not represent a legally salient facts holding. Thirdly, the passage was not part of a traditional holding statement (often starting with "we hold that . . . "), so it was not a legislative holding.

Aside from being dicta, it is not clear that this passage justifies an exercise of the police power or eminent domain based on aesthetics alone. Note the passage's peculiar cadence, repeating the phrase "as well as" six times in order to produce a prevaricating push-pull: "aesthetic as well as monetary"; "beautiful as well as healthy"; "beautiful as well as sanitary."[102] It is no mistake that Justice Douglas explicitly paired aesthetics as the more progressive justification with more traditional justifications such as public health. Perhaps he was "soft-launching"[103] aesthetics as a new and independent member of the police power justifications by pairing aesthetic concerns with those involving health and safety.[104] But read in the plainest and narrowest terms, he was merely revisiting what the Court had held since 1909 in *Welch*: states could exercise the police power to achieve aesthetic goals if those goals were

decided on aesthetics alone. The *Berman* Court cited important health and safety problems that would support government interference with property rights." (first citing Samuel Bufford, Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation, 48 UMKC L. Rev. 125, 165–66 (1980); then citing Guberman, supra note 96, at 302; and then citing *Berman*, 348 U.S. at 30, 33)).

[99] *Berman*, 348 U.S. at 28 (quoting District of Columbia Redevelopment Act of 1945, ch. 736, § 2, 60 Stat. 790, 790 (1946)).

[100] See Solum, supra note 97 (explaining what constitutes a ratio decidendi holding).

[101] *Berman*, 348 U.S. at 30.

[102] Id. at 33.

[103] Soft launch, Oxford English Dictionary, https://www.oed.com/dictionary/soft-launch_v (last visited Mar. 6, 2025) ("To release (a new product or service) with little or no publicity or to a restricted audience or market, usually with the aim of trialling it before a subsequent release to a wider market.").

[104] This is similar to how *Euclid* and *Civello* handled aesthetics. See supra notes 86–88 and accompanying text.

accompanied by another one of the traditional police power justifications.[105]

More persuasive, but less often discussed, dicta appear in the following statement from *Berman*:

> Miserable and disreputable housing conditions *may do more than spread disease and crime and immorality*. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[106]

This statement—representing the second category of *Berman* dicta referenced at the beginning of this Section—moves further beyond the traditional health and safety justifications for condemnation. It illustrates the burden of miserable housing by emphasizing its ugliness and lack of charm, and it may suggest that aesthetics could stand as both a harm and a potential solution to blight. But this language is also couched in terms of emergency: it is when unattractiveness becomes an "insufferable burden" upon the spirit that the remedy of eminent domain becomes available.[107] This drastic language is an escalation of the nuisance-oriented treatment characteristic of *Euclid*. It was also prefaced by a note that while the "[p]ublic safety, public health, morality, peace and quiet, [and] law and order" are "more conspicuous examples of the traditional application of the police power . . . they merely illustrate the scope of the power and do not delimit it."[108] For this proposition, the Court cited *Noble State Bank v. Haskell*, which stated that the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion *to be greatly and immediately necessary to the public welfare*."[109] In situations presenting extreme squalor, as here, perhaps remedying the aesthetic concerns was

[105] Welch v. Swasey, 214 U.S. 91, 105 (1909); see also Stevenson, supra note 43, at 528–29 (describing that the trend in court decisions following *Welch* was to generally permit regulations based on aesthetics factors when they were auxiliary to another valid police power).

[106] *Berman*, 348 U.S. at 32–33 (emphasis added).

[107] Id.

[108] Id. at 32 (citing Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911)).

[109] 219 U.S. at 111 (emphasis added).

indeed "greatly and immediately necessary to the public welfare."[110] But few modern-day situations—at least of those producing judicial opinions that rely on *Berman* as a justification for aesthetic regulation—present aesthetic emergencies so soul-crushing as the one presented in *Berman*.

C. Things Fall Apart[111]*: The Later Twentieth-Century Decisions*

While *Berman* dealt with aesthetic regulation much more explicitly than previous opinions, it did not clearly hold that aesthetics alone could be a valid justification for exercises of the police power—under either the potential nuisance rationale hinted at by *Euclid*, or the emergency rationale suggested by the second category of *Berman* dicta. Nevertheless, the seed of purely aesthetic regulation had been planted, taking root in subsequent decisions that appeared to easily accept *Berman* as proof that states could regulate aesthetic harms to promote the general welfare, with increasingly tenuous connections to the other police power justifications.[112] As Part III further discusses, lower courts have accepted the implications from these cases to varying degrees. There is also scholarly disagreement over whether *Berman*'s progeny actually extended its dicta to allow for purely aesthetic regulation.[113]

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[110] Id.

[111] William Butler Yeats, The Second Coming, *in* 1 The Collected Works of W.B. Yeats: The Poems 189, 189 (Richard J. Finneran ed., 2d ed. 1997) ("Things fall apart; the centre cannot hold; / Surely some revelation is at hand.").

[112] See, e.g., City Council v. Taxpayers for Vincent, 466 U.S. 789, 805, 817 (1984) (involving controversy over political signs); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) (plurality opinion) (involving billboard regulation); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978) (involving historic preservation); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (involving quiet neighborhood zoning regulations); Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 665–66 (4th Cir. 1989) (involving regulation of a solid waste disposal facility); Rosenthal & Rosenthal Inc. v. N.Y. State Urb. Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985) (involving an urban renewal project); People v. Stover, 191 N.E.2d 272, 275–76 (N.Y. 1963) (involving city regulation of clotheslines).

[113] Compare Regan, supra note 18, at 1027 & nn.95–96 (arguing that while the Supreme Court has had the opportunity to extend *Berman* to aesthetic zoning, it has not done so, either dismissing appeals or ruling on First Amendment grounds, as was done in *Metromedia* (first citing *Metromedia*, 453 U.S. at 507–08 (plurality opinion); then citing Corey Outdoor Advert., Inc. v. Bd. of Zoning Adjustments, 327 S.E.2d 178 (Ga. 1985), *appeal dismissed*, 474 U.S. 802 (1985); then citing Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979); then citing Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 575 P.2d 835 (Colo. 1978) (en banc), *appeal dismissed*, 439 U.S. 809 (1978); then citing *Stover*, 191 N.E.2d at 272, *appeal dismissed*, 375 U.S. 42 (1963); and then citing Village of Hudson v. Albrecht, Inc., 458 N.E.2d 852 (Ohio 1984), *appeal dismissed*, 467 U.S. 1237 (1984))), with Mark Bobrowski, Scenic Landscape Protection Under the Police

The first major case to deploy *Berman*'s dicta was *Village of Belle Terre v. Boraas*.[114] The Court cited *Berman* to support its expansive reading of the police power, ultimately holding that the village could restrict land use within a particular zone to single-family houses: "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[115] "Family values, youth values, and the blessings of quiet seclusion" may well contribute to the general welfare, although it is less clear (and the opinion did not strive to explain) that aesthetics do so. But by this point, twenty years after *Berman* had been decided, the Court easily read *Berman* as rejecting the argument that cities could not take land "to develop a better balanced, more attractive community," citing both categories of *Berman* dicta (that is, the dicta espousing aesthetics as an auxiliary to the traditional police power justifications and as a solution to emergency circumstances) in support.[116] Although there was no suggestion in *Belle Terre* of emergency or blight necessitating an overhaul of the village's existing aesthetics as there was in the second category of *Berman* dicta, which classed aesthetic harms as an "insufferable burden,"[117] the *Belle Terre* Court suggested that unattractive communities—even unattractively composed family units—imposed a burden, or a nuisance, on families that the legislature could reasonably

Power, 22 B.C. Env't Affs. L. Rev. 697, 704 & n.44 (1995) ("*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." (first citing *Metromedia*, 453 U.S. at 493 (plurality opinion); and then citing *Berman*, 348 U.S. at 28)).

[114] *Belle Terre*, 416 U.S. at 9.

[115] Id.

[116] Id. at 5–6 (quoting *Berman*, 348 U.S. at 31). As discussed in Section II.B, *Berman* suggested that aesthetics could be used as a valid justification for exercises of the police power when paired with more traditional police power justifications, as it declared that "[t]he values [the concept of the public welfare] represents are . . . *aesthetic as well as* monetary," and that "[i]t is within the power of the legislature to determine that the community should be beautiful *as well as* healthy." 348 U.S. at 33 (emphasis added). Notice that this passage, read plainly, does not suggest that aesthetics alone could stand as a sufficient justification for exercises of the police power. Id. As for the second category of *Berman* dicta, the *Berman* Court also suggested that the scope of the police power might not be limited to its traditional applications when "[m]iserable and disreputable housing conditions . . . make living an almost insufferable burden." Id. at 32. Barring such dire circumstances, it is not clear from the Court's opinion that aesthetics could be used to justify exercises of the police power.

[117] *Berman*, 348 U.S. at 32–33.

regulate in order to promote the general welfare.[118] Even Justice Marshall in dissent agreed that legitimate aims of the state included "making the community attractive to families" and emphasized that "[t]he police power which provides the justification for zoning is not narrowly confined."[119]

Four years later, in handing down *Penn Central Transportation Co. v. New York City*, the Supreme Court ruled that landmark laws creating a comprehensive plan to preserve structures of historic or aesthetic interest were not unconstitutional.[120] It held that states and cities could enact land use restrictions "to enhance the quality of life by preserving the character and desirable aesthetic features of a city," citing *Berman*, *Belle Terre*, and, most surprisingly, *Welch*.[121] This was the first time that the Supreme Court expressly cited *Welch* for the proposition that states could regulate to preserve the aesthetic features of a city.[122]

Berman itself did not include a citation to *Welch*, and perhaps for good reason. Read narrowly, *Welch* stands for the proposition that aesthetic goals would not necessarily invalidate a regulation if another traditional police power justification could be found to support it—not that states could regulate for purely aesthetic goals, nor that aesthetic goals themselves, without more, furthered the general welfare.[123] Although the *Welch* Court upheld the regulation in question despite the statutes' failure to explicitly mention fire safety goals, which suggested the Court was

[118] *Belle Terre*, 416 U.S. at 8–9 ("It is said, however, that if two unmarried people can constitute a 'family,' there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." (footnote omitted)).

[119] Id. at 13–14 (Marshall, J., dissenting) (citing *Berman*, 348 U.S. 26).

[120] 438 U.S. 104, 131–32 (1978).

[121] Id. at 129 (first citing City of New Orleans v. Dukes, 427 U.S. 297 (1976); then citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976); then citing *Belle Terre*, 416 U.S. at 9–10; then citing *Berman*, 348 U.S. at 33; and then citing Welch v. Swasey, 214 U.S. 91, 108 (1909)).

[122] Though the *Euclid* Court did indeed cite *Welch*, it did not explicitly mention aesthetics when doing so. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). Nor did the Court do so as a part of its commentary on preserving "attractive surroundings." See id. at 394. Instead, the *Euclid* Court merely referenced *Welch* as authority for the proposition that municipalities could regulate buildings' height and construction specifications in order to address fire safety concerns, "the evils of over-crowding," and "offensive trades, industries and structures likely to create nuisances." Id. at 388 (first citing *Welch*, 214 U.S. 91; then citing Hadacheck v. Sebastian, 239 U.S. 394 (1915); then citing Reinman v. City of Little Rock, 237 U.S. 171 (1915); and then citing Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529–30 (1917)).

[123] See *Welch*, 214 U.S. at 105.

willing to entertain states' aesthetic goals, it was still careful to find those traditional safety goals before delivering its holding.[124] By citing *Welch* alongside *Belle Terre*, which holds that regulating a community's aesthetics in order to promote the general welfare is a valid use of the police power,[125] the *Penn Central* Court implied that purely aesthetic regulation has enjoyed a longer history in American jurisprudence than the Court as an institution has actually been willing to entertain.[126]

Litigants began co-opting the First Amendment to challenge aesthetic zoning restrictions in the 1960s.[127] The first case using this strategy made it to the Supreme Court twenty years later in *Metromedia, Inc. v. City of San Diego*.[128] The stated purpose of the ordinance at issue in *Metromedia* was "'to eliminate hazards to pedestrians and motorists brought about by distracting sign displays' and 'to preserve and improve the appearance of the City.'"[129] The Supreme Court of California held that the goals of reducing traffic and improving the appearance of the city were "proper objectives for the exercise of the city's police power."[130] The United States Supreme Court agreed:

> Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals. It is far too late to contend otherwise with respect to either traffic safety, or esthetics, see *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26, 33 (1954).[131]

The Court went on to note that it was "not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'"[132] These are perhaps

[124] Id. at 107–08.

[125] *Belle Terre*, 416 U.S. at 9 ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.").

[126] *Penn Central*, 438 U.S. at 129.

[127] Menthe, supra note 17, at 249–51.

[128] 453 U.S. 490, 498 (1981) (plurality opinion).

[129] Id. at 490.

[130] Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 411 (Cal. 1980), *rev'd*, 453 U.S. 490 (1981).

[131] *Metromedia*, 453 U.S. at 507–08 (plurality opinion) (footnote omitted).

[132] Id. at 510 (citations omitted). Recall also the potential nuisance rationale of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926), discussed in *supra* Section II.B.

the clearest statements of support for purely aesthetic zoning that the Court has provided thus far—the disjunctive "either" in the first passage makes the case especially strong, as it divorces aesthetics from traditional safety concerns and lets it stand alone as its own police power justification. Furthermore, one may read the Court's conclusions on aesthetic regulation as a necessary component of its broader First Amendment analysis on commercial speech and content-based regulation, and thus solidly a part of its ratio decidendi holding.[133]

Over time, the string of precedent on which the Court relies to make statements about aesthetic regulation has seemingly grown longer, and the conclusions it draws have grown bolder. With the passage of decades, *Berman*, *Belle Terre*, and *Penn Central* are now widely considered unproblematic and definitive evidence that solely aesthetic regulation is permissible and encompassed by the police power.[134] The most interesting contribution to this point comes not from the plurality's opinion in *Metromedia*, but from Justice Brennan's concurrence. Much like Justice Marshall had done in *Belle Terre*,[135] Justice Brennan agreed

[133] See Solum, supra note 97 for a discussion of holding theories. Compare Regan, supra note 18, at 1027 & n.95 (arguing that because the Supreme Court ruled on First Amendment grounds in *Metromedia*, it did not extend *Berman* to aesthetic zoning), with *Metromedia*, 453 U.S. at 507–08 (plurality opinion) (first citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–66 (1980); and then citing Berman v. Parker, 348 U.S. 26, 33 (1954)) (holding that the city's aesthetic goals satisfy prong two of the *Central Hudson* test, which requires a substantial governmental interest). By recognizing the ordinance's aesthetic goals as a substantial governmental interest, the Court arguably held in support of aesthetic regulation outside of First Amendment contexts. Indeed, the Court was discussing aesthetic regulation and regulating to prevent aesthetic harms in connection with prong two of the *Central Hudson* test, which asks whether the asserted government interest is a substantial one. *Cent. Hudson*, 447 U.S. at 557. Because the test requires all prongs to be met, it appears that the Court was, at least in part, making a definitive holding in support of aesthetic regulation. See Bobrowski, supra note 113, at 704 n.44 ("*Metromedia* is notable in that the Court unanimously endorses the concept of regulation for aesthetic objectives by a municipality."). Ruling on First Amendment grounds in this context does not preclude a concurrent holding on aesthetics.

[134] See *Metromedia*, 453 U.S. at 507–08 (plurality opinion) (referencing *Berman*, *Belle Terre*, and *Penn Central* to support its conclusion that aesthetics are substantial and valid government goals); see also Trs. of Union Coll. v. Members of Schenectady City Council, 690 N.E.2d 862, 864 (N.Y. 1997) ("Unquestionably, municipalities can 'enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.'" (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978))).

[135] Village of Belle Terre v. Boraas, 416 U.S. 1, 13–14 (1974) (Marshall, J., dissenting) (noting that legitimate aims of the state included "making the community attractive to families").

that states could regulate for aesthetics: "I do not doubt that '[i]t is within the power of the [city] to determine that the community should be beautiful.'"[136] Justice Brennan conspicuously forgot to include the latter half of that quote—"as well as healthy"[137]—thus taking the sentence out of context and potentially broadening *Berman*'s dicta beyond the simplest meaning. It appears that many, if not all, of his brethren were reading *Berman* in the same way, despite the fact that *Berman* was careful to discuss traditional exercises of the police power to justify its decision, which did not rest solely—or even independently—on aesthetics.[138]

The Court came to a very similar conclusion in another First Amendment case, *City Council v. Taxpayers for Vincent*, which upheld a Los Angeles municipal code prohibiting the posting of signs on public property.[139] In holding that advancing aesthetic values furthered an important or substantial government interest, which satisfied the second prong of the *United States v. O'Brien* test for viewpoint-neutral regulation,[140] the Court again cited *Berman*, *Penn Central*, *Belle Terre*, *Euclid*, and *Welch*.[141] It concluded that "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property . . . constitutes a significant substantive evil within the City's power to prohibit,"[142] essentially adopting the nuisance rationale of *Euclid* and *Metromedia*.[143] *Taxpayers for Vincent* is also similar to *Penn*

[136] *Metromedia*, 453 U.S. at 530 (Brennan, J., concurring in the judgment) (alterations in original) (quoting *Berman*, 348 U.S. at 33).

[137] *Berman*, 348 U.S. at 33.

[138] See id. at 32–33.

[139] 466 U.S. 789, 817 (1984).

[140] Id. at 804–05 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)). The *O'Brien* decision established a four-part test for determining when viewpoint-neutral regulation suppresses free expression contrary to the protections established by the First Amendment. To pass constitutional muster (1) the regulation must have been within the constitutional power of the government to enact; (2) the regulation must further an important or substantial government interest; (3) the government interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on the alleged First Amendment freedom must be no greater than is essential to the furtherance of that interest. 391 U.S. at 377. For further explanation, see 1 Rodney A. Smolla, Smolla & Nimmer on Freedom of Speech § 9:6 (West 2025).

[141] *Taxpayers for Vincent*, 466 U.S. at 804–05.

[142] Id. at 807.

[143] See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–88 (1926) (explaining that the law of nuisance, with consideration of the area governed, should be consulted in determining the scope of the locality's police power); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981) (plurality opinion) (validating a city's interest in maintaining the

Central in that they both cited *Welch* to support their claims that states may legitimately exercise their police powers to advance aesthetic values.[144] In the context of this holding, as in the context of *Penn Central*, the Court appears to be making historical claims about solely aesthetic regulation that stretch further than history can realistically support—at least, not without a more careful review of that history and how it has developed into a modern doctrine supporting solely aesthetic regulation.

The preceding Section is certainly not intended to suggest that the Court may never tolerate expansions of the police power's scope when it finds a clear basis for doing so. It does aim, however, to illustrate the larger question this Note poses, which asks whether the way this doctrine has developed is stable enough to support the use of aesthetics alone for exercises of the police power—especially when the limitations on its use and the standards by which to judge it have not been clarified by the Court even in the highly scrutinized First Amendment setting. The largely uncritical approaches in these subsequent decisions, all of which appear to have easily accepted *Berman* as proof that states have the power to regulate aesthetic harms to promote the general welfare, have produced a doctrine much like a house of cards: if not troubling, then at least worthy of closer inspection.

III. TRENDS IN STATE COURT RECEPTION OF AESTHETIC ZONING

It is no longer an open question at the federal level whether aesthetics alone are a valid justification for exercises of the police power.[145] At the state level, too, there appears to be a trend toward accepting aesthetics alone as a valid basis for action under the police power—and all states

appearance of the city as "substantial," thus allowing the prohibition of "unattractive" billboards).

[144] See *Taxpayers for Vincent*, 466 U.S. at 805 (citing Welch v. Swasey, 214 U.S. 91, 108 (1909)); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978) (citing *Welch*, 214 U.S. at 108).

[145] See National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4331) (stating that the federal government should use all practicable means to "assure for all Americans safe, healthful, productive, *and esthetically and culturally pleasing surroundings*" (emphasis added)); see also Juergensmeyer & Roberts, supra note 24, § 12:1, at 513–15 ("Consideration of aesthetics in the promulgation of federal regulations was essentially guaranteed in 1969, with passage of the National Environmental Policy Act . . . [which] made consideration of aesthetic objectives a fundamental part of national policy . . . .").

have accepted aesthetic regulation in at least some capacity.[146] Though this shift is certainly deserving of more research, it is not the object of this Note to provide an exhaustive recounting of each state's current stance on solely aesthetic zoning. Rather, this Section seeks only to briefly illustrate this trend, drawing on a comprehensive fifty-state survey conducted in 2006 (the "Pearlman Study") which details "a movement toward greater acceptance by the states of aesthetics as a basis for action pursuant to the police power."[147]

As of 2006, twenty-three states (including the District of Columbia) clearly allowed regulation based on aesthetics alone.[148] Some of those states cited Supreme Court decisions such as *Metromedia, Inc. v. City of San Diego* and *City Council v. Taxpayers for Vincent* to support their findings;[149] others cited state statutes;[150] yet others cited portions of their state constitutions.[151]

Thirteen states allowed regulation based on aesthetics when combined with other factors but indicated a willingness to accept aesthetics alone as a valid justification.[152] Indeed, the Maine Supreme Judicial Court even seemed to suggest that aesthetic goals may be considered an addition to the traditional police power justifications. In *Brophy v. Town of Castine*,[153] the court ruled that a zoning ordinance requiring buildings to

[146] Kenneth Pearlman, Elizabeth Linville, Andrea Phillips & Erin Prosser, Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation, 38 Urb. Law. 1119, 1120 (2006). This study recreated Samuel Bufford's 1980 study, which classified each of the fifty states and Washington, D.C. into categories representing different levels of acceptance for aesthetic zoning. Id.; see Bufford, supra note 98, at 130.

[147] Pearlman et al., supra note 146, at 1120.

[148] Id. at 1181.

[149] See, e.g., Barber v. Mun. of Anchorage, 776 P.2d 1035, 1037–38 (Alaska 1989) (upholding a ban on "portable and roof signs because they are widely perceived as aesthetic blights" (citing *Taxpayers for Vincent*, 466 U.S. at 807)); Lamar Corp. v. City of Twin Falls, 981 P.2d 1146, 1151 (Idaho 1999) (explaining that "[a] city may regulate . . . for the purpose of preserving aesthetics even though aesthetic judgments are 'necessarily subjective'" (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981) (plurality opinion))).

[150] See, e.g., Yarbrough v. Ark. State Highway Comm'n, 539 S.W.2d 419, 422 (Ark. 1976) (upholding H.B. 665, 70th Gen. Assemb., Reg. Sess. (Ark. 1975), which allowed regulation of highway signs for the preservation of natural beauty).

[151] See, e.g., State v. Diamond Motors, Inc., 429 P.2d 825, 827 (Haw. 1967) (explaining that Hawaii's constitution gives Hawaii the "power to conserve and develop its natural beauty, . . . sightliness and physical good order, and for that purpose private property shall be subject to reasonable regulation" (quoting Haw. Const. art. VIII, § 5)).

[152] Pearlman et al., supra note 146, at 1181.

[153] 534 A.2d 663 (Me. 1987).

be set back at least seventy-five feet from the water's edge was constitutional:

> Clearly, a town may use zoning ordinances to promote its interest in the health, safety or general welfare of the community. There is likewise no doubt that a setback requirement is a valid means of advancing that interest. The set-back of structures 75 feet from the water's edge in Castine reasonably promotes the town's interest in preserving, for the public's *aesthetic welfare*, those areas from development.[154]

If courts were to expand the concept of the general welfare to include aesthetic welfare, it would not seem a stretch for them to also allow for solely aesthetic zoning.[155] Lastly, some of the states in this category ruled that aesthetics alone could constitute a public nuisance,[156] which recalls the *Euclid*-ean method of justifying zoning projects motivated by aesthetic considerations.[157]

The Pearlman Study also found that a few states as of 2006 appeared to follow an "aesthetics-plus" approach, allowing for regulation based on aesthetics combined with other factors, but stating that regulation based on aesthetics alone was impermissible.[158] For example, in *Cosmopolitan National Bank v. County of Cook*, the Supreme Court of Illinois held in 1984 that aesthetic considerations "cannot be the sole justification for a zoning ordinance, but the fact that a zoning ordinance is partially based on aesthetic concerns does not make it invalid"—ostensibly following *Welch v. Swasey*.[159] The court's decision in *Cosmopolitan National Bank* does not appear to have been overturned or treated negatively at the Supreme Court of Illinois, nor at the intermediate appellate level, since 1984.[160]

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[154] Id. at 664 (emphasis added) (citations omitted).

[155] Such a conclusion would be even easier to make if courts were to bridge the doctrinal gap between general and aesthetic welfare by finding that "'aesthetic injury' alone is not an infringement of any legal rights," as the Supreme Judicial Court of Maine held in *Charlton v. Town of Oxford*, 2001 ME 104, ¶ 33, 774 A.2d 366, 376.

[156] See, e.g., Boyles v. City of Topeka, 21 P.3d 974, 975 (Kan. 2001) (ruling that aesthetics alone could constitute a public nuisance "particularly in urban areas, [as] offensive and unsightly conditions do have an adverse effect on people. . . . The general welfare is promoted by action to insure the presence of such attractive surroundings").

[157] See discussion supra Section II.B.

[158] Pearlman et al., supra note 146, at 1154, 1167–80.

[159] Cosmopolitan Nat'l Bank v. County of Cook, 469 N.E.2d 183, 190 (Ill. 1984).

[160] The author reached this conclusion after conducting a Westlaw search for cases citing *Cosmopolitan National Bank* and filtering for negative treatment, both at the Supreme Court

A lower court in Indiana in 1994 also stated that "courts cannot act as arbiters of proper aesthetics and good taste, and should not enjoin an activity solely because it causes some aesthetic discomfort or annoyance."[161] It appeared to follow the spirit of (though did not cite) an Indiana Supreme Court case from 1930, which held that aesthetics were a reasonable auxiliary consideration in regulation, but which also noted that "citizens must not be compelled . . . to give up rights in property solely for the attainment of aesthetic object[ives]."[162] In 2010, however (four years after the Pearlman Study was conducted), another Indiana state court challenged this statement when it held that "[t]he aesthetic quality of the property is an appropriate consideration in promoting general welfare and regulating how the property is maintained."[163]

Maryland's highest court, which was at the time the Maryland Court of Appeals, has held that the "achievement of an aesthetically pleasing result . . . [is not] a permissible use of the police power."[164] It appeared to draw a distinction between ordinances with the goal of preserving or protecting "something which was aesthetically pleasing" and those ordinances that "intended to achieve by regulation an aesthetically pleasing result, with no thought of enhancing the public welfare."[165] A later decision from this court appeared to be more accepting of aesthetic zoning writ large, citing *Berman* favorably in a footnote that discussed "the potential uses of zoning ordinances in order to 'enhance the quality of life by preserving the character and desirable aesthetic features of a city.'"[166]

of Illinois and Illinois appellate level courts. No such cases were found. Nor did a broader search for cases discussing solely aesthetic zoning or zoning based on aesthetic justifications alone yield any cases that contradicted *Cosmopolitan National Bank*.

[161] Saurer v. Bd. of Zoning Appeals, 629 N.E.2d 893, 898 (Ind. Ct. App. 1994) (citing Wernke v. Halas, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992)).

[162] Gen. Outdoor Advert. Co. v. City of Indianapolis, 172 N.E. 309, 312 (Ind. 1930) (citation omitted).

[163] Hendricks Cnty. Plan. & Bldg. Dep't v. Goode, 923 N.E.2d 1002 (Ind. Ct. App. Mar. 10, 2010) (No. 32A01-0907-CV-329), 2010 WL 811333, at *3 (unpublished table decision).

[164] Mayor of Baltimore v. Mano Swartz, Inc., 299 A.2d 828, 832 (Md. 1973) (citations omitted). The Maryland Court of Appeals went on to state that "[w]hile aesthetic goals may legitimately serve as an additional legislative purpose, if health, morals or safety or other ends generally associated with the concept of public welfare are being served, . . . they cannot be the only purpose of regulation." Id. (citations omitted).

[165] Id. at 835.

[166] Casey v. Mayor of Rockville, 929 A.2d 74, 97 n.36 (Md. 2007) (first citing City of New Orleans v. Dukes, 427 U.S. 297, 304–05 (1976); then citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976); and then citing Berman v. Parker, 348 U.S. 26, 33 (1954)).

Although such a finding might require a renewed state survey focused on solely aesthetic zoning and paying careful attention to the "holdout" states in the last category, it does not seem improbable that this trend has continued to gather momentum during the two decades following the Pearlman Study. Especially after the Supreme Court's decision in *Kelo v. City of New London*,[167] which expanded the power of eminent domain by ruling that economic development plans satisfied the "public use" requirement of the Fifth Amendment's Takings Clause,[168] more states may have decided that the scope of the police power is open to similar expansion, or that aesthetic regulation that promotes economic or property value growth as an ancillary consequence is a valid exercise of the police power.[169]

IV. THE CONSTITUTIONAL VULNERABILITY OF SOLELY AESTHETIC ZONING

Despite the progressively warmer state court reception of solely aesthetic zoning, current trends at the Supreme Court may prompt renewed consideration of whether aesthetic regulation is, in at least some of its manifestations, constitutionally vulnerable. Increased attention toward historical attitudes about property regulation, as well as more favorable inclinations toward conservative interpretations of the Takings Clause—both of which were important features of Justice Thomas's dissent in *Kelo v. City of New London*—has most recently resurfaced in the unanimously decided *Tyler v. Hennepin County*.[170]

In *Kelo*, Justice Thomas examined the original meaning of the phrase "public use" in the Fifth Amendment, the Constitution's common law background, and early American eminent domain practice in order to locate some limit on the government's eminent domain power under the Takings Clause.[171] Within this last category, he discussed state limits on the eminent domain power and focused especially on the Mill Acts, which

[167] 545 U.S. 469 (2005).

[168] Id. at 480–84.

[169] See, e.g., Metromedia, Inc. v. City of San Diego, 592 P.2d 728, 735 (Cal. 1979) ("Because this state relies on its scenery to attract tourists and commerce, aesthetic considerations assume economic value. Consequently any distinction between aesthetic and economic grounds as a justification for billboard regulation must fail."), *vacated*, 610 P.2d 407 (Cal. 1980), *rev'd*, 453 U.S. 490 (1981).

[170] 143 S. Ct. 1369, 1372 (2023).

[171] *Kelo*, 545 U.S. at 506–12 (Thomas, J., dissenting).

he argued permissibly regulated quasi-public entities actually used by the public.[172] Though he acknowledged that some states tested the limits of the eminent domain power by allowing the taking of property to build private roads, he insisted that the constitutionality of these exercises was hotly contested throughout the late nineteenth and early twentieth centuries.[173] Justice Thomas therefore concluded that the historical disagreement over and disparate treatment of the eminent domain power among state courts "cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property."[174] In other words, where state courts historically afforded conservative treatment to a relevant category of property regulation—and even when this treatment failed to garner complete adherence or even general consensus—Justice Thomas's approach would err toward the simplest interpretation of a constitutional limit on property regulation.

Justice Thomas also criticized the Court's modern Public Use Clause jurisprudence in his dissent, arguing that it had "adopted its modern reading blindly, with little discussion of the Clause's history and original meaning."[175] He was particularly critical of the *Kelo* majority's reliance on *Fallbrook Irrigation District v. Bradley*[176] to support its expansion of the Clause's public use requirement to include economic development objectives.[177] The majority pointed to *Bradley* as revealing the Court's nineteenth-century acceptance of the broader "public purpose" interpretation of the Fifth Amendment's public use requirement, as it began to incorporate the Amendment against the states.[178] Justice Thomas pushed back on this reliance, noting that one of *Bradley*'s central phrases in support of the "public purpose" interpretation was dictum (for which the *Bradley* Court cited no authority) and that the *Bradley* Court failed to acknowledge contemporary authorities that had remained loyal to the "actual use" test.[179] He also admonished *Bradley* for failing to articulate a constitutional principle in support of its position, stating that the Court's

[172] Id. at 512.
[173] Id. at 513.
[174] Id. at 514.
[175] Id.
[176] 164 U.S. 112, 161–62 (1896).
[177] *Kelo*, 545 U.S. at 515 (Thomas, J., dissenting).
[178] Id. at 480 (majority opinion) (citing *Bradley*, 164 U.S. at 160–61).
[179] Id. at 515 (Thomas, J., dissenting).

finding that the irrigation projects "must be regarded as a public use"[180] lest no irrigation projects be allowed to proceed—much like the *Kelo* majority's finding that a narrow interpretation of the public use requirement would be "impractical given the diverse and always evolving needs of society"[181]—was merely a policy preference not embodied by the Constitution.[182] Justice Thomas also noted that subsequent cases incorporating *Bradley*'s public purpose test followed "with little analysis" and "by barren citation."[183] The mere fact that *Bradley* had been accepted without protest by the Supreme Court for over a century made little difference to Justice Thomas given the deficiencies in its constitutional analysis. In effect, he called for a more critical look at the precedents the Court relied on to expand traditional tenets of property law beyond principled limits.

Justice Thomas gave a similarly critical treatment to *Berman v. Parker*, in which he saw "misguided lines of precedent converge[]," [184] labeling it "boundlessly broad and deferential."[185] Though his criticisms of *Berman* have been well covered by scholars,[186] it is worth noting his warning that "[w]hen faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning."[187]

To be sure, using a history- and precedent-focused framework to scrutinize the doctrine of purely aesthetic regulation is not merely an idle exercise premised on one lone dissent. Rather, certain of its features have entered the mainstream and are being used to place limits on property regulation—such as in the recently decided *Hennepin County*.[188] This case looked to state law, traditional property law principles, and historical practice to overturn a Minnesota statute, in effect since 1935, that allowed the government to seize property to satisfy unpaid taxes when the value

[180] Id. (quoting *Bradley*, 164 U.S. at 160).
[181] Id. at 479 (majority opinion).
[182] Id. at 516 (Thomas, J., dissenting).
[183] Id. at 515–16.
[184] Id. at 519 (citing Berman v. Parker, 348 U.S. 26 (1954)).
[185] Id. at 514 (citing *Berman*, 348 U.S. 26).
[186] See, e.g., David L. Breau, Justice Thomas' *Kelo* Dissent, or, "History as a Grab Bag of Principles," 38 McGeorge L. Rev. 373, 374 (2007); Tom I. Romero, II, *Kelo*, *Parents* and the Spatialization of Color (Blindness) in the *Berman-Brown* Metropolitan Heterotopia, 2008 Utah L. Rev. 947, 947–48.
[187] *Kelo*, 545 U.S. at 523 (Thomas, J., dissenting).
[188] 143 S. Ct. 1369, 1376 (2023).

of the property seized was greater than the tax debt and which gave the former owner no opportunity to recover the surplus.[189] The Court unanimously held that the government's retention of excess proceeds from the sale of seized property to satisfy delinquent tax bills was a taking of property without just compensation.[190]

The Court first noted that while state law was an important source of property rights, it could not serve as the only one, lest a state "sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate."[191] Thus, the Court would also consider traditional property law principles, historical practice, and its own precedents in order to discover whether the plaintiff had a property interest in the surplus from the sale of her condominium.[192] An interesting feature of *Hennepin County*'s subsequent analysis is that while its history-and-tradition approach is reminiscent of Justice Thomas's examination of the Mill Acts, it went back much further in time to trace the development of a foundational property law principle. Indeed, *Hennepin County* located the origins of the principle against surplus retention in the Magna Carta, signed in 1215, and then followed its continuance in American law by identifying a "consensus" among ten states that had adopted similar statutes shortly after the Founding.[193]

As a result of this consensus and after finding that "[t]he minority rule then remains the minority rule today,"[194] the Court sided with the majority rule's more conservative interpretation of property rights. But one could also have reached the same conclusion using Justice Thomas's *Kelo* approach. Though there existed a disagreement among state courts on a foundational property law principle, and the Minnesota state legislature had "attempt[ed] to circumvent"[195] limits on its ability to intrude on property rights (here, by collecting and retaining surpluses since 1935),

[189] Id. at 1372, 1376.
[190] Id. at 1376.
[191] Id. at 1372 (internal quotation marks omitted) (citation omitted).
[192] Id. at 1371–72.
[193] Id. at 1372.
[194] Id. at 1378.
[195] Kelo v. City of New London, 545 U.S. 469, 514 (2005) (Thomas, J., dissenting) ("The disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.").

the most natural reading of the Takings Clause, and the one that had been longer accepted throughout history, prevailed.

What can the *Kelo* dissent and the *Hennepin County* decision, taken together, tell us about the constitutionality of purely aesthetic zoning? To begin, early American practice appeared to eschew solely aesthetic regulation; the few states that entertained aesthetic regulation at all did so when aesthetics were combined with another traditional police power justification in what one could term an "aesthetics-plus" approach.[196] Even the existence of this disagreement, let alone the fact that no early decisions or state legislation appeared to accept aesthetics alone as a valid justification for regulation under the police power, would be enough under Justice Thomas's approach to favor the more conservative interpretation of property rights and foundational property law principles.[197] The fact that aesthetics-plus had long been the majority approach in American jurisprudence may also remind us of *Hennepin County*'s finding that a majority approach can furnish evidence of foundational property law principles that can overcome even long-standing state law to the contrary.[198] Though the majority of states today appear to be trending toward an aesthetics-alone approach, this historical attitude, largely unchanged before *Berman* was decided in 1954, may still be compelling evidence that purely aesthetic regulation might not be constitutional.

Furthermore, *Berman* (which also garnered criticism from Justice Thomas's dissent in *Kelo*[199]) was used by later aesthetics-oriented cases to justify diminutions of property rights without close criticism or analysis.[200] Read carefully, *Berman* reasoned no more than the following: aesthetics can be used to justify property regulation when aesthetics are used in an aesthetics-plus approach as an auxiliary to the other police power justifications, or when there arises an aesthetic emergency.[201] In

[196] See supra Section II.A (discussing *Newton v. Belger*, 10 N.E. 464, 464 (Mass. 1887), *Welch v. Swasey*, 214 U.S. 91, 108 (1909), and *St. Louis Poster Advert. Co. v. City of St. Louis*, 249 U.S. 269, 274–75 (1919)).

[197] *Kelo*, 545 U.S. at 523 (Thomas, J., dissenting).

[198] The Minnesota tax-surplus law at issue in *Hennepin County* had been in place for approximately eighty-eight years before it was struck down in 2023. See 143 S. Ct. at 1376.

[199] See *Kelo*, 545 U.S. at 514–15 (Thomas, J., dissenting) (citing Berman v. Parker, 348 U.S. 26 (1954)) (labeling the decision as "boundlessly broad and deferential").

[200] See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981) (plurality opinion).

[201] See *Berman*, 348 U.S. at 33; supra Section II.B.

other words, *Berman* does not appear to support solely aesthetic regulation—at least not in the absence of an emergency. Moreover, *Berman*'s poetic musings about aesthetics were mere dicta, rather than binding holdings.[202] *Village of Belle Terre v. Boraas*, *Penn Central Transportation Co. v. New York City*, *Metromedia, Inc. v. City of San Diego*, and *City Council v. Taxpayers for Vincent* used this dicta "with little analysis,"[203] and at times "by barren citation,"[204] to increase the scope of the police power while imposing ever-weakening limits on it. An approach mirroring Justice Thomas's analysis in *Kelo* would call to reexamine these cases, at least as far as they appear to justify (either in holding or dicta) a doctrine of purely aesthetic zoning.

One caveat to the parallels drawn in this Part is that *Kelo* and *Hennepin County* were Takings Clause cases.[205] The Takings Clause and the general definition of property, at even a highly abstracted level, are perhaps less open to interpretation than the ever-shifting limits of the police power and the broad definition of the general welfare.[206] Solely aesthetic zoning also appears to be the majority rule today (or, is at least trending in that direction)[207] and has been since around 1980.[208] However, it remains that the Supreme Court has never satisfactorily dealt with the doctrine of solely aesthetic zoning and its role within state police power—at least not without sidestepping a long-overdue interrogation of its constitutionality, doing so most commonly by finding and then tacking on a more palatable police power justification to mask the infirmity of its aesthetics analysis.[209] It is hardly difficult to imagine a case in which state regulation of aesthetics, due to those regulations' unbounded and subjective nature,[210] arguably runs afoul of individuals' property rights—even putting aside whatever First Amendment rights those individuals have to free expression through their property.[211] The shadow of unconstitutionality would be even more acute in a case involving a taking

[202] See supra note 97 and accompanying text.
[203] *Kelo*, 545 U.S. at 515–16 (Thomas, J., dissenting).
[204] Id. at 516.
[205] Id. at 469 (majority opinion); Tyler v. Hennepin County, 143 S. Ct. 1369, 1371 (2023).
[206] See supra note 2 and accompanying text (discussing the broad definition of the police power).
[207] See supra Part III.
[208] See Pearlman et al., supra note 146, at 1120, 1181.
[209] See supra Section II.C (discussing post-*Berman* cases).
[210] See supra Part I.
[211] See Menthe, supra note 17, at 225.

based solely, or even partially, on aesthetics where, for example, the aesthetic basis was found to be the predominant purpose of the ordinance and the other recited purposes were found to be merely incidental goals.

CONCLUSION

Perhaps people do have a right to live in beautiful, well-ordered environs—we would all certainly prefer that than the alternative. Perhaps beautiful cities do raise the spirit, enliven the mind, and provide for the general welfare. Even if aesthetics are a "right thing," they do not have a place lurking behind the more palatable police powers, or in the darkened corners of dicta. It may be time for the Court to fully consider solely aesthetic regulation, and the discord it may strike with foundational property law, on its own merits.

Perhaps some revelation is yet at hand.[212]

[212] See Yeats, supra note 111, at 189 ("Surely some revelation is at hand.").