Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways

(CONCLUDED)

BILLBOARD REGULATION IN THE UNITED STATES: TENDENCY OF DECISIONS

The older phase of billboard regulation, in the main concerned with their control by municipalities, need not concern us here at any length. Its history may be readily found elsewhere.\(^5\) In general, the courts have eventually found it possible to sustain ordinances licensing or taxing billboards, and regulating them as to size and kind, on the grounds that if flimsily built they are a menace to passers-by or from fire, and that if built down to the ground they may conceal garbage dumps, or crime, or immorality.\(^5\) Moreover, in aid of a zoning policy, they may be restricted, as to location. Yet even today, these mild extensions of the police power in general permitted against billboards are the grounds of protest for dissenting opinions and, on occasion, for those of the majority of a court, which refuses to follow the road taken by more socially minded tribunals.\(^5\) And the language of these protests, to the effect that the ordinances attempt to impose an aesthetic criterion, have in this respect a ring of sincerity not always present in the more socially advanced opinions which support the legislation in question, ingeniously but at times somewhat disingenuously, on the sole grounds of public safety and morality.\(^5\)

Since control of advertising along highways, especially on private

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\(^5\) In one case an affidavit supporting the validity of the ordinance argued that billboards "intensified the heat by reflecting the sun's rays in the streets," an ingenious objection not elsewhere met with. Kansas City Gunning Adv'g Co. v. Kansas City (1912) 240 Mo. 659, 144 S. W. 1099, 1102.


\(^5\) Thus one justice, dissenting, could see in the ordinance no possible justification save the improper one of aesthetics. According to him, the city council had "adopted the aesthetic view of a civic league or confederation of civic leagues" and in the ordinance "the very definition of a billboard bespeaks aesthetics, rather than public safety, public morals, public health, or general welfare." St. Louis Gunning Adv'g Co. v. St. Louis (1911) 235 Mo. 99, 202, 137 S. W. 929, 961, 964, 967.
property, must eventually be justified, constitutionally speaking, even after the needs of public health, morals and safety have been recognized to the utmost, by a franker admission that the aesthetic sense does contribute to the larger definition of public welfare or well-being, it may be well to turn to those instances where some recognition has been given to this essential fact. These are few, but significant. Professor Freund wrote in 1904:

"It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent), is entirely beyond the police power, and an unconstitutional interference with the rights of property. Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive odors and noises. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further applications."55

He also said:

"The question whether mere ugliness not involving any consideration of decency can be placed under police restraint has hardly advanced beyond the range of tentative discussion."56

Yet, as early as 1900, in an opinion upholding on other grounds a Los Angeles ordinance regulating billboards, Judge Ross could not refrain from adding:

"Moreover, the views in and about a city, if beautiful and unobstructed, constitute one of its chief attractions, and in that way add to the comfort and well-being of its people."57

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55 Freund, The Police Power (1904) § 182.
56 Op. cit. § 180, p. 162. At the same time, before zoning had become general, Professor Freund wrote of American cities (§ 181):

"General municipal building regulations in this country are enacted exclusively in the interest of health or safety . . . In America buildings have never been controlled by law with a view to securing beauty or symmetry."

Cf. "Thus, esthetic considerations, it would seem, fall outside the scope of the police power until the sensibilities of the community as a whole become so highly developed that the public is shocked and disturbed by what is ugly." Note (1914) 27 Harvard L. Rev. 571, 572.

A Maryland judge twenty years ago thus recorded his glimpse of a new day:

"It may be that, in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power, even for such purposes." Cochran v. Preston (1908) 108 Md. 220, 70 Atl. 113, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048, 23 L. R. A. (n. s.) 1163.

57 In re Wilshire (C. C. S. D. Cal. 1900) 103 Fed. 620, 623. Cf. "It is difficult to understand, why an easement of view from every part of a public street is not, like light and air, a valuable right, of which the owner of a building on the street ought not to be deprived by an encroachment on the highway by a coterminous or adjacent owner. The right of view or prospect is one implied, like other rights, from the dedication of a street to public uses." First Nat'l Bank v. Tyson (1902) 133 Ala. 459, 32 So. 144, 150, 59 L. R. A. 399, 91 Am. St. Rep. 46.
In a decision sustaining legislation against billboards, on approved grounds, a Missouri judge without stress, however, of aesthetic predilections, indulges in the dictum:

"My individual opinion is that this class of advertising as now conducted is not only subject to control and regulation by the police power of the State, but that it might be entirely suppressed by statute, and that, too, without offending against either the State of Federal Constitution."

And a New York trial judge, holding that whether billboards constitute a nuisance in the Adirondacks State Park, portions of which are still privately owned, is a question of fact, to be decided on the evidence, says:

"We have reached a point in the development of the police power where an esthetic purpose needs but little assistance from a practical one in order to withstand an attack on constitutional grounds."

58 St. Louis Gunning-Adv'g Co. v. St. Louis (1911) 235 Mo. 99, 146, 137 S. W. 929. That this expression of opinion is far from unsupported can be seen from Mr. Justice Holmes's statement:

"If the city desires to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in the Cusack Co. Case." St. Louis Poster Adv'g Co. v. St. Louis (1919) 249 U. S. 269, 274, 63 L. Ed. 599, 39 Sup. Ct. 274.

59 People v. Sterling (1927) 128 Misc. 650, 220 N. Y. Supp. 315, 318; aff'd (1928) 222 App. Div. 849, 226 N. Y. Supp. 881. The modern note, admitting Beauty to full legal partnership, is also struck in a number of zoning cases:

"It is time that courts recognize the aesthetic as a factor in life. Beauty and fitness enhance values in public and private structures." State v. Houghton (1920) 144 Minn. 13, 20, 176 N. W. 159, 162. The majority opinion is expressed by Holt, J., the dissenting opinion by Dibell, J., thus reversing their relative positions on the first hearing (1919) 144 Minn. 1, 174 N. W. 885. The final dissenting opinion upholds the continuing validity of the doctrine of laisses faire: "Heretofore the people in this country have been permitted to work out their own social relations unaided by direct legislation." 144 Minn. at 13, 23, 176 N. W. at 164.

The Kansas Court said: "With the march of the times, however, the scope of the legitimate exercise of the police power is not so narrowly restricted by judicial interpretation as it used to be. There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations." Ware v. Wichita (1923) 113 Kan. 153, 157, 214 Pac. 99, 101.

In Wisconsin it has been said: "It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured . . . The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste . . . But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered." State v. Harper (1923) 182 Wis. 148, 196 N. W. 451, 455.

"The aesthetic taste is not to be frowned on, or classed as prejudice." State v. Roberge (1927) 144 Wash. 74, 80, 256 Pac. 780, 783.

The frankest and most modern viewpoint is expressed by the Louisiana Court, when it says: "If by the term 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of general welfare . . . Why should not the police power avail, as well to suppress or prevent a nuisance committed by offending the
As, in the matter of zoning, the frankest judicial recognition of the eye, as a sense organ entitled to protection, comes from Louisiana, a Civil Law state, so the first decision unequivocally to state the real objection to billboards comes from an American judge sitting in another Civil Law jurisdiction, the Philippine Islands. This pioneer decision, whose language may some day become judicially popular, deserves more than passing quotation.

A statute taxed billboards, and also gave the Collector of Internal Revenue the power summarily to remove any sign or billboard exposed to public view which, after due investigation, he decided was "offensive to the sight or otherwise a nuisance." Section 5 of the Philippine Bill of July 1, 1902, the fundamental act of the Islands, contains the familiar prohibition of laws which deprive "any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws." Yet Mr. Justice Trent, speaking for a Court of American and Filipino jurists, says:

"Without entering into the realm of psychology, we think it quite demonstrable that sight is as valuable to a human being as any of his other senses, and that the proper ministration to this sense conduces as much to his contentment as the care bestowed upon the senses of hearing or smell, and probably as much as both together. Objects may be offensive to the eye as well as to the nose or ear. Man's esthetic feelings are constantly being appealed to through his sense of sight . . .

"The sense of sight is the primary essential to advertising success. Billboard advertising, as it is now conducted, is a comparatively recent form of advertising. It is conducted out of doors and along the arteries of travel, and compels attention by the strategic locations of the boards, which obstruct the range of vision at points where travelers are most likely to direct their eyes. Beautiful landscapes are marred or may not be
seen at all by the traveler because of the gaudy array of posters announc-
ing a particular kind of breakfast food, or underwear, the coming of a
circus, an incomparable soap, nostrums or medicines for the curing of all
the ills to which the flesh is heir, etc., etc. It is quite natural for people
to protest against this indiscriminate and wholesale use of the landscape
by advertisers and the intrusion of tradesmen upon their hours of leisure
and relaxation from work. Outdoor life must lose much of its charm and
pleasure if this form of advertising is permitted to continue unhampered
until it converts the streets and highways into veritable canyons through
which the world must travel in going to work or in search of outdoor
pleasure."

Mr. Justice Trent then cuts to the heart of the matter, by recog-
nizing that the general public, in taxing itself to build the highways,
has thereby *created* for the private owners alongside the opportunity to
sell space for advertising, and that it therefore has a right to control
the use of abuse of this added value conferred by its highways. He
says:65

"The success of billboard advertising depends not so much upon the
use of private property as it does upon the use of the channels of travel
used by the general public. Suppose that the owner of private property,
who so vigorously objects to the restriction of this form of advertising,
should require the advertiser to paste his posters upon the billboards so
that they would face the interior of the property instead of the exterior.
Billboard advertising would die a natural death if this were done, and its
real dependency not upon the unrestricted use of private property but
upon the unrestricted use of the public highways is at once apparent.
Ostensibly located on private property, the real and sole value of the
billboard is its proximity to the public thoroughfares. Hence, we conceive
that the regulation of billboards and their restriction is not so much a regu-
lation of private property as it is a regulation of the use of the streets and
other public thoroughfares."66

65 32 Philippine Rep. at 609.
66 This standpoint, that the owner adjacent to highways, who sells the eye-
sight of the public to the advertisers, is abusing a public right, is obtaining recog-
nition: "The property which the landowner claims is, in the last analysis, the at-
tention of the public, and why may not the public, through the municipal authori-
ties, prohibit him from exercising his vantage point to seize that which belongs not
to him but to the public ... its privacy of mind? The truth is that the billboard
is not so much an unaesthetic structure as the courts would have it, but a violent
intruder on the public peace and comfort." Ralph Straub (1924) 28 Law Notes
68, 71.

Col. Frederick S. Greene, State Superintendent of Public Works of New York, in
a report to the Governor and Legislature says: "Such a tax is recommended not
only to produce revenue, but also to lessen the number of unsightly signs which
are now a blot upon the scenery of this state. Aside from this esthetic point, a
sign tax is eminently just. As everyone knows, a dirt road has no advertising
value, but after the state has expended $50,000 and more a mile to convert a dirt
road into an improved highway, traffic is immediately attracted and signs inevit-
ably follow the traffic. Signboard companies thus reap, without any return to the
state, a benefit which the state has provided through expenditure of millions of
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The decisions in the United States which hamper the regulation of the billboards he conceives to be "an unwarranted restriction upon the scope of the police power by the courts. If the police power may be exercised to encourage a healthy social and economic condition in the country, and if the comfort and convenience of the people are included within those subjects, everything which encroaches upon such territory is amenable to the police power. A source of annoyance and irritation to the public does not minister to the comfort and convenience of the public. And we are of the opinion that the prevailing sentiment is manifestly against the erection of billboards which are offensive to the sight."

He freely grants that the opinion he is expressing for the Supreme Court of the Philippine Islands is at variance with a number of continental decisions to the effect that the police power cannot interfere with private property rights for purely aesthetic purposes:

"The courts, taking this view, rest their decisions upon the proposition that the esthetic sense is disassociated entirely from any relation to the public health, morals, comfort, or general welfare and is, therefore, beyond the police power of the state. But we are of the opinion, as above indicated, that unsightly advertisements or signs, signboards, or billboards which are offensive to the sight, are not disassociated from the general welfare of the public. This is not establishing a new principle, but carrying a well recognized principle to further application."

On denying a rehearing, he further says:

"It might be well to note that billboard legislation in the United States is attempting to eradicate a business which has already been firmly established. This business was allowed to expand unchecked until its very extent called attention to its objectionable features. In the Philippine Islands dollars." Italics ours. Annual Report for 1926 (Feb. 14th, 1927). Cf. Annual Report for 1927 (Jan. 24th, 1928) p. 6.

"In the case of a billboard statute there is in a sense a regulation of the use of a public way, since the value of the private use arises entirely from the adjoining public way. It would not involve a great advance to allow regulation of private property adjoining public places for aesthetic reasons." Note (1916) 29 Harvard L. Rev. 860, 862.

See also Editorial, San Francisco Examiner, July 12th, 1928: "The people are expending literally billions to make travel easy and pleasant, and the signboard companies for a negligible outlay in comparison, are seriously depreciating that investment." Ibid., July 24th, 1928: "As fast as the American people invest a million to make a roadbed attractive to motorists the signboard companies, by spending a few hundreds of dollars, make the roadsides hideous."

In recognition of the added value conferred by highways and roads on adjacent property, County Assessors in New Jersey are substantially increasing assessments on the land, in proportion to the amount of advertising matter it carries. (Letter from N. J. State Board of Taxes and Assessments, August 7, 1928.)

67 32 Philippine Rep. at 610.
68 32 Philippine Rep. at 611.
69 FREUND, THE POLICE POWER (1904) 166.
70 32 Philippine Rep. at 618.
such legislation has almost anticipated the business, which is not yet of such proportions that it can be said to be fairly established. It may be that the courts in the United States have committed themselves to a course of decisions with respect to billboard advertising, the full consequences of which were not perceived for the reason that the development of the business has been so recent that the objectionable features of it did not present themselves clearly to the courts nor to the people. We, in this country, have the benefit of the experience of the people of the United States and may make our legislation preventive rather than corrective.”

And he adds the economic argument which suggests itself so naturally in a jurisdiction which enjoys an annual tourist-crop.71

“There are in this country, moreover, on every hand in those districts where Spanish civilization has held sway for so many centuries, examples of architecture now belonging to a past age, and which are attractive not only to the residents of the country but to visitors. If the billboard industry is permitted without constraint or control to hide these historic sites from the passerby, the country will be less attractive to the tourist and the people will suffer a distinct economic loss.”

BILLBOARD REGULATION IN THE UNITED STATES: LEGISLATION

Something has been done to stem the tide of billboards, without recourse to legislation. A number of large corporations, with executives of broader vision than their competitors, sensing the public irritation, have questioned the value of advertisements thus neutralized and, moved by civic idealism as well as by more material reasons, have led the way by taking down all their roadway signs. Other advertisers, in large numbers, have been induced by civic organizations definitely to restrict billboards to commercial districts.72 Even the organized outdoor advertisers have felt compelled to improve the artistic standards of their signs, and to inaugurate a policy, to be carried out within five years, of restricting them to commercial districts and to places where they “beautify” the landscape.73

71 32 Philippine Rep. at 618.
72 The General Federation of Women’s Clubs reported seventeen such national advertisers in 1924, thirty-one in 1926, two hundred forty-seven in 1928. Biennial Report, 1928. One woman’s club in Honolulu secured the banishment of the billboard “without legislative action, without official support of Government authorities, without illegal boycott, and without damage to the commercial interests of the island.” (1928) 148 THE OUTLOOK 101.
73 Lest this last phrase should seem unduly harsh, the following quotations from a single bulletin, issued by the Outdoor Advertising Association of America and made up of the favorable expressions of opinion by its friends among newspapers and individuals, upon the new “self-government” policy, are appended:
But the advertisers who have “taken the pledge,” so to speak, are a small minority; those who have voluntarily restricted themselves to light wines and beer naturally wish to remain themselves the judges of the aesthetic content of a given landscape, and can hardly view its charms with impartiality; in addition, there remain all the unorganized advertisers, frequently the chief offenders against the public safety and peace of mind. The public is concerned and the circumstances call for its action. To what extent has it already expressed itself in legislation?

It may be well to preface the answer by stating first, for purposes of comparison, what legislation has been enacted in California on the subject. Hardly any. This state prohibits the placing or maintenance of signs on property of the state or its subdivisions “without lawful

1. “If it is true, as Herbert Hoover recently remarked, that ‘modern advertising is the hand-maiden of mass production,’ then outdoor display may become the Anna Pavlowa of advertising mediums.”

2. “The standard poster panel and painted bulletin bring life and color to drab environments and harmonize with good surroundings.”

3. “A colorful poster along the way tells its story in a glance, which impression becomes stronger as the same design is seen repeatedly in different localities. . . .

“Their size assures attention from all who pass, and the ease with which their story is told truly reaches its destination along the lines of least resistance.”

4. “It is indeed good . . . to learn that billboards are to be so improved in form and design that wherever they have been a blot on the landscape of nature heretofore they henceforth will be an ornament—an improvement upon nature herself.” Palo Alto paper. Italics ours.

5. “The triumph of common sense over the mawkish, esthetic sentimentality which has of late years raised a great hue and cry over all kinds of ‘outdoor publicity.’ . . .

“Certainly few journeys through the United States offer so much diversity or grandeur that the traveler’s eye does not rest with relief upon some work of art (however inferior) after the unutterable boredom offered by nature.” (Possibly humorously intended, but seriously quoted in the bulletin.)

6. “Experts are now seeking ways to make outdoor advertising a part of the natural landscape.” Italics ours.

7. “The poster makers who make interesting pictures, who suggest the arts and facts that lift us out of the commonplace in our machine-driven lives, these artists are angels in disguise. They have found the secret of the fine arts, that spirit of inspiration glorifying the commonplace.” Advertising Progress, Bull. No. 4 (June, 1927).

Manifestly there is not much hope to be derived from a quarter whose business is advertising, and whose natural and first desire must be to advertise as much as it possibly can. Its announced policy of “self-regulation” does not meet the necessities of the case, either in theory or in practice. The issue, of course, is not “attractive signs” or “improving nature,” but leaving the landscape alone, to make its own, perhaps simple, unimproved appeal. Signs, duly controlled, may belong in commercial districts, they certainly do not belong in the landscape. As Mr. Justice Sutherland has said, in a recent zoning case:

“A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.” Euclid v. Ambler Realty Co. (1926) 272 U. S. 365, 388, 71 L. Ed. 303, 47 Sup. Ct. 114.
permission," or on private property without the consent of the owner or lessee, and the signs so prohibited are declared to be nuisances. permission," or on private property without the consent of the owner or lessee, and the signs so prohibited are declared to be nuisances. A sign erected upon or over a state road or highway without a permit from the department of engineering is further declared to be a public nuisance, punishable as a misdemeanor. This is all the legislation on the subject in this state. In particular there is no provision of any kind, in the interest of safety, for keeping "sight distance" at intersections.

On the other hand, certain states in addition give any person the right to remove, without legal process, infringing signs on the public highway. Colorado, Hawaii, and New York also create the presumption that the person whose goods are so advertised authorized the unlawful placing of the advertisement.

Many jurisdictions either tax outdoor advertising or require a license for its operation, or both, or give power to state subdivisions to do so. A number of the states merit particular attention, especially with respect to their provisions for greater safety on the highways. Kansas in 1927 enacted twenty-two laws on the subject of roads and bridges, thus effectually bringing its highway statutes up to date, in the light of new conditions of travel. Jurisdiction is given to the highway com-

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76 The office of the state highway engineer writes that his fieldmen have explicit instructions to check up on all sign encroachments and effect their removal: (Letters to the author, Aug. 26th, 1927; Aug. 3rd, 1928.) But the state is large, the fieldmen few, the advertisers many, and every motorist doubtless knows of standing encroachments. Moreover, the California statute is by no means as mandatory as those of certain other states, which explicitly provide that the whole right-of-way shall be kept unencumbered, for its full width.
79 Cartell's Cons. Laws (1923) c. 41, § 121.
81 Laws Relating to Roads and Bridges, Kansas Highway Commission, May 1, 1927.
mission over signs on the right-of-way of state highways;82 the commission also has general power to maintain and improve the state highway system.83 Under these enactments the Kansas Highway Commission has adopted resolutions prohibiting billboards on any part of the highways, and as well on private property within 1000 feet of any crossing or other dangerous point.84

Connecticut prohibits advertisements and signs within one hundred feet of any public park, state forest, playground or cemetery, "or within fifteen feet from the outside line of any highway outside of the thickly settled or business part of a city or town," except on the walls of a building and then only of goods sold or business conducted within.85 The superintendent of state police may order the removal or change in location of any advertisement when, "in the opinion of said superintendent, such advertisement obstructs a clear view along any highway, or is within the legal limits of any highway."86

Colorado prohibits the erection of billboards upon "or along" any public highway, outside an incorporated town or city, within three hundred feet from intersecting corners, or upon or along any sharp curve, in such manner as to obstruct the full view of curve or intersecting highway.87 By the act its restrictions "are hereby declared to be neces-

82 Kansas Laws 1927, c. 257, p. 465.
83 Kansas Laws 1927, c. 263, § 11, p. 463.
84 (3) "It is provided further that any billboards or other advertising erected outside the limits of the highway shall be erected at least one thousand feet from any corner, cross road, railroad crossing or other dangerous places, where the erection of the sign any closer than one thousand feet would be an obstruction to the sight distance of any vehicle traveling upon the highway." KAN. STATE HIGHWAY COM. ENGINEERING MEMO. No. 4, Sept. 27, 1927. The state highway engineer writes that this resolution "has not been contested in our courts, but it is being complied with, by a very large majority of the advertising firms.

"I consider that it will only be a little while until all of our radii for curves will be, at least, 1,000 feet. It will then be necessary to move the signs back that far in order to keep them out of the curve." (Letter to the author, July 20th, 1928.) That the resolution would in all likelihood be sustained is indicated by the recent decision against a billboard which projected but eight inches over the right-of-way, above a ditch alongside the actual highway, in which the Kansas Supreme Court said: "In this day of the rapidly moving automobile the traveller (the public) is entitled to an unobstructed view of the highway." National Sign Co. v. County Commissioners (1928) 126 Kan. 81, 265 Pac. 927, 928.

Kansas also gives authority to county commissioners to remove all billboards exceeding four feet in height within fifty yards of any "railroad grade crossing, abrupt corner in the highway, or entrance to a driveway off of a public highway." Kan. Laws 1927, c. 159, p. 203. It also authorizes municipalities to regulate the construction and location of billboards on public streets "and on property adjacent thereto." Kan. Laws 1921, c. 122, § 26; KAN. REV. STAT. (1923) 13-406.

86 Ibid. § 9, p. 4319.
87 Colo. Laws 1923, c. 128, p. 367.
sary for the general welfare and public safety in the use and enjoyment of the public highways.\textsuperscript{88}

Vermont grants its secretary of state power to withhold a license for a billboard unless its "kind, size and location ... meets with his approval," and to "order the removal or change in location of any advertisements when in the opinion of said secretary such advertisement obstructs a clear view along any highway."\textsuperscript{89}

Maine prohibits all signs "so situated with respect to any public highway as to obstruct clear vision of an intersecting highway or highways or otherwise so situated as to prevent the safe use of the public highways."\textsuperscript{90} The penalty is a fine of $5 to $500; maintenance of a sign beyond ten days after conviction leads to further fine of not to exceed $50 per diem. The state highway police are to remove all offending signs. The highway is to be "deemed the full width of the road as laid out."

Arizona deputes to its highway commission the duty of prescribing "rules and regulations governing the use of highways in so far as safety and convenience are concerned."\textsuperscript{91} The Commission has not yet attempted to restrict, like the Kansas commission, billboards on private property, but in its resolutions regulating signs on the rights of way it has expressed itself as follows:

"The Highway Commission has come to the conclusion that commercial advertising signs serve no public purpose. They mar the landscape and in addition to being unsightly they distract the attention of motorists and are in many instances a positive danger to the traveling public."\textsuperscript{92}

Massachusetts, realizing that courts must be inevitably slow in responding to modern needs in a jurisdiction where a line of cases had crystallized the dogma that "aesthetic purposes" could be valid only when distinctly "auxiliary" to more recognized factors,\textsuperscript{93} has taken


\textsuperscript{89} Vermont Acts 1925, No. 32, §§ 3, 7, pp. 43–4.

\textsuperscript{90} Laws of Maine 1925, c. 188, p. 177; \textit{ibid.} 1927, c. 160, p. 145.


\textsuperscript{92} Ariz. State Highway Comm. Resolutions, July 9, 1928. Since this article was written, the California highway commission has adopted (Nov. 22, 1928) somewhat similar resolutions.

drastic action. Its Constitutional Convention incorporated among the constitutional amendments, submitted and ratified in 1918, the following: "Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law."\(^{94}\)

Under this provision, and after an investigation made by a commission of three, consisting of the Attorney General, the Chairman of the State Highway Commission, and the Chief of the District Police,\(^{95}\) general jurisdiction was given by statute to the State Department of Public Works over advertising signs on public ways "or on private property within public view of any highway, public park, or reservation," with penalties specified for failure to observe its regulations.\(^{96}\) The department issued regulations in 1924. These, in addition to a number of restrictions calculated to insure safety, provide: that permits are required for advertising signs; that no permit will be granted for a sign within three hundred feet of any public park or reservation, if visible from any part of the same; that no outdoor advertising shall be painted or affixed upon any fence or pole within fifty feet of any public way, nor upon any rock or tree, nor directly upon any wall; and that no permit will be granted near certain public ways where, in the opinion of the division of highways of the department, having regard to the usual scenic beauty of the territory, signs would be particularly harmful to the public welfare.\(^{97}\)

Although drastic, the regulations seem reasonable. But the billboard interests had vested rights in billboards erected before the promulgation of the regulations and in some cases doubtless antedating the law of 1924, possibly even the constitutional amendment of 1918. When the department attempted to enforce the state law and regulations, and the historic town of Concord to enforce its by-law on the same topic, injunctions were applied for on the ground that enforcement was in contravention of the Federal Constitution, and these were temporarily

\(^{94}\) Mass. Const. 1918, Art. 72. At the same time was adopted the following amendment on zoning: "The General Court shall have power to limit buildings according to their use or construction to specified districts of cities and towns." Art. 71.

\(^{95}\) Mass. Special Acts and Resolves 1919, c. 69, p. 338.


\(^{97}\) Division of Highways, Bulletin of January 24, 1924; Massachusetts Federation of Planning Boards, Bull. No. 15, Sept. 1924.
granted. In all, three cases are now pending before the Supreme Judicial Court of Massachusetts, evidence at the moment being heard before a master. The decisions, when given, will doubtless be reviewed by the Supreme Court of the United States.

The statute of the Philippine Islands, restricting billboards generally on aesthetic grounds, has already been mentioned in connection with the case of Churchill v. Rafferty; that of New York, which in the express intention of saving the natural beauty of the Adirondack State Park declared billboards within the park boundaries, even though situated on private property, to be public nuisances was sustained in the case of People v. Sterling.98

It can be readily seen from the above that there are three different means employed by current legislation to restrict billboards erected on private property adjacent to highways. First: The use of the power to license or tax; second: the use of the police power, in relation to safety, which in the case of Kansas or Vermont can manifestly go far; and, third: the use of the police power, frankly invoked on behalf of aesthetics, as by Massachusetts, the Philippine Islands, and, in the special case of the Adirondack State Park, by New York.

**TO WHICH OF THESE THREE MEANS OUGHT CALIFORNIA TO RESORT?**

*To all three:*

First, it ought to lay a progressive tax upon all billboards, the rate of tax per square foot increasing with the size of the board. The progressive tax would be justified by the fact that the large board attracts attention, over the smaller, in a proportion greater than their relative sizes, and would doubtless be upheld.99 Such a tax, while aiming at revenue from interests deriving benefit from the public highway, would

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tend to discourage billboards, beyond a certain size, and would tend to do away with most of the giant monstrosities that line our roads and impair our views.¹⁰⁰

Second, it ought to authorize police regulations, probably framed, certainly enforced, by the State Highway Commission, looking to the insuring of safety at crossings, curves, hills and other dangerous points. The precedents furnished by Colorado, Kansas, Maine, Vermont and other states, point the way.¹⁰¹

Third, in connection with the power to license, it ought to take steps to control all signs, of no matter what size, as to size and loca-

¹⁰⁰Such a progressive tax was suggested as early as 1913 by the Mayor's Billboard Advertising Commission of the City of New York (see Williams, The Law of City Planning and Zoning (1922) 417, for text of bill introduced in the New York legislature of 1922). Porto Rico taxes only signs of more than four square feet. Laws of Porto Rico 1921, c. 42, § 22, p. 298. ($25.00 per advertisement.) A similar Connecticut statute was upheld in State v. Murphy (1916) 90 Conn. 662, 98 Atl. 343. The Philippine Islands tax all billboards, and all signs displayed on premises not occupied by business buildings, twice as much per square meter as signs and signboards on premises used for business buildings. Philippine Adver. Code (1917) § 1477. Vermont taxes billboards of an area of six square feet or more. Vermont Acts 1925, No. 32, p. 43.

"Any charge . . . should bear some relation to the value of the advertisement; and the value of the advertisement varies directly with the number of people who see it. This depends on the location as well as on the size and nature of the advertisement. The advertising company normally grades its charges according to the size and type of advertisement, and also according to the number of people passing within view of the board. A tax should be similarly graded . . . a billboard at the head of a street or at a curve where it may be seen for several blocks is more valuable than a neighboring site with a more limited 'area of projection.' . . .

"It is worth noting that the usual rate in French cities on billboards of the size of those commonly used in this country is the equivalent of seven dollars per square foot, and under certain conditions even thirty dollars per square foot. These taxes are undoubtedly repressive but not prohibitive. There is probably no tax in this country which exceeds ten cents per square foot and very few which are equal to one cent per square foot . . . the total revenue from this source in cities of the United States with a population of 30,000 and over in some years has been less than the amount collected in Berlin alone. And in Berlin this represents rentals paid by advertising companies for the use of the city's advertising kiosks. Billboards are prohibited. Apparently appreciable revenues can be obtained even with important restrictions." M. Newcomer, Taxation of Billboards (1924) 13 National Municipal Review 349-350.

¹⁰¹An instance of suggested zoning for safety along the highways is to be found among the recent recommendations made by a committee appointed by Governor C. C. Young to report on measures necessary to curtail the danger of fire to California forests and fields. The committee recommend that an eight or ten-foot strip, adjoining the highway right-of-way, be ploughed under in all grain fields. San Francisco Press of August 8, 1928. A safety zoning law, requiring the destruction of all cedar trees, infected with red rust, within a radius of two miles from an apple orchard, is valid. Kelleher v. Schoene (W. D. Va. 1926) 14 F. (2d) 341; Kelleher v. French (W. D. Va. 1927) 22 F. (2d) 341; Virginia v. Entomologist (1920) 128 Va. 351, 105 S. E. 141; Miller v. Entomologist (1926) 146 Va. 175, 135 S. E. 813, aff'd (1928) 48 Sup. Ct. 246.
tion. Signs beyond certain specified size should be prohibited; all others should be restricted to commercial districts and be otherwise permitted to parallel the highways only beyond a certain zone. This could be done largely without suggestion of any aesthetic intention, by following the Ontario statute already described, prohibiting or regulating all signs within a certain distance from a highway or road supported in whole or in part by state funds; in part, it would frankly admit an aesthetic intent, where necessary to protect a landscape which could be marred by signs beyond such fixed zone.

Would such a statute be constitutional? As to its provisions based upon the power to tax, and upon the police power to achieve greater safety at intersections, there can hardly be doubt that it would. As to the provisions looking to a zoning of the highways, in the interests both of safety and of the general welfare, and of protecting landscapes on purely aesthetic grounds, admittedly there is some room for difference of opinion. That of the writer is that such a statute, carefully drawn and from not too extreme a standpoint, would be upheld.

The reasons for such opinion are not far to seek. They are implicit in what has been already said. No new principle is involved—the statute would merely apply to the now congested highways the social idea of "zoning" which the congested cities have already called into existence. It would be supported by the requirement of safety, since admittedly every sign visible from the highway intends, and tends, to distract in some degree the attention of the motorist.

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103 The Ontario statute provides a restricted zone a quarter of a mile wide either side of the highway. The Webb Bill, introduced at the last session of the New York legislature, asks for one, five hundred feet wide. Connecticut, as already mentioned, requires a zone of but fifteen feet.

104 In addition, legislation should be passed enabling counties, if not the state, to deal with advertising roads other than highways. Municipalities may regulate billboards under the general zoning power. Appeal of Liggett (1927) 291 Pa. 109, 139 Atl. 619. Cf. Williams, op. cit., supra n. 100, at 418. California cities have in general done so.

105 "It does seem as if in the interest of our enormously increasing traffic all billboards visible from the public highway, in their diversion of attention as well as in their actual interference with safety, might properly be declared to be dangerous nuisances." J. Horace McFarland, The Billboard and the Public Highways (1924) 116 ANNALS AM. ACAD. POL. AND SOC. SCI. 95.

It is difficult to see how the adjacent landowners could legitimately complain of the restriction. They have accepted the benefits of the highway, they are subject to changes in its use as changing conditions may require, "Where land is conveyed for a public highway the implication must be that it will be used as the convenience and welfare of the public may demand, although that demand may be augmented by the increase of population. The benefits which an owner of the servient estate receives from the increase in population and consequent building up of the community usually far more than compensate him for the increased burden he may claim to have suffered." Collopy v. United Railroads (1924) 67 Cal. App. 716, 723, 228 Pac. 59.
would be supported as well by the economic consideration, now increasingly recognized by the courts, that "beauty pays"—a consideration that closely approaches, in a state with a large appeal to tourists, to the dignity of being a part of the "general welfare." Lastly, it might even be supported on the unequivocal aesthetic ground, simply because a landscape, unmarred, does contribute to "the emotional and spiritual side of our nature," and our civilization has reached a point where it is ready to include such a value among those entitled to protection.

Moreover, as it fortunately happens, the Supreme Court of California is among those which have proven receptive to the modern vision of a complex world of many needs and satisfactions, all contributing to the general welfare. It is not too much to say that the late Mr. Justice Lennon's opinions in the leading zoning cases expressed for the court in classic fashion, and in terms as broad as, and in some respects broader than, any heretofore used elsewhere, its support of legislative measures intended to make for a richer and fuller life in our cities. After reading those opinions, it takes but little effort to foresee, as a possibility not utterly remote, a decision by this court extending a similar protective imagination over the gifts of valley, mountain and shore.

California is not chained, like Massachusetts, by the links of earlier

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107 An ordinance prohibiting the solicitation of passengers in railroad stations, by agents of hotels and transfer companies, has been upheld in the interest of "the peaceable and convenient use of such depots by arriving and departing strangers." In re Barmore (1917) 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D 1688. "The business is no doubt a legitimate and useful one. But even lawful occupations are subject to reasonable regulation, and one of the recognized modes of regulation is by prescribing the places where a given occupation may or may not be conducted." 174 Cal. at 287. The opinion quotes approvingly from a decision of the United States Supreme Court sustaining a Kansas statute: "The legislature clearly has the power to make regulations for the convenience and comfort of travelers on railroads, and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importunities of drummers." Williams v. Arkansas (1910) 217 U. S. 79, 89, 54 L. Ed. 673, 30 Sup. Ct. 493. Cf. In re Stratham (1920) 45 Cal. App. 436, 187 Pac. 986. Nor is it of importance that the transfer company had a contract with the railroad company, giving it the right of solicitation within the depot. The police power, once its scope over the given subject-matter is granted, is superior to contracts made between private parties. "All contracts are subject to this power, the exercise of which is neither abridged nor delayed by reason of existing contracts." 174 Cal. at 289. Cf. Mott v. Cline (1927) 200 Cal. 434, 446, 253 Pac. 718.

If travellers on railroads are entitled to protection from solicitation, it would seem lawful to extend similar protection to travellers on public highways, even though the drummers in the latter case assail the eye instead of the ear-drum.

decisions shying, even though not bolting at the word "aesthetic."\textsuperscript{100} It need not seek the tedious shortcut of amending its Constitution. Its court, in \textit{Varney v. Williams}, it is true, did once deny validity to an ordinance directed against billboards.\textsuperscript{110} But in that case the ordinance \textit{prohibited}, not merely regulated, any and all billboards, save those advertising business on the premises, and the decision hardly furnishes a precedent today against legislation less drastic. Further, \textit{Varney v. Williams} was decided before the advanced decision in the zoning case of \textit{Ex parte Hadacheck}.\textsuperscript{111} Also, as has been pointed out by an appellate opinion, it "was decided almost fifteen years before the Miller and Zahn cases."\textsuperscript{112} Those fifteen years, and the three elapsed since, have seen some expansion, in the scope of the police power, in California as elsewhere!

**CONCLUSION**

State action to control the billboard nuisance would seem to be soon due, in the interest of public peace of mind, as well as of public safety. At the beginning of this article it was said that certain indications of a forming public opinion — straws showing the direction of the wind — would be noted later. Here are a few — doubtless every reader will be able to supply others for himself.

When in 1924 the Standard Oil Company of California tore down some 1200 highway signs, on Pacific Coast highways, it had expected some mild public approval. But the unanimous chorus of praise it received exceeded all its corporate expectations.\textsuperscript{113} As one newspaper comment put it, "It is the first time in history that all of the newspapers of this state have been able to agree about anything."\textsuperscript{114}

\textsuperscript{100} The court once expressed an aesthetic viewpoint, in favor of certain threatened trees, forming a part of "a shaded avenue, declared to be one of the most beautiful in the state." Santa Barbara v. More (1917) 175 Cal. 6, 8, 164 Pac. 895, L. R. A. 1917F 385.


\textsuperscript{111} (1913) 165 Cal. 416, 132 Pac. 584, L. R. A. 1916B 1248; \textit{aff'd} Hadacheck v. Sebastian (1915) 239 U. S. 394, 60 L. Ed. 348, 36 Sup. Ct. 143.

\textsuperscript{112} Thillie v. Los Angeles, \textit{supra} n. 49 at 193. Moreover, Mr. Justice Sloss, while declaring in \textit{Varney v. Williams} that aesthetic considerations were insufficient, standing by themselves, to support an exercise of the police power, admitted that they were not entirely outside the scope of government. For he said (155 Cal. at 320): "That the promotion of aesthetic or artistic considerations is a proper object of governmental care will probably not be disputed."

\textsuperscript{113} STANDARD OIL BULLETIN, April, 1924, pp. 1, 12-14; \textit{ibid}, March, 1924, p. 3. Also special pamphlet, HIGHWAY ADVERTISING SIGNS, August, 1924.

\textsuperscript{114} Corning Advance, March 13, 1924. Even allowing for the fact that the press, as an advertising medium, is itself in competition with the billboards, its unanimity in this instance is notable. And much of the commendation came from officials, civic organization and private individuals. Special pamphlet, \textit{supra} n. 113.
When the State Director of Public Works recently came out against "hot dog" stands and for the preservation of places of unusual beauty adjoining the roads, there again followed similar general approval.\textsuperscript{115}

Even small cities are regulating billboards. Modesto, for instance, both prescribes their character and location, and taxes them.\textsuperscript{116}

Civil organizations and women's clubs are making themselves heard. In one recent instance, when the chambers of commerce of a northern county proposed that the county use its advertising funds to billboard its attractions throughout Southern California the County Federation of Women's Clubs protested, partly in fear lest the southern section should retaliate in kind.\textsuperscript{117}

Publicists, also, are speaking to the point, among them Mr. Chester Rowell, who says:

"So, we have conceded that, of the five senses and the numerous organs of the human body, certain ones are entitled to protection, namely: the sense of hearing and the sense of smell. So your neighbor may not set up an intolerable din upon the next lot after the normal hours of sleep. That would offend the sense of hearing. He may not set up an intolerable stench that would spread over his neighbor's property. But he may offend the eye, he may offend every esthetic sense. He may shut off your view, he may outrage every artistic harmony of the neighborhood. And, in spite of the fact that every other civilized country of the world long ago established laws against that, it would be unconstitutional in the United States to establish, for the eye—or for the soul to which it is the window—those protections which have been established for the ear and the nose."\textsuperscript{118}

The legal conclusion of the able publicist may, or may not, be correct. One thing is certain—if today eyesores are yet protected by the constitution, tomorrow that protection will be granted to the eye, and to the soul whose window it is. "For had the eyes never seen the stars, and the sun, and the heaven, none of the words which we have spoken about the universe would ever have been uttered."\textsuperscript{119}

Chauncey Shafter Goodrich.

SAN FRANCISCO, CALIFORNIA.

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\item \textsuperscript{115} California Highways and Public Works (December, 1927) Official Journal Department of Public Works, p. 22.
\item \textsuperscript{116} Ordinance No. 302 (n. s.), adopted Dec. 1, 1926.
\item \textsuperscript{117} Los Gatos-Saratoga Star, Feb. 9, 1928, p. 1.
\item \textsuperscript{119} Plato, \textit{op. cit., supra} n. 7, par. 47.
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