REVIEW ESSAY

Law, Beauty, and Human Stability: A Rose Is a Rose Is a Rose

ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE. By John J. Costonis.† Urbana and Chicago: University of Illinois Press, 1989. Pp. xxi, 129. \$22.50 hardcover.

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INTRODUCTION

Modern land use law seeks to reconcile private claims on property with society's interest in having land used for the public good. Indeed, many scholars see the conflict between private property and the public interest as the central issue underlying not only land use law but many other areas of property law as well. On the one hand, it is impossible—at least in today's world—to protect property absolutely in the sense long ago espoused by Blackstone.¹ On the other hand, lawmakers are not free to ignore property owners' rights even when enacting measures designed to advance the public interest.²

Nowhere is this tension between private property and public controls more acutely apparent than in the domain of aesthetic regulation. When, if ever, can the state exercise its police power by imposing restrictions on private property for aesthetic purposes? Since the turn of the century, hundreds of courts have struggled with this problem in cases addressing such wide-ranging concerns as unsightly billboards,³ urban renewal,⁴ and historic preservation.⁵ Despite this barrage of judicial

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1. 2 W. BLACKSTONE, COMMENTARIES *2.

2. An array of constitutional provisions protects property from legislative encroachment. See *infra* text accompanying note 40.

3. See, e.g., *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 62 A. 267 (1905), and *infra* text accompanying notes 14-17.

4. See *infra* text accompanying notes 18-20.

5. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

activity, and occasional forays by legal commentators,⁶ no satisfactory theory has yet emerged to justify and harness aesthetic controls.

Professor John Costonis' recent book *Icons and Aliens: Law, Aesthetics, and Environmental Change*⁷ attempts to provide a fresh theoretical framework for analyzing aesthetically motivated controls on property. His topic has great significance both for property theory and for real world applications. Although in some respects the book simply reformulates traditional justifications for aesthetic regulation, it does contribute valuable new insights in an area of law needing analytical development. Costonis' book, therefore, merits the serious attention of property and constitutional law scholars, as well as lawyers and other participants in the areas of land use planning and real estate development.

I

JUDICIAL APPROACHES TO AESTHETICS: AN OVERVIEW

Prior to the 1950s, courts were predominantly hostile toward laws restricting the use of property for aesthetic purposes. Most courts invalidated these measures as violations of substantive due process. This attitude towards aesthetic controls was very much in step with the Supreme Court in the era of *Lochner v. New York*,⁸ which actively scrutinized state regulation of property and contract rights.

Early courts facing landowners' challenges to such land use restrictions generally reasoned that, under the due process clause, a government could only exercise its police power for the public health, safety, or general welfare.⁹ Acknowledging that restrictions based on aesthetic considerations have no perceivable link to health and safety, these courts asked whether they could be legitimized as advancing the "general welfare." In many opinions the answer was "No," with two rationales generally espoused. First, the end of furthering aesthetics was not sufficiently important in comparison with traditional police power uses.¹⁰ Courts viewed legislation designed to promote aesthetic values as too

6. See, e.g., Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982); Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218 (1955); Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 36 (1969); Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977).

7. J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* (1989).

8. *Lochner v. New York*, 198 U.S. 45 (1905).

9. For an example of judicial recognition of this kind of police power, see *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 62 A. 267 (1905).

10. See, e.g., *id.* at 287, 62 A. at 268 (invalidating sign ordinance enacted, not to secure public safety, but for "[a]esthetic considerations [which] are a matter of luxury and indulgence rather than of necessity").

divorced from traditional police power objectives to justify infringement upon the more highly valued property rights.

Second, early courts commonly believed that aesthetic regulation carried too great a danger of unbridled subjectivity,¹¹ unlike other areas of state regulation, where objective evaluation of the governmental purpose is possible. Courts considered aesthetic laws no more than reflections of the legislature's subjective aesthetic values, which might well differ from the values of other citizens. Worse, no objective test was available to determine whether the legislators' or the dissenting citizens' aesthetics were preferable or right.¹²

Despite this general trend, cracks in the veneer of the judicial anti-aesthetics rule appeared as long ago as the 1910s. As happened in so many areas of Anglo-American law, courts continued to apply a rule (in this case to prohibit aesthetically based land use regulations) while effectively changing its meaning through increasingly narrow interpretations. Instead of striking down legislation that had a significant aesthetic component, judges began to uphold such measures whenever they could plausibly find that the regulation promoted one of the traditional ends of government—health, safety, or the general welfare. Soon laws having more than one end—the protection of aesthetics and of something else—were constitutional if the “something else” fit within traditional police power dogma.¹³ The ban thus extended solely to aesthetics-only zoning or other controls.

More significantly, the courts strained to find traditional police power justifications for controls that quite clearly were enacted primarily for aesthetic reasons. The classic case of this genre is *St. Louis Gunning Advertisement Co. v. City of St. Louis*,¹⁴ cited by Costonis¹⁵ and other

11. See, e.g., *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 148 N.E. 842 (1925) (aside from fact that police power is based upon necessity which does not include aesthetics, varying subjective opinions of aesthetics make it an unworkable standard).

12. *Id.* at 661-62, 148 N.E. at 844 (“[T]he public view as to what is necessary for aesthetic progress greatly varies. Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats.”).

13. See, e.g., *Gorieb v. Fox*, 274 U.S. 603, 609 (1927) (sustaining building setback lines, which “add[ed] to the attractiveness” of the neighborhood, because they also promoted health and safety objectives); *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919) (sustaining locational and size regulations for billboards, notwithstanding “aesthetic considerations” underlying regulatory scheme, because safety, morality, and health concerns were primary).

For a modern example, see *Village of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 73, 458 N.E.2d 852, 856 (1984) (sustaining architectural regulations based upon “legitimate governmental interest in maintaining the aesthetics of the community” because they also protected property values), *appeal dismissed*, 467 U.S. 1237 (1984).

14. 235 Mo. 99, 137 S.W. 929 (1911), *dismissed per stipulation*, 231 U.S. 761 (1913).

15. Costonis calls the author of the opinion “imaginative” but concludes that such “flights of fancy” and “silliness had to end” (p. 23).

modern land use scholars¹⁶ as exemplifying the vices of the old anti-aesthetics rule. The Missouri Supreme Court sustained a city ordinance banning billboards in certain neighborhoods, finding that the legislators intended to eradicate not visual blight upon the urban landscape, but rather the use of billboards as shields for illicit activities: "[B]ehind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim"¹⁷

Finally, in 1954 the United States Supreme Court heralded a reversal of the anti-aesthetics rule in *Berman v. Parker*.¹⁸ *Berman* concerned the scope of the eminent domain power in the context of an urban renewal project.¹⁹ Justice Douglas found the power's scope broad and expansive, and in a ringing opinion for the Court observed in dictum:

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.²⁰

The state courts, although not compelled to do so as a matter of federal law,²¹ quickly jumped on the bandwagon by embracing the *Berman* attitude that legislating solely for beauty or aesthetics is fully within the purview of the police power.²²

In the decades since *Berman*, the modern view validating aesthetic regulation has become firmly entrenched as a core principle of land use and environmental law. The new rule has served as the catalyst and prime legal prop for a wide variety of programs, ranging from historic preservation and the protection of scenic vistas to public architectural and landscaping controls. Most courts have extended their full blessing

16. See, e.g., R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 81 (1981) (describing *St. Louis Gunning* as "artificially" asserting health, safety, or moral conditions to cover the ordinance's true aesthetic purposes); Dukeminier, *supra* note 6, at 219-20 (suggesting that *St. Louis Gunning* was based upon the "unproven hypothesis" that billboard signs are harmful primarily to health, safety, or morals).

17. *St. Louis Gunning*, 235 Mo. at 145, 137 S.W. at 942.

18. 348 U.S. 26 (1954).

19. *Id.* at 28-29. Department store owners challenged a comprehensive redevelopment plan that would appropriate their store in the plan's ongoing efforts to eliminate and prevent substandard housing. They alleged that their property was not itself slum housing and that, once acquired by the redevelopment agency, it would be resold to the private sector. *Id.* at 31.

20. *Id.* at 33 (citation omitted).

21. Not only was the *Berman* position on aesthetics expressed in dictum, but it involved the construction of the federal due process and takings clauses. See *id.* at 31. Thus, state courts were free to continue their ban on aesthetics-only regulation if they interpreted the scope of their state's police power as more narrow under their state constitutions.

22. Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125, 131 (1980) (listing 16 jurisdictions permitting regulations based solely on aesthetic criteria).

to aesthetic regulation, according it coequal status with the more traditional police power objectives.²³ A few modern courts have sought a middle ground, characterizing aesthetics as a proper, but less weighty, legislative end than health and safety concerns, and therefore meriting less judicial deference.²⁴

II

PSYCHOLOGICAL DESTABILIZATION THEORY

Against this background of courts' increasing acceptance of aesthetic regulation, Costomis presents his analysis of aesthetic regulation. Costomis criticizes courts both for their early hostility toward aesthetic regulation, as well as their current embrace of it. The old decisions he finds miserly in their conception of the state's police power but at the same time overly willing to interfere with legislative decisionmaking (pp. 21-23, 43). Costomis thus aligns himself with modern constitutional dogma criticizing judicial activism pursued under the banner of substantive due process.

23. See, e.g., *Gouge v. City of Snellville*, 249 Ga. 91, 287 S.E.2d 539 (1982) (upholding prohibition of satellite television dish in front yard); *Zilinsky v. Zoning Bd. of Adjustment*, 105 N.J. 363, 521 A.2d 841 (1987) (upholding requirement that every single-family home have a garage in order to reduce visual clutter of parked cars); *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982) (upholding regulation of junkyards); *Village of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 458 N.E.2d 852 (1984) (upholding architectural controls on exterior appearance of shopping center), *appeal dismissed*, 467 U.S. 1237 (1984).

A few courts continue to follow the rule banning property restrictions based on aesthetics alone, while permitting aesthetic controls when coupled with other legitimate governmental interests. See, e.g., *Art Van Furniture, Inc. v. City of Kentwood*, 175 Mich. App. 343, 437 N.W.2d 380 (1989) (upholding general validity of sign ordinance directed towards safety and aesthetics, but finding section of ordinance distinguishing signs by their size unreasonable classification in violation of due process), *appeal denied*, 433 Mich. 916 (1989).

24. See, e.g., *City of Chicago v. Gordon*, 146 Ill. App. 3d 898, 904, 497 N.E.2d 442, 447 (1986) (when prohibition of outdoor advertising signs and displays is justified "on the grounds that it promotes aesthetic values, the justification must be carefully scrutinized to determine if it is merely a public rationalization for an improper purpose"); *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 478, 373 N.E.2d 255, 260-61, 402 N.Y.S.2d 359, 365-66 (1977) (observing in the context of amortization of nonconforming signs and structures that while "aesthetics, in itself, constitutes a valid basis for the exercise of the police power[.], . . . [i]n contrast to a safety-motivated exercise of the police power, a regulation enacted to enhance the aesthetics of a community generally does not provide a compelling reason for immediate implementation with respect to existing structures or uses") (citations omitted).

Justice Brennan has adopted a similar view on how aesthetics regulation operates with the police power, at least when the regulation affects freedom of expression. He would require that a local government prove its commitment to aesthetic concerns by showing that it is comprehensively addressing such concerns throughout the community, before he would permit it to impose an aesthetic control upon a particular group of property owners. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 530-34 (1981) (Brennan, J., concurring). In *Metromedia*, Brennan asserted, in part, that a San Diego billboard ordinance should be invalidated because the city had failed to demonstrate a sufficiently substantial interest in aesthetics in commercial and industrial areas. Brennan noted that San Diego had not demonstrated a coordinated effort "to address other obvious contributors to an unattractive environment." *Id.* at 531.

Costonis posits that contemporary decisions, while free from the infirmities of previous opinions, have other faults. In their zeal to bless aesthetic controls such as historic preservation, billboard bans, and architectural design limits, modern courts have uncritically announced the general principle that legislative promotion of aesthetic values is a proper end of government. In explaining their position, these courts often merely assert that the promotion and protection of community aesthetics is in the public interest and therefore a proper use of the police power. This, as Costonis properly notes, is only a conclusion, not a reason (p. 78). To the extent that a reason is given, courts speak in terms of beauty. The courts' message echoes the dictum of *Berman v. Parker*: beauty is important, and a beautiful environment is in the public interest.

A. Costonis' Thesis

The pendulum has swung too far, Costonis believes. Modern courts have failed to articulate coherently what limits, if any, attach to the state's use of coercion to promote legislatively defined aesthetic values. No theory has developed to explain when aesthetic regulations must give way to competing social policies—such as the public interest in reasonably ascertainable legal standards and the protection of private property and freedom of expression. We have no such coherent theory, asserts Costonis, because neither the courts nor the scholars have provided a sound underlying rationale for the legitimacy of aesthetic regulation. Costonis is concededly an apologist for the modern view that it is appropriate for the state, at least in many instances, to require citizens to obey the aesthetic rules that it promulgates (pp. xvi, 1).²⁵ His goal, therefore, is to provide a theoretical justification for aesthetic regulation that not only supports such regulation but also indicates its proper limits.

Costonis' prescription is simply stated and, at least on its face, elegant. Because beauty fails to justify aesthetics regulation fully,²⁶ we

25. Several other commentators have taken a more critical view of governmental use of aesthetic controls. See, e.g., B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979) (arguing that recent growth control and environmental movements have effected expensive regulations and controls benefiting only an elite group).

26. Costonis believes that beauty fails as a justification for aesthetic law for two reasons. First, beauty is incapable of measurement by standards that are precise enough for the lawmaking context. Thus, along with other modernists, he rejects the notion of "formal canons of beauty" which are mathematically based or derived from a mechanical interplay between the human senses (chiefly vision) and the physical attributes of art or the environment (pp. 60-62). "Beauty or ugliness is not a property of an environmental feature taken by itself. . . . [t]hese terms [express] emotional reactions triggered by messages broadcast to us by the [physical] environment[] . . ."(p. 60). Reactions to the environment vary from individual to individual and from one generation to the next, thus creating an ever-changing standard of beauty.

Second, even if the beauty of an environmental feature could be objectively defined, the due process clause would still compel the government "to identify the governmental purpose advanced by measures enacted in beauty's name" (p. 78). Costonis rejects as problematic the contentions that

must identify another brace. For this role, Costonis looks to the inner self. The legal basis for aesthetic laws, Costonis contends, is our individual and group psychological well-being. In place of beauty, he substitutes

our individual and social needs for stability and reassurance in the face of environmental changes that we perceive as threats to these values.

. . . .

. . . Cherished features of our environment are preserved not because they are "beautiful" but because they reassure us by preserving, in turn, our emotional stability in a world paced by frightening change. Features serving this function are the "icons" of this volume's title. . . . New developments posing such threats are this volume's "aliens" (pp. xv, 1-2).

Under this rationale, society protects certain features of its physical environment, not because they are beautiful, but because they represent our personal and collective sense of stability. Continuity in our environment gives us reassurance. When our cherished "icons" are disturbed or destroyed—for example, a historic district is demolished or a scenic beach front is spoiled by development—we suffer emotional anguish. Psychologically, we are destabilized.

Costonis asserts that the legal justification for aesthetic regulation should reflect this reality, namely society's psychological affinity for stable environmental features. Thus, Costonis would replace beauty with stability as the central legal rationale for aesthetic regimes because stability offers a better-reasoned justification than beauty for state control of aesthetics and, unlike beauty, provides proper limits to state action (pp. 79-80).

B. Critique

Costonis describes his psychological destabilization theory at length. He contrasts "museum aesthetics," for which popular conceptions of beauty provide appropriate standards, with "courthouse aesthetics," where stability should be the reigning standard (pp. 8-13). While the book has as its scholarly core Costonis' destabilization theory, including three applications of it to discrete problem areas,²⁷ the work is also peppered with numerous anecdotes and pictorial illustrations designed to underscore Costonis' points.²⁸ This material, whatever one may think of Costonis' grander theory, is in itself provocative and insightful.

(1) state promotion of beauty leads to civic virtue (the theory "praised by Hitler") and (2) preservation of beauty preserves property values (p. 78).

27. See *infra* text accompanying notes 34-75.

28. For example, he relates a brouhaha on the Upper East Side of Manhattan, which pitted a Korean entrepreneur, who wanted to open a delicatessen on Park Avenue that would also sell vegetables, against his tony neighbors who feared that the invading "alien" vegetables would destroy their cherished "icon"—the silk-stocking character of the neighborhood (pp. 2-4).

The mere rendition of Costonis' basic thesis, however, raises an immediate question. Has the author, in developing the stability rationale, done anything more than play a word game? Doesn't beauty, as we commonly think of the term, simply reflect the fact that many members of society have strong psychological attachments to certain features of our physical environment? Beauty is in the eye of the beholder; beauty and the perception of beauty are one and the same. Beauty is not an objective verity, but a cognitive and emotional reaction within the human mind. Emotional and psychological destabilization result from the impairment of icons because these icons are the environmental features that we consider beautiful.²⁹

Ultimately, all Costonis has done in his main thesis is to redefine "beauty" as that which imports psychological and emotional stability and reassurance. Although neat and clever, this substitution does not supply a new rationale for aesthetic control. All the theory really accomplishes is to let us talk about beauty without using the "b" word. By calling it something else, one deflects the uncomfortable allegations raised by critics of state aesthetic controls that beauty by itself is not a sufficiently weighty police power goal to justify the regulation of private property, and that the determination of beauty is inherently subjective.

C. Beauty as an End of the State

Even though Costonis' psychological destabilization theory is essentially a linguistic sleight of hand, it does have certain value. By reorienting the vocabulary of aesthetic regulation, Costonis' theory underscores one key point about regulating aesthetics: environmental beauty is tied to our individual and community stability (even though Costonis expressly disclaims any intent to link the two (pp. 60-62)). The stability concept affirms that beauty is not simply a luxury, but rather is an important societal goal. Thus environmental beauty has substantial public value far beyond "beauty for its own sake."

Characterizing aesthetics as a stabilizing force fits in nicely with traditional notions of the scope of the police power. As the traditional police power protects health, safety, and general welfare, so does the preservation of aesthetic components of the environment nurture our psychological and emotional well-being. Indeed, preserving icons preserves our collective mental health. This insight answers the objection often made by early courts and critics of aesthetic controls that promoting a beautiful environment is too attenuated from traditional govern-

29. Costonis seems to recognize that what we term "beauty" in the physical world is an expression of an internal mental state (pp. 60-65). Given this, it is hard to see how he avoids the conclusion that it is the removal of "beauty" in the environment that leads to a personal sense of destabilization.

mental ends to pass muster under the due process clause. Under the stability rationale, preserving environmental beauty arguably rises to the same level of importance as protecting our physical bodies (a traditional police power end) by, for example, preventing the spread of disease or reducing the risk of fires.

Including beauty as a legitimate end of the police power, by likening it to psychological stability, means that governmental subsidies for the promotion of beauty are constitutional: the state can spend money, purchase or condemn property, fashion tax subsidies, and so forth, to protect our societal icons.³⁰ It does not matter, for subsidy purposes, that the state's decision as to what is "beautiful" and what is not may be arbitrary, elitist, or inherently subjective. If citizens object to such use of public revenues, their sole remedy lies within the public arena.³¹ As long as the end—the promotion and cultivation of beauty—benefits the public by guaranteeing stability, the form it takes is of no constitutional consequence. Thus, subsidizing a painting or an opera, buying a sculpture for a city plaza, or purchasing open space to preserve scenic beauty are all equally legitimate as long as they promote majoritarian ideals of beauty and historical and cultural values in ways that preserve our psychological well-being.³²

This contribution of the stability theory, however, should not be overrated. Few, if any, scholars presently question the validity of state subsidization of the fine arts, literature, music, or environmental beauty in the forms of open space, wilderness, parks, attractive public spaces,

30. The subject of appropriate state subsidies becomes more complex, however, when icons take on religious significance. *See, e.g., County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989) (placement of Nativity crèche on public property violated establishment clause of first amendment, but placement of Chanukah Menorah on public property near Christmas tree did not).

31. *See, e.g., N.Y. Times*, July 27, 1989, at A1, col. 2 (describing Senate vote to bar federal support for certain types of art, and art organizations' reactions); *Atlanta Constitution*, Sept. 5, 1989, at C3, col. 4 (argument that NEA budget supports culture appealing mainly to "elitists").

32. *See Berman v. Parker*, 348 U.S. 26, 33 (1954) ("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."). While the Supreme Court has not directly considered a constitutional challenge to an art subsidy program, its abortion funding cases—which permit the government to make financial distinctions notwithstanding the existence of a constitutional right (i.e. refuse to pay for abortions despite their constitutional basis in the right to privacy)—suggest that the government may selectively subsidize art. *See, e.g., Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (state statute restricting use of public employees and facilities in performing or assisting abortions was not unconstitutional since women are simply left with the same choices as if the state had chosen not to operate any public hospitals); *Harris v. McRae*, 448 U.S. 297 (1980) (limitation on federal funding of abortion in the Hyde Amendment not unconstitutional, because a woman's freedom of choice does not comprehend a constitutional entitlement to the financial resources to exercise all protected choices). Thus, the denial of subsidies for a particular type of art or beauty does not infringe on constitutional rights. *See, e.g., Dept. of Interior and Related Agencies Appropriations Act of 1990*, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741 (1990).

and the like. Rather, contemporary critics focus upon the propriety of the government's imposing beauty on private owners by regulation, instead of subsidizing beauty by directly "purchasing" it with revenues. The usefulness of the stability theory depends on how it would resolve these "means" questions, aside from the theory's simple legitimation of government ends.³³

III

APPLICATIONS OF AESTHETIC THEORY

After propounding and illustrating the psychological destabilization theory, Costonis turns to an examination of governmental means that may be used to further aesthetic stability. He focuses upon three problem areas: setting aesthetic standards, determining the proper scope of freedom of expression within the aesthetics regulation context, and protecting property under the takings clause.

A. *Aesthetic Standards*

The standards controversy centers essentially on whether it is possible to define, with reasonable objectivity and concreteness, the values an aesthetics regime would promote. Critics contend that since beauty is subjective and immeasurable, so are aesthetic standards; as a consequence we must tolerate imprecision and vagueness in aesthetic regulation. The problem is compounded when the government delegates authority to an administrative body to enforce those loose or nonexistent standards. Legitimate questions of the separation of powers and unbri-dled administrative discretion necessarily arise.

Costonis somewhat artificially divides his discussion into two standards issues: first how to select icons deserving of protection and, second, how to identify "aliens" (meaning foreign forms) threatening a protected icon.³⁴ As for icon selection, he suggests a focus on two considerations: the degree of consensus in the community³⁵ that "an environmental feature has actually become an icon" (pp. 84-90), and the

33. See *supra* text accompanying note 30.

34. Basically, Costonis is saying, "First let's pick the icons, then we will decide which aliens we should repel." This division appears artificial, for the two inquiries seem merely to be alternative expressions of the same idea. By what standards will we protect an environmental feature viewed as socially desirable by some members of the community, when other members desire to use their property in ways that detract from that given feature? Every environmental feature is a deserving "icon" with respect to at least some "aliens." For example, a suburban tract home, run-of-the-mill in every way, clearly warrants protection from neighboring property used as a junkyard—a nuisance under well-settled doctrine.

35. Here Costonis' primary concern is how legislators should measure community support for certain icons. Some present no problem, as public support is overwhelming (Costonis cites the Vieux Carré historic district in New Orleans as one example) (p. 85). For harder cases, Costonis suggests going beyond head counts, with legislative reliance on design professionals and civic groups. For

likelihood that administrable standards can be devised (p. 80) to define the physical features of the protected icon. Assessing our capacity to draft administrable standards, he finds some "bad news—it must be recognized up front that there are some icons for which administrable standards simply cannot be devised" (p. 80).³⁶ Costonis' prime example of an icon lacking administrable standards, and thus erroneously selected for protection, is a historic district containing a melange of different architectural styles.³⁷

According to Costonis, once we have validly anointed an icon, we must protect it by drafting objective, administrable standards that identify which "aliens" are to be repulsed. While icon selection may involve a heavy dose of subjective value judgments, standards for protection may not. As an illustration, "San Franciscans are deeply attached to their city's image as one of hills descending gradually to the bay. This attachment, of course, is entirely subjective. But standards preventing aliens from marring this image can be stated in topographical, engineering, and other objective terms" (pp. 90-91).

Costonis finds aesthetic regulation far too vague when it is couched in language commonly seen in a wide variety of historic preservation ordinances and other public controls: that neighboring land uses and new improvements be "compatible," "harmonious," or "congruous" with existing development (icons). Such nonstandards, which modern courts typically tolerate, provide virtually no notice to landowners of what is required. At the same time they unacceptably expand the discretion of administrators charged with interpreting the ordinances. Courts, Costonis argues, should strike down such inexactitude "by insisting that a challenged aesthetics regime specify with reasonable clarity its purposes, the salient characteristics of its icon, and the criteria that will be employed to ward off aliens" (p. 92).

If courts require this level of specificity, they will invalidate on

such cases, he recommends particular value be placed on the process, with the use of public hearings and similar procedures (p. 85).

36. Costonis writes:

Aesthetics regimes cannot protect ideas or feelings as such, only the physical features of the icon that signify these ideas or trigger these feelings. But associations that cause us to think of some resources as icons may be resident elsewhere than in their physical features or, even if there, unrenderable in terms of coherent standards.

(pp. 85-86).

37. New York City erred, he believes, in designating the Upper East Side as a historic district.

As he writes,

[t]his 60-block, 1,000-building area undoubtedly includes a number of individual buildings and blocks for which workable standards could be drawn. But the claim, essential to historic district status, that the Upper East Side Historic District as a whole is architecturally coherent is disingenuous. By the city's own count the district contains upward of sixty-three different architectural styles . . .

(p. 87). Costonis sharply criticizes as standardless the New York City definition of a historic district as any area having a "special character or special historical or aesthetic interest or value . . ." (p. 82).

vagueness grounds a great many of the presently operative aesthetic controls, which use abstract, generalized language. Rulemaking bodies would have to spend significant time and energy to revise the existing general standards.³⁸ If courts move in this direction, they certainly will buck the modern trend toward expanding administrative discretion and flexibility.

Nonetheless, Costomis' call for greater specificity in aesthetics regulation has two distinct advantages. First, specific requirements give property owners reasonable notice of development restrictions. This notice, in turn, enables buyers, sellers, and other market participants to predict with reasonable certainty the costs associated with aesthetic compliance for development, redevelopment, or continuation of existing uses.³⁹ In contrast, these people cannot predict the nature and amount of such costs under the current system of aesthetic controls, which essentially leaves specific standard setting to public officials who review each plan on a case-by-case basis. To use Costomis' example (pp. 90-91), a person considering a new office tower in San Francisco would have a much better chance of estimating costs if she could fashion a proposal meeting clear standards for height, bulk, engineering and topography designed to protect aesthetic values, rather than a generalized standard

38. Drafters prefer general standards for two reasons. First, they are far easier to write. Second, by allowing for flexibility and ambiguity, they augment the discretionary authority of public officials. Cf. R. ELICKSON & A. TARLOCK, *supra* note 16, at 236-38 (potential relaxation of restrictions by officials used as leverage in "dealmaking strategy" to extract concessions from developers).

39. Objective aesthetic standards advance efficiency, as long as they are rational either as Pareto-efficient allocations of competing land use entitlements or as accurate forecasts of local government's implementation of open-ended standards. If efficient in either manner, the objective standards reduce transaction costs stemming from imperfect information. Quantitatively stated regulatory standards mean developers are less likely to incur substantial development costs for preliminary plans that ultimately fail to satisfy the land use regulations. By the same token, there will be savings in the transaction costs associated with bargaining between the developer and the public officials because fewer negotiable items will be left open for ad hoc deal making between the parties. See *supra* note 38.

An analysis of the comparative efficiency of objective and open-ended land use regulations necessarily requires an examination of the developer's attitudes toward risk. To the extent that he or she is risk averse, uncertainty as to the regulatory cost will tend to cause a developer to shy away from pursuing a project whose completion otherwise would be economically justified. For example, assume an ordinance requires the dedication of "appropriate open space if the council determines that the proposed development will create additional need for open space not met by existing publicly owned open space." Assume further that for a given development proposal, there is a 50 percent chance that the council will require no dedication of open space, there is a 50 percent chance the council will require the dedication of land having a value of \$1,000,000, and the developer cannot determine the council's final decision without expending substantial amounts of money. A risk-neutral developer, in its preliminary planning, will budget an expected dedication expense of \$500,000 and will proceed with the project if a profit is foreseeable on that basis. A risk-averse developer, however, will refuse to go forward if it projects a loss based on a dedication expense of \$1,000,000.

that "new development shall not impair the aesthetic qualities" of the community.

The second strength of requiring increased specificity is fairness. By curtailing the latitude of discretion in interpreting a particular aesthetic standard, one reduces the likelihood of arbitrary and capricious decision-making. Consequently, it is more likely that similarly situated property owners will receive similar treatment (by administrators or courts) under an aesthetics regime utilizing objective standards.

One surprising feature of Costonis' prescription for objective aesthetic standards is that it seems completely unrelated to the destabilization rationale which he presents as the book's main thesis. He makes no attempt to explain how either vague standards or objective standards relate to the promotion—or destruction—of personal or collective stability. Does this demonstrate that Costonis' stability theory simply lacks a sweep that is broad enough to account for the standards problem? Is stability thus too narrow to serve as a general theory?

Although one could derive aesthetic standards that substitute psychological stabilization for beauty as their goal, these standards would suffer from the same vagueness problem that Costonis objects to in the current beauty-based regulations. For example, a building height and bulk limit in a neighborhood subject to aesthetic controls could read: "The height and bulk of every building shall be limited in order not to cause psychological destabilization in the community or its residents." While mental health professionals might be able to serve as expert witnesses to interpret the meaning of such a regulation, such a standard would seem even more vague and amorphous than one requiring simply "good" or "beautiful" architecture or "harmony" with the existing neighborhood.

Nor is the problem resolved if instead we insist on objectively worded standards, but use the stability theory to mean that the objective criteria must have a base in preserving stability. Thus a height, density, or use restriction would be expressed objectively, but must be set at the limit which optimizes individual and group psychological stability. A five-story limit on building height on a particular site is justified if a higher limit would destabilize neighbors; presumably the input of health care professionals on this point (and myriad other similar points) is needed at a public hearing or other forum prior to promulgation of the standard. This approach of utilizing health care professionals, however, hardly seems helpful because it would generate substantial costs with little discernable gain. There is no apparent reason why "stability" any more than "beauty" will point the way to proper objective standards. Costonis' failure to relate the stability concept to the standards issues

reinforces the conclusion that his advocated shift of emphasis from beauty to stability is little but a change of words.

B. Freedom of Expression

As land use planning has become increasingly constitutionalized in nature, due process, equal protection, and takings claims have predominated. There is great potential for a shift in focus from these clauses to first amendment challenges.⁴⁰ Costonis perceptively recognizes that the legal protection of icons—accomplished by the exclusion of aliens—may raise constitutional issues concerning freedom of expression under the first amendment. The problem arises if the proponent of an alien form is considered to be engaging in “speech” within the meaning of the first amendment.⁴¹

Addressing this issue, Costonis posits that some aliens, and not others, qualify as protected speech. While he notes that the Supreme Court has not yet applied the first amendment in this context, he points to architecture designed by a recognized, professional architect to which neighbors object because of its lack of conformity to the architectural style represented by nearby structures.⁴² “For many, architecture and

40. First amendment attacks on billboard regulations already proliferate. See, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding ban of political signs on public property); *Ackerley Communications v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989) (striking down billboard regulation that “grandfathered” certain existing nonconforming signs based upon their content and location); *Bell v. Township of Stafford*, 110 N.J. 384, 396, 541 A.2d 692, 699 (1988) (striking down citywide ban on signs because township did not demonstrate “compelling legitimate governmental interests”).

41. Costonis correctly notes that there are no cogent reasons for considering an icon (for example, a building having unique architectural values) to be symbolic speech (pp. 93-94). Although he does not say it explicitly, Costonis appears to assert that an icon is not speech because its creator has already spoken in the sense that the icon, unlike the threatening alien, already exists (p. 94). This formulation is problematic: for example, a book is also a thing that physically exists, but presumably no one would contend that the first amendment protection accorded its message ends upon printing because the book has already “spoken.” Perhaps a better analysis is that an icon is symbolic speech, but that the Constitution only protects its present owner as speaker. That owner could choose to stop speaking (by destroying the icon) without violating the first amendment. Moreover, if that owner continues to speak through its icon, its speech rights will not extend to silencing aliens who send different messages from neighboring properties because the first amendment does not guarantee the speaker an audience undistracted by other messages.

42. As indicated above, the Supreme Court has yet to decide the extent to which the first amendment applies to aesthetically oriented land use regulations. Among its first amendment decisions, four lines of cases appear relevant: those addressing symbolic speech, commercial speech (sign ordinances), adult entertainment, and time, place, and manner regulations. Each group of cases has its own distinctive doctrinal analysis that strikes balances between expression and regulation. Consequently, it makes a difference which one or ones are applied to a land use regime that limits constitutionally protected expression.

The symbolic speech cases, of which *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (burning American flag to protest policies of Reagan administration upheld), is a recent example, extend the ambit of the free speech clause to nonverbal conduct carrying with it a significant element of expression. Labelling an action “symbolic speech” removes the normal presumption of

other environmental features communicate ideas more effectively than does language, a point captured in Louis Sullivan's description of the architect as 'a poet who uses not words but building materials as a medium of expression' " (p. 94). He concludes that other aliens, such as a vegetable market intruding upon an elite neighborhood, are not speech, given the lack of intent to convey a particular message. Under the Court's first amendment cases, such expressive conduct by landowners and architects should be viewed as "symbolic speech," although Costonis does not employ this term.

Recognizing that such "alien architecture" represents the architect's symbolic speech (and presumably also the symbolic speech of the landowner who has contracted with the architect and who plans to build the alien) protected by the first amendment, Costonis then asks whether the state has adequate justification for suppressing that speech at the behest of the neighbors. Standard first amendment doctrine requires that the state demonstrate a "compelling interest" before it may prohibit otherwise protected speech.⁴³ Here Costonis' psychological destabilization

constitutionality that applies when the government regulates the conduct of its citizens in order to promote a legitimate governmental objective. To date, in addition to recognizing various types of expressive conduct related to flags as protected symbolic speech, *see, e.g.*, *Spence v. Washington*, 418 U.S. 405 (1974) (attaching peace sign to flag), the Court has recognized the following: picketing to promote causes, *United States v. Grace*, 461 U.S. 171 (1983); wearing black armbands to protest the Vietnam War, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); and sit-ins to protest racial segregation, *Brown v. Louisiana*, 383 U.S. 131 (1966).

Treating a landowner's proposed architecture and other "expressive" land use activities as symbolic speech has two implications. First, the landowner's symbolic speech might not qualify for protection if it is not a form of political protest. Courts could draw a line here based upon the concept that political discourse is more highly valued under the Constitution than other speech. *Cf. Near v. Minnesota*, 283 U.S. 697, 717 (1931) (finding freedom of the press "especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officials and charges of official misconduct"). Undoubtedly, most types of expressive conduct engaged in by landowners cannot be seen as political discourse, even if broadly construed. Perhaps a homeowner's occasional demonstration of outrage against a local government (such as hanging the mayor in effigy on her front lawn) would qualify. Nevertheless, while most architectural design will not rise to the level of political discourse, at least some architects would consider radical design to carry a "political" message. In addition, the other lines of Supreme Court cases addressing commercial speech and adult entertainment have tended to indicate that some landowners' activities are sufficiently expressive to warrant constitutional protection. Their persuasive authority, however, may be limited. *See infra* note 52 and accompanying text.

Second, as noted above, symbolic speech analysis accords less protection than that extended to pure speech, even where the landowner's conduct might qualify. *See, e.g., Johnson*, 109 S. Ct. at 2540 ("The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.") (citations omitted). The government will prevail upon a showing that (1) its regulation is directed toward the conduct, not the expressive ideas; (2) its regulation is no more restrictive than necessary; and (3) other channels of communication remain open for the would-be speaker. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

43. Costonis also uses the phrase "sufficiently substantial governmental interest," by which lie

theory hits full stride. Government, we learn, can suppress aliens whose creation would constitute symbolic speech, in order to protect the stability of neighborhoods: "[A]liens often destroy stable land use patterns by eroding the ties that bind people to places. Preservation of these patterns not only is a valid governmental concern but is 'the most essential function performed by local government' " (p. 99).⁴⁴

By limiting first amendment protection to those aliens designed by professional architects intent on conveying a particular message, Costonis takes an overly conservative position and one that runs counter to the Court's first amendment cases. First, Costonis fails to explain why only the work of professional architects, and not a broader spectrum of structures, should be accorded first amendment protection. Although the message a renowned architect wishes to convey may be the clearest and most articulate message relating to land usage, first amendment law has generally rejected, for good reason, the evaluation of the *quality* of speech as a predicate for protection. *Mad Magazine* and Shakespeare are both speech, both enjoying the same ambit of protection. Thus it is not clear why symbolic speech would stop with a renowned design professional or the landowner who hires her. What of a journeyman architect who designs a regular house that lacks architectural significance, but is nonetheless "out of character" with neighboring structures? Perhaps it is a one-story contemporary with redwood siding, while all the neighbors have brick two-story Georgians. It would be elitist to count the product of an aspiring Frank Lloyd Wright as "speech," but not more modest efforts of unknown creators that are affordable to middle-class home buyers. If there is a problem in identifying the message conveyed by a proposed undistinguished tract home, it should suffice that the owner, through the architect or builder, is saying, "This is a house that I like; it's my home and it expresses my being."⁴⁵

means the same thing (pp. 93, 98). He borrows the phrase from Justice White's majority opinion in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (the zoning law at issue must further a "sufficiently substantial government interest"). When government regulates symbolic speech, it must meet this same heavy burden of justification unless its interest is unconnected to the communicative nature of the conduct. See *supra* note 42.

44. Costonis cites Justice Marshall's dissent in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974). However, his reliance on this case is somewhat misleading, since neither the Court nor the dissent considered the first amendment guarantee of freedom of expression in upholding a zoning ordinance prohibiting the occupancy of homes by nontraditional family groups.

45. A house's exterior often expresses its residents' personality. See Cooper, *The House as Symbol of the Self*, in *DESIGNING FOR HUMAN BEHAVIOR: ARCHITECTURE AND THE BEHAVIORAL SCIENCES* 130 (1974) (drawing upon psychologist Carl Jung's work involving dreams and concepts of the collective unconscious, the archetype, and the symbol); Rainwater, *Fear and the House-as-Haven in the Lower Class*, 32 J. AM. INST. PLANNERS 23, 24 (1966) (describing how home functions in terms of "self-expression and self-realization" of its occupants). Kenneth Jackson has described the American single-family suburban house and yard as a symbol representing family, stability, and achievement. K. JACKSON, *CRABGRASS FRONTIER* 45-61 (1985).

Second, Costonis unnecessarily limits the message elements of land use to architectural display solely through the construction of buildings. What of the suburban landowner who, in a typical neighborhood of manicured lawns, decides to let her yard go "back to nature"? When the neighbors complain of weeds and the general absence of landscape maintenance, the naturalist often explains her yard as reflecting her environmental ethic of returning the land to its natural environment, coupled perhaps with disdain for the homogeneity of the suburbs.⁴⁶ It is hard to dispute that the unkempt yard does convey such a message. Similarly, symbolic speech may be intended when an owner paints her house exterior a bright pink,⁴⁷ or places an unusual sculpture or figurine in the front yard.⁴⁸

Whatever may be the scope of symbolic speech in the context of land use, once a particular activity is found to constitute speech, the state may only prohibit that activity to protect a substantial public interest unrelated to the message or content of the speech.⁴⁹ Costonis' use of the stability concept as the state's justification for the suppression of speech is a serious blunder. Preventing emotional and psychological destabilization of the neighbors is directly related to the message of the "alien" who seeks to speak. The reason why the neighbors would be destabilized by

46. See, e.g., J. KEATS, *THE CRACK IN THE PICTURE WINDOW* xi-xii (1957) ("[F]or even while you read this, whole square miles of identical boxes are spreading like gangrene In any one of these new neighborhoods . . . you can be certain all other houses will be precisely like yours, inhabited by people whose age, income, number of children, problems, habits, conversation, dress, possessions and perhaps even blood type are also precisely like yours [T]oday's housing developments [are] conceived in error, nurtured by greed, corroding everything they touch.").

47. At a minimum, this expresses "I like pink. I'm a nonconformist." Again, while the message is neither political nor at a high level of discourse, protected first amendment speech requires neither. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (finding cartoon portraying Jerry Falwell as having engaged in incest to be protected speech).

48. A broad reading of symbolic speech encompassing such land uses may be criticized as opening up too much land use regulation to landowner challenges based upon the first amendment. Indeed, where can the line be drawn between activities that communicate some message or idea, and those that do not? To some extent, all volitional human activity conducted in a public place (i.e., anywhere other persons are likely to notice it) possesses an element of communication. Nothing in first amendment law indicates whether or where to draw a line limiting symbolic speech to activities with pronounced or articulate messages.

Perhaps the Court will choose to draw a line delimiting symbolic speech short of the examples described in the text. No such lines, however, are suggested by the types of symbolic speech that to date have received constitutional protection, such as flag burning, *Texas v. Johnson*, 109 S. Ct. 2533 (1989); adult motion picture theaters, *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46 (1986) (restricting location of adult theaters but emphasizing that ordinance does not ban them altogether); and nude dancing, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

49. This rule is illustrated in the pornography zoning cases, where the Court upheld reasonable locational restrictions on adult entertainment when the city's goal was to protect neighborhoods from the "secondary effects" of adult entertainment. See *infra* note 52 and text accompanying note 57; *City of Renton*, 475 U.S. at 47-48; see also *Schad*, 452 U.S. at 72-75 (discussing borough's inability to justify restrictions); *Young v. American Mini Theatres*, 427 U.S. 50, 54-55 (1976) (discussing council's motive of preventing deterioration of commercial neighborhoods).

the unwanted land use is that they would have to see or hear the message. If, for example, the symbolic speech consists of architecture or the "back to nature" landscaping referred to above, any neighbors who suffer destabilization have this reaction because they dislike the message. They are destabilized because they are unwilling "listeners."

Stripped of the verbiage of stability, Costonis' argument is that the government may suppress land uses whose exterior appearance to the community constitutes speech if the neighbors find that speech disturbing. A long line of Supreme Court precedents demonstrates that even when speech upsets or offends others the state may not censor it. In *Texas v. Johnson*,⁵⁰ the Court recently struck down a Texas statute prohibiting desecration of the American flag. In the majority opinion, Justice Brennan observed: "[The] bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁵¹ Clearly the result in *Johnson* would not change merely because witnesses and other members of society who were gravely offended were "destabilized" by the practice of flag burning.

In reaching his conclusion that aesthetic regulation is justified to protect neighborhoods from destabilization—even when it restricts protected speech—Costonis relies too heavily on the Supreme Court adult entertainment cases,⁵² completely ignoring the more closely analogous symbolic speech and sign ordinance cases.⁵³ Both the symbolic speech

50. 109 S. Ct. 2533 (1989).

51. *Id.* at 2544 (citing thirteen previous Supreme Court opinions expressing this principle).

52. The Supreme Court opinions in the adult entertainment cases are difficult to interpret, as the Justices were divided on the issues, producing a total of eleven opinions in the three leading cases. See *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Young v. American Mini Theatres*, 427 U.S. 50 (1976). In these cases a rule has apparently emerged that a city may not totally exclude adult entertainment but may restrict adult entertainment outlets to confined areas, subject to two conditions: First, the areas permitting adult businesses must be reasonably suitable in size and location. Second, the regulation must be content neutral, intended to regulate not the "adult message" but the "secondary effects" the businesses will have on the surrounding neighborhood, such as increased traffic, crime, noise, and urban decay. See *City of Renton*, 475 U.S. at 47-48.

53. The Supreme Court sign ordinance cases extend the commercial speech doctrine, first developed to overturn state bans on advertising for certain businesses, to the land use area. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748 (1976) (establishing pharmacists' right to advertise prices of prescription drugs). Calling an activity "commercial speech," as with symbolic speech, reverses the normal presumption that state regulation is valid, but such speech takes a place below pure speech in a hierarchy of first amendment values. Restrictions upon commercial speech are analyzed under a four-part test enunciated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980):

For commercial speech to come within [the first amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

and the sign ordinance cases involve the regulation of a message designed to be seen by others. The symbolic speech doctrine extends the first amendment to nonverbal conduct that substantially expresses an idea to bystanders.⁵⁴ Likewise, the sign ordinance cases⁵⁵ involve messages, the intended audience of which is whoever happens to come into visual contact with the speaker's sign.⁵⁶ In contrast, consumers of adult entertainment (whether books, films, or live entertainment) are customers who pay to enter the premises to listen to, view, or purchase the message inside. Since neighbors cannot directly hear (or see) the activity of adult businesses unless they themselves patronize the establishments, they are not directly subjected to the message.

These differences in how the message is broadcast are critical when considering whether the regulation in question is content neutral and whether it addresses only the "secondary effects" of the message. With the adult businesses, externalities imposed on the neighborhood can properly be seen as secondary effects. But when the regulation addresses symbolic speech, signs, building exteriors, and other visual elements of real property, talk of the message's "secondary effects" is simply nonsense. The goal of the landowners' expressive conduct, be it architectural or otherwise, is to broadcast a message to the neighbors. This goal is fundamentally different from that of the proprietors of adult businesses who engage in an indoor activity for profit. If a regulation silences a landowner's message, that silencing will be both the regulation's purpose and its primary effect.⁵⁷

Id.

54. See *supra* note 42.

55. See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

56. Consequently, because signs are speech the government must provide greater justification for sign regulations than for other forms of land use regulations. This burden is heavier if the sign's message is political or noncommercial, or if the regulation is not content neutral. See *Metromedia*, 453 U.S. 490 (invalidating provision of ordinance banning noncommercial messages for on-premises signs, but upholding ban of off-premises commercial billboards).

57. Arguably, time, place, and manner restrictions may serve as rationales for aesthetic controls limiting a landowner's expressive conduct. The Supreme Court has addressed time, place, and manner restrictions on protected speech on a number of occasions, usually in settings involving the availability of public forums for speech. See, e.g., *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (upholding rule limiting to rental booth distribution of written materials at state fair); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding noise limits applied to trucks with loudspeakers on public streets). The analysis applied here basically parallels the *Central Hudson* criteria that are applied to commercial speech. See *supra* note 53.

It may be plausible to apply the balancing reflected in time, place, and manner regulations to public architectural controls and other limits on landowners' expressive conduct. See D. MANDELKER, *LAND USE LAW* § 2.46, at 68 (2d ed. 1988) (land use regulations such as dispersal requirements for adult movie theaters are hybrid in character and may be justified as time, place, and manner restrictions on commercial speech). However, this course is probably both unnecessary and unwise. Land use regulations that infringe upon expression and symbolic speech fit more closely with the sign ordinance cases than with the time, place, and manner rules designed to allocate usage

Although protecting neighborhood stability fails to justify limiting landowners' constitutional rights of freedom of expression, other rationales for aesthetic controls are possible. State-imposed aesthetic controls may be justified even when they suppress protected symbolic speech, because the neighbors of the "speaker" are a captive audience. As a general rule, people offended by the protected speech of others have the right and ability to refuse to listen by absenting themselves from the locale where the speech is taking place. For symbolic speech, bystanders are usually free to avert their eyes from the symbol or activity and move away. But when the symbol involves a land use of permanent or long-term duration, rather than a single incident, the neighbors are arguably captives.

Consider the example of the "back to nature" landscaping aficionado. The neighbors are compelled to listen. Living on the same street as a front yard covered with chest-high weeds and other untamed growth, they cannot avert their eyes in any realistic sense without abandoning their property. And the right that a person may have to sell her home if she is sufficiently offended by her neighbor's natural lot does not ameliorate the captive audience problem. Any home buyer in the immediate vicinity would step into the seller's shoes, becoming a new member of the captive audience. Such a sale also provides the seller no escape from the speech because she will receive a discounted purchase price reflecting the proximity to the "speech," assuming that many suburban homebuyers will share her preference for typical landscape maintenance and distaste for unkempt neighboring properties.

Recognizing that a landowner's symbolic speech is addressed largely to a captive audience does not necessarily mean that the state may always silence her speech to protect the captive neighbors. Under first amendment analysis, the term "captive audience" was developed in a different context from the present one, to permit greater latitude in fashioning time, place, and manner regulations. Generally, time, place, and manner regulations must be content neutral to withstand constitutional scrutiny; in the context of a captive audience, however, regulations may be content based if they are reasonably tailored to protect the captives' legitimate interests.⁵⁸

While the time, place, and manner rules are in large part inapposite to the land use context because they apply to speech taking place in a

of a public forum. Moreover, imposing time, place, and manner restrictions on the landowner's expressions while on her own property is unsettling. For example, in the situation of pure speech, could the government ever impose valid time limitations on talk occurring on private property?

58. See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (Blackmun, J., plurality opinion) (upholding city ban on political advertising on public buses, but permitting commercial advertising).

public forum,⁵⁹ the method of balancing the conflicting rights of the speaker and the captives may be applied to the problem of the landowner's symbolic speech. One application might be to decide that the state cannot restrict a landowner's speech solely for aesthetic reasons, no matter how important those reasons are. Alternatively, captive audience analysis might permit state-imposed aesthetic controls to override protected symbolic speech only when the harm to the captives substantially outweighs the benefit to the speaker-landowner. Such balancing might replicate the trend of modern courts under nuisance law to grant relief from an aesthetic nuisance when the harm appears quite palpable and much greater than the apparent utility of the defendant's conduct. This view would permit the state, by statute or ordinance, to restrict the expressive conduct of landowners rising to the level of an aesthetic nuisance.

The key point is that the author fails to deal in a meaningful way with the first amendment problems posed by aesthetic regulation. Indeed, his proposed destabilization theory presents special problems with the first amendment. At the very least, it will not wash to say, without explanation, that the avoidance of psychic injury is a compelling state interest. There is a great need for a more sensitive first amendment analysis, whether based upon treating the neighbors as a captive audience, as outlined above, or otherwise.

C. Taking of Property

Costonis' takings analysis of aesthetic regulation of private property fails to advance beyond an elementary discussion of the leading Supreme Court case in the area, *Penn Central Transportation Co. v. City of New York*.⁶⁰ This shortcoming is quite surprising, given the provocative, thoughtful nature of earlier parts of the book and Costonis' prior publications on takings jurisprudence generally.⁶¹ Either Costonis simply ran

59. Public forums within the neighborhood would include public streets and parks and any other publicly owned properties regularly used as a situs for expressive activity, see *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45-46 (1983), but the land use regulations considered here restrain speech that has a physical situs on privately owned property.

60. 438 U.S. 104 (1978). Costonis apparently agrees with both the result in *Penn Central*—upholding the city's landmark designation of the Grand Central Terminal, thereby prohibiting without compensation additional office construction on the site—and its rationale that aesthetic programs are solidly within the police power and deserve substantial deference from the courts. Costonis does, however, criticize Justice Brennan's majority opinion for its conclusion that fashioning standards for landmark designations presents no special problems, and for its failure to provide more explicit guidance on when the costs imposed on a landowner by an aesthetics regime violate the fifth amendment (pp. 108-09).

61. See, e.g., Costonis, *Presumptive and Per Se Takings*, 58 N.Y.U. L. REV. 465 (1983) (discussing a decisional model for the judicial management of compensation practice under the takings clause); Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977) (focusing on a "middle way" of land use regulation between the paths of

out of steam near the end of the book, or made the decision to provide only the barest overview for any readers completely unfamiliar with the takings landscape.

The primary weakness of Costonis' takings discussion is that it fails to assess the impact of the psychological destabilization theory in the area. Over the years, courts and scholars have developed a number of theories and tests addressing applications of the takings clause to land use regulation.⁶² One commonly espoused takings theory focuses on whether the landowner's proposed use would cause public harm, relying on the nuisance rationale that the legislature can prevent a landowner from harming others without compensating for any losses stemming from such a prohibition.⁶³ Alternatively, if the regulation is aimed not at preventing harm, but at conferring a public benefit, then a compensable taking has occurred. Until now, scholars have generally agreed that many aesthetic regulations, such as historic landmark ordinances, confer a collective public benefit at the cost of a landowner, who is denied permission to demolish or materially change the appearance of a protected building.⁶⁴ Can the psychological harm inflicted upon individuals and the community by a landowner's destruction of an icon (even though she owns the icon) justify the aesthetic regulation under the nuisance-prevention test? Acceptance of this view would be a tremendous boon to aesthetics regimes, virtually immunizing them from takings attacks; if the landowner's removal of an icon is akin to a nuisance, then the state may prohibit an icon's removal or destruction regardless of the economic hardship or cost to the landowner. Scholars who contend that the doctrine of regulatory takings is fundamentally in error and should be abandoned by the Court⁶⁵ might well find such an application of the

police power and eminent domain); Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975) (arguing for recognition of accommodation power and fair compensation as means of relieving tension between the dictates of fairness and effective public governance).

62. For a concise discussion, see D. MANDELKER, *supra* note 57, §§ 2.01-2.19 (2d ed. 1988 & Supp. 1989); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 588-99 (2d ed. 1988).

63. The classic cases upholding prohibitions on existing business uses despite the destruction of substantially all of the property owner's investment are *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (sustaining legislation preventing brickmaking in residential neighborhood), and *Mugler v. Kansas*, 123 U.S. 623 (1887) (sustaining legislation which closed a brewery without compensating owners for diminution in property value).

64. See, e.g., D. MANDELKER, *supra* note 57, § 2.08, at 24 (regulation requiring preservation of historic landmark "confers a public benefit"). An important early theoretical analysis of the nuisance-benefit theory is Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 664-69 (1958). Professor Dunham observed that "to compel a particular owner to undertake an activity to benefit the public . . . [is] evil [because] there is no approximation of equal sharing of cost or of sharing according to capacity to pay" *Id.* at 665.

65. See, e.g., F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 238-55 (1973) (presenting legal arguments advocating this view); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction*

destabilization theory tantalizing.

Another possibility is that the stability theory, rather than securing a triumph under the nuisance-prevention rationale, could help to discredit that rationale. Wholly apart from the problem of aesthetic regulation, the theory parsing nuisance prevention and benefit extraction has been criticized on the grounds that the distinction is soft. Critics argue that it is impossible to tell which conflicting land use causes the problem.⁶⁶ For example, is it the polluting factory that interferes with nearby residences, or is it the location of the residences that interferes with the factory? The destabilization concept, if broadly applied, turns the nuisance-prevention theory on its head by recasting aesthetic regulations as harm prevention exercises of the police power. Instead of leading to victory, this maneuver could serve to put a nail in the coffin of the nuisance-benefit theory.

A takings theory advocated by Chief Justice Rehnquist, traceable to one of Justice Hohnes' classic opinions, upholds a regulation if it secures an "average reciprocity of advantage."⁶⁷ Zoning is the most common example given of a regulatory scheme justified by the reciprocity theory.⁶⁸ The basic idea is that if the benefits of a regulatory regime are sufficiently widespread among members of society, no compensation is necessary since the owners who incur losses also receive significant benefits.

One rough edge of the reciprocity theory—not previously delineated by courts or commentators—is whether other regulations may provide offsetting benefits and burdens and should be included in the analysis.⁶⁹

Manifesto, 9 VT. L. REV. 193, 245 (1984) (arguing that compensation for regulatory takings is not constitutionally required and is poor public policy).

66. See, e.g., D. MANDELKER, *supra* note 57, § 2.08, at 26 (common belief that industrial use harms residential use, and not vice versa, rests on "implicit value judgment" that residences have preferred status in "land use hierarchy"); L. TRIBE, *supra* note 62, at 594-95 (noting a "loss of faith" in our ability to decide "who had harmed whom," coupled with an expanding definition of what constitutes harm itself); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-1201 (1967) (under criterion of efficiency, there is no principled distinction between prevention of harms and extraction of benefits). But see Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728-31 (1973) ("evaluative terms" such as "harms" are commonly understood in ordinary speech and can properly serve as basis for legal rules such as nuisance).

67. *Penn Central*, 438 U.S. at 139-40 (Rehnquist, J., dissenting) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

68. See, e.g., D. MANDELKER, *supra* note 57, § 2.10, at 27-28. In any given case, only one element of the local government's land use ordinances is usually under consideration, such as a density limit, a set-back requirement, or a use provision. It is implicitly assumed that, for reciprocity purposes, the entire set of zoning controls is properly considered.

69. Arguably, subdivision regulations and sign ordinances are sufficiently similar to justify their inclusion in the regime of reciprocal benefits and burdens. In *Penn Central*, Justice Rehnquist, relying upon the opinion of the New York Court of Appeals in the same case, stated in dissent that

The stability rationale could broaden the analysis to include other stability-enhancing measures which are nonaesthetic (for example, community recreation programs and measures designed to promote positive mental health) within the base used for comparison.

At least two balancing tests for regulatory takings have garnered widespread judicial support. The simpler test measures the social gain achieved by a regulation against the private economic loss, denying compensation if the former outweighs the latter.⁷⁰ A broader balancing test, first articulated by Justice Brennan in *Penn Central*, encompasses a multitude of factors and incorporates many elements from the standard takings theories.⁷¹ Under either the narrow or broad view of takings balancing, is the goal of preserving individual and neighborhood stability a significant new "plus" for the government in the equation? The answer may well be yes. Such a change would potentially make a great difference because aesthetic goals have often been perceived as marginal in importance compared to private economic losses.⁷² It would be interesting to know what Costain thinks about such potential uses of his destabilization theory.⁷³

the zoning laws of New York City are sufficiently different from the city's historic landmark ordinance that they should not be analyzed together for reciprocity. 438 U.S. at 139 n.2, 140 (Rehnquist, J., dissenting). Justice Brennan, author of the majority opinion, did not challenge this assumption but disagreed with Justice Rehnquist on the factual question of whether New York City's landmark designations were numerically sufficient to satisfy reciprocity. *Id.* at 134-35 (noting that New York City has 31 historic districts and over 400 individual landmarks).

70. See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding uncompensated destruction of cedar trees to save nearby apple trees because legislature decided apple trees had greater public value); *DeKalb County v. Albritton Properties*, 256 Ga. 103, 344 S.E.2d 653 (1986) (finding taking by balancing economic value of homeowners' buyout agreement with commercial developer against public interest in maintaining residential zoning).

Balancing the public need against the private interest is advocated by Cratovil & Harrison, *Eminent Domain, Policy and Concept*, 42 CALIF. L. REV. 596, 608-11 (1954), and criticized by Michehnan, *supra* note 66, at 1193-96, 1234-35.

71. During the past decade, the Supreme Court has emphasized a two-part formulation that finds a taking if a regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citations omitted); see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins*). The stability rationale for aesthetic land use regulations may provide potent ammunition for the first prong of the *Agins* test, buttressing the importance and legitimacy of the state interest in aesthetics.

72. Consider sign ordinances, for example. Many are upheld against takings challenges, but others are struck down on the grounds that they are not justified by traffic safety concerns, and enhancing the visual environment does not justify the uncompensated economic losses to billboard proprietors. See *supra* note 40. The destabilization concept may serve to replace the traffic safety argument (often a strained argument when advanced by regulators) as a solid prop for sign controls.

73. The other standard takings theories are not as well supported by either the aesthetic nature of a land use regulation or the stability rationale. A popular offshoot of the *Agins* test, see *supra* note 71, examines the degree to which the landowner's "investment-backed expectations" are frustrated. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-502 (1987) (discussing challenger's failure to establish Subsistence Act's harmful impact); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (government's assertion of navigational servitude found to interfere with

Finally, Costonis fails to address one key question: Is *Penn Central* still good law? *Penn Central*, decided more than a decade ago by a vote of six to three,⁷⁴ has functioned as the legal cornerstone for the historic preservation movement and other aesthetically oriented regulatory regimes. Were the case to arise today for the first time, however, it is unlikely that it would come out the same way—in light of the Court's changing composition and its recent extensions of constitutional protection vis-à-vis private property.⁷⁵ It may be that the Rehnquist Court, exercising judicial restraint, will not expressly overrule *Penn Central* if the occasion presents itself. Nonetheless, the case is a prime candidate to become circumscribed precedent. Only the most sanguine supporters of governmental aesthetic controls would espouse the view that *Penn Central* remains a general charter for aesthetic regulation, even when such regulation inflicts substantial uncompensated losses upon a small number of property owners. The limits imposed by the takings clause on historic preservation and other aesthetic regimes are bound to be re-litigated in the near future, and the outcome of the reexamination will have

investment-backed expectations). In applying this economic viability theory of takings, the regulation's aesthetic goals should not matter, because the focus is on the landowner's profit-making opportunities. The aesthetic regulation problem lies on the other side of the ledger. From the landowner's perspective, a given alleged diminution in value is the same in dollars and cents, whether the reason for the regulation is to prevent a traditional nuisance, to benefit a government-owned facility, or to provide an aesthetically pleasing environment.

The enterprise theory proposed by Professor Sax requires compensation for a regulatory taking if the "economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity," and denies compensation whenever the loss is a "consequence of government acting merely in its arbitral capacity." Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63 (1964). When do measures directed towards preserving and enhancing the aesthetic environment constitute a government enterprise, and when are they arbitration rules applied to private interests? While Sax's test may yield results at the ends of the spectrum (a museum is a government enterprise, a zoning ban on junkyards in residential neighborhoods arbitrates private interests), most types of aesthetic regulation, such as architectural design controls, do not fall easily in one category or the other.

74. Justice Rehnquist dissented, joined by Chief Justice Burger and Justice Stevens. 438 U.S. at 138-53.

75. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (striking condition that owners provide public access easement to beach before obtaining permit); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (landowner may recover damages for temporary regulatory taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding unwelcome cable installation a taking of owner's property under physical occupation test). While the Supreme Court during the 1980s denied some property owners' claims to constitutional protection from laws that impinge upon property, see, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (rent control law did not violate due process or equal protection clauses on its face); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (rejecting coal mine interests' challenge to mine subsidence legislation), the overall movement is unmistakably in the direction of decreasing the scope of deference to regulation and increasing the ambit of constitutional protection of property. Although these cases involve regulations that were not aesthetically based, there is no reason to believe that the Court, when it faces aesthetic regulation, will depart from its recent willingness to cloak property with constitutional protection.

great and immediate importance for the relationships between public regulators of land use and property owners.

CONCLUSION

Icons and Aliens addresses a topic significant not only for the legal academy, but also for the day-to-day lives of the communities in which we live. As the book capably demonstrates, the widespread growth of aesthetics regimes during this century merits a critical and searching re-examination. While substantial benefits have accrued to many communities from the collective pursuit of aesthetic objectives through law, real costs have been imposed as well. Aesthetic regulation has not proven to be an unmitigated good. Difficult questions arise when an aesthetics regime, coercive in nature, intrudes upon the property and liberty interests of individuals who do not share the legally mandated aesthetic value.

Serious attempts to answer such questions—of which *Icons and Aliens* is clearly one—necessarily go beyond law, in a narrow doctrinal sense, and extend into the broader realms of social, political, and ideological values. To his credit, Costonis has taken this path. He neither pretends that the questions are easy nor gives us facile answers. Although I have taken issue with a number of his positions, including his central thesis that stability can and should replace beauty as the underlying rationale for aesthetic regulation, in my opinion he has identified the key issues and discussed them in a provocative and imaginative manner. For this reason, and for his eminent standing as a property law scholar, *Icons and Aliens* deserves close attention.