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Equal Protection and Aesthetic Zoning: A Possible Crack and a Preemptive Repair

Louis G. Tassinary*
Dawn Jourdan**
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I. Introduction

The States' power to regulate reasonably the use of private property to promote public health, safety, and welfare derives from the Tenth Amendment to the Constitution and includes the power to designate geographical areas in which the erection of certain structures, the conduct of particular or all businesses, and other land uses are prohibited. Behind the seemingly innocuous requirement of reasonableness lurks the ubiquitous tension between the interests of society and those of the individual as well as between environmental preservation and unfettered economic growth.

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In 1954, the United States Supreme Court decided \textit{Berman v. Parker}. In expansive obiter dictum, the \textit{Berman} Court indicated that the concept of general welfare includes aesthetic values. Justice Douglas wrote:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, \textit{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.

For the half-century since \textit{Berman}, state and federal courts have used Justice Douglas' dictum to uphold zoning based on aesthetic considerations. Pre-\textit{Berman}, courts were consistently unwilling to curtail private property rights on the basis of aesthetic considerations. Post-\textit{Berman}, many, if not most, courts are more than willing to do so. Currently, a majority of states permit zoning based on aesthetics in combination with more traditional bases such as health and safety, and a minority allow zoning based solely on aesthetic factors. Although it is certainly plausible to argue that beauty itself serves the public good, the more

\begin{itemize}
\item[3.] \textit{Id.} at 31 (holding that health, safety and welfare factors of slum clearance justified an eminent domain action under the Fifth Amendment). For an in-depth review of \textit{Berman} and the property conditions of the area of Washington, D.C. at issue in that case, see Amy Lavine, \textit{Urban Renewal and the Story of Berman v. Parker}, 42 URB. LAW. 423 (2010).
\item[4.] \textit{Berman}, 348 U.S. at 33 (citation omitted) (emphasis added).
\item[6.] See, e.g., City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co., 62 A. 267, 268 (N.J. 1905). Commenting on the ability to use the police power to regulate billboards, at the turn of the prior century the New Jersey Court of Errors and Appeals observed:

\begin{quote}
No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.
\end{quote}

\textit{Id.}

\item[7.] \textit{See Burton v. City of Alexander}, No. 99-D-1233-E, 2001 U.S. Dist. LEXIS 6651, at *31-32 (M.D. Ala. Mar. 20, 2001) (endorsing the view that the rational basis test is a rubber stamp with respect to aesthetic based ordinances); \textit{JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE} 921 (1998) (concluding that aesthetic zoning is "now generally recognized as a valid police power").
\item[8.] Regan, \textit{supra} note 5, at 1020-26.
\item[9.] \textit{See Mark Bobrowski, Scenic Landscape Protection Under the Police Power}, 22 B.C. ENVTL. AFF. L. REV. 697, 744 (1995) (arguing that visual resource protection's importance "makes it a [public] purpose that may stand alone as an exercise of the police power").
\end{itemize}
typical argument is that the legitimate public purpose undergirding aesthetic zoning is the process by which results are achieved, not the end product. That is, when a community enacts legislation to implement its aesthetic ideals, citizens unite and democratically aver a collective vision about how the physical environment should best be developed. While individual citizens may certainly disagree with a community's collective vision, the process giving rise to its expression arguably validates the presumption of public good. As a result, most courts view aesthetic zoning as fitting comfortably within the states' general police powers over health, safety, and welfare.

A fairly recent Supreme Court decision may empower disaffected property owners with an alternative way to challenge aesthetic zoning regulations. In Village of Willowbrook v. Olech, the property owner alleged "the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners." The complaint further described the village's demand as "irrational and wholly arbitrary." According to the Seventh Circuit, the property owner could allege an equal protection violation by asserting the state's action was motivated solely by a "spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." On appeal, the Supreme Court agreed, holding that "[t]hese allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis." Although it affirmed the Seventh Circuit's decision, the Court explicitly

11. See Poindexter, supra note 5, at 490-92. Commenting on aesthetic regulations claimed to unfairly target the mobile home industry in Alabama, a district court recently expressed this perspective quite pointedly:
Linedrawing is more of an art than a science, and legislation often distinguishes between classes of people in a manner that is overinclusive, underinclusive, or both. But so what? The manufactured home industry accounts for 25 percent of all new single-family home starts, pumps more than $33 billion annually into the domestic economy, and has its own congressional caucus. This industry, like any other faction, can take of itself in the democratic process.

13. Id. at 565.
14. Id.
"[did] not reach the alternative theory of ‘subjective ill will’ relied on by [the lower] court."\textsuperscript{17}.

Justice Breyer, in a separate concurrence, pointed out that "[t]his case . . . does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause."\textsuperscript{18} Justice Breyer’s caveat notwithstanding, the strong implication is that by basing its decision on the arbitrary and capricious nature of the village’s action against a single individual as opposed to the village’s ostensible vindictiveness, the Court reaffirmed that a sufficiently unreasoned or sophistical zoning decision can and will violate the Equal Protection Clause:

Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that the purpose of the equal protection clause [sic] of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.\textsuperscript{19}

This article considers whether Olech infers that unreasoned zoning decisions violate the Equal Protection Clause, and explores the meaning of "similarly situated." The authors further examine what type of evidence might be necessary to ensure that aesthetic regulations pass constitutional muster with respect to the Fourteenth Amendment’s Equal Protection Clause.

II. Equal Protection and Means-End Analysis

The classic formulation of the problem of equal protection under the law was provided by Tussman and tenBroek.\textsuperscript{20} Their simple yet powerful insight was that the reasonableness of a legal classification, defined as whether it treats "similarly" those who are "similarly situated," hinges upon the adequacy of the coupling between the legislative purpose and the means employed to accomplish that purpose.\textsuperscript{21} As Tussman and tenBroek conceptualized it, a classification is reasonable and, therefore,

\textsuperscript{17.} Id.
\textsuperscript{18.} Id. (Breyer, J., concurring).
\textsuperscript{19.} Id. at 564 (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)) (citations omitted).
\textsuperscript{21.} Id. at 346.
EQUAL PROTECTION AND AESTHETIC ZONING 379

passes constitutional muster if an appropriate fit exists between a class T (those burdened because they possess the classificatory trait) and a class M (those the law intended to burden because they create the mischief the law is designed to address).\textsuperscript{22} For example, assume a height restriction is intended to minimize the dangers of an architectural rigmarole posed by burgeoning development in an urban area. Means-end analysis requires courts to ask: Does the class (T) of those building projects that are prevented because they are more than x stories high have a sufficiently close "fit" to the class (M) of incoherently designed buildings?

The benefit of framing the question in this manner is that it allows the use of elementary set theory\textsuperscript{23} to clarify the nature of the misfit. To continue with the above example, set theory may show the use of building height as an aesthetic surrogate to be either underinclusive or overinclusive. Underinclusion occurs when the burdened class T (buildings prevented by the height restriction) excludes some "mischievous" maverick buildings within class M (buildings the restriction intended to prevent).\textsuperscript{24} In other words, some buildings that should be burdened are not. Overinclusion occurs when the burdened class T improperly includes some tall, context-sensitive buildings that are not "mischievous" but are nevertheless forced to carry the undeserved burden.\textsuperscript{25} Although the example classes used here are admittedly buildings, not individuals, the imposition of building restrictions inevitably burdens the class of persons who design and construct buildings.

Tussman and tenBroek’s model clarifies the nature of means-end analysis but it is not a perfect model.\textsuperscript{26} Perhaps its most fundamental weakness is that it does not explicitly deal with the problem of alternatives.\textsuperscript{27} The model reveals when a particular legal classification is under- or overinclusive in the abstract but it is not designed to answer the question, “Compared to whom or what?”\textsuperscript{28} An example of how this

\begin{itemize}
  \item \textsuperscript{22} Id.
  \item \textsuperscript{24} Tussman & tenBroek, supra note 20, at 348.
  \item \textsuperscript{25} Id. at 351.
  \item \textsuperscript{26} See Kenneth W. Simons, Overinclusion and Underinclusion: A New Model, 36 UCLA L. Rev. 447 (1989) (discussing an alternative “misfit” analysis model thorough which courts can engage in means-ends rationality).
  \item \textsuperscript{28} Simons, supra note 26, at 459.
\end{itemize}
model can fail to capture such relevant issues is poignantly revealed in
the case that infused aesthetic concerns into modern police power juris-
prudence, Berman v. Parker.29

But what did Mr. Berman really want to tell the courts? In part, surely he wanted to
argue that he considered this a stupid taking—-it did not make sense. It did undoubt-
edly irk him that someone else might reap the future profits of his parcel. A major
part of his common-sense argument was, however, that, because his property was not
blighted, it did not logically serve the public purpose to redevelop it, especially in
light of the costs the public would have to pay to buy it, tear it down, and rebuild it.
Analytically, this argument does not deny that such redevelopment might ultimately
serve public ends. Rather, it asserts that it was, in one sense of the word, “unneces-
sary”; given the costs to the public and Mr. Berman, it was not rational to choose to
condemn and redevelop his unblighted property rather than just leave it in status quo.
If it ain’t broke, don’t fix it.30

The justices, however, never confronted the question of specific rationality—that is, whether condemning this particular parcel served
the public redevelopment purpose.31 Instead, “the decision dealt with
means-ends rationality in relentlessly general terms, and the argument
as to specific rationality ultimately was finessed away via a presump-
tion of validity.”32

The Olech decision suggests that it may no longer be as easy to “fi-
nesse” the argument of specific rationality via arguments relating to the
presumption of validity. What is therefore needed is a model that will
assist courts in making decisions relating to the extent to which classi-
fications arising from aesthetic regulations result in roughly equivalent
congeners; that is, to what extent classifications result in protagonists
similarly situated with respect to burdens that actually advance an aes-
thetic purpose.33 At least one such model is possible, and it is a model
familiar to social scientists.

III. Construct Validation Model34

Figure 1 depicts the basic inferential task confronting an empirical so-
cial scientist. Typically, a researcher attempts to make inferences about
hypothetical constructs (such as scenic beauty, control, stress, and crowding). To do so requires operationalizing those constructs so that meaningful measurements can be made in a manner that others can replicate.

30. Plater & Norine, supra note 27, at 686 (footnote omitted).
31. Id.; see also Berman, 348 U.S. at 31, 34.
32. Plater & Norine, supra note 27, at 686 (emphasis added).
34. Donald T. Campbell and Donald W. Fiske, Convergent and Discriminant Valida-
tion by the Multitrait-Multimethod Matrix, 56 PSYCHOL. BULL. 81, 81-105 (1959).
For example, suppose an investigator hypothesizes that perceived loss of scenic beauty is stressful. This hypothesis implies a causal relationship between two constructs. Testing the hypothesis, however, requires operational definitions of both "perceived loss of scenic beauty" and "stress." A possible operational definition of "perceived loss of scenic beauty" is digitally altered images of the viewscape of Estes Park, Colorado streets, with high-rise apartments hiding the Rocky Mountains. An operational measurement of "stress" is physiological reactivity, such as changes in blood pressure. Such a simple conceptual model is depicted in Figure 2.

Two inferential problems become immediately clear, and are functionally equivalent to the problems of overinclusion and underinclusion in the means-end analysis outlined by Tussman and tenBroek.35 First, any one operational definition may capture only part of the underlying construct; and second, operational definitions are multidimensional and may represent two or more constructs.36 These relationships are depicted graphically in Figure 3.

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35. Tussman & tenBroek, supra note 20, 348-53.
Note that the claim that a construct is either underrepresented or overrepresented at the operational level assumes that the construct is clearly defined in the first place. Consequently, construct invalidity can be seen as arising from problems with methods or operations. Analogously, albeit conversely, the claim that a legislative means is either overinclusive or underinclusive presumes that the legislative purpose or end is clearly defined.
The under- and overrepresentation problems are endemic to scientific inquiry as well as to legislative enactments, suggesting that reliance on any one operation or legislative means nearly always leads to distorted conclusions or undue burdens. The empirical solution to both sets of problems is multiple operationalism; that is, to specify a set of correspondence rules that associate a single concept (end) with multiple operations (means). Confidence in construct relationships is attained only when empirical relationships replicate across multiple operations. Figure 4 depicts the logic of multiple operationalism.

In each situation a different set of operations is used, each of which is overrepresented and underrepresented. But across situations, the "excess" representation varies while the relation between constructs A and B remains constant. Based on supportive and consistent empirical relationships, the most rational explanation for the entire set of results is that A and B are linked in some substantive and real manner. Although it is not possible to rule out entirely the possibility that, for example, C caused D in Study 1, E caused F in Study 2, and G caused H in Study 3, such a complex model is less parsimonious and becomes less plausible (less rational) as additional supportive studies are added.

In the social sciences, construct validation is recognized to be a slow, methodical process that typically takes years to complete. While an analogy to the slow, methodical process of the common law is initially appealing, clearly the application of such a standard to means-end analysis would effectively preclude any legislative classifications. A common approach of legislatures and administrative agencies in other domains is to rely upon the scientific community to supply relevant data to ensure that the means employed to accomplish a legitimate end are both rational and efficient. Recent data from the field of environmental psychology suggest that, as least with respect to scenic aesthetics, this approach may provide a parry to the "Pandora's box" of specific rationality released by the *Olech* decision.

IV. Evolutionary and Scientific Aesthetics

In 1847, just two years before Charles Darwin published *The Origin of Species*, Herbert Spencer published a short article on how art may have evolved from early adaptive behaviors. Darwin elaborated upon

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Spencer’s seminal idea, spurring subsequent theorists in the biological and social sciences to speculate as to how behaviors selected originally for relative survival and reproductive success evolved into the making of and appreciation for art.\footnote{See, e.g., \textit{Grant Allen, Physiological Aesthetics} (1877); \textit{Desmond Morris, The Biology of Art: A Study of the Picture-Making Behaviour of the Great Apes and its Relationship to Human Art} (1962); \textit{Paul Ziff, Art and Sociobiology}, 90 Mind 505 (1981).} Not surprisingly, philosopher aestheticians almost immediately dismissed the speculation,\footnote{\textit{Bernard Bosanquet, A History of Aesthetic} 441 (1904).} and it limped along as a scientific backwater throughout most of the twentieth century\footnote{See, e.g., \textit{D.E. Berlyne, Aesthetics and Psychobiology} (1971); \textit{Albert R. Chandler, Beauty and Human Nature: Elements of Psychological Aesthetics} (1934); \textit{Thomas Munro, The Scientific Method in Aesthetics} (1928); \textit{R.W. Pickford, Psychology and Visual Aesthetics} (1972).} until its recent rebirth.\footnote{See, e.g., \textit{Biopoetics: Evolutionary Explorations in the Arts} (Brett Cooke & Frederick Turner eds., 1999).} This rebirth, however, focuses not only on how such psychological skills developed from humbler beginnings, but also on how aesthetic production and perception is necessary to survival and reproduction.\footnote{See, e.g., \textit{D.E. Berlyne, Aesthetics and Psychobiology} (1971); \textit{Albert R. Chandler, Beauty and Human Nature: Elements of Psychological Aesthetics} (1934); \textit{Thomas Munro, The Scientific Method in Aesthetics} (1928); \textit{R.W. Pickford, Psychology and Visual Aesthetics} (1972).} An even longer historical perspective suggests that naturalistic, picturesque and park-like landscape ideals attributed solely to the relatively recent rise of scenic aesthetics\footnote{See, e.g., \textit{Ingo Rentschler, Beauty and the Brain: Biological Aspects of Aesthetics} (Ingo Rentschler, David Epstein & Barbara Herzberger eds., 1989); \textit{Ellen Dissanayake, Art and Intimacy: How the Arts Began} (2000); \textit{Steven Mithen, The Prehistory of the Mind: The Cognitive Origins of Art, Religion and Science} 154-63 (1996).} are, in reality, corporeal examples sampled from a population of pastoral and Arcadian idylls that dates}


45. See, e.g., \textit{Biopoetics: Evolutionary Explorations in the Arts} (Brett Cooke & Frederick Turner eds., 1999).


48. The term “Arcadian” refers generally to a people indigenous to the hills of the Peloponnesos in southern Greece, pre-dating both the Dorian invasions and the establishment of the Olympian Pantheon. Recent evidence suggests that they may have inhabited the area as early as 50,000 years ago causing, through millennia of poor land management, the severe erosion that created the wasteland of dry shrubs and rocks we visit today. \textit{See Curtis N. Runnels, Environmental Degradation in Ancient Greece}, 272 Sci. Am. 96 (1995). One historian defines “Arcadian” in the following manner:

The popular term “Arcadian,” describes a utopian garden paradise where serene pastoral folk drink, dance and lounge around in an endless summer.

This atmosphere of nostalgia in Utopia has survived as the philosopher’s definition of “Arcadia,” leaving behind a vital and ancient tapestry of folklore. In the reality of mythological Arcadia there were many terrifying dangers, the least of which was death, for its vast population of nymphs, dryads, naiads, satyrs, fauns, Cyclops and lesser gods such as Pan and occasionally Dionysus. Perhaps it was these disenfranchised deities who brought with them the carpet of lush vegetation that transformed the rocky wasteland into the wild and crazy playground of Ovid’s “Metamorphoses”. [sic] In a sense, classical Arcadia was never a Utopia, and its character is as complex and mysterious as the human psyche.
back to the beginnings of human civilization. From glimpses of “nature writing” on ancient Sumerian stone tablets to the pastoral poetry of Theocritus and Virgil to the sustainable land practices of the early kibbuzim and Benedictine Monks, the balance Arcadia struck between nature in the raw and unrestrained urbanism is one that people have sought throughout human history. Pioneering environmentalist and bacteriologist Rene Dubos argued that historical similarities in Arcadian human settlement patterns and land manipulations reflect our evolutionary past. Our species has had a tendency to settle near water and prospect and refuge opportunities, when possible, and to manipulate environments to approximate these and other savanna-like characteristics when it was not.

Interestingly, the Arcadian idyll has a counterpart in modern empirical research on landscape preferences. Overwhelmingly, people in the U.S. aesthetically prefer natural to urbanized environments, and natural environments of a particular sort are liked best of all. People prefer fairly open areas with low ground cover, a water source directly (pond, stream) or indirectly (flowering plants, green vegetation) indicated, and occasional clumps of trees and shrubs, with the whole presenting a somewhat complex yet comprehensible scene. This amalgam of elements is noteworthy not only for its resemblance to historically recurrent Arcadian idylls, but also for its similarity to the savanna environments of our speciation. The similarities have prompted multiple researchers to propose evolutionary explanations for environmental aesthetics. Though differences exist among these evolutionary approaches, most empha-

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50. See id.
54. Id.
55. Id.
56. Id.
size the centrality of perception and emotion in human-environment transactions, and all see these processes as vital to the performance of such survival behaviors as habitat selection, harm avoidance, shelter-seeking, and the location of food and water resources.

Much of the support for these theories comes from the past thirty years of landscape research in North America, where studied populations broadly agree in favoring savanna-like environments. One of the earliest examinations of evolutionary theories of landscape preferences was reported by Balling and Falk,58 who reasoned that cultural (and other learned) influences on landscape perception should be least among those least exposed to their culture, children. They solicited landscape preference ratings from eight-, eleven-, and fourteen-year-old children; college students; adults; and senior citizens. All were shown landscape scenes representing savannas, tropical forests, temperate deciduous forests, coniferous forests, and deserts. The findings generally supported an evolutionary model of landscape preferences, with younger children (the eight- and eleven-year-olds) clearly favoring savannas over other landscape types while older participants found the savannas and more familiar landscapes (deciduous and coniferous forests) equally pleasing.59

Researchers also cite cross-cultural similarities in landscape preferences as evidence of an evolutionary contribution to environmental aesthetics. Similarities in landscape preferences tend to be greater among similar cultures,60 and less so among dissimilar ones.61 However, even among dissimilar cultures, there is evidence of substantial overlap in how people understand and evaluate environments. At least one researcher has found, for example, that Chinese students and British professionals produce very similar semantic factor structures when responding to architectural and landscape stimuli,62 semantic factors that are in turn
very similar to those reported for Swedes. Yang and his colleagues examined differences in the way Korean and Western groups perceive and evaluate environments, finding that study participants from these cultures categorize environments in much the same way and prefer the same landscape style and elements. Furthermore, differences in landscape preferences between Western landscape design experts and various Chinese subpopulations are more readily accounted for by urban versus rural residential experience than by culture of origin.

Despite these cross-cultural similarities in aesthetic and other responses to environments, very little cross-cultural research has explicitly examined evolutionary models of environmental aesthetics. One notable exception is a study comparing the effects of culture, occupation, symbolic significance of the landscape, and theoretically assigned beauty of the landscape to participants' assessments of scenic beauty, picnic, and residential preferences. The study compared Koreans and Texans with various occupations (farmers, landscape architecture students, and others), testing their responses to landscapes with positive semantic associations for Koreans (for example, the location of a Buddhist temple), landscapes with positive associations for Texans (the campus of a highly-regarded university), and landscapes with no strong semantic associations for either group. Participants rated photographs representing high- and low-beauty landscape exemplars (as defined by R. Kaplan and S. Kaplan's evolutionary theory of environmental aesthetics) in each of the semantic landscape categories.

Though this was a fairly complex study testing an ambitious model of cognitive and affective responses to landscapes and involving multiple independent and dependent variables, the results were strikingly uniform. Koreans and Texans reported very similar scenic beauty, picnic and living preferences, regardless of the semantic associations of the

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68. Id.
69. See Kaplan & Kaplan, supra note 57.
landscapes being judged. Indeed, though some statistically significant differences exist for the semantic factors across the three judgments, the theoretically assigned aesthetic value of the scenes was clearly the most important factor. The results were nearly the same when preference ratings were compared among farmers, landscape architects, and others. Effect sizes for the independent variables showed that theoretically assigned scenic beauty accounted for twenty-seven to forty percent of the variance in the three preference judgments, while the other factors (culture, semantic associations, and occupational status) combined to account for less than ten percent of the variance in each of the judgments.

Other researchers have tested evolutionary hypotheses that focus on specific perceptual features, highlighting the importance of seemingly casual or passive encounters with environments. Several evolutionary theories, for instance, propose that environments with clear focal features are preferred over environments without them; and self-report data lend support to this proposition. Results from eye tracking research also suggest that people are more apt to examine preferred relative to nonpreferred environmental scenes by using focal clusters of eye fixations. Further, prospect focal features in environmental scenes are found to elicit eye fixations of greater duration than would be expected by chance. Preferences for tree shapes also highlight the importance of perceptual features for environmental aesthetics. Studies of North American and cross-cultural populations suggest that spreading and globular, acacia-like tree shapes are preferred over others; and in particular, acacia tree shapes associated with highly productive savanna habitats are preferred over acacias from less productive habitats. Thus,

70. Id.
71. Id.
72. Id.
73. See id.; Ulrich, supra note 57.
74. Ulrich, supra note 57.
76. See APPLETON, supra note 52.
80. Orians & Heerwagen, supra note 57, at 111-23.
whether the focus is on specific perceptual features of the environment or on the perception of broader environmental tableaux, repeated findings of intra- and inter-cultural similarity in aesthetic preferences strongly suggest that any proposed aesthetic criteria that ignore evolutionary contributions are arguably "irrational." In addition, because perceived structural characteristics (relatively open fore- and mid-grounds or occasional clumps of trees) and specific content and perceptual features (water and tree shapes) clearly influence landscape preferences in theoretically meaningful ways, this body of research contradicts the notion that visual perception is a shallow or insignificant component of the human-environment transactions involved in aesthetic landscape experiences. And finally, to the extent that similarities in landscape preferences raise the possibility of heritable predispositions favoring certain environmental features and configurations, this work suggests that the perceptual processing of environmental information (and the associated affective responding) may be less malleable than is commonly supposed.\footnote{81}

In addition, much of the impetus for research on the restorative benefits of nature has come from actively engaged recreationists in scenic settings, self-reporting stress reduction, and other psychological benefits.\footnote{82} It is important to note that much of the affectively oriented research specifically investigating the physiological restorative benefits of nature has focused on physically passive participants in laboratory experiments.\footnote{83} The reported mood altering and stress reduction effects have often been short lived, at least in terms of the physiological return to baseline that has been reported.\footnote{84} But, both the physical passivity in this work and the short lived nature of the effects are due to practical constraints inherent in conducting psychophysiological research in the laboratory, not to any theoretical propositions regarding the restorative benefits of scenic (Arcadian and savanna-like) environments.\footnote{85} Even when physiological return to baseline is quick and mood alterations brief, we should not necessarily infer from this brevity that the effects produced by perceptual encounters with scenic landscapes are shallow,

\footnotetext{81}{Gobster, supra note 47, at 55-56.}{82}{BENEFITS OF LEISURE (B. L. Driver, Perry J. Brown & George L. Peterson eds., 1991) (defining and quantifying the impact of leisure on society).}{83}{For a review, see Russ Parsons & Louis G. Tassinary, Environmental Psychophysiology, in HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY. (Robert B. Bechtel & Arza Churchman eds., 2002)}{84}{Russ Parsons & Terry C. Daniels, Good Looking: In Defense of Scenic Landscape Aesthetics, 60 LANDSCAPE & URB. PLAN. 43 (June 2002).}{85}{Ulrich, supra note 57.}
short lived, or limited to the perceptual and affective domains. To cite a recent example from the psychophysiological restorative benefits literature, brief viewing of scenic environmental surrogates can not only facilitate recovery from stressors, but can also gird one for subsequent stressful encounters and lead to improved performance on a subsequent cognitive task.\(^{86}\) And, in the behavioral literature more generally, Isen and her colleagues\(^ {87}\) have published extensively on the beneficial effects of brief, mild-positive moods on cognitive flexibility (such as creative problem solving).\(^ {88}\)

If we generalize from these psychophysiological laboratory findings to the recreational behaviors and scenic settings that spawned restorative environments research,\(^ {89}\) the contention that perceptually driven, short lived mood changes are somehow arbitrary or capricious appears unfounded. When one is camping, hiking, fishing, or the like in a scenic environment, short lived, perceptually induced positive moods are typically followed (often in rapid succession) by other perceptually induced positive moods, such that long-lasting, substantial positive psychological experiences are not uncommon.\(^ {90}\) Thus, neither the psychophysiological laboratory research on restorative benefits\(^ {91}\) nor the consideration of these findings appropriately generalized to recreational settings supports an argument that aesthetic values are shallow, unimportant, or rationally insufficient to support zoning regulations.

V. Conclusion

A recently published article by Kimberly Smith begins with the following hypothetical:

Picture this scenario: The Senate has convened to debate whether to initiate an air war in Bosnia. The Senators gravely evaluate strategies, estimate casualties, compare costs and benefits. Suddenly in the midst of these deliberations, a senior legislator takes the floor and solemnly declares, “We’re overlooking a critical issue. How


\(^{88}\) Id.

\(^{89}\) See Parsons & Daniels, supra note 84.


\(^{91}\) Benefits have been shown to be both affective and cognitive in nature. For a review, see Russ Parsons & Terry Hartig, *Environmental Psychophysiology*, in *HANDBOOK OF PSYCHOPHYSIOLOGY* (Louis G. Tassinary, John T. Cacioppo & Gary Berntson eds., 3d ed. 2007).
will intensive bombing will [sic] affect the Bosnian scenery? How will it impact the lovely forests, the exquisite wildflowers, and clarity and serenity of the sunrise? Any action that threatens such beauty is surely wrong."

... How would those staid, serious representatives respond to a brief advocating the preservation of the beauty of the Bosnian countryside? Could an argument strictly from natural beauty get a hearing in democratic deliberation? Should it?

Thus, the standard pluralist model of democracy does not appear to provide much guidance on the legitimacy of excluding interests from the political arena (for example, seeking religious converts, racial and sexist agendas, etc.), let alone pursuing aesthetic interests through politics. Smith argues that effective deliberation requires some initial gatekeeping in order to prevent "viable claims from being buried under a mass of hopeless causes as well as [to preserve] something of the dignity and seriousness of the political arena." Subsequent to a careful legal and policy-based analysis she concludes that citizens should actively seek aesthetic goals through the political arena because we must aspire to "a democracy in which sensitive aesthetes and expressive and emotional forms of discourse have a secure place ... [in order to avoid] cultural mediocrity, degraded materialism and suffocated human spirits." Smith argues that the Cape Wind Associates' proposal to erect a phalanx of nearly two hundred 400-foot-tall wind turbines on a shallow portion of Nantucket Sound off the coast of Massachusetts represents a muted epitome of this hypothetical. The Cape Cod wind project would be the nation's first ever offshore wind farm and its largest renewable energy installation. If successful, the project would prove to the rest of the nation that a sizable community of approximately 250,000 residents can theoretically be nearly energy independent. A dilemma exists, however, because the proposed "wind farm would be located within 13 miles of the shores of two of the most coveted and environmentally protected resort islands [and coastlines] in the nation"—areas with some of the "most rigorous local development codes and habitat protections in the nation."

93. *Id.* at 152.
94. Smith's concept of "effective deliberation" is strikingly similar to Platter & Norine's concept of "specific rationality." See Platter & Norine, *supra* note 27.
96. *Id.* at 194-95.
98. *Id.*
99. *Id.*
The most tenable concern of the project’s opponents pertains to the coveted ocean views. The disruption of the unobstructed viewshed is not in contention. Rather, the relative importance of such an aesthetic value is what is at issue; that is, just as in Smith’s more extreme hypothetical, the question of how the wind turbines will affect the Massachusetts Bay scenery is at the core of the present imbroglio.

To justify preserving existing landscapes or urbanscapes via the codification of aesthetic values requires the premise that beauty is essential to our mental, physical, and spiritual health—a basic need, albeit one that may require the education of our individual and collective attention. Ridiculing aesthetic values as stemming from an elitist fastidiousness is one way to diminish their role in public policy and thus make such regulations appear necessarily arbitrary and arguably capricious. As put by some earlier courts, “Aesthetic considerations are fraught with subjectivity. One man’s pleasure may be another man’s perturbation, and vice versa.” 100 “Successive city councils might never agree as to what the public needs from an aesthetic standpoint. . . . The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power.” 101

The central constitutional (equal protection) question should not be whether the codification of aesthetic values achieves an ideal level of rationality in theory, and should not be limited to issues of procedural due process; the question should be whether codification can achieve an acceptable level of rationality in practice. That question, as we have seen, is best resolved empirically. While disputes over the relative value of the “seamless continuity of the horizon line,” 102 whether from Pompey’s Pillar 103 or Cape Cod, may not be easily settled, they are not intrinsically more or less rational than debates over the value of standardized testing, English immersion, or school vouchers. In each of the

102. Little, supra note 97.

On the south bank of the Yellowstone River in Montana, Pompey’s Pillar, a sandstone butte that is approximately 100 feet tall, bears the only physical evidence of the remarkable 8,000-mile expedition of Lewis and Clark. . . . In the shadow of Pompey’s Pillar, United Harvest Corporation, a grain exporting conglomerate, [erected] a 100-acre grain-loading trucking and railroad terminal with four looming 150-foot-tall grain elevators.

Id.
latter cases the construct validation process has progressed to the point where experts in the relevant social sciences share a common language allowing for meaningful debate—one that fuels the generation of falsifiable knowledge claims. Codified aesthetic values will surpass the "specific rationality" Plimsoll mark, and thus pass constitutional muster, if tethered to equivalent empirical social science. The values will likely "sink the ship," however, should the courts embrace the line of reasoning proffered by the Supreme Court in Village of Willowbrook v. Olech, and if lawmakers continue to view aesthetic values as whimsy shielded from scrutiny by the presumption of validity.