

## PROPERTY IN THE HORIZON: THE THEORY AND PRACTICE OF SIGN AND BILLBOARD REGULATION

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### ABSTRACT:

*This article is the first piece of legal scholarship to address the land use issues associated with signs and billboards in a comprehensive and systematic manner. Although other scholars have addressed signs as a category of First Amendment law, the land use side of the sign issue has been neglected. Signs are a pervasive form of land use, and they pose distinctive practical and theoretical problems for land use law and policy. Yet, the land use literature has rarely treated signs as such. This article seeks to fill the void.*

*The article has three principal aims. First, it provides a comprehensive history of sign and billboard disputes, using one city's century-long experience as a case study. The article relies on original research from primary sources to explain how and why patterns of sign land use and sign regulation have evolved over time. It pays special attention to the economics of signs and the public choice aspects of sign regulation. Secondly, the article uses lessons gleaned from this history to construct a framework for thinking about sign regulation. It examines how signs relate to concerns about nuisance, aesthetics, information, and expression. It also corrects certain conceptual mistakes made by judges and policymakers. Finally, the article evaluates the regulatory tools available for controlling sign land use. It critiques some common approaches to regulating signs, and it argues that sign regulation should embrace alternative regulatory tools, such as nuisance law and taxation, which have so far been underutilized and underappreciated.*

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The charming landscape which I saw this morning, is indubitably made up of some twenty or thirty farms. Miller owns this field, Locke that, and Manning the woodland beyond. But none of them owns the landscape. There is a property in the horizon which no man has but he whose eye can integrate all the parts, that is, the poet.  
– Ralph Waldo Emerson<sup>1</sup>

Who owns the landscape? Emerson's words evoke this central question in the law and policy of land use – a conflict between landowners, neighbors, passersby, and yes, even poets. Each claims a portion of the horizon as one's own, yet the claims inevitably conflict. The landowner seeks to make full use of her parcel of land and wishes not to be bothered by the predilections attached to the intruding eyes of others. The neighbor, however, cannot help that he has eyes and that the landscape therefore intrudes upon him, affecting enjoyment of his own land. The passerby, meanwhile, uses her eyes to appreciate the landscape as a whole and seeks to make it as pleasing and useful as possible. And finally, the poet. He sees in the landscape a potential for Beauty, an aspiration beyond the personal interests and material needs of any one person.

Emerson notwithstanding, this knotty collection of reasonable interests cannot be resolved with the poet's pen alone. It demands also the pen of the lawmaker. Law fashions the rules that allocate property in the horizon; the legal landscape determines our visual one. Cognizant of this fact, legal scholars have devoted considerable attention to some aspects of property in the horizon – “aesthetic regulation,” as it has been called.<sup>2</sup> However, less time has been devoted to one such aspect: the use of one's land to display a sign or billboard to the public.

Throughout history, signs have been pervasive, and the desire to regulate them has been equally so. Signs are perhaps the oldest form of mass communication. Indeed, the oldest known advertisement was a sheet of papyrus posted in the ancient Egyptian city of Thebes, offering a reward for a runaway slave.<sup>3</sup> In 1480, Gutenberg made possible the first poster printed from type in the English language, an advertisement for *The Pyes of Salisbury Use*, a religious law book.<sup>4</sup> By the late 17<sup>th</sup> century, England was so inundated with signs that one historian observed, “London was literally darkened with great

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1 Ralph Waldo Emerson, *Nature* (1836), in *THE AMERICAN LANDSCAPE: A CRITICAL ANTHOLOGY OF PROSE AND POETRY* 580 (ed. John Conron, 1973).

2 See, e.g., ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 557-598 (2d ed. 2000) (noting the aesthetic aspects of zoning ordinances and discussing architectural review procedures and historic preservation programs as predominantly aesthetic land use controls); John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982) (theoretical discussion of the aims of aesthetic regulation).

3 JULIET LAUVE STAUDT, *BILLBOARDS IN AMERICA: AN EXAMINATION OF THE EFFECT OF MESSAGE CONTENT ON PUBLIC OPINION TOWARD OFF-PREMISE SIGNAGE/OUTDOOR ADVERTISING* 6 (1989).

4 Phillip Tocker, *Standardized Outdoor Advertising: History, Economics and Self-Regulation*, in *OUTDOOR ADVERTISING: HISTORY AND REGULATION* 11, at 24 (John W. Houck ed. 1969).

swinging sign boards of every description . . . .”<sup>5</sup> And in 20<sup>th</sup> century America, signs have stirred much public controversy, have been the objects of state, local, and national attempts at regulation, and have commanded the attention of at least three presidents.<sup>6</sup>

Yet, despite the ubiquity of sign disputes, no systematic treatment of the land use issues associated with signs and billboards currently exists.<sup>7</sup> By treating the sign issue as a distinct form of land use dispute, this article attempts a fresh look at the controversies and complexities bedeviling the regulation of signs. The article undertakes a study of one city’s approach to sign regulation over the course of a century and uses the historical lessons from this study to construct a framework for thinking about sign land use. In doing so, this article offers new insights into the economics of sign land use and the public choice aspects of sign regulation, insights that should be of interest to policymakers in every city. More broadly, this historical case study illustrates the many practical dimensions of land use politics and policy as they have evolved over time. Finally, it offers some concrete normative suggestions for improving sign regulation, and it argues that two forms of regulation – private nuisance law and taxation – have been underutilized and underappreciated.

The article proceeds in three parts. Part I tells the story of sign regulation in New Haven, Connecticut from 1870 to the present. This history covers the shifting demand for signs, the changing nature of the sign industry, signs’ effects on the city’s visual environment, and the politics and practice of New Haven’s resulting attempts to regulate signs within its borders. This history also seeks to situate New Haven’s experience within a national context. Part II steps back from the particular to the general, disentangling the various themes that emerge from New Haven’s century of sign disputes. Specifically, it

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<sup>5</sup> *Id.* at 25.

<sup>6</sup> Presidents Calvin Coolidge, William Howard Taft, and Lyndon Johnson each took part in sign disputes, albeit in very different manners. See *infra* Sections I.B, I.C.

<sup>7</sup> To the extent scholars have studied sign land use, they have tended to focus narrowly. Some scholars have taken a national perspective, discussing the federal effort to regulate billboards along interstate highways. However, the federal effort was an aberration in the history of billboard regulation, most of which has actually taken place at the state and local level. Other scholars have discussed the First Amendment issues associated with signs and billboards. However, most discussions of the First Amendment in sign regulation have treated it in isolation, without situating speech concerns within a broader understanding of the purposes of signs and the aims of regulation. In *City of Ladue v. Gilleo*, 512 U.S. 43, 48, the Supreme Court observed, “While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems . . . . Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.” However, despite their relevance to First Amendment law, these “distinctive problems” have not been fully analyzed in the legal literature. For a representative example of the existing literature, see R. Douglass Bond, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 MICH L. REV. 2482 (1990) (discussing First Amendment issues); Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463 (2000) (focusing on billboard regulation from a federal regulatory perspective); *Removal of Billboards: Some Alternatives for Local Governments*, 21 STETSON L. REV. 899 (1992) (practitioner-oriented summary of billboard-related black letter doctrine).

analyzes four theoretical lenses through which to view the practice of sign regulation: nuisance, aesthetics, information, and expression. The analysis in this Part attempts to clarify the values at stake on all sides of the sign dispute and correct some common misconceptions. Finally, Part III integrates these elements into a normative framework for thinking about sign land use. It begins by discussing the non-legal factors that determine the composition of the horizon; then it asks whether law can improve upon the unregulated status quo. In answer, it rejects two general approaches to sign regulation, and recommends a more promising third way.

## I. A History of Sign Regulation in New Haven

### A. Sidewalks and Snipe Signs: 1870-1910

Strolling through New Haven's streets in the late 19<sup>th</sup> century, one would have encountered a bustle of activity. New Haven's industry was booming, the central city's population was increasing at its most rapid rate, and the city's landscape was a dense cluster of commerce and "civic fauna."<sup>8</sup> The city was a patchwork of homes, small grocery stores, hardware stores, department stores, bakeries, hotels, small retailers, restaurants, saloons, and theatres, to name a few. In this era before zoning, urban land – and the resulting landscape – played host to a rich variety of heterogeneous "mixed uses."

Yet, amid this creative chaos, customer and merchant alike needed at least some semblance of order. Merchants vied for the attention of New Haven residents, and residents needed a topographical compass by which to navigate the scene. Signs offered a solution.

On one block of New Haven's Chapel Street, signs advertised a pharmacy, a clothing retailer, and the "Corner Hat Store." Some signs were attached flat against the buildings, directly above their storefronts. Others were affixed to the buildings but protruded horizontally over the sidewalk, where they would catch the eye of the passing pedestrian. Still others crept up the fronts and sides of the buildings, announcing their presence to carriage and trolley passengers down the road. These signs are often called "on-premise" or "on-site" signs, since they advertise the goods or services sold at the place in which the sign is located. In addition to such signage, sidewalk awnings occupied a prominent role along New Haven streets. They provided shade for pedestrians but also signaled that commerce was alive in the storefronts to which they were attached. Later, these awnings would support elaborate "marquees" and would offer a convenient perch for still more signs.

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<sup>8</sup> Between 1870 and 1920, New Haven experienced more than two-thirds of its total net population growth. DOUGLAS W. RAE, CITY: URBANISM AND ITS END 64 (2003). *See generally id.* at 56-112.

In addition to on-premise signs and awnings, the oldest known “billboard” in the New Haven area appeared along the Derby turnpike sometime before 1750. Interchangeably called “off-premise” signs, “off-site” signs, or “billboards,” these signs occupied high-traffic areas and advertised goods or services sold elsewhere. However, the Derby sign’s spot on an arterial road may have been a rarity, since most signs tended to crop up wherever they would find the most passing eyes – and that was in the central city. During the late 19th century, billboards were less prevalent than on-premise signs. The final variety of sign was known as a “poster,” “handbill,” or “snipe sign.” Temporary but cheap, these printed paper advertisements were posted on bulletin boards, walls, fences, and many other flat surfaces throughout the city.

For residents, signs were a source of communication and identification, a public and omnipresent register of the goods and services available for purchase. A street without signs would have been a disorienting experience indeed. For merchants, however, signs were more than a convenience; they were a means of survival. New Haven scholar Douglas Rae has described the competitive situation of these merchants, observing, “To an extent unimaginable today, the city was enveloped by a dense fabric of small enterprises, each focused on a tiny territorial market in which it held a precarious competitive edge.”<sup>9</sup> As one contemporary observer put it, “competition among the merchants was ferocious as indeed it was a buyer’s market. Shoppers had many choices of stores, 3-4 bakeries, 6-7 meat markets, 5-6 groceries, etc. . . . [T]here was always another shop next door or across the street.”<sup>10</sup> Signs announced the presence of this competition and served as a relatively cheap and convenient way of luring the customer from the other side of the street. Though not an objective group, outdoor advertisers agreed at the time that the display of advertising signs was “an economic necessity.”<sup>11</sup>

Despite intense competition and a resulting proliferation of signs, city merchants had a strong incentive to keep their signs in good shape and make them pleasing to the eyes of passing pedestrians. As Rae describes it, city shops were “supremely grounded institutions – committed irrevocably to places and the people living in them.”<sup>12</sup> If a shopowner became an aesthetic nuisance, he risked enduring the wrath of his neighbors and the disrepute of his customers.

However, these rules of decorum did not apply to a less savory class of sign advertisers known as “snipers.” Unrooted in a particular neighborhood, these sign vigilantes posted handbills or painted messages on signboards, walls, fences, trees, and just about any other piece of property that would bear

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9 RAE, *supra* note 8, at 85.

10 *Id.* at 92.

11 CATHERINE GUDIS, *BUYWAYS: BILLBOARDS, AUTOMOBILES, AND THE AMERICAN LANDSCAPE* 104 (2004).

12 RAE, *supra* note 8, at 88.

their message.<sup>13</sup> And as the name might suggest, snipers rarely sought the permission of property owners. Moreover, since they were paid based on the number of advertisements they were able to post, the snipers battled each other to discover new posting spots and to crowd existing spots by covering older posters with new ones.

In the late 19<sup>th</sup> century, these snipe signs began to advertise national brands and helped to make patent medicines such as St. Jacob's Oil, Hood's Sarsaparilla, and Carter's Little Liver Pills household names.<sup>14</sup> Though no doubt indulging some hyperbole, one observer described the scene: "This was a business in which, during the 1880s, rugged individualism reached a spectacular peak. Rare was the rock of vantage in any spot that did not bear the name of somebody's pills. No fence or wall was immune, for the property owner's permission was rarely sought."<sup>15</sup>

Perhaps the most common – and also the most controversial – user of such signs was the entertainment industry. During this period before mass broadcast media, New Haven's sixty public halls, thirty-one theatres, handful of movie houses, and frequent football and baseball events competed for space on the leisure calendars of New Haven residents.<sup>16</sup> Competition in the entertainment industry must have been just as intense as it was among city merchants. However, the "products" offered by a theatre or music hall changed more rapidly, as a single venue would host a fluctuating roster of performers and shows. Hence, the flow of information between advertisers and the public necessarily had to travel at a higher velocity, and signage accommodated this need. Given the intense competition and the high velocity of information, the entertainment industry would go to great lengths to grab the attention of New Haven residents. It is no surprise, then, that the most elaborate sign found in surviving pictures of turn-of-the-century New Haven is one for Poli's Bijou, a downtown theatre.<sup>17</sup> National entertainment acts and less highbrow local venues might have been even bolder (and less tasteful) in their attention-getting efforts, often making heavy use of snipe signs. Indeed, garish signs were a common vaudeville ploy, showered upon a city as the performers swarmed into town. One outdoor advertising textbook later observed that P.T. Barnum's circus had no equal in "variety, extent and, perhaps one might also say in extravagance of its poster advertising."<sup>18</sup>

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13 One particularly enterprising sniper managed to paint an advertisement for St. Jacob's Oil on a rock at Niagra Falls – a deed for which he gained national notoriety and not a small amount of infamy. See Charles R. Taylor & Weih Chang, *The History of Outdoor Advertising Regulation in the United States*, 15 J. MACROMARKETING 47, at 48 (1995).

14 *Id.*

15 *Printer's Ink* (1938), quoted in *id.* at 48.

16 See RAE, *supra* note 8, at 178-81.

17 Indeed, another theatre, the Hyperion, erected a less imposing, though perhaps less elegant, sign that became quite controversial. See *infra* at 23.

18 HUGH AGNEW, *ADVERTISING MEDIA* 329 (1932).

Against this proliferation of signs – some more irksome than others – New Haven’s city government reacted. By 1870, in a section of the city ordinances devoted to “amusements,” the city managed to prohibit the worst abuses of the snipers:

No play bill, or advertisement of any [theatrical performance],<sup>19</sup> shall be posted upon any public building or fence in said City, nor on or about any tree in the streets of said City, nor upon any private property without the consent of the owner of such property.

....

No person shall destroy, remove, tear, or otherwise deface any bill (posted in such places as may be permitted) descriptive of any performance, to be exhibited, duly licensed as aforesaid.<sup>20</sup>

These prohibitions made it unlawful both to post signs on public or private property without permission and to deface the signs of others. To deter such activity, the ordinance imposed a fine of five dollars for the former and two dollars for the latter.<sup>21</sup> This prohibition and fine scheme remained in force for decades without any substantial changes.<sup>22</sup> However, enforcement must have been difficult, since bills did not identify the freelance sniper who had posted them. It would have taken a massive effort to continually police all of the trees, walls, and fences in the city.

Although the city aimed to protect public property from sniping, it did not necessarily oppose the occasional use of public property, particularly sidewalks, to display private signs. A resident could request permission from the city council to place a sign on public property, and the council often granted such permission.<sup>23</sup> Between 1870 and 1910, thirteen requests could be found in available records of the Board of Aldermen.<sup>24</sup> The Board granted twelve of them and rejected only one.<sup>25</sup>

Although its effectiveness may be questioned, the anti-sniping regulation helped to control the most egregious and visually offensive excesses of the sign

19 The ordinances defined such performances with colorful vaudevillian specificity. They included any “public concert, play, farce, show, tragedy, comedy, pantomime, or other theatrical or dramatic performance, exhibition of gymnastics, or of dexterity or skill of body, circus or exhibition of animals or curiosities, for gain.” NEW HAVEN, CONN., ORDINANCES § 2 (1870).

20 NEW HAVEN, CONN., ORDINANCES §§ 4-5 (1870).

21 *Id.*

22 *See, e.g.*, NEW HAVEN, CONN., ORDINANCES §§ 18-19 (1905) (using identical language as the 1870 ordinance).

23 The Aldermanic Journal does not explain how signs were to be posted on public property. They could have been affixed to utility posts or fences, or perhaps placed on the sidewalk or other portion of public land.

24 This count is sadly incomplete. I was only able to find records for the Board of Aldermen covering the following years: 1889, 1896, 1901-1910. These years may not be wholly representative of the actual percentage of requests made or granted.

25 1889 JOURNAL OF THE BOARD OF ALDERMEN OF THE CITY OF NEW HAVEN 135 [hereinafter B.A. JOURNAL] (rejecting request by G.B. Bunnell); 1902-1903 B.A. JOURNAL 421-22, 434 (granting requests by Postal Telegraph Cable Co., Joseph H. Lang, and Joseph F. Igo); 1903-1904 B.A. JOURNAL 187-88 (granting requests by Simons & Co., Harry Hyman, Toole & Maginn, the Palladium Theatre, Abraham Rubin, Harris Ginsberg, Verdi & Balsamo, John J. Kelly, and Joseph Gartland).



snipers. It also protected private property against unwanted infringement. This approach to sign regulation fit easily within the reigning *Lochner*-era paradigm that placed strong limits on the scope of the police power to regulate the use of private property. During this period, the courts generally disapproved of police power regulation for aesthetic purposes. However, the anti-sniping ordinances did not limit the sniper's freedom in the name of visual beauty, even though that may have been a significant reason for the ordinances' existence. Rather, the ordinances limited the sniper's freedom in the name of protecting the rights of those property owners who had become victims of sniping. Hence, with respect to these regulations, the aims of protecting individual property rights and promoting visual order worked happily in tandem.<sup>26</sup>

However, in a different kind of early sign regulation, these goals were not so easily reconciled. The city aimed to regulate the dimensions and placement of signs attached to buildings and storefronts that extended over the street line. These signs were attached to private property (the building) but hovered over public property (the sidewalk). Even though the area above the sidewalk was public property, it remained at best unclear whether the city could use its police power to regulate such signs for purely aesthetic reasons.<sup>27</sup> Restrictions were thus often cloaked in the language of public safety, justified by the risk of falling signs. Yet, no observer of this early sign regulation could conclude that concern for safety was the controlling force. Even in this early period, we see a

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26 In reality, the landscape probably was just as cluttered with snipe signs in the wake of these regulations as it was before them. Since snipers could negotiate with property owners for the right to post on walls, fences, and other kinds of property, the ordinance simply allowed property owners to share in the fortunes of snipers. However, given the velocity of information conveyed through frequent sniping, a sniper's transaction costs in negotiating with a property owner likely exceeded the costs of violating the anti-sniping ordinance (a five dollar fine discounted by the probability of being caught). Hence, in practice, the ordinance likely resulted in much clutter for the landscape and little compensation for the property owners. In contrast, for established and easily identifiable advertisers, the transaction costs of negotiating with property owners were probably worth bearing, since these advertisers' ads could be more permanent and stood at greater risk of being caught in violation of the ordinance. This explains why some people went to lengths to petition the city for permission to post signs. It also explains how "off-premise" signs on private property could have been more advantageous to some advertisers than illegal sniping.

27 Although one would assume that the city would have full rights to regulate the space above its public land, this was not necessarily the case. It remained legally uncertain whether the public right in the street extended above the street to a sign projecting over it. In a case holding that Yale University could not erect a bridge over High Street without the city's permission, the Connecticut Supreme Court nevertheless explained that an abutting landowner "has an equal right to the use of the highway with every member of the public, and such other rights of ownership in the fee as are not inconsistent with the public easement in the highway." *Yale Univ. v. City of New Haven*, 104 Conn. 610 (1926). Clarifying what it meant by "consistent" uses, the court added:

[T]he abutter enjoys certain privileges upon, or over or under the highway which are slight or minor encroachments upon the public easement such as stepping-stones, steps, porches, signs, awnings, windows, areas, vaults, [etc.] . . . Obstructions of this character are . . . generally sanctioned. . . . Such an owner would be obliged to remove them if they should become an obstruction to public travel . . .

*Id.* (emphasis added) (quotations omitted). This suggests that the courts were much more willing to protect private property rights than to protect public property rights. Hence, it was unclear whether the public property right in a street extended beyond use for public travel into the realm of aesthetics.

clash between the city's aesthetic interests and the interests of individual landowners.

The 1870 municipal ordinance prohibited "any sign, show-board, lantern, or show-board, of any description whatever" from projecting more than three feet beyond the building to which it was attached.<sup>28</sup> Moreover, signs less than nine feet above the sidewalk could not project more than one foot beyond a building.<sup>29</sup> The city punished violations of the former with a fine between four and fifty dollars and violations of the latter with a slightly higher fine between five and fifty dollars.<sup>30</sup>

In the ensuing years, this ordinance was adjusted somewhat, lowering the height requirement (from nine feet to seven and one half feet) for signs projecting up to three feet into the street. The new ordinance also replaced the one-foot restriction on lower signs with a discretionary system that empowered the Superintendent of Streets to determine how far lower signs could extend.<sup>31</sup> This change could have been interpreted as a weakening of the sign ordinance. However, the discretion granted to the city bureaucracy probably ended up being more draconian than the clear rule it replaced, for in 1889 the city council found it necessary to limit its grant of discretion. It amended the sign ordinance with a procedural safety valve:

[I]f the Court of jury shall find that any sign attached to any building does not project into the street more than five inches, and that no substantial interference to public travel is caused thereby, then the person prosecuted shall not be liable for a violation of this and the preceding [sic] section.<sup>32</sup>

The Superintendent of Streets probably earned this rebuke by overzealously regulating trivial protrusions into the street.

Soon, in addition to the usual signs attached to the sides of buildings, merchants began erecting signs affixed to metal posts that they had placed on the sidewalks in front of their stores.<sup>33</sup> The Superintendent of Streets responded predictably by ordering them removed, but the city council quickly reined him in. In May 1896, the city council declared a moratorium on enforcement of the Superintendent's order so that they could consider the matter more fully.<sup>34</sup> This resulted in a wholesale revision of the sign ordinance that again wrested power away from the Superintendent of Streets. The new ordinance, drafted in July and passed the following month, permitted signs affixed to metal posts

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28 NEW HAVEN, CONN., ORDINANCES § 42 (1870).

29 *Id.* at § 43.

30 *Id.* at §§ 42-43.

31 *See* NEW HAVEN, CONN., ORDINANCES § 387 (1890). The available records from this period are incomplete such that I could not pinpoint the year in which this change took place. We know only that it happened sometime between 1871 and 1889. It is quite possible that the Board of Aldermen tinkered in other ways with the sign ordinance during this period.

32 1889 B.A. JOURNAL 154.

33 These posts often served dual purposes, holding up awnings that were permitted to extend over the sidewalk, as well as displaying signs.

34 *See* 1896 B.A. JOURNAL 117-18.

placed next to the inside of the curbstone, but – and this was the rub – only at the discretion of the city council.<sup>35</sup> However, what the Superintendent lost in discretion, he appears to have made up in stricter rules. The city council raised the height requirement from seven and one half feet to eight feet, and more substantially, it prohibited all protruding signs attached to buildings below eight feet.<sup>36</sup>

By August 1905, the restrictions briefly grew stricter still. The city council scrapped its old ordinance and prohibited *all* signs projecting into any street. The new ordinance required existing signs erected in contravention of the previous ordinance to be “removed immediately” and existing signs erected in accordance with the previous ordinance to be removed before January 1, 1906.<sup>37</sup> However, this tough measure did not last long, as it met backlash from New Haven merchants. The April 2, 1906 entry in the Journal of the Board of Aldermen notes “petitions of J.C. Cronan et als., the Edward Malley Co. et als., Hart Market Co. et als., and M.S. Doroff et als., for repeal of” the previous year’s ordinance.<sup>38</sup> The Committee on Streets recommended that “the prayer of said petitioners should be granted in part,” and proposed a more lenient ordinance that reinstated the previous allowance for signs attached to buildings above eight feet and protruding into the street no more than three feet.<sup>39</sup> By July 2, the Board of Aldermen accepted the committee’s recommendation, but with a few curious additions.<sup>40</sup> First, the new ordinance made a special exception permitting the placement of clocks on iron posts attached to the inside of the curbstone. This exception sounds bizarre, until one learns that the New Haven Clock Company was one of the city’s largest manufacturers – and likely wielded strong political clout.<sup>41</sup> Yet, while the Aldermen served corporate interests, they did not forget their own. Hence, the second exception to the new ordinance allowed banners and flags to be displayed over streets and sidewalks “which may have indicated or affixed upon them names of political parties and of candidates for office and portraits of such candidates.”<sup>42</sup> As if to emphasize the lower status of New Haven’s less powerful merchants and advertisers, the ordinance added tersely, “No flag or banner shall be used for advertising purposes.”<sup>43</sup>

The 1905 effort to crack down on sidewalk signs appeared to have backfired, stirring a backlash that resulted in capture of the regulatory process

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35 See *id.* at 213 (proposal); *id.* at 303-04 (passage).

36 *Id.*

37 NEW HAVEN, CONN., ORDINANCES § 511 (1905).

38 1906 B.A. JOURNAL 409. Edward Malley Co. was a large New Haven department store that likely exerted strong political influence.

39 *Id.*

40 *Id.* at 850 (passage of new ordinance).

41 The company occupied two city blocks and employed roughly 1,000 workers. RAE, *supra* note 8, at 108-09.

42 1906 B.A. JOURNAL 514-15.

43 *Id.* at 515.

by powerful interest groups.<sup>44</sup> Unlike previous regulatory efforts, the strong push to eliminate all on-premise sidewalk signs raised the stakes for various special interests. The most powerful of them were sufficiently motivated to throw their weight into the political process, and the result was a new ordinance much to their particular liking. Large businesses (those who could afford eight foot signs), a manufacturer, and political parties gained; small businesses and city beautifiers lost.

In the period between 1870 and 1910, sniping proliferated, and on-premise signs stubbornly protruded over the sidewalk. New Haven's response was remarkably active in prohibiting sniping and regulating sidewalk signs. This was also a period of much creativity. The city tinkered with height restrictions (from nine feet, down to seven and one half feet, and then up to eight feet), with the proper balance between legislative rules and bureaucratic discretion, and with the strictness of such rules themselves. The results, however, were decidedly mixed.

#### *B. Automobiles and Cities Beautiful: 1910-1950*

Outdoor advertising had boomed during the late 19<sup>th</sup> century. Indeed, it had enjoyed greater revenues than any other advertising medium.<sup>45</sup> Yet, as the century wound to a close, this trend reversed itself. The growth of mass magazines with national circulations helped to erode the demand for outdoor advertising, as advertisers turned to print media for a cheap and effective alternative.<sup>46</sup> During the early years of the 20<sup>th</sup> century, it looked as though advertising posters – the most controversial breed of signs – would gradually disappear from the landscape, and so too would the legal and policy dilemmas that accompanied them. In 1908, however, Henry Ford invented the Model T.

Ford boasted, “I will build a motor car for the great multitude” which will give all people “the blessing of hours of pleasure in God’s great open spaces.”<sup>47</sup> Ford no doubt delivered on his first promise, but whether he fulfilled his second promise of pleasurable open spaces remains less obvious. The rise of the automobile and the subsequent development of high-volume highways profoundly altered the outdoor advertising industry. As motorists flocked to God’s open spaces, signs did the same. By 1927, revenue in the outdoor advertising industry had grown to twenty one times what it had been in

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44 This episode is a remarkable harbinger of the effort many decades later to prohibit billboards along interstate highways – a high-stakes regulatory move that similarly resulted in capture by powerful interests. *See infra* Section I.C.

45 GUDIS, *supra* note 11, at 104.

46 *Id.*

47 *Id.* at 400-01.

1912.<sup>48</sup> Indeed, by 1938, one study determined that Connecticut's landscape played host to 362 large highway billboards.<sup>49</sup>

How exactly did this transformation come about? Many observers, particularly those most critical of billboards, have assumed that highways attracted billboards like mosquitoes to swamps. Highways, the story goes, gave advertisers a "free" opportunity to profit at the public expense, and companies paid for as much of this advertising as they could get. However, this story remains too simplistic. In reality, nothing is free – even advertising along public highways.<sup>50</sup> Hence, a more nuanced explanation of the growth in outdoor advertising must account not simply for how highways increased the ease of outdoor advertising, but also for how they increased the need for such advertising. In short, greater mobility changed the nature of commerce, and the resulting commercial realities transformed the functions of signs. The automobile altered the pattern of commerce by initiating two key trends – one on the demand side and the other on the supply side.

First, on the demand side, population in New Haven's central city ceased to grow, while suburban areas grew rapidly. Between 1920 and 1950, the percentage of New Haven residents living in the central city declined from 80.8% to 62.1%.<sup>51</sup> In the midst of this transformation, one New Haven resident lamented, "Manifestly a centrifugal force is acting powerfully to carry away our population from the business and industrial centers and the territory adjacent thereto to the city limits and across."<sup>52</sup> The automobile allowed residents to take advantage of cheaper housing in the suburbs while reducing the inconvenience of distance. Residents could afford to live further apart from each other, since the automobile ensured that a long distance in space need not be so long a distance in time. This dispersion of New Haven residents created a broad

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48 Revenue was \$4 million in 1912 and \$85 million in 1927. *OUTDOOR ADVERTISING: THE MODERN MARKETING FORCE* 29 (Outdoor Advertising Ass'n. of America ed., 1928) [hereinafter "MODERN MARKETING"]. It is unclear whether these numbers represent yearly reported revenue, or whether they are instead adjusted for inflation. Assuming that they were not inflation-adjusted, \$85 million in 1927 would be roughly equivalent to \$45 million in 1912 (using the Consumer Price Index). This still amounts to an eleven-fold increase in revenue over fifteen years.

49 Connecticut was in fact well below the national average of 583 billboards. Taking population into account, Connecticut had one billboard for every 4,230 residents while the average state had one billboard for every 2,710 residents. Pennsylvania had the most billboards (2,255), with New York (1,809) and Texas (1,783) trailing somewhat behind. Washington, D.C. (42), followed by Nevada (54) and Wyoming (66) had the least. Accounting for population, D.C. (12,324), Massachusetts (6,907), and New York (6,115) had the highest population per billboard; Idaho (1,074), Arkansas (1,155), and South Dakota (1,197) had the lowest. See HUGH E. AGNEW, *OUTDOOR ADVERTISING* 119 (1938). These numbers are only rough proxies, since they do not necessarily capture the degree to which the landscape of a given state was saturated with billboards. Ideally, we would want to know the ratio of billboards to road-miles. Unfortunately, such data is not readily available.

50 Costs include land acquisition or rental, sign structures, maintenance, monitoring, etc. See *infra* Section III.A.

51 RAE, *supra* note 8, at 233.

52 Charles Guyot Dana, *New Haven's Problems: Whither the City? All Cities?*, in RAE, *supra* note 8, at 232.

but shallow customer base, as customers no longer lived near the block on which they shopped.

The change in geographic composition of the consumer population initiated a second key trend, this time on the supply side of commerce in New Haven. As Douglas Rae explains it, retailing “went from a thick fabric of small enterprises to a far thinner fabric of larger enterprises.”<sup>53</sup> Small retailers saw their local customer bases move away, and as the distance between retailer and customer increased, the number of similar retailers within a customer’s orbit also increased. Many small retailers could not survive the intense competition that resulted. For example, between 1923 and 1935, 533 of New Haven’s 833 small grocery stores went out of business.<sup>54</sup> Small retailers gave way to larger chain stores that could exploit economies of scale and could offer more variety at a single location.<sup>55</sup> Indeed, the commercial variety of the old city block was transplanted to the insides of the large chain retail stores, and this urbanism-in-a-box became a special destination for mobile customers rather than a permanent part of their everyday landscape. Moreover, these new large retailers no longer required prime downtown real estate; they scattered, just as their customers had done, to take advantage of cheaper land and less congested streets in the suburbs.

Viewing these trends in demand and supply together, we see a commercial geography far different from that of the 19<sup>th</sup> century. The coming of the automobile witnessed a simultaneous dispersion of customers and aggregation of retailers: A smaller number of scattered retailers served a more numerous customer base occupying a larger geographic area. Since residents no longer shopped where they lived, they needed both more motivation and more information to decide where and how they would do their shopping. In the days of urbanism, residents attracted retailers; in the new era of suburbanization, retailers had to attract residents. While the central city used to exert a centripetal force that bonded customers with local retailers, retailers now had to work harder to draw in customers on their own.

These new commercial realities formed the engine behind the modern sign landscape. Signs enabled advertisers to bridge the distance between customer and retailer. Since retailers no longer occupied locations along the daily paths of most residents,<sup>56</sup> retailers needed a mechanism to signal, inform, and attract residents to their cul-de-sacs of commerce. This necessity begot the modern highway billboard, or “off-premise” sign. For a retailer located away from major commuter highways, an on-premise sign would have little use; few eyes

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53 RAE, *supra* note 8, at 253.

54 *Id.* at 239.

55 *See id.* at 240.

56 Of course, land along busy highways became prime real estate for retailers, and in this sense, some retailers did manage to remain along such busy paths. However, decentralization created many more such paths, each of which carried less traffic. Main Street gave way to a complex of interconnected highways.

would see it, and those who did see it were likely those who lived nearby and thus did not need its information. In contrast, the off-premise billboard made aggregated retail amidst diffuse population possible, since it allowed retailers to pull customers from beyond the retailers' immediate geographic area. Off-premise signs expanded a retailer's visual sphere of influence, and thereby expanded its customer base.

This new pattern of commerce also affected the content of off-premise advertising. Rae explains, "The development of strip centers and enclosed malls . . . was irresistible to the mass retailers, and it became part of an enormous movement that would provide consumers with a measure of choice and 'real freedom' that was previously impossible to envision."<sup>57</sup> As the variety of products available at malls and large retailers broke down earlier geographic monopolies, newfound consumer choice made the market for products far more competitive. At one of New Haven's large grocery stores, for example, one might have been able to purchase fifteen varieties of canned soup and five brands of toothpaste. In this competitive market for products, consumers needed information and producers wanted to influence consumer choices. As a result, the rise of mass retailing increased the incentive for manufacturers of individual products to advertise their products directly to consumers. Yet, given the variety of products and the difference in incentives, manufacturers could not always count on retailers to vigorously advertise products on their behalf. Hence, national brands aimed to shape consumers' buying choices before consumers reached the highly competitive store shelves. As a result, the content of outdoor advertising increasingly began to herald specific products as well as retail locations.

Finally and most obviously, the new reality of the automobile made highways a valuable forum through which producers and retailers could communicate with customers. Such mass communication was made possible and efficient by public space – a place in which most city residents congregated or passed through. The highways of the 20<sup>th</sup> century replaced the sidewalks of the 19<sup>th</sup> century as the most dynamic and populated public space. And in a corresponding enlargement of scale, the shop signs and posters of the 19<sup>th</sup> century were eclipsed by the billboards of the 20<sup>th</sup> century.

However, this scaling-up of public space and its attendant signage had particular effects on the visual landscape. The speed of automobiles presented both a challenge and an opportunity to advertisers. Speed was an opportunity, since it ensured that more drivers would pass by a sign during a given period. But it was also a challenge, since advertisers had to influence passing drivers in a matter of seconds as they sped along. Hence, to catch the fleeting attention of passing motorists, signs did everything they could to stand out. In some cases, multiple billboards would be placed next to each other, or one billboard might

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57 RAE, *supra* note 8, at 230.

stretch one hundred feet in length.<sup>58</sup> Rising in height as well as length, double and triple-decker billboards also dotted the landscape.<sup>59</sup> The standard twenty-four-sheet sign (104 inches by 234 inches) gave way to the thirty-sheet sign (115 inches by 259 inches).<sup>60</sup>

Moreover, such low-tech efforts to grab attention were accompanied by more sophisticated technological innovations in the billboard industry. Billboards displayed objects and cutouts made from plastic and acrylic. Borderless fiberglass board “allowed the advertising content to explode off of the billboard surface, while new reflective paints and superreal painting techniques gave two-dimensional art an enhanced sense of verisimilitude.”<sup>61</sup> “Rotating tripanels” allowed for multiple changing images on a single billboard. “Boom” trucks and cranes allowed signs to be placed at greater heights. Aerodynamic billboard frames and aircraft-grade alloy bracing allowed “sky signs” to sit atop tall buildings.<sup>62</sup> Finally, elaborate electric lighting allowed signs to pierce through a darkened landscape. As a leading outdoor advertising textbook noted with regard to electric signs, “The first and most important attribute is the ability of these advertisements to *attract attention*.”<sup>63</sup> Indeed, this was true for all of the billboard industry’s high-tech and low-tech innovations.

However, unlike the shop signs of the previous era, off-premise billboards lacked a sense of place. They stood apart from the manufacturers’ or retailers’ actual locations and were therefore free from many of the norms of conformity that accustom neighbors to respect the aesthetic sensibilities of their neighborhoods. In this manner, off-premise billboards had much in common with the old snipe signs. The national manufacturer and retail store two miles off the highway were strangers to the neighborhoods in which their off-premise signs advertised. Hence, when the aims of attracting attention and conforming to the visual landscape inevitably conflicted, off-premise advertisers had little reason to conform and every reason to attract attention.

Although technological innovation allowed for new means of attracting attention and the lack of neighborly pressure lifted restraints on the aesthetic intrusiveness of such means, the real force behind the early 20<sup>th</sup> century billboard explosion lay deeper still: At the heart of sign advertising along busy highways was a collective action problem. An individual sign attracted attention by standing out – increasing its size, height, or flamboyance relative to other signs within view. Yet, once one sign increased its relative ability to catch motorists’ eyes, the other nearby signs endured a disadvantage and

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58 William H. Wilson, *The Billboard: Bane of the City Beautiful*, 13 J. URBAN HIST. 394, 396 (Aug. 1987)

59 *Id.*

60 GUDIS, *supra* note 11, at 159.

61 *Id.*

62 *Id.*

63 MODERN MARKETING, *supra* note 48, at 94.



increased their own attention-getting measures. This self-perpetuating cycle ensured that sign owners would have to invest in ever bigger and more outlandish signs, gradually overwhelming the landscape. A similar dynamic affected the placement of signs themselves. The value of a sign decreases as the number of signs in an area increases. A lone sign along a highway catches every motorist's eye, but that same sign catches fewer eyes when it sits amidst a jumble of signs competing for attention. Hence, each individual sign owner gains from adding one sign to the landscape, but the addition of each new sign diminishes the value of all existing signs. Without coordination and mutual agreement, the horizon becomes a tragedy of the commons, as overuse depletes a scarce visual resource.

In both cases, sign owners as a group would have benefited from fewer and less ostentatious signs, but the incentives of sign owners as individuals ran in the opposite direction. Sign owners could agree among themselves to limit their activities, but such agreements would inevitably attract new, unrestrained entrants who could exploit the self-restraint of the existing group of advertisers. Hence, collective action would only be possible under one of two conditions: Either sign advertisers would have to make it more valuable for new entrants to join the existing group and accept its restraints than to go it alone, or sign advertisers would have to erect barriers that prevented new advertisers from entering the market altogether.

In 1925, the need for mutual coordination formed one impetus that gave birth to the Outdoor Advertising Association of America (OAAA), which would experiment with both methods of collective action.<sup>64</sup> The OAAA's constitution defined its objectives: "To provide for the American business community an efficient and economical instrument of distribution; to insure through standardization of practice and structure a scientific advertising medium; and to advance the common interests of those engaged in the business of advertising."<sup>65</sup> The OAAA distinguished between "organized" and "unorganized" outdoor advertisers, lauding the former but disdaining the latter.<sup>66</sup> Indeed, a 1938 advertising textbook by an author aligned with the OAAA aimed to impress would-be advertisers with six elaborate flowcharts heralding the sophisticated organization of the OAAA.<sup>67</sup>

The benefits of becoming an "organized" outdoor advertiser were substantial, for the OAAA exploited economies of scale that allowed nationalization, standardization, and rationalization in the billboard industry. As the prevalence of national manufacturers and national brands increased, a

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<sup>64</sup> GUDIS, *supra* note 11, at 106. In 1891, poster advertisers formed the Associated Billposters' Association, which underwent various name changes before evolving into the Outdoor Advertising Association of America. The early association, however, never wielded much influence until its transformation in 1925. *Id.*

<sup>65</sup> MODERN MARKETING, *supra* note 48, at 4.

<sup>66</sup> See OUTDOOR ADVERTISING, *supra* note 49, at 3.

<sup>67</sup> See *id.* at 12-13, 16, 19-21.

coordinated and nationalized sign industry could significantly reduce the transactions costs of large advertising campaigns. The Fisk Tire company explained on behalf of all such advertisers, “[T]he national advertiser is looking for wide poster distribution and not for a local showing . . . . The advertiser does not want the mass of details that would come with dealing with hundreds of plant owners; he does want a standard and a uniform service.”<sup>68</sup> Advertisers could negotiate with the OAAA, which would then distribute advertising contracts among its members.

The OAAA also provided technical know-how to advertisers and sign companies. Advertisers had become accustomed to the circulation figures and standardized rates offered by magazines and other print media, but the outdoor advertising industry had not been as sophisticated. To remain competitive, the OAAA realized that it needed to replace “[g]uesswork and rule-of-thumb” with “the slide rule and scientific analysis of basic traffic facts.”<sup>69</sup> In 1924, the OAAA established a national research clearinghouse and other programs to study traffic patterns and develop a standard system for measuring the impact and value of a given advertisement “showing.”<sup>70</sup> These efforts aimed to better understand the nature of the “outdoor market,” ultimately concluding that the old method of targeting geographic locales should be replaced with a new focus on traffic volume.<sup>71</sup> Reinforcing the fact that modern advertising signs had become divorced from a sense of place, the OAAA’s researchers eschewed political, geographic, and population markers in favor of a “basic and fundamental” theorem: “where traffic moves, trade flows.”<sup>72</sup> The “traffic flow map” became the bible of the organized outdoor advertising industry. Those poor folk who chose not to join the OAAA gave up these resources at their peril.

Although the OAAA offered significant benefits to its members, it also aimed to establish a cartel that would deny “unorganized” sign companies access to the outdoor advertising market. Even though most print advertising was purchased through general advertising agencies, the OAAA required its members to accept national work only from designated “direct-selling” companies that exclusively handled outdoor advertising.<sup>73</sup> However, in order to be licensed as a “direct-selling” company, the advertising agency had to agree to place ads only with OAAA members. The OAAA entered into similar arrangements with lithography companies. OAAA members had an interest in perpetuating this scheme, since the organization denied membership applications from sign companies that wanted to cover territory already covered by OAAA members. Moreover, national advertisers went along because the

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68 GUDIS, *supra* note 11, at 109.

69 OUTDOOR ADVERTISING, *supra* note 49, at 149.

70 GUDIS, *supra* note 11, at 109.

71 OUTDOOR ADVERTISING, *supra* note 49, at 93.

72 GUDIS, *supra* note 11, at 124.

73 *Id.* at 106.

transactions costs of dealing with the various non-member sign companies were often prohibitive. The cartel successfully reduced the number of non-member billboard companies and virtually eliminated general advertising agencies from the outdoor advertising industry.<sup>74</sup>

As the OAAA cartel consolidated its power over the outdoor advertising industry, it attempted significant “self-regulation” to limit the mutually destructive tendencies of competing billboard companies. Although the OAAA certainly aimed to expand billboard coverage in newly developing areas, it also worked to avoid saturation and overbuilding. The net result was likely a reduction in the overall number of billboards.<sup>75</sup> In 1925, the OAAA also initiated a “five-year plan” to standardize billboard sizes and structures, preventing billboards from trying to outdo each other by gradually enlarging.<sup>76</sup> Moreover, realizing that a few particularly offensive billboards could fuel backlash against the entire industry, the OAAA aimed to regulate such abuses. The by-laws of the OAAA specified that its members were prohibited from placing signs: “so as to create a hazard to traffic;” “on streets or portions of streets which are purely residential in their nature, or in other locations where the resentment of reasonably minded persons would be justified;” “on streets facing public parks where the surrounding streets are residential;” and “in locations that interfere with the view of natural scenic beauty spots.”<sup>77</sup> Indeed, the OAAA even censored advertising copy, adopting rules more stringent than any conceivable government regulation:

No advertising structure . . . will display copy which is critical of the laws of the United States or of any State, or which induces violation of Federal or State Laws, or which is offensive to the moral standards of the community at the time the copy is offered for display, or which is false, misleading or deceptive.<sup>78</sup>

The OAAA’s organization chart even listed a division responsible for “censorship of copy,” presumably to enforce this stringent rule.<sup>79</sup>

In light of such attention to self-regulation, the first president of the OAAA was likely sincere when he explained in his address to the association, “[The] public interest coincides absolutely with the desires and best interests of the advertiser.”<sup>80</sup> He added, “The enforcement of these new standards will no doubt be burdensome to the industry, but the final result will be worth all it may cost.”<sup>81</sup> The OAAA’s standards even garnered praise from Edgar

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74 *Id.* at 107.

75 *Id.* at 109.

76 *Id.*

77 MODERN MARKETING, *supra* note 48, at 204.

78 OUTDOOR ADVERTISING, *supra* note 49, at 241.

79 *Id.* at 13.

80 *Id.* at 45.

81 *Id.*

Heermance, one of the earliest advocates of “socially responsible” corporate governance.<sup>82</sup>

The OAAA likely had some success with its self-regulation. Heermance recounted a story of a woman complaining that billboards had been erected on a nearby lot. According to Heermance, “The company at once shifted the location, at a considerable cost.”<sup>83</sup> Indeed, by 1927, the OAAA announced that 55,000 billboards had been changed to conform to the new standards.<sup>84</sup> This news compelled one writer to happily declare, “The entire story of self-government in Outdoor Advertising is a demonstration of the power of organization.”<sup>85</sup> But alas, while this may have been so, the OAAA collided with one particularly irksome limit to the power of its organization – the Sherman Antitrust Act. The cartel’s success was stymied by three antitrust lawsuits under the Sherman Act challenging the association’s membership rules.<sup>86</sup> As the OAAA’s cartel power diminished, it lost the ability to control the industry. Hence, ironically, the antitrust suits may not have entirely served the public interest. Although the billboard cartel meant higher prices for advertisers, its restrictions reduced competition among sign companies and thereby reduced the tendency of competitive billboards to clutter the landscape. The cartel could effectively sidestep the collective action problem at the heart of roadside advertising. But as the cartel weakened, self-regulation could be no more than words on paper. Indeed, reflecting on the OAAA’s efforts at self-regulation over the first half of the 20th century, OAAA president Phillip Tocker lamented, “Undue group action and coercion to regulate abuse would violate the anti-trust laws.”<sup>87</sup> The OAAA was left with an unenforceable code of ethics, and noncompliance reigned.<sup>88</sup>

Although the sign industry experimented with self-regulation, the loudest voices calling for preservation of the visual landscape came from outside the

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82 In his 1926 book, *The Ethics of Business*, Heermance devoted a chapter to praising the outdoor advertising industry. He observed:

Thirty years ago, outdoor advertising, as a medium of publicity, was in bad repute, both with the public and with the larger advertisers.

....

[But now, there will be a] contrast between the new standardized panel and the old commercial sign, (and perhaps the same effect on the advertiser) . . .

....

The organization in the Outdoor Advertising industry has taken the long-term view, both of the expensiveness of the cheap sign, and of its own responsibility to the public.

EDGAR L. HEERMANCE, *THE ETHICS OF BUSINESS: A STUDY OF CURRENT STANDARDS* 81, 91-92 (1926).

83 *Id.* at 86.

84 GUDIS, *supra* note 11, at 201.

85 *Id.*

86 The lawsuits were filed in 1912, 1928, and 1950. In each case, the association was forced to relax its membership rules, but the multiple lawsuits reflect the OAAA’s general intransigence. *See* GUDIS, *supra* note 11, at 107-08. The court decisions are unreported. *But see* *General Outdoor Advertising Co. v. Commissioner of Internal Revenue*, 32 B.T.A. 1011 (1935) (noting 1928 consent decree in action regarding taxation of attorneys’ fees).

87 Tocker, *supra* note 4, at 48.

88 *See* Taylor & Chang, *supra* note 13, at 54.

industry – and they grew loud indeed. As signs proliferated, a mass movement of vociferous anti-billboard activists set out to reclaim the horizon on the public’s behalf. During the early 20<sup>th</sup> century, activists drawn from women’s clubs, garden clubs, and other civic groups declared war on the growing “billboard blight.”<sup>89</sup> Led by Elizabeth Boyd Lawton, this predominately female group of “scenic sisters” formed a coalition called the National Committee for Restriction of Outdoor Advertising, and it rallied around the belief that the billboard “desecrates scenic and civic beauty.”<sup>90</sup> The campaign against aesthetic “desecration” took on a moral and religious dimension, as the anti-billboard activists stressed the virtues of scenic beauty and visual order.

The scenic sisters championed a kind of “domestic housekeeping writ large,” organizing efforts to publicize billboard abuses, initiating letter-writing campaigns to dissuade advertisers from using billboards, and boycotting advertisers who persisted.<sup>91</sup> Indeed, employing rather ironic tactics, the scenic sisters built anti-billboard billboards that carried messages such as, “Landscapes belong to the public; billboards destroy them.”<sup>92</sup> They also supported erection of screens to block motorists’ views of billboards.<sup>93</sup> Lawton admitted that her true goal went beyond public suasion, observing, “We believe that a public opinion campaign will pave the way for successful legislation later.”<sup>94</sup> But she added that the opinion campaign “will, of itself, produce a very real check on this nuisance.”<sup>95</sup> And to some extent, it did. In 1924, Standard Oil announced in six hundred paid newspaper advertisements that it would not advertise in scenic areas.<sup>96</sup> Standard Oil explained in a letter to the billboard industry, “It is the desire of the management of this company to co-operate in every way with the various civic organizations and women’s clubs in its territory which are seeking to preserve and improve the natural beauties of the highways.”<sup>97</sup> Pillsbury Flour, Kelly Springfield Tire Company, and Gulf Oil soon followed suit, agreeing to limit their outdoor advertising to commercial areas.<sup>98</sup> It was perhaps a testament to the success of this grassroots

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89 GUDIS, *supra* note 11, at 172.

90 *Id.* at 165, 173.

91 *Id.* at 163.

92 *Id.* at 176.

93 *Id.*

94 *Id.* at 174.

95 *Id.*

96 *Id.* at 178. It may have helped that John D. Rockefeller’s wife was a scenic sister herself. *See id.* at 179.

97 *Letter to the Editor*, PRINTER’S INK (April 17, 1924), in HEERMANCE, *supra* note 82, at 87. Perhaps to save face among the business community, the letter also offered a rather far-fetched financial explanation: “The officers of our company are interested in this matter as good citizens, but we have, of course, a more personal interest as well, for anything which adds to the beauty of the highways gives added pleasure to motoring and so is a service to our customers.” *Id.*

98 GUDIS, *supra* note 11, at 179.

movement that upon Lawton's death in 1950 OAAA leaders circulated her obituary, to which they had appended, "File: Nuisances Abated."<sup>99</sup>

While anti-billboard women pursued a grassroots "outside" strategy, anti-billboard men commenced an "inside" effort to influence policymakers, planners, and political elites. These men, such as Frederick Law Olmsted, J. Horace McFarland, and in New Haven, George Dudley Seymour, led the City Beautiful movement, and as such formed the moderate wing of the anti-billboard effort. An exemplar of the City Beautiful movement, Cass Gilbert and Frederic Law Olmsted's *Report of the New Haven Civic Improvement Commission* observed in 1910 that New Haven's streets were "made hideous by an incongruous jumble of signs."<sup>100</sup> Gilbert and Olmsted explained further:

Extravagant advertising signs and billboards greatly injure the aspect of many New Haven streets. No one can question that the presence of large and frequently garish advertising signs, designed specifically to stand out strikingly from their surroundings and violently arrest the attention, is more or less irritating and annoying to most people . . . . [I]t is very seldom that the ordinary citizen gets any advantage from the signs and posters that begins to compensate him for the annoyance.<sup>101</sup>

Gilbert and Olmsted went on to advocate taxes and licensing, rather than outright prohibition, as a reasonable way of controlling the proliferation of signs.<sup>102</sup> That same year, George Dudley Seymour, head of New Haven's first city planning commission, advocated similar regulations in a speech to the New Haven Chamber of Commerce.<sup>103</sup> In a striking contrast to the moralizing rhetoric of the scenic sisters, Seymour appealed to the Chamber members' elite cosmopolitan pretensions: "One of the great reasons why the cities on the continent of Europe impress the American traveler so much is, that the whole subject of advertising signs is so carefully regulated and controlled."<sup>104</sup> Seymour observed that New Haven's "reasonably good sign ordinance" was not well enforced, and he urged the city to take "a progressive stand" on sign regulation.<sup>105</sup> Seymour took particular issue with electric signs, noting "the erection of an illuminated sign on the top of one of the buildings facing the Green."<sup>106</sup> Like Gilbert and Olmsted, Seymour preferred taxation to outright

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<sup>99</sup> *Id.* at 173.

<sup>100</sup> CASS GILBERT & FREDERICK LAW OLMSTED, REPORT OF THE NEW HAVEN CIVIC IMPROVEMENT COMMISSION 31 (1910).

<sup>101</sup> *Id.* at 33.

<sup>102</sup> "The most effective way to deal with the billboard nuisance then appears to be by license and taxation,—the same method that is used to control many other business enterprises which are legitimate but liable to abuse." *Id.*

<sup>103</sup> See GEORGE DUDLEY SEYMOUR, *A Proposition to Regulate Illuminated Signs*, in NEW HAVEN 207, 207 (1942).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 209.

<sup>106</sup> *Id.* at 210.

prohibition,<sup>107</sup> but his speech nevertheless aroused controversy in the business community.<sup>108</sup>

Despite the pleas of Seymour and New Haven's City Beautiful movement, the Board of Aldermen showed little commitment to stronger sign regulation. Indeed, the year before Seymour's Chamber speech, the Board of Aldermen had granted permission for the Hyperion theatre to erect a flashy electric sign on its canopy over the sidewalk. Mayor James Martin wrote to the Board in protest, explaining that the sign was "strongly objected to by the owners and occupants of adjacent property."<sup>109</sup> Yet, although three aldermen proposed a stricter ordinance to govern electric signs and a specific revocation of the Hyperion's privilege, the full Board did not pass either measure.<sup>110</sup> Indeed, a photo taken eight years later shows the offending sign in defiant splendor.

This episode echoed again in 1914, when the Board of Aldermen granted Shartenberg & Robinson a permit to erect a large marquee (sixty-seven feet long and twelve feet wide) on Chapel Street. George Dudley Seymour vigorously opposed the marquee as an "invasion of a public right."<sup>111</sup> After the newspaper refused to publish Seymour's letter of protest to the Board of Aldermen, Seymour was forced "to become a pamphleteer."<sup>112</sup> Indeed, he also organized a blue-ribbon letter writing team, including former President Taft, Frederick Law Olmsted, and the President of the New York City Board of Aldermen. Taft wrote, "I think it is a very bad policy to encroach upon the streets in any way, and I am thoroughly in sympathy with [Seymour's] opposition to the proposal."<sup>113</sup> However, even these luminaries were not enough to convince the Board of Aldermen to change course. As Seymour lamented years later, "My protest failed (as most protests do), the Aldermen, under heavy pressure," allowed the marquee to be built.<sup>114</sup> The marquee, he added, "remains a monument to what may be done . . . if enough pressure is exerted by and for petitioners for special privileges."<sup>115</sup>

Despite agitation from the scenic sisters, pleas from City Beautiful leaders, and two high-profile local sign controversies during the first quarter of the 20<sup>th</sup> century, New Haven took few legislative measures to restrict the proliferation of signs. In 1911, someone proposed an ordinance to require the lowest portion of billboards to be at least four feet above the ground, but the proposal was

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107 Seymour indicated that signs were regularly taxed in Europe, and that the Connecticut city of Berlin had also established a taxation scheme. *Id.* at 212, 214 n.80.

108 Seymour noted that two Chamber members "enthusiastically opposed" his speech, and that a controversy ensued in the local newspapers. *See id.* at 207 n.79.

109 1909 B.A. JOURNAL 331.

110 *See Id.* at 494-96.

111 GEORGE DUDLEY SEYMOUR, *The Use of the Streets by Private Interests – The Fight over the Shartenberg & Robinson Marquee*, in NEW HAVEN 582, 582 (1942).

112 *Id.*

113 *Id.* at 584.

114 *Id.* at 587.

115 *Id.*

rejected.<sup>116</sup> In 1919, the Oriental Restaurant Company had erected a marquee larger than the existing ordinances allowed, but the Board of Aldermen granted permission for it to remain as constructed.<sup>117</sup> Finally, during the 1920s, the Board of Aldermen amended New Haven's sign ordinance to deal explicitly with the new breed of billboards. However, the new regulations reflected safety rather than aesthetic concerns. The regulations required secure bracing and prohibited structures to be built with wood or other flammable material.<sup>118</sup> Although the regulations limited the size of billboards (fourteen feet for freestanding billboards; twenty-seven feet for rooftop billboards, known as "sky-signs"), these limits were no stricter than the industry standard at the time.<sup>119</sup> Indeed, by 1929, the Board of Aldermen softened the limits, raising the maximum height requirement for freestanding billboards by two feet.<sup>120</sup>

While billboard opponents could claim few successes in New Haven, they fared better at the state level. In 1927, the Connecticut state legislature managed to enact a fee-and-licensing scheme like that urged by George Dudley Seymour.<sup>121</sup> All owners of large off-site highway billboards<sup>122</sup> were required to purchase licenses at a hefty yearly fee of \$100 (\$1,058 in 2003 prices).<sup>123</sup> Additionally, each individual billboard was assessed a yearly fee between \$3 and \$9 (\$32 to \$95 in 2003 prices), depending on the billboard's size.<sup>124</sup> The legislature also banned signs within one hundred feet of public parks, state forests, playgrounds, and cemeteries.<sup>125</sup> One is tempted to interpret this legislation as a victory for the city beautifiers and a defeat for advertisers. However, closer examination suggests that the licensing scheme was actually well suited to the interests of the organized outdoor advertising industry. By imposing a large fixed cost, the yearly licensing fee made it expensive for new billboard companies to enter the outdoor advertising market, while the small per-sign fee did little to increase the variable costs of additional billboards for the established advertiser. For example, a hypothetical large billboard company with thirty billboards would pay the equivalent of \$95 (in 2003 prices) per sign. But the small company with only three billboards would pay \$412 per sign.<sup>126</sup> Large existing sign companies could offset the licensing fee with

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116 See 1911 B.A. JOURNAL 414 (proposed); *id.* at 703 (rejected).

117 See 1919 B.A. JOURNAL 94.

118 See 1923 B.A. JOURNAL 162-63 (enacting safety requirements); NEW HAVEN, CONN., ORDINANCES § 334 (1928) (full sign ordinance).

119 See *supra* at 27.

120 See 1929 B.A. JOURNAL 30-32 (proposal); *id.* at 63 (passage). The Board of Aldermen also created an exception permitting prior nonconforming signs that were less than thirty square feet. See 1936 B.A. JOURNAL 85 (proposal); *id.* at 109 (passage).

121 An Act Concerning Advertising Signs and Advertising Structures, Conn. Pub. L., Ch. 254 (June 8, 1927).

122 Small signs and on-premise signs were exempted from these state regulations. *Id.* at § 3.

123 *Id.* at § 1.

124 *Id.* at § 4. The fees were assessed and enforced by the Superintendent of State Police.

125 *Id.* at § 7.

126 See Figure A and accompanying notes, *supra*, at 40.



revenue from their fleet of billboards; small upstarts could not. Hence, it may have been entirely rational for established sign advertisers to pay \$95 per sign for the lucrative privilege of market dominance. This lopsided fee structure explains how the legislature managed to enact sign control measures that would ordinarily have met vigorous opposition from the sign industry.

During the first half of the 20<sup>th</sup> century, we see a puzzling contrast between the relatively strong public antipathy to billboards and the relatively timid regulatory efforts of New Haven's city government. Why, at the time of greatest public support for sign regulation, did so little actually transpire at the local level? At least two factors were probably at work. First, New Haven was bound by the remnants of *Lochner*-era limitations on use of the police power for aesthetic purposes. "Aesthetic regulation" sat under a cloud of uncertainty regarding the extent to which cities could use their police powers to beautify their urban areas. Some jurisdictions had explicitly declared aesthetic regulation to be impermissible.<sup>127</sup> However, courts moved slowly away from their early police power restrictions. In 1916, the Connecticut Supreme Court upheld the City of Bridgeport's sign licensing fees by characterizing the fees as strictly "revenue producing measure[s]" instead of aesthetic regulation, thereby sidestepping the police power issue.<sup>128</sup> By 1920, the Connecticut Supreme Court observed a movement toward greater court tolerance of aesthetic motives, as a compliment to, but not a substitute for, traditional health, welfare, and safety motives.<sup>129</sup> By 1944, the Connecticut Supreme Court upheld a city sign ordinance against an aesthetics challenge:

Whether or not esthetic considerations in themselves would support the exercise of the police power, there can be no question that, if a regulation finds a reasonable justification in serving a generally recognized ground for the exercise of that power, the fact that esthetic considerations play a part in its adoption does not affect its validity.<sup>130</sup>

Hence, cities could avoid legal trouble by cloaking all aesthetic regulations in the language of public safety. As a New York court aptly explained, "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."<sup>131</sup> However, despite this erosion of police power restrictions, New Haven may nevertheless have been hesitant to test its limits.

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127 See, e.g., *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 62 A. 267, 268 (N.J. App. 1905) ("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.").

128 *State v. Murphy*, 98 A. 343, 344 (Conn. 1916).

129 See *Town of Windsor v. Whitney*, 111 A. 354, 357 (Conn. 1920) ("A few years ago it was, so far as the rule had been announced undoubted that restrictions could not be impossible upon a private property solely for aesthetic considerations. [But] '[t]he law on this point is undergoing development . . .'" (citing a popular treatise).

130 *Murphy v. Town of Westport*, 40 A.2d 177, 179 (Conn. 1944).

131 *Perlmutter v. Greene*, 182 N.E. 5, 6 (N.Y. App.).

The second factor responsible for the limited sign regulation during this period was probably the success of the organized billboard industry in capitalizing on the two world wars. The wars at once distracted attention away from the beautification movement and presented an opportunity for the billboard industry to align itself with the war effort. A 1942 OAAA publication boasted, “Inasmuch as advertising media are the principal channels of communication, they bear a grave responsibility for the public’s state of mind, which is a bulwark to national security.”<sup>132</sup> By 1944, outdoor advertisers were in full swing. Working closely with the Office of Civilian Defense and private industry, billboard companies displayed propaganda posters, advertised war bonds, recruited military volunteers, hosted victory gardens, and promoted thrift.<sup>133</sup> Signs were no longer irksome intruders upon the horizon. Rather, like flags, they became markers of patriotism and civic pride.

### *C. National Highways and National Regulation: 1950-1980*

Despite much anti-billboard furor, the early 20<sup>th</sup> century brought little actual regulation to New Haven, and by the end of the period, the exigencies of World War II were deflating what remained of the anti-billboard cause. Yet, as the country emerged from World War II, whatever billboard companies may have contributed to the victory in Europe did not translate into a lasting victory for themselves along the roadway. The 1950s brought development of the interstate highway system, and with it, stepped-up criticism of “billboard blight.”

In 1956, the Federal Aid Road Act authorized the construction of a 41,000-mile interstate highway network, ninety percent of which was to be funded by the federal government.<sup>134</sup> By 1958, Interstate 95 became the first federal highway to weave through New Haven.<sup>135</sup> The Oak Street Connector followed a year later, and Interstate 91 arrived by 1966. These highways formed an “x” pattern, converging in the central city and framing New Haven’s downtown area in their northwesterly quadrant. The new highways offered a wide roadway that promised to increase traffic flow and ease congestion. But the highways also sliced through existing urban space, fracturing and dominating the city’s landscape. As one observer explained, “The view from the [Oak

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<sup>132</sup> OUTDOOR ADVERTISING ASS’N OF AMERICA, *OUTDOOR ADVERTISING: A CHANNEL OF COMMUNICATION WITH THE PUBLIC* (1942).

<sup>133</sup> See OUTDOOR ADVERTISING ASS’N OF AMERICA, *OUTDOOR ADVERTISING: A CHANNEL OF COMMUNICATION IN THE WAR EFFORT* (1944). During the First World War, President Coolidge even recognized the “fine service which [the OAAA] and its members have rendered to the national interest at more than one period during the trying years through which the country has lately been passing.” Letter of President Calvin Coolidge, Aug. 23, 1923, in *MODERN MARKETING*, *supra* note 48, at 5.

<sup>134</sup> See Federal Aid Road Act of 1956, ch. 462, tit. I, § 103(b), 70 Stat. 376 (current revised version at 23 U.S.C.A. §§ 101, 202, 204, 205).

<sup>135</sup> I-95 had already been planned as the Connecticut Turnpike prior to 1956. See *RAE*, *supra* note 8, at 330.

Street] connector is good . . . but the view of the connector . . . is dull.”<sup>136</sup> To city utilitarians, particularly those residing in the suburbs, the new highways were a gift of convenience. To city aesthetes, however, they were an invasion of ugliness.<sup>137</sup>

Whatever the benefits of the interstate highway system, signs were not usually considered one of them. The increased traffic flow along major highways made abutting signs more profitable, and therefore, more prevalent. But while highways were loved by those traveling upon them and disdained by those looking at them, highway billboards often drew equal ire from both groups. Hence, anti-billboard activists renewed their efforts to reclaim the visual landscape. But this time activists brought a new approach to their old cause – endeavoring to turn “billboard blight” into a national issue worthy of federal regulation.

As we have seen, sign regulation up to this point was sometimes a state concern, but it remained more often a local affair. New Haven city government took responsibility for designing the rules that allocated property in its horizon. The case for federal funding of interstate highways rested on the notion that the convenient interstate movement of people and goods conferred benefits far beyond the borders of a given state or municipality. Moreover, highways spanning multiple political subdivisions required costly coordination to build locally. However, the horizon along a highway does not share these attributes. It would seem to be a quintessentially local resource best controlled by those who had the greatest stake in it – local residents.

Why, then, did sign regulation become a national issue? Three factors were probably at work. First, local efforts at sign regulation had mostly failed to stop the proliferation of signs. As we saw in New Haven, the City Beautifiers and the Scenic Sisters were unable to enact strict sign regulations. City politicians were either uninterested in beautification or beholden to sign companies and the local businesses that depended on them. In theory at least, federal regulation allowed an end-run around the special interests that dominated local politics. Secondly, some determined the presence of signs along federally-funded highways to be a misuse of a federally-provided public good. In this view, signs were less a desecration of the local landscape than they were a rapacious attempt to profit at public expense. In the words of the activists, billboards threatened to turn the government’s \$25 billion highway investment into the “greatest giveaway of all time,” “a huge theft from the public,” and “a subsidy to the billboard industry.”<sup>138</sup> Since the federal government had paid for its highways, the “improper” use of those highways

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136 ALLAN R. TALBOT, *THE MAYOR’S GAME: RICHARD LEE OF NEW HAVEN AND THE POLITICS OF CHANGE* 114 (1967).

137 Lewis Mumford, speaking of New York’s new highways, offered a colorful denunciation: “This is pyramid building with a vengeance: a tomb of concrete roads and ramps covering the dead corpse of a city.” RAE, *supra* note 8, at 330.

138 GUDIS, *supra* note 11, at 219.

was seen as a federal injustice. Finally, anti-billboard activists saw the federal highway program as a new opportunity that they may as well exploit. Federal funding of highways gave Congress the leverage it needed to attach accompanying regulations. In the minds of activists, federal regulation offered a new means of bringing pressure to bear on the billboard industry. It was a new tool they saw no reason not to use.

Two years after it commenced efforts to construct an interstate highway system, Congress took up the issue of billboard regulation. The Federal-Aid Highway Act of 1958, in a provision commonly known as the “Bonus Act,” established incentives for states to control sign proliferation along interstate highways.<sup>139</sup> The Bonus Act offered a 0.5 percent increase in federal highway funding to states that established certain size, lighting, and spacing standards and prohibited billboards outside commercial and industrial zones.<sup>140</sup> The official purpose of the Bonus Act reflected significant aesthetic motivations, tinged with the notion that billboards abuse a federal public good. As the Act explained, federal sign regulation was necessary to “promote the safety, convenience, and enjoyment of public travel and the free flow of interstate commerce and to protect the public investment” in interstate highways.<sup>141</sup> Yet, despite its ambitious intentions, the Bonus Act could claim only modest results. The Bonus Act’s small financial incentive could not overcome the billboard industry’s lethally effective state lobbyists.<sup>142</sup> As one anti-billboard activist complained, the billboard lobby

shrewdly puts many legislators in its debt by giving them free sign space during election time, and it is savage against the legislator who dares oppose it. It subsidizes his opposition, foments political trouble in his home district, donates sign space to his opponents and sends agents to spread rumors among his constituents.<sup>143</sup>

Hence, by the time the Act expired in 1965, only twenty-three states expressed a desire to qualify for bonuses and a mere seven of those states ended up establishing regulations sufficient to receive them.<sup>144</sup>

By 1965, anti-billboard activists considered the Bonus Act to be a failure and lobbied to replace it with stronger regulations. These activists made common cause with fellow beautifier Lady Bird Johnson, and thereby gained a powerful ally in her husband, President Lyndon Johnson. With the goal of “improv[ing] the quality of American life,” Johnson’s Great Society project, at

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139 Federal-Aid Highway Act of 1958, Pub.L. 85-381, Apr. 16, 1958, 72 Stat. 89 (current revised version at 23 U.S.C.A. §§ 101, 104, 117, 118, 121, 123, 128, 203, 304).

140 *See id.* at § 122, 72 Stat. 89, 95-96.

141 *Id.* at § 122(a), 72 Stat. 89, 95.

142 For a detailed discussion of the Bonus Act’s legislative history and ultimate failure, see Albert, *supra* note 7 at 483-90.

143 GUDIS, *supra* note 11, at 221.

144 *Id.*

Lady Bird's behest, absorbed the highway beautification cause.<sup>145</sup> In a special message to Congress, Johnson explained, "By making our roads highways to the enjoyment of nature and beauty we can greatly enrich the life of nearly all our people in city and countryside alike."<sup>146</sup> Johnson considered beauty to be a national resource akin to wealth, noting, "Beauty . . . is one of the most important components of our true national income, not to be left out simply because statisticians cannot calculate its worth."<sup>147</sup> Johnson and the anti-billboard activists were particularly concerned with preserving scenic vistas along rural highways.

On May 26, 1965, Johnson urged Congress to enact regulations that would ban outdoor advertising within 1,000 feet of interstate highways in commercial, industrial, and unzoned areas.<sup>148</sup> To accomplish this effort, new signs would be prohibited in such areas, and existing signs would be removed through "amortization."<sup>149</sup> As Congress considered Johnson's proposals, interest groups lined up on both sides – urban planners, garden clubs, and women's clubs on the side of Beauty; advertisers, business groups, and sign operators on the side of Commerce. For both sides, the stakes were high and the battle fierce.

Although anti-billboard reformers had Lady Bird's ear, the pro-billboard forces had access to many figures entrenched in the Washington policymaking apparatus. Shrewdly, the billboard industry did not object to the need for federal legislation. It simply wanted a hand in crafting it. Hence, when it came time to draft the legislation, White House aide Bill Moyers sought help from OAAA president Phillip Tocker. In a poetic image of the whole affair, President Johnson announced his proposed legislation to a group of scenic sisters on the White House lawn, while Tocker watched the pageantry from Moyers' West Wing office.<sup>150</sup> The final legislation that Congress passed as the "Highway

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145 Lyndon B. Johnson, Annual Message to the Congress on the State of the Union, 1 Pub. Papers 6 (Jan. 4, 1965); *see also* Lyndon B. Johnson, Special Message to the Congress on Conservation and the Restoration of Natural Beauty, 1 Pub. Papers 155 (Feb. 8, 1965) [hereinafter "Special Message to Congress"] (recommending billboard regulation).

146 Special Message to Congress, *supra* note 145, at 159.

147 *Id.* at 156.

148 *See generally* Albert, *supra* note 7, at 491. The proposal left to state and local discretion the regulation of signs in residential areas and areas further from the highway.

149 Amortization allows the government to prohibit an existing use of property without having to pay compensation through the exercise of eminent domain. The existing use is permitted to continue for a "reasonable" time, after which it must be discontinued. Most courts have upheld amortization, holding that the Constitution does not require additional compensation. *See generally* Charles F. Floyd, *The Takings Clause and Signs: The Takings Issue in Billboard Control*, in 2001 ZONING AND PLANNING LAW HANDBOOK 637, 651 n.34 (Patricia E. Salkin, ed.) (collecting cases). A minority of courts have found amortization to be unlawful, deeming it akin to a slow, uncompensated taking. *See* Jay M. Zitter, *Annotation, Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R.5<sup>th</sup> 391 (1992 & 2004 Supp.) (collecting cases). Much controversy also surrounds the reasonableness of amortization time periods. *See generally* Margaret Collins, *Methods of Determining Amortization Periods for Non-Conforming Uses*, 3 WASH. U. J.L. & POL'Y 215 (2000).

150 *See* GUDIS, *supra* note 11, at 224.

Beautification Act” (HBA) disappointed the hopes of anti-billboard activists.<sup>151</sup> The HBA replaced the carrot of the Bonus Act with a tough-sounding stick: States would lose ten percent of their federal highway funds unless they prohibited billboards within 660 feet of interstate highways in commercial, industrial, and unzoned areas. So far so good. Yet, buried within the HBA was a prohibition of amortization. States did not have to remove existing billboards, and if they wanted to do so, they would have to pay compensation to achieve it.

Hence, the HBA effectively prohibited new billboards in certain areas while protecting old billboards everywhere. Given the fact that more billboards already existed than were likely to come into existence, the HBA amounted to a net loss for anti-billboard activists. Echoing the sentiment of many such activists, Helen Reynolds complained of “the shocking unbalance favoring concessions to the billboard lobby.”<sup>152</sup> And in an ironic juxtaposition, members of the billboard industry ran newspaper ads supporting “President Johnson’s legislative program to improve the beauty of our country.”<sup>153</sup> The anti-billboard activists had raised the stakes of billboard regulation and effectively made it a national issue. Then they had lost.

The impact of the HBA’s compensation requirement was softened somewhat by the Act’s allocation of federal funds to cover seventy-five percent of compensation costs incurred by the states in billboard removal. However, one scholar has observed that “there was never any concrete estimate of what the removal program would cost.”<sup>154</sup> Indeed, federal sign removal expenditures peaked at \$27 million in 1976 and declined to \$2 million by 1984.<sup>155</sup> A 1985 review by the General Accounting Office estimated that it would take an additional \$427 million in federal money to remove the remaining 124,000 nonconforming billboards.<sup>156</sup>

According to many scholars and activists, the compensation requirement, combined with a shallow well of federal dollars, effectively tied the hands of state governments, preventing them from removing existing nonconforming billboards.<sup>157</sup> If only the HBA had not done this, the story goes, there would have been much more billboard removal. However, the subsequent history of

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151 Highway Beautification Act of 1965, Pub.L. 89-285, Oct. 22, 1965, 79 Stat. 1028 (codified at 23 U.S.C.A. § 136).

152 GUDIS, *supra* note 11, at 225.

153 *Id.* at 224.

154 Albert, *supra* note 7, at 502.

155 COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE S. COMM. ON ENVIRONMENT AND PUBLIC WORKS 2 (1985) [hereinafter “GAO Report”]

156 *Id.* at iii. This amounts to a total federal and state compensation cost of \$4,592 per billboard. In 2005 dollars, the cost per billboard would be roughly \$8,312.

157 See, e.g., Albert, *supra* note 7, at 502 (“Lack of funding has been the most immediate impediment to achievement of the highway beautification goal.”); Charles F. Floyd, *Billboard Control Under the Highway Beautification Act – A Failure of Land Use Controls*, 45 J. AM. PLAN. ASS’N 115, 116 (1979) (“[The] forced compensation feature, combined with meager appropriations for the program, has meant that very few signboards have actually been removed under the Act.”).

billboard regulation casts doubt on this blame-the-feds theory. Although the HBA required states to remove “illegal” signs (i.e., nonconforming signs erected after the HBA or otherwise violating state regulations) immediately without compensation, the GAO review found that many illegal signs nevertheless remained standing eighteen years later.<sup>158</sup> Citing “lack of support” for sign removal, the GAO observed, “Unlike the decrease in the removal of nonconforming signs, the decrease in illegal sign removals is not attributable to reductions in federal funds because removing these signs does not require the payment of compensation.”<sup>159</sup> Hence, at the same time as Congress lost its motivation to fund sign removal, states were also losing their own motivation to eliminate the signs that they could have easily removed on their own. Meanwhile, despite the restrictions of the HBA, Vermont, Maine, Hawaii, and Alaska exhibited extraordinary motivation, managing to remove all billboards within their states.<sup>160</sup> Thus, federal law had less of an effect on the realities of billboard removal than the conventional wisdom assumes. States with much motivation went far beyond the HBA; states with little motivation stopped short of it.

Connecticut appears to have been neither particularly aggressive nor particularly lax in its sign control efforts. Five years after passage of the Bonus Act and two years before the Highway Beautification Act, the state amended its 1927 sign regulations so that it would have qualified for Bonus Act payments.<sup>161</sup> By 1967, Connecticut had updated its laws to comply with the HBA.<sup>162</sup> Connecticut also empowered the highway commissioner to promulgate further regulations and assess licensing fees, but in most cases, local ordinance and zoning regulations were permitted to go further than state regulations.<sup>163</sup> It remains difficult to tell how successfully the highway commissioner removed illegal billboards or eliminated old billboards through compensation. A news article from 1981 suggested that Connecticut had removed only 124 of the state’s 612 “illegal” signs.<sup>164</sup> Indeed, a Guilford citizen complained in 1985, “Enough is enough. For some time now I have watched billboards sprouting up like weeds all over the place.”<sup>165</sup> This period also saw a weakening of the state’s billboard fee-and-licensing scheme established in 1927. In 1959, the legislature increased the per-sign fee but not

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158 See GAO Report, *supra* note 155, at 11.

159 *Id.*

160 See GUDIS, *supra* note 11, at 226. These states prohibited new billboards, and removed existing billboards, using both state and federal money to fund HBA-required compensation.

161 See 1963 Conn. Acts 339-341 (Reg. Sess.) (prohibiting billboards within 660 feet of highways outside industrial, commercial, and unzoned areas).

162 See 1967 Conn. Acts 976-980 (Reg. Sess.) (prohibiting billboards within 660 feet of highways outside industrial, commercial, and unzoned areas; requiring compensation for removal).

163 *Id.* at 978.

164 See *Regulation of Outdoor Signs Praised: Illegal Billboards Targeted by State*, NEW HAVEN REG., Aug. 17, 1981. The report appeared to conflate “illegal” signs with existing nonconforming signs requiring compensation.

165 Armin Paul Thies, Letter to the Editor, *Billboards*, NEW HAVEN REG., May 18, 1985.

the yearly licensing fee, such that the total increase did not outpace inflation.<sup>166</sup> Later, in 1986, the legislature replaced the protectionist yearly licensing fee with a moderate one-time fee of \$25 to \$50 per billboard (\$42 to \$84 in 2003 prices), depending on size.<sup>167</sup> The legislature also increased the yearly per-sign fee, but at less than the rate of inflation. Hence, total inflation-adjusted fees dropped dramatically to an average of \$39 per billboard (in 2003 prices).<sup>168</sup> The state of Connecticut appears to have done little to satisfy residents such as the one from Guilford.

While sign regulation saw much activity at the federal and state level during this period, it remained off the agenda of policymakers back in New Haven.<sup>169</sup> Ironically, however, New Haven was unwittingly undertaking its single most effective sign control measure: urban renewal. Many of the large swaths of land taken by the city for urban renewal projects included prime billboard locations along the highways that ran through New Haven. While this land remained in city hands, no billboards could be erected. Indeed, the southern part of I-95 along Long Wharf remains devoid of billboards today, since the city's redevelopment plan for that area did not expire until New Haven managed to enact a more stringent sign ordinance in the 1990s.

As the last decade of the 20<sup>th</sup> century approached, anti-billboard activists resigned themselves to defeat. The legal restraints of the *Lochner* era had loosened and given policymakers much freedom to craft aesthetic regulations. And in this new era, unsatisfied with state and local regulation, anti-billboard activists took their cause to the very top. However, by 1979, this culmination of the beautification movement was being called a "failure."<sup>170</sup> Indeed, one sympathizer lamented, "Even though billboard control was one of the first important environmental issues, it now is seemingly out of vogue with [environmental] groups."<sup>171</sup>

This failure resulted primarily from a miscalculation on the part of anti-billboard activists. They did not foresee that the federal legislative process could be turned against them, nor did they realize that theirs was a losing battle from the start. The history of the HBA finds explanation in the theory of public choice, and as such, presents a case study in "government failure."<sup>172</sup> National billboard politics exemplified a familiar dynamic, explained by Mancur Olson

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166 An Act Concerning Fees for Advertising Sign Permits, Conn. Pub. Act No. 635 (1959); see Figure A and accompanying notes, *supra*, at 40.

167 An Act Concerning Fees for Outdoor Advertising Signs, Conn. Pub. Act No. 86-209, § 2 (Aug. 1, 1986).

168 See Figure A and accompanying notes, *supra*, at 40.

169 But see discussion *infra* Section I.D (discussing sign regulations in 1962 zoning ordinance).

170 Floyd, *supra* note 149, at 115.

171 *Id.* at 125.

172 See, e.g., GORDON TULLOCK ET AL., GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 37-38 (2002).



as the “tendency for the ‘exploitation’ of the great by the small.”<sup>173</sup> If the provision of a public good moderately benefits a large, diffuse group but substantially harms a small, concentrated one, the latter group will tend to prevail because each of its members will have a larger relative incentive to act.<sup>174</sup> In the case of the HBA, the scenic benefits of eliminating billboards would have been distributed among a large number of people (all highway users) but would have affected each of them only a small amount. In contrast, the costs of anti-billboard legislation would have been concentrated among a small number of people (billboard companies) and would have affected each greatly. For the sign industry, billboard regulation presented an existential threat; for anti-billboard highway users, it was something of a hobby, albeit for some a passionate one. This dynamic predicted that the billboard industry would leverage more political force than their anti-billboard opponents.<sup>175</sup> And the prediction proved correct.

Indeed, two factors compounded the impact of this dynamic. First, the fact that anti-billboard activists attempted to prohibit billboards nationally, rather than at the state level, actually weakened their political leverage. It ensured that the benefits of regulation would be distributed amongst a larger group while simultaneously increasing the potential costs of regulation to the billboard industry. After all, a loss in a given state would strike a blow to the sign industry, but a loss in Congress would put it out of business. Moreover, the success of anti-billboard measures in Vermont, Maine, Hawaii, and Alaska offers a telling contrast to the federal failure. These four states share attributes that would cause us to predict the success of anti-billboard regulation: They are smaller, more scenic, and have relatively less traffic volume than other states.<sup>176</sup> These circumstances likely tipped the political balance in favor of billboard regulation. With federal regulation, however, the balance tipped far in the opposite direction.

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173 MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 35 (2d ed., 1971).

174 *See id.* at 33-36.

175 Olson explains, “Since relatively small groups will frequently be able voluntarily to organize and act in support of their common interests, and since large groups normally will not be able to do so, the outcome of the political struggle among the various groups in society will not be symmetrical.” *Id.* at 127. Each motorist would have received only a small share of the total value of federal beautification. Hence, individual motorists had little incentive to organize to provide it.

176 The states’ small size would allow anti-billboard activists to organize more effectively and would concentrate the benefit of scenic highways on a smaller group. While those opposing billboards are a large group (relative to their foes) in the national context, they are not so large in a small state. Since the group of beautification beneficiaries would be smaller in a small state, each person’s potential relative share of beautification would be larger and the costs of organization would be lower. As such, the anti-billboard interest group would be more effective. *See id.* at 48. Additionally, the scenic nature of these states would increase the intensity of benefits resulting from anti-billboard measures. Finally, the low traffic volume would decrease the intensity of costs to the billboard industry, and thereby limit its willingness to expend resources to defeat anti-billboard measures.

Secondly, the national effort to regulate signs left anti-billboard activists worse off, since it gave the billboard industry political cover under which to seek federal protections it could not have achieved on its own. The billboard industry could never have gotten away with passing a federal Billboard Protection Act, but it could achieve the same thing under the auspices of a Highway Beautification Act. Once the anti-billboard activists made the sign issue a subject of federal legislation, the billboard industry exploited the public's informational disadvantage by burying its favored provisions within a complex bill. Hence, the anti-billboard activists unwittingly built a Trojan horse for the billboard industry. As this period came to a close, it was clear that, for its original proponents, the HBA had amounted to nothing more than a cautionary lesson against overzealous sign regulation.

#### *D. City Planners and Angry Neighbors: 1980-2005*

The last decade of the 20<sup>th</sup> century ushered in the modern era of New Haven sign control. While the billboard controversy had raged at the national level during the 1960s, New Haven was preoccupied with urban renewal and the wholesale reshaping of the city's urban environment. This had the unintended consequence of limiting the proliferation of signs in New Haven, even though the empty lots, "brutalist" architecture, and hulking "coarse-grain" structures of urban renewal may not have produced a net aesthetic improvement for the city.<sup>177</sup> Yet, as urban renewal efforts waned and land returned permanently to private hands, the sign issue made a local resurgence.

It was addressed this time through the popular modern land use mechanism of zoning. New Haven's early zoning ordinances made no mention of signs until 1962.<sup>178</sup> The 1962 ordinance had permitted small non-illuminated signs in residential districts and larger signs of any kind in business or industrial districts. Besides a modest requirement that no billboards be placed within 100 feet of one another, the ordinance did little to prevent the erection of standard-sized billboards on any business or industrial property.<sup>179</sup>

As urban renewal redevelopment plans expired in the 1980s, signs appeared to have become a growing concern to New Haven's city planners. In its 1981 annual report, the City Plan Commission noted that New Haven's

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<sup>177</sup> See generally BERNARD J. FRIEDEN & LYNN B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 41-44 (1989) (critiquing the aesthetic and social impact of urban renewal).

<sup>178</sup> See NEW HAVEN, CONN., ZONING ORDINANCE § 44 (1962); NEW HAVEN, CONN., ZONING ORDINANCE (1941); NEW HAVEN, CONN., ZONING ORDINANCE (1925).

<sup>179</sup> In lots with buildings, the total area of a billboard could not exceed four square feet for every foot of length of the front of the building wall; in lots without buildings or with buildings less than 100 feet in width, the total area could not exceed one square foot for every foot of street frontage. See NEW HAVEN, CONN., ZONING ORDINANCE § 44A.3 (1962). In practice, these limitations likely had little effect, except to prevent very large signs. The industry standard 275 square foot billboard would have required less than 70 feet of building width.

sign regulations had “become inadequate.”<sup>180</sup> The City Plan Commission saw a surge in demand for new billboards, particularly in the Annex, Grand Avenue, and I-91 areas.<sup>181</sup> In 1986, the City Plan Commission again reported an “ongoing discussion related to improvement of the City’s visual environment.”<sup>182</sup> Throughout the 1980s, however, sign control efforts never moved beyond “discussion.”

Finally, in the early 1990s, another surge in billboard activity spurred the City Plan Department into more vigorous action. Billboard companies had sought numerous special exceptions<sup>183</sup> from the Board of Zoning Appeals to erect large billboards, the “cumulative effect” of which the Department deemed to “obstruct views of East Rock, the Harbor, [and] the towers and spires of our downtown.”<sup>184</sup> In a report to the Board of Zoning Appeals objecting to two such petitions for special exceptions, the Department explained:

New Haven has a total of 24 dual faced and 12 single faced billboards in the 8 miles of limited access highway corridor in the City. Five of these billboards, all double sided and 4 more than 60’ tall, have been approved and constructed in 1994. If the 2 billboards proposed this month are approved, there will be 38 billboards along 8 miles of highway. [W]e will be forced to see a billboard every ten to twelve seconds.<sup>185</sup>

The report warned that such continued permissiveness from the Board of Zoning Appeals would “substantially diminish the pleasure of travel as vistas and views in the travel corridor are dominated by billboards.”<sup>186</sup>

Nevertheless, the Board of Zoning Appeals was not very receptive to the Department’s concerns. In desperation, the Department took its case to the Board of Aldermen. It sought a six-month moratorium on new billboards that would allow time to rethink the city’s sign ordinance. In his plea to the aldermen, city planner Stephen Papa urged that the “visual quality” of New Haven affected the “image of our City,” as it would be perceived by travelers along I-95 and I-91.<sup>187</sup> He convincingly argued that the existing ordinance had become obsolete:

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180 NEW HAVEN CITY PLAN COMMISSION, OUTLINE OF CITY PLAN DEPARTMENT ACTIVITIES 7 (1982).

181 Interview with Michael Piscitelli, Assistant Director of Comprehensive Planning, New Haven City Plan Department, in New Haven, Conn. (May 10, 2005) [hereinafter “Piscitelli Interview”].

182 NEW HAVEN CITY PLAN COMMISSION, ANNUAL REPORT 20 (1986).

183 New Haven’s zoning ordinance did not permit billboards in many areas to be higher than twenty feet. Hence, many billboard companies had to petition the Board of Zoning appeals for permission to erect much taller billboards.

184 Memorandum from Karyn Gilvarg, New Haven City Plan Department, to Walter Esdaile (Sep. 15, 1994) (copy on file with author).

185 New Haven City Plan Department, Advisory Report to the Board of Zoning Appeals, File #94-55-S (on file with the New Haven City Plan Department, New Haven, Conn.).

186 *Id.*

187 1994 B.A. JOURNAL 1428.

[T]he 1963 comprehensive revision of the New Haven Zoning Ordinance . . . was revised within a framework of 1950's and 1960's development controls that prohibited the placement of advertising signs within the City of New Haven Renewal Areas. These renewal controls have lapsed in some areas and will lapse in others over the coming decade.<sup>188</sup>

Moreover, Papa explained that the “size and height of billboards recently proposed were not technologically or economically feasible when the current Zoning Ordinance was adopted in 1963.”<sup>189</sup> At the same time as it pressed the Board of Aldermen, the City Plan Department attempted to gain public support for its efforts. Quoted in a *New Haven Register* story, city planner Karyn Gilvarg warned, “People will be saying, ‘Oh yeah, I remember New Haven. That’s where I saw the funny ad about the bank.’”<sup>190</sup> She added, “It won’t be ‘Oh yeah, that’s the place where the road opens up and you get a beautiful view of the water.’”<sup>191</sup> Not everyone agreed, however. In the same article, Alderman George Perez said that he had never noticed New Haven’s billboards, and he chided the City Plan Department for spending so much time on the issue. Echoing Perez’s apathy, a representative for the Connecticut Motor Club observed, “It’s not something our members have been very concerned about.”<sup>192</sup>

In both the rhetoric of the City Plan Department and the reaction of some contemporaries, we see a markedly different political reality than we saw in the heady days of the federal beautification crusade. Note that Gilvarg showed no scorn for billboards in her public comment. Indeed, she seemed to admit that their “funny ads” had some charm. Hence, as she put it, this effort was about preserving the scenic beauty of a great city; it was not about preventing evil billboards from abusing a public roadway. Perhaps Gilvarg realized that a few zealous city planners would never be able to rally an indifferent public to the anti-billboard cause. Gilvarg and her fellow planners were better off appearing as reasonable, technocratic stewards of the city environment. On this ground, they would be best able to exert their authority.

The tactic succeeded. In February 1995, the Board of Aldermen granted the requested moratorium and established a billboard working group to consider a revision of New Haven’s sign ordinance.<sup>193</sup> The working group included representatives from the major area billboard companies, as well as aldermen and City Plan staff. After nine months of consultation (made possible by a second six-month moratorium), the working group managed to draft a new ordinance.

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188 *Id.*

189 *Id.*

190 Allan Drury, *Moratorium Sought on New Billboards Along Highways*, NEW HAVEN REGISTER, Jan. 26, 1995, at A3.

191 *Id.*

192 *Id.*

193 *See* 1995 B.A. JOURNAL 146-48.

The new ordinance did most of its work through provisions limiting the spacing, height, size, and in some instances, location of billboards. It distinguished between on-premise signs and off-premise signs,<sup>194</sup> permitting on-premise signs in all commercial or industrial areas, subject to height and size limitations.<sup>195</sup> Declaring that off-premise advertising signs were “of lesser importance” than on-premise signs, the ordinance enacted additional restrictions for off-premise billboards.<sup>196</sup> Billboards were restricted to certain zones and prohibited from certain scenic areas, required to be at least 1,500 feet apart from one another, and required to be no more than thirty feet in height.<sup>197</sup> Beyond prohibition of billboards in certain areas, the ordinance had two different methods of limiting the ability of signs to crowd the horizon: Spacing requirements would reduce the total number of billboards while height requirements would reduce the visual impact of any given billboard.

Prior to submitting the ordinance to the full Board of Aldermen, the working group held two public hearings to present its draft and seek public comment. Perhaps suggestive of the real force behind this sign control effort, private citizens and community groups were outnumbered at the hearings by planners, city officials, and billboard company representatives.<sup>198</sup> Everyone except the billboard representatives unreservedly supported the new ordinance. Many people expressed the need to protect views and vistas, particularly views of the Harbor, East Rock, West Rock, Long Wharf, Oyster Village, and Quinnipiac River areas. Even the Connecticut Department of Environmental Protection applauded the ordinance, observing, perhaps tenuously, that it would “re-unite the City with its waterfront” by “maintaining and creating visual connections between them.”<sup>199</sup>

The billboard company representatives also expressed support for the new ordinance, but they were dissatisfied with the ordinance’s height and spacing restrictions. Since I-95 and I-91 were built mostly on berms or bridges through New Haven’s urban areas, the highways often sat twenty or more feet above the street level in the surrounding neighborhoods. Hence, to ensure highway

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<sup>194</sup> For a discussion of the First Amendment concerns implicated by distinguishing between different kinds of signs, see *infra* Section II.D.

<sup>195</sup> See NEW HAVEN, CONN., ZONING ORDINANCE §§ 44(b)-(c) (1996).

<sup>196</sup> *Id.* at § 44.1. In regulating off-premise signs, the ordinance articulated five factors that constituted its purpose: effective use of signs as a means of communication; enhancement of the aesthetic environment; furtherance of traffic safety; minimization of adverse effects on nearby property; enabling of fair and consistent enforcement. *Id.*

<sup>197</sup> See *id.* at § 44.1(b).

<sup>198</sup> A total of six planners or city officials and five industry spokesmen either made public comments or wrote letters in support of the new ordinance. Five private citizens and four community group representatives also made comments. See New Haven City Plan Comm’n, Minutes of Meeting 1198, Nov. 15, 1995 (copy on file with author); New Haven Board of Aldermen, Comm. on Legislation, Minutes, Nov. 30, 1995 (copy on file with author) [hereinafter “Aldermen Hearing”].

<sup>199</sup> Letter from David J. Kozak, Envtl. Analyst, Office of Long Island Sound Programs, Conn. Dep’t of Envtl. Prot., to the New Haven City Plan Comm’n, Nov. 13, 1995 (copy on file with author).

visibility, the billboard companies wanted a fifty or sixty foot height requirement instead of the thirty feet that had been proposed.<sup>200</sup> Curiously, the billboard companies were much more willing to accept spacing requirements than height requirements. Indeed, it was a company representative who had proposed the increase in spacing from 500 feet to 1,500 feet, hoping that the concession would garner less restrictive height limits.<sup>201</sup> This curiosity is probably explained by the fact that spacing requirements keep new entrants out of the billboard market, limiting supply and thereby raising the value of existing billboards. For the billboard companies who had already taken New Haven's prime locations, freedom with regard to height would have been much more advantageous, since it would increase the value of existing signs.

Ultimately, no revisions were made to the proposed ordinance. In December 1995, the Board of Aldermen passed the new sign law unanimously.<sup>202</sup> Upon passage, one alderman declared that they had come up with a "compromise zoning ordinance that satisfies all of us who are interested in this situation."<sup>203</sup> Needless to say, however, few people were interested. The *New Haven Register* did not even deem this event worthy of a story.

Yet, such was not the case with another piece of December sign news. The *New Haven Register* reported the worry of one resident that his "modest blue collar neighborhood" was "about to be battered."<sup>204</sup> The dire source of such battery was a Kmart sign. Intended to be visible from I-91, the sign would be lighted, 85 feet high, and advertise the new Elm City Plaza retail development. Yet, the sign fomented vocal and passionate reactions from nearby residents. One letter to the editor published in the *New Haven Register* decried the sign as "visual pollution," a "slap in the face," an "insult to city residents," and most frighteningly, a "callous monster."<sup>205</sup> The Kmart episode offers a striking contrast to the dispute over New Haven's sign ordinance. The latter excited a vociferous public response, while the former was met mostly with apathy. Residents did not think or worry about signs, unless one appeared in their backyard.

Indeed, the only other major New Haven sign controversy during this period involved another not-in-my-backyard dispute. In 1997, a group of eight aldermen representing poor and minority constituencies proposed an ordinance to prohibit alcohol and tobacco advertising on billboards or storefronts near schools, churches, parks, and libraries. The *New Haven Register* reported that poor and minority neighborhoods were "saturated with billboards and posters

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200 See Aldermen Hearing, *supra* note 198 (statement of Anthony Avallone).

201 See *id.* (statements of Anthony Avallone and Charles Ghione).

202 See 1995 B.A. JOURNAL 1657-58.

203 *Id.* at 1658 (statement of Alderman Schmalz).

204 David McClendon, *Billboard Proposal Strikes a Nerve*, NEW HAVEN REGISTER, Dec. 4, 1995, at A3.

205 Barbara Blanco, Letter to the Editor, *Proposed Kmart Sign Insults City Residents*, NEW HAVEN REGISTER, Nov. 10, 1995, at A14.

hawking alcohol and tobacco” and that residents had resolved to “reclaim their environments.”<sup>206</sup> The pastor of a local church explained, “If there’s one thing depressed communities don’t need it’s someone coming in and profiting off of vice.”<sup>207</sup> Local community groups and the Board of Aldermen’s black and Hispanic caucus members supported the prohibition; business groups and the local chapter of the ACLU opposed it. At a public hearing, twenty citizens showed up and gave lengthy testimony. Ultimately, however, the City Plan Commission refused to recommend any changes to the sign ordinance, and the prohibition was never enacted by the Board of Aldermen.

As a general matter, New Haven’s zoning ordinance has been relatively successful at limiting the proliferation of signs while permitting them to a reasonable degree. However, billboard companies do appear to have found one soft spot in the ordinance’s armor – the special exception process. Sign companies may request permission from the Board of Zoning Appeals to circumvent ordinance regulations. Since the new sign ordinance was enacted, at least three billboard companies have sought exceptions from the Board of Zoning Appeals.<sup>208</sup> The Board is appointed by the Mayor, and there is at least circumstantial evidence of rent-seeking behavior on the part of billboard companies. In 1995, Gannett Outdoor Advertising donated a \$15,000 billboard advertisement along I-95, portraying a large picture of Mayor John DeStefano Jr., ostensibly intended to welcome visitors to New Haven for the 1995 Special Olympics. The mayor’s political opponents objected, deeming it a campaign advertisement in violation of state campaign finance laws. Yet, the billboard company was untroubled, explaining, “As far as we’re concerned, it has no political overtones. John DeStefano just happens to be the mayor of New Haven at this time.”<sup>209</sup> The continued ability of New Haven’s sign ordinance to control the city’s billboards will likely depend on whether the billboard companies exert enough influence on this and future mayors to win exceptions through the Board of Zoning Appeals.

While New Haven’s city government busied itself with sign regulation during this period, the Connecticut state legislature remained less active. The state made no major revisions to its HBA-inspired regulatory framework,<sup>210</sup> and in 2003, it raised billboard permit fees such that the increase only barely

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206 David McClendon, *City Would Ban Vice Ads in ‘Kid’ Zones*, NEW HAVEN REGISTER, Feb. 8, 1998, at A1.

207 *Id.*

208 See Denali Dasgupta, *Highway Robbery: Are More Billboards Around the Corner?*, NEW HAVEN ADVOCATE, Feb. 10, 2005 (appeals by All Visions and Next Media); Mark Zaretsky, *Company Wants to Put Up Tallest Billboard*, NEW HAVEN REGISTER, Feb. 6, 1996, at A3 (appeal by Gannett Outdoor Advertising).

209 Mark Zaretsky, *GOP Rips Mayor on Olympics Billboard*, NEW HAVEN REGISTER, May 20, 1995, at A3. The state Elections Enforcement Commission ultimately cleared DeStefano of wrongdoing. See Mark Zaretsky, *Mayor’s Campaign Cleared in Billboard Dispute*, NEW HAVEN REGISTER, Jul. 25, 1995, at A4.

210 See CONN. GEN. STAT. ANN. § 13a-123 (West 2005) (current statute governing highway billboards in accordance with HBA-mandated 1967 regulations).

exceeded inflation.<sup>211</sup> Unlike the fees issued in the first half of the century, fees since 1986 likely had little effect on the number of advertising billboards. (See Figure A)

| EVOLUTION OF CONN. STATE BILLBOARD FEES <sup>†</sup> |      |               |                   |                    |                     |                      |
|--|------|---------------|-------------------|--------------------|---------------------|----------------------|
|  |      |               | 1927 <sup>*</sup> | 1959 <sup>**</sup> | 1986 <sup>***</sup> | 2003 <sup>****</sup> |
| Annual Sign Fees (per sign)                          | Sign | <300 sq ft    | \$32              | \$32               | \$17                | \$20                 |
|  |      | 300-600 sq ft | \$63              | \$63               | \$34                | \$40                 |
|  |      | >600 sq ft    | \$95              | \$95               | \$50                | \$60                 |
| Yearly License Fee (per sign company)                |      |               | \$1,058           | \$632              | —                   | —                    |
| One-Time License Fee (per sign)                      | Sign | <300 sq ft    | —                 | —                  | \$42                | \$50                 |
|  |      | >300sq ft     | —                 | —                  | \$84                | \$100                |
| Hypothetical Avg. Yearly Fee/Sign <sup>‡</sup>       | Sign | Small Company | \$412             | \$272              | \$39                | \$47                 |
|  |      | Large Company | \$95              | \$82               | \$39                | \$47                 |

**Figure A:** Billboard Fees.

The politics of billboard control during the 1990s contrasted starkly with the periods that preceded it. Unlike the highway beautifiers or the scenic sisters before them, activists could not muster support for a broad anti-billboard cause. Indeed, there was no cause and there were no activists. Rather, billboard disputes arose from the occasional clash between fragmented political interests: billboard companies, Kmart, angry neighbors, church groups, and a handful of city planners. The public expressed little concern about billboards, and when people were concerned, the concerns were particularized. When asked about the City Plan Department's general opinion of city billboards, one city planner lamented, "We hate them! But it's mostly a City Plan obsession."<sup>212</sup> Although the planners may not have spoken for many, they exerted significant political power that allowed them to successfully enact local sign regulations.

<sup>211</sup> Conn. Pub. Act 03-115, § 81 (Jul. 1, 2003).

<sup>†</sup> All fees are reported in 2003 dollars, adjusted for inflation via the Consumer Price Index.

<sup>\*</sup> An Act Concerning Advertising Signs and Advertising Structures, Conn. Pub. L., Ch. 254, §§ 1, 4 (June 8, 1927).

<sup>\*\*</sup> An Act Concerning Fees for Advertising Sign Permits, Conn. Pub. Act No. 635 (1959).

<sup>\*\*\*</sup> An Act Concerning Fees for Outdoor Advertising Signs, Conn. Pub. Act No. 86-209, § 2 (Aug. 1, 1986).

<sup>\*\*\*\*</sup> Conn. Pub. Act 03-115, § 81 (Jul. 1, 2003).

<sup>‡</sup> These estimates are calculated by assuming that a hypothetical small company owns three signs and a hypothetical large company owns thirty signs. I further assume that each sign measures four hundred square feet and lasts fifteen years.

<sup>212</sup> Piscitelli Interview, *supra* note 181.



In a final image that the beautifiers of old would have found ironic, the city itself erected twelve new billboards – to advertise its “anti-blight” program.<sup>213</sup> In short, after a century of sign disputes, nobody wants to own the horizon. But everybody still wants to own a piece of it.

## II. Untangling the Sign Dispute: Four Recurrent Themes

The history of sign disputes reflects a collection of various forces and interests driving the regulation and use of property in the horizon. But despite the variety of such disputes, some common themes emerge from the century-long history. In this Part, we take a step back, disentangling the theoretical threads that weave through debates over sign regulation. Too often, the issue has been the subject of simple indifference or anti-billboard polemic. But, as with many policy dilemmas, sign regulation entails difficult choices among competing goods. This Part seeks to clarify the nature of these choices, offering a bridge between the descriptive analysis of Part I and the normative analysis to be undertaken in Part III. We shall examine four recurrent themes that pervade dilemmas over property in the horizon – nuisance, aesthetics, information, and expression.

### A. Nuisance

From controlling snipe signs to the activism of the scenic sisters to the premise of the HBA, the theme of “nuisance” has often accompanied the arguments for sign regulation. From this perspective, signs should be understood by analogizing them to pollution. The pollution model deems signs to be a misuse of a public good, and it suggests that signs ought to be regulated in the same manner as we regulate polluting factories or other companies that damage the environment for private gain. Indeed, for much of the 20<sup>th</sup> century, sign regulation was a significant item on the agenda of the environmentalist movement. In the words of one anti-billboard writer, signs “damag[e] environmental assets.”<sup>214</sup> Another writer maintains, “Visual Quality, like clean air and fertile soils, is one of the nation’s natural resources.”<sup>215</sup> And most colorfully, anti-billboard groups are fond of referring to billboards as “litter on a stick.”<sup>216</sup> In one respect, the pollution analogy clarifies sign disputes; in another respect, however, this rhetoric muddles them.

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<sup>213</sup> See *12 New Billboards Laud City’s Anti-Blight Program*, NEW HAVEN REGISTER, Oct. 23, 1996, at A9.

<sup>214</sup> Meg Maguire et al., *Beauty as Well as Bread*, 63 J. AMERICAN PLANNING ASS’N 317, 318 (1997).

<sup>215</sup> Harvey K. Flad, *Country Clutter: Visual Pollution and the Rural Roadscape*, 553 ANNALS OF THE AMERICAN ACADEMY OF POL. & SOC. SCIENCE 117, 120 (1997).

<sup>216</sup> Scenic America, *Opinion Polls: Billboards are Ugly, Intrusive, Uninformative*, at <http://www.scenic.org/billboardsign/publicopinion.htm> (last visited Feb. 17, 2005).

Let us begin with the clarification. By conceiving signs as visual pollution, we avoid an analytical error commonly made in rationales for sign regulation: the overidentification of property in the horizon with property in land. Parties on both sides of sign disputes often make this error. On one hand, sign owners claim that their property right in a parcel of land confers exclusive dominion over any effect their land might have on the horizon.<sup>217</sup> Sign owners thus assume that their right to erect a sign flows from their use of the privately-owned land on which it rests. On the other hand, anti-billboard activists claim that the public's property right in a highway confers the power to control or eliminate anything that relies upon the highway for its value.<sup>218</sup> Anti-billboard activists thus assume that the public's right to eliminate billboards flows from the billboards' use of the publicly-owned land that provides the billboards' sole source of existence.

Despite their radically different conclusions, the premise behind both of these arguments is identical: Whoever owns the parcel of land that a sign uses thereby owns the portion of horizon that a sign affects. However, this principle quickly amounts to analytical gridlock, since a sign "uses" both public roadways and private lots. Since both are necessary and sufficient prerequisites to a sign's existence, a "use" principle cannot resolve the clash between them. Insofar as the purpose of a roadway is travel, the sign-owner's use of his land does not interfere with the public's use of the roadway. In this sense, a sign is a nonrival use of the roadway, since it does not deprive any driver of the ability to travel upon it.<sup>219</sup> Indeed, signs are less likely to overuse a roadway than many other uses such as abutting retail outlets, gas stations, or motorists, all of which heighten congestion. Thus, the problem is not that billboards use the

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217 This argument has most often been used by property owners seeking to challenge restrictive sign ordinances. *See, e.g.*, *Metromedia, Inc. v. City of Pasadena*, 216 Cal. App. 2d 270 (1963) (rejecting as "sophistry" respondents' claim of absolute right to use land upon which signs are located).

218 As one scholar has observed, civic beautifiers staked much of their case against billboards on the claim that "the advertiser gained unfair advantage of people passing through publicly created and publicly maintained spaces." Wilson, *supra* note 58, at 402. Recall, also, that this argument was a major rationale for federal anti-billboard legislation. *See supra* Section I.C. A number of court decisions dealing with various billboard disputes also deploy this use-of-public-property argument. *See, e.g.*, *Churchill v. Rafferty*, 32 Phil. Rpt. 580, 609 (Phil. 1915) ("Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares."); *General Outdoor Adver. Co. v. Dept. of Public Works*, 193 N.E. 799 (Mass. 1935) ("[Advertisers] are seizing for private benefit an opportunity created for quite a different purpose by the expenditure of public money in the construction [of] public ways . . ."); *New York State Thruway Auth. v. Ashley Motor Court*, 176 N.E.2d 566 (N.Y. 1961) ("Billboards and other advertising signs are obviously of no use unless there is a highway to bring the traveler within view of them."); *Modjeska Sign Studios, Inc. v. Berle*, 55 A.D.2d 340 (1977) ("[Signs'] enhanced value when they are seen by a large number of people was created by the State in the construction of the roads and not by the signs' owners."). The argument has also been made by anti-billboard scholars. *See* Charles F. Floyd, *The Takings Issue in Billboard Control*, 3 WASH. U. J.L. & POL'Y 357, 360-63 (2000).

219 This would not be true if billboards created unsafe conditions for drivers, by distracting their attention. Yet, although such claims have often been made by billboard opponents, little evidence supports them. Indeed, some people have even argued that billboards reduce accidents by breaking up the monotony of the open road. *See* Albert, *supra* note 7, at 479-80.

roadway but that both motorists and sign owners claim an opposing right to use the horizon.

In short, when we speak of property in the horizon, we are speaking of an entirely different resource than property in land. The unavoidable fact of signs is that they simultaneously “use” the land on which they rest and the land against which they abut. Since the principle of “use” cannot distinguish between the claims of either landowner, we are left with two options. Either we accept that ownership (distinguished from use) of land confers ownership in that land’s piece of the horizon, or we treat the horizon as a scarce public resource, the use of which should be determined by a separate set of rules. On this question, the analogy to pollution helps us clarify the nature of signs, and suggests the superiority of the latter approach. Since the horizon is more than the sum of its parts, there is a potential for landowners to overuse it. As signs proliferate, landowners deplete the resource of an uncluttered horizon, and thereby impose external costs on others. The problem with signs is not that they extract benefits from a publicly-provided roadway. Rather, like pollution, the problem is that they impose external costs by depleting a natural resource that is in some sense claimed by the public – the horizon.

However, the rhetoric of pollution can also be misleading, at least to the extent that it causes anti-billboard activists to exaggerate the harms inflicted by signs. Not every sign is akin to a factory spewing smoke. As we saw in Part I, some people might enjoy a horizon full of signs. Others may despise it. And still others may be entirely indifferent. This fact of aesthetic subjectivity limits the force of the pollution analogy. The analogy helps us understand that signs certainly produce an externality. However, unlike the situation of a polluting factory, we cannot always be so sure that sign externalities are wholly negative.

For this reason, courts have been hesitant to recognize aesthetic nuisance as a common law right of action, often treating aesthetic nuisance claims as per se impermissible.<sup>220</sup> Yet, upon closer examination, this per se rule against aesthetic liability appears unfounded. Unaesthetic sights are not obviously more subjective or beholden to idiosyncratic taste than noises or odors, categories which have traditionally been recognized as sources of nuisance.<sup>221</sup> Even pollution, the archetypical nuisance, is not always obviously a negative externality. Yet, this provides no compelling reason to abandon all pollution nuisance claims. Rather, nuisance law distinguishes between smoke emitted from a noxious factory and smoke emitted from a backyard barbecue – that is,

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220 See, e.g., *Lane v. City of Concord*, 70 N.H. 485, 49 A. 687 (1901) (It is “well-settled that the unsightly condition of one’s premises does not of itself afford a right of action to a more aesthetic adjoining owner.”); but see Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075, 1079-80 (1970) (citing a 1932 case, *Yaeger v. Traylor*, 306 Pa. 530, as possibly the first case to recognize a private right of action for aesthetic nuisance).

221 Cf. Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes* 48 OHIO ST. L.J. 141, 167 (1987) (arguing that traditional principles of nuisance law should be applied to unsightly land uses, since “there is no physiological basis for distinguishing visual sensibilities from noise or odor perception”).

between the gradations of harm caused by a particular act. Hence, the challenge for aesthetic nuisance, as for any other kind of nuisance, is to articulate what uses of the horizon inflict substantial costs on others, who should decide when this has occurred, and what should be done once such costs are identified (in light of the benefits weighing on the other side). We shall attempt this task in Part III, after we have more fully examined the dimensions of the sign issue.

### *B. Aesthetics*

To better understand the nature of sign externalities, let us then turn to our second perspective – aesthetics. Although much ink has been spilled debating whether aesthetics are a sufficient rationale for exercise of the police power, most modern scholars find aesthetic regulation to be permissible. Since *Berman v. Parker*, courts have also tended to agree.<sup>222</sup> Indeed, some observers have been right to point out that aesthetic regulation often remains no more subjective than other sources of legislative motivation.<sup>223</sup> Nevertheless, such consensus tells us more about changing attitudes toward the scope of substantive limitations on the police power than it tells us about changing attitudes toward the subjectivity of aesthetic judgments.<sup>224</sup> Although courts may not deem aesthetic regulation irrational as a matter of law, such regulation may nevertheless be unreasonable as a matter of policy. Our degree of confidence in aesthetic judgment affects how we view the propriety and method of allocating property in the horizon.

The most consistently troubling aspect of aesthetic regulation has been its apparent subjectivity. Take, for example, Connecticut's tree-lined Merritt Parkway. To one writer in the *Atlantic Monthly*, it seemed a perfect example of unblemished beauty. He observed, "A few of the nation's great scenic highways have been preserved from the billboard desecraters. The Merritt Parkway in Connecticut is an excellent example."<sup>225</sup> Yet, another journalist told a sharply contrasting story involving art critic Seldon Rodman:

Riding along Connecticut's Merritt Parkway one day ... [Rodman] told architect Philip Johnson about New Jersey's Routes 4 and 17: "Not a tree, not a blade of grass; nothing but billboards and gas pumps." Replied

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<sup>222</sup> 348 U.S. 26 (1954) In *Berman*, the Supreme Court upheld a redevelopment program against a police power challenge, noting, "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.* at 33.

<sup>223</sup> See, e.g., Stephen F. Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1, 58 (1977) ("[T]he problem of aesthetic regulation has much in common with many other forms of legislation . . .").

<sup>224</sup> See *Oregon City v. Hartke*, 240 Ore. 35, 47, 400 P.2d 255, 261 (Ore. 1965) (observing that the change in attitudes toward aesthetic regulation "may be ascribed more directly to the judicial expansion of the police power to include within the concept of 'general welfare' the enhancement of the citizen's cultural life").

<sup>225</sup> Vance Packard, *America the Beautiful – And Its Desecraters*, THE ATLANTIC MONTHLY 51 (Aug. 1961).

Johnson: "I'd prefer that to this green tunnel!... It's a nightmare of monotony. A nurseryman's bonanza."<sup>226</sup>

The same road could be a "great scenic highway" to one observer and a "nightmare of monotony" to another. Likewise, a sign may be offensively ugly to one person's eyes while charmingly attractive to someone else's. Indeed, another person may think it both, depending on the location.

However, it will not suffice to throw up our hands at such subjectivity. The fact that some aesthetic judgments may differ from person to person does not necessarily mean that areas of consensus do not exist, nor does it mean that decisions based on aesthetic judgments are necessarily unreasonable. Hence, we must look beyond the obvious fact of subjectivity to understand how aesthetic judgments actually work. The nature of aesthetics has been debated by philosophers and artists for centuries. Yet here, we concern ourselves with three basic theories of aesthetic regulation, each of which illuminates the sign controversies that remain our primary subject. The theories need not be mutually exclusive; each clarifies the sign dispute in its own way.

The first approach, which could be called the *sensory theory*, can be summed up in a phrase evocative of Forrest Gump, "Beauty is as beauty does." In this view, an aesthetic judgment is merely a psychological fact. When we say something is beautiful or ugly, we say only that it pleases our eyes or makes us feel good in some inarticulable way. As one legal scholar most closely aligned with this approach has observed in regard to aesthetic regulation, "In the long run, what the people like and acclaim *as* beautiful provides the operational indices of what *is* beautiful so far as the community is concerned."<sup>227</sup> Hence, the proper degree of aesthetic regulation can be determined by summing up the aesthetic preferences of all members in a community.<sup>228</sup>

The sensory theory suggests that empirical studies of human responses to the landscape offer a potential guide to aesthetic regulation.<sup>229</sup> One such study examined the reactions of test subjects to pictures of landscaped and commercial

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226 GUDIS, *supra* note 11, at 227.

227 J.J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218, 227 (1955).

228 Unsurprisingly, the sensory theory has been a favorite of economists, who prefer to take preferences as given rather than inquire into the sources of such preferences. Indeed, one economically-minded legal scholar has suggested that aesthetic preferences should be measured through the price system – determining the aesthetic impact of a given land use by its affect on the market value of nearby land. See Frank Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 36 (1969).

229 See generally Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1442-43 (1973). The author cites two studies to support the argument that aesthetic judgments display more objectivity than is commonly supposed. One study found substantial agreement in how test subjects ranked various pictures of scenic areas. The other study found that test subjects tended to find pictures of natural scenes "more pleasing" than pictures of urban scenes. These studies do support the general notion that aesthetic judgments are not hopelessly in conflict. However, the studies are of limited use, since they do not identify the situations in which we might expect more or less uniformity in aesthetic taste.

roadways as various elements were removed from the pictures.<sup>230</sup> The study found that only a small minority of people noticed the removal of billboards while a large majority of people noticed the simultaneous removal of billboards, utility poles, wires, and other signs.<sup>231</sup> People were split in their tendency to notice removal of some, but not all, objects.<sup>232</sup> Two lessons emerge from these findings. First, there may be great uniformity in aesthetic sentiment in extreme cases, but much less uniformity everywhere in between. Secondly, many varieties of signs may not independently create an extreme case of aesthetic repulsion.<sup>233</sup> Most subjects were indifferent to the removal of billboards. Agreement on the removal of billboards only coalesced when other major alterations were also made to the landscape. This bell-shaped distribution of aesthetic opinion may explain the tempo of billboard politics we observed in Part I. We saw no sustained general public opposition to billboards throughout the century. Rather, public opinion cycled between indifference and opposition. Perhaps the indifference resulted from an aesthetic equilibrium in which billboards had little effect on our aesthetic perceptions. Billboards only garnered significant opposition once they reached a saturation point, overwhelming the visual environment.

The second way of understanding aesthetic regulation could be labeled the *expressive theory*. In contrast to the sensory theory, the expressive theory seeks to explain visual preferences not as mere facts, but rather as the result of moral or political value judgments.<sup>234</sup> In this view, aesthetic judgments are shells for the expression of deeper values. Hence, aesthetic disputes should be considered an extension of other political disputes, and we should expect aesthetic opinion to be no more or less uniform than political opinion. This approach may explain the intensity of anti-billboard animus displayed by the scenic sisters, as well as the “Great Society” rationale for the HBA. One scholar has characterized billboard politics as a clash between pastoral and industrial

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230 ARTHUR D. LITTLE, INC., A STUDY OF HUMAN RESPONSE TO VISUAL ENVIRONMENTS ALONG THE URBAN ROADSIDE (1968). I am not aware of any subsequent experimental studies of aesthetic responses to billboards. Much polling has been done to determine whether people find billboards “ugly.” However, the answers vary wildly, depending on whether the billboard industry or the billboard opponents ask the question. *Compare* Polls and Surveys, Outdoor Advertising Association of America, <http://www.oaaa.org/government/polls.asp> (citing polls showing that a majority of people do not find billboards ugly), *with* Opinion Polls: Billboards Are Ugly, Intrusive, Uninformative, Scenic America, <http://www.scenic.org/billboardsign/publicopinion.htm> (citing polls showing that a majority of people do find billboards ugly).

231 32.4% of people noticed a difference when billboards were removed from the commercial scene, and 37.2% noticed a difference when they were removed from the landscaped scene. When everything was removed, 83.8% noticed a difference with the commercial scene and 83.7% noticed a difference with the landscaped scene. *Id.* at III-9.

232 *Id.*

233 The study’s authors conclude, “[T]he effect of billboard removal alone is rather minimal for both the commercial and landscaped routes. This would suggest, of course, that the other roadside elements also contribute to the evaluations given by the observers.” *Id.* at IV-11.

234 This approach has been most clearly typified by Catherine Gudis in her social history of billboard advertising. *See* GUDIS, *supra* note 11.

values.<sup>235</sup> These values reflect enduring fault lines in American society – Jeffersonian agrarianism versus Hamiltonian industrialism, sentimental idealism versus commercial realism. Anti-billboard activists stressed the moral urgency of beautification. In the opinion of one scenic sister, landscape beauty should be considered a “spiritual asset,” a “power for uplift,” and “one of the great character-building forces of our nation.”<sup>236</sup> Reflecting their established gender roles, the scenic sisters stressed the household virtues of tidiness while their male antagonists emphasized the commercial virtues of productivity. Decades later, leaders of New Haven’s black and Hispanic community viewed tobacco and alcohol billboards as a kind of political exploitation.

The final approach to aesthetic regulation could be called the *cultural theory*. Unlike the expressive theory, the cultural theory emphasizes the functions of a particular aesthetic, rather than the values that the aesthetic represents.<sup>237</sup> One legal scholar associated with this approach explains, “[T]he environment is a *visual commons* impregnated with meanings and associations that fulfill individual and group needs for identity confirmation.”<sup>238</sup> He concludes that aesthetic regulation ought to promote community stability and identity. From the perspective of the cultural theory, the visual environment creates relationships among people, and the value of such relationships determines the value of a given aesthetic. In the context of sign disputes, as with other questions of urban form, this approach boils down to a debate about the social desirability of physical order. For some in the City Beautiful movement and many among the scenic sisters, billboards were thought to clutter the landscape and thereby produce a culture of chaos and disorder. Visual chaos threatened civic homogeneity and social stability; it promoted antisocial behaviors.<sup>239</sup>

Yet, as Jane Jacobs observed, too much order can itself be antisocial.<sup>240</sup> Jacobs argued that the orderly aesthetic of urban renewal destroys the vibrant diversity that fosters social connections and breathes life into a city. In this view, the most culturally damaging threat to urbanism is aesthetic: “The Great Blight of Dullness.”<sup>241</sup> And though roadside signs have been accused of many things, dullness is not one of them. In fact, against the monotony of a sprawling highway, signs add a measure of civic vitality – a kind of highway urbanism. In some respects, billboards do for the highway what shop windows

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235 See *id.* at 182-95.

236 *Id.* at 187.

237 For a sociological study of signs in this tradition, see JOHN A. JAKLE & KEITH A. SCULLE, *SIGNS IN AMERICA’S AUTO AGE: SIGNATURES OF LANDSCAPE AND PLACE* (2004).

238 Costonis, *supra* note 2, at 419.

239 Cf. GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996) (contending that orderly urban environments reduce crime).

240 See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (Vintage Books ed. 1992).

241 *Id.* at 357.

and storefronts do for the sidewalk. Jacobs also observed that a certain social order existed underneath the apparent physical chaos of urbanism.<sup>242</sup> The pluralism and vitality of a “chaotic” city environment create a patchwork of human connections that enhance a city’s “social capital.” Here too, signs may contribute positively to the roadside environment. To the extent signs communicate ideas and signify communities, they reduce the social isolation of the motorist and bolster social capital. This function of signs was most apparent during the two world wars, when highway billboards helped foster patriotism and collective sacrifice for the war effort. But it remains present in more mundane advertising as well. The memorable Burma-Shave jingles became cultural icons of a generation; the sign for the roadside greasy-spoon diner conveys a sense of place; even forgettable advertisements for national brands create a shared popular culture.<sup>243</sup>

Whether we view aesthetic regulation from a sensory, expressive, or cultural perspective, one lesson emerges most clearly: The aesthetic impact of a sign depends on its context. This lesson is the common denominator of all three aesthetic theories.<sup>244</sup> Although some of a sign’s context is supplied by the subjective values of the viewer (the expressive theory), much of it depends on the nature of the surrounding landscape (the sensory theory) and the nature of the sign’s particular effect on the social environment (the cultural theory). Hence, to say that aesthetic judgments are subjective is to state something of a half-truth. Subjectivity results from the great variety of visual contexts, not necessarily from the variety of reactions to any particular context. We may all agree that a particular sign is ugly, but we cannot agree that all signs are ugly.

### C. Information

While the previous sections have dwelled mostly on the social costs of signs, we now turn to their potential benefits. First among these is the value of the information that signs convey. In Part I, we observed that changes in commercial realities affected the demand for signs. And of course, since companies spend great sums of money on advertising, such advertising must be of substantial value to the advertisers. However, economists have long questioned whether advertising increases total social welfare. In the skeptical view, expenditures on advertising simply shift consumer preferences from one

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<sup>242</sup> Jacobs observes, “The leaves dropping from the trees in the autumn, the interior of an airplane engine, the entrails of a dissected rabbit, the city desk of a newspaper, all appear to be chaos if they are seen without comprehension.” But, she adds, “Once they are understood as systems of order, they actually *look* different.” *Id.* at 376.

<sup>243</sup> Message content clearly affects the cultural value of a sign. An empirical study of viewers’ responses to various billboards concluded that message content influences the perceived aesthetic attractiveness of a sign. Viewers prefer billboards containing public service, travel, and entertainment content to billboards containing product, political, or sexually oriented content. *See* STAUDI, *supra* note 3, at 68.

<sup>244</sup> *Cf.* *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365, 388 (1926) (“A nuisance may be merely a right thing in the wrong place, – like a pig in the parlor instead of the barnyard.”).



product to another, and back again. While an advertiser might spend money influencing me to buy Pepsi instead of Coke, my resulting preference for Pepsi would not reflect any improvement in quality or reduction in price, nor any gain in marginal utility. The advertising would redistribute revenue from Coke to Pepsi, but it would leave me no better off. In short, the prevailing view held that advertising shaped tastes rather than satisfying them, and advertising expenditures therefore reduced total social welfare.

However, three theories have called this view into question and have given us reason to believe that advertising can be economically beneficial. According to the first theory, advertising communicates information about the existence and price of competing goods, thereby minimizing consumers' "search costs."<sup>245</sup> Advertising increases the ease of comparing prices and products, and the availability of such information enhances the efficiency of the marketplace. One empirical study has supported this theory, finding that advertising restrictions in the market for eyeglasses raised market prices by twenty-five to one hundred percent.<sup>246</sup> While this informational theory explains advertising for competing products sold at separate retail locations, it does not explain advertising for products commonly sold together at large retailers. Grocery stores and other retailers likely do a better job than advertisers of reducing search costs. After all, a single shelf makes for easier and less costly price comparison than a highway full of billboards.

A second theory, however, offers a different explanation for the social benefits of brand advertising. In this view, the establishment and advertisement of a brand provides a shorthand method for producers to communicate information regarding product quality.<sup>247</sup> Consumers need information about quality as much as information about price, and this information cannot easily be gleaned from the retail shelf. Producers have an interest in ensuring that their brands establish reliable expectations of quality, since failure to satisfy expectations reduces the long-term value of the brand. Like information about price, information about quality reduces search costs and thus increases the efficiency of retail markets.

Yet, this still does not explain the advertisement that shows nothing more than an attractive woman enticing us to "Drink Pepsi!" Hence, the third theory completes the picture. According to this theory, advertising is itself a consumption good that complements the good being advertised.<sup>248</sup> Pepsi tastes

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245 See George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

246 See Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337 (1972).

247 See Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 629-33 (1981); cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 45 (6<sup>th</sup> Ed. 2003) (observing, in the context of trademark law, that trademarks allow producers to signal consistent product quality to consumers and thereby encourage producer expenditures to improve quality).

248 See Gary S. Becker & Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 QUARTERLY J. ECON. 941 (1993).

better if drinking it makes us think of a beautiful woman. In this view, advertising makes us happier about the goods we choose to consume, increasing the marginal utility of those goods. If this marginal utility exceeds the marginal cost of advertising, such advertising generally increases total welfare.

Two surveys of billboard advertising content offer some empirical evidence in support of these theories. Although we may not be able to distinguish between a billboard that shapes tastes and one that provides a utility-enhancing complement, analysis of advertising content will tell us the degree to which billboards supply information that tends to reduce search costs. A 1992 study cataloged the content of 705 billboards along highways in Michigan, and a similar 1995 study did the same for 250 billboards along highways around Philadelphia.<sup>249</sup> In the message content of the billboards, the Michigan study found an average of 2.04 “information cues,” and the Philadelphia study found 1.77.<sup>250</sup> At least 96% of the billboards in both studies contained at least one cue.<sup>251</sup> The most common information cue, appearing in 73% of Michigan billboards and 54.8% of Philadelphia billboards, related to the availability or location of advertised products – useful information indeed.<sup>252</sup> Hence, in most cases, billboard advertising appears to comport with the informational theories of advertising discussed above, even if it also simultaneously shapes tastes and delivers consumption goods.

#### D. Expression

Let us now turn to the second benefit secured through signs – the creation of a forum for public expression. Since signs communicate information, opinions, and ideas, their use implicates the special concerns of the First Amendment. Signs are a convenient means of communicating expression to a large audience. Over the last few years alone, New Haven area billboards have been used to spread the word of God,<sup>253</sup> to find a liver donor for a patient in need of a transplant,<sup>254</sup> to send a message of love from a soldier in Iraq to his wife back home,<sup>255</sup> and to protest policies at a local hospital.<sup>256</sup> Of course, they have also frequently been used to advocate for political candidates, to persuade

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249 See Charles R. Taylor, *A Technology Whose Time Has Come or the Same Old Litter on a Stick?*, 16 J. PUB. POL’Y & MARKETING 179 (Spring 1997) (summarizing findings from the Michigan and Philadelphia studies).

250 *Id.*

251 *Id.*

252 *Id.*

253 On a billboard, God warned motorists, “Keep using my name in vain, I’ll make rush hour longer.” See *I-95 Billboard Message Is Simply Divine*, NEW HAVEN REGISTER, Jul. 20, 2003.

254 See *Family Seeks Liver With I-91 Billboard*, NEW HAVEN REGISTER, Dec. 13, 2004.

255 See *They Don’t Make Valentine Cards Big Enough for This Message*, NEW HAVEN REGISTER, Feb. 13, 2004.

256 See Paul Bass, *Heartless Hospital*, NEW HAVEN ADVOCATE, Apr. 17, 2003.

residents to purchase goods and services, and to provide information about where and how such goods and services can be acquired. Finally, and more controversially, billboards have been used to advertise alcohol and tobacco,<sup>257</sup> to depict scantily clad women,<sup>258</sup> and to display messages that arguably perpetuated gender violence.<sup>259</sup>

In short, the horizon has undeniably become a vibrant public marketplace of expression, with all of the dilemmas that such status entails. In many cases, the expressive nature of signs has been both a motive for regulation and a compelling argument against it. Since a complete discussion of sign-related First Amendment issues lies beyond the scope of this article, this Section aims simply to clarify the most relevant existing doctrine and to suggest the implications of such doctrine for the policy calculus of sign regulators.<sup>260</sup>

In resolving sign disputes, the Supreme Court has generally sought to balance the strength of the communicative interest in a particular kind of sign display, the strength of the government's interest in regulating such display, and the degree to which the sign ordinance advances the government's interest. The Court has generally been permissive of content-neutral sign regulations, but it has been more demanding in its review of regulations that make distinctions based on sign content.

Content-neutral regulations that limit the size, height, spacing, or location of signs usually do not pose constitutional problems. In these cases, regulation aims to reduce the non-communicative harms imposed by signs, and the Court has deemed the prevention of aesthetic harm to be a sufficiently substantial government interest in this context.<sup>261</sup> Such content-neutral regulations thus direct speech toward less harmful channels without discriminating against particular viewpoints. However, recognizing the unique value of the sign medium, the Court has held that too much content-neutral regulation can nevertheless run afoul of the First Amendment if it effectively silences certain kinds of speech.

In *City of Ladue v. Gilleo*, the Court invalidated a content-neutral sign ordinance that banned all signs in residential areas, since the ordinance prevented a resident from displaying a small anti-war sign in the window of her

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<sup>257</sup> See *supra* Section I.D.

<sup>258</sup> See Craig Amaker, *I-91 Billboard with 'Intimate' Ad Should Be Toned Down a Bit*, Letter to Editor, NEW HAVEN REGISTER, Oct. 18, 2003.

<sup>259</sup> Advertising a local jeweler, the billboard depicted diamond wedding rings, above which it read, "Sometimes it's ok to throw rocks at girls!" See Alejandra O'Leary, *Gem Bums*, NEW HAVEN ADVOCATE, Dec. 16, 2004.

<sup>260</sup> For in-depth discussions of sign-related First Amendment issues, see M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 MICH. L. REV. 1877 (2005); Bond, *supra* note 7.

<sup>261</sup> See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (plurality opinion) ("Nor can there be substantial doubt that the twin goals [of] traffic safety and the appearance of the city . . . are substantial government goals.").

home.<sup>262</sup> The Court concluded that “residential signs are an unusually cheap and convenient form of communication” and that “adequate substitutes [do not] exist for the important medium of speech” that the city closed off.<sup>263</sup> Of course, substitutes did exist. Gilleo could have handed out pamphlets, knocked on her neighbors’ doors, or purchased a newspaper advertisement. But the Court deemed such substitutes “inadequate” because they were substantially more costly (in time or money) than placing a sign in one’s window. Hence, sign speech is valuable, at least in part, because it is one of the cheapest and most effective methods of public expression.<sup>264</sup> Nevertheless, although any regulation raises the cost of communication, content-neutral regulations that leave open reasonable sign or non-sign means of communication would not ordinarily violate the First Amendment.

In contrast to content-neutral sign regulations, content-based regulations pose more difficult constitutional problems, since they involve government value judgments that end up silencing particular viewpoints.<sup>265</sup> In *Metromedia, Inc. v. City of San Diego*, the Supreme Court articulated what can be considered its “sign doctrine.”<sup>266</sup> However, *Metromedia*’s five opinions, none commanding a majority, reveal the complexity of content-based sign regulation. And *Metromedia*’s subsequent fate in more recent cases calls its permanence into question. San Diego had enacted a sign ordinance, which prohibited all “off-site” billboards and all noncommercial “on-site” signs, with the result that only on-site commercial signs were permitted within the city. The Court’s plurality struck down the ordinance, holding that it impermissibly favored commercial signs over noncommercial signs.<sup>267</sup> The Court also indicated that it would have invalidated the ordinance if the ordinance prohibited noncommercial off-site signs while permitting noncommercial on-site signs.<sup>268</sup> Hence, after *Metromedia*, only two content-based distinctions appeared to be permissible. First, cities could prohibit commercial signs while allowing noncommercial signs.<sup>269</sup> Secondly, cities could prohibit off-site

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<sup>262</sup> 512 U.S. 43 (1994).

<sup>263</sup> *Id.* at 57, 56. *See also* *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (invalidating sign ordinance that prohibited homeowners from placing “For Sale” or “Sold” signs on their property).

<sup>264</sup> Here, First Amendment concerns and nuisance concerns are not likely to conflict too often, since the most visually intrusive kinds of signs also tend to be the most expensive (e.g., large highway billboards).

<sup>265</sup> *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (Content discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”) (quoting *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)).

<sup>266</sup> 453 U.S. 490 (1981).

<sup>267</sup> 447 U.S. at 417.

<sup>268</sup> *Id.* at 414-15.

<sup>269</sup> The Court relied on the assumption that noncommercial expression is more valuable than commercial expression. Hence, San Diego’s ordinance was impermissible, since it “effectively invert[ed] this judgment, by affording a greater degree of protection to commercial than to noncommercial speech.” *Id.* at 513.

commercial signs while allowing on-site commercial signs.<sup>270</sup> In essence, the only allowable content-based distinctions were those that either restrained commercial speech as a whole, or that restrained particular kinds of commercial speech. This conclusion rested on the rationale that commercial speech requires less protection under the First Amendment than noncommercial speech.

In two subsequent cases, however, the Court has shown a greater willingness to protect commercial signs from content-based regulation. In *City of Cincinnati v. Discovery Network, Inc.*, the Court invalidated an ordinance that banned newsracks containing commercial handbills but allowed newsracks containing newspapers.<sup>271</sup> The Court reasoned that the distinction between commercial and newspaper handbills did not “reasonably fit” the city’s interest in aesthetic regulation, since commercial and newspaper newsracks have equal visual impacts.<sup>272</sup> The ordinance could only have been motivated by a content-based decision to categorically assign commercial handbills less value, and that was impermissible.<sup>273</sup> In *Lorillard Tobacco Co. v. Reilly*, the Court went further still.<sup>274</sup> Citing *Discovery Network*, the Court invalidated an ordinance banning tobacco billboards within 1,000 feet of a school or playground, since the prohibition on commercial speech did not reasonably fit the government’s interest in discouraging youth smoking.<sup>275</sup> Rather, the ordinance broadly infringed on the ability of tobacco companies to advertise legal products to adults.

It remains difficult to square the principles articulated in *Metromedia* with those of *Discovery Network* and *Lorillard*. *Discovery Network* explicitly retracted *Metromedia*’s implication that cities could be categorically more restrictive of commercial speech than of noncommercial speech. Similarly, *Lorillard* casts doubt on *Metromedia*’s suggestion that cities could distinguish between preferred kinds of commercial speech, since such distinctions usually do not “reasonably fit” the substantial government sign-control interest in aesthetics.<sup>276</sup> In future cases, the Court could limit *Discovery Network* and *Lorillard* to their somewhat extreme facts.<sup>277</sup> However, the Court appears to

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270 *Id.* at 511-12.

271 407 U.S. 410 (1993).

272 *Id.* at 417. *See also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y., 447 U.S. 557 (1980) (requiring, in commercial speech cases, a “reasonable fit” between the government interest and the means employed to further that interest).

273 The Court observed that the “city’s argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.” *Discovery Network*, 407 U.S. at 419.

274 533 U.S. 525 (2001).

275 *Id.* at 561-62.

276 Content-based distinctions that prohibit commercial billboards for non-aesthetic reasons would not necessarily violate *Lorillard* or *Discovery Network*. For example, prohibitions on obscene billboards reasonably fit the government interest in keeping obscenity out of the public square.

277 In *Discovery Network*, there were only sixty-two prohibited commercial newsracks amidst 1,500-2,000 permitted newspaper newsracks. *Discovery Network*, 507 U.S. at 418. If there had been more commercial newsracks than newspaper newsracks, perhaps the Court would have found a reasonable fit between aesthetic aims and the content-based prohibition. *See* Calo, *supra* note 260, at

have grasped what is really going on in cases of content-based commercial sign restrictions: The content distinction is not a shorthand method of furthering general aesthetic aims; rather, the distinction reveals a regulatory decision about whether aesthetic benefits outweigh the value of certain kinds of commercial speech. Because of its own growing recognition of the value of commercial speech, the Court appears to be increasingly skeptical of the latter approach.

Is the Court correct? Scholars have vigorously debated the degree to which commercial speech should be accorded First Amendment protection.<sup>278</sup> Ironically, the theory of advertising that earns the least respect among economists, the taste-shaping theory, ought to garner the most respect among First Amendment theorists. For a long time, the Court devalued commercial advertising by focusing solely on its tendency to communicate information.<sup>279</sup> But commercial advertising also communicates the same cultural ideas and opinions that underlie the rationale for protecting noncommercial speech. After all, speech persuading someone to purchase a certain product – be it a diamond wedding ring or a can of Pepsi – is really communication about the values a consumer should hold. This communication allows for individual self-realization and public discourse in the market for goods, just as noncommercial speech allows for the same in the market for ideas.<sup>280</sup> Ultimately, however, commercial speech theory and doctrine remain presently “controversial and confused.”<sup>281</sup>

The good news for sign regulation is that it need not venture too deeply into this territory, for content-based sign regulation is usually an ineffective means of limiting the proliferation of signs. Cities can typically control the most visually intrusive aspects of signs through content-neutral restrictions such as those limiting sign density, size, and location. While courts cannot avoid the need to judge the relative value of different kinds of speech, municipalities can easily avoid such decisions by leaving them to the free market. City ordinances can protect scenic vistas and limit visual clutter without distinguishing between or among commercial sign content. While the

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1889-1898 (arguing that *Discovery Network* should be limited for this reason). Similarly, in *Lorillard*, the ban on tobacco billboards within 1,000 feet of schools or playgrounds would have kept tobacco ads off of 87% to 91% of billboards in major cities. *Lorillard*, 533 U.S. at 562.

278 See, e.g., Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990); R.H. Coase, *Advertising and Free Speech*, 6 J. LEG. STUD. 1 (1977).

279 See, e.g., *Central Hudson*, 447 U.S. at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”). Robert Post amplifies this rationale, arguing that noncommercial speech is valuable when it fosters “collective self-determination” through “public discourse,” but that commercial speech is less valuable when it simply conveys information. Post, *supra* note 278, at 7-8. He observes, “Although economic efficiency is no doubt an important consideration for government policy, it is difficult to see why it should be a specifically First Amendment concern.”

280 Ronald Coase has observed, “There is simply no reason to suppose that for the great mass of people the market for ideas is more important than the market for goods.” Coase, *supra* note 278, at 4.

281 Post, *supra* note 278, at 1.

costs of signs are externalized onto all of those people who must view the horizon, the benefits of signs usually accrue to those who pay for them. Hence, market incentives will ensure that signs will be put to their highest and most beneficial use. If signs are scarce, sign content will be determined by the highest bidder – the one who values the content most. Sign regulation should thus aim to internalize the costs of sign land use, rather than choosing among the various benefits it wishes to promote.

Indeed, government attempts to distinguish between more and less valuable sign content can lead to dubious results. *Metromedia*'s distinction between on-site and off-site commercial signs provides a good example. This is a content distinction based on the assumption that on-site signs are more valuable to businesses and consumers than off-site signs. One scholar has argued that on-site advertisers have few other means of identifying their premises.<sup>282</sup> Yet, while this explains why on-site signs are valuable, it does not explain why they are more valuable than off-site signs. Surely, the business located a few miles away from the highway uses the off-site sign in the same way as the business located next to the highway uses the on-site sign. Indeed, off-site signs may actually be more valuable to businesses that rely on such signs to compete with other businesses located closer to the roadway.<sup>283</sup> Moreover, we ought also presume that a landowner would not willingly rent out his land for use by someone else's off-site sign, unless the off-site sign was actually more valuable than any other possible uses of the land. At best, then, the relative value of on-site and off-site signs remains uncertain. The horizon would be better served by limiting the size and density of all signs, and by protecting particularly scenic areas around highways, than by dubious categorical distinctions between the value of on-site and off-site advertising.

Content-based distinctions are more compelling when they attempt to limit particular content-based harms, rather than carve out protections for content-based benefits. There may be some instances where a particular sign's content is offensive or harmful to the surrounding community. In this case, it may in fact make sense, from a legal and policy perspective, to limit the harm by prohibiting the sign. Indeed, *Discovery Network* can be read to support this approach: Content-based distinctions focused on the benefits of a sign (i.e., noncommercial newspapers being more valuable than commercial handbills) do not reasonably fit the government's aesthetic interest because the aesthetic interest only relates to the costs of a sign (i.e., its impact on the visual environment). In contrast, content-based distinctions focused on the costs of a sign (e.g., an obscene billboard next to a school) do reasonably fit the

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282 See Bond, *supra* note 7 (arguing that signs identifying a place deserve heightened protection).

283 See Keith B. Leffler, *The Prohibition of Billboard Advertising: An Economic Analysis of the Metromedia Decision*, 1 SUP. CT. ECON. REV. 113, 127 (1982) (predicting that prohibition of off-site signs would enhance the monopoly power of roadside businesses).

government's interest in protecting children, and would therefore likely be permissible under *Discovery Network*.

### III. Controlling Sign Land Use: A Sketch of Regulatory Options

In Part I, we examined the history of sign regulation in New Haven, revealing how changes in the demand for signs, the coordination of the sign industry, and the regulatory response of national and local governments shaped the evolving composition of the horizon. In Part II, we examined the four main theoretical perspectives that ran through every sign dispute. The nuisance perspective helped us frame sign questions as a debate about the rules that should allocate property in a scarce public resource – the horizon. The aesthetic perspective helped us clarify the subjective nature of decisions about the kind of horizon we ought to have, and it highlighted the importance of context in making these aesthetic decisions. The informational perspective helped us understand the economic functions and benefits of billboard advertising, the most important being communication of valuable information. Finally, the expression perspective helped us clarify the importance of signs as a forum for expression and the dangers of over-intrusive content-based regulation. Together, these perspectives help us understand the values at stake in disputes over sign land use. We may now attempt to integrate these pieces into a more coherent whole.

#### A. *The Non-Legal Backdrop*

Let us begin by sketching a simple list of factors that explain the conditions under which signs arise and the impact they have on the horizon. A sign will sprout up along the roadside if the value of the sign to the advertiser exceeds its costs. The value of a sign depends on the following four factors:

*Traffic volume.* Ever since the early 20<sup>th</sup> century, the sign industry has recognized that the rate of traffic flow defines the size of the advertising market a sign is able to reach. More traffic means more eyes, and more eyes means more potential customers.

*Visibility to traffic.* The value of a sign depends not only on the number of eyes that will see it, but also how long each pair of eyes will fixate upon it. Hence, the signs that are the most visible allow for the longest exposure. This factor affects the height and placement of signs.

*Effectiveness in communicating message content.* Signs are only valuable if they can attract eyes and communicate a message once they have done so. The size, color, and other visual aspects of a sign will affect its ability to communicate its message.

*Value of information conveyed.* An advertisement for umbrellas in California would be less valuable than an advertisement for sunscreen. Since



signs speak to geographically-bounded markets, the value of a sign's content depends on the value of the information conveyed to passersby in a given area.

Reflecting the sum of these factors, a typical two-faced highway billboard can generate as much as \$36,000 in revenue per year, though revenue will vary widely based on location.<sup>284</sup> The cost of a given sign to an advertiser depends on three primary factors:

*Cost of land.* Off-site sign companies usually lease land and pass these costs on to advertisers. On-site sign advertisers must determine whether a sign is the best use of their land in light of the alternatives.

*Cost of sign structure.* Modern advertising billboards can be expensive to build and maintain. These costs tend to increase with the size of the billboard. Depending on size, construction, illumination, and other factors, the average billboard structure costs between \$1,000 and \$15,000, with the high end representing the most prevalent "steel monopole" variety.<sup>285</sup>

*Opportunity costs.* The money a company spends on a sign could be used for print, radio, television, or other advertising. It could also be invested in other company activities.

These seven factors amount to the market rules that govern the unregulated horizon. And they explain many of the realities we observed in Part I. Traffic volume and visibility explain why signs proliferated along high-volume freeways but less so in other areas of the city. Communication effectiveness explains the collective action problem that motivates signs to become ever more visually arresting, though the need to be visually appealing may mitigate such excesses to some extent. Information value explains why certain kinds of advertising content were most prevalent, particularly entertainment advertising at the turn of the century. Today, content that would be most useful to passing motorists – information about gas stations, restaurants, etc. – tends to dominate highway billboards.<sup>286</sup> The cost of land (as well as lower traffic volume) explains why billboards tend to be sparse in wealthy neighborhoods.<sup>287</sup> The cost of sign structures explains why elaborately lighted "spectaculars" are not used everywhere, but also why such signs became more prominent as technological innovations made them cheaper in the early 20<sup>th</sup> century. Finally, opportunity costs explain why large businesses and

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<sup>284</sup> See William D. Brinton, Amortization – A Constitutional Alternative to Cash Compensation, available at <http://www.scenicflorida.org/bbamconstalt.html> (citing rats for Jacksonville, Florida). I was not able to obtain numbers specific to New Haven.

<sup>285</sup> See Billboard Valuation Information, North Carolina Dept. of Revenue, available at [http://www.window.state.tx.us/taxinfo/proptax/faguide02/appl\\_155.html](http://www.window.state.tx.us/taxinfo/proptax/faguide02/appl_155.html). I was not able to find cost estimates specific to New Haven.

<sup>286</sup> The Michigan and Philadelphia studies found that restaurants, bars, specialty retailers, and transportation-related retailers dominated billboard content. See Taylor, *supra* note 249.

<sup>287</sup> See *id.* (noting a negative correlation between income and billboard density). It may also be that wealthy neighborhoods are more concerned with aesthetics, and therefore regulate signs more strictly.

manufacturers tend to use billboards less than local small businesses.<sup>288</sup> For small businesses, signs can be the most cost-effective means of reaching a geographically-bounded audience. For larger advertisers and manufacturers, other media may be more efficient or may allow better targeting of customer market segments.

To this list of market forces, we should also add forces of reputation, social sanction, and private coordination. The placement and character of signs may depend to some extent on the informal norms that govern relationships between neighbors.<sup>289</sup> The more tight-knit a community is, the less likely neighbors will perpetrate visual offenses on each other. Hence, as we saw in Part I, snipe signs tended to be worse than signs erected by the landowner, and larger chain businesses tended to offend more often than homeowners. We also saw that private coordination in the sign industry could limit some of the visual excesses of signs, but that antitrust concerns stymied the power of effective coordination and “self-regulation.” Finally, the nationalization of the sign industry also contributed to a lack of neighborliness in sign advertising. In New Haven, local family-owned sign companies have been eclipsed by community outsiders.<sup>290</sup>

These non-legal factors governing property in the horizon will ensure that some areas face few sign problems while other areas may be inundated with signs. And in sign-laden areas, the signs will compete for visual attention. These signs will generate private benefits for the businesses and customers who use them as a channel of communication, but they will also produce externalities. Unlike a factory emitting pollution, a sign may generate positive externalities by increasing the amount of information in the market and thereby benefiting all consumers. Moreover, in the appropriate context, a sign may also contribute to the culture and visual vitality of an area. But finally, and most obviously, signs produce a negative externality when they reduce the visual attractiveness of the horizon. Yet, as we have seen, the aesthetic impact of a sign depends to a large degree on its context.

Can law improve on this situation by reshuffling the rules that govern property in the horizon? Perhaps. But it remains a complex task to minimize the net costs of sign land use, while preserving their benefits. This is the formidable challenge of sign regulation.

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288 *See id.*

289 *See generally* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

290 Two major national billboard companies, Gannett Outdoor Advertising and NextMedia, dominate New Haven’s billboard market. Barrett Outdoor Communications, a local family-owned business, is an additional minor player.

### *B. Two Approaches to Regulation*

Robert Ellickson has suggested a basic set of criteria for evaluating the efficiency of various land use controls that can be usefully applied to the sign context. To be efficient, a sign-control measure must minimize the sum of “nuisance costs,” “prevention costs,” and “administrative costs.”<sup>291</sup> First, passersby incur nuisance costs when they are forced to tolerate an aesthetically offending horizon. Second, prevention costs accrue to those who take steps to reduce nuisance costs. A motorist may bear prevention costs by avoiding an ugly stretch of highway, or a sign owner may bear prevention costs by altering or removing an offending sign. Finally, administrative costs encompass the public costs of making and enforcing sign rules or the private costs of negotiating and transacting private agreements.

The history of sign disputes suggests two general approaches to sign regulation. The first approach involves strong government control of property in the horizon through zoning, amortization, land use planning, and the heavy regulation of sign content. This approach grants the government something close to an ownership right in the horizon and empowers the government to determine the horizon’s most beneficial use. This approach was exemplified by New Haven’s 1905 effort to prohibit all signs projecting over the sidewalk, the vigorous enforcement of sign rules by New Haven’s Commissioner of Streets, and the national push by the highway beautifiers to eliminate billboards along interstate highways. Each of these efforts sought to reduce the nuisance costs of billboards through centralized, top-down prohibitions. However, their history reveals the difficulty of such efforts in two respects. First, attempts to control visual externalities through the democratic process involve difficult collective action problems. Since the horizon is a public good in which aesthetic benefits are distributed amongst a large group of people, the aesthetic preferences of the majority will tend to be dominated by the preferences of more vocal minorities – in this case, the billboard industry. Moreover, these coordination problems heighten as the size of the regulated horizon increases. Hence, such attempts at strong regulation of signs through the democratic process resulted in capture by the billboard industry, once in New Haven and again on the national stage. This approach thus entails very high administrative costs without significantly reducing nuisance costs.

Such difficulties can be avoided by transferring regulatory authority from the democratic process to centralized administrative policymakers, such as the City Plan Department or the Board of Zoning Appeals. However, such approach brings on the second problem with top-down government regulation – the difficulty of aggregating aesthetic information. The central planner may not correctly identify the contexts in which signs cause true aesthetic harm to a

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<sup>291</sup> Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 688-89 (1973).

large number of people, and may not adequately weigh the costs of aesthetic regulation. In the case of New Haven's late-19<sup>th</sup> century Commissioner of Streets, this led to aggressive overregulation of trivial protrusions into the street; in the case of the modern Board of Zoning Appeals, it may have led to underregulation. Centralizing aesthetic authority in a small number of zealous beautifiers risks control by aesthetic perfectionists who treat the horizon as their own personal canvass. Yet, granting such authority to less zealous administrators risks indifference, or worse, capture by regulated interests. In the former situation, nuisance costs are reduced or eliminated at the expense of significantly increased administrative and prevention costs. In the latter case, nuisance costs remain while administrative costs increase.

The second approach to sign regulation rejects government control, and replaces it with Coasean bargaining.<sup>292</sup> This approach grants landowners exclusive rights to determine the composition of their portion of the horizon and empowers individuals to construct the horizon in a piecemeal fashion. This approach involves management of the horizon through self-regulation, private coordination, market forces, and negotiations for the purchase of horizon rights. This approach was exemplified by the relatively loose era of sign regulation in the first half of the 20<sup>th</sup> century, and also by the compensation requirement of the federal Highway Beautification Act. This approach avoids the coordination and information difficulties of granting full horizon rights to the government. But of course, there remains the troublesome problem of negative externalities caused by the individual decisions of landowners. According to the Coase Theorem, those harmed by the visual externalities of signs would be able to purchase horizon rights from landowners.<sup>293</sup> If the visual cost of a sign to a third party exceeds the benefit it produces for the landowner, and if transactions costs are minimal, then the third party will be able to purchase control of the horizon at an efficiency-maximizing price – a price that reduces nuisance costs more than it increases prevention costs. In this Coasean world, private bargaining would maximize the benefits of signs while minimizing their negative externalities. Hence, in this view, the fact that few states were willing to pay compensation to eliminate billboards under the HBA may simply be an indication that the public values scenic beauty less than the billboard owner values his sign. And the fact that a few states were willing to pay compensation suggests that, in those states, the benefits of a sign-free horizon exceeded the costs.

Despite its promise, however, the Coasean approach faces three major difficulties. First, the transaction costs (in Ellickson's formulation, "private administrative costs") of negotiating over horizon rights may make such

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292 Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

293 This could take the form of compensation under the HBA, whole land purchases, or purchases of scenic easements. See, e.g., Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin's Great River Road*, 66 J. AMERICAN PLANNING ASS'N 177 (2000) (discussing Wisconsin's effort to purchase easements on land adjacent to a scenic highway).

negotiation nearly impossible. Since the horizon is a public good, and since a sign's negative externality is distributed amongst a large number of highway motorists, the cost of a sign to a single motorist is likely never to exceed the sign's benefit to a landowner. Hence, in order for efficient bargaining to occur, the myriad motorists would face enormous costs in aggregating their preferences and acting collectively to purchase an offending sign. The government may aggregate these preferences and finance sign purchases through tax revenue on motorists' behalf. However, as we saw above, the democratic process involves information and coordination difficulties of its own that serve to increase administrative costs without necessarily reducing nuisance costs. The second problem with the Coasean approach involves the ability of landowners to require the purchase of more horizon rights than necessary. For example, if the government or a group of motorists aimed to eliminate all billboards along a portion of highway, they could purchase land or scenic easements from all of the landowners who had erected billboards. However, nearby landowners who did not previously value billboards on their property would then have an incentive to demand payment as well. Even though they had no intention of erecting billboards, their potential to erect billboards would have to be compensated. Hence, the purchase of the horizon along a highway would cost more than the actual total value of the horizon to landowners. Prevention costs would thus likely exceed the reduction in nuisance costs. The final difficulty posed by the Coasean approach involves its distributional consequences. While bargaining between sign owners and beautifiers could theoretically be efficient such that the sum of costs are minimized, sign owners would still capture all of the gains from use of the horizon while motorists would bear all of the costs. The result would be inequitable.<sup>294</sup> This inequity would not satisfy those who believe the horizon is in some sense a community resource, intrinsically valuable for reasons beyond the preferences of individuals.

### *C. An Alternative Approach*

Given the major difficulties of both above approaches to sign regulation, we ought to consider an alternative approach. Instead of granting government or landowners complete property rights to the horizon, this approach seeks a more flexible middle ground. Rights to the horizon would be shared between motorists and landowners through the mechanisms of private nuisance law, limited zoning regulations, and taxation. To a large extent, such policy tools have so far been underappreciated and underutilized. This approach may not perfectly optimize the costs and benefits of sign land use, but it would likely do a better job than the alternatives.

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<sup>294</sup> Ellickson rightly observes, "an efficient policy may be an unfair one, particularly when the gains of the policy are not distributed to those injured by its imposition." Ellickson, *supra* note 291, at 681.

We ought to start from the premise that billboards are neither uniformly ugly nor uniformly benign. Rather, the size of the negative externality generated by a sign depends fundamentally on its aesthetic context. And that is a purely local concern. The aesthetic context of the horizon is better ascertained from city hall than from the statehouse or the White House. Hence, as much as possible, sign regulation ought to be devolved to local governments. After all, those who frequently gaze upon a horizon have the strongest interest in its regulation. On this score, the HBA remains a cautionary lesson, warning us against resurrecting the nationalizing zealotry of the scenic sisters.

It could plausibly be argued that the state level should be the preferred domain for sign regulation, since one locality's failure to regulate signs may impose costs on residents in other localities. For example, a resort town has an interest in ensuring that the "vacation experience" it provides is not hampered by an unpleasant highway leading into the town. Alternatively, a resident living in one town may have an interest in the horizon he encounters when venturing beyond it. However, despite such interconnected interests, local control of the horizon is still likely to be superior to the alternatives. Those residents who live and work in a locality will tend to bear a higher proportion of that locality's sign nuisance costs than outsiders. They are also likely to bear more of the prevention costs, as sign regulation constrains the local economy. Since local residents will bear a higher average proportion of such costs than outsiders, they have the greatest incentives to minimize costs appropriately.

But what form should local regulation take? Let us answer this question by reference to three hypothetical sign problems drawn from disputes we observed in Part I: the bad neighbor problem; the scenic vista problem; and the general proliferation problem. As we shall see, each problem demands its own particular regulatory tool. Together, these tools compose the optimal sign regulatory scheme.

#### i. Bad Neighbors

Imagine a large, brightly-colored neon sign erected right next to an unassuming, middle-class private residence.<sup>295</sup> It advertises a casino fifteen miles down the road. The sign would have complimented the commercial strip down the road, but it does not compliment the neighborhood that must endure it. The neighborhood does host numerous other signs, but those do not bother the neighbors much, since they tend to be less intrusive than the casino sign. The casino sign thus imposes nuisance costs on its neighbors. Of course, the sign is also a valuable advertising tool for the casino. Without the sign, the

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<sup>295</sup> This stylized example is loosely based on the dispute between Kmart and New Haven residents over a large advertising sign, discussed in Section I.D.

casino would have fewer customers and lose significant revenue. The casino's potential prevention costs are thus also high.

In this situation, the harm caused by the offending sign is very context-dependent. This sign would be an acceptable neighbor in a different neighborhood, while other signs make acceptable neighbors in this neighborhood. Prohibitory zoning could be used to control signs in this neighborhood, but a one-size-fits-all approach might not be sufficiently sensitive to aesthetic context, and thereby might prohibit sign externalities that are actually positive while permitting other externalities that are negative. Even a sufficiently fine-tuned zoning scheme that managed to prohibit the casino sign while permitting the neighborhood's other signs might still increase prevention costs more than the reduction in nuisance costs. This is because zoning only has the two options we discussed in Section B: Either allow the sign or prohibit it.

Here, private nuisance law probably offers the better means of controlling such idiosyncratic use of the horizon. Unlike zoning, nuisance law generally allows the dilemma of distinguishing between negative and positive externalities to be determined on a case-by-case basis, ensuring against the most sweeping – and thus most subjective – aesthetic policy judgments. Indeed, the many gradations of particular aesthetic harm are well-suited for the incrementalism and practical wisdom of the common law. Although courts have been hesitant to recognize aesthetic causes of action,<sup>296</sup> aesthetic regulation may be an area where adjudication by the courts would be less unfairly subjective (and surely less overbroad) than regulation through the police power. While a complete sketch of such a common law nuisance regime lies beyond the scope of this article, others have suggested possible legal standards for aesthetic nuisance.<sup>297</sup> Ellickson recommends defining such nuisances as those actions found to be “unneighborly according to contemporary community standards.”<sup>298</sup> Another commentator suggests a similar standard – that of the “normal individual in the community” – that has been employed in cases of noise and smell.<sup>299</sup> Of course, such standards admit of ambiguity, but they nevertheless account for a sign's neighborhood context while avoiding the aesthetic distortions of a one-size-fits-all approach.

Unlike zoning, nuisance law also allows a more flexible division of sign costs and benefits. Courts need not choose between injunctive relief and no relief at all. In many cases, it will be more efficient to award damages to

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<sup>296</sup> *But see, e.g.*, *Foley v. Harris*, 286 S.E.2d 186 (Va. 1982) (granting defendant's request for injunction to remove unsightly junked vehicles from subdivision lot).

<sup>297</sup> For a thoughtful sketch of such a regime, see Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141 (1987). *See also* Ellickson, *supra* note 291, at 722-60 (proposing, in detail, the rules that ought to govern a modern nuisance law regime).

<sup>298</sup> Ellickson, *supra* note 291, at 732.

<sup>299</sup> Coletta, *supra* note 297, at 170.

compensate neighbors for sign externalities.<sup>300</sup> This can reduce nuisance costs in situations where the total cost of nuisance avoidance exceeds the cost of the nuisance itself. The casino sign's neighbor may not entirely be made whole upon winning a suit for damages, but the suit would allow the neighbor to share in some of the benefits of the offending sign or use the damages to finance purchase of a different house. While it is true that aesthetic harm may be difficult to quantify for the purposes of awarding damages, this is no more the case for aesthetic nuisances than for other types of nuisances. In some instances, sudden drops in property value following the erection of an offending sign will be a useful objective measure of the sign's impact, given the standards of the surrounding community.<sup>301</sup> Ultimately, however, courts would have to use a good dose of common sense.

From the perspective of minimizing nuisance and prevention costs, private nuisance law will be superior to zoning. However, the one significant drawback of the nuisance approach involves the administrative costs it would entail. Adjudication is expensive in time and money. These costs do provide neighbors an incentive to settle aesthetic disputes privately, and they check judicial overreaching by ensuring that only the most egregious aesthetic nuisances make it to a courtroom. Moreover, zoning has its own administrative costs. Nevertheless, private nuisance will be less efficient to the extent reductions in nuisance and prevention costs do not outweigh the difference in administrative costs. Ultimately, this is an empirical question that would need to be tried and tested before it could be answered conclusively.

## ii. Scenic Vistas

Let us now turn to our second hypothetical sign problem – the problem of scenic vistas. Imagine a highway from which picturesque waterfront vistas could be seen as one drove along.<sup>302</sup> Imagine further that city residents took particular pride in this landscape and thought of it as a distinctive characteristic of their city. Now imagine that a sign company, aiming to capitalize on the high-traffic highway, erects a number of large billboards blocking motorists' views of the waterfront. Here, the nuisance costs are caused less by any particular negative feature of the signs, but more by the positive features of the horizon that the signs eclipse. Moreover, nuisance costs are spread among the large number of highway travelers, rather than concentrated on the residents of a particular neighborhood.

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300 Injunctions should only be preferred in cases where nuisance costs clearly exceed prevention costs. This is perhaps unlikely to be true in many instances. Ellickson observes that one reason courts had been hesitant to recognize nuisances was the assumption that injunctions were the only available remedy. This need not be so. *See* Ellickson, *supra* note 291, at 720.

301 *See* Michelman, *supra* note 228.

302 This example is loosely based on New Haven's attempts to protect scenic views of the Harbor, East Rock, West Rock, Long Wharf, Oyster Village, and Quinnipiac River areas. *See supra* Section I.D.



Despite the promise of adjudication through private nuisance law, private law would not adequately control this kind of sign problem, since the signs affect large numbers of people along busy highways. Because of coordination difficulties, individual motorists would not likely band together to bring a nuisance suit. Even if they did do so, the administrative costs of such a suit might make it prohibitive. Hence, some public regulation through zoning remains necessary. The scenic vista along the waterfront should be protected through prohibitions on large signs in this area, thereby eliminating those signs that impose the most excessively high nuisance costs on a large number of individuals.<sup>303</sup>

The risk for this kind of regulation is that zealous regulators will go too far, prohibiting signs in instances where prevention costs exceed nuisance costs. However, unlike the above situation dealing with particularly ugly signs, the task of identifying particularly beautiful vistas is relatively straightforward. The truly scenic areas of most cities are not difficult to discern and do not frequently change. Regulators should generally avoid the “hard cases” and focus on the easy ones – historic landmarks, scenic views, and so on. This will ensure that regulators only prohibit signs where nuisance costs are very high. If such regulations remain modest and if they are perceived to have significant public support, the stakes will not be so high that sign advertisers capture the regulatory process.

### iii. General Proliferation

The final sign problem is less specific – the proliferation of ambiguously ugly signs in ambiguously scenic areas. This, of course, describes most of the horizon. It certainly describes much of New Haven’s I-91 or I-95. In this situation, signs impose moderate nuisance costs, though the extent of such costs likely depends on each motorist’s particular aesthetic sensitivity. Since such signs also produce the majority of outdoor advertising revenue, potential prevention costs are likely to be high.

Since aesthetic judgment is likely to be the most subjective in this middle area, this situation raises the greatest concern that regulators will be unable to correctly quantify nuisance costs, and thereby find the optimal balance that minimizes the sum of nuisance and prevention costs. Regulators may regulate too much or too little, and they will incur significant administrative costs in assessing the aesthetic impact of each existing sign. Hence, in this area, the case for regulation is at its weakest. If regulation does occur, it ought to be as simple, moderate, and flexible as possible.

Hence, the best tools for addressing general proliferation in this manner are light zoning and taxation. Zoning should aim to address the excessive

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<sup>303</sup> Existing billboards protected by the HBA would have to be removed through compensation. Other billboards could be amortized.

proliferation of signs that results from the collective action problem observed in Part I – the tendency of signs to compete for attention in ways that are mutually detrimental.<sup>304</sup> By imposing modest spacing and size limits on highway billboards, regulators can reduce excess nuisance costs without imposing additional prevention costs. For this reason, such regulations tend to find support from sign owners, as they did during the drafting of New Haven’s sign ordinance.<sup>305</sup>

Beyond such modest zoning measures, taxation may be the most effective method of controlling general sign proliferation. Decades ago, leaders in the City Beautiful movement proposed taxation as a reasonable means of regulating signs.<sup>306</sup> In 1927, the state of Connecticut took their advice, though the fee schedule appeared to have functioned more as a protectionist device to keep upstarts out of the outdoor advertising market than a serious form of sign regulation. And by 1986, sign fees had lost all of their bite, since the legislature did not increase them enough to exceed inflation. This is unfortunate. Special taxation of signs forces sign owners to internalize some of the costs they impose in using the scarce resource of the horizon. Yet, it avoids a zero-sum situation in which policymakers are forced to choose between all of the benefits of signs or all of their costs in a given area. In this sense, taxation is the public equivalent to imposing a liability rule in private nuisance. The market, rather than government planners, would determine which signs communicated the most valuable information, which signs represented the most valuable kinds of expression, and which locations would allow signs to best facilitate such communication. A tax would ensure that more of these choices would be made, since a portion of the cost of using the horizon would be factored into the cost of erecting a sign. Along most of the horizon, the government should not pick and choose which signs should be placed where, but it should create incentives for sign advertisers to do the prioritizing themselves. Advertisers are free to erect their signs, but they must part with a share of the benefits. This is likely to reduce somewhat the overall level of nuisance costs imposed by signs. Indeed, given the Coasean constraints of the HBA, tax revenue from signs could be used to finance the removal of the most egregious nonconforming billboards in scenic areas.

The challenge for a system of special taxation is to keep administrative costs as low as possible. The simpler the system, the easier it will be to enforce. Taxation could take two forms. It could be based on sign value or it could be based on sign impact. The value approach would require appraisals and a percentage tax on yearly sign revenue. Alternatively, the impact approach would be based on objective indices of a sign’s visual effects, such as size. The latter approach has been adopted by Connecticut. It remains favorable, since it

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304 See discussion *supra*, at 16-17.

305 See discussion *supra*, at 36-38.

306 See *supra* Section I.B.

is both simpler and easier to enforce, and is thus the less administratively costly option.<sup>307</sup> It also avoids the perverse incentive of taxing the most profitable signs (i.e., the signs that provide the most value to consumers and advertisers) higher than the least profitable signs, regardless of visual impact. The administration of a sign tax system may be an exception to the general rule that regulation should take place at the local level. There may be significant efficiencies in creating a statewide regulatory agency rather than a small one in every city. Under Connecticut's current system, the legislature sets the sign fee schedule, and the Department of Transportation administers the fees. Since Connecticut already has this system in place, it makes little sense to keep sign fees so low. Current yearly fees range from \$20 to \$60 per billboard.<sup>308</sup> At this rate, the fees might not even pay for the costs of administering them.

The state should therefore raise its fees. However, it remains difficult to know exactly how high the optimal fees should be. If they are set too high, they threaten to put too many signs out of business; if they are set too low, they will have little impact. The purpose of such fees is to reduce nuisance costs through deterrence, rather than to compensate those harmed by a particular nuisance. Hence, the fee should be sufficiently large to make an impact in the calculus of sign advertisers. A typical billboard produces roughly \$36,000 of revenue per year.<sup>309</sup> Hence, Connecticut's current fees amount to less than a quarter of one percent of billboard revenue, and this seems too low. Of course, the precise level of optimal deterrence will depend on the regulator's preferred amount of general sign proliferation, and such deterrence may best be ascertained through trial and error.

#### IV. Conclusion

We have wandered through a century of history and a good deal of theory to reach the perhaps unsatisfying conclusion that sign regulation is no simple matter. Indeed, we have surely proven Emerson correct: The poet may be the only one amongst us who can truly reconcile the conflicting claims on property in the horizon – and then, only in speech. Nevertheless, practical life demands more from the lawyer and policymaker. We must preserve the benefits of signs as forums of information and expression, while limiting their costs as aesthetic intrusions on the horizon. And the best means of accomplishing these conflicting goals can be found in that most ancient of practical virtues – moderation. Instead of heavy-handed prohibitions or Coasean *laissez-faire*, we should use the more moderate tools of private nuisance law, light zoning, and taxation to resolve the disputes that will inevitably arise over property in the horizon. This too, seems to be New Haven's own conclusion after a century of

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<sup>307</sup> See Ellickson, *supra* note 291, at 775 (observing that fines are most successful when based on a “reasonably objective index of noxiousness that is negligibly volatile over time”).

<sup>308</sup> See Figure A, *supra*, at 40.

<sup>309</sup> *Supra* note 284.

experimentation with various methods of sign regulation. Over the past century, the city experienced both anti-billboard zealotry and regulatory indifference. Yet, although private nuisance and taxation are underemphasized and zoning is overemphasized, New Haven's current approach to sign control reflects a moderate middle path. On the horizon, the lessons of theory and the lessons of history have converged.