

Judging the Aesthetics of Billboards

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The signboards upon which this class of advertisements are displayed are constant menaces to the public safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants. They are also inartistic and unsightly.

In cases of fire they often cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure and broad surface, render them liable to be blown down and to fall upon and injure those who may happen to be in their vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and the dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind 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; and last, but not least, they obstruct the light, sunshine and air, which are so conducive to health and comfort.

— *St. Louis Gunning Advertisement Co. v. City of St. Louis* (1911)¹

I. INTRODUCTION

Advertising billboards have occupied a highly visible and quite controversial place in American life for well over a century. Billboards are designed to convey commercial messages to public passers-by, and they employ size, bright colors, catchy slogans, and sometimes lights and moving parts to do so.² Because billboards visually impact their surroundings and are “designed to compel attention,” as one court put it,³ throughout their history these outdoor

¹ 137 S.W. 929, 942 (Mo. 1911).

² Contemporary billboards are steel frames on which large paper or plastic signs are placed as advertisements. A hundred years ago, outdoor advertisements were often painted or plastered directly onto fences and walls, and boards purposefully designed as billboards were wooden and often rickety. Billboards are distinguished from *signs* in that signs identify on-site businesses, whereas billboards advertise products or businesses found elsewhere. HUGH AGNEW, *OUTDOOR ADVERTISING* 9-11 (1938).

³ *Gen. Outdoor Adver. Co. v. Dep't of Pub. Works*, 193 N.E. 799, 808 (Mass. 1935) (“Billboards are designed to compel attention. The advertising matter displayed upon them in words, pictures or devices, is conspicuous, obtrusive and ostentatious, being designed to intrude forcefully and persistently upon the observation and attention of all who come within the range of clear normal vision.”). The advertising industry is forthright in seeking this effect. An early how-to manual for outdoor advertisers, in explaining the advantage of outdoor advertising over magazine and newspaper publishing, said the following:

Posting has many advantages over other forms of advertising. First may be mentioned the large display which it makes possible, and its consequent conspicuousness. You simply cannot get away from it, and, consciously or otherwise, it burns its way into the mind through an ever alert vision. It appeals to masses and classes—to everyone who passes.

GEORGE H.E. HAWKINS, *POSTER ADVERTISING* 7 (1910), *available at* <http://scriptorium.lib.duke.edu/dynaweb/ea/printlit/q0039/>.

advertisements have been denounced as ugly, overbearing, intrusive—even dangerous and immoral, as illustrated by the *St. Louis Gunning* opinion. Since the turn of the twentieth century, Americans have been hard at work enacting legislative restrictions on the size, appearance, and location of billboards, or seeking to ban them altogether. At the same time, outdoor advertising companies and property owners have brought hundreds of federal and state lawsuits to defend their right to advertise outdoors. Historically, billboard plaintiffs have argued that legislative restrictions exceed the permissible scope of regulation and unconstitutionally deprive them of their private property; more recently, advertisers have also argued that billboards are protected on free speech grounds.

In the earliest billboard cases, courts sometimes struck down municipal ordinances which restricted outdoor advertising, deferring to the private property rights of landowners and advertisers. Courts soon began to uphold increasingly broad regulations, however, based on increasingly deferential rationales. Judges initially sustained billboard regulations under the spurious pretext of health and safety concerns such as fire safety or fear of crime, as illustrated by *St. Louis Gunning*, even though billboard ordinances have always been motivated by aesthetic dislike of outdoor advertising.⁴ Only later were courts willing to openly accept aesthetics as a valid basis for regulating billboards.⁵ By upholding steadily more restrictive billboard laws,

⁴ As one judge noted in 1941,

Various regulations of outdoor advertising, such as sign boards along the highways, have been upheld upon the somewhat tenuous ground that they affected in some way the public health, morals or safety when as a matter of fact I believe that in most cases the purpose behind the statute was mainly the protection of what might be called the right of view of the natural beauty of the surrounding country.

Hav-a-Tampa Cigar Co. v. Johnson, 5 So. 2d 433, 439 (Fla. 1941) (Brown, C.J., concurring).

⁵ A court remarked on this trend in 1930: “Under a liberalized construction of the general welfare purposes of state and federal constitutions, there is a trend in the modern decisions (which we approve) to foster, under the police power, an aesthetic and cultural side of municipal development” *Gen. Outdoor Adver. Co. v. Indianapolis*, 172 N.E. 309, 312 (Ind. 1930). See generally *infra* § III(C).

culminating in the acceptance of aesthetically-motivated regulations, judges thereby came into consensus with growing public dislike of outdoor advertising.

This Note presents a cultural and judicial history of billboard regulation in the United States, with particular emphasis on how judges and the public have perceived the aesthetic qualities of billboards.⁶ Perhaps unsurprisingly, the American public has consistently found outdoor advertising to be intrusive, ugly, crassly commercial, and a taint on nature.⁷ The story of billboards in America is thus characterized by an ongoing struggle between a profit-seeking industry and a resistant public. That struggle has played out in the political arena, where municipal, state, and federal legislators have enacted increasingly restrictive billboard laws; in the courts, where the industry has consistently challenged the regulatory tide; and in broader public discourse, where billboard detractors and advocates argue over the merit of outdoor advertising.

This Note focuses on the struggle in the courts, where outdoor advertisers have vigorously challenged restrictive regulations for over a century. This stream of litigation has kept judges squarely in the middle of the public struggle between the public and the outdoor advertising industry. This Note applies the judicial history of billboards to illustrate the broader question of the judicial system's relationship with public opinion. In particular, this Note

⁶ Other issues, such as the role of the First Amendment in billboard jurisprudence, also arise but are not the principal focus of this work. Most contemporary scholarship on billboards has focused on free speech considerations, in response to the emergence of this issue in contemporary billboard regulation, but this Note is more historical in focus. For more on billboards and the First Amendment, see *infra* § IV.

⁷ This conclusion that billboards have always been unpopular with the American public is based on public opinion polls, *infra* notes 60, 297-98, newspaper editorials, *infra* note 52, civic activism, *infra* notes 51-59, and scholarly discussion of this topic, *see, e.g., infra* notes 179-84 (discussing architects' criticisms of billboards). Public opinion on this topic can also be inferred from a century of legislative efforts to regulate outdoor signs. *See, e.g., infra* § III(B) (discussing the federal Highway Beautification Act of 1965). That said, there is some evidence that Americans have not been uniformly opposed to outdoor advertising. *Infra* note 305 (discussing contrary opinion surveys); *infra* note 183 (discussing contrary evidence). To some extent the resolution of this question is constrained by scant historical evidence about *popular* (as opposed to elite) opinion on this subject, although this Note accepts elite opinion as a proxy for broader public opinion, to some extent. *Infra* note 61 and accompanying text (discussing this issue). Overall, the author concludes that the balance of evidence demonstrates that a majority of Americans has always disliked billboards.

focuses on how the evolving legal standards which judges have applied to billboards have generally coincided with public desire to regulate the medium. As we shall see, the judiciary has generally acquiesced to majority public sentiment in upholding the regulation of outdoor advertising.⁸

The body of this Note is divided into three parts, corresponding to the emergence of billboard advertising and consequent regulation and litigation; the heyday of billboard regulation in the courts; and the more nuanced era of contemporary regulation. Part II describes how modern outdoor advertising came into being at the turn of the twentieth century: the industry flourished by advertising consumer products of the newly emerging mass-market economy, but the unregulated oversaturation of urban billboards quickly prompted public outcry and resulting municipal controls. After initially ruling in favor of advertisers' private property rights, courts soon began to endorse municipal billboard regulations under an expanding municipal "police power" authority.

Americans have been particularly resistant to billboards since they spread to highways and the countryside, where their aesthetic impact on their surroundings is particularly great.⁹ Part III examines billboard regulation in the highway era, showing how the industry responded to public disapproval through professionalization and self-regulation; how continued disapproval eventually led to the federal Highway Beautification Act; and how courts mirrored public dislike of billboards by upholding increasingly broad regulations, often conveying very unflattering

⁸ Like most scholarship on billboard law, this Note focuses on the judicial rather than legislative history of billboards. Legislatures do play an important role in the relationship described in this paper between courts and the public, since legal disputes over outdoor advertising almost always arise from legislative enactments, and judges are therefore constrained by the parameters of the laws which they adjudicate. Nevertheless, choosing to downplay the role of legislatures in this Note simplifies the analysis and brings the relationship between courts and public opinion to the forefront.

⁹ Most broadly, this resistance reflects a deep-seated pastoral tradition in American culture, which perceives human civilization as a corruption of pristine nature. CATHERINE GUDIS, *BUYWAYS* 213 (2004); Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11, 24-32 (2000); see also *supra* § III(B) (discussing public perception of highway billboards).

impressions of billboards in the process. The scope of billboard laws expanded during this period, from initially modest citywide ordinances to a nationwide ban on billboards next to federal highways. This remarkable regulatory growth was enabled by the judiciary's liberalized attitude toward aesthetic rationales for legislation.

Part IV explores how the emerging doctrine of First Amendment protection for commercial speech has since shifted the legal precedent back toward advertisers' favor. This modern era began in 1981 with the Supreme Court's momentous decision in *Metromedia, Inc. v. City of San Diego*,¹⁰ where the Court first rejected a billboard law because it restricted advertisers' and bystanders' free speech rights. The decision was a substantial setback for billboard opponents. Some opinions have since acknowledged billboards' aesthetic harm and susceptibility to regulation but nevertheless have found regulations unconstitutional on free speech grounds. Regulatory efforts continue to expand, however, despite the legal setback, while the outdoor advertising industry continues its steady growth and record profitability.

The judicial and cultural history of billboard regulation lends itself to two general themes. As a descriptive matter, the history of billboards illustrates a broader phenomenon in land use and local government law, namely the expansion of municipal police power to include regulations that are explicitly motivated by aesthetic goals. Many scholars have written on this trend toward aesthetic regulation, both as it applies to billboards¹¹ and more generally.¹² In the

¹⁰ 453 U.S. 490 (1981).

¹¹ The most recent discussion of billboard law is Jacob Loshin, Note, *Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation*, 30 ENVIRONS ENVTL. L. & POL'Y J. 103 (2006). Most of the scholarship on billboards, which dates back a full century, has focused on summarizing the case law on billboard regulation and predicting its evolution toward increasing acceptance of aesthetic regulation. This Note presents that history within a broader historical context, linking the judicial and cultural history of billboards to suggest historical reasons *why* aesthetic regulation of billboards likely emerged. For previous discussions of the aesthetic regulation of billboards, organized in chronological order, see Everett L. Millard, *Present Legal Aspect of the Billboard Problem*, 11 ILL. L. REV. 29 (1916); Chauncey Shafter Goodrich, *Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways*, 17 CAL. L. REV. 120 (1928); Chauncey Shafter Goodrich, *Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways (Concluded)*, 17 CAL. L. REV. 214 (1929); H.S.V.S.,

nineteenth and early twentieth century, courts held that municipal authority to enact laws which affect individual rights must be closely linked to health and safety rationales. That authority gradually expanded and became more permissive, such that aesthetic goals such as reducing visual clutter or preserving scenic beauty were eventually upheld as valid governmental objectives. Billboard regulations have always been motivated by the sense that outdoor advertising is ugly and a nuisance, but turn-of-the-century judges found the promotion of beauty to be too vague and subjective a standard to justify restrictions on the use of private property.

Second, the cultural history of billboards illustrates the fact that courts upheld increasingly broad billboard regulations within a historical context that pressured them to act. The regulatory authority of legislatures expanded while American society was undergoing a

The Present Trend in Billboard Regulation, 1 ALB. L. REV. 105 (1931); Henry W. Proffitt, *Public Esthetics and the Billboard*, 16 CORNELL L.Q. 151 (1931); George K. Gardner, Note, *The Massachusetts Billboard Decision*, 49 HARV. L. REV. 869 (1936); Ruth I. Wilson, *Billboards and the Right to be Seen from the Highway*, 30 GEO. L.J. 723 (1942); Dennis H. Willms, Comment, *Municipal Corporations—Regulation of Billboards and Advertising Structures for Esthetic Purposes*, 35 MARQ. L. REV. 365 (1952); Thomas Gilliam, *The Case for Billboard Control: Precedent and Prediction*, 36 DICTA 461 (1959); Frank Barkofski, Comment, *Regulation of Outdoor Advertising for Aesthetic Reasons: A Jurisprudential View*, 6 ST. LOUIS U. L.J. 534 (1960); Marvin M. Moore, *Regulation of Outdoor Advertising for Aesthetic Purposes*, 8 ST. LOUIS U. L.J. 191 (1963); David J. Miller, Note, *Aesthetic Zoning: An Answer to Billboard Blight*, 19 SYRACUSE L. REV. 87 (1967); Robert W. Pearson, Comment, *Billboard Laws Today—Reaction or Solution?*, 24 BAYLOR L. REV. 86 (1972); Richard Sutton, Note, *Billboard Regulations, and Aesthetics*, 21 CLEV. ST. L. REV. 194 (1972); John T. Lucking, Note, *The Regulation of Outdoor Advertising: Past, Present and Future*, 6 ENVTL. AFF. 179 (1977); Susan Peters, Comment, *The Truth About Beauty: The Changing Role of Aesthetics in Billboard Legislation*, 9 ENVTL. L. 113 (1978); Ronald G. Aronovsky, *Metromedia, Inc. v. City of San Diego: Aesthetics, the First Amendment, and the Realities of Billboard Control*, 9 ECOLOGY L.Q. 295 (1981); Charles F. Floyd, *Billboards, Aesthetics and the Police Power: Legislative Developments Have Largely Negated Judicial Gains by Scenic Beauty Proponents*, 42 AM. J. OF ECON. & SOCIOLOGY 369 (1983); James Lynch, Comment, *The Federal Highway Beautification Act After Metromedia*, 35 EMORY L.J. 419 (1986); R. Douglass Bond, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 MICH. L. REV. 2482 (1990); Katherine Dunn Parsons, Comment, *Billboard Regulation After Metromedia and Lucas*, 31 HOUS. L. REV. 1555 (1995); M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 MICH. L. REV. 1877 (2005).

¹² For scholarly discussion of aesthetic regulation more generally, see, for example, ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* 3d §16 (1986); DANIEL R. MANDELKER, *LAND USE LAW* §11 (5th ed. 2003); Newman F. Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124 (1926); Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697 (1995); Henry P. Chandler, *The Attitude of the Law Toward Beauty*, 8 A.B.A. J. 470 (1922); John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1981); J. J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW AND CONTEMP. PROBS. 218 (1955); Wilbur Larremore, *Public Aesthetics*, 20 HARV. L. REV. 35 (1906); Clinton Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149 (1953).

rapid and tumultuous transition from an agrarian economy to an urbanized industrial power. Pervasive outdoor advertising was indicative of the emerging nationalized consumer culture in turn-of-the-century America.¹³ As with many new phenomena in this tumultuous period, billboards were treated ambivalently by the American public. The saturation of oppressive and irritating billboards was particularly complicated because it reflected a broader cultural unease with the emerging consumerism.¹⁴ Whether consciously or not, judges expanded the applicable legal doctrines to accommodate public dislike of outdoor advertising. The particular legal mechanism which allowed this expanding regulatory standard was the police power, an open-ended legal doctrine that inherently accommodated evolving social values. In this way, the judicial history of expanding acceptance of billboard regulation mirrored the cultural history of increasing public desire to regulate.

Judicial opinions are insightful cultural artifacts, conveying legal information but also hinting at the social values of the historical eras in which the opinions were written, particularly the social values of the judges that wrote them. Michael Klarman endorses this inquiry into the cultural element of judging when he writes that “In the absence of determinate law, constitutional interpretation necessarily implicates the values of judges, which themselves generally reflect broader social attitudes.”¹⁵ This Note presents cultural and legal evidence, centered on the historical correlation between public dislike of billboards and judicial deference

¹³ See generally STUART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE (1976); JACKSON LEARS, FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA (1994); ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920-1940, at 1-2 (1985) (explaining that advertisers facilitated economic modernization by popularizing consumer goods); JAMES D. NORRIS, ADVERTISING AND THE TRANSFORMATION OF AMERICAN SOCIETY, 1865-1920 (1990).

¹⁴ As one commentator stated in 1936, “[T]he attempt to fill the people’s leisure hours with advertisements is merely an attempt to bind them to the service of a manufacturing scheme.” Gardner, *supra* note 11, at 902.

¹⁵ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5-6 (2004). It is important to remember, of course, that legal opinions are not intended and should not be primarily viewed as reflective of judges’ *personal* opinions, though judges’ cultural viewpoint inevitably informs their decisionmaking.

to regulation, to support the argument that the judiciary reacted to and endorsed a broad cultural disdain for outdoor advertising.

This conclusion about billboards, in turn, reflects recent scholarship on the longstanding debate over the allegedly undemocratic (or “countermajoritarian”) nature of the judiciary. Historically many scholars have worried that courts reflect elite rather than popular opinion, with troubling implications for American democracy,¹⁶ but a handful of modern authors have persuasively challenged that theory. Barry Friedman argues that, in fact, “[T]here is a substantial congruity between popular opinion and the decisions of constitutional judges.”¹⁷ Michael Klarman agrees that “Judges are part of contemporary culture, and they rarely hold views that deviate far from public opinion.”¹⁸ These authors note that courts’ majoritarianism is partly due to the political limitations of the judicial branch. As one article recently observed of the Supreme Court, “Although the Supreme Court is ostensibly immune to the ebbs and flows of public opinion, most observers agree that it must enjoy a reasonable measure of public support or risk losing the legitimacy that undergirds its decisions.”¹⁹ The majoritarian thesis is premised on a legal-realist approach to the law, emphasizing the actual rather than idealized basis of legal

¹⁶ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AND THE BAR OF POLITICS* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”), cited by Barry Friedman, *Marbury in the Modern Era: Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2596 n.3 (2003).

¹⁷ Friedman, *supra* note 16, at 2598. “Mediated popular constitutionalism” is Friedman’s theory that the process of judicial review is much more reflective of public opinion, and more responsive to it, than commonly argued in the longstanding countermajoritarian thesis. See *id.* Friedman also describes judicial review as a “dialogue” between courts and the public, emphasizing the fact that our judicial system plays an interactive role in public discourse. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-55, 668-80 (1993). The history of billboard regulation illustrates this close relationship between courts and the public.

¹⁸ KLARMAN, *supra* note 15, at 6. G. Edward White describes judges’ majoritarianism in terms of limitations imposed upon them by their cultural circumstances: “I continue to think that judges are significantly constrained in their decision-making . . . because they are, like other actors in a culture at a phase in its history, imprisoned by the unexpressed but deeply held premises that set the boundaries of an ideological agenda.” G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* xxv (3d ed. 2007).

¹⁹ John M. Scheb II & William Lyons, *Public Perceptions of the Supreme Court in the 1990s*, 82 JUDICATURE 66, 66 (1998); cf. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957) (arguing that the Supreme Court is a political—i.e. *politicized*—institution).

decision-making, including judges' personal judgment and their impression of the public interest.²⁰ This realistic and pragmatic view of the law can be traced to Oliver Wendell Holmes, the famous Supreme Court justice and author of *The Common Law*,²¹ who argued that law was "a manifestation of dominant beliefs at a given time."²²

The majoritarian thesis, which purports to describe how judges rule, frequently also carries an explicitly normative endorsement of the judiciary's responsiveness to public opinion. The same holds true in this Note, which finds that courts' majoritarian affirmation of public opinion through most of the history of billboard law has benefited American society by promoting the public interest. Flexible legal doctrine, combined with democratically-minded judges who are receptive to public needs and cognizant of their own dislike of billboards, has resulted in legal opinions allowing local governments to control the spread of billboards. The subject of this Note illustrates a general observation that the American judiciary is willing and able to respond to public needs, as one would hope to see from a legal system that is culturally intertwined with and accountable to the broader public.

II. THE EMERGENCE OF MODERN BILLBOARDS

²⁰ See generally WILFRID E. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968) (describing the realist movement).

²¹ OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

²² WHITE, *supra* note 17, at 132 (paraphrasing Holmes's conclusion in THE COMMON LAW). Holmes made the following classic declaration in that work:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, *even the prejudices which judges share with their follow-men*, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

HOLMES, *supra* note 20, at 5 (emphasis added), *cited by* KLARMAN, *supra* note 15, at 5.

Outdoor advertising as a communications medium dates back at least to the Egyptian and Roman empires, when announcements were carved into stone for public display.²³ In the United States, marketers enlisted outdoor advertising as early as the 1830s, when P.T. Barnum used painted sheets of paper to promote his circuses.²⁴ By the end of the Civil War there were already hundreds of “billposting” companies, which employed roving freelancers to post full-text or illustrated advertisements for a broad range of services and events.²⁵ The late-nineteenth-century outdoor advertising industry was “absolutely unorganized and chaotic,” as an industry writer later observed,²⁶ leading to uncontrolled saturation. Billposters painted or pasted their advertisements onto any available public spaces, including fences, buildings, barns, and even roadside rocks and cliffs.²⁷ The advertisements were often placed without regard to property ownership, and the signs often covered one another.²⁸ Beginning in the 1870s, several states

²³ AGNEW, *supra* note 2, at 24-26. For a classic history of early advertising, see FRANK PRESBREY, *THE HISTORY AND DEVELOPMENT OF ADVERTISING* (1929).

²⁴ AGNEW, *supra* note 2, at 27. The term “billboard” apparently originated with the practice of posting theatrical “bills” on wooden *boards*, fences, or walls. JOHN S. WRIGHT & DANIEL S. WARNER, *ADVERTISING* 218 (1962).

²⁵ AGNEW, *supra* note 2, at 27-29; PRESBREY, *supra* note 22, at 500. An extensive archive of advertisements from the years 1840 to 1921, showing the great variety of goods and services advertised then, is available online through Duke University’s Broadsides Collection, part of a larger catalogue entitled *Emergence of Advertising in America: 1850-1920*, at <http://scriptorium.lib.duke.edu/ea/> (last visited Apr. 29, 2007). Billposting contracts sometimes resulted in litigation, as early lawsuits show. *See* *Smith v. Spitz*, 31 N.E. 5 (Mass. 1892) (holding advertising company not liable for injury caused by billboards left in the road by billposter); *Dunn v. T. J. Cannon Co.*, 151 P. 1167 (Okla. 1915) (requiring that advertising company pay customers for posters placed outside the agreed-upon geographic area).

²⁶ A.E. Canney, *The Romance of the Poster*, in *THE ADVERTISING YEARBOOK FOR 1924* 306 (John Clyde Oswald ed., 1925).

²⁷ *THE BILLBOARD NUISANCE* 11 (Clinton Rogers Woodruff, ed., 1908); JAMES P. WOOD, *THE STORY OF ADVERTISING* 182-84 (1958). Posting advertisements on natural or man-made objects not intended for that purpose has long since been legislated out of common practice. *See, e.g.*, VA. CODE ANN. § 33.1-373 (2006). Such bans date to the 1890s. *See, e.g.*, REPORT OF THE HAWAIIAN COMMISSION, S. Doc. No. 55-1C, at 365 (1898) (quoting a Hawaiian law stating that it was a misdemeanor to “affix or attach any show bill, handbill, poster, advertisement, or other notice to any building, fence, bridge, tree, rock, pole, or other structure or object” without permission).

²⁸ GUDIS, *supra* note 9, at 9-13. *See, e.g.*, *Ryan v. Reagan*, 62 N.Y.S. 39, 40 (1900) (holding that defendant billposters wrongfully “covered the plaintiff’s property with signs, posters, billboards, placards and other advertising mediums”).

were compelled to pass laws to discourage unscrupulous billposters from tearing down each others' advertisements.²⁹

Only later, toward the end of the nineteenth century, were advertisements posted in leased, legal locations on wooden boards erected for that purpose.³⁰ Early billboards were wooden and often dangerously unstable, as evidenced by a number of tort claims at the turn of the century arising from advertisements which fell over onto pedestrians.³¹ These early claims foreshadowed the public animosity which quickly developed in response to the growth of billboard advertising. These cases also foreshadowed later opinions in classifying billboards as “nuisances,”³² since later courts would concur with majority public opinion that *all* billboards—not just individual ones, and not just dangerous ones—are nuisances. In addition, courts' concern with public safety in these cases became a leading basis for upholding billboard regulations in the future.³³

A. *Billboards in Urban America*

²⁹ See, e.g., OLIVER L. BARBOUR, A TREATISE ON THE CRIMINAL LAW AND CRIMINAL COURTS OF THE STATE OF NEW YORK 517 (3d ed. 1883) (1874 law against defacing or destroying any legal “bill-board”); ASA IGLEHART, A TREATISE ON THE LAW RELATING TO THE POWERS AND DUTIES OF JUSTICES OF THE PEACE AND CONSTABLES IN THE STATE OF INDIANA 805 (1877) (1865 law against defacing or destroying any legal advertisement). For more on the early history of billboards in America, see AGNEW, *supra* note 2, at 27-46; GUDIS, *supra* note 9, at 9-34; Phillip Tocker, *Standardized Outdoor Advertising: History, Economics and Self-Regulation*, in OUTDOOR ADVERTISING: HISTORY AND REGULATION 11, 11-36 (John W. Houck ed., 1969); Outdoor Advertising Association of America (“OAAA”), History of Outdoor Advertising, <http://www.oaaa.org/outdoor/sales/history.asp> (last visited Mar. 5, 2007).

³⁰ Designated posting locations also allowed for increasingly large advertisements. GUDIS, *supra* note 9, at 14-19. Billboards were novel enough to generate substantial description and flexible spelling in early opinions. For example, in *Langan v. Atchison*, 11 P. 38 (Kan. 1886), a billboard was elaborately described as “a large frame structure for the purpose of supporting thereon boards for the purpose of advertising shows, fairs, expositions, excursions, and such other matters and things as are usually and commonly advertised by the posting of large paper bills.” *Id.* at 39. The opinion variously identified the structure as a “billboard,” “bill-board,” or a “bill or show board.” See *id.* at 40, 41.

³¹ See, e.g., *Cason v. City of Ottumwa*, 71 N.W. 192 (Iowa 1897) (finding city liable for injury from falling billboard which was leaning against a wall); *Temby v. Ishpeming*, 103 N.W. 588 (Mich. 1905) (holding city not liable for injury resulting from privately-owned billboard blown onto plaintiff by the wind); *Filippo v. American Bill Posting Co.*, 81 N.E. 463 (N.Y. 1907) (finding bill posting company liable for falling billboard).

³² *Langan*, 11 P. at 42; *Temby*, 103 N.W. at 589.

³³ See, e.g., *Langan*, 11 P. at 42 (stating that city was responsible for protecting pedestrians “from the imperfectly constructed and insecure bill-board” because of “its power to prevent and remove nuisances and to regulate all structures”).

The early history of American billboards is aptly summarized by Alan Boyd, former U.S. Secretary of Transportation, who once remarked of outdoor advertising that “[u]nlike beauty, ugliness spreads if left unchecked.”³⁴ At the turn of the twentieth century, in an era before concerted public opposition and governmental controls, modern billboards spread without restraint through urban areas and along public highways. Billboards were much more numerous and played a more conspicuous role in American cityscapes a century ago. Early billboards were often clustered in large groups, often linked end-to-end in rows and sometimes stacked on top of one another.³⁵ Vacant city blocks were sometimes surrounded by rows of billboards fronting on the sidewalk; in other cases, enormous billboards were placed on rooftops and high up on the exterior walls of buildings for greater visibility.³⁶ In places like Atlantic City, hundreds of electric billboards also lit up at night for maximum effect; these “spectaculars,” as they were called, had a much greater visual impact than contemporary billboards, which are generally only illuminated from below.³⁷ The proliferation of billboards was driven by manufacturers of mass-produced consumer goods, who endorsed outdoor advertising as an effective, inexpensive means of promoting their products to a wide audience, including the waves of newly-arrived and

³⁴ *Review of Highway Beautification—1967: Hearings on H.R. 7797 Before the Subcomm. on Roads of the H. Comm. On Public Works*, 90th Cong. 932 (1967) (statement of Allan S. Boyd, Secretary of Transportation), *quoted in* Ruth R. Johnson, *Federal Highway Beautification Goals*, in *OUTDOOR ADVERTISING: HISTORY AND REGULATION*, *supra* note 28, at 136.

³⁵ *See, e.g.*, C.O. BRIDWELL, CLOWRY CHAPMAN, & I.C.S. STAFF, *Outdoor Advertising*, in *OUTDOOR ADVERTISING AND ADVERTISING LAW*, at 31, 45, 48 (1926) (photographs showing rows of billboards); *OUTDOOR ADVERTISING: HISTORY AND REGULATION*, *supra* note 28, at 28, 30 (two- and three-story billboards). In contrast, the billboard industry now declares that “we do not support the construction of stacked bulletins.” OAAA, *The OAAA Code of Industry Principles*, <http://www.oaaa.org/government/codes.asp> (last visited Mar. 29, 2007).

³⁶ *See, e.g.*, *Chicago v. Gunning System*, 73 N.E. 1035, 1036 (Ill. 1905) (finding that plaintiff advertiser maintained four hundred billboards on vacant property in the city of Chicago); AGNEW, *supra* note 2, at 8, 124, 264 (photographs of enormous Coca-Cola advertisements that once towered over New York and Chicago); 51 *THE CHAUTAUQUAN* 18-81 (1908) (various articles presenting photographs and testimony about billboard saturation). New York City now endorses Times Square advertisements as a tourist draw, economic generator, and city icon, but the city makes a special exception for this neighborhood. GUDIS, *supra* note 9, at 240.

³⁷ Examples of electric billboards can be found on the Library of Congress website, which offers an extensive repository of advertising images. *See* Library of Congress, *American Memory Home*, <http://memory.loc.gov/ammem/index.html> (search under “Advertising” for “Atlantic City” and view photographs entitled “Boardwalk”) (last visited Mar. 29, 2007).

illiterate or non-English-speaking immigrants.³⁸ Billboards proliferated in an era without regulation because advertisers lacked any constraint from within or outside the industry.³⁹

Similar billboard saturation occurred in rural areas, as well. An illustrative photo of an Illinois highway, crowded with advertisements in 1932, remarked that “there are twenty billboards to the mile.”⁴⁰ One author predicted in 1907 that “If the ‘landscape’ signs between New York and Philadelphia continue their rapid increase the time may come when there will be one continuous advertising fence between the two cities.”⁴¹ Rural billboard saturation resulted from the popularization of automobiles and highway travel, which created a huge new market for viewing advertisements. As Jacob Loshin explains, “[T]he new reality of the automobile made highways a valuable forum through which producers and retailers could communicate with customers.”⁴² Indeed, the sales volume of billboard advertisements increased from \$2 million a year in 1900 to \$60 million in 1925, in great measure due to the rise of highway billboards.⁴³

Billboards’ impact on the American cityscape and landscape understandably drew the ire of the American public, which reacted negatively to their unsightliness and unchecked proliferation. One commentator wrote in 1908 that “there is a strong crusade in full swing all

³⁸ Quentin J. Schultze, *Legislating Morality: The Progressive Response to American Outdoor Advertising, 1900-1917*, 17 J. POP. CULTURE 37, 38 (1984). The Outdoor Advertising Association of America explains that “In 1900, a standardized billboard structure was created in America, and ushered in a boom in national billboard campaigns. Confident that the same ad would fit billboards from Connecticut to Kansas, big advertisers like Palmolive, Kellogg, and Coca-Cola began mass-producing billboards for the national market.” OAAA, *History of Outdoor Advertising*, *supra* note 28. One advertiser, extolling the value of outdoor advertising in helping to promote products and thus expand the global economy, noted that “the poster has helped to create a world-wide trade and extend the commerce of nations.” Canney, *supra* note 25, at 309.

³⁹ Loshin, *supra* note 11, at 119-20.

⁴⁰ GUDIS, *supra* note 9, at 183; *see also id.* at 178 (satirical cartoon of country road blighted by continuous billboards).

⁴¹ SEYMOUR EATON, *Sermon No. 2: “Board-Fence Advertising,”* in *SERMONS ON ADVERTISING* (1907), available at <http://scriptorium.lib.duke.edu/dynaweb/aaa/printlit/q0014>; *see also* J. Horace McFarland, *Why Billboard Advertising as at Present Conducted is Doomed*, 51 THE CHAUTAUQUAN 19, 20 (1908) (“Along the roads . . . all are alike begirt with whiskey, phonographs, fly screens, corsets, tobacco, beer and razors, often to the second and third tiers of shouting signs, between which one can but seldom see the landscape, because of the prevailing signscape—from which there is no escape!”).

⁴² Loshin, *supra* note 11, at 118.

⁴³ BRIDWELL, *supra* note 34, at 62.

across this country against the further maintenance of billboards and signboards.”⁴⁴ An anti-billboard activist correctly predicted the following year that rising aesthetic standards would force a change in the legal status of outdoor advertising:

The people will not much longer endure the ignominy of unchecked billboard ugliness The rising tide of indignation will sweep away the signs. Public opinion in America is dominant, and when aroused, restless. The public are thinking and speaking now, in respect to billboard intrusions, and they have several ways of making themselves heard⁴⁵

Broadly speaking, the negative reaction to billboards reflected public discomfort with the emergence of urbanization and consumerism in twentieth-century America.⁴⁶ By the turn of the twentieth century, cities were already passing local zoning regulations in response to growing public annoyance.⁴⁷ Most of the early ordinances required billboards to be below a certain height and set back a certain distance from the curb,⁴⁸ though several early laws instituted total municipal bans.⁴⁹ Advertisers began to challenge the ordinances immediately, and their court

⁴⁴ *Offence to the Public Eye a Nuisance*, 51 THE CHATAUQUAN 63, 70 (1908). Another author agreed that year that “[t]he growth of opposition to what is popularly and properly called the billboard nuisance, is one of the most striking developments of the past year” *Billboards versus Beauty*, 51 THE CHATAUQUAN 18, 18 (1908). In 1916 another writer declared that “[t]he people have been generally awakened to resentment against the selfish imposition upon them of these unnecessary and disfiguring objects” Millard, *supra* note 11, at 29.

⁴⁵ McFarland, *supra* note 40, at 37.

⁴⁶ One author aptly illustrated this unease:

In the days when populations were widely scattered in isolated villages, hamlets, and rural areas, the preservation of beauty could reasonably be left to the discretion of the individual land-owner. But today the great density of our urban population . . . and the general complexity of our civilization render it necessary for the state to take steps to preserve what remains of our nation’s beauty

Moore, *supra* note 11, at 203.

⁴⁷ See McFarland, *supra* note 39, at 44-45 (reporting in 1909 on “efforts to censor, tax, or abolish the nuisance” in dozens of cities nationwide); see also, e.g., Loshin, *supra* note 11, at 110-15 (describing early billboard and sign regulations in New Haven).

⁴⁸ See, e.g., *City of Passaic v. Paterson Bill Posting Co.*, 62 A. 267, 267 (N.J. Ct. App. 1905).

⁴⁹ See, e.g., *Varney & Green v. Williams*, 100 P. 867, 867 (Cal. 1909) (regulation outlawing billboards within the town). These early cases all involved *city* regulations, in particular, because billboards were initially concentrated in urban areas and cities were therefore the first to respond with billboard controls. See *infra* § II(C)-(D).

challenges were initially successful, but as billboards continued to spread and public animosity grew, judges began to approve increasingly broad citywide and statewide billboard restrictions.⁵⁰

Outspoken public disapproval of billboards propelled the push toward municipal regulation and subsequent judicial affirmation.⁵¹ Unsightly outdoor advertising attracted the ire of social reformers and other public-minded activists, in particular, and opposition to billboards coalesced around their efforts.⁵² Scathing newspaper editorials criticized the “shrieking” billboards,⁵³ political cartoons satirized their omnipresence and enormous size,⁵⁴ and the *Ladies’ Home Journal* targeted particularly unattractive examples in a monthly column.⁵⁵ The American Civic Association, an urban-reform organization founded in 1904, organized letter-writing campaigns against advertisers, boycotted companies that used billboards to advertise their

⁵⁰ See, e.g., *Murphy v. Westport*, 40 A.2d 177, 178 (Conn. 1944) (upholding a town’s ban on any outdoor advertising signs except for on-site signs); *Preferred Tires, Inc. v. Village of Hempstead*, 19 N.Y.S.2d 374 (Sup. Ct. 1940) (upholding a town’s total billboard ban); see generally *infra* § II(C)-(D).

⁵¹ One observer understood that rising aesthetic standards would force a change in the legal status of outdoor advertising. He foreshadowed the future of regulation in 1909 when he observed that

The people will not much longer endure the ignominy of unchecked billboard ugliness The rising tide of indignation will sweep away the signs. Public opinion in America is dominant, and when aroused, restless. The public are thinking and speaking now, in respect to billboard intrusions, and they have several ways of making themselves heard

McFarland, *supra* note 40, at 37.

⁵² As one industry writer warned advertisers in 1910,

Don’t get into any wrangles with the local Civic Improvement Society, and have them writing all your advertisers to discontinue the use of your medium. You can find plenty of good locations without spoiling the landscape. A whiskey advertisement right next to a church is bound to rankle in the breasts of the congregation.

HAWKINS, *supra* note 3, at 29. See generally THE BILLBOARD NUISANCE, *supra* note 26 (anti-billboard treatise); Schultze, *supra* note 37 (describing the urban-reform movement); 51 THE CHAUTAUQUAN 18-81 (1908) (collecting anti-billboard articles by members of the American Civic Association and other reformers).

⁵³ THE BILLBOARD NUISANCE, *supra* note 26, at 32-36 (reproducing critical editorials).

⁵⁴ GUDIS, *supra* note 9, at 169, 178; JOHN A. JAKLE & KEITH A. SCULLE, SIGNS IN AMERICA’S AUTO AGE 138-39 (2004).

⁵⁵ JAMES FRASER, THE AMERICAN BILLBOARD: 100 YEARS 14 (1991).

products, and offered model regulations that were crafted to ensure judicial approval.⁵⁶ Outdoor advertisements even fell victim to occasional vigilante justice.⁵⁷

In particular, the anti-billboard movement implicated a turn-of-the-century “City Beautiful” movement of reformers who sought to improve overcrowded and ugly urban areas in the name of civic order, cleanliness, and beauty.⁵⁸ Many of the early billboard opponents were women—“scenic sisters,” as the industry called them.⁵⁹ The anti-billboard movement was also mostly a middle- and upper-class phenomenon, with wealthier and better-educated people advocating on everyone’s behalf to raise the quality of everyday life in urban areas.⁶⁰ However, the social-class specificity of the reform movement does not mean that public dislike was limited to this group: a 1908 survey of visitors to Niagara Falls found the public overwhelmingly opposed to the rampant billboard advertising which blighted the Falls.⁶¹ Faced with a lack of

⁵⁶ One enormously successful boycott in Hawaii, spearheaded by a women’s organization in the 1920s, resulted in the earliest statewide ban on billboards. The Hawaii ban still exists. GUDIS, *supra* note 9, at 180-81; *see generally id.* at 166-81 (further describing the civic response to billboards); THE BILLBOARD NUISANCE, *supra* note 26, at 23-28 (model regulations).

⁵⁷ In turn-of-the-century Massachusetts, a minister nicknamed the “Minister Militant” tore down and cut down hundreds of illegally-posted bills. THE BILLBOARD NUISANCE, *supra* note 26, at 28-31; Frederic A. Whiting, *The Minister Militant*, 51 THE CHATAUQUAN 59 (1908). More recent anti-billboard actions have involved painting over billboards and modifying their text to undermine their marketing message. GUDIS, *supra* note 9, at 233-36. The contemporary anti-advertising movement, more broadly, is celebrated in the glossy magazine *Adbusters*. *See* <http://www.adbusters.org> (last visited Mar. 29, 2007).

⁵⁸ GUDIS, *supra* note 9, at 168. The American Civic Association later described billboards as “one of the most serious menaces to the successful achievement of ‘The City Beautiful.’” THE BILLBOARD NUISANCE, *supra* note 26, at 4. *See also* William H. Wilson, *The Billboard: Bane of the City Beautiful*, 13 J. URB. HIST. 394 (1987).

⁵⁹ Women became civic boosters on the subject of billboards because aesthetics were viewed as a women’s issue, which made billboards an acceptable subject of their attention. GUDIS, *supra* note 9, at 170. A commentator later described this movement as “a vendetta of garden clubs against billboards.” Ross D. Netherton, *Highway Beautification and Outdoor Advertising*, in OUTDOOR ADVERTISING: HISTORY AND REGULATION, *supra* note 28, at 231. In fact, many garden clubs did subsequently support the Highway Beautification Act of 1965. Moore, *supra* note 11, at 193 n.18; *infra* § III(B).

⁶⁰ GUDIS, *supra* note 9, at 167-68; Schultze, *supra* note 37 (describing the anti-billboard movement as a middle-class effort to impose its values on the lower class and immigrants). The fact that the anti-billboard movement was driven by wealthier and more educated people does not mean that poorer people were less opposed to billboards, however. The disparity could simply reflect lesser political power, political activity, and historical visibility among the poor. Then again, a study in the 1970s did find that dislike of billboards was greater among better-educated people. Cyril Hermann, *Human Response to Visual Environments in Urban Areas*, in OUTDOOR ADVERTISING: HISTORY AND REGULATION, *supra* note 28, at 66.

⁶¹ The American Civic Association found that eighty-four percent of visitors were displeased by the advertisements surrounding the Falls. THE BILLBOARD NUISANCE, *supra* note 26, at 31-32. Another description of the survey

historical evidence regarding the full extent of public dislike of billboards, it may be reasonable to some extent to accept activists' and newspaper editors' criticism as a proxy for broader social opinion on this issue.⁶² All Americans were experiencing the pressures of a rapidly urbanizing society, and they likely perceived billboards as an unnecessary nuisance in the overcrowded, hectic world of modernizing turn-of-the-century cities. Urban areas brought people closer, which led to the expansion of nuisance law and the police power—including approval of billboard regulation—as a means of reducing people's imposition on one another.⁶³

Outdoor advertisers inadvertently compounded public disfavor by taking public opinion for granted. As one historian explained, “In its ‘frontier days’ the attitude of many of [the industry’s] promoters was ‘the public be damned.’ This naturally resulted in widespread and even vicious resentment.”⁶⁴ A Chicago newspaper from the early 1900s concurred:

[T]he billboard men have only themselves to thank for the persistent agitation against [sic] their business. They have not been quick to recognize the bounds and demands of decency. They have, in many instances, outraged public sentiment. They have too often assumed an arrogant and offensive manner, and resented perfectly legitimate “interference.”⁶⁵

The president of the American Civic Association agreed, noting in 1908 that “the intemperance of the advertising interests which exploit the noisy billboard is the strongest present force toward their complete abolition.”⁶⁶ In an era before pervasive regulation, the outdoor advertising

reported that “Barely two percent of the replies reported any favorable interest in the signs.” McFarland, *supra* note 40, at 42-43.

⁶² As one author notes, “Reformers believed themselves to be public fiduciaries acting on behalf of the masses.” Schultze, *supra* note 37, at 40. Immigrants and less educated Americans were the target of billboard advertising. *Id.* at 38. They were probably less bothered by billboards, but it is unclear to what degree.

⁶³ Newman F. Baker, *Municipal Aesthetics and the Law*, 20 ILL. L. REV. 546, 547 (1926) (“[I]n the present day of concentration of population and enforced co-operation we find beauty becoming a matter of community concern.”); Chandler, *supra* note 12, at 470-71 (discussing urbanization and its impact on aesthetic regulation). The regulatory expansion by courts was mostly a proxy for broader general public opinion. Then again, as Michael Klarman has noted, “Though judges live in a particular historical and cultural moment, they are not perfect mirrors of public opinion.” KLARMAN, *supra* note 15, at 6.

⁶⁴ AGNEW, *supra* note 2, at 232.

⁶⁵ THE BILLBOARD NUISANCE, *supra* note 26, at 32.

⁶⁶ McFarland, *supra* note 40, at 39.

industry evidently believed it could afford to disregard negative public opinion in favor of economic opportunity. There were large profits to be made in advertising the growing market for mass-produced consumer goods.⁶⁷

The developing public resistance to billboards is also attributable to rising aesthetic standards in American culture at the turn of the twentieth century, which reflected rising cultural values in a maturing and prosperous country. As the American Civic Association explained in 1908, “Billboards are detrimental to the advancing taste in municipal art and offensive to the growing artistic sense of American communities.”⁶⁸ This trend toward rising aesthetic sensibility was reiterated by an 1899 opinion upholding height regulations for buildings in downtown Boston, in which the Massachusetts Supreme Court explained that “[m]any things [related to quality of life] which a century ago were luxuries or were altogether unknown, have now become necessities.”⁶⁹ Outdoor advertising arose at the same time as this growth in civic beauty, magnifying the conflict. As one reformer observed, billboard advertising “educates in bad taste and in ugliness just when there is the strong beginning of a nation-wide movement toward good taste and beauty.”⁷⁰

The billboard industry was also pressured to self-regulate by its own clients. By the 1920s American businessmen began to recognize that civic beauty was good for business,⁷¹ and they encouraged one another to disavow billboards in order to protect the business community’s

⁶⁷ BRIDWELL, *supra* note 34, at 62; GUDIS, *supra* note 9, at 28. One outdoor advertiser suggested that outdoor advertising was responsible for much of the meteoric revenue growth of companies such as R.J. Reynolds Tobacco Co., Wrigley, and Palmolive in the early twentieth century. S.N. Holliday, *Three Essentials to Business Building*, in THE ADVERTISING YEARBOOK FOR 1922 255 (1923).

⁶⁸ THE BILLBOARD NUISANCE, *supra* note 26, at 3.

⁶⁹ Attorney Gen. v. Williams, 55 N.E. 77, 78 (Mass. 1899); *see also* Barkofske, *supra* note 11, at 535 (“[A] concern for the beautiful, the pleasant, the artful has increased tremendously.”); Goodrich, *supra* note 11, at 129 (“The United States has seen grow, alongside its higher standards of living, a different conception of the fitness of things.”); Larremore, *supra* note 12, at 35-38 (observing “the growth of the civic and municipal aesthetic sense” at the turn of the century).

⁷⁰ McFarland, *supra* note 40, at 19.

⁷¹ *See* Goodrich, *supra* note 11, at 121 n.4 (citing articles in business magazines from the 1920s proclaiming the economic benefits of billboard restrictions).

reputation.⁷² Editorials in trade magazines for tobacco and theatres questioned whether outdoor advertising was cost-effective, given the negative backlash frequently generated by those advertisements.⁷³ Unfortunately for the outdoor advertising industry, even though it has always emphasized the artistry and visual attractiveness of advertising billboards, the American public and judiciary have consistently concluded that such artistry is outweighed by their negative effect on civic beauty.⁷⁴

B. The Municipal Police Power

Although advertisers and landowners have vigorously litigated the wave of anti-billboard legislation that began at the turn of the twentieth century, their challenges have generally failed to stop the growth of restrictive laws.⁷⁵ Advertisers generally fail in court because local governments are empowered to regulate aspects of everyday life in the interest of public health, safety, morals, and welfare.⁷⁶ So long as challenged regulations are found to be within the scope of this authority, known as the “police power,” judges will defer to the will of the legislature.⁷⁷ Judicial understanding of the police power has broadened over time: it was defined narrowly in the nineteenth century but expanded incrementally as judges approved an increasingly broad spectrum of challenged regulations. In particular, the police power gradually incorporated

⁷² For example, the Business Men’s Club in Cincinnati sent letters to every company that patronized the city’s billboards, requesting that they show civic pride by refraining from using outdoor advertisements. THE BILLBOARD NUISANCE, *supra* note 26, at 12.

⁷³ McFarland, *supra* note 40, at 42.

⁷⁴ See generally FRASER, *supra* note 54 (emphasizing the artistic history of billboards). But see *supra* note 182 (presenting evidence which suggests that Americans have not always been universally opposed to outdoor advertising).

⁷⁵ Then again, legislation was in turn unable to stop the inexorable spread of billboards. Schultze, *supra* note 37, at 42. Billboard-related legislation has been both regulatory and criminal in focus. In the latter area, due to “popular demand,” by 1930 most states had outlawed posting advertisements on public or private property without consent. Proffitt, *supra* note 11, at 168-75 (collecting nationwide billboard laws in 1931).

⁷⁶ See, e.g., Rochester v. West, 51 N.Y.S. 482, 484 (App. Div. 1898) (the police power “inheres in the state, and in each political division thereof, to protect, by such restraints and regulations as are reasonable and proper, the lives, health, comfort, and property of its citizens”).

⁷⁷ See Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 995-1001 (1994) (describing the origins of the police power).

aesthetics as a permissible regulatory goal during the twentieth century, as evidenced by courts' acceptance of aesthetic rationales for billboard controls.⁷⁸

Billboard regulations have always been primarily motivated by public dislike of the ugliness and intrusiveness of outdoor advertising.⁷⁹ Even before judges became willing to include aesthetic concerns within the scope of the police power, however, courts facilitated the aesthetic goals of billboard laws by upholding them under specious but generally accepted rationales such as public health and safety. The baseless nature of such rationales and their aesthetics-serving outcome have led many observers to suggest that courts sympathized with public desire to regulate billboards and were willing to shape legal doctrine to match their desired ends.⁸⁰

The police power has always supplied the legal justification for billboard regulation, so the evolution of that authority deserves particular attention. The legislative authority to impose regulations designed to further the public good has always been constrained by countervailing interests in private property rights and limited government.⁸¹ In the nineteenth century, courts heavily favored these libertarian interests over the government's goal of improving society through regulation.⁸² During this era, in the famous decision *Lochner v. New York* (1905)⁸³ and

⁷⁸ *Infra* §§ III(C), IV.

⁷⁹ As the president of the American Civic Association noted in 1908, "It is the unreasonable obtrusiveness of existing billboard effort that creates the primary objection [to them]." McFarland, *supra* note 40, at 19.

⁸⁰ *See, e.g.*, *St. Louis Gunning Adver. Co. v. City of St. Louis*, 137 S.W. 929 (Mo. 1911) (approving dubious health and safety rationales for billboard regulations); *Perlmutter v. Greene*, 182 N.E. 5 (N.Y. 1932); *see generally infra* § III(C) (describing scholarly commentary on this issue).

⁸¹ In contrast, the eventual triumph of aesthetic regulation of billboards "articulated an important legal principle: that the right of private property did not always override the interest of the public in preserving the aesthetic value of the landscape." LEARS, *supra* note 13, at 294.

⁸² For example, in *Yates v. Milwaukee*, 77 U.S. 497 (1870), the Supreme Court rejected a city's attempt to declare property a nuisance so that the city could remove it.

⁸³ 198 U.S. 45 (1905).

others, the Supreme Court put clear limits on the scope of the police power.⁸⁴ For example, in *Mugler v. Kansas* (1887)⁸⁵ the Court held that statutes must have a “real or substantial relation” to public health, morality, or safety to avoid violations of property rights.

Over time, judges became increasingly deferential to governmental regulation and expanded their understanding of municipal police power authority. This expansion of legislative authority was driven by external social forces, particularly the need for greater regulation of everyday life as the United States evolved from a decentralized, agrarian society into an industrialized, urbanized one. As one court noted in 1925, “The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State . . . to limit individual activities to a greater extent than formerly.”⁸⁶ The police power was able to accommodate this vast reorganization of American life because the power is inherently flexible, since it is indexed to an open-ended and constantly evolving standard of “the public welfare.”⁸⁷ The same court explained that “With the growth and development of the State, the police power necessarily develops, within reasonable bounds, to meet the changing conditions. The power . . . is elastic and capable of expansion in order to keep pace with human progress.”⁸⁸

⁸⁴ As the Court explained in *Lochner*, “[T]here is a limit to the valid exercise of the police power by the state Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power The claim of the police power would be mere pretext.” *Id.* at 56.

⁸⁵ *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

⁸⁶ *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1925) (internal citation omitted), *cited with approval in* *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926). In contrast, “One need only recall the ugliness of the typical city of the early 1900s . . . to realize that aesthetic considerations were given scant heed by our forefathers—and to realize as well that the force of circumstances was building up great pressure for the recognition of such considerations.” Robert A. Bergs, Note, *Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain*, 23 *GEO. WASH. L. REV.* 730, 735 (1955).

⁸⁷ *Infra* note 90.

⁸⁸ 149 N.E. at 788.

Oliver Wendell Holmes highlighted the loosening and broadening of the police power when he famously declared in *Noble State Bank v. Haskell* (1911)⁸⁹ that “the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.”⁹⁰ By declaring that governmental authority is directly tied to “usage,” “prevailing morality,” or “strong and preponderant opinion” of the public welfare, Holmes implied that *public opinion* by itself—including, for example, public dislike of billboards—justified governmental regulations and provided the standard for judging them.⁹¹ In other words, *Noble State Bank* created a majoritarian legal bridge between public wants and judicial approval. The only constraint on the police power, Holmes suggested, was the reasonable interpretation of the courts and the ensuing evolution of the common law: “With regard to the police power, as elsewhere in the law, lines are pricked out [sic] by the gradual approach and contact of decisions on the opposing sides.”⁹²

Holmes’s permissive reading of the police power, “to the effect that preponderant public opinion determines [its] scope,” was soon adopted by the lower courts because it “met the needs

⁸⁹ 219 U.S. 104 (1911).

⁹⁰ *Id.* at 111. This instrumental function of the common law is similarly illustrated by Guido Calabresi’s suggestion that in tort law, principles of causation are deliberately vague to allow for flexible application to evolving social needs. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 105-08 (1975). Most broadly, the entire American common-law system of law is inherently flexible because the system is intended to satisfy public needs in the context of constantly evolving social conditions.

⁹¹ Afterwards an observer cited Holmes’s quote for the proposition that “the conception of what constitutes the general welfare is frankly recognized to be a flexible one, changing with the times and dependent on public opinion.” Goodrich, *supra* note 11, at 131. Holmes tried to mute the impact of this definition with an unusual supplementary opinion two months after the original *Haskell* decision, where he wrote that “[t]he analysis of the police power [in the original opinion], whether correct or not, was intended to indicate an interpretation of what has taken place in the past not to give a new or wider scope to the power.” *Haskell*, 219 U.S. at 580. Nevertheless, Holmes’s broad definition of the police power in the original *Haskell* opinion took on a life of its own. In following years, many courts relied on the language to support their own expansive readings of the police power. See Goodrich, *supra* note 11, at 131 n.40 (citing sources which followed the language in *Haskell*).

⁹² 219 U.S. at 112. One observer noted that these “often-quoted words” meant that “the only real restraints upon the exercise of this power are those imposed by the courts themselves.” Moore, *supra* note 11, at 203.

of the times,” namely the public pressure toward greater regulation of overcrowded urban life.⁹³ Continuing accommodation of regulation under an elastic definition of the “public welfare” eventually gave courts the authority to uphold laws with explicitly aesthetic justifications.⁹⁴

Other Supreme Court opinions also illustrated this trend toward a more expansive understanding of the police power. In *Welch v. Swasey* (1909),⁹⁵ the Court upheld height restrictions on buildings pursuant to the police power and in deference to the state legislature, “whose people are to be affected by the operation of the law.”⁹⁶ In *Euclid v. Ambler Realty Co.* (1926),⁹⁷ the Supreme Court declined to define the police power, writing that “it varies with circumstances and conditions,”⁹⁸ and in *Berman v. Parker* (1954),⁹⁹ the Court deferred to the legislature because the definition of the police power is case-specific.¹⁰⁰ *Berman* was particularly important for billboard jurisprudence because it explicitly declared the Supreme Court’s acceptance of aesthetics as a valid basis for regulation.¹⁰¹

By mid-century most American courts accepted aesthetic goals as a valid secondary rationale for restricting the appearance and location of billboards, and in subsequent decades a majority came to accept beauty as a valid stand-alone rationale.¹⁰² Although the police power allowed for judicial affirmation of outdoor advertising regulations, the courts were nevertheless

⁹³ Goodrich, *supra* note 11, at 131.

⁹⁴ *Id.* at 130-31 (describing “the increasing elasticity of the police power”). As one court described the change in 1917,

The assumption that the police power extends only to the protection of the health, safety and morals of the public, which was at one time quite general, is now out of date. The modern view is that the state may control the conduct of individuals by any regulation which upon reasonable grounds can be regarded as adapted to promoting the common welfare, convenience, or prosperity.

State v. Wilson, 168 P. 679, 681 (Kan. 1917).

⁹⁵ 214 U.S. 91 (1909).

⁹⁶ *Id.* at 106.

⁹⁷ 272 U.S. 365 (1926).

⁹⁸ *Id.* at 387.

⁹⁹ 348 U.S. 26 (1954).

¹⁰⁰ *Id.* at 32.

¹⁰¹ *See infra* § III(C).

¹⁰² *See infra* § III(C).

slower to respond to the billboard blight than the American public was. One commentator wrote in 1916 that “public opinion seems to have outrun the courts in the question of billboard control,”¹⁰³ and another observed in 1955 that the courts “seem to have lagged far behind public execration of eyesores.”¹⁰⁴ Sometimes courts do lag behind public opinion, which may be a feature of the common law system,¹⁰⁵ but on this issue the delay was likely attributable to judges’ wariness regarding the apparently subjective basis of aesthetic regulation.¹⁰⁶

C. *Early Pro-Industry Opinions*

Outdoor advertising companies challenged city billboard ordinances as they were implemented at the turn of the twentieth century. The advertisers argued that such regulations amounted to uncompensated takings of private property in violation of the companies’ due process right to display advertisements on private property—whether their own or rented for that purpose. The government’s enduring defense has been that billboard regulations fall within the constitutional scope of the police power, first based on public health, safety, and welfare rationales and more recently also for aesthetic reasons. Courts were evenly split in the earliest billboard cases, with outcomes dependent on whether the challenged ordinances were reasonably related to health and safety rationales such as the threat of toppling over. In the process, courts often embellished their opinions with colorful rhetoric to underscore billboards’ annoying

¹⁰³ Millard, *supra* note 11, at 29.

¹⁰⁴ Dukeminier, *supra* note 12, at 236.

¹⁰⁵ As Goodrich argued, *supra* note 11, at 130, “[J]udicial opinion must lag a considerable distance behind the public opinion that eventually shapes it.” Then again, Michael Klarman argues that courts sometimes anticipate future opinion, as was the case with abortion, the death penalty, and gay rights. E-mail from Michael Klarman, Professor, University of Virginia School of Law, to author (Oct. 30, 2006) (on file with author).

¹⁰⁶ Catherine Gudis suggests that courts were skeptical of aesthetic regulation because an overwhelmingly male judiciary considered aesthetics to be women’s concern and thus outside the scope of legal attention. GUDIS, *supra* note 9, at 174. Another author was more bluntly cynical: “Perhaps it is too much to expect that in our materialistic United States the billboard, so strongly linked with big business, will be outlawed in the interest of mere beauty.” H.S.V.S., *supra* note 11, at 109.

character, which suggests that the judiciary was sympathetic toward or agreed with public animosity toward the eyesores.¹⁰⁷

The first court challenge to a billboard law, *Atlanta v. Dooly*,¹⁰⁸ was decided in 1885. In this case a “billposting” company sued the city of Atlanta for tearing down a billboard that the city council regarded as a nuisance.¹⁰⁹ The court held that the city lacked authority to appropriate the company’s property rights in this manner. In doing so, the court indignantly criticized the city’s “unauthorized and wanton invasion of private rights” and the “the *ex parte* application of a few citizens” for instigating the removal.¹¹⁰ The court’s irritation at these regulatory efforts reflects the fact that governmental efforts to suppress the emerging billboard nuisance were rare and not yet widely accepted in 1885, and that public activism was then in an incipient and marginal state.

The next billboard decision, *Crawford v. Topeka* (1893),¹¹¹ struck down a Topeka, Kansas ordinance that required billboards to be set back from the street. The court held that the challenged ordinance was overbroad because most billboards are safe,¹¹² in contrast with later courts, which frequently accepted cities’ safety arguments with minimal scrutiny. The court

¹⁰⁷ For example, a 1908 opinion discussed trolley-car advertisements along Fifth Avenue in New York City this way:

It is along this avenue of churches that on Sunday these glaring billboards are driven. It is this scheme of beauty which is sacrificed to the demands of modern commercialism. It is along this entrance to parks and along the parks themselves, preserved to attract lovers of nature and of the beautiful, that these unnatural and inartistic moving picture signs are displayed.

Fifth Ave. Coach Co. v. City of New York, 111 N.Y.S. 759, 765 (Sup. Ct. 1908). An observer afterwards suggested a correlation between public opinion and the outcome of this case, noting that “the [streetcar] signs came off, obedient to an outraged public opinion reflected by a just judge.” McFarland, *supra* note 40, at 20.

¹⁰⁸ 74 Ga. 702, 1885 Ga. LEXIS 385 (1885).

¹⁰⁹ *Id.*, prior history at *1.

¹¹⁰ *Id.* at 707. This unfavorable glimpse of early activism in Atlanta evokes an equally unflattering description of the “agitators . . . composed of artists and dreamers” who first opposed billboards in Chicago. Millard, *supra* note 11, at 29.

¹¹¹ 33 P. 476 (Kan. 1893).

¹¹² *Id.* at 476. In a conclusion often invoked by later courts in rejecting billboard regulations, the court declared that “Although the police power is a broad one, it is not without limitations, and a secure structure which is not an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat.” *Id.*; *cited in, e.g.*, Bryan v. Chester, 61 A. 894, 895 (Pa. 1905).

inferred that the billboard law was actually motivated by dislike of billboards, but they were unwilling to accept this justification for regulation.¹¹³ The conclusion in *Crawford* and similar opinions that billboards were not a nuisance reflects the dominance of *Lochner*-era private property rationales in the late nineteenth century, but it also suggests that billboards were not yet widely disfavored.

Other turn-of-the-century cases agreed with *Crawford* that citywide billboard regulations were not reasonably related to health or safety goals and were therefore unconstitutional.¹¹⁴ In 1905 courts began to explicitly confront—and reject—cities’ aesthetic motivation for billboard laws. Early opinions held that aesthetics could not justify municipal regulation under the police power. In *Chicago v. Gunning System*,¹¹⁵ the Supreme Court of Illinois recognized the aesthetic justification behind a litigated billboard law and held that such “sentimental” regulation was punitive and thus unreasonable.¹¹⁶ Despite speculation that billboard regulations might be valid because obscene advertisements could “injure the public morals,”¹¹⁷ the court nonetheless held that Chicago’s billboard restriction was overbroad because the disputed sign was in a remote part of the city.¹¹⁸ In another case decided in 1905, Pennsylvania’s Supreme Court concluded that a

¹¹³ 33 P. at 477-78 (“The unreasonableness of the ordinance in question is easily seen when it is considered that the mere posting of a harmless paper upon a structure changes it from a lawful to an unlawful one.”).

¹¹⁴ See, e.g., *Bill Posting Sign Co. v. Atlantic City*, 58 A. 342 (1904); *People v. Green*, 83 N.Y.S. 460 (Sup. Ct. 1903). These courts distinguished *Rochester v. West*, 58 N.E. 673 (N.Y. 1900), the first case to uphold a billboard law, because the challenged ordinance in *Rochester* was more narrowly tailored. *Rochester* limited the height of billboards and therefore addressed the danger of tall signs being blown over, whereas the laws in *Green* and *Bill Posting* banned all outdoor signs indiscriminately.

¹¹⁵ 73 N.E. 1035 (Ill. 1905).

¹¹⁶ *Id.* at 642 (“The purpose . . . seems to be mainly sentimental, and to prevent sights which may be offensive to the aesthetic sensibilities of certain individuals residing in or passing through the vicinity of the billboards.”).

¹¹⁷ *Id.* at 639-40.

¹¹⁸ *Id.* at 641. The city’s 1900 ordinance restricted the size and location of billboards and required that the boards be constructed of metal. *Chicago v. Gunning System*, 1905 Ill. LEXIS 2554, syllabus at *2-5 (1905).

citywide billboard ban was not safety-related and that billboards’ alleged unsightliness was too subjective to a basis for banning them.¹¹⁹

In a third 1905 opinion, *City of Passaic v. Paterson Bill Posting Co.*,¹²⁰ the court found that a restriction on the size and location of a city’s outdoor advertising was “due rather to aesthetic considerations than to considerations of the public safety.”¹²¹ The court observed that “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.”¹²² Then, in a notable statement often cited by later opinions, the court held that “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.”¹²³

This early judicial aversion to billboard regulation underwent a complete reversal within several decades, and by mid-century many courts upheld billboard regulations by deferring to legislatures’ aesthetic goals.¹²⁴ This remarkable shift in billboard jurisprudence is undoubtedly attributable in part to the normal evolution of the common law, but the expansion can be more particularly explained by extralegal factors, namely the contemporaneous influence and pressure on the courts created by widespread public frustration with overbearing and omnipresent advertisements.¹²⁵ One author, writing in 1926, obliquely explained this judicial shift by noting

¹¹⁹ *Bryan v. Chester*, 61 A. 894, 895 (Pa. 1905) (“[Billboards] may not be unsightly to the eyes of any other person than those of the members of [city] councils.”). The text of the ordinance explicitly declared that advertising boards were “unsightly, and very often are either a nuisance or create one.” *Id.*

¹²⁰ 62 A. 267 (N.J. 1905).

¹²¹ *Id.* at 268.

¹²² *Id.*

¹²³ *Id.*; see also, e.g., *Haller Sign Works v. Phys. Culture Training Sch.*, 94 N.E. 920, 923 (Ill. 1911) (“[T]he police power cannot interfere with private property rights for purely aesthetic purposes.”).

¹²⁴ See *infra* § III(C).

¹²⁵ As Professor Klarman notes, evolutions in the law can be explained by a combination of internal, jurisprudential factors and external sociopolitical developments, the latter of which include “the personal values of judges, the broader social and political context of the times, and external political pressure.” KLARMAN, *supra* note 15, at 5. With billboard regulation, the external cultural context of billboards changed—the public grew to dislike them—which in turn softened the courts’ view of billboard regulation.

that “in the early part of this century public opinion was not so decidedly adverse to the use of bill-boards as it is today, and the unsightliness of bill-boards had not been the subject of so many magazine articles and editorials.”¹²⁶

D. The Emergence of Regulatory Deference

Although the previously-described opinions found that billboard controls exceeded cities’ regulatory authority, just as many early decisions upheld their right to restrict billboards, even based in part on aesthetic rationales.¹²⁷ Many of these opinions came from New York courts; given the high concentration of billboards in New York City, it makes sense that anti-billboard sentiment developed early there, among the public and judiciary alike.¹²⁸ These pro-regulation opinions applied the same narrow “health and safety” definition of the police power as less permissive courts, but with greater laxity, finding that the *potential* of safety risks was a sufficient basis for regulation.¹²⁹ These opinions also considered a broader range of regulatory rationales, often characterizing outdoor advertising under the catchall and self-fulfilling “nuisance” label, which effectively bypassed the argument that the government could not regulate billboards unless they were unsafe.¹³⁰

In addition to setting a permissive regulatory precedent, these early pro-government opinions also occasionally adopted colorful and unflattering rhetoric to describe billboards. The

¹²⁶ Baker, *supra* note 12, at 131.

¹²⁷ For example, an early federal opinion held that billboards could be regulated under the police power in part because they interfere with “the views in and about a city” and thus affect people’s comfort and well-being. *In re Wilshire*, 103 F. 620, 623-24 (S.D. Cal. 1900).

¹²⁸ As the *Yale Law Journal* put it, “The courts of New York have . . . taken a more popular, if less legal, view of billboard legislation” than their more conservative judicial contemporaries. *Municipal Corporations—Police Power—Billboards—City of Passaic v. Paterson Bill Posting Co.*, 26 *Atl. 267 (N.J.)*, 15 *YALE L.J.* 248 (1905).

¹²⁹ *Wilshire* found that billboards “are usually, if not invariably, cheap and flimsy affairs, constructed of wood, and erected on vacant lots of land along or near to the streets, in order to catch the eye of the passers-by. Such structures, if of sufficient height, may be very readily blown over by wind” and result in injury. *In re Wilshire*, 103 F. at 623. Billboards did indeed sometimes blow over due to wind, *supra* note 30, but this danger was exaggerated, which leads to the suggestion that courts were willing to stretch legal rationales to satisfy underlying regulatory goals.

¹³⁰ *Supra* § II(C).

alarmist language of *St. Louis Gunning*, excerpted in the epigraph above, is a classic example of this phenomenon. Other opinions also sometimes took liberties with colorful language, going beyond what was legally necessary to establish that billboards were valid targets of municipal regulation.¹³¹ In doing so, these billboard opinions suggest that judges may have personally agreed that billboards were nuisances and could be—or should be—controlled. At the least, courts were willing to uphold legislatures’ desire to suppress the billboard blight, which implies some concurrence between the judiciary and public opinion.

The earliest decision to uphold a billboard law was *Rochester v. West*, a New York Supreme Court case from 1898.¹³² In this case an advertising company unsuccessfully challenged a city ordinance that imposed a licensing requirement for advertisers and restricted the height of city billboards.¹³³ The court found that the restrictions were justified under the police power because billboards are intrusive and potentially offensive: “[T]he modern system of advertising by posters is such that one can hardly pass along the streets of any large town without being compelled to gaze upon advertisements which are enormous in size and not infrequently offensive in their character.”¹³⁴ The *Rochester* opinion described outdoor advertisements as a nuisance to neighbors and “a constant menace to the lives and limbs of those who are obliged to pass along in front of them,” given the risk of unstable billboards blowing over in the wind.¹³⁵

¹³¹ Consider this language from the Supreme Court:

The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce The radio can be turned off, but not so the billboard or street car placard The Legislature may recognize degrees of evil and adapt its legislation accordingly.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932).

¹³² 51 N.Y.S. 482 (App. Div. 1898).

¹³³ *Id.* at 486.

¹³⁴ *Id.* at 484.

¹³⁵ *Id.* at 485. The decision was affirmed on appeal because of the risk that falling billboards pose to pedestrians. *Rochester v. West*, 58 N.E. 673, 674 (N.Y. 1900).

Subsequent opinions agreed that height restrictions and other minor impositions on billboards were permissible applications of the police power. In *Gunning System v. Buffalo* (1902),¹³⁶ the New York Supreme Court found that billboards were “common nuisances” and therefore reasonably restricted for “the promotion of peace and good order.”¹³⁷ A federal court similarly held in 1902 that removal of billboards “is not taking private property for a public use, but must be construed as a salutary restraint on a noxious use by the owner, and within the police power of a city.”¹³⁸

Judges were unafraid to express their strong feelings regarding outdoor advertising. A particularly colorful opinion from 1905, *Tompkins v. Pallas*,¹³⁹ forbade New York City’s park commissioner from selling advertising space on a fence adjacent to a park. The court’s description of the fence’s billboards—or “colored illustrated signs of crude design,”¹⁴⁰ in the court’s words—is undeniably and gratuitously disdainful:

[The billboards] comprise advertisements of cheap cigars and Russian teas, of Irish whiskey and Geneva gin, of a hair restorative and a complexion balm, of horses and automobiles, of shore dinners and pawnshops, of wall papers and hose supporters, of rye whiskey and headache powders, of chiropodists and chemists, and of various other trades and commodities. Many of the advertisements are emphasized, if not embellished, by pictorial representations of the articles referred to therein.¹⁴¹

¹³⁶ 77 N.Y.S. 987 (App. Div. 1902).

¹³⁷ *Id.* at 988. Ruling on an injunction in the same case the year before, the court had found no evidence that billboards were a fire danger, a “place of resort for lewd and vicious characters,” or a trash dump. The court concluded that “[t]he worst that is said of the structures themselves is that they are not agreeable to look at, but clearly that affords no reason for their summary abatement as a nuisance.” *Gunning Sys. v. Buffalo*, 71 N.Y.S. 155, 157 (App. Div. 1901).

¹³⁸ *Whitmier & Filbrick Co. v. Buffalo*, 118 F. 773, 776 (W.D.N.Y. 1902).

¹³⁹ *Tompkins v. Pallas*, 95 N.Y.S. 875 (Sup. Ct. 1905).

¹⁴⁰ *Id.* at 876.

¹⁴¹ *Id.*

Such scornfulness was perhaps understandable given the intrusiveness of many early billboards and advertisers' disdain for local regulation.¹⁴²

The outcome of *Tompkins* was undoubtedly affected by the advertisements' impact on parklands, since courts were particularly receptive to arguments about billboards' aesthetic harm to natural areas.¹⁴³ Indeed, early decisions such as *Tompkins* that banned advertising near urban parklands foreshadowed the later acceptance of aesthetic rationales for regulating highway billboards, where advertisements' negative impact was magnified by their scenic and pastoral surroundings. Conversely, judges' earlier resistance to allowing aesthetic regulation of urban billboards likely reflected a general cultural assumption that billboards were more visually and commercially appropriate in urban areas.¹⁴⁴ In other words, the divergent outcome of billboard cases—here illustrated by the different treatment of rural versus urban billboards—again suggests that courts were receptive to and acted on prevailing cultural values.

The most remarkable and influential early billboard decision, the one that definitively shifted courts in favor of billboard regulation, was *St. Louis Gunning Advertisement Co. v. City of St. Louis* (1911),¹⁴⁵ the case quoted in the epigraph. This decision ran 120 pages in length,

¹⁴² For example, in apt illustration of Hugh Agnew's description of the "frontier days" of early outdoor advertising, AGNEW, *supra* note 2, at 232, the same court decided a case three years later in which an advertising company had illegally and audaciously erected three *hundred-foot-long* billboards in downtown Manhattan. *C. J. Sullivan Adv. Co. v. City of New York*, 113 N.Y.S. 893 (Sup. Ct. 1908).

¹⁴³ See *People v. Sterling*, 220 N.Y.S. 315 (Sup. Ct. 1927) (upholding billboard ban in the Adirondacks because of the region's natural beauty); *McNamara v. Willcox*, 77 N.Y.S. 294 (Sup. Ct. 1902) (upholding the revocation of an advertising license on a wall adjacent to a park); *cf. Attorney Gen. v. Williams*, 55 N.E. 77, 78 (Mass. 1899) (upholding an ordinance intended to "promote the beauty and attractiveness of a public park" by limiting the height of parkside buildings). An observer correctly predicted in 1907 that "considering the growth of the aesthetic sentiment," the aesthetic rationale in *Attorney General v. Williams* would be extended to billboards. Larremore, *supra* note 12, at 42. *But see Commonwealth v. Boston Adver. Co.*, 74 N.E. 601 (Mass. 1905) (holding that a ban on parkside advertisements was an unreasonable taking of private property).

¹⁴⁴ This attitudinal dichotomy between rural and urban billboards is illustrated by the Highway Beautification Act of 1965, which banned billboards near interstate highways but allowed billboards in commercial and industrial areas. See *infra* § III(B) (discussing the Act).

¹⁴⁵ 137 S.W. 929 (Mo. 1911); see also Baker, *supra* note 12, at 134 n.41 (collecting cases that followed the holding in *St. Louis*).

including an extensive discussion of billboards' alleged risks to safety and morality.¹⁴⁶ The court sustained a St. Louis billboard restriction because “[d]ecency and good morals,” in addition to the city’s health and general welfare, demanded the suppression of billboard nuisances.¹⁴⁷ At the same time, the court soundly rejected the aesthetic rationale for regulation as unreasonably subjective.¹⁴⁸ Regardless of the legal basis for the holding in *St. Louis Gunning*, the court’s melodramatic conclusions about the evils of billboards indicate that soon after the turn of the century, at least one court had already been influenced by and was responding to negative public opinion of outdoor advertising. Indeed, the overstated rhetoric in the court’s decision sounds remarkably similar to the alarmist tone of *The Billboard Nuisance*, the advocacy piece published three years earlier by the American Civic Association.¹⁴⁹ This chronological and rhetorical congruity suggests that the judge may have viewed himself as a similar social reformer (a “judicial activist,” in contemporary parlance), acting on behalf of the public to clean up the urban landscape.

In sum, in the first decades of billboard litigation courts were divided as to whether outdoor advertising could or should be regulated. *St. Louis Gunning* unequivocally answered that question in the affirmative, albeit under a dubiously dramatic characterization of the health, safety, and moral risks of outdoor advertising. Courts came to accept the broader public’s understanding of billboards as a nuisance, and after *St. Louis Gunning* most courts upheld billboard regulations, first under deferential health and safety rationales and later for aesthetic

¹⁴⁶ 137 S.W. at 941. Police officers and health officials testified that billboards attracted muggers and vagrants; that the space behind them collected “refuse, rubbish, and filth;” and that the boards were often at risk of toppling over. *Id.* These claims are credible because early billboards often reached to the ground, were often linked end-to-end in long walls of advertisements, and frequently were pasted or posted onto preexisting fences bordering vacant lots.

Supra note 35 and accompanying text.

¹⁴⁷ 137 S.W. at 945.

¹⁴⁸ *Id.* at 961 (“[A]ll do not have the same tastes or ideas of beauty; what would please one might not please another.”); see also *City of Youngstown v. Kahn Bros. Bldg. Co.*, 148 N.E. 842, 844 (Ohio 1925) (stating a similar concern).

¹⁴⁹ THE BILLBOARD NUISANCE, *supra* note 26.

reasons, as well. Sometimes the health and safety rationales were factually questionable,¹⁵⁰ suggesting that courts were stretching their legal conclusions to match their desired end of upholding restrictive billboard laws.¹⁵¹ Both the outcomes of these cases and the rhetoric that judges used in arriving at those outcomes indicate that, whether intentionally or not, courts quickly fell in line with the majoritarian dislike of billboards that emerged at the turn of the century.¹⁵² As the president of the American Civic Association explained in 1909, “Even these legal defenses of the billboards [that people can erect signs on private property] are weakening under the steady even if slow growth of public indignation.”¹⁵³

III. THE HEYDAY OF BILLBOARD REGULATION

After courts accepted that billboard regulations were valid exercises of the government’s power to promote public health and safety, they began to expand the definition of the police power to include aesthetic regulatory goals. During the heyday of regulation, from *St. Louis Gunning* in 1911 to *Metromedia* in 1981,¹⁵⁴ legal opinions upheld regulations for a variety of

¹⁵⁰ A 1914 opinion sustained billboard restrictions partly out of concern for firemen’s access to buildings in case of fire. *Cream City Bill Posting Co. v. Milwaukee*, 147 N.W. 25, 28 (Wis. 1914). Other courts accepted the questionable argument that highway billboards could distract drivers and cause accidents. *See, e.g., Gen. Outdoor Adver. Co. v. Dep’t of Pub. Works*, 193 N.E. 799, 813-14 (Mass. 1935). Authorities disagree as to whether billboards actually affect driving. *See* U.S. DEP’T OF TRANSP., FED. HWY. ADMIN., RESEARCH REVIEW OF POTENTIAL SAFETY EFFECTS OF ELECTRONIC BILLBOARDS ON DRIVER ATTENTION AND DISTRACTION, FINAL REPORT § 2.4.1 (2001) (reporting that electronic billboards “may be associated with a higher crash rate under certain conditions”); Netherton, *supra* note 58, at 223-24 (discussing studies suggesting that billboards cause automobile accidents). *But see* OAAA, PRESENTING THE TRUTH ABOUT OUTDOOR ADVERTISING 20-21 (1957) (discussing studies that show *no* relationship between highway advertising and accidents), *cited in* GUDIS, *supra* note 9, at 218 n.28. Whether or not a real risk of distraction existed, courts accepted the traffic-safety rationale simply because it was plausible, out of deference to the legislature’s reasonable exercise of the police power. *See, e.g., Whitmier & Ferris Co. v. State*, 230 N.E.2d 904, 905 (N.Y. 1967).

¹⁵¹ *See infra* notes 212-21 and accompanying text (discussing scholars’ observations on this issue).

¹⁵² *See Baker, supra* note 12, at 133 (explaining that “the public demanded bill-board regulation and the courts realized the growing force of this demand,” hence courts’ definition of the police power expanded to satisfy that demand).

¹⁵³ McFarland, *supra* note 40, at 38.

¹⁵⁴ *See supra* § II(D) (discussing *St. Louis Gunning Adver. Co. v. City of St. Louis*, 137 S.W. 929 (Mo. 1911)); *infra* § IV(A) (discussing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 (1981)).

reasons, often with colorful rhetoric that criticized billboards' impact on their surroundings.¹⁵⁵ The outcome of these cases reflects judges' sympathy toward public opinion on this issue, or at least their willingness to defer to public opinion. This period is characterized by judicial deference to increasingly comprehensive and burdensome laws at every level of government, culminating in the federal Highway Beautification Act of 1965, which banned billboards near rural highways. The industry responded to widespread public dislike and judicial disfavor through greater self-regulation and restraint, but they were unsuccessful in stemming the regulatory tide.

A. Industry Self-Regulation

Even as outdoor advertisers were contesting municipal regulations in the courts, the industry also sought to improve its image and dampen public disapproval through organization and standardization.¹⁵⁶ Outdoor advertisers banded together as early as 1872, when the first billposters' association was formed.¹⁵⁷ These alliances eventually transformed the industry, in the words of one author writing in 1938, "From a promiscuous part-time employment of unorganized men . . . to the present well organized, well conducted and highly responsible association of businessmen"¹⁵⁸ Part of the industry's maturation came in acknowledging—undoubtedly due in part to court decisions which told them so¹⁵⁹—that billboards have a significant impact on civic life and thus are of public concern and justly regulated by the government.¹⁶⁰ Once outdoor advertisers recognized that "cooperation [and compromise are] better than warfare" against public opinion, as one author put it, the industry began to act more

¹⁵⁵ See, e.g., *supra* notes 138-42 and accompanying text.

¹⁵⁶ See AGNEW, *supra* note 2, at 31-42 (describing the industry's self-regulation); GUDIS, *supra* note 9, at 22-27 (same).

¹⁵⁷ The International Bill Posters' Association of North America. FRASER, *supra* note 54, at 10.

¹⁵⁸ AGNEW, *supra* note 2, at 45-46.

¹⁵⁹ See *infra* § III(C).

¹⁶⁰ AGNEW, *supra* note 2, at 232.

responsibly and professionally.¹⁶¹ They evidently hoped that self-regulation would lessen public pressure for further governmental regulation, which was even less preferable.¹⁶²

Early industry-imposed controls were modest in scale. In the late nineteenth century the advertising associations agreed among themselves to cease posting advertisements for burlesque shows, because those ads were a significant source of public offense in billboards' early years.¹⁶³ The industry also created standardized metal structures, more attractive and less likely to blow over than wooden ones.¹⁶⁴ Poster sizes were also standardized nationwide, which resulted in economies of scale as well as increased uniformity of appearance, and hence greater attractiveness and professionalism.¹⁶⁵ Outdoor advertising organizations were particularly concerned with controlling rogue advertisers, which the industry blamed for the negative public attitudes. As one author explained in 1909, illegal posting "is responsible for a great portion of aesthetic opposition to a well-ordered medium."¹⁶⁶

In the early twentieth century, outdoor advertisers adopted increasingly elaborate professional codes of conduct in response to public complaint and unfavorable litigation.¹⁶⁷ The

¹⁶¹ *Id.* at 233; *cf.* Loshin, *supra* note 11, at 119-20 (suggesting that advertisers cooperated with one another to avoid unprofitable collective-action problems that previously arose from uncoordinated competition).

¹⁶² Charles Pascall, *Poster Censorship*, in *THE ADVERTISING YEAR BOOK FOR 1924*, *supra* note 25, at 319 ("The billposters, therefore, to protect and advance the interest of their trade . . . and preferring their own committee to the local authority as the controlling organization, persisted in their policy of condemning any poster which was calculated to cause offence.").

¹⁶³ GUDIS, *supra* note 9, at 26-28. For example, the problem of provocative advertisements provoked legislation in Newark, New Jersey, in 1908 against outdoor advertisements showing "suggestive pictures of partially draped women." *THE BILLBOARD NUISANCE*, *supra* note 26, at 12.

¹⁶⁴ BRIDWELL, *supra* note 34, at 35-36. Later billboards were sometimes garnished by trellises, decorative columns, and tasteful landscaping. GUDIS, *supra* note 9, at 202-04.

¹⁶⁵ BRIDWELL, *supra* note 34, at 63; FRASER, *supra* note 54, at 14 ("Standardization and self-regulation were closely related and perceived by most association members as the means by which the outdoor advertising industry could gain general acceptance."); EDWARD J. ROWSE & CARROLL A. NOLAN, *FUNDAMENTALS OF ADVERTISING* 247-49 (1950).

¹⁶⁶ BRIDWELL, *supra* note 34, at 11; *see also* FRASER, *supra* note 54, at 188 (explaining in 1991 that there will always be "industry 'bad guys' . . . despite a solid stream of conscientiousness").

¹⁶⁷ Other media industries also regulated themselves in response to public disapproval. The Motion Picture Association of America ("MPAA") adopted a rating system for films and the Recording Industry Association of America ("RIAA") instituted a parental-advisory program. *See* Wikipedia: The Free Encyclopedia, MPAA Film Rating System: Origins, http://en.wikipedia.org/wiki/MPAA_film_rating_system (last visited Mar. 29, 2007);

Poster Advertising Association established “Standards of Practice” for its member advertisers, including the instruction to select locations “so as not to cause friction either with the municipal authorities or the people of the neighborhood.”¹⁶⁸ The Association’s “very busy” censorship committee was empowered to fine or expel agencies for creating advertisements that generated public complaint.¹⁶⁹ The Outdoor Advertising Association of America (“OAAA”), which is now the industry’s principal trade organization, established “still higher ideals” when it formed in 1925.¹⁷⁰ The OAAA declared that billboards should not be erected on private property without consent, nor on residential streets, nor within highway rights-of-way.¹⁷¹ Moreover, billboards should not “mar or impair scenic beauty” nor create “a hazard to traffic,” and advertising copy should not “offend moral sense of public.”¹⁷²

Outdoor advertisers’ self-regulation has continued to expand, in line with the expanding scope of government-imposed restrictions and judicial sanction. By 1969, in the context of widespread judicial approval of aesthetically-driven billboard laws, the OAAA’s ethics code conceded the public interest in banning billboards from scenic areas: “We share the public interest in natural scenic beauty, parks, and historical monuments. We do not erect our advertising displays in such areas.”¹⁷³ By 1969 the OAAA also accepted “reasonable” billboard

RIAA, Issues: Parental Advisory Label (“PAL”) Program, <http://www.riaa.com/issues/parents/advisory.asp> (last visited Mar. 29, 2007).

¹⁶⁸ BRIDWELL, *supra* note 34, at 9.

¹⁶⁹ Kerwin H. Fulton, *Twenty Years of Poster Progress*, in *THE ADVERTISING YEARBOOK FOR 1922*, *supra* note 66, at 250, 253-54.

¹⁷⁰ BRIDWELL, *supra* note 34, at 62-63; *see also* Loshin, *supra* note 11, at 120-24 (describing the origins of the OAAA); The Outdoor Advertising Association of America, <http://www.oaaa.org> (last visited Mar. 29, 2007).

¹⁷¹ BRIDWELL, *supra* note 34, at 62-63. Note that refraining from placing signs within rights-of-way would still allow for signs that are visible from the highway, albeit placed on private property outside the rights-of-way.

¹⁷² *Id.* The OAAA elaborated on these rules a decade later, adding a ban on billboards near historical sites, parks, and in “any other areas where the resentment of reasonable-minded persons would be justified.” AGNEW, *supra* note 2, at 239-41.

¹⁷³ Tocker, *supra* note 26, at 49. On the contrary, the OAAA promised, “We locate our structures with discretion and good taste with regard to frequency and concentration.” *Id.*

regulation, a position maintained by the organization today.¹⁷⁴ The organization continues to impose new restrictions; for example, in 1990 they asked member companies to limit the use of advertisements for cigarettes and other products that cannot be sold to minors.¹⁷⁵

In addition to regulation, advertisers also curried public favor by improving the artistic quality of their signs, promoting the social utility of outdoor advertising, and donating their services to social causes. The industry evidently believed, in the words of one speaker, that artistically superior billboards would mollify their critics: “Make the poster panel a manifestation of good art, and objections to it will vanish—even from those who are most militant in raising the cry against the ‘billboard.’”¹⁷⁶ Outdoor advertisers also highlighted the informational value of billboards and portrayed the industry as a valuable source of employment and economic growth.¹⁷⁷ During the World Wars and the Great Depression, the industry donated billboard space for public-service messages, for both patriotic and promotional purposes, and the industry continues this public service today.¹⁷⁸

B. Highway Billboards and Public Criticism

¹⁷⁴ *Id.* at 50; OAAA, The OAAA Code of Industry Principles, *supra* note 34.

¹⁷⁵ FRASER, *supra* note 54, at 188.

¹⁷⁶ Dudley Crafts Watson, *Art, a Key to American Business*, in THE ADVERTISING YEARBOOK FOR 1922, *supra* note 66, at 259, 261; *see also* GUDIS, *supra* note 9, at 199 (“The organized outdoor advertising industry also sought to redefine the billboard as tasteful and even a work of art, in both its architectural structure and poster imagery.”).

¹⁷⁷ *See* GUDIS, *supra* note 9, at 196-201, 209; Fulton, *supra* note 168, at 251 (describing “free public advertising of an enlightening and interesting nature”); OAAA, Legislative Issues: Bans and Moratoria, <http://www.oaaa.org/government/Issues/issue.asp?id=16> (last visited Mar. 29, 2007) (“Outdoor advertising is an important medium of communication . . .”).

¹⁷⁸ FRASER, *supra* note 54, at 24-37 (reproducing wartime public-service advertisements); GUDIS, *supra* note 9, at 207 (describing the donation of advertising space during the Depression). Even the famously funny Burma-Shave advertisements frequently presented public-service messages; this was a “shrewd policy,” according to a later observer, because “it established the firm as being public-spirited, [which was] an asset in confronting the ominously growing anti-billboard forces.” FRANK ROWSOME, JR., THE VERSE BY THE SIDE OF THE ROAD: THE STORY OF THE BURMA-SHAVE SIGNS AND JINGLES 32 (1965). The OAAA recently reported that the contemporary outdoor advertising industry donates \$350 million a year to charitable organizations. Press Release, OAAA, Outdoor Ad Revenue Continues Double-Digit Growth (Dec. 6, 2005), *available at* http://www.oaaa.org/news/release.asp?RELEASE_ID=1484. However, the non-profit group Scenic America, which opposes billboards, suggests that the billboard industry donates advertising space to charity mostly to curry favor with politicians and the public, and only does so when they do not have paying customers. Scenic America, “Public Service” Billboards: Signs of An Ulterior Motive, http://www.scenic.org/billboards/industry/ps_billboards (last visited Mar. 29, 2007).

The advertising industry evidently hoped that voluntary regulations would be sufficient to appease a reasonable-minded public. Industry writers portrayed their detractors as merely a vocal minority, and the OAAA privately described billboard opponents as “zealots.”¹⁷⁹ Public criticism of billboards continued, however, particularly among the artistic elite. In 1969 an architecture professor characterized billboards as “a public nuisance and a national shame” and declared that they were causing “visual indigestion” and “the uglification of the American landscape.”¹⁸⁰ Another architect, Peter Blake, used billboards to symbolize the desecration of nature in postwar America, describing the billboard industry—“America’s affluent uglifiers”—as an amoral and all-powerful industry at odds with the public interest and causing the “brutal destruction of our landscape.”¹⁸¹ This strident language again evokes the exaggerated rhetoric seen in *St. Louis Gunning* and the American Civic Association’s pamphlet on *The Billboard Nuisance*,¹⁸² reiterating the fact that billboards have generated strong reactions throughout their history.¹⁸³

¹⁷⁹ GUDIS, *supra* note 9, at 213 (quoting an internal OAAA memo, date unknown). One industry publication blamed opposition to outdoor advertising on three “interest groups”: the media, academia, and the uninformed. JAMES CLAU, R.M. OLIPHANT, & KAREN CLAU, SIGNS. LEGAL AND AESTHETIC CONSIDERATIONS 63 (1972). Another publication dismissed the critics of advertising as “nature lovers.” WRIGHT & WARNER, *supra* note 23, at 229.

¹⁸⁰ Patrick Horsbrugh, *Criticism of Highway Signs and Advertisements*, in OUTDOOR ADVERTISING: HISTORY AND REGULATION, *supra* note 28, at 185, 190. See generally *id.* at 183-202.

¹⁸¹ PETER BLAKE, GOD’S OWN JUNKYARD: THE PLANNED DETERIORATION OF AMERICA’S LANDSCAPE 15, 69 (1963). Blake suggested that “When people talk about the flood of ugliness engulfing America, they first think of billboards—and, more specifically, of the billboards that line our highways and dot our landscape.” *Id.* at 11. The OAAA even considered suing Blake for libel based on his strong and outspoken criticism of the outdoor advertising industry. GUDIS, *supra* note 9, at 228. But see ROBERT VENTURI ET AL., LEARNING FROM LAS VEGAS (1972) (architect’s celebration of Las Vegas’s “ugly” signs).

¹⁸² *St. Louis Gunning Adver. Co. v. City of St. Louis*, 137 S.W. 929, 942 (Mo. 1911); THE BILLBOARD NUISANCE, *supra* note 26.

¹⁸³ Sometimes such emotions fall strongly in favor of billboards, however. Blake’s work stands in marked contrast to the glowing tone adopted by the industry writer who compared billboards to the Rockies and the Brooklyn Bridge, as things of beauty and grandeur. BRIDWELL, *supra* note 34, at 4. Moreover, even as billboards were generating public reproach and being regulated in cities, some small towns welcomed the signs because they invoked big-city sophistication, which indirectly attests to the advertisements’ prominent role in promoting modern consumer culture. GUDIS, *supra* note 9, at 52. Not all billboards were disliked, either; the iconic Burma-Shave highway advertisements, with their clever jingles, became much-loved classics. Then again, the Burma-Shave advertisements were small, spartan, folksy, and humorous, which undoubtedly made them better-liked than bigger and more overbearing signs. ROWSOME, *supra* note 177, at 18 (comparing Burma-Shave advertisements with the

Blake's book also reflected the shifting concerns of billboard critics, from fears about the signs' effect on public safety in the *St. Louis Gunning* era to contemporary concerns about their visual impact on natural landscapes. Indeed, public animosity toward outdoor advertising seems to have increased when billboards spread *en masse* from urban areas to rural highways, where their negative impact on their surroundings was more pronounced. For people like Peter Blake, billboards symbolized the worst of American consumerism and seemed irreconcilably in conflict with pastoral purity.¹⁸⁴ Critics felt that billboards offended the deeply-rooted pastoral values and ambivalence toward consumerism felt by many Americans. As one historian succinctly described of anti-billboard sentiment, "Critics felt that markets ought not mix with Mother Nature."¹⁸⁵

Regardless of the public criticism, the large size and comparatively low cost of billboards made them well-suited to automobile traffic, and the industry grew quickly along with the growth in cars and highways. As one author noted at mid-century, "Public opinion forced the removal of some signs and managed to force some legislation through that checked the worst offenses, but outdoor advertising was too useful and economical a medium to be controlled

"intensely serious hard sell" of most advertisements). See generally *id.* (history and complete text of Burma-Shave jingles); Burma-Shave Home, <http://burma-shave.org> (last visited Mar. 29, 2007) (catalogue of Burma-Shave advertisements). See also Loshin, *supra* note 11, at 142, 150-51 (arguing that Americans have been less universally opposed to billboards than argued here).

¹⁸⁴ One author recently showed how billboards symbolize a moral dichotomy between consumerism and nature: "Billboards honor us as good consumers Aesthetically pleasing communities and vistas, on the other hand, honor our humanity." John F. Rohe, *Billboard Regulation in Michigan: Navigating the Line Between Free Speech and Aesthetic Considerations*, 83 MICH. B. J. 27, 28 (2004); see also GUDIS, *supra* note 9, at 194 (suggesting that billboards represented the corruption of pastoral purity by urbanization).

¹⁸⁵ See GUDIS, *supra* note 9, at 6, 213 (billboard opponents believed in "environmental purity as a national heritage"). The author explains that public dislike of highway billboards is grounded in American pastoralism, derived from the country's agrarian past, which is unflatteringly compared with this icon of modern commercialism and its suggestion of moral decay. *Id.* at 182-95; see also Doremus, *supra* note 9 (discussing America's interest in the psychological and spiritual benefits of unspoiled nature).

easily.”¹⁸⁶ The spread of billboards transformed rural highways into commercial “buyways,” in the words of a 1923 advertisement,¹⁸⁷ which led to public concern about the advertisements’ aesthetic impact. An industry executive observed in 1926 that

Because of this vast growth, public interest has needed careful consideration. Opposition to the placing of billboards where they obstruct the view has grown strong, and this has been heightened by the great number of new and scenic highways that have been constructed and the countless number of people who tour over these roads.¹⁸⁸

In response to this disapproval of highway billboards, the OAAA agreed to exclude outdoor advertisements from scenic highways.¹⁸⁹

The billboard nuisance evolved from a largely local, urban issue into a nationwide problem as public highways continued to grow in number. By mid-century, nationwide public opposition to highway billboards was sufficiently widespread and pronounced to provoke federal intervention. The issue came to a head in the “Great Billboard Battle of 1958,”¹⁹⁰ which capped several years of Congressional debate over whether to regulate outdoor advertising as part of the Federal-Aid Highway Act, the legislation which instituted President Dwight D. Eisenhower’s new interstate highway system.¹⁹¹ The final Act outlawed most billboards within 660 feet of highway rights-of-way, but it was watered down by exceptions for signs identifying on-site and local businesses, official signs, and other signs in the public interest.¹⁹²

¹⁸⁶ WOOD, *supra* note 26, at 347; *see also* AGNEW, *supra* note 2, at 147-95 (describing the growth in automobile use during the 1920s and 1930s); Loshin, *supra* note 11, at 115-19 (describing the growth of highway billboards); note 42 and accompanying text (describing the billboard industry’s increasing sales volume during this period).

¹⁸⁷ The advertisement reads, “The highway has become the buyway It is millions of miles long. And billions of dollars are spent because of what the public sees when it travels this buyway.” GUDIS, *supra* note 9, at 1-2.

¹⁸⁸ BRIDWELL, *supra* note 34, at 62.

¹⁸⁹ AGNEW, *supra* note 2, at 235-41. Standard Oil scored a public-relations coup when it, too, decided in 1924 to refrain from placing its advertisements on scenic highways. GUDIS, *supra* note 9, at 178-79.

¹⁹⁰ BLAKE, *supra* note 180, at 14.

¹⁹¹ Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, 72 Stat. 89 (1958); Clifton W. Enfield, *Federal Highway Beautification: Outdoor Advertising Control, Legislation and Regulation*, in *OUTDOOR ADVERTISING: HISTORY AND REGULATION*, *supra* note 28, at 149-67 (describing the legislative process in Congress).

¹⁹² § 12, 72 Stat. at 95.

President Lyndon B. Johnson subsequently proposed the draconian Highway Beautification Act of 1965,¹⁹³ which would have required states to ban nearly all billboards within a thousand feet of interstate highways or else lose all federal highway funding.¹⁹⁴ In final form, however, the Highway Beautification Act was similar to the earlier Federal-Aid Highway Act; it instructed states to regulate billboards within 660 feet of highway rights-of-way or else lose ten percent of their highway funding.¹⁹⁵ Advocates for strict billboard laws viewed the bill as a failure,¹⁹⁶ while the OAAA supported it in final form after initially opposing it.¹⁹⁷ Most notably, the bill preempted state courts by requiring “just compensation” for the removal of any signs and failed to impose any size or height restrictions.¹⁹⁸ It also created a substantial loophole by excluding commercial and industrial areas from the billboard ban.¹⁹⁹ Moreover, subsequent amendments to the Act have undermined its effectiveness by permitting billboards in non-scenic areas that would otherwise be regulated.²⁰⁰

¹⁹³ 23 U.S.C. § 131 (2002). Johnson advocated for aesthetic regulation in a special message to Congress. 111 CONG. REC. 2045 (1965).

¹⁹⁴ Loshin, *supra* note 11, at 131-35 (describing the legislative history and provisions of the Act); Lynch, *supra* note 11, at 425-33 (same).

¹⁹⁵ 23 U.S.C. § 131(b). Similar restrictions have been adopted by many state legislatures. *See, e.g.*, VA. CODE ANN. §§ 33.1-369, -370 (2006) (outlawing off-premise signs within 660 feet of parkways and federal highways). For further description of the Highway Beautification Act’s provisions, see Roger A. Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 MICH L. REV. 1296 (1972); Enfield, *supra* note 190, at 169-78; Johnson, *supra* note 33, at 116-29.

¹⁹⁶ CHARLES F. FLOYD, *HIGHWAY BEAUTIFICATION: THE ENVIRONMENTAL MOVEMENT’S GREATEST FAILURE* (1979); SCENIC AMERICA, *HIGHWAY BEAUTIFICATION ACT: A BROKEN LAW* (1997); SCENIC AMERICA, *FIGHTING BILLBOARD BLIGHT: AN ACTION GUIDE FOR CITIZENS AND PUBLIC OFFICIALS* 44-47 (1999) [hereinafter *SCENIC AMERICA*] (discussing the need to reform the Act).

¹⁹⁷ FRASER, *supra* note 54, at 113; *see also* GUDIS, *supra* note 9, at 223-25 (describing the politics behind the Act); Loshin, *supra* note 11, at 136-38 (suggesting that the advertisers’ lobby was responsible for the bill’s outcome); Tocker, *supra* note 28, at 53-54 (explaining that the OAAA agreed with the Act’s provision that billboards should be banned from scenic highways but not from commercial or industrial areas).

¹⁹⁸ 23 U.S.C. §§ 131(g), (n). States followed Congress’s lead by passing similar just-compensation requirements. *See, e.g.*, VA. CODE ANN. § 33.1-370.1 (2006) (adopted in 2003). Because of this compensation rule, as Jacob Loshin explains, the Highway Beautification Act “prohibited new billboards in certain areas while protecting old billboards everywhere.” Loshin, *supra* note 11, at 131.

¹⁹⁹ 23 U.S.C. § 131(d).

²⁰⁰ The Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240 (1991), 49 U.S.C. § 101 (2002), allows billboards in non-scenic areas, and the 1995 Scenic Byways Amendment allows states to exclude roads from state or federal scenic byways designation. *See also* OAAA, *Laws and Regulations*,

Observers disagree with regard to the Highway Beautification Act's effectiveness in reducing the number of highway billboards. In 1985 the General Accounting Office concluded that 587,000 signs had been removed in the twenty years since the Act passed, but the agency also found that 172,000 signs remained due to lack of funding to compensate sign owners.²⁰¹ Moreover, 320,000 billboards had been added since the Act was passed.²⁰² In effect, although the government had spent two hundred million dollars to pay for billboard removal, an estimated half a million highway advertisements still remained in 1985.²⁰³ Because of the ongoing just-compensation requirement, contemporary critics allege that the Highway Beautification Act actually discourages billboard removal and is thus counterproductive.²⁰⁴ However, the OAAA presents a more favorable view of the Act, citing a 1996 Federal Highway Administration report showing that there were 127,000 fewer legal highway signs, 750,000 fewer illegal ones, and only 74,000 legal signs remaining at that time due to the Act.²⁰⁵ As the OAAA emphasizes, the Highway Beautification Act continues to severely restrict billboards along 306,000 miles of federally-funded highways.²⁰⁶ Moreover, regulatory activity at the state and local level may be picking up the slack.²⁰⁷

<http://www.oaaa.org/government/laws.asp> (last visited Mar. 29, 2007) (summarizing current highway billboard laws).

²⁰¹ U.S. GEN. ACCOUNTING OFFICE, THE OUTDOOR ADVERTISING CONTROL PROGRAM NEEDS TO BE REASSESSED: REPORT TO THE CHAIRMAN, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, UNITED STATES SENATE ii-iii (1985).

²⁰² Harvey K. Flad, *Country Clutter: Visual Pollution and the Rural Landscape*, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 125 (1997).

²⁰³ *Id.* The U.S. Senate approved a moratorium on further billboard construction along interstate highways in 1990, but the ban never became law. Visual Pollution Control Act of 1990, S. 2500, 101st Cong. (1990); *see also* S. REP. No. 101-532 (Senate report of the proposed bill following conference); 1990 Bill Tracking S. 2500 (LEXIS) (summary of the legislative history).

²⁰⁴ *See, e.g.*, Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463 (2000).

²⁰⁵ OAAA, Laws and Regulations, *supra* note 199 (describing the Federal Highway Administration's "Nationwide Statistical Report"). The president of the OAAA later reported that 710,000 signs came down after passage of the Highway Beautification Act, and that there were fewer signs in 1991 than 1965. FRASER, *supra* note 54, at 188.

²⁰⁶ *See* OAAA, Laws and Regulations, *supra* note 199.

²⁰⁷ One author suggested in 1986 that federal enforcement of the Highway Beautification Act "currently suffers from conservative restraint or indifference," but that state activity might compensate for this inaction. Lynch, *supra* note

C. *Aesthetic Regulation in the Courts*

Courts have approved gradually more ambitious billboard regulations, as previously described. Soon after the *St. Louis Gunning* opinion in 1911, three Supreme Court cases also found billboard regulations to be valid, thereby unambiguously establishing the constitutionality of billboard regulations while at the same time moving the judiciary closer to accepting aesthetic rationales for regulation. In *Thomas Cusack Co. v. Chicago* (1917),²⁰⁸ the Supreme Court sustained a Chicago ordinance requiring that outdoor advertisers gain permission from neighbors before erecting billboards in a residential area. The Court determined the ordinance was within the city's authority to promote "the safety, morality, health and decency of the community,"²⁰⁹ even though the city's stated rationale was an implausible concern with fire hazards and crime. The Court's permissive treatment of municipal police power in this opinion, despite the lack of a convincing factual justification, led several observers to suggest that the Supreme Court was bowing to public opinion.²¹⁰

Although *Cusack* did not address whether billboard regulations could be justified by aesthetic dislike, the Supreme Court considered this issue just two years later. In *St. Louis Poster Advertising Co. v. City of St. Louis* (1919),²¹¹ the Court upheld the same St. Louis ordinance that was challenged in *St. Louis Gunning*, a law that limited the size and location of

11, at 423 n.23. Local government activism against billboards, which has helped compensate for the failures of the federal Act, mirrors the emergence of local environmental law as a productive alternative to traditional top-down, "command and control" federal environmental regulation. See John R. Nolan, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2002).

²⁰⁸ 242 U.S. 526 (1917).

²⁰⁹ *Id.* at 529-30.

²¹⁰ One author remarked that "the Supreme Court has shown the disposition to go to great lengths in sustaining any statute or ordinance to promote public safety and welfare for which any substantial reasons may be assigned." Note, *A Billboard Ordinance Upheld by the Supreme Court of the United States*, 2 VA. L. REG. 940, 941 (1917). Another wrote that "the United States Supreme Court has said that the police power cannot be exercised solely for the protection of the aesthetic, but the same court has tacitly approved such laws [in *Cusack* and *Euclid v. Ambler Realty Co.*, *supra* note 86] by engaging in some remarkable *tours de force*." V.V.C., Note, *The Modern Tendency Toward Protection of the Aesthetic*, 44 W. VA. L.Q. 58, 60 (1937).

²¹¹ 249 U.S. 269 (1919).

city billboards.²¹² The plaintiffs' billboards were fireproof and able to withstand heavy winds, which would have satisfied earlier courts' concerns about instability and flammability, but the Court nonetheless sustained the ordinance based on precedent, without addressing the facts of the case.²¹³ Most significantly, in this case the Supreme Court for the first time acknowledged aesthetics as a permissible *secondary* rationale for billboard regulation:

Possibly one or two details [of the ordinance] . . . have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary.²¹⁴

St. Louis Poster Advertising Co. was not the first opinion to accept aesthetics as a secondary rationale for regulation, either. A decade earlier, in *Welch v. Swasey* (1909),²¹⁵ the Supreme Court had upheld a height restriction on urban buildings primarily because of a valid fear of fire, albeit with the added and unobjectionable possibility of “considerations of an aesthetic nature.”²¹⁶

The third Supreme Court decision to address a billboard law, *Packer Corp. v. Utah*,²¹⁷ shows that by 1932 the Court unequivocally shared lower courts' concern with the aesthetic impact of billboards. *Packer* upheld a statewide prohibition on outdoor advertising of tobacco products.²¹⁸ The Court agreed with the lower court that outdoor advertising was distinguishable from print advertising, and thus could be regulated differently, because of the way billboards involuntarily intrude on passerby's sight. The Court's holding carries a hint of displeasure:

²¹² *Id.* at 273.

²¹³ *Id.* at 274.

²¹⁴ *Id.*

²¹⁵ 214 U.S. 91 (1909).

²¹⁶ *Id.* at 108. In the same vein, the lower court had held that “if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary.” *Welch v. Swasey*, 79 N.E. 745, 746 (Mass. 1907).

²¹⁷ 285 U.S. 105 (1932).

²¹⁸ *Id.* at 107; *see also* UTAH CODE ANN. § 76-10-102 (2005) (current version of the law).

“Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without choice or volition [P]eople . . . have the message of the billboard thrust upon them by all the art and devices that skill can produce.”²¹⁹

Following the Supreme Court’s precedent in *St. Louis Poster Advertising Co. and Welch v. Swasey*, a growing number of courts began to uphold billboard regulations under hybrid rationales that acknowledged aesthetics as a secondary goal. For example, in *Perlmutter v. Greene* (1932),²²⁰ the New York Court of Appeals affirmed the state’s right to erect a large screen in front of a highway billboard to shield drivers from “obnoxious sights of public nuisances.”²²¹ After characterizing the issue of “whether artistic considerations alone are sufficient to warrant the general prohibition of billboards on private property” as “unsettled,” the court concluded that “Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency.”²²² Another court agreed in 1930 that “aesthetic considerations may be considered along with other factors determining the question of the general welfare,” although “a city may not prohibit billboards . . . merely because such boards are unsightly.”²²³

Many scholars have criticized courts’ reasoning during this intermediate period, in which the judiciary accepted aesthetically-motivated billboard laws under the pretext of health and safety.²²⁴ In 1916, five years after *St. Louis Gunning*, Everett Millard remarked that “the courts

²¹⁹ 285 U.S. at 110.

²²⁰ 182 N.E. 5 (N.Y. 1932).

²²¹ *Id.* at 6.

²²² *Id.* at 5-6. The *Harvard Law Review* noted that *Perlmutter* “left open” the possibility of purely aesthetic regulation, and that “legislation frankly aimed at preserving the beauty of the highways will not always be beyond the pale of due process.” Recent Cases, *Highways—Rights and Remedies of Abutters—Erection by State of Screen to Hide Billboard*, 46 HARV. L. REV. 158, 158 (1932).

²²³ *Gen. Outdoor Adver. Co. v. Indianapolis*, 172 N.E. 309, 312, 315 (Ind. 1930); *see also Gen. Outdoor Adver. Co. v. Dep’t of Pub. Works*, 193 N.E. 799, 815 (Mass. 1935) (holding that “considerations of taste and beauty may enter in, as auxiliary,” in legislation) (internal quotation marks omitted).

²²⁴ *See generally* Bobrowski, *supra* note 12 (describing scholarly discussion of aesthetic regulation).

are careful to tie down to physical objections [such as risk of toppling or flammability] as the chief basis of their decisions. Objections based upon the protection of beauty are only thrown in, at best, for good measure.”²²⁵ Henry Chandler wrote in 1922, “With many protestations and by means of the fantastic argument that bill-boards are a menace to public safety, the courts have nevertheless given aid to the movement for protection against this disfigurement.”²²⁶ A third author explained in 1932 that “courts have constantly sought to find some evidence of tangible harm on which to base a finding against this form of advertising. The lengths to which they have gone justify the oft repeated suspicion that the judges, as well as the public, are moved by aesthetic considerations.”²²⁷

Scholars offered various reasons for courts’ backdoor approach to aesthetic regulation. One observer linked the phenomenon to “the strictly utilitarian bias of Anglo-Saxon and of American law,” under which “other and better acknowledged grounds than that of the merely aesthetic” have been used to regulate billboard nuisances.²²⁸ At least two authors have suggested that judges obscured their true reason for upholding billboard laws because beauty seemed to be too subjective a basis for zoning regulations, as the court concluded in *St. Louis Gunning*.²²⁹ Another scholar has noted that throughout American history, in a variety of contexts, aesthetic rationales for protecting nature have

²²⁵ Millard, *supra* note 11, at 30.

²²⁶ Chandler, *supra* note 12, at 472.

²²⁷ H.S.V.S., *supra* note 11, at 106; *see also* Sutton, *supra* note 11, at 195 (“Even though the only true rationale behind the regulation of signs along public highways is to preserve and enhance the beauty of the environment, most jurisdictions have refused to recognize this purpose alone to be constitutionally legitimate and have relied instead on circuitous grounds of questionable legal validity.”).

²²⁸ Goodrich, *supra* note 11, at 122. Goodrich also identified the courts’ reluctance to accept aesthetically-motivated zoning as being grounded in Americans’ pragmatism. *Id.* at 127-28.

²²⁹ 137 S.W. 929, 961-62 (Mo. 1911). Dukeminier defended the aesthetic rationale for regulation as imperfect but adequate: “The cry for precise criteria [of beauty] might well be abandoned because it does not make sense. Beauty cannot be any more precisely defined than wealth, property, malice, or a host of multiordinal words to which courts are accustomed.” Dukeminier, *supra* note 12, at 226-29. Catherine Gudis agreed that judges considered aesthetics to be too subjective and feminine a standard for their attention. GUDIS, *supra* note 9, at 170, 174.

frequently been couched in economic rationales for purposes of political expediency.²³⁰ Whatever the real reason for courts' duplicitous rationales, scholars unanimously agree with J.J. Dukeminier's observation that "It seems plain that the primary offense of billboards is ugliness. Any jerry-built billboard may of course be a menace to safety and a fire hazard, but the billboard regulations are not limited to keeping the signboard screws tight."²³¹

Regardless of the reason for the judiciary's delay in acknowledging the aesthetic goals behind billboard regulations, scholars' indignation regarding this lag is itself significant. The legal commentary on this issue implies that the courts *should have* matched public opinion on this issue much sooner than they did, and that judges' delay was either dishonest or, worse, undemocratic. In other words, scholars seem to assume that courts *should have been* majoritarian. Pursuant to this implied understanding of the role of courts in society—which I argue is a proper one, at least with regard to billboards—courts serve the public and promote the public good through their responsiveness to dominant cultural attitudes.²³²

Despite courts' initial ambivalence regarding aesthetic regulation of billboards, over time the common law responded to pervasive public dislike, and the ugliness and intrusiveness of outdoor advertising gradually became accepted as an adequate stand-alone basis for exercising the police power to control billboards. As early as 1927, the Supreme Court of New York could declare that "We have reached a point in the development of the police power where an esthetic purpose needs but little assistance from a practical one to withstand an attack on constitutional

²³⁰ See Doremus, *supra* note 9.

²³¹ Dukeminier, *supra* note 12, at 220.

²³² Of course, we should not be surprised that courts were not unabashedly in step with public desire to regulate billboards due to ugliness, since courts often react to social change rather than creating it.

grounds.”²³³ Another court announced in 1941 that “the time has come to make a candid avowal of the right of the legislature to adopt appropriate legislation based upon these so called aesthetic, but really very practical, grounds.”²³⁴

The Supreme Court conclusively established the constitutionality of aesthetic regulation in *Berman v. Parker*,²³⁵ a 1954 opinion which affirmed Congress’s right to take private property to redevelop a blighted neighborhood in Washington, D.C. The Court presented a famously expansive reading of the police power and said aesthetics were a valid basis for exercising it:

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.²³⁶

Subsequent cases often relied on *Berman* to uphold billboard regulations for aesthetic reasons alone.²³⁷ After *Berman*, most courts no longer felt compelled to search for traditional health-and-safety rationales to uphold billboard laws, instead affirming them under a deferential “rational relationship” degree of constitutional scrutiny applied to rationales including aesthetics.²³⁸ A minority of states still requires that scenic regulations be grounded in health or safety rationales, or in economic reasons such as the protection of property values or promotion

²³³ *People v. Sterling*, 220 N.Y.S. 315, 318 (Sup. Ct. 1927) (upholding a law which banned billboards from Adirondack Park to conserve natural beauty). *But see O’Mealia Outdoor Adver. Co. v. Rutherford*, 27 A.2d 863, 665 (N.J. 1942) (relying on *Passaic v. Paterson Bill Posting Co.*, 72 N.J.L. 285 (1905), in finding that “Aesthetic considerations are a matter of luxury and indulgence rather than necessity, and it is necessity alone which justifies the exercise of the police power . . .”).

²³⁴ *Hav-A-Tampa Cigar Co. v. Johnson*, 5 So. 2d 433, 439 (Fla. 1941).

²³⁵ 348 U.S. 26 (1954).

²³⁶ *Id.* at 33 (internal citation omitted); *see also* Jacob M. Lashly, *The Case of Berman v. Parker: Public Housing and Urban Redevelopment*, 41 A.B.A. J. 501 (1955) (describing the legal and political significance of *Berman*).

²³⁷ *See, e.g., John Donnelly & Sons, Inc. v. Outdoor Adver. Bd.*, 339 N.E.2d 709, 717 (Mass. 1975); *Opinion of Justices*, 169 A.2d 762, 764 (N.H. 1961). In 1984 the Supreme Court cited *Berman* for the conclusion that “It is well settled that the state may legitimately exercise its police powers to advance esthetic values.” *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984).

²³⁸ *See Bobrowski, supra* note 12, at 707-08 (discussing post-*Berman* constitutional review of billboard laws). For an example of post-*Berman* deference, *see Jasper v. Commonwealth*, 375 S.W.2d 709, 711 (Ct. App. Ky. 1964) (stating that police power authority encompasses the aesthetic goal of enhancing scenic beauty).

of tourism, but this view is steadily shrinking.²³⁹ Of course, even jurisdictions that require a rationale other than aesthetics nevertheless accomplish the same result of upholding aesthetically-driven regulations, albeit indirectly.²⁴⁰

The Supreme Court has relied on *Berman* to uphold a variety of laws created in the interest of promoting aesthetics. In *Village of Belle Terre v. Boraas* (1974),²⁴¹ the Court upheld an ordinance limiting neighborhood residences to single families because “[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.”²⁴² In *Penn Central Transportation Co. v. New York City* (1978),²⁴³ the Court held that property owners were properly barred from erecting a large office tower on top of the historic Grand Central Terminal in New York, a plan which the Court characterized as “an aesthetic joke.”²⁴⁴ The Court deferred to the city by holding that its Landmarks Preservation Law appropriately promoted the general welfare²⁴⁵ and did not result in

²³⁹ In the decades since *Berman*, as one author notes, “Tracking the majority position on this issue has become a cottage industry.” Bobrowski, *supra* note 12, at 701 n.32. Bobrowski catalogues the various surveys which scholars have performed over the years to track states’ acceptance of aesthetics as a stand-alone regulatory rationale. The surveys show a significant trend toward greater acceptance of aesthetics:

See, e.g., RICHARD C. SMARDON & JAMES P. KARP, *THE LEGAL LANDSCAPE* 25, 26-27 (1993) (thirty states permit regulation for aesthetic purposes alone, five states do not, fifteen are undecided or have not considered the issue) (30/5/15). *See generally* Kenneth Regan, *You Can’t Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 *FORDHAM L. REV.* 1013 (1990) (20/26/5); Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 *UMKC L. REV.* 125 (1980) (16/16/9); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 *MICH. L. REV.* 1438 (1973) (14/23/14); Louis H. Massotti & Bruce I. Selfon, *Aesthetic Zoning and the Police Power*, 46 *J. URB. L.* 773 (1969) (7/35/8).

Bobrowski, *supra* note 12, at 701 n.32.

²⁴⁰ As one author notes, “[T]he property values rationale is but the latest in a series of ruses, in line with the regulations and decision in *St. Louis Gunning*, designed to camouflage the aesthetic purposes behind a local regulation.” Bobrowski, *supra* note 12, at 715.

²⁴¹ 416 U.S. 1, 9 (1974).

²⁴² *Id.* at 9. In the same opinion, the Court noted that in *Berman*, “We refused to limit the concept of public welfare that may be enhanced by zoning regulations.” *Id.* at 5.

²⁴³ 438 U.S. 104 (1978).

²⁴⁴ *Id.* at 117-18; *see also id.* at 129 (“States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.” (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

²⁴⁵ *Id.* at 125, 138.

a taking.²⁴⁶ The Court concluded that “[s]tates and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”²⁴⁷ Similarly, in *Members of City Council v. Taxpayers for Vincent* (1984)²⁴⁸ the Court upheld a law that banned private signs from public places on the grounds that eliminating visual clutter is a valid basis for regulation.²⁴⁹ Citing *Berman*, Justice Stevens wrote that “It is well settled that the state may legitimately exercise its police powers to advance esthetic values.”²⁵⁰

In addition to their increased deference to billboard regulation, courts have also become freer in denouncing the visual harm of outdoor advertising, in the same way that courts in the *St. Louis Gunning* era emphasized billboards’ risks to health and safety. Judges’ gratuitous criticism of the visual impact of advertising on communities and the countryside suggests that judges may sympathize with majoritarian dislike of billboards. As early as 1935, the Supreme Court of Massachusetts upheld a highway billboard ban to protect travelers “from annoying obtrusion of

²⁴⁶ *Id.* at 128-31. *Penn Central*’s unsympathetic attitude toward takings of private property parallels the denial of takings claims in billboard lawsuits. Although some early opinions did find that regulations “took” advertisers’ and landowners’ private property by keeping them from erecting outdoor advertisements, *supra* § II(C), the expanding police power soon superseded those property complaints. The police power remains sufficient justification for billboard regulation today, but now, courts often deny that any property rights are taken at all when billboards are restricted or banned. Instead, courts increasingly characterize billboards as exploiting a public resource—access to public roads and the public’s attention—such that banning billboards is not taking private property but depriving advertisers of the right to exploit public property. For example, in *Kelbro, Inc. v. Myrick*, 30 A.2d 527 (Vt. 1943), the court declared that

Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares.

Id. at 529. Courts’ attitude toward takings claims echoed one activist’s earlier observation that “Billboard advertising as now conducted is a business of unfair and special privilege, seeking to exploit for the benefit of a few the costly beauty of our cities while it destroys the natural beauty of our scenery.” McFarland, *supra* note 40, at 46. See generally Charles F. Floyd, *The Takings Issue in Billboard Control*, 3 WASH. U. J.L. & POL’Y 357, 358 (2000).

²⁴⁷ 438 U.S. at 129.

²⁴⁸ 466 U.S. 789 (1984).

²⁴⁹ *Id.* at 817.

²⁵⁰ *Id.* at 805 (citing *Berman*, 348 U.S. at 32-33).

commercial propaganda.”²⁵¹ A 1975 case in the same court characterized billboards as “visual pollution” and noted “the serious effects billboards have on the aesthetics of a locality.”²⁵² In 1967, a court described postwar growth in outdoor advertising as a “blight . . . upon the national landscape” whose “deleterious effects” have increased.²⁵³ Moreover, the court wrote, “Advertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction, and deterioration. They are just as much subject to reasonable controls, including prohibition, as enterprises which emit offensive noises, odors, or debris.”²⁵⁴

Just as remarkable, however, many courts have agreed that billboards can be regulated for aesthetic reasons without investigating the factual question of their aesthetic character or impact. Such courts apparently take for granted that billboards are ugly, or at least that billboards have *some* sort of visual impact and thus merit aesthetic regulation, regardless of the nature of the impact. Either way, these permissive decisions suggest that most judges approve of—indeed, probably share—the majority public dislike of billboards.

IV. CONTEMPORARY BILLBOARD REGULATION

Early billboard laws were generally modest, seeking only to limit the size or location of outdoor advertisements, but public pressure and judicial concurrence have resulted in increasingly restrictive regulations.²⁵⁵ By mid-century, many billboard lawsuits involved

²⁵¹ *Gen. Outdoor Adver. Co. v. Dep’t of Pub. Works*, 193 N.E. 799, 827 (Mass. 1935) (deferring to the legislature’s authority to regulate billboards within public view of highways); *see generally* Gardner, *supra* note 11 (evaluating this decision).

²⁵² *John Donnelly & Sons, Inc. v. Outdoor Adver. Bd.*, 339 N.E.2d 709, 718, 721 (Mass. 1975).

²⁵³ *Cromwell v. Ferrier*, 225 N.E.2d 749, 754-55 (N.Y. 1967).

²⁵⁴ *Id.* One could argue that judges used denunciatory rhetoric in their opinions to help justify their holdings, but their frequent and legally inessential emphasis on billboards’ ugliness nonetheless suggests the possibility that cultural viewpoints are being reflected in the judges’ rhetoric.

²⁵⁵ *See* U.S. BUREAU OF PUBLIC ROADS, *COMPILATION OF LAWS OF THE SEVERAL STATES IN FORCE ON JANUARY 21, 1928 DEALING WITH THE REGULATION OF OUTDOOR ADVERTISING* (1929) (collecting statutes related to billboard control from all fifty states).

challenges to outright bans on off-site advertising—that is, total bans on signs advertising businesses that are not located on the same property. For example, in *Hav-A-Tampa Cigar Co. v. Johnson* (1941),²⁵⁶ billboard owners challenged the constitutionality of a Florida statute that outlawed billboards within fifteen feet of highways throughout the state. The court followed “the obvious intent of the legislature” in upholding the expansive law as a valid exercise of the police power.²⁵⁷ Courts have generally accepted comprehensive billboard bans which carve out an exception for on-site signs under the theory that off-site advertising is merely a nuisance while on-site signs are necessary for commerce.²⁵⁸

In recent decades, billboard laws and resulting litigation have focused on highway billboards more than urban ones, reflecting the industry’s shift in emphasis toward highways. These cases also generally favor government regulation, due to the anti-billboard precedent in the courts and to judges’ particular sensitivity to billboards’ economic and visual impact on the natural landscape. For example, in 1961 the Supreme Court of New Hampshire pre-approved the constitutionality of a law which outlawed off-site highway billboards throughout the state.²⁵⁹ The ban was justified for safety reasons—to promote visibility and reduce distractions from highway signs—but also for the sake of scenery, since “New Hampshire is peculiarly dependent upon its scenic beauty to attract the hosts of tourists, the income from whose presence is a vital factor in our economy.”²⁶⁰ The court also noted that “interstate highways are built with taxpayers’ money to promote the general welfare and safety of the public by affording means of

²⁵⁶ 5 So.2d 433 (Fla. 1941).

²⁵⁷ *Id.* at 436.

²⁵⁸ *See, e.g., United Adver. Corp. v. Metuchen*, 198 A.2d 447, 450 (N.J. 1964) (“There are obvious differences between an on-premise sign and an off-premise sign. Even if the baleful effects of both be in fact the same, still in one case the sign may be found tolerable because of its contribution to the business or enterprise on the premises.”). The Supreme Court has also upheld this distinction. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 (1981) (affirming a prohibition on offsite advertising).

²⁵⁹ *Opinion of Justices*, 169 A.2d 762 (N.H. 1961). The enacted statewide ban is found at N.H. REV. STAT. ANN. §§ 236:69 to 236:89 (2005).

²⁶⁰ 169 A.2d at 764.

swift, safe and pleasurable travel for all, and not to secure commercial advantages for a limited number of advertisers.”²⁶¹ Other courts have agreed that unlicensed highway advertisements are properly characterized as unauthorized and noxious exploitation of public views rather than constitutionally sacrosanct uses of private property.²⁶²

A. The First Amendment Problem

After decades of failed efforts to show that billboard restrictions and bans are unconstitutional takings of private property, in recent decades outdoor advertisers have successfully undermined the judicial acceptance of billboard laws by challenging the laws on First Amendment grounds. This new trend in billboard jurisprudence arose from a collision of regulatory history and evolving common law in the 1970s: state and local governments were instituting sweeping billboard bans at the same time as the Supreme Court was developing a commercial speech doctrine. With this doctrine, the Court recognized a degree of First Amendment protection for commercial speech such as advertising, based on the public’s right to have access to this information. The commercial speech doctrine led the Court to reconsider the free speech implications of billboard controls, and since then courts have often overturned regulatory ordinances as unconstitutionally overbroad because of their effect on the public’s or advertisers’ free speech rights.²⁶³

²⁶¹ *Id.* at 763.

²⁶² *See, e.g.,* *Perlmutter v. Greene*, 182 N.E. 5, 7 (N.Y. 1932) (“No contract exists between the State and the owner that the latter may forever use his property to erect billboards anywhere along the highway; no right *in rem* exists, for the adjacent owner has no title to the highway.”). The public seems to agree, as illustrated by this author:

Taxpayers, however, pay for the roads. We buy the cars. We supply the gas. Billboard companies acquire a sliver of the adjoining land and presume to invite themselves onboard as the motorists’ guest. Their vanity has no mute button. There is no off switch. Our eyes cannot be averted. One billboard company’s website promises that: “outdoor boards are unavoidable, unstoppable.” In short, the motorist’s personal freedom of thought involuntarily becomes a billboard company’s merchandise.

Rohe, *supra* note 183, at 30.

²⁶³ *See generally* Lynch, *supra* note 11 (describing the trend toward billboard laws being struck down for free speech reasons).

As previously described, earlier billboard cases mostly involved due process challenges to municipal authority, pursuant to the police power, to “take” private property by imposing billboard controls or bans.²⁶⁴ Even though it seems self-evident today that billboards are a form of speech and therefore create First Amendment concerns, the early cases did not address this issue because the Supreme Court had not yet applied the First Amendment to commercial speech.²⁶⁵ The Court reiterated the unprotected state of commercial speech as recently as 1942, explaining then that “the Constitution imposes no such restraint on government as respects [the regulation of] purely commercial advertising.”²⁶⁶ The Court retreated from this position and began to recognize free speech rights for commercial speech in a series of decisions beginning with *Bigelow v. Virginia* in 1975,²⁶⁷ in which the Court built on prior decisions to hold that “speech is not stripped of First Amendment protection merely because it appears [as paid commercial advertisements].”²⁶⁸ As the Court explained the following year in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*,²⁶⁹ the informational value of commercial speech to consumers gives it constitutional weight because “there is a right to receive information and ideas.”²⁷⁰ *Virginia Pharmacy* held that the state could not prevent pharmacists from advertising the costs of drugs because consumers had a First Amendment right to commercial information.

²⁶⁴ See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 498 n.7 (1981) (describing the Court’s early billboard jurisprudence).

²⁶⁵ *Id.* at 498 (“Early cases in this Court sustaining regulation of and prohibition aimed at billboards did not involve First Amendment considerations. See *Packer Corp. v. Utah*, 285 U.S. 105 (1932); *St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917).”). Moreover, as a whole, First Amendment doctrine was less developed earlier in the twentieth century.

²⁶⁶ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

²⁶⁷ 421 U.S. 809 (1975).

²⁶⁸ *Id.* at 818.

²⁶⁹ 425 U.S. 748 (1976).

²⁷⁰ 425 U.S. at 757; see also *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“*Central Hudson*”) (elaborating upon the commercial speech doctrine).

The commercial speech doctrine added an additional level of constitutional scrutiny for assessing the constitutionality of outdoor advertising. While a broadened police power remained sufficient to meet most Fourteenth Amendment due process challenges, courts now had to examine whether regulations affecting commercial speech, in particular, nonetheless adversely affect the First Amendment. This doctrine was first applied to billboards in the landmark decision *Metromedia, Inc. v. City of San Diego* (1981),²⁷¹ where the Supreme Court for the first time overruled a billboard regulation on free speech grounds.²⁷² Several advertising companies had challenged a city ordinance which intended to “preserve and improve the appearance of the city” by outlawing all outdoor advertisements except for on-site signs.²⁷³ The Court’s opinion began by approving the billboard law’s safety and aesthetic rationales.²⁷⁴ It also found that the city’s regulation satisfied the constitutional test for limitations on commercial speech established a year earlier in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.²⁷⁵ *Central Hudson* had held that regulation of commercial speech is only valid if the limitation directly advances a substantial government interest and is not overbroad,²⁷⁶ in *Metromedia* the billboard law specifically advanced the city’s substantial interest in beautification and safety.²⁷⁷ However, the majority in *Metromedia* nonetheless struck down the ordinance because it unconstitutionally

²⁷¹ 453 U.S. 490 (1981).

²⁷² For more on the development of the Supreme Court’s commercial speech doctrine and its application to billboards in *Metromedia*, see Lynch, *supra* note 11, at 433-45.

²⁷³ 453 U.S. at 493-96.

²⁷⁴ *Id.* at 507-08 (White, J.) (plurality opinion); see also *id.* at 528, 530 (Brennan & Blackmun, JJ., concurring) (agreeing that traffic safety and aesthetics are valid regulatory goals); *id.* at 560 (Burger, C.J., dissenting) (“The plurality acknowledges—as they must—that promoting traffic safety and preserving scenic beauty ‘are substantial governmental goals.’”).

²⁷⁵ *Central Hudson*, 447 U.S. 557, 564 (1980) (establishing the Court’s commercial speech test). The *Central Hudson* test was restated in *Metromedia*, 453 U.S. at 507, as follows:

- (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it
- (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and
- (4) reaches no further than necessary to accomplish the given objective.

²⁷⁶ 447 U.S. at 566.

²⁷⁷ 453 U.S. at 507-12 (applying *Central Hudson*’s test to the billboard ordinance).

burdened non-commercial speech—which enjoys greater constitutional protection than commercial speech—since the advertising ban included non-commercial billboard content.²⁷⁸ Based on the new commercial speech doctrine, for the first time the Court identified and distinguished the “noncommunicative” aspects of billboards—their physical presence and aesthetic impact on their surroundings, which could be regulated—from their “communicative” aspects, namely their speech content, which the government could restrict only within prescribed limits.²⁷⁹

By introducing the new variable of advertisers’ and consumers’ free speech rights, *Metromedia* created a sea change in billboard jurisprudence and shifted the legal playing field toward advertisers.²⁸⁰ Many courts have since struck down billboard regulations by finding that protection of commercial speech overrules the police power’s deference to public desire to suppress outdoor advertisements.²⁸¹ On at least three occasions since *Metromedia* the Supreme Court has favored outdoor advertisers on free speech grounds, although the opinions range beyond the issue of billboards. In *City of Cincinnati v. Discovery Network, Inc.* (1993),²⁸² the Court struck down a ban on commercial handbills because the law was overbroad, with negative effects on advertisers’ First Amendment rights that outweighed the city’s stated aesthetic goals

²⁷⁸ 453 U.S. at 513-15. Chief Justice Burger and Justice Rehnquist both offered strong dissents that called attention to the Court’s previous deference to cities’ regulatory power over billboards. Burger described billboards as “visual pollution” and “ugly and dangerous eyesores,” *id.* at 559, 561, and complained that the majority opinion “exhibits insensitivity to the impact of these billboards on those who must live with them and the delicacy of the legislative judgments involved in regulating them.” *Id.* at 556.

²⁷⁹ *Id.* at 502 (“As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium, but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects.”) (internal citation omitted).

²⁸⁰ For more on *Metromedia*’s implications for future billboard regulation, see, for example, Aronovsky, *supra* note 11; Bond, *supra* note 11; Keith B. Leffler, *The Prohibition of Billboard Advertising: An Economic Analysis of the Metromedia Decision*, 1 SUP. CT. ECON. REV. 113 (1982); Loshin, *supra* note 11, at 155-59 (discussing *Metromedia* and subsequent Court opinions).

²⁸¹ See, e.g., *Metromedia, Inc. v. Mayor of Baltimore*, 538 F. Supp. 1183 (D. Md. 1982) (finding that a billboard regulation unconstitutionally burdened noncommercial speech); *Georgia v. Café Erotica, Inc.*, 507 S.E.2d 732 (Ga. 1998) (finding that billboards advertising a strip club are protected speech).

²⁸² 507 U.S. 410 (1993).

for regulating.²⁸³ In *City of Ladue v. Gilleo* (1994),²⁸⁴ the Court declared a city ordinance unconstitutional because it suppressed an entire medium of speech by preventing homeowners from displaying signs on their property.²⁸⁵ Most recently, in *Lorillard Tobacco Co. v. Reilly* (2001),²⁸⁶ the Court struck down a statewide ban on outdoor tobacco advertising because it was overbroad and thus failed the *Central Hudson* test for the constitutionality of commercial speech restrictions.²⁸⁷

Note that the advent of free speech concerns in billboard litigation does not signal a judicial retreat from courts' prior alignment with public opinion regarding the value of billboard controls. On the contrary, this new variable in billboard law merely reflects the inevitable application of a broader and conflicting trend in the common law, namely the development of a commercial speech doctrine.²⁸⁸ To the extent that the mixed legacy of recent billboard opinions suggests a softening of public pressure on judges to find in favor of regulators, such softening undoubtedly reflects a legacy of past regulatory successes and a shift in public attention toward newer forms of advertising media, such as television and the Internet.²⁸⁹ Over the course of a century of legislation and litigation, regulators succeeded in constraining the originally

²⁸³ *Id.* at 419, 425.

²⁸⁴ 512 U.S. 43 (1994).

²⁸⁵ *Id.* at 55; see also Stephanie L. Bunting, Note, *Unsung Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in City of Ladue v. Gilleo*, 20 HARV. ENVTL. L. REV. 473 (1996).

²⁸⁶ 533 U.S. 525 (2001).

²⁸⁷ *Id.* at 561 ("The broad sweep of the regulations indicates that the Attorney General did not 'carefully calculate the costs and benefits associated with the burden on speech imposed' by the regulations.") (citing *Discovery Network*, 507 U.S. at 417). But see *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding a law banning private signs from public places, albeit on police-power grounds rather than First Amendment ones). See generally Calo, *supra* note 11 (discussing these cases).

²⁸⁸ As Michael Klarman notes, "judicial decision making involves a combination of legal and political factors." *Supra* note 124. In this case, the First Amendment has become a sufficiently powerful legal factor to partially supersede public dislike of billboards and judges' interest in accommodating that dislike. The fact that public opinion cannot always determine the outcome of these cases does not mean that the underlying political disfavor toward outdoor advertising has changed. Moreover, to the extent that Americans support the principle of free speech, the new generation of cases merely reflects a more nuanced combination of public opinions on this topic.

²⁸⁹ As early as 1955, a scholar suggested that "This victory over ugliness is undoubtedly due largely to the growth of other more effective advertising mediums—newspapers, magazines, radio, and television—with a resultant lessening of demand by business interests for billboard space and community protection." Dukeminier, *supra* note 12, at 233-34.

unregulated and grossly intrusive billboard industry, so public opinion served its purpose and accomplished its goal. Overall, the accommodation of free speech concerns should be viewed more as an added nuance to contemporary doctrine rather than as an indication of backtracking of public desire or judicial willingness to control billboards.

The commercial speech doctrine certainly has not prevented contemporary courts from accepting aesthetic rationales for billboard regulation or continuing to criticize outdoor advertisements in their opinions. The Supreme Court illustrates the now unquestioned agreement that advertisements can be regulated simply because they are unattractive nuisances. In *Metromedia* the Supreme Court found that “billboards by their very nature, wherever located and however constructed, can be perceived as an ‘esthetic harm.’”²⁹⁰ In *City of Ladue* the Court referred to the “visual clutter” of highway billboards,²⁹¹ and in *Members of City Council v. Taxpayers for Vincent* (1984),²⁹² the Court concluded, “The problem addressed by this ordinance—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City’s power to prohibit.”²⁹³ This rhetoric reinforces the conclusion that judges (like the American public) see billboards as an aesthetic problem that deserves regulatory control, albeit regulation that is now qualified by countervailing free speech concerns.

B. The OAAA and Scenic America

The longstanding struggle over the aesthetics of billboards has pitted the advertising industry and landowners against the American public, with public interests generally represented by activists, scholars, legislatures, and judges. This conflict continues to present both legal and

²⁹⁰ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981).

²⁹¹ 512 U.S. at 58.

²⁹² 466 U.S. 789 (1984); *see also supra* notes 237, 287 and accompanying text (previous references to this opinion).

²⁹³ *Id.* at 807. *Taxpayers for Vincent* addressed the problem of lawn signs, not billboards, but the Court’s concern with visual pollution is shared by both opinions.

cultural components. The industry and the public continue to contest not only the legal scope of advertisers' rights—Where can billboards be placed? How large can they be?—but also the cultural identity of billboards in American culture—Are billboards indeed a nuisance and visual blight, or are they informative and artistic?

Scenic America and the Outdoor Advertising Association of America (OAAA) are the principal advocacy groups working on billboards today, and they aptly illustrate the contemporary debate over the merits of outdoor advertising.²⁹⁴ Scenic America is a non-profit organization which leads the nationwide crusade against billboards, the modern-day successor in spirit to the turn-of-the-century American Civic Association. Scenic America endeavors to “safeguard America’s natural beauty and community character” by advocating for strict regulation of outdoor advertising, among other goals, because “Nothing destroys the distinctive character of our communities and the natural beauty of our countryside more rapidly than uncontrolled signs and billboards.”²⁹⁵ Scenic America declares that billboards are a public nuisance because they distract drivers, add visual clutter to communities, impose upon individuals’ privacy, and often lead to further commercial blight in formerly undeveloped areas.²⁹⁶ Some of these concerns—distraction of drivers, visual clutter, and unattractiveness—echo the types of concerns which courts frequently rely on in upholding billboard regulations.²⁹⁷

Scenic America offers contemporary opinion polls which indicate that the American public overwhelmingly considers billboards to be ugly, intrusive, and uninformative,²⁹⁸ echoing

²⁹⁴ Scenic America, <http://www.scenic.org> (last visited Mar. 30, 2007); OAAA, <http://www.oaaa.org> (last visited Mar. 30, 2007).

²⁹⁵ Scenic America, Mission Statement, <http://www.scenic.org/mission> (last visited Mar. 30, 2007); Scenic America, Background on Billboards, <http://www.scenic.org/billboards> (last visited Mar. 30, 2007).

²⁹⁶ SCENIC AMERICA, *supra* note 195, at 5-9.

²⁹⁷ *Supra* § III(C).

²⁹⁸ Scenic America, Opinion Polls: Billboards are Ugly, Intrusive, and Uninformative, <http://www.scenic.org/billboards/background/opinion> (last visited Mar. 30, 2007). The overwhelming support for a statewide ban on billboards in Alaska, which passed by a margin of seventy-two percent to twenty-eight percent,

the conclusions of earlier surveys.²⁹⁹ The organization also disputes the industry's argument that billboards are important to the economy; on the contrary, Scenic America argues that "billboard control improves community character and quality of life, both of which directly impact local economies."³⁰⁰ Scenic America also explains how to campaign for and enact new billboard laws, and the organization offers model local and state ordinances as guidance.³⁰¹ The American Planning Association and the Southern Environmental Law Center, among other organizations, share Scenic America's goal of strictly regulating the outdoor advertising industry.³⁰²

The Outdoor Advertising Association of America, on the other hand, is the primary trade organization of the outdoor advertising industry. The OAAA represents more than a thousand outdoor advertising companies which together account for over ninety percent of industry revenue.³⁰³ The OAAA offers leadership and guidelines, marketing research, consumer

offers added evidence of public opinion emphatically aligned against billboards. SCENIC AMERICA, *supra* note 195, at 4.

²⁹⁹ A 1957 poll found that seventy percent of respondents favored billboard restrictions on the new interstate highway system and a 1960 poll in *Harper's Magazine* found that eighty-three percent of respondents favored "the total abolition of billboards." Moore, *supra* note 11, at 193. *See also supra* note 60 (citing a 1908 survey finding that a majority of visitors to Niagara Falls disliked the advertisements surrounding the Falls).

³⁰⁰ SCENIC AMERICA, *supra* note 195, at 62; *see also* Scenic America, Billboards by the Numbers, <http://www.scenic.org/billboards/background/numbers> (last visited Mar. 30, 2007); Scenic America, Billboard Control is Good for Business, <http://www.scenic.org/billboards/background/business> (last visited Mar. 30, 2007); Scenic America, Communities Prohibiting Billboard Construction, <http://www.scenic.org/billboards/background/communities> (last visited Mar. 30, 2007).

³⁰¹ SCENIC AMERICA, *supra* note 195. In order to make the model ordinances constitutional, according to established billboard case law, the model laws comprehensively declare that billboards distract drivers, threaten beautiful landscapes, hurt property values and tourism revenue, and are unnecessary as sources of information. The ordinances ban "off-site" advertisements while allowing "on-site" signs for businesses located on the same property as the sign, which is a distinction that courts make and billboard opponents accept. *Supra* note 245. The model ordinances allow off-site noncommercial (i.e. informational) messages, as well, to forestall possible First Amendment challenges in light of *Metromedia*. Model billboard regulations date back as early as 1908, when the American Civic Association first offered samples of fledgling billboard controls. THE BILLBOARD NUISANCE, *supra* note 26, at 18-20, 23-28.

³⁰² The American Planning Association has posted a Policy Guide on Billboard Controls on its website, <http://www.planning.org/policyguides/billboards.html> (last visited Mar. 30, 2007), and at least two other groups have also published manuals for creating anti-billboard legislation. *See* STANFORD ENVIRONMENTAL LAW SOCIETY, A LEGAL HANDBOOK FOR BILLBOARD CONTROL (1976); SOUTHERN ENVIRONMENTAL LAW CENTER, VISUAL POLLUTION AND SIGN CONTROL: A LEGAL HANDBOOK ON BILLBOARD REFORM (1987).

³⁰³ OAAA, About OAAA, <http://www.oaaa.org/about/> (last visited Mar. 30, 2007); Press Release, Outdoor Ad Revenue Continues Double-Digit Growth, *supra* note 177.

relations, and governmental lobbying to the outdoor advertising industry.³⁰⁴ The association reports that outdoor advertising continues to thrive, despite the ongoing onslaught of restrictive laws and outright bans. The industry has experienced a twenty-fold increase in revenue since 1970, it continues to experience double-digit revenue growth, and its clients spent \$6.8 billion on outdoor advertising in 2006.³⁰⁵ The OAAA also counters Scenic America's public polling with more favorable surveys of public opinion, although the industry's surveys mostly show that some Americans consider billboards to be *informative*, carefully sidestepping the question of whether billboards are unattractive.³⁰⁶

While not directly disavowing the idea that billboards are ugly, the OAAA argues that billboards are historically and artistically important; they are informative and unobtrusive; they add "excitement and appeal to urban areas;" and they "bring creative art, humor and energy to the roadway landscape."³⁰⁷ Of course, as the case law makes clear, courts have generally been indifferent to, if not in open disagreement with, this sympathetic view of billboards.³⁰⁸ The OAAA is also misguided in its legal conclusion about billboards' visual impact. The organization takes the position that "It is not acceptable to use aesthetics to rationalize against the promotion of legal products or the exercise of free expression guaranteed by the First Amendment to the Constitution." This conclusion directly contravenes the majority judicial

³⁰⁴ OAAA, Mission Statement, <http://www.oaaa.org/about/mission.asp> (last visited Mar. 30, 2007).

³⁰⁵ *Id.*; OAAA, Outdoor Advertising Expenditures, 1970-2006, http://www.oaaa.org/outdoor/facts/Historical_Expenditures.pdf (last visited Mar. 30, 2007); OAAA, Facts and Figures, <http://www.oaaa.org/outdoor/facts> (last visited Mar. 30, 2007).

³⁰⁶ The types of billboards that consumers usually find informative are highway advertisements that include directional information for motorists, as compared to urban billboards that focus on product advertising. *See* Floyd, *supra* note 245 (making this distinction between urban and rural billboards); OAAA, Polls and Surveys, <http://www.oaaa.org/government/polls.asp> (last visited Mar. 30, 2007) (presenting this inferable distinction in their survey results). Advertisers argue that billboards are informative as a means of promoting their public value, but the federal government has addressed this public need by creating official highway signs that advertise food, lodging, and gas facilities available at each exit, and by creating tourist information centers along the highways. *See* Johnson, *supra* note 34, at 143-47 (describing the development of tourist information centers).

³⁰⁷ OAAA, Legislative Issues: Aesthetics, <http://www.oaaa.org/government/Issues/issue.asp?id=13> (last visited Mar. 30, 2007).

³⁰⁸ *Supra* §§ II(D), III(C).

opinion that billboards may be regulated for aesthetic reasons, although it does reflect the fact that free speech concerns have complicated legislatures' regulatory efforts.³⁰⁹

C. Modern Billboard Regulation

The United States has experienced more than a century of debate and legal struggle over advertisers' right to display outdoor advertisements to public passers-by. The legacy of billboard regulation in this country is mixed, illustrated by the somewhat unsuccessful efforts of the Highway Beautification Act and by the advent of First Amendment concerns with *Metromedia*. Even the advertising industry can claim partial victory in the struggle for public favor, regulatory controls, and judicial sympathy.³¹⁰ Nevertheless, judicial approval of billboard laws in a majority of constitutional challenges brought by advertisers has allowed for widespread and far-reaching restrictions on the appearance, size, and location of outdoor advertising in contemporary America. At least a thousand cities have instituted total bans or tough restrictions on outdoor advertisements, including cities as large as Houston, which recently prohibited new billboards from being erected and required that existing ones be removed by 2013.³¹¹

Local governments have the most control over billboards—that is where “the real billboard action occurs,” as Scenic America puts it—because municipalities are responsible for issuing permits for all billboards within their jurisdiction, whether for local, state, or federal roads.³¹² Local governments are also authorized to regulate local billboards pursuant to the

³⁰⁹ OAAA, Legislative Issues: Aesthetics, *supra* note 307; *supra* § III(C) (discussing aesthetic zoning jurisprudence). The OAAA also presents industry positions on many other topics, including traffic safety, taxes, scenic byways, and alcohol and tobacco advertising. OAAA, Key Issues, <http://www.oaaa.org/government/Issues> (last visited Mar. 30, 2007).

³¹⁰ For example, most people continue to believe that billboards are unattractive and irritating, but some agree that billboards can be informative. THE BILLBOARD NUISANCE, *supra* note 26, at 31-32; Scenic America, Opinion Polls, *supra* note 297; OAAA, Polls and Surveys, *supra* note 305.

³¹¹ SCENIC AMERICA, *supra* note 195, at 3, 11-12; *see also, e.g.*, CHARLOTTESVILLE, VA., CODE § 34-1024 (2006) (banning new off-site signs in the city); § 34-1026 (allowing exceptions from the city ban for historic markers, professional name-plates, political signs, and traffic signs).

³¹² SCENIC AMERICA, *supra* note 195, at 13.

police power. Scenic America therefore emphasizes local activism, recommending a three-step process of increasingly comprehensive citywide billboard bans, beginning with temporary and then permanent moratoriums on new construction and culminating with the removal of existing billboards.³¹³ Many state governments have also developed comprehensive outdoor advertising laws, in part to avoid partial loss of highway funding pursuant to a requirement of the Highway Beautification Act.³¹⁴

Because municipal authority to regulate billboards is sometimes superseded now by advertisers' First Amendment challenges, Scenic America encourages regulators to take note of the evolving legal doctrine in this field.³¹⁵ Fortunately for governments and activists, *Metromedia's* legacy has complicated regulatory efforts but has hardly debilitated them. Scenic America counsels that billboard regulations will probably be upheld by any contemporary court, even taking into account the issue of advertisers' free speech rights, as long as the laws conform to guidelines for commercial speech restrictions established by the Supreme Court. As they explain, restrictive laws must directly advance substantial state interests, not impose on commercial speech any more than necessary, leave open alternate means of communication (such as newspapers and magazines), and be content-neutral and impartially administered.³¹⁶

Despite a century of lawmaking intended to curb the appearance, placement, and scale of outdoor advertisements, local, state, and federal laws have not seriously affected the continuing

³¹³ *Id.* at 14-15.

³¹⁴ *See Lynch, supra* note 11, at 423 n.27 (collecting outdoor advertising statutes in forty-seven states in 1986). Virginia's highway-advertising law, for example, is grounded in the same range of police-power justifications that have been tested and approved in court over the decades: promoting highway safety, tourism, "natural scenic beauty," and most generally the "general welfare of the Commonwealth." VA. CODE ANN. § 33.1-351 (2006).

³¹⁵ SCENIC AMERICA, *supra* note 195, at 34-40.

³¹⁶ *Id.* at 35-36. These guidelines take into account the constitutional test for commercial-speech regulation established in *Central Hudson*, 447 U.S. 557 (1980), *supra* notes 274-75. The guidelines also reflect the Supreme Court's opinion in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), which held that completely prohibiting residential yard signs left homeowners no effective way of communicating constitutionally-protected political speech.

growth and profitability of the outdoor advertising industry.³¹⁷ Although four states have outlawed billboards entirely, and over 1500 communities have banned new billboard construction,³¹⁸ the amount of money spent on outdoor advertising reached \$6.8 billion in 2004, as previously mentioned,³¹⁹ driven in part by rental fees upward of \$100,000 a month for prime billboard locations.³²⁰ Several outdoor advertising corporations are worth billions of dollars and have enjoyed significant gains in stock value in recent years.³²¹ Given the compelling economic incentives that drive the outdoor advertising industry and the entrenched public resistance manifested by groups such as Scenic America, the cultural, legislative, and judicial struggle over billboards' place in the American landscape and cityscape is likely to continue indefinitely.

V. CONCLUSION: BILLBOARDS, AESTHETICS, AND THE POLICE POWER

Over the course of the twentieth century, American courts came into agreement with the American public that billboards are unattractive and could be regulated for that reason alone. This gradual acceptance of aesthetic regulation of outdoor advertising mirrored broader developments in constitutional law and American history. In the nineteenth century, courts defined the government's regulatory power quite narrowly, reflecting their deference to property rights and the relatively modest scope of the law in that period. Then, as cities modernized and became more crowded at the turn of the twentieth century, individual liberty necessarily gave

³¹⁷ OAAA, Outdoor Ad Revenue Continues Double-Digit Growth, *supra* note 177; OAAA, Outdoor Advertising Expenditures, 1970-2006, *supra* note 304.

³¹⁸ SCENIC AMERICA, *supra* note 195, at 11-12; Scenic America, Communities Prohibiting Billboard Construction, *supra* note 299; Scenic America, Billboard Control is Good for Business, *supra* note 299. The four states with total billboard bans are Vermont, Hawaii, Alaska and Maine. *Id.*

³¹⁹ *Supra* note 305.

³²⁰ GUDIS, *supra* note 9, at 239-40.

³²¹ *Id.* at 226, 240-41. After the billboard company Outdoor Systems went public in the late 1990s, its stock rose 1,460 percent, rivaling the gains of Internet giants such as Yahoo! and Amazon.com. *Id.* at 241.

way to regulatory compromises in the interest of the public good.³²² The history of billboard laws and the judiciary's increasing deference to them thereby illustrates a broader shift toward the pervasive regulation of everyday life in modern America.

The legal history of billboards is notable for the judicial system's remarkable willingness and ability to accommodate the public's dislike of these signs. Not only have courts accepted billboard controls as valid state objectives, but the judiciary has frequently articulated and concurred with public concerns about the nuisances of outdoor advertising. There are both cultural and legal explanations for this commonality between courts and the public. On a cultural level, courts reflect public opinion of billboards because the legal system is subsumed within the broader society: judges are citizens too, and they are susceptible to the same cultural biases as the public at large.³²³ As G.E. White explains, "judging is bound to reflect the governing social and intellectual assumptions of various periods in American history, and . . . its relation to its social context is one of total integration."³²⁴ Through the process of determining the legal outcomes of cases, particularly those involving indeterminate constitutional issues that require greater judicial discretion to resolve, judges express the same underlying values as the American public they serve. In the case of billboard law, those values include the importance of aesthetic beauty, pastoral purity, community pride, and freedom from unwelcome commercial

³²² See *supra* note 85 (citing *City of Aurora v. Burns*, 319 Ill. 84, 93 (1925) ("The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State . . . to limit individual activities to a greater extent than formerly.")).

³²³ With regard to billboard law, one author observed that "the decisions of our courts do reflect the changing conditions, the changing attitudes, and even the changing tastes of the people they affect." Barkofske, *supra* note 11, at 534; see also *supra* note 17 and accompanying text (similar arguments). This fact of the judiciary's cultural place within a broader American society leads to two observations. First, it offers support for Barry Friedman's theories of judicial review as "mediated popular constitutionalism" and "dialogue," *supra* note 17, which describe his general conclusion that judicial review is much more majoritarian than commonly thought. In effect, as an earlier author explained, "public opinion when sufficiently crystallized and permanent, makes the law." Chandler, *supra* note 12, at 474. Second, this sociological approach to judicial review also suggests that legal history is necessarily subsumed within social history. See generally KLARMAN, *supra* note 15 (illustrating the ways in which judicial outcomes are determined through a mixture of legal doctrine and sociopolitical influences).

³²⁴ WHITE, *supra* note 17, at 6.

messages.³²⁵ Billboard law thus illustrates the “reflective function” of the American judicial system, as one author put it, whereby “courts have reflected the changing views of the nation in placing more emphasis on the aesthetic side of life.”³²⁶ Indeed, the confluence of public opinion and judicial opinion regarding billboards seems to support one scholar’s classic observation that “judges, as well as the public, are moved by aesthetic considerations.”³²⁷

As a matter of legal mechanics, courts were able to satisfy public demand for billboard controls because the police power is a flexible and now very expansive legal doctrine, giving judges more than enough discretion to define and accommodate the public interest.³²⁸ The elasticity of the police power mirrors the general indeterminacy of constitutional law, where, in the absence of objective legal standards, imprecise social values necessarily become the (often-unacknowledged) standard of judgment.³²⁹ Justice Holmes made this link between cultural desires and judicial outcomes legitimate and doctrinally explicit, thereby helping to pave the way for courts to accommodate public dislike of billboards, when he declared in *Noble State Bank v. Haskell* (1911) that municipal police power is indexed to public opinion.³³⁰ Lower courts eagerly adopted Holmes’s declaration that public opinion determined the scope of legislative

³²⁵ See, e.g., Kimberly Smith, *Mere Taste: Democracy and the Politics of Beauty*, 7 WIS. ENVTL. L.J. 151, 155 (2000) (“Americans have persistently endorsed beauty as an independent policy goal since the latter half of the nineteenth century.”).

³²⁶ Barkofske, *supra* note 11, at 535.

³²⁷ H.S.V.S., *supra* note 11, at 106; cf. *supra* note 226 and accompanying text (prior reference to this quotation).

³²⁸ This observed correlation between legal flexibility and politically-favorable judicial outcomes coincides with Michael Klarman’s general conclusion that “Constitutional law generally has sufficient flexibility to accommodate dominant public opinion” KLARMAN, *supra* note 15, at 449.

³²⁹ See *id.* at 5 (“[B]ecause constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”).

³³⁰ 219 U.S. 104, 111 (1911) (“[T]he police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.”). For further discussion, see *supra* note 90 and accompanying text.

regulatory authority because it “so met the needs of the times,” namely the public pressure toward greater regulation of modern American life.³³¹

Judicial accommodation of the public desire to suppress billboards is a proper and desirable illustration of the American common-law system at work.³³² Our legal system is designed so that courts can promote the public good as they see fit, in response to changing conditions in American society. As Guido Calabresi has observed, “the object of law is to serve human needs.”³³³ In the case of billboards, the public “needed” to be free to regulate this unpopular advertising medium, and courts accommodated that desire. Judicial approval of billboard controls illustrates how courts have helped Americans adjust to changing social conditions—first urbanization and a booming consumer economy, and later the growth of automobiles and highways—by evolving the common law to uphold increasingly expansive governmental intervention into modern American life. Land use regulation the not the only area that reflects the legal principle that law should reflect evolving social needs; the law of negligence, for example, is based on standards of “reasonableness,” an inherently open-ended doctrine which requires judges and juries to apply social and moral standards of behavior.³³⁴

Indeterminate legal standards such as the elastic police power are vulnerable to criticism for lacking a moral standard or built-in restraints, but in fact, the majoritarian and public-serving outcome of the judicial process *is itself* the moral principle at work. Moreover, the restraint built into a publicly-responsive legal system is embodied in the institutional limitations of a judiciary

³³¹ Goodrich, *supra* note 11, at 131. Another scholar appropriately described Holmes’s work as “sociological jurisprudence,” Barkofske, *supra* note 11, at 534, although this legal movement is most commonly associated with the turn-of-the-century scholar Roscoe Pound. See WALTER F. MURPHY ET AL., COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 14 (6th ed. 2006) (describing Pound’s work).

³³² As one author noted, billboard jurisprudence favorably shows that “the views of the people which courts’ rulings affect are reflected in the decisions.” Barkofske, *supra* note 11, at 543.

³³³ Calabresi, *supra* note 89, at 105.

³³⁴ See Kenneth S. Abraham, *The Trouble With Negligence*, 53 VAND. L. REV. 1187, 1190 (2001) (noting that assessing “the level and nature of care that are reasonable in a given situation” in negligence cases necessarily involves “the finder of fact’s own general normative sense of the situation”).

that is ultimately dependent on public opinion for its approval and continued relevancy.³³⁵

Indeed, publicly responsive yet indeterminate legal doctrines not only promote the public good better than more rigid rules would; judicial responsiveness to public opinion surely also reflects reasonably-held public expectations about courts' responsiveness to public needs.³³⁶

³³⁵ See WHITE, *supra* note 17, at xxv-xxvi; Scheb & Lyons, *supra* note 17.

³³⁶ Carol Rose, in her famous article *Crystals and Mud in Property Law*, explained in part the counterintuitive observation that “muddy” (i.e., indeterminate) legal rules may in fact be more clear and certain than rigid rules, since they match public expectations that the law will respond to parties’ unique and evolving needs. Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 609 (1988).