

# Michigan Law Review

---

Volume 89 | Issue 6

---

1991

## Icons and Aliens: Law, Aesthetics, and Environmental Change

Scott Schrader

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Land Use Law Commons](#), [Property Law and Real Estate Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Scott Schrader, *Icons and Aliens: Law, Aesthetics, and Environmental Change*, 89 MICH. L. REV. 1789 (1991).

Available at: <https://repository.law.umich.edu/mlr/vol89/iss6/37>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE. By *John J. Costonis*. Urbana: University of Illinois Press. 1989. Pp. xix, 127. \$22.50.

In *Icons and Aliens: Law, Aesthetics, and Environmental Change*, John J. Costonis<sup>1</sup> critically examines the expanding field of law loosely termed the law of aesthetics. This area of law concerns governmental efforts to maintain environmental aesthetics by imposing limits upon the use of private property.<sup>2</sup> Costonis does not merely examine the status of the law, or rearticulate the policy concerns elucidated by courts. Rather, he advocates a fundamental change for the role of the law of aesthetics. He criticizes the development of the law to date for unduly focusing on the "beauty" standard, wherein courts judge the aesthetic importance of environmental attributes in terms of how visually pleasing they are, and thereby decide whether or not to preserve or otherwise protect them (p. xv, 60-70). Costonis advocates a different standard, a dichotomous paradigm that pits "icons" against "aliens." He defines icons as those environmental attributes for which there is a substantial amount of human attachment; aliens are intrusions that threaten such icons. Costonis' fundamental argument is that a properly focused law of aesthetics would seek not to preserve beauty, but to preserve icons, protecting them from harm threatened by the encroachment of aliens (pp. xv-xvi, 45-51).

Centuries ago, aesthetic legal issues simply did not exist. Important cultural landmarks, for example, were simply designated by the King, Emperor, or Pope, without explanation, justification, or dispute (p. 13). Even in this country, institutional recognition of a law of aesthetics occurred only quite recently. Early formalist legal thinkers refused to recognize government's ability to infringe upon the rights of private property and free expression.<sup>3</sup> Not until 1926 did the Supreme Court legitimize public control of privately held land through zoning ordinances.<sup>4</sup> Later, in the watershed case *Berman v. Parker*,<sup>5</sup> the

---

1. John J. Costonis is Dean of the School of Law and Milton R. Underwood Professor of Free Enterprise at Vanderbilt University. He is also the author of *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE* (1986). *Icons and Aliens* is based in part upon his earlier article, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982) [hereinafter *Law and Aesthetics*].

2. Costonis draws mainly on examples of historical preservation and urban renewal, but his analysis similarly implicates other cultural phenomena. See p. xviii.

3. See, e.g., *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 62 A. 267 (1905) (striking down municipal ordinances which regulated the size of advertising billboards); see also *Curran Bill Posting & Distrib. Co. v. City of Denver*, 47 Colo. 221, 107 P. 261 (1910).

4. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) (permitting a village to enforce a zoning ordinance that would diminish the value of some real property within its control).

5. 348 U.S. 26 (1954).

Court held constitutional the massive urban renewal efforts undertaken by the city of Washington, D.C. This case was widely understood to signal the Court's willingness to allow government efforts to beautify communities; for the law of aesthetics, it marked a startling break with the past (p. 23). Lower courts completely reversed their attitudes toward aesthetic initiatives, and legislatures responded with an outpouring of statutes and statutorily created administrative agencies, mainly for the purposes of historic preservation and urban renewal.<sup>6</sup> The judiciary, taking *Berman* as a high court harbinger of a new direction for this area of the law, seemed amenable to almost any such program, and began to function as little more than a rubber-stamp reviewer of these efforts. Costonis quotes Norman Williams, whom he describes as "one of the deans of American land use law," as commenting, "[i]n no other area of planning law has the change in judicial attitudes been so complete."<sup>7</sup>

As Costonis correctly notes, such a judicial attitude gave short shrift to the need to limit preservation. The decision to designate a structure as a landmark may create a host of associated economic restraints; it certainly prohibits owners from doing certain things with their property, perhaps even forcing upon them financial burdens of restoration and upkeep.<sup>8</sup> For Costonis, the "legal subsidies" attending such decisions necessitate ensuring that landmark designations, as well as other aesthetic initiatives, enjoy popular support.<sup>9</sup> Moreover, beyond this economic reasoning, uninhibited preservation just seems plainly unnecessary. As a director of economic development in Buffalo, New York, said, "[i]t's important to hold on to symbols of the past . . . [but] how many symbols do you need?"<sup>10</sup>

---

6. See pp. 23-25. Even the roots of environmental legislation can be traced to *Berman*. P. 25. The author cites as an example the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1988) (requiring the submission of "environmental impact statements" to governmental agencies before proposed developments will be approved). P. 25.

7. P. 23 (citing 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 11.02 (1974)).

8. Costonis recounts the experience of Sandra and Robert Wagenfeld, who bought a house in the Greenwich Village neighborhood of Manhattan that had an abandoned gas station, dating from 1922, in the backyard. The couple had planned to demolish the gas station and replace it with a garden until the city intervened. In addition to denying them permission to level the structure, the city actually demanded that the Wagenfelds pay \$100,000 to restore it. Pp. 75-76. According to Costonis, "such affirmative obligations are not unusual." P. 76.

9. [A] powerful subsidy, coextensive with lost liberties, results every time the law is enlisted in aid of a social impulse. As a society committed to a broad range of personal and economic freedoms, we presume that we should not grant these legal subsidies in the absence of persuasive reasons for doing so. Confidence that we can define what we expect to achieve by legalizing the impulse is imperative. So too is assurance that the social gains and losses attending the subsidy will meet with broad citizen support. We seek to be persuaded as well that the law can handle the assignment faithful both to the impulse and to its own integrity. When in doubt on these matters, the proper course is to withhold the subsidy, leaving the groups who favor and oppose the impulse to slug it out among themselves. P. 12.

10. P. 40 (quoting *Buffalo's Grain Elevators: Inspiration or a Blight?* N.Y. Times, Aug. 19, 1984, at A40, col. 1).

The post-*Berman* judiciary, however, tended to ignore the negative side of rampant preservation. Especially in the specific area of historic preservation, where very loose standards guided the determination that a structure had historic value, courts approved governmental aesthetic initiatives with very little scrutiny.<sup>11</sup> This created an incentive for some to pursue historic designations as a means to a less laudable end, and many private interest groups manipulated aesthetic legal rules to their advantage. Costonis quotes Beverly Moss Spatt, former chair of the New York City Landmarks Preservation Commission: “[P]eople are requesting and gaining designation for a whole array of [improper] reasons: to maintain the status quo, to prevent development, to revitalize an area, to gentrify or gain tax benefits.”<sup>12</sup>

One manifestation of this problem, New York City’s decision to designate the Isaac Rice mansion a historic landmark, serves as a touchstone for Costonis’ analysis (pp. 4-8). This Upper West Side building had been owned for some years by the yeshiva Chofetz Chaim, who used it to house a religious school for Jewish children. Facing a shortage of funds, the yeshiva decided to move the school to a less lucrative location, and arranged to sell the mansion, at a substantial profit, to a developer who planned to build a high-rise apartment building on the site. Neighboring residents objected to this plan, however. Wishing to keep their quaint community from taking on the appearance of the nearby Upper East Side where such high-rises predominated, these West Side residents banded together to oppose the new development. They did not, however, sue to enjoin the construction of the planned building. Since the high-rise would be permissible under the governing zoning laws, such legal relief would have been difficult to obtain. Instead, the neighborhood organization cleverly appealed to the city to have the mansion designated a landmark.<sup>13</sup> The mansion, “[a]n eclectic blend of Beaux Arts and Neo-Georgian styles” (p. 4) dating from 1901, was the lone neighborhood survivor from an earlier era when similar structures prevailed. As such, it did have a certain historic interest that might, with persuasion, win support from a preservation-minded city agency, whom the post-*Berman*

---

11. Costonis quotes Clifford Weaver and Richard Babcock, who commented that “historic has come to mean practically anything that, in some fashion or other, is not run-of-the-mill.” P. 30 (citing C. WEAVER & R. BABCOCK, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* 35 (1979)).

12. P. 30 (citing Spatt, *When the Landmaker Law is Misused*, N.Y. Times, July 8, 1980, at A16, col. 5 (letter to the editor)).

13. Costonis notes “historic preservation laws . . . afford immeasurably greater protection against neighborhood change than do zoning laws.” P. 25. This was undoubtedly true here; the Board of Standards and Appeals, the city’s governing authority for reviewing zoning appeals, is not eager to grant zoning variances. Indeed, one developer recently was ordered to remove the top twelve floors of an already constructed 31-story Upper East Side building that, apparently due to a mistake in reading a city map, had been erected in violation of the city’s zoning rules. Dunlap, *Developer Agrees to Plan to Cut 12 Floors from a Too-tall Tower*, N.Y. Times, Apr. 23, 1991, at B1, col. 2.

judiciary had shown a willingness to follow.<sup>14</sup> Advocates both for and against preservation of the mansion intensely lobbied the Board of Estimate, the city agency responsible for approving landmark designations. Interestingly, the debate surrounding the mansion controversy largely ignored the architectural qualities of the mansion. In the end the Board, by a divided vote, approved the designation of the mansion as a landmark; the yeshiva's development plans were foiled.<sup>15</sup> The neighbors had successfully used the law of historic preservation to effect local zoning, a technique now pejoratively dubbed "landmarking by ambush" (p. 8).

Underlying the Rice Mansion dispute is the idea that law is appropriate to control the visual appearance of cities. Currently, courts exercise such control by judging the aesthetic merit of the structures involved. Costonis criticizes this "beauty approach" on several fronts (p. 60). He sees the focus on sensory reactions to environmental attributes as being too simplistic, ignoring the attendant cultural and intellectual qualities of the attribute (p. 61). Furthermore, the beauty approach does not contextualize the environmental attribute; a better standard would view the attribute not in isolation, but rather with regard to its relationship to its surroundings (pp. 68-70). More fundamentally, the beauty approach fails in application, since no objective criteria exist for evaluating beauty.<sup>16</sup>

Costonis acknowledges that these weaknesses may be unavoidable when curators make aesthetic judgments for museums. But for a court, which makes legally binding pronouncements, he considers such shortcomings to be fatal flaws. In an attempt to devise a better test, Costonis looks behind the legal rules and focuses on the societal side of legal aesthetics. The purpose of landmark preservation is to protect buildings not for their own sake, but rather because people have emotional attachments to them. Costonis therefore argues that the proper gauge of aesthetic initiatives should not focus on the formal qualities of the attribute but rather on the human responses it creates:

---

14. The agency had the power to designate as a landmark any structure that possessed "special character" or "special historical or aesthetic interest or value." Under such broad, vague standards it would be difficult for a reviewing court to overturn its edicts. P. 5; see *supra* note 11 and accompanying text.

15. P. 8. The yeshiva, however, was not alone. Ownership of a landmark-designated building by a financially struggling religious institution is actually quite common. See Stipe, *Historic Preservation: The Process and the Actors*, in *THE AMERICAN MOSAIC* 6 (R. Stipe & A. Lee eds. 1987). The experience of New York City continues to fit this rule — quite recently, St. Bartholomew's church "lost what it presented as a life-and-death struggle" to build a skyscraper on its property; in the process, it "came to epitomize the religious community's struggle against the landmarks law." Dunlap, *St. Bart's to Open Its Doors to an Adversary*, *N.Y. Times*, May 4, 1991, at A25, col. 2. Facing the multimillion dollar costs of maintaining its landmarked buildings, the church found it necessary to initiate a sizable fundraising campaign. *Id.*

16. "Law knows nothing about beauty. It can set speed limits or require that contracts be in writing, but it can neither create beauty nor issue ukases guaranteeing that others will do so. The Constitution contains no recipe for beauty." P. 9.

"Experience teaches [that i]n legal aesthetics *people* come first; their emotional investment in environmental features, second; and the formal qualities of these objects, last" (p. 45). To reinforce this point, he skillfully supplements his analysis with photographs and cartoons, which convincingly accentuate the emotional attachments to environmental attributes in a way that the printed word alone cannot.<sup>17</sup> He concludes legal aesthetics should make preservation of social stability, rather than beauty, its overriding goal; to this end, he advances the icon/alien standard.

Under his view, icons are not objects of "beauty," but environmental attributes for which there is significant aggregate human attachment. Icons provide communities with a sense of stability, order, and reassurance; with their loss comes great sorrow (pp. 46-47). Environmental attributes can become icons through their history, their continuity with their surroundings, or their symbolic meaning, each of which may satisfy a fundamental human need for stability. Aliens, conversely, threaten this sense of stability; they are directly counterposed to icons.<sup>18</sup> The clash of alien and icon occurs because "the associations bonding an icon to its champions fail to jibe with those imputed to the alien."<sup>19</sup>

Costonis' arguments to jettison the beauty standard in favor of his icon/alien construct is convincing. Despite assertions to the contrary,<sup>20</sup> the beauty standard is too fundamentally subjective to be useful for reviewing landmark designations.<sup>21</sup> The icon/alien construct is less subjective: community attachment is easier to measure than aes-

17. Costonis' recognition of the human impact of cartoons is not unique. For example, historians and others have recognized that Thomas Nast's campaign of cartoons in Harper's Magazine had a devastating effect upon William "Boss" Tweed and his associates. See M. KELLER, *THE ART AND POLITICS OF THOMAS NAST* 177 (1968). The law has recognized this as well. "Nast's castigation of the Tweed Ring, . . . and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. . . . From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them." *Hustler Magazine v. Falwell*, 485 U.S. 46, 54-55 (1988).

18. The symmetry is not total, however. Icons can stand alone, whereas aliens exist only in opposition to icons (p. 55), a fact that often makes them more difficult to pinpoint (p. 51).

19. P. 57. In the Rice Mansion example, the true icon for the neighbors was not the mansion, but the Upper West Side itself. The West Side residents were not genuinely interested in the mansion; they simply employed landmark designation as a means to preserve their neighborhood. The alien, under this construct, was the proposed high-rise building. P. 46; see generally pp. 45-70.

20. See p. 108 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 133 (1978) ("[T]here is no basis whatsoever for a conclusion that courts will have any greater difficulty in identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.")); see also Duerksen, *Local Preservation Law*, in *A HANDBOOK ON HISTORIC PRESERVATION LAW* 79 (1983) ("The [*Penn Central*] Court rejected out-of-hand the contention that regulation of landmarks is inevitably arbitrary because it is a matter of taste.").

21. See, e.g., Goldstone, *Aesthetics in Historic Districts*, 36 *LAW & CONTEMP. PROBS.* 379, 379 (1971) ("From Socrates to Santayana some very ugly arguments have taken place over the question of what is beautiful and what is not.").

thetic beauty. Moreover, grounding preservation in community attachment is simply a much more defensible policy than the preservation of beauty for its own sake. Making the law of aesthetics work to facilitate a sense of stability in the community is a difficult policy to assail. At first blush, therefore, the icon/alien paradigm sounds quite promising. Yet it leaves for the law too limited a role. Able only to monitor social stability, the law cannot sanction positive aesthetic efforts. Although Costonis himself seems to recognize this limitation,<sup>22</sup> he nonetheless restricts his paradigm to this role of preserving stability, excluding any consideration of how the law might encourage creative aesthetic initiatives.

Consider the example of the Louvre in Paris. Few would doubt that the Louvre is a giant cultural icon, not only for the Parisians but for the world at large. Recently, in celebration of the bicentennial of the French Revolution, the French government solicited ideas for an addition to the Louvre. The renowned architect I.M. Pei proposed to interpose a modernistic glass pyramid upon the Louvre's stately courtyard.<sup>23</sup> Judging by its clear contrast to the Baroque-Renaissance style of the existing building, in form, construction, composition, and tone, most would certainly describe it as an alien under Costonis' paradigm.<sup>24</sup> Yet, over objections rooted no doubt in similar sentiment, the proposal was approved, and the addition was built. The obvious question is: were the French wrong to impose this seeming alien upon such an important and widely recognized icon?<sup>25</sup>

The example is not meant to test Costonis' icon/alien construct in application, but rather to expose its limitations. That is, not being so presumptuous as to question the propriety of the French planners' decision, one must admit that the usefulness of the icon/alien dichotomy is lost. The architect Pei envisioned an addition whose contrast with the original structure would give viewers of the Louvre a new appreci-

---

22. "[There is] a question that merits a successor volume: Are we overdoing our commitment to icons? Reassurance and stability are important, even indispensable in our lives, but so too are innovation and autonomy." P. xviii.

23. See Miller, *A Castle Under the Louvre*, 176 NATL. GEOGRAPHIC 102, 107 (1989).

24. Civic hostility to the juxtaposition of a pyramidal structure against a more familiar setting is not unique to the French. See *State ex rel Stoyanoff v. Berkeley*, 458 S.W.2d 305, 308 (Mo. 1970) (The Missouri Supreme Court upheld the denial of a building permit for a "residence . . . of a pyramid shape."). But see Smothers, *A Pyramid in Memphis Brings Accusations But No Glitter Yet*, N.Y. Times, May 24, 1991, at A12, col. 2 ("For two years [the city of Memphis, Tennessee] has lived with the expectation that a monumental steel and glass pyramid would rise and become the clarifying symbol of Memphis, just as the Empire State Building symbolizes New York.").

25. Of course, as a formal legal issue this example is somewhat off point. The usual context for disputes over preservation occurs when the government in some way acts to restrain a private owner of property. The Louvre, being publicly owned, is not such a case. Yet because it presents a stark contrast of forms in a widely known context, it is a useful example to confront, as Costonis would, a "broader inquiry into the linkages among ourselves, our symbolic environment, and the law." P. xviii.

ation of the building.<sup>26</sup> By imparting this new vision, the Pei addition challenges viewers, and may even be said to *educate* them. Yet Costonis' model would not allow such a result, since the glass pyramid must almost certainly be described as an alien threatening the Louvre, an undisputable icon. The model is thus exposed as denying the law the capability to recognize these types of educational functions that an environmental attribute may serve.

Such a role for the law seems to be in order, as confirmed by another recent example, from the Bedford-Stuyvesant community of Brooklyn, New York.<sup>27</sup> In the course of an urban renewal project, developers discovered artifacts from a forgotten community of successful nineteenth-century African Americans. Community leaders seized upon this finding, and a movement to preserve the remains of the community — termed “Project Weeksville” — ensued. Ultimately, the project was a success; Project Weeksville had an “electrifying effect” on the community.<sup>28</sup> But it is important to note that the sentiments of the community at large were not the impetus behind this effort. “The purpose of the project was *to provide* a sense of continuity of culture to those who lived in the immediate neighborhood and *to acquaint* black people with the richness of their heritage even beyond Weeksville.”<sup>29</sup> Presumably Costonis would condone the concern for “continuity” underlying this effort. But the effort departs from his strict stability standard in that the decisionmakers involved with Project Weeksville employed the law *positively*, engendering rather than awaiting a feeling of community association. Mere scattered artifacts would most likely never fuel any far-reaching community attachment; the preservationists therefore used legal aesthetics to spark such a sentiment.

Reactions to Pei's Louvre addition may be mixed, at least for now,<sup>30</sup> but it is hard to argue against the propriety of something like

26. One could argue that Pei's addition did not threaten the Louvre icon, but rather enhanced it, and therefore the glass pyramid was not in fact an alien. It is doubtful, however, that Costonis himself would make such a logical stretch. He sees “[c]onservation, not creativity, [to be] legal aesthetics' province.” P. 68; see *infra* note 31.

27. See Lee, *Discovering Old Cultures in the New World: The Role of Ethnicity*, in *THE AMERICAN MOSAIC*, *supra* note 15, at 191.

28. *Id.*

29. *Id.* (emphasis added).

30. One wonders if the Pei addition will enjoy the same fate as its Parisian companion, the Eiffel Tower. Costonis' narrative is instructive:

Prior to its erection in 1899 and its planned demolition twenty years later, it was scorned as the “dishonor of Paris” by Gounod, Prudhomme, and other members of the Committee of Three Hundred (one member per meter of the tower's height). Implored the group: “Is Paris going to be associated with the grotesque mercantile imaginings of a constructor of machines . . . ?” Yet the tower still stands, now as the beloved signature of the Parisian skyline and an officially designated monument to boot.

P. 64. Elsewhere the author's tone is even stronger: “[T]here is a sense in which the Eiffel Tower is Paris.” P. 18.



Project Weeksville. Although the legal recognition of these remains preceded any widespread attachment to them, the beneficial effect on the community more than justified the effort. Yet the icon/alien model seems to leave no room for such developments; only environmental attributes for which there is *already* community attachment are proper for the law to recognize.<sup>31</sup> Project Weeksville highlights this limitation as a failing of Costonis' proposed construct.

Adoption of the icon/alien construct is the first half of Costonis' solution. The second half centers on implementation. Having outlined the legal rubric, Costonis must ascertain how the legal system will apply it. For Costonis, determination of icons is a simple matter: legal decisionmakers must look to the wishes of the communities.<sup>32</sup> When a community has a sufficient emotional stake in an environmental attribute, it should be adjudged an icon, worthy of legal protection. In essence, then, Costonis puts his faith in the institutional processes of our legal system to effectuate his scheme for the preservation of icons.<sup>33</sup>

To Costonis, the Rice Mansion landmark designation resulted from a clear failure of legal process. What was essentially a zoning issue became a historic preservation issue. This characterization problem was complicated by the loose standards guiding the determination of landmarks, which merely required a structure to possess a "special character" or "special historical or aesthetic interest or value" (p. 5). This combination of mischaracterization and loose, vaguely worded standards, left the process guiding the Rice Mansion designation ripe for manipulation.<sup>34</sup> Adoption of the icon/alien standard, in contrast, would focus attention on the real issue at hand. Properly framed, the

31. Costonis seems to recognize this problem. He notes that "[p]opular support for sound aesthetics policies may fail to emerge absent legislative leadership [and] . . . education and public relations efforts." P. 85. But he limits such efforts to "get[ting] a line on community attitudes through hearings and other public proceedings." *Id.* Although he sees the need to encourage communities to express previously felt, but possibly not clearly understood, attachments, he shows no inclination to support the legal recognition of educational initiatives like Project Weeksville.

Other language from the book reinforces this interpretation. Costonis asserts "the law . . . is reactive, not prescient." P. 85. "The law cannot identify icons in advance of their appearance in the culture, serendipity not being its strong suit." P. 58. A similar view surfaces in his discussion repudiating the beauty standard. "Law cannot *create* beauty anew. More modest and derivative, its charge is to *safeguard* icons." P. 80 (emphasis added). Elsewhere, he states "[c]onservation, not creativity, is legal aesthetics' province. What is being conserved, of course, is the icon, which comes to the law's attention only *after* it has achieved that status in the community's mind." P. 68 (emphasis in original).

32. This idea is certainly not a novel one. "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." O. HOLMES, *THE COMMON LAW* 36 (M. Howe ed. 1963).

33. Costonis sees legal process issues as crucial to the fair working of his scheme. He has previously recognized "the overriding importance of the process values that the rule of law should and must safeguard, even at the cost of foregoing particular desired outcomes, if need be." *Law and Aesthetics*, *supra* note 1, at 358 n.5.

34. See *supra* notes 11-12 and accompanying text.

question before the Commission would have been whether the Rice Mansion was an icon worthy of preservation; the effect of the proposed high-rise upon the West Side neighborhood should not have affected the decision. Whether or not the West Side neighborhood was an icon worth preserving, and whether the proposed high-rise was a sufficiently destructive alien as to warrant an injunction, would be issues for a zoning commission or a court, but were not proper considerations for the agency whose function was to designate landmarks.<sup>35</sup>

Recently the legal process techniques embraced by Costonis have been questioned by both the left and the right. Adherents of the law and economics school of thought would either privatize the law of aesthetics or discard it altogether. Costonis scolds these critics for being too willing to give up all the positive results of the infant law of aesthetics in reaction to some negative results (pp. 13-15). Using the jargon of law and economics, he notes that the privatization or abandonment of legal aesthetics would neglect the many "symbolic externalities" that clashes between icons and aliens impose upon the community at large.<sup>36</sup> He also points out a practical problem with this view: at this point there is no turning back—the law of aesthetics is now so entrenched, as both a social and legal norm, that the complete reversal these critics advocate is simply impossible.<sup>37</sup>

Recent critical legal scholars, as well as those who write from critical race and feminist perspectives, have begun to advocate more substantive, rather than process-oriented, reforms for the law. Costonis advocates a general method for icon determination, wherein courts, as well as administrative agencies, respond to community sentiment. He thus avoids any articulation of substantive norms, such as architectural standards, to use within this method. Costonis does recognize that this is "a question the law cannot answer from within" (p. 36).

35. Although the final result may have been for the best, such a failure of legal process is troubling. If the icon had been properly recognized, a court or zoning commission might not have considered the alien — the proposed new building — a sufficient threat to prohibit its erection. Furthermore, zoning rules would not prohibit the demolition of the mansion; rather they would proscribe the permissible limits of what could be built in its place. A development upon the Rice Mansion property that did not destroy the character of the West Side could therefore receive legal approval.

36. If economists can think of the environment as a Monopoly board on which economic games are played, why can't the rest of us think of it as a stage rich in icons invested with and broadcasting our deepest religious, artistic, social, and personal commitments? I have no quarrel with theorists who advise that a leading purpose of land use law is "externalities control," that is, keeping the soot from your factory from dirtying the laundry hung in my backyard. But if land use theory is to reflect what people actually seek from public governance, it must go beyond soot and laundry.

"Symbolic externalities" distress people no less and, often, more, for we experience incompatibility as a clash among the messages we associate with the environment's icons and aliens. Driving every legal regime framed to nurture the aesthetics impulse, I am convinced, is the effort to prevent or minimize such associational dissonance.

Pp. 16-17.

37. "[W]e are condemned to come to terms with aesthetics, whether we like it or not. Aesthetics considerations are ubiquitous . . ." P. 15.

But he declines to address directly the question: what *ought* the substantive values of a society be?

Illustrative is his description of the timely problem of gentrification. Young affluent buyers move into a declining neighborhood, renovate old decaying houses, and restore what had been a dilapidated residential area (pp. 37-38). As a result, real estate prices escalate, neighborhoods are designated as historic districts, with accompanying restrictions on use and affirmative duties of care, and tax rates rise. Consequently, the original residents tend to be constructively forced out of the neighborhood.<sup>38</sup> Application of the icon/alien model to this situation becomes confusing. The icon may be the old houses; the alien, old age and disrepair. Or, the icon may be the original neighborhood, possessing a vibrant character despite the decaying physical structures; the alien, the "yuppie" invaders. But having exposed this dilemma, Costonis fails to resolve it. He concludes by merely posing the question "how would you vote?" (p. 37). He declines to provide any definite answer.

As already noted, Costonis avoids such substantive inquiries through his reliance on a democratic politics standard. This is problematic, however, most notably because the likely result of such a majoritarian approach would be discriminatory. Preservationists, the initial and therefore crucial decisionmakers in the preservation scheme, are an essentially homogenous lot.<sup>39</sup> Since legal decisionmakers will most likely be more sympathetic to sentiments characteristic of the communities from which they hail, it would not be surprising to see discriminatory thresholds employed for the recognition of icons. Specifically, those icons held genuinely meaningful to communities that lack legal empowerment may be less likely to be recognized than those icons championed by communities that the law has traditionally favored. Experience tells us who wins in the gentrification scenario posed above.<sup>40</sup> The Project Weeksville example is simi-

---

38. *But see Lee, Discovering Old Cultures in the New World: The Role of Ethnicity*, in *THE AMERICAN MOSAIC*, *supra* note 15, at 199 ("[D]isplacement must be viewed more as a result of a complex array of urban forces than a single phenomenon, such as historic [district designation].").

39. "[T]he preservation profession is nearly devoid of minorities and recent immigrants." *Id.* at 204.

40. The following comment is illustrative:

The problems of preserving the ethnic and social flavor of a place arise most often and most readily in the displacement issue — gentrification as it has come to be called, wherein low-income and minority families and the elderly are displaced as the result of increased property values resulting from the new popularity of inner city neighborhoods. As learned from the experience of cities such as Savannah, Georgia; Charleston, South Carolina; Pittsburgh, Pennsylvania; and elsewhere, it is possible to reduce the problem to some extent, but rarely with unqualified success.

Stipe, *The Next Twenty Years*, in *THE AMERICAN MOSAIC*, *supra* note 15, at 277.

The problem with gentrification is not exclusive to inner-city neighborhoods. In Guilford, Maryland, for example, a small, low-income African-American community is quietly disappearing at the hands of developers catering to young professional couples who wish to live in the

larly telling; had the discovery been made thirty years earlier, or in the Upper West Side rather than in Bedford-Stuyvesant, the legal reaction would have certainly been much less favorable to preservation. Because of this amenability toward discriminatory application, the legal process solution is not very satisfying.<sup>41</sup>

It is possible that Costonis overlooks these problems because of his unabashed enthusiasm for the law of aesthetics. He writes optimistically on the future of this area of the law: "Aesthetics and law are an odd couple . . . . I write as a marriage counselor . . . [who] *want[s]* this marriage to work" (p. 1). Costonis criticizes those who would conclude from the Rice Mansion and like examples that the law of aesthetics should be discarded, comparing such thinking to "throwing the baby out with the bathwater" (p. xvii). Rather, he seeks to examine the history of the law of aesthetics, clarify the issues, and offer a way to improve the process. Extending his matrimonial metaphor, he announces "the honeymoon has ended and the hard work of making the marriage work lies ahead" (p. 1).

Despite some serious problems, *Icons & Aliens* is clearly an influential and exciting development in this field. Costonis has provided a clear analytical framework for the issues, in contrast to the muddle presented by the case law. The icon/alien standard is a prominent improvement over the currently and historically popular beauty standard. Moreover, the attention to the human needs and responses underlying the legal rules results in a book that is entertaining for the nonlegal as well as the legal reader. Although this replacement is not without faults, the book is nonetheless an important first step in a critical reappraisal of the law of aesthetics.

— Scott Schrader

---

economically active area. One such affluent newcomer recognized that a sense of history and community might exist in what is left of the original neighborhood, yet still dismissed it as "a bunch of decrepit-looking buildings," griping "[y]ou'd think they'd want to clean up the area." Shen & Jennings, *Patchwork Development Passes by Working Poor*, Wash. Post, Mar. 24, 1991, at B1, col. 2.

41. Even when recognized, icons may suffer from discriminatory treatment. In South Carolina, there are three national historic districts. One of these districts, which contains a one-time school for freed slaves (now called the Penn Center), suffers from deterioration and decay, while the other two, the downtown districts of Beaufort and Charleston, thrive.

It's symbolic of the inequities that still exist between the races in this nation . . . . Black people, by and large, are still not capable of donating the kind of money necessary to their institutions as whites are able to do. We have made efforts to raise money from both sides, and we haven't been able to get it from either.

Schneider, *Historic District in South Carolina Struggles to Preserve Black History*, N.Y. Times, May 26, 1991, at A22, col. 1 (quoting Emory Campbell, director of the Penn Center).