# Book Review

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

John J. Costonis

University of Illinois Press; 1989; 127 pages; Illustrations, Notes; Hardback.

## Keeping Time: The History and Theory of Preservation in America

William J. Murtagh

The Main Street Press, Pittstown, New Jersey; 1988; 237 pages; Illustrations, Chronology, Bibliography; $25, hardback.

CURRENT LEGAL TRENDS do not bode well for historic preservation. After the heady successes in court and Congress during the 1970s, modifications to the nation's tax laws began to erode the viability of renovating historic buildings in the middle part of the 1980s. Recent case law trends promise to erode preservation efforts even further. It is timely, therefore, to have two excellent books by experts with considerable experience in historic preservation which summarize from entirely different perspectives where we are and where we are going with respect to historic preservation and the law.

John Costonis, in *Icons and Aliens*, deals primarily with legal philosophy and the common law. According to Costonis, community values often focus around specific structures or districts which become untouchable in terms of redevelopment or, indeed, any kind of change. These are our icons. The forces of change, whatever their form, are the aliens, against which icons must be protected and preserved. The problem is that our common law, the law of judges and cases, does not provide clear means to that community end, protecting our icons from aliens. The philosophies which have motivated the judges—protecting property rights and saddling general welfare with aesthetic burdens—often run afoul of other equally or more important principles, goals or philosophies, like protecting freedom of speech and expression, and protecting the rights of individuals to use their property as they like so long as they do not injure neighbors or the public at large.

The heyday of the common law protection of icons culminated in *Penn Central Transportation Co. v. New York City*,[1] when the United States Supreme Court upheld New York's famous historic preservation ordinance and its application to preserve Grand Central Station from the "alien" attempt to develop the site into a high-rise office building. State cases before and since—particularly since—made it clear that the welfare clause of the police power would be used to preserve historic buildings and arguably other things of beauty. (*See Berman v. Parker*,[2] in which Douglas's famous dicta recited that the police power could be used to make cities beautiful as well as safe.) As Costonis notes, deciding what is beautiful is beyond the capacity of the law, which is able only to devise a framework for preservation, not standards therefor.

In *Keeping Time*, William Murtagh takes a somewhat different path to the same conclusion in terms of success of the historic preservation movement, but without concern about resolving the law's role. In rich and elaborate detail, Murtagh sets out the prominent role of Congress in creating the climate for the National Trust to assume the lead in preserving significant buildings and districts throughout the country. Prominent in this historical overview are the parts played by the National Historic Preservation Act to neutralize the federal bulldozing of important structures and neighborhoods in the name of highway building and urban renewal during the 1950s and 1960s.

Critical also were tax measures designed to make it profitable to rehabilitate old structures rather than tear them down, together with the network of state statutes, preservation officers, and organizations which national legislation helped provide. Indeed, a major bonus in his book are the copious appendices setting out excerpts from major federal legislation, glossary, and chronology of the historic preservation movement. Murtagh thus concentrates on the written law—statutes, ordinances, regulations—which helped build the preservation movement into what it is today. Both authors richly illustrate their points with copious drawings and photographs that make the books an additional pleasure to read.

However, there are clouds on the horizon that neither book addresses. The principal one is a new and growing tendency to provide greater legal protection for regulations passed for health and safety than for welfare; and historic and aesthetic preservation is inextricably tied to the welfare clause of the police power.

1. 438 U.S. 104 (1978).
2. 348 U.S. 26 (1954).

Though the seeds of the distinction are discernible in the renewable zoning case of *Village of Euclid v. Ambler Realty Co.*,[3] it is set out with greater clarity in *Keystone Bituminous Coal Association v. DeBenedictis*,[4] in which the Supreme Court recharacterized Holmes' *Pennsylvania Coal Co. v. Mahon*[5] takings language as "advisory" and set out a modified test for regulatory takings (all economic use). But Justice Stevens, writing for the majority, also redefined the goals of the police power which would justify a land-use regulation that took all, or at least all economic, use of private property: health, the environment, and fiscal integrity. This is not necessarily, or even likely, the same as health, safety, and welfare. In particular, welfare, is conspicuously absent.

Nor does Chief Justice Rehnquist restore it writing for the majority in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*.[6] Although primarily a compensation issue case (the Court assumed that a regulatory taking had occurred and addressed itself primarily to the question of whether compensation was an available remedy in a regulatory—as compared to a physical—taking case), Rehnquist's dicta indicated that he, too, could accept substantial reduction in property rights through regulation. The state could "insulate" itself if it could show that the law was part of the state's authority to enact "safety regulations."

Of course, neither of the aforementioned landmark cases dealt with welfare issues. In *Keystone*, the regulation was directed at subsidence caused by coal mining. In *First Lutheran*, the regulation was directed at flood hazards. It is what the California Court of Appeals did on remand from the United States Supreme Court in *First Lutheran* that is most chilling.[7] Claiming to take its cue from the U.S. and California Supreme Courts, as well as a line of "nuisance" cases which preceded and followed *Pennsylvania Coal Co. v. Mahon*,[8] the Court of Appeals suggested that there is no regulatory taking regardless of the use left of the subject property—provided the regulation is for *health and safety*.

Welfare, however, fares not so well at all. The Court suggests that regulations based on aesthetics and premature urbanization will be more easily construed as regulatory takings and compensation—provided lit-

3. 272 U.S. 365 (1926).
4. 480 U.S. 470 (1987).
5. 260 U.S. 393 (1922).
6. 482 U.S. 304 (1987).
7. First English Evangelical Lutheran Church of Glendale v. Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (Cal. Dist. Ct. App.), *cert denied*, 110 S. Ct. 866
8. 260 U.S. 393 (1922)

tle economic use is left—will be available. If this signals the beginning of a trend, then splitting off the welfare leg of the police power to stand alone will most likely result in measurable more successful challenges to welfare-based police power regulations—such as the designation of historic structures and districts—coupled with more frequent compensation awards as well.

In sum, the ground gained by the historic preservation movement in *Penn Central Transportation Co. v. New York*, all as ably chronicled by Costonis and Murtagh, could well be lost if the U.S. Supreme Court buys into the double police power standard suggested by the California courts. Instead of carefully devising strategies to take the field in order to provide a workable framework for preserving our icons as Costonis carefully works out, the movement must retire to the ramparts of regulatory taking jurisprudence. Instead of celebrating with Murtaugh how far the historic preservation movement has come since its fledging days at the foundation of the Republic, preservationists will be mourning the loss of major legal tools to defend historic heritage. Instead of a culmination of the historic preservation movement from two different and stimulating perspectives which *Icons and Aliens* and *Keeping Time* represent, these two excellent and readable books will become the last paeans to a movement which will have to fight decades-old legal battles anew.

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