"HEY! LOOK AT ME!": A GLANCE AT TEXAS'S BILLBOARD REGULATION AND WHY ALL ROADS LEAD TO COMPROMISE

Comment

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I. POSING THE QUESTION: WHY TEXAS HAS AN INTEREST IN BILLBOARD REGULATION

While traversing across Texas in the mid-1800s, William Bollaert described the state's isolated roadways across pristine landscapes: "[T]he roads are choked up with the wild sun-flower and weeds, so much so that other roads are made by the side of the old ones, for the little transit there is in this direction . . . very few travellers and the 'mail rider.'"[1] Long before the existence of crowded highways and intersections, Texas's natural beauty dominated the scenery.[2] Such openness attracted settlers to the area seeking new opportunities in agriculture and ranching.[3] The infrastructure of Texas developed over time and now supports the second largest population in the nation.[4] Some could argue that, relatively speaking, Texas has shrunk in size over the years.[5] As cities grew, highways soon proliferated, and the infrastructure of the highway systems continued to improve.[6] A new era of travel for Texans boomed, and the traveling public would soon encounter a powerful force—the outdoor advertising industry.[7]

The billboard existed long before the Internet, television, or cell phones.[8] Once described as "temporary affairs, consisting of upright timbers, or posts, set in the ground at various distances from each other," billboards started out as rudimentary structures.[9] These signs "present[ed] a smooth vertical surface upon which the various announcements [were] made or displayed."[10] Around one hundred years ago in Paris, Texas, the city marshal arrested a man for posting signage on a billboard because the City of Paris had passed an

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1. WILLIAM BOLLAERT'S TEXAS 183 (W. Eugene Hollon ed., 1956) (presenting a personal account by William Bollaert of a road along the Colorado River that he traversed while visiting Texas). Bollaert was English and arrived in Galveston, Texas, in February of 1842, just before the United States annexed Texas. Stanley Pargellis, *Introduction* to WILLIAM BOLLAERT'S TEXAS, at xvii, xxi (W. Eugene Hollon ed., 1956). He excelled at chemistry, botany, and geology, and wrote of his journeys across Texas during such a pivotal time in the state's history. *See id.* at xviii, xxvi.

2. *See* WILLIAM BOLLAERT'S TEXAS, *supra* note 1, at 183.

3. *See generally* TEXAS ALMANAC 2010-2011, at 34-35 (Elizabeth Cruce Alvarez ed., 65th ed. 2010) (discussing agriculture and land ownership as motivating factors behind early movements to Texas).

4. *Id.* at 15 (referencing the U.S. Census Bureau's 2009 Statistical Abstract).

5. *See generally TxDOT History: 1917-1930*, TEX. DEP'T OF TRANSP., http://www.dot.state.tx.us/about_us/1930_1917.htm (last visited Jan. 11, 2012) (depicting the development of the Texas highway system).

6. *See id*. A company out of St. Louis, Missouri, created the first Texas license plate in 1917 to designate licensed vehicles within the state. *Id.*

7. *See id.*; *infra* notes 24-33 and accompanying text.

8. *See generally* David Burnett, Note, *Judging the Aesthetics of Billboards*, 23 J.L. & POL. 171, 179-82 (2007) (describing how outdoor communication likely dates back to the Egyptian and Roman empires). Billboards in America started as painted ads on various structures such as barns and buildings visible to the public. *See id.* at 180. Even natural landscapes offered opportunities for communication to the public. *See id.*

9. St. Louis Gunning Adver. Co. v. City of St. Louis, 137 S.W. 929, 941-42 (Mo. 1911).

10. *Id.* at 942.

ordinance designating the position of a "billposter."[11] Only the billposter could legally post a billboard within the limits designated in the ordinance.[12] A challenge against the city's ability to create the exclusive position of billposter ensued.[13] Although the Texas Court of Criminal Appeals sharply criticized billboard advertisements as "constant menaces to the public safety and welfare of the city" as well as "inartistic and unsightly," the court ultimately dismissed the case.[14] While the court recognized the city's authority to regulate the billboard industry, it held that the city "did not have the power and authority to create the office of billposter . . . and prohibit and exclude all others from following that business."[15] Thus, the billboard industry achieved a victory—the Texas court supported the openness of the industry, and not just those individuals to whom the city alone approved.[16] Even today, advertisers and citizens alike have an interest in the local and statewide regulation (or not) of outdoor advertising.[17]

In Parts II and III, this Comment will give background information on Texas's billboard regulation in order to demonstrate the depth, complexity, and variation within the topic. The focus will then shift in Part IV to show ambiguities in Texas law concerning billboards as fixtures and why such a status matters. Next, in the second portion of Part IV, various appellate cases will demonstrate the trends and variances in Texas's local ordinances. Part V gives an overview of relevant arguments and proposals other states have made to lessen ambiguities of billboard regulation by imposing strict, yet concrete, state legislation. Ultimately, this Comment will conclude in Part VI that between variations among local regulations and the ongoing debate over the stringency of highway-beautification legislation, in the near future, Texas will face a decision: it must determine whether more rigid legislation is the best option to achieve uniformity. The discussion will argue that statewide variations between cities is actually best for Texas, but along highways, uniformity and tighter legislation, such as those in other states, are the only ways to truly preserve Texas's landscapes.[18] In the end, variations among cities positively reflect Texas's necessary diversity and local viewpoints; however,

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11. *See Ex parte* Savage, 63 Tex. Crim. 285, 287, 141 S.W. 244, 245 (1911).

12. *See id.*

13. *Id.* at 288-89, 141 S.W. at 246.

14. *Id.* at 291, 141 S.W. at 247-48 (quoting *Gunning Adver. Co*., 137 S.W. at 942).

15. *Id.* at 295, 296-97, 141 S.W. at 250-51.

16. *Compare Ex parte* Howell, 71 Tex. Crim. 71, 72, 75, 158 S.W. 535, 536-37 (1913) (deciding that an ordinance allowing only the city scavenger to remove certain wastes was a valid exercise of the city's police power), *with Ex parte Savage*, 63 Tex. Crim. at 289-93, 141 S.W. at 247-48 (stating the limitation of billboard advertising only to the office of billposter was an improper use of the city's police powers).

17. *Compare* John W. Houck, *Toward a Society of Visual Quality*, *in* OUTDOOR ADVERTISING 1, 1 (John W. Houck ed., 1969) (lamenting over the loss of the country that was known as "America the Beautiful"), *with* Phillip Tocker, *Standardized Outdoor Advertising: History, Economics and Self-Regulation*, *in* OUTDOOR ADVERTISING 11, 11 (John W. Houck ed., 1969) (describing the outdoor advertising industry as "an important part of marketing").

18. *See* discussion *infra* notes 297-300.

tighter statewide highway restrictions could offer a compromising element to soften the debate.[19]

II. THE DEVELOPMENT OF OUTDOOR ADVERTISING AND THE EARLY CLASH WITH BOTH THE STATES' POLICE POWERS AND THE BEAUTY OF NATURE

The issue of billboards and the seemingly constant controversy over the constitutional issues surrounding both their proliferation and their demise represent the apex of an industry that has steadily developed over time.[20] A look at the general development of the industry helps to explain the current variations in the law because, for the most part, the billboard industry's development paralleled the country's rapid changes in technology.[21] Curbing this development, however, is the concept and acceptance of zoning, a relatively new influx in property law considering the perpetual nature of property itself.[22] The protections offered through zoning and other exercises of the government's police powers coupled with the fight for scenic views created two obstacles for the growing outdoor-advertising industry.[23]

A. Protecting the People: How History Dictated the Utilization of Police Powers

Before the massive road signs of today, the earliest billboards took the form of mere posters, largely due to the advent of moveable type.[24] Soon, the circulated bill, which was similar to modern periodicals, gave way to the "posted" bill, which helped early shopkeepers identify their places of business to the public passersby.[25] Eventually, people began to use outdoor signs not only to identify but also to advertise, and most of these early advertisements were simple notices to communicate upcoming fairs, various sales, or even new medicines.[26] By the end of the Civil War, the industry had grown to encompass 275 bill-posting firms.[27]

Just a few decades later, the proliferation of the automobile almost single-handedly paved the way for the boom of the outdoor-advertising industry in

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19. *See* discussion *infra* notes 286-90.

20. *See, e.g.*, Katherine Dunn Parsons, Comment, *Billboard Regulation After* Metromedia *and* Lucas, 31 HOUS. L. REV. 1555, 1563-605 (1995) (discussing both the First and the Fifth Amendment issues surrounding two Supreme Court decisions about billboards and commercial speech).

21. *See generally* Tocker, *supra* note 17, at 24-46 (presenting a chronology of developments within the billboard industry from paper messages to the use of various lighting techniques).

22. *See* CLIFFORD L. WEAVER & RICHARD F. BABCOCK, CITY ZONING: THE ONCE AND FUTURE FRONTIER 3-6 (1979).

23. *See infra* Part II.A-B.

24. *See* Tocker, *supra* note 17, at 24.

25. *See id.* at 24-25.

26. *See id.* at 26-27.

27. *See id.* at 29.

America.[28] From out of the deserts, mountains, and valleys across the country, advertisers saw opportunity in the open land to solicit business.[29] The retail industry picked up on the profitability of billboards as a way to "pull customers from beyond the retailers' immediate geographic area" through the use of the automobile.[30] Thus, "[t]he highways of the 20th century replaced the sidewalks of the 19th century as the most dynamic and populated public space."[31] Beyond shopping malls and crowded cities, Texas's rural lands offered an opportunity for retailers to capitalize on the automobile's shrinking of the great state.[32] The debate occurring today concerning billboards along Texas's highways and among busy cities began as a debate over the fair allocation of rights between advertisers and aesthetically minded citizens.[33]

Even as early as 1917, the United States Supreme Court became caught up in the battle between statewide beautification, government regulation, and the advertising industry.[34] In *Thomas Cusack Co. v. City of Chicago*, a corporation sued the City of Chicago and argued that a municipal ordinance regulating billboards within residential areas was an overly broad use of the city's police powers.[35] Though the Court did not need to decide the issue of a possible takings claim, the decision turned on the city's ability to limit the construction of billboards in designated areas through the use of its police powers.[36] The evidence at trial revealed that the billboards in this area of Chicago had "offensive and insanitary accumulations . . . habitually found about them" and indicated that the billboards "afford a convenient concealment and shield for immoral practices."[37] The Court seemed to bend its opinion towards the views and interests of the American public with some skepticism of the industry.[38] Thus, the United States Supreme Court approved of this restrictive ordinance as

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28. *See* Jacob Loshin, Student Article, *Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation*, 30 ENVIRONS ENVTL. L. & POL'Y J. 101, 113 (2006).

29. *See id*. at 114.

30. *Id.* at 115.

31. *Id.* at 116.

32. *See generally* Tocker, *supra* note 17, at 37 (using both a photograph and a caption to explain how the automobile pushed the billboard industry into rural areas).

33. *See generally* Fred P. Bosselman, *Regulation of Signs in the Post-McLuhan Age*, *in* OUTDOOR ADVERTISING 99, 99-103 (John W. Houck ed., 1969) (recognizing that the advent of zoning around 1910 had a nationwide effect on the outdoor advertising industry, especially in cities).

34. *See, e.g.*, St. Louis Adver. Co. v. City of St. Louis, 249 U.S. 269, 270 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 527 (1917).

35. *See Thomas Cusack Co*., 242 U.S. at 527-28.

36. *See id.* at 530-31.

37. *Id.* at 529.

38. *See id.* at 529-31; *see also* Burnett, *supra* note 8, at 178 (noting that some argue billboard regulation reflects a strong connection between the courts and the public voice). The "majoritarian thesis" promotes the idea of the American public as a loud voice for the often-undisclosed judicial reasoning behind billboard regulation. *See* Burnett, *supra* note 8, at 179. *See generally* Mitchel L. Winick, Debra Thomas & Robin Sisco, *Attorney Advertising in Texas: Regulations Mean Serious Business*, 3 TEX. WESLEYAN L. REV. 1, 32-33 (1996) (reflecting on the interest Texas courts have in protecting citizens from "uninvited solicitation," specifically within the context of attorney advertising).

a valid exercise of the city's police powers to protect the health and best interests of its citizens.[39]

Nearly two decades later, instead of the billboard restrictions found in *Thomas Cusack Co*., Lubbock County, Texas residents challenged the changing highway system in *Nairn v. Bean*, which, like *Thomas Cusack Co.*, indicated the problems of a growing state facing pressures for change and modernization.[40] In *Nairn*, residents filed suit when the county judge and the county commissioners entertained a proposition for highway changes through part of Lubbock.[41] The court determined that the "plans and policies for the location, construction, and maintenance of a comprehensive system of state highways and public roads" rested with the state administration.[42] Thus, the decisions surrounding early highway construction in Texas, and the advertising that would presumably follow, walked the narrow line of encouraging modernization while also recognizing the interests and concerns of the general public.[43]

B. Protecting the View: How Growth Created Concern for Preservation

Beyond arguments between large advertisers and city regulations, the other battlefront lies between nature and commercial marketing—an industry that both informs and entertains us.[44] The billboard industry in Texas seems to inevitably clash with the preservationist stance that "[n]ature has long been viewed not only as the foundation of human subsistence, but also as a source of economically important resources."[45] Over the past one hundred years, the national trend has been towards preservation, conservation, and appreciation of natural resources.[46] Parallel to this environmental awareness is a general apprehension and resistance to signage that impedes natural beauty; however, this sentiment has likely arisen out of the proliferation of the outdoor-advertising industry.[47]

Since the early 1900s when Texas courts were just beginning the analysis of police powers in reference to outdoor advertising, the billboard industry has

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39. *See Thomas Cusack Co*., 242 U.S. at 529-30.

40. *See* Nairn v. Bean, 121 Tex. 355, 355-57, 48 S.W.2d 584, 584-85 (1932).

41. *See id.* at 355-56, 48 S.W.2d at 584.

42. *Id.* at 361, 48 S.W.2d at 586.

43. *See id.* at 357-61, 48 S.W.2d at 585-87; *see also* St. Louis Poster Adver. Co. v. City of St. Louis, 249 U.S. 269, 274 (1919) (citing earlier cases that placed billboards in a separate property category and described how public welfare determined whether or not municipalities were properly limiting billboards).

44. *See generally* Alison E. Gerencser, *Removal of Billboards: Some Alternatives for Local Governments*, 21 STETSON L. REV. 899 (1992) (noting the concern among community residents about the often unsightly nature of billboards but recognizing the inherent rights of advertisers).

45. *See* Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11, 16 (2000).

46. *See id.* at 25-32. The Progressive Era of the 1920s spawned the proliferation of the National Park Service. *See id.* at 29.

47. *See* Burnett, *supra* note 8, at 175.

grown significantly.[48] Nationwide, three billboard companies own almost ninety percent of the billboards in the United States: Clear Channel Communications, Inc., Viacom, Inc., and Lamar Advertising Company.[49] But, on the other side of the debate are groups such as Scenic America, a nonprofit organization that supports the nation's natural beauty and scenic highways.[50] Texas has its own affiliate of Scenic America, Scenic Texas, which similarly promotes various restrictions on billboards.[51] Scenic Texas reports that there are over 35,000 billboards statewide as well as 550 new permits for billboards each year, and apparently, rural Texas faces the strongest threat of billboard proliferation.[52]

While the trend towards the recognition of environmental concerns and scenic preservation may seem like a fairly recent debate, some argue that "[b]illboard regulations have always been primarily driven by public dislike of ugly and intrusive outdoor advertising."[53] This description, however, fails to consider the commercial side of billboard advertising, which may not be entirely negative.[54] Still, some courts in recent years have held that aesthetic reasons alone may support billboard regulations.[55] The justification behind this reasoning lies in the courts' arguably greater willingness over time to consider public opinion, social welfare, and community pride in evaluating billboard laws.[56] Beautification of long, winding highways as well as busy city streets is a strong factor underlying the debate for more rigid restrictions on billboard proliferation.[57]

Included in the movement for aesthetics to be a mechanism for billboard regulation is the question of degree—the public may consider some billboards more intrusive than others.[58] Possibly to define and measure the level of intrusion billboards impose on the traveling public and surrounding landscapes, case law and statutes often refer to two major classifications of outdoor advertising, and more specifically, billboards: on-premise signage and off-premise signage.[59] On-premise signs designate the location of the billboard's placement and are placed on the premise advertised while off-premise signs

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48. *See Ex parte* Savage, 63 Tex. Crim. 285, 289-93, 141 S.W. 244, 247-48 (1911).

49. William D. Brinton, Georgetown University Law Center Continuing Legal Education: Litigating Regulatory Takings Claims, *Billboard Legislation and the Takings Issue* 8-9 (Oct. 18-19, 2001), *available at* SCENIC AMERICA, http://www.scenic.org/billboards-a-sign-control/legal-issues-and-billboards (follow "Takings and Amortization in the Billboard Control Issue" hyperlink) (last visited Jan. 11, 2012).

50. *See* SCENIC AMERICA, http://www.scenic.org/about-us (last visited Jan. 11, 2012).

51. *See* SCENIC TEXAS, http://www.scenictexas.org (last visited Jan. 11, 2012).

52. *Texas Counties: Billboard Facts*, SCENIC TEXAS, http://www.scenictexas.org/resources (follow "County Billboard Facts" hyperlink) (last visited Jan. 11, 2012) [hereinafter *Billboard Facts*, SCENIC TEXAS].

53. Burnett, *supra* note 8, at 211.

54. *See infra* notes 274-78 and accompanying text.

55. *See* Burnett, *supra* note 8, at 227.

56. *See id.* at 228-29.

57. *See id.* at 229.

58. *See infra* notes 59-60 and accompanying text.

59. *See* Tocker, *supra* note 17, at 15.

require some acquisition of space and advertise businesses or goods located off of the premises where the sign is located.[60] For purposes of this Comment, reference will be to the generic, modern billboard industry, thus encompassing both on-premise and off-premise signs, unless specified.[61]

Still, despite efforts to classify, organize, or define, the question remains as to how strict and how uniform regulation should be.[62] The following discussion addresses laws governing billboards in Texas, and then, the analysis shifts to how tighter statewide legislation may not necessarily be the clear-cut answer for Texas on every aspect of the debate.[63]

III. STATUTORY CONTROL IN TEXAS: THE STRUCTURE OF BILLBOARD REGULATION

Much of Texas law parallels federal law in the area of sign ordinances along interstate and primary highways.[64] The exceptions in the federal law—billboards within commercial or industrial zones, signs beyond 660 feet from the interstate yet still visible from the highway, and signs located on the advertised premise itself—are some areas where states can further restrict billboard proliferation.[65] By analyzing the overarching federal law, which lies mostly within the Federal Highway Beautification Act of 1965 (the Federal Beautification Act), the broad scope of Texas's regulatory power becomes more apparent.[66] The issues further develop as statewide regulation gives way to local ordinances, which reflect a varying array of local cultures, developing businesses, and unique landscapes.[67] These local laws fall into the open areas of the federal and state legislation and allow cities to adopt laws of their choosing, which may be stricter than the federal legislation.[68] The following section will funnel from federal laws to local ordinances in order to explain

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60. *See* TEX. LOC. GOV'T CODE ANN. § 216.002(2)-(3) (West 2008). But, "[d]iffering treatment for different kinds of signs generally does not create an equal protection violation, as long as the difference is reasonably related to legitimate government concerns." 3 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 26.10 (5th ed. 2008).

61. *See supra* note 60.

62. *See* discussion *infra* Part V.

63. *See* discussion *infra* Parts III, V.B.

64. *Compare* 23 U.S.C. § 131(c) (2006) (restricting outdoor advertising within 660 feet of the highway as well as signs intended to be visible from the highway though beyond 660 feet), *with* TEX. TRANSP. CODE ANN. § 391.002(a) (West 2007) (stating the "intent of the [Texas] legislature to comply with the Highway Beautification Act of 1965").

65. *See* TEX. TRANSP. CODE ANN. § 391.032(a)(1)-(2); Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463, 507-12 (2000); *see also* SALKIN, *supra* note 60, § 26.2 (detailing the creation and consequences of the Federal Highway Beautification Act).

66. *See* Tex. Att'y Gen. Op. No. GA-0192, at 2-3 (2004) [hereinafter Tex. Att'y Gen. Op.].

67. *See* Robert Reinhold, *Focus: Houston; A Fresh Approach to Zoning*, N.Y. TIMES, Aug. 17, 1986, at 81, *available at* 1986 WLNR 776230.

68. *See* Tex. Att'y Gen. Op., *supra* note 66, at 3; *see also* Gerencser, *supra* note 44, at 901 (commenting on the discretion given to state and local authorities within the framework of federal legislation).

how billboard regulation's development over the years created variation not only between cities within Texas but also between states.[69]

A. The Leader: The Federal Highway Beautification Act

In 1965, President Lyndon Johnson approved the Federal Beautification Act, which outlined a way for states to take control of the proliferating billboard industry.[70] President Johnson noted:

> We have placed a wall of civilization between us and the beauty of our countryside. In our eagerness to expand and improve, we have relegated nature to a weekend role, banishing it from our daily lives. I think we are a poorer nation as a result. I do not choose to preside over the destiny of this country and to hide from view what God has gladly given.[71]

The Federal Beautification Act connects federal-highway fund apportionment to a state's ability to control billboard proliferation within 660 feet of the interstate highway.[72] States risk a loss of 10% of federal highway funds for failure to effectively comply.[73] The Federal Beautification Act also requires payment of just compensation for billboards removed along these highways; however, the authority to control signage within various districts, for example, zoned commercial areas, rests with the states.[74] While further details of billboards that effectively comply with the Federal Beautification Act are unnecessary for the purposes of this discussion, critics have argued that the overall effect of this federal legislation has been dismal at best.[75]

The Federal Beautification Act, while arguably fair in providing a requirement for just compensation, required the federal government to contribute 75% of the cost for billboard removal.[76] But, the money ran out—the federal government was no longer able to follow through with such contributions to the states.[77] So, the focus remained on each individual state's control of the outdoor advertising industry, namely in the loophole of commercial areas specifically exempted from the blanket 660-foot ban outlined

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69. *See infra* Part III.A-D.

70. *See* SALKIN, *supra* note 60, § 26.2.

71. *How the Highway Beautification Act Became a Law*, U.S. DEPT. OF TRANSP. FED. HIGHWAY ADMIN. (Dec. 29, 2008), http://www.fhwa.dot.gov/infrastructure/beauty.cfm (describing the impetus behind the federal highway legislation).

72. *See* 23 U.S.C. § 131(c) (2006).

73. *See id.*

74. *See id.*; *see also* TEX. TRANSP. CODE ANN. § 391.032(a)-(b) (West 2007) (noting Texas's ability to control advertising in industrial and commercial areas).

75. *See, e.g.*, Brinton, *supra* note 49, at 3-4; Albert, *supra* note 65, at 463-64, 507 (commenting on the intricacies of the exceptions within the Federal Beautification Act, including: "for on-premise signs, for urban signs outside the 660-foot corridor but visible from the road, and for signs within 660 feet of the right-of-way within industrial or commercial areas").

76. *See* 23 U.S.C. § 131(g) (2006).

77. *See* Albert, *supra* note 65, at 465-67.

under the Federal Beautification Act.[78] The exceptions presumably relied on local police powers to "prevent the zoning of rural areas as commercial or industrial strips," thus allowing for the Federal Beautification Act to have some bite, and ultimately, effect.[79] But in reality, the argument remains that the Federal Beautification Act actually diminished state and local police powers because the federal government required compliance, including adequate compensation for removed billboards.[80] Even though the promised funding to the states ran out, the Act still held states to their end of the bargain; therefore, the states were responsible for regulation beyond mere federal compliance of demonstrating "effective control" over signage.[81]

B. The Replica: Texas's Attempt at Statutory Control of Billboards

After what seemed like a federal shortfall, Texas law still leaves much for local governments to decide.[82] To begin, Texas codified its own version of the Federal Beautification Act, the Texas Beautification Act, to further address the issue.[83] The purpose of the Texas Beautification Act was to implement the similar federal law of the 1960s and diminish the "public nuisance" of billboards.[84] The Texas Beautification Act outlined two specific purposes: "(1) [to] promote the health, safety, welfare, morals, convenience, and enjoyment of the traveling public; and (2) [to] protect the public investment in the interstate and primary [highway] systems."[85] Such access to air and space seems relevant to any parcel of land, and the state should rightfully consider such needs when planning and zoning.[86]

The basics of the Texas Beautification Act mirror the Federal Beautification Act as to the prohibition of signs within 660 feet of the nearest edge of a right-of-way as well as those signs that are more than 660 feet from

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78. *See id.* at 487-88; *see also* Tex. Att'y Gen. Op., *supra* note 66, at 3 (noting the Texas Transportation Commission's control over commercial areas under the exemption).

79. *See* Albert, *supra* note 65, at 488.

80. *See* Charles F. Floyd, *The Takings Issue in Billboard Control*, 3 WASH. U. J.L. & POL'Y 357, 374-78 (2000); *see also* State v. Brinegar, 379 F. Supp. 606, 615-16 (D. Vt. 1974) (explaining an argument made by the State of Vermont that the Federal Beautification Act was in violation of the Tenth Amendment because it too heavily coerced the states to act).

81. 23 U.S.C. § 131(b) (2006); *see* Albert, *supra* note 65, at 481, 494-95.

82. *See* TEX. TRANSP. CODE ANN. § 391.036 (West 2007). The Texas Transportation Commission's scope of regulatory duty includes "outdoor advertising . . . only on a federal-aid primary highway, interstate highway, state highway, or farm-to-market road." *Id.*

83. *See id.* § 391.002(a).

84. Tex. Dep't of Transp. v. Barber, 111 S.W.3d 86, 90 (Tex. 2003).

85. § 391.002(a).

86. *See* CHARLES FOX, THE COUNTRYSIDE AND THE LAW 38 (1971). Though specifically referring to access to the British countryside, the author's comment that "local planning authorities have a duty to take steps to enable the public to have access to open country for open-air recreation" bears strongly on the foundation upon which both the Federal Beautification Act and the Texas Beautification Act stand. *Id.*

the edge of the interstate but visible from that highway.[87] The subsequent sections of the Texas Transportation Code outline the various exceptions to this generic proposition—exceptions that could later form the heart of confusion, frustration, and debate.[88] One exception, dealing with industrial and commercial zones, allows areas to qualify as commercial or industrial either by state designation or by mere land use consistent with commercial or industrial purposes.[89] The Texas Transportation Commission has the power to regulate billboards within these designated zones, which are not under control of the Federal Beautification Act.[90] The assumption follows that state and local laws fill in the gaps not covered by either the Federal Beautification Act or the Texas Beautification Act (the Beautification Acts), namely those areas within city limits and commercial zones.[91] Because the Beautification Acts apply only to interstate and primary highways, cities are free to control billboard proliferation along city streets not included; however, potential conflict could still arise if a regulated highway cuts through a city possessing its own internal regulations.[92]

In another effort towards the regulation of highways, the Texas Legislature passed the Rural Roads Act (the Rural Act) and established regulations for advertising on signs visible from rural roads that are not located within the limits of incorporated cities or towns.[93] The Rural Act regulates billboards that are outside incorporated city limits and visible from rural roads; however, it excludes further limitations on "sign[s] that [are] allowed to be erected and maintained under the highway beautification provisions contained in [Texas Transportation Code] Chapter 391."[94] The statute provides further exemptions including signs in existence before September 1, 1985, and various directional signs for small businesses.[95] The requirements for both off-premise and on-

87. *Compare* 23 U.S.C. § 131(c) (2006) (noting the 660-foot limitation as well as the visibility restriction beyond 660 feet from the interstate), *with* TEX. TRANSP. CODE ANN. § 391.031(a) (West Supp. 2010) (stating the limitations in 23 U.S.C. § 131(c)).

88. *See* § 391.031(b). Outdoor advertising under this portion of the statute allows for the erection of signage for various purposes, including: various advertisements of property, advertisement of activities occurring on the property, and both designated and undesignated industrial or commercial areas. *See id.* § 391.031(b)(1)-(4).

89. *See id.* § 391.031(b)(4).

90. *See id.* § 391.032 (West 2007).

91. *See id.* § 391.005. Federal provisions similarly outline the states' ability to control commercial or industrial areas by noting:

> Outdoor advertising . . . may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under the authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary.

23 U.S.C. § 131(d) (2006).

92. *See* Tex. Att'y Gen. Op., *supra* note 66, at 4-5 (citing TEX. LOC. GOV'T CODE ANN. § 216.902 (West 1999)); City of Houston v. Harris Cnty. Outdoor Adver. Ass'n, 732 S.W.2d 42, 48 (Tex. App.—Houston [14th Dist.] 1987, no writ); *see also* SALKIN, *supra* note 60, § 26.5 (noting how "local legislation will be upheld unless it is inconsistent with the state or federal law").

93. *See* TEX. TRANSP. CODE ANN. § 394.002 (West 2007).

94. *See id.* §§ 394.002-.003.

95. *See id.* § 394.003(a)(2), (c).

premise signs often take the form of height and spacing restrictions as well as various permit requirements to which an advertiser must thoughtfully and thoroughly comply.[96] Off-premise signs require a valid permit from the Texas Transportation Commission, which issues permits only for billboards that are "within 800 feet of a recognized commercial or industrial business activity or the office of a governmental entity," and the desired billboard must be on the same side of the street as that business or other office.[97] Again, the theme of commercial or industrial areas reappears, and even the height and size requirements under the Rural Act seem generous.[98] While the administrative intricacies of the Rural Act and the overarching Texas Beautification Act become cumbersome, the goals of these laws offer a starting point for further progress to highway beautification.[99]

C. Evaluating the Texas Highway Beautification Act: The Barber *Case*

While noble in purpose, the Federal Beautification Act encountered its share of criticism, largely from funding difficulties as well as states' feelings of abandonment by the federal government.[100] In the years since the establishment of the Beautification Acts, the basic framework of regulation that is based on various exemptions seems sufficient; however, implementation is much more complex.[101] While the current divided scheme may be complicated yet workable, perhaps this framework is the best method even if some confusion and debate remain.[102]

Such difficulties with the intricate statutory scheme have proven frustrating not only for the public, but also for advertisers who must comply with the various laws.[103] In 2003, the state of the law regarding billboard

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96. *See id.* §§ 394.021-.022, .041-.042, .045.

97. *Id.* § 394.021(b)(1)-(2).

98. *See id.* § 394.041 (prescribing height restrictions of no more than forty-two and one-half feet); *id.* § 394.042 (detailing billboard-face dimensions of no more than 400 square feet for an on-premise sign and 672 square feet for an off-premise sign).

99. *See generally infra* note 111 and accompanying text (highlighting the generic goals of the Texas Highway Beautification Act).

100. *See* Albert, *supra* note 65, at 487-89; James Lynch, Comment, *The Federal Highway Beautification Act After* Metromedia, 35 EMORY L.J. 419, 425-27 (1986).

101. *See generally* Tex. Att'y Gen. Op., *supra* note 66, at 1 (replying in detail to an inquiry by the Honorable Florence Shapiro about a local sign ordinance allowing for "the issuance of a new nonconforming sign permit to allow the replacement of an existing nonconforming sign with a new nonconforming sign").

102. *See generally* 43 TEX. ADMIN. CODE § 21.142 (2010) (offering numerous definitions for consideration in interpreting Texas billboard laws along highways); Tex. Att'y Gen. Op., *supra* note 66, at 1-4 (outlining the various intricacies and roles of the federal, state, and local governments regarding Texas signage). Attorney General Greg Abbott's response noted that local ordinances allowing for replacement of impermissible signs with new nonconforming signs may be valid under Texas law; however, state and federal law trumps local ordinances within the areas defined by the Beautification Acts. *See* Tex. Att'y Gen. Op., *supra* note 66, at 5-6.

103. *See, e.g.*, Brooks v. State, 226 S.W.3d 607, 608-09 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In *Brooks*, the defendant applied for a permit through the Texas Department of Transportation (TxDOT) to erect a billboard within Houston's extraterritorial jurisdiction, which is within five miles of the city's

regulation in Texas came to the attention of the Texas Supreme Court.[104] In *Texas Department of Transportation v. Barber*, a Texas landowner sought to have the Texas Beautification Act declared unconstitutional.[105] While First Amendment issues were prevalent in the case, the holding left much to be debated concerning property laws.[106]

The court outlined the specific language of the Texas Transportation Code provisions regarding outdoor advertising and took specific note of the term "outdoor advertising" in Texas by explaining:

> "Outdoor advertising" is defined as: an outdoor sign, display light, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing designed, intended, or used to advertise or inform if any part of the advertising or information content is visible from the main-traveled way of the interstate or primary system.[107]

After listing this definition and various exceptions to the Texas Beautification Act, the court described how Barber's sign, which was an advertisement to encourage viewers to call Barber's law offices and listen to a pre-recorded message about rights against vehicle searches, violated a spacing requirement.[108] After the Texas Department of Transportation (TxDOT) notified Barber of the infringement, Barber sued TxDOT in resistance to the removal of his billboard.[109]

Though the decision ultimately rested on whether the removal of the nonconforming billboard violated Barber's right to free speech, the apparent approval of outdoor advertising under TxDOT's control is a natural inference.[110] The court noted how "the [Texas Beautification] Act contains exemptions to accommodate as much speech as possible and still accomplish the goals of preserving the landscape and promoting travel safety."[111] Many citizens would likely agree that such regulations to promote the beautification

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boundary, yet he failed to obtain a permit from the *city*. *See id.* at 608 & n.2. The court determined that the city permit was necessary despite the fact that the sign at issue stood along a primary, federally funded highway. *See id.* at 609-11. Thus, the defendant, without a city permit, faced a misdemeanor charge. *See id.* at 608, 611.

104. *See* Tex. Dep't of Transp. v. Barber, 111 S.W.3d 86, 89-91 (Tex. 2003).

105. *See id.* at 91-92.

106. *See id.* at 92-106 (detailing the free-speech implications arising from the billboard restrictions but also considering the Texas Beautification Act's purpose in preserving natural beauty and public welfare as a valid counterargument to landowner interests).

107. *See id.* at 90 (citing TEX. TRANSP. CODE ANN. § 391.001(10) (West 2007)).

108. *See id.* at 90-91.

109. *Id.*

110. *See id.* at 106. The court specifically noted that the regulation did not unduly restrict Barber's channels of communication to highway passersby, thus concluding that the ambit of TxDOT's regulation does not impermissibly limit speech on the roadways. *See id.* at 105.

111. *Id.* at 103.

of Texas's highways are noble in purpose.[112] Nevertheless, the interpretation of the interplay between federal, state, and local laws poses a specific challenge.[113] Much of the variation, then, rests within these gaps of responsibility that the law grants to local governments.[114]

D. Local Authority: Protecting Your Backyard Views

The heart of the debate over the validity of various billboard restrictions lies within the interpretation of local ordinances because Texas law allows its cities to create billboard laws to control signs outside the scope of the interstate or primary highway system and not controlled by the Rural Act.[115]

Still, the delegation of power from the state to the local governments regarding sign regulation is "not intended to require a municipality to provide for the relocation, reconstruction, or removal of any sign" but rather "is intended only to authorize a municipality to take that action and to establish the procedure [for that action]."[116] The inference follows that municipalities may exercise discretion to oversee the "relocation, reconstruction, or removal of any sign within its corporate limits or extraterritorial jurisdiction."[117] Still, most variations among Texas cities exist within these apparently simple definitions and the local governments' power to enforce these provisions.[118]

For example, in *Sign Supplies of Texas, Inc. v. McConn*, a Texas federal district court looked into the constitutionality of a Houston local ordinance relating to portable signage.[119] The ordinance prohibited new off-premise portable signs, yet it allowed on-premise portable signs so long as the advertiser obtained a valid permit from the City of Houston.[120] Such a permit required the payment of $60 plus other stipulations and fees, including a $300 annual fee for a license to erect signs within the city.[121] The court did not focus as much on the legality of the distinction between the two types of portable signs so much as it focused on the City of Houston's ability to pass such an ordinance, especially due to the ordinance's bearing on takings.[122]

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112. *See generally* Anne E. Swenson, Comment, *A Sign of the Times: Billboard Regulation and the First Amendment*, 15 ST. MARY'S L.J. 635, 636-37 (1984) (describing some courts' view that aesthetics alone is sufficient justification for billboard control).

113. *See, e.g.*, Brooks v. State, 226 S.W.3d 607, 608 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

114. *See id.* at 608-10 (describing the requirement to comply with city restrictions).

115. *See* Sign Supplies of Tex., Inc. v. McConn, 517 F. Supp. 778, 785 (S.D. Tex. 1980). Most local billboard regulations now rest within the general police powers of the states' authority and fall under the descriptions of zoning ordinances. *See* Gerencser, *supra* note 44, at 911-12.

116. TEX. LOC. GOV'T CODE ANN. § 216.001 (West 2008).

117. *Id.* § 216.003(a).

118. *See generally id.* § 216.901(a) (allowing specifically for home-rule municipalities to "license, regulate, control, or prohibit the erection of signs or billboards by charter or ordinance").

119. *Sign Supplies of Tex., Inc.*, 517 F. Supp. at 780.

120. *See id.* at 781.

121. *Id.*

122. *See id.* at 781-83.

While the court recognized the ordinance as squarely within the city's police powers to protect "the public health, safety and general welfare," the discussion of the ordinance's vagueness, as contended by the plaintiff–advertiser, bears special importance.[123] The plaintiff asserted that "the ordinance [was] so vague and indefinite that persons of ordinary intelligence must necessarily guess at their meaning and differ as to their application."[124] Although this argument failed because the ordinance was sufficiently specific, the theory raised an interesting point—determining "the necessary measure of certainty" required.[125] And further, assurance of full compliance with a plethora of requirements seems illusory.[126]

The guidelines with which local governments must comply offer a starting point, but the statutory provisions offer permission more than clarity.[127] Few chapters in the Texas Local Government Code specifically discuss the issue of sign regulation.[128] Many of the provisions relate to compensation—compensation for relocated signs, reconstructed signs, and removed off-premise signs.[129] One pertinent limitation on the wide range of permissibility is the requirement that in order to remove or relocate a sign, a municipality must designate a municipal board composed of two real-estate appraisers, one person involved in the sign industry, one employee of TxDOT, and a Texas-licensed architect to address the issue.[130] Presumably, this board seeks to give valid representation to the various interests involved in the removal or relocation of signs.[131]

Finally, Texas cities can not only enforce stricter laws than the federal or state laws, but courts have also suggested that the compensation requirement for removal of billboards included under the Federal Beautification Act does not necessarily apply to billboards removed within city limits in certain instances.[132] This process of amortization allows cities, in lieu of compensation, to permit a billboard that is not in compliance with a local ordinance to remain on the property until the owner receives sufficient income to merit the removal of the billboard.[133] In essence, the owner is allowed to gain income from the

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123. *See id.* at 783.

124. *Id.*

125. *Id.*

126. *See generally* sources cited *supra* note 102 and accompanying text (referring to numerous definitions contained within Texas billboard laws).

127. *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 216.003 (West 2008).

128. *See, e.g.*, *id.* § 216.

129. *See id*. §§ 216.006-.009.

130. *See id.* § 216.004.

131. *See id.*

132. *See, e.g.*, Lubbock Poster Co. v. City of Lubbock, 569 S.W.2d 935, 938 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.) (referencing City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972)).

133. *See* Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R. 5TH 391 (1992). In Texas, amortization is a valid exercise of a city's police powers. *See* Eller Media Co. v. City of Houston, 101 S.W.3d 668, 681 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Cases justify this method of regulation by arguing that "[w]hen the government imposes regulations that restrict the

noncomplying billboard without the city immediately footing the bill to remove the billboard.[134] Such a procedure appears to again place much discretion within the power of local authorities; therefore, differences across the state are inevitable.[135]

IV. THE CURRENT CONFUSION AND UNDERLYING VARIATION IN TEXAS'S BILLBOARD LAWS

The connection between property and person remains a fundamental consideration at the heart of American jurisprudence.[136] A psychological phenomenon lies at the center of this mystic relationship in which "a well-developed person must invest herself to some extent in external objects."[137] Meanwhile, these investments in the external become "necessary assurances of control [that] take the form of property rights."[138] Such a profound appreciation and understanding of the power of ownership supports the briefly stated, yet incredibly dissected, area of billboard law and the underlying property rights within Texas jurisprudence.[139]

While the plain language of the Texas Constitution dictates that the taking of "property" deserves compensation, the pertinent issue remains—defining exactly what *is* property.[140] Municipalities in Texas promulgate billboard ordinances and dictate such property rights through zoning requirements, which exemplify how cities seek to satisfy both sides of the issue.[141] All seems understandable until later case law demonstrates how these definitions and subsequent interpretations can be confusing and often heavily depend on careful drafting and meticulous compliance.[142]

At the heart of change is the issue of state and local regulation under the control of federal guidance and how much state and local governments will

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use of property, but do not interfere with ownership or possession by the owner and do not render the property valueless, a taking does not necessarily occur." *Id.*

134. *See* Gerencser, *supra* note 44, at 913-14.

135. *See generally Lubbock Poster Co*., 569 S.W.2d at 942-44 (upholding a city zoning ordinance that contained an amortization period of six and one-half years and noting how the ordinance was not an invalid circumvention of either of the Beautification Acts).

136. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957-58 (1982).

137. *Id.* at 961.

138. *Id.* at 957.

139. *See* TEX. CONST. art. I, § 17 (stating that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made"); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935 (Tex. 1998); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984).

140. *See* TEX. CONST. art. I, § 17.

141. *See generally* Lamar Corp. v. City of Longview, 270 S.W.3d 609, 611-13 (Tex. App.—Texarkana 2008, no pet.) (describing a local billboard ordinance prohibiting billboard construction within a certain footage from a public park); Loshin, *supra* note 28, at 136-38 (discussing the power of zoning ordinances but recognizing the often slow process of achieving change).

142. *See generally* Brooks v. State, 226 S.W.3d 607, 609-11 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (analyzing the intricacies of TEX. LOC. GOV'T CODE ANN. § 216.902 (West 1999) in the context of a Houston outdoor-sign dispute).

regulate further.[143] "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."[144] The result is a variety of ordinances that require both advertisers and the public alike to sort through the rules, and such a plethora of restrictions poses the question of whether consistency and simplification are best for Texas.[145] The following discussion begins with an analysis of crucial concepts involved in billboard law in a broad, constitutional sense and then ends with an overview of examples of differences among local ordinances across Texas.[146]

A. The General Question: Fixture or Personal Property?

Over the past several decades, the Supreme Court has continued to develop and reform the test for analyzing takings, a term that ultimately means the evaluation of property and the determination of whether the property owner is entitled to compensation upon removal.[147] The Supreme Court has interpreted the Fifth Amendment to apply when regulations render the property virtually useless; however, city zoning ordinances offer examples of a more convoluted evaluation as they often affect public welfare.[148] The promulgation of city regulations is squarely within the scope of the permissive exercise of a city's police powers, but if the ordinance does not further a legitimate state interest, a taking has occurred.[149] If the regulation does further such a public purpose, the court will then decide if the "regulation goes too far [and] will be recognized as a taking."[150]

To determine if a regulation has exceeded permissible bounds, the Supreme Court identified three factors: "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[151] Furthermore, Justice Scalia, in *Pennell v. City of San Jose*, recognized that a

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143. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (outlining the factors for consideration in the federal context of property rights and takings); *accord Mayhew*, 964 S.W.2d at 935 (following virtually the same federal considerations for violation of property rights in the takings context).

144. Loshin, *supra* note 28, at 135.

145. *See infra* Part V.A-B.

146. *See infra* Part IV.A-B.

147. *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 569-70 (1984). Rose describes the complexity of takings by describing one author's theory that property owners ultimately face a societal issue—unfair treatment by the government, which ultimately leads to discouragement towards investments, overall inefficiency, and public loss. *See id.*

148. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922); *see also* Eller Media Co. v. City of Houston, 101 S.W.3d 668, 681 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (citing examples of when regulations cause devaluation of property and compensation is not required because the regulation simply prohibits certain uses of the property).

149. *See Pa. Coal Co.*, 260 U.S. at 415; *Eller Media Co.*, 101 S.W.3d at 681.

150. *Pa. Coal Co.*, 260 U.S. at 415.

151. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

"social evil" could arise without careful consideration of public policy in government regulations, and zoning requirements often protect community interests.[152] He explained:

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.[153]

With these preliminary federal guidelines in place, the Texas Supreme Court decided a set of cases and created precedent for further litigation involving takings and regulations.[154] In *Mayhew v. Town of Sunnyvale*, the Texas Supreme Court sought to clarify the meaning of "investment-backed expectations" by noting that existing zoning requirements are factors for consideration; thus, the impact of local regulation seems to be an underlying consideration in assessing a takings claim.[155] In fitting the concept of billboard laws within the defined scheme of property takings, "one must examine how the regulation affects the property as a whole."[156] Even though municipalities may promulgate ordinances to protect citizens' health and welfare and owners have certain inherent rights to their property, balancing these often competing interests across the wide spectrum of Texas's billboard regulations is difficult.[157]

Some case law involving billboard owners' challenges to city ordinances includes defining the billboard as a type of property interest.[158] Determining the billboard's status as either a real property fixture or an element of personal property helps dictate the amount of compensation received for the billboard's removal.[159] In a possible effort towards clarity, the Texas Supreme Court in *Logan v. Mullis* specifically addressed the issue of fixtures and when an item of property becomes part of the attached real estate.[160] *Logan* involved a roadway easement, which the landowner, Logan, had purchased from neighboring

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152. Pennell v. City of San Jose, 485 U.S. 1, 19-20 (1988) (Scalia, J., dissenting).

153. *Id.* at 20.

154. *See* Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935 (Tex. 1998); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984).

155. *See Mayhew*, 964 S.W.2d at 936.

156. Floyd, *supra* note 80, at 365.

157. *See* Lamar Corp. v. City of Longview, 270 S.W.3d 609, 615 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

158. *See, e.g.*, State v. Clear Channel Outdoor, Inc., 274 S.W.3d 162, 165-66 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

159. *See id.* at 165.

160. *See* Logan v. Mullis, 686 S.W.2d 605, 607-08 (Tex. 1985).

property owners.[161] Following the purchase, Logan created a road over the easement and placed a culvert, which was actually the ends of a railroad car, below the roadway to provide for the passage of a creek.[162] After the easement was no longer a necessity for purposes of highway access, Logan blockaded the easement and by removing the culvert, warned adjacent landowners against using the easement.[163]

The issue turned on whether the culvert had indeed become a fixture and thus part of the realty; if so, Logan could not have removed it without incurring liability at the moment he abandoned his easement rights.[164] The court established three factors to determine if a piece of property in Texas has become a fixture: "(1) the mode and sufficiency of annexation, either real or constructive; (2) the adaptation of the article to the use or purpose of the realty; and (3) the intention of the party who annexed the chattel to the realty."[165] The court appeared to focus on the third factor—intention—because in constructing the culvert, Logan used relatively permanent materials such as gravel and concrete to solidify and transform the landscape.[166] These issues of intent and permanency have become a foundation for current cases concerning billboards in Texas courts.[167]

Following *Logan*, one case declined to extend *Logan*'s reasoning to the context of billboards while another case considered *Logan* in its opinion.[168] In *State v. Clear Channel Outdoor, Inc.*, the court held that the *Logan* test was inappropriate to consider in the context of billboard condemnations and subsequent compensation analyses.[169] The court's reasoning indicated dissatisfaction with *Logan*'s focus on the party's intent at the time of the alleged fixture's placement.[170] In its reliance on *Logan*, the State argued an intentional taking had not occurred because the billboard was personal property, meaning sufficiently removable and not worth its fair market value.[171] The court, while holding that the *Logan* test "conflicts with well-settled principles concerning whether a property owner has the right to compensation

161. *Id.* at 606.
162. *See id.* at 607.
163. *See id.*
164. *See id.*
165. *Id.*
166. *See id.* at 608-09.
167. *See, e.g.*, State v. Clear Channel Outdoor, Inc., 274 S.W.3d 162, 165 (Tex. App.—Houston [1st Dist.] 2008, no pet.).
168. *Compare id.* at 164-66 (declining to adopt the *Logan* reasoning), *with* Harris Cnty. Flood Control Dist. v. Roberts, 252 S.W.3d 667, 670 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (considering the *Logan* analysis).
169. *See Clear Channel Outdoor, Inc.*, 274 S.W.3d at 165-66. In *Clear Channel Outdoor, Inc.*, a billboard company erected a billboard on a parcel of land that was subject to condemnation to prepare for freeway expansion. *See id.* at 163. TxDOT refused to include the actual billboard in its condemnation valuation, arguing that the billboard was personal property and was to be excluded from the compensation calculations. *See id.*
170. *See id.* at 165.
171. *See id.*

in the condemnation context[,]" nevertheless determined that Clear Channel presented sufficient evidence to support the affixed nature of the billboard as part of the realty.[172] *Clear Channel Outdoor* seemed to depart from pertinent case law utilizing the *Logan* test to determine the status of a billboard as either a personal property interest or a fixture.[173]

In *Harris County Flood Control District v. Roberts*, the billboard's classification was again at issue because the Harris County Flood Control District argued that the compensation for the condemned leasehold interest would not include the "personal property" of the billboard structure.[174] The evidentiary findings and testimony presented at trial included a form from the billboard company to the Harris County Appraisal District that "stat[ed] that the property [was] 'business personal property.'"[175] Still, the court referenced and considered the *Logan* test in its evaluation, yet the opinion yielded the same result as the First District Court of Houston in *Clear Channel Outdoor*—the billboard was indeed a fixture attached as part of the realty.[176]

With the two Houston appellate courts viewing the applicability of the *Logan* test differently, a careful analysis of the specific facts of each case affords an opportunity to discover any subtle nuances to determine if the *Logan* test is still a viable test for consideration in billboard law.[177] The two Houston appellate courts decided both *Roberts* and *Clear Channel Outdoor* in 2008, and both cases involved issues of compensation for the billboard structure.[178] Furthermore, in both cases, the billboard company had only a lease interest in the parcel of land.[179] A minor focus in *Roberts* was on the billboard-company president's testimony at the trial, which could in some way have influenced the court's reasoning in citing the *Logan* test, but the argument still centered on whether the "[s]ign [s]tructure was a fixture at the time of the taking."[180] As another factual difference, *Roberts* was a condemnation proceeding brought by

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172. *Id.* at 165-66.

173. *See* City of Argyle v. Pierce, 258 S.W.3d 674, 684 (Tex. App.—Fort Worth 2008, pet. dism'd); *Harris Cnty. Flood Control Dist*., 252 S.W.3d at 670-72.

174. *See Harris Cnty. Flood Control Dist.*, 252 S.W.3d at 669-70.

175. *Id.* at 671.

176. *See id.* at 670 & n.2, 672.

177. *See generally* Sonnier v. Chisholm-Ryder Co., 909 S.W.2d 475, 478-79 (Tex. 1995) (mentioning the *Logan* test in interpreting the meaning of "improvement" under Texas Civil Practice and Remedies Code § 16.009, which provides protection against personal injury claims for one who constructs or repairs an improvement on the property). In discussing the applicable statute, the court noted the difficulty in defining an improvement, a parallel to the ambiguity regarding fixtures. *See id.* The decision noted a discrepancy in the appellate courts by reviewing the facts of various cases and determining that "[t]he confusion stems from focusing on the personalty as attached to realty without reference to the fact that it is *annexation* that transforms the personalty into an improvement." *Id.* at 479.

178. *See Harris Cnty. Flood Control Dist*., 252 S.W.3d at 669-70; State v. Clear Channel Outdoor, Inc., 274 S.W.3d 162, 163-64 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

179. *See Harris Cnty. Flood Control Dist.*, 252 S.W.3d at 669-70; *Clear Channel Outdoor, Inc*., 274 S.W.3d at 163-64.

180. *Harris Cnty. Flood Control Dist*., 252 S.W.3d at 670-72. The billboard-company president testified as to the construction of the billboard in order to show its permanency. *Id.* at 670.

the Harris County Flood Control District while *Clear Channel Outdoor* was an inverse condemnation claim brought by the billboard company.[181] This distinction largely centers on which party is asserting the condemnation—either the governmental entity seeks to condemn the land (condemnation) or the property owner seeks compensation for an allegedly wrongful condemnation by a governmental entity (inverse condemnation).[182] Either way, compensation lies at the heart of the argument.[183]

Thus, the inconsistency is apparent—recent case law from the same city, though ultimately reaching the same decision that the respective billboards were indeed fixtures attached to the real property, valued the *Logan* test differently.[184] Though various subtle factual differences in the cases could explain why the *Logan* test is or is not a viable consideration to address billboard condemnation proceedings in Texas, the recognition of this variation in approval among courts is relevant to addressing where billboard regulation in Texas stands.[185]

In the same year that the Houston appellate courts decided *Roberts* and *Clear Channel Outdoor*, the Fort Worth Court of Appeals, in *City of Argyle v. Pierce*, determined that sign owners did not assert a compensable inverse-condemnation claim.[186] Though the facts were complex, the determination of a property interest in the billboard structure emphasized the sufficiency of the parties' pleadings. [187] The court noted how the sign owners "merely assert generally that 'the [s]ign is a fixture,' without providing any evidence of its permanent nature."[188] Furthermore, the court emphasized how "there is no constitutional property right to use realty in any certain way without restriction."[189]

Thus, the issue remains as to how Texas courts will resolve the fixtures issue surrounding billboard structures.[190] While the subtle facts of the case or

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181. *Id.* at 668-69; *Clear Channel Outdoor, Inc.*, 274 S.W.3d at 163.

182. *See* BLACK'S LAW DICTIONARY 332 (9th ed. 2009).

183. *See id.*

184. *Compare Clear Channel Outdoor, Inc*., 274 S.W.3d at 164-66 (arguing against the use of the *Logan* test for purposes of billboard condemnation claims), *with Harris Cnty. Flood Control Dist*., 252 S.W.3d at 669-70 (citing the three-factor *Logan* test for consideration in the assessment of a billboard as a fixture of the real property for purposes of compensation).

185. *See Clear Channel Outdoor, Inc.*, 274 S.W.3d at 165.

186. *See* City of Argyle v. Pierce, 258 S.W.3d 674, 684-86 (Tex. App.—Fort Worth 2008, pet. dism'd).

187. *See id.* at 684. *City of Argyle* involved an inverse condemnation claim regarding a billboard company's leasehold interest as well as a property owner's fee interest. *Id.* The complexity stems from the city's ordinance banning outdoor signage in an area within the city's extraterritorial jurisdiction, which is outside the city limits yet can be included in the city's sign ordinances. *See id.* at 677-78. Alongside the fixture analysis, the court upheld the ordinance as not entirely depriving the plaintiffs of their uses of the land—it merely prohibited *certain* usages of the land. *See id.* at 685.

188. *Id.* at 684.

189. *Id.* (citing City of La Marque v. Braskey, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

190. *See generally* discussion *infra* Part V.B (discussing how variations among Texas case law's inconclusive test regarding billboards and compensation may not be such a negative issue).

the substance of the parties' pleadings have some bearing on the determination of fixture versus personal property, statewide ambiguity as to the utilization of the *Logan* test may be seen as detrimental to both advertisers and citizens alike.[191] Whether or not there exists a better way by means of more concrete mechanisms for evaluation is another issue.[192] The point remains that Texas signage law appears to rest on subtly unclear principals regarding the evaluation of signage classifications for compensation, so any small ambiguity could grow.[193]

B. The Bigger Question: How Varied Are Texas's Local Sign Ordinances?

While determining whether a billboard is personal property or a permanent fixture is relevant to thoroughly evaluating the requirement of just compensation under the Federal Beautification Act, the narrower concern expanding the inconsistencies focuses on variations among local regulations.[194] Because each city across Texas is unique and thus possesses varying needs and implores differing values, perhaps variation is inherent.[195] As Justice Douglas explained, public welfare is a complex issue:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[196]

Cities across Texas differ in their approach to billboard proliferation.[197] To further complicate the issues, the relatively new digital billboards add another factor to the debate and often present a sort of bargaining chip—a petition to cities to allow for digital billboards in exchange for taking down varying quantities of traditional billboards.[198] For example, as of July of 2009,

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191. *See generally City of Argyle*, 258 S.W.3d at 684 (judging the pleadings as lacking evidentiary support to merit a finding that the billboard was a fixture).

192. *See generally* discussion *infra* notes 216-26 (analyzing other states' billboard regulations as a basis for evaluating the Texas system).

193. *See generally infra* notes 202-10 and accompanying text (commenting on the broad array of public interests that city ordinances must take into account).

194. *See infra* text accompanying notes 197-210.

195. *See infra* notes 273-77 and accompanying text.

196. Burnett, *supra* note 8, at 213 (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)).

197. *See infra* text accompanying notes 198-99.

198. *See* Rudolph Bush, *Advertising Firms Urge Dallas City Council to Allow Digital Billboards*, THE DALLAS MORNING NEWS (Oct. 2, 2010), http://dallasnews.com/news/community-news/dallas/headlines/20101001-Advertising-firms-urge-Dallas-City-Council-208.ece; *see also* Matt Richtel, *Digital Billboards, Diversions Drivers Can't Escape*, N.Y. TIMES (Mar. 1, 2010), http://www.nytimes.com/2010/03/02/technology/02billboard.html (reporting that "only about 2,000 of the nation's 450,000 billboards are digitized" but that the number is likely to grow).

the City of El Paso passed an ordinance to ban new billboard construction as well as to put numerical caps and timing restrictions on digital billboards.[199]

Unique approaches in city regulations are important because they often affect citizens in more ways than generic billboard regulations alone.[200] Because city codes could vary over a short amount of time, the following appellate cases depict examples of sign ordinances in Texas rather than the current state of the law.[201] For example, in *Outdoor Systems, Inc. v. BBE, L.L.C.*, the City of Dallas banned all new billboards within city limits, which caused the value of two existing billboards within the city to skyrocket.[202] Such an increase in value presumably created an increased interest in the outcome of the litigation between a tenant and a landlord over rightful ownership of the relevant properties.[203]

But, property values are not the only consideration underlying local billboard ordinances as regulations reflect community values and views of the neighborhood's visual appeal.[204] For example, a Longview city ordinance specifically prohibited signs within 1,500 feet of a public park.[205] Such a prohibition reflected a community opinion towards the town's appeal by only "encourag[ing] signs which are well designed; which preserve locally recognized values of community appearance; which protect public investment in, and the character of, public thoroughfares."[206]

As a final illustration, in *City of Argyle v. Pierce*, the Fort Worth appellate court presented another factor in analyzing city ordinances—areas that are included under the local regulation.[207] The ordinance prohibited off-premise outdoor advertisements; however, the restriction extended into the city's extraterritorial jurisdiction.[208] Much of the case surrounded questions of whether the property was actually located within the city's extraterritorial jurisdiction, an area where even a map proved to be less than helpful.[209] In sum, billboard regulations, while varied across the state, impact financial considerations, reflect community views, and direct property utilization; careful compliance with these ordinances is essential.[210] While scanning every

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199. Darren Meritz, *El Paso City OKs Billboard Ban*, THE EL PASO TIMES (July 14, 2009), http://elpasotimes.com/ci_12839263.

200. *See generally* Outdoor Sys., Inc. v. BBE, L.L.C., 105 S.W.3d 66, 68-69 (Tex. App.—Eastland 2003, pet. denied) (demonstrating how billboard ordinances can affect the valuation of billboards on certain properties).

201. *See generally id.* (referencing a 1998 Dallas city ordinance as an escalating factor in the litigation).

202. *Id.* at 68-69.

203. *See id.* at 68-69, 72-74.

204. Lamar Corp. v. City of Longview, 270 S.W.3d 609, 611-12 (Tex. App.—Texarkana 2008, no pet.).

205. *Id.* (citing LONGVIEW, TEX., REV. ORDINANCES ch. 85, art. III, § 85-60 (2003)).

206. *See id.* at 615-16 (quoting LONGVIEW, TEX., REV. ORDINANCES ch. 85, art. I, § 85-1 (2003)).

207. *See* City of Argyle v. Pierce, 258 S.W.3d 674, 678-79 (Tex. App.—Fort Worth 2008, pet. dism'd).

208. *See id.* at 677; *see also supra* note 187 and accompanying text (defining the concept of extraterritorial jurisdiction).

209. *See City of Argyle*, 258 S.W.3d at 678-79.

210. *See supra* notes 202-09 and accompanying text.

newspaper and city ordinance throughout the state could offer different types of proposals, compromises, and prohibitions, such as the few mentioned above, the diversity among cities remains; however, perhaps these variations are just what Texas needs.[211]

V. HOW OTHER STATES COULD BE THE STARTING POINT, BUT NOT NECESSARILY THE EASY ANSWER, TO TEXAS'S REGULATION

Since the passage of the Federal Beautification Act, states have faced the issue of how to effectively satisfy the mandates of "effective control" and "just compensation."[212] Effective control, however, is merely the beginning, and more rigid regulations are crucial factors in efforts towards the beautification of America's landscapes.[213] The following analysis will build upon the previous discussions of current variations and ambiguities in Texas law to suggest a compromising medium—the current fluidity of local law and inconclusive fixtures test accompanied by legislation for tighter highway regulations.[214] The decision to fully implement both Beautification Acts requires statewide action to clean up Texas's highways while leaving room for cities to exercise discretion.[215]

A. Adopting Strictness and Uniformity in Statewide Highway Regulation

At least four states have enacted strict, statewide billboard regulations, largely in an effort to protect scenic views and natural landscapes.[216] These state regulations intensify and enforce the federal legislation beyond the limitations required under the Federal Beautification Act.[217] Still, exceptions in each so-called restrictive state do exist, for example, for "official business directional signs" and "on-premise signs" that are "advertising activities being conducted on the same premises."[218] As another example, in Hawaii, various exceptions exist for business signs, which, like in Vermont, are indicative of

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211. *See infra* notes 273-77.

212. *See* Gerencser, *supra* note 44, at 901, 925 n.134.

213. *See generally* Robert W. Pearson, Comment, *Billboard Laws Today—Reaction or Solution*, 24 BAYLOR L. REV. 86, 94-97 (1972) (describing early decisions from Florida and New York in which the courts supported using aesthetics as a basis for tighter billboard regulations).

214. *See* discussion *infra* notes 297-300 and accompanying text.

215. *See generally* Vermont v. Brinegar, 379 F. Supp. 606, 617 (D. Vt. 1974) (recognizing Vermont's efforts to tighten billboard control through removal of billboards along highways under the generic direction given in the Federal Beautification Act).

216. *See* SALKIN, *supra* note 60, § 26.2 (stating that Vermont, Maine, Hawaii, and Alaska have imposed "statewide billboard bans"); *see also* Katie Zezima, *Mural Tests Vermont Law That Forbids Billboards*, N.Y. TIMES (May 8, 2008), http://www.nytimes.com/2008/05/08/us/08vermont.html (highlighting a controversy over whether a painted mural along a certain highway violates Vermont's billboard regulations designed to protect roadside views).

217. *See, e.g.*, VT. STAT. ANN. tit. 10, §§ 486, 493-94 (1998 & Supp. 2005).

218. *Id.* §§ 486, 493 (1998). For details on more Vermont exceptions, *see id.* § 494 (1998 & Supp. 2005).

on-location business activities and serve as indicators as much as advertisements.[219] Nonetheless, both states have statewide billboard laws that are more restrictive than their sister states.[220]

Vermont adopted such measures largely to protect the environment and resulting tourism, and this precedent may serve as an example for other states' future legislation.[221] Vermont's mandate is clear: "[n]o person may erect or maintain outdoor advertising visible to the travelling public except as provided in this chapter."[222] Furthermore, the statutory purpose behind Vermont's regulation was to protect the travelling public, the state's scenic resources, and the profitable business of tourism.[223] Even the exemptions, such as those for on-premise signs, come with specific stipulations for signs visible from the highway, such as prohibiting use of most moving lights and mandating a clean appearance.[224] Vermont also created a travel information council, which helps to oversee the issuance of permits for the select signs qualifying as "official business directional signs."[225] While the impetus behind Vermont's regulatory control over the proliferation of billboards along highways grows out of a concern for the state's treasures—scenic views and carefree visitors—the underlying theories behind these mandates suggest valid rationales and thoughtful explanations for Vermont's laws regarding signage.[226]

Vermont's legislation could be attributable to the interpretation of and limitation on the "right to be seen," that is in essence, how much a property owner of land abutting a highway (abutter) can display to attract attention.[227] An early Vermont Supreme Court case described how these abutters inherently

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219. *See* HAW. REV. STAT. ANN. § 445-112(3) (LexisNexis 2005) (describing an exception for "[a]ny outdoor advertising device indicating . . . the building or premises on which it is displayed"); *see also* State v. Diamond Motors, Inc., 429 P.2d 825, 827 (Haw. 1967) (emphasizing aesthetics in upholding a sign ordinance that restricted billboard dimensions within an industrial area of Honolulu). Still, even along federal or state highways within the state, Hawaii provides exceptions for "directional and other official signs and notices" as well as "advertising activities conducted on the property upon which [the sign is] located." HAW. REV. STAT. ANN. § 264-72(1), (3) (LexisNexis 2008).

220. *See generally supra* Part III.B, D (describing Texas's statutory control over billboards, which arguably gives much deference to local authority).

221. *See* VT. STAT. ANN. tit. 10, § 482(1)-(5) (1998); *see also* Timothy J. Fete, Jr., Comment, *Illegal Billboards: Why the General Assembly Should Revise the Outdoor Advertising Control Act to Comply with North Carolina Easement Law*, 80 N.C. L. REV. 2067, 2068-69, 2074-79 (2002) (utilizing Vermont's precedent to propose that billboard regulation in the state of North Carolina should adhere to state easement law).

222. VT. STAT. ANN. tit. 10, § 488 (1998). Such permitted exceptions provided for in the statute include on-premise signage. *See id.* § 493.

223. *Id.* § 482.

224. *See id.* §§ 493, 495(a)(3), 495(c)(2) (1998 & Supp. 2005).

225. *See id.* §§ 489, 499 (1998).

226. *See id.* § 482; *see also infra* notes 227-37 and accompanying text.

227. *See* Kelbro, Inc. v. Myrick, 30 A.2d 527, 529-30 (Vt. 1943) (noting that the abutter "has right of view to and from the property, from and to the highway; that is, his right to see and to be seen"); Fete, *supra* note 221, at 2080-81. *See generally* Ruth I. Wilson, *Billboards and the Right to Be Seen from the Highway*, 30 GEO. L.J. 723 (1942) (noting the abutting owner's right to be seen).

possess two distinct sets of rights: one private and one public.[228] With a focus on the private right, the court likened an abutter's right to display billboards on the property adjacent to the highway to the law on appurtenant easements.[229] Under this theory, the dominant estate (the land containing the billboard) may only utilize the servient estate (the public highway) for the benefit of the dominant estate itself.[230] So, the property owner's right to be seen "is limited to such right as is appurtenant to that property and includes the right to display only goods or advertising matter pertaining to business conducted thereon."[231] Such a limitation effectively prohibited advertising of the off-premise matter and allowed Vermont to remove the billboard.[232] The court's opinion disapproved of the taking of a public commodity for private benefit by explaining:

> [The abutters] are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways. The right asserted is not to own and use land or property, to live, to work, or to trade. . . . [I]t's main feature is the superadded claim to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising.[233]

In another theory behind Vermont's billboard laws, one legislator in the 1930s envisioned a Vermont free of billboard clutter along the highways.[234] His proposal, which eventually became law, suggested a regulation that was nearly impossible to comply with and still achieve the goal of visibility: "there may be no more square feet on the face of a sign than there are linear feet between the sign and the highway."[235] In essence, large billboards simply could not conform to such an odd, yet effective, regulation because in order to comply, the billboard would lose its readability.[236] While these mentioned theories may address the foundation of Vermont's stricter billboard controls, the billboard industry has evolved over time, and a simplistic explanation requires supporting case law to give further analysis and detail.[237]

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228. *See Kelbro, Inc.*, 30 A.2d at 529-30. The public right includes access to commodities to which the landowner uses concurrently with the public, while private rights take the form of easements, a term the court uses to describe the right to be seen. *See id.*

229. *See id.*

230. *See id.* at 530; Fete, *supra* note 221, at 2080-81.

231. *See Kelbro, Inc*., 30 A.2d at 530.

232. *See id.* at 531; Fete, *supra* note 221, at 2080-81.

233. *Kelbro, Inc.*, 30 A.2d at 529 (quoting Gen. Outdoor Adver. Co. v. Dep't of Pub. Works, 193 N.E. 799, 808 (Mass. 1935)).

234. *See* Norman Williams, Jr. & John M. Taylor, 6 WILLIAMS AM. LAND PLAN. LAW § 129.5 (rev. ed. 2003).

235. *Id.*

236. *See id.*

237. *See* Wilson, *supra* note 227, at 749.

In *State v. Brinegar*, a federal district court in Vermont offered yet more depth and perspective behind Vermont's trailblazing attack on billboard proliferation along highways, although through a constitutional analysis.[238] Vermont filed suit after the U.S. Secretary of Transportation, Claude S. Brinegar, ordered that Vermont lose 10% of its federal highway funds for violating the Federal Beautification Act.[239] The alleged violation was for failure to justly compensate billboard owners upon the removal of highway billboards included under the Federal Beautification Act.[240] Vermont argued that terms of the Federal Beautification Act did not clearly establish a nexus between removal compensation and the highway funds; however, the court decided otherwise, citing both legislative history as well as administrative opinions.[241] The court determined that, indeed, for a state to satisfy effective control under the Act, billboard owners must receive just compensation.[242] The opinion not only dispelled Vermont's Tenth Amendment challenge to the Federal Beautification Act's enforcement, but it also reaffirmed the mandate of payment for billboards removed pursuant to the Act.[243]

Brinegar offers somewhat of a paradox—a federal mandate towards an environmentally conscientious state seeking to comply with the Federal Beautification Act's purpose.[244] This apparent contradiction ultimately represents the fairness principles of protecting the state's ideals while recognizing the importance of payment for the removed property.[245] While some would argue that this case suggests ways for states to fashion reasons to avoid compensation for certain signage, the calling of this case could be more generally about uniformity and enforcement, broadly imploring states to create means for ensuring full compliance with this significant part of the Federal Beautification Act.[246]

In the opinion, Judge Coffrin recounted the debate on the Senate floor and explained the seriousness of the states' responsibilities for the Federal Beautification Act's enforcement, especially in regards to just compensation:

> [T]he sponsor of the Administration's version of the Highway Beautification and Scenic Development Act of 1965[] was asked by Senator George Murphy of California, "what would happen" if a state could not afford its 25 percent share of just compensation or for any other reason decided not to pay its share of the compensation requirement. Senator Randolph replied that "there

238. *See* State v. Brinegar, 379 F. Supp. 606, 609-10, 617 (D. Vt. 1974).
239. *See id.* at 607-08.
240. *See id.*
241. *See id.* at 610-12.
242. *See id.* at 615.
243. *See id.* at 617.
244. *See id.*
245. *See id.* at 615.
246. *See generally* Fete, *supra* note 221, at 2089-91 (arguing that "state law should determine the applicability of the just compensation requirement in the federal act" and focusing on the case as a springboard for negating compensation for certain signage).

> would be a penalty of 10 percent withheld from the amounts payable until the State complies."[247]

The requirement of compensation is, therefore, not an opportunity for shortcuts but rather a challenge to states to comply thoroughly, regardless of the methods or means taken.[248] Even Vermont, with its innovative, conservationist intentions, could not circumvent the underlying, nationwide charge for full compliance.[249]

Still, Vermont's billboard laws and relevant, yet somewhat antiquated and scant, case law show that uniformity and stringency are key elements for a successful, but fair, anti-billboard campaign.[250] But, Vermont's success is not attributed to an unequivocal takings or compensation evaluation.[251] In fact, as with Texas, Vermont's considerations of fixtures versus personal property are considerably unclear, following nearly the exact same three-element test.[252] The difference, however, is in the scarcity of Vermont's case law involving billboards and compensation analyses under the fixtures test.[253] Still, Vermont similarly gives some deference to municipalities in the form of permissive zoning ordinances.[254] Municipalities in Vermont may utilize zoning ordinances to further "permit, prohibit, restrict, regulate, and determine land development."[255] Such powers include restrictions on "[d]imensions, location, erection, construction, repair, maintenance, alteration, razing, removal, and use of structures."[256] This delegation of power presumably serves as a backdrop for municipalities to especially control on-premise signage beyond the statewide limitations.[257]

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247. *Brinegar*, 379 F. Supp. at 611 (footnote omitted) (citing S. 2084, 89th Cong. (1965) & 11 CONG. REC. 23,874 (1965)).

248. *See generally supra* note 247 and accompanying text (quoting portions of the Senate debate in which one congressman adamantly pushed imposition of a penalty for a state's noncompliance).

249. *See Brinegar*, 379 F. Supp. at 617.

250. *See generally supra* notes 221-25 and accompanying text (discussing Vermont as a trailblazer in billboard regulation along the state's highways).

251. *See infra* note 252.

252. *See* First Nat'l Bank v. Nativi, 49 A.2d 760, 762-63 (Vt. 1946) (considering whether various machineries were fixtures of the manufacturing plant). As with Texas, full consideration of what constitutes a fixture in Vermont requires thought into the following: "(1) [t]he annexation of the article, whether actual or constructive; (2) its adaptation to the use of the realty to which it is annexed[;] and (3) the intention with which the annexation has been made, whether or not to make it a permanent accession to the freehold." *Id.* at 763.

253. *See generally* Village of Lyndonville v. Town of Burke, 505 A.2d 1207, 1209-11 (Vt. 1985) (addressing the three-part test in *First National Bank* in the context of utility lines and accompanying equipment for tax-levying purposes); Sherburne Corp. v. Town of Sherburne, 207 A.2d 125, 127-28 (Vt. 1965) (applying the three-part fixtures test to determine if a ski lift was a fixture attached to the real estate).

254. *See* VT. STAT. ANN. tit. 24, § 4402(1) (2007).

255. *Id.* § 4411(a) (Supp. 2010).

256. *Id.* § 4411(a)(2).

257. *See id.* § 4411; *see also* SMART GROWTH VERMONT, http://www.smartgrowthvermont.org/toolbox/tools/billboardandsigncontrol/ (describing how municipalities in Vermont control the use of on-premise signage) (last visited Jan. 11, 2012).

The Vermont courts have encountered cases involving such billboards within city limits, and in one early case, a court upheld a local zoning ordinance despite a town vote to repeal the ordinance.[258] In essence, the town of Shaftsbury, Vermont, *wanted* the plaintiff billboard company to be able to more easily erect signs.[259] The court analyzed whether the town's popular vote was sufficient to repeal the local zoning ordinance.[260] Surprisingly, while the State of Vermont granted zoning authority to the local government, the court said "[t]he townspeople have no independent power to exercise any authority in connection with the granted power not encompassed by the legislative enactments."[261] While the legislature has since repealed many of the statutes involved in this case, the underlying premise still holds—delegation of power merits careful thought, requiring local activists, regardless of state, to consider how to best approach local billboard ordinances.[262]

As indicated through a broad analysis of relevant statutory authority as well as early case law from Vermont, the state's achievements in billboard control are largely a result of stringent, statewide highway laws—not profound local ordinances or well-developed laws relating to fixtures and compensation.[263] The lesson to be learned from Vermont is broad: consistency should center on shared roads (i.e., statewide highways and rural roads).[264] This specific focus was arguably the goal of the Federal Beautification Act, the Texas Beautification Act, and the Rural Act, in the first place.[265]

B. Why Texas Needs Compromise: Perfecting the Oxymoron of Diversity Based on Consistency

States like Vermont and Hawaii set the limit for where Texas *could* go with billboard regulation if statewide, concrete legislation mandated more stringent billboard regulation along roadway stretches.[266] Exact copies of such strong measures may in fact not be workable nationwide, especially in Texas; however, the charge for cleaner highways and rural roads is admirable and worthy of Texas's consideration.[267]

Overall, Texas courts have taken a more unsettled view of billboard restrictions, and statewide legislation, with its deference to local authority,

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258. *See* Nat'l Adver. Co. v. Cooley, 227 A.2d 406, 407-08 (Vt. 1967).
259. *See id.* at 406-07.
260. *Id.* at 407.
261. *Id*.
262. *See id.* at 407-08.
263. *See supra* notes 251-62 and accompanying text.
264. *See supra* notes 216-22 and accompanying text.
265. *See supra* notes 70-71, 85, 93 and accompanying text.
266. *See supra* note 222 and accompanying text; *see also* Metromedia v. City of San Diego, 453 U.S. 490, 515 n.20 (1981) (noting how state law dictates the regulation of billboards in commercial or industrial areas abutting interstate or primary highways); *infra* note 284 and accompanying text.
267. *See infra* notes 273-77.

favors neither consistency nor total eradication within city limits.[268] This piecemeal, city-by-city approach marks the development of Texas's billboard regulation.[269] As suggested by one author, "local government should balance the aesthetic needs of the community against the costs of partial or total billboard removal."[270] Because of the often-high cost of billboard removal, many communities in Texas may simply not want to pay the cost.[271] The diversity among individual Texas cities is likely where the state's legislation has in fact headed down the right path, even if there are numerous paths.[272]

As the second largest state in the nation, Texas's total area encompasses 268,581 square miles, and with thirty-one cities having a population of 100,000 people or more, the state's diversity exists in more than just natural resources.[273] With avid businesses in nearly every category including agriculture, oil and gas, finance, and manufacturing, the statewide contrasts come at no surprise and suggest that some cities would be more willing to permit billboards within city limits to promote these businesses.[274] Billboards offer a public forum for product promotion, allowing consumers to learn about the quality, price, and availability of products and services.[275] Arguably, this medium is economically valuable and allows for product comparisons, consumer persuasion, and even societal happiness—all meaningful intangibles that could prove very beneficial to a growing city.[276] With Texas's uniqueness in mind, the previous review of how other states regulate the billboard industry offers further insight into the idea of a workable compromise, but the overview does not give a conclusive answer for Texas.[277]

Similarly, Texas does not uniformly adopt a clear test for determining if billboards are fixtures for all purposes of compensation; however, the fluid *Logan* test might be the best solution because it requires parties to plead with accuracy and persuasiveness.[278] Using a uniform test such as *Logan* is arguably necessary to allow parties to plead specifically and consistently across the state.[279] The *Logan* test, which is similar to the fixtures test in Vermont, does

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268. *See supra* notes 197-211 and accompanying text.

269. *See, e.g.*, *supra* text accompanying notes 197-98.

270. Gerencser, *supra* note 44, at 930.

271. *See generally id.* (commenting on how, because of compensation requirements that often call for cash payments, removal of billboards within the community requires careful consideration of any possible alternatives).

272. *See supra* Part III.B.

273. *See* TEXAS ALMANAC 2010–2011, *supra* note 3, at 13-14.

274. *See id.* at 14.

275. *See* Loshin, *supra* note 28, at 151-52.

276. *See id.*

277. *See supra* notes 221-26, 273-76 and accompanying text.

278. *See generally* City of Argyle v. Pierce, 258 S.W.3d 674, 684 (Tex. App.—Fort Worth 2008, pet. dism'd) (recognizing the importance of careful drafting in a case involving a billboard).

279. *See generally id.* (asserting the importance of careful pleading regarding billboard condemnation claims by stating that the sign company and property owner did "not further allege any facts explaining why the sign . . . is 'property' that the City has inversely condemned"). *City of Argyle* also referred to the *Logan* test in its discussion of whether the billboard was a fixture attached to the realty. *See id.*

not necessarily *need* to be concrete and formulaic in order for Texas to adopt more rigid regulations at either the state or local level.[280] All that appears truly necessary is full compliance with the Federal Beautification Act's requirement of compensation for removed billboards along interstate and primary highway systems.[281] Beyond this specification, further stipulations as to billboard compensation mechanisms, especially concerning the cities' police powers, can simply rest under the guidance of case law.[282] Perhaps ambiguities in the *Logan* test, like those in local billboard ordinances, actually *promote* fairness by allowing each situation to rest on its own facts and pleadings; however, courts across Texas should utilize a consistent method in evaluating billboards to inform practitioners of how Texas courts will judge these cases.[283]

In leaving cities to adopt their own restrictive ordinances and in allowing courts to interpret a billboard's property classification on a case-by-case basis, the adoption of stricter measures along Texas's rural roads and highways could be a valid counterweight to complete the compromise.[284] Professor John W. Houck stated this need to compromise in reference to the nationwide billboard tension:

> When two legitimate societal interests clash, an accommodation must be worked out. If this is not possible, society may have to go without one or both of the interests. I believe that America is big enough, varied enough, and wise enough to satisfy both the claims of highway beautification and outdoor advertising.[285]

While Texas cases involving billboard regulations have not yet embraced the right to be seen as applied through easement law, Texas cities have instead taken a step towards banning new billboards.[286] Possibly, this same theory could be applied to begin the process of tightening highway regulations, including commercial and industrial zones along these strips.[287] That way, the

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280. *See supra* Part IV.A (discussing Vermont's inconclusive fixtures test as well as its comparatively strict billboard regulation, likely suggesting that the two concepts can coexist).

281. *See* 23 U.S.C. § 131(g) (2006); State v. Brinegar, 379 F. Supp. 606, 617 (D. Vt. 1974).

282. *See generally* Floyd, *supra* note 80, at 372 n.34 (listing a plethora of case law from varying jurisdictions across the United States that upheld amortization as a valid use of police powers). A large number of the listed cases involved a city as a party to the litigation. *See id.*

283. *See generally* State v. Clear Channel Outdoor, Inc., 274 S.W.3d 162, 165 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (declining to consider the *Logan* test).

284. *See Billboard Facts*, SCENIC TEXAS, *supra* note 52. Scenic Texas similarly describes how rural areas are the most prone to billboard proliferation because cities, but not counties, in Texas have the authority to control billboard construction. *Id.*; *see also infra* notes 297-300.

285. Patrick Horsbrugh, *Criticism of Highway Signs and Advertisements*, *in* OUTDOOR ADVERTISING 183, 183 (John W. Houck ed., 1969) (quoting Professor John W. Houck).

286. *Compare* Fete, *supra* note 221, at 2077-93 (proposing that North Carolina follow Vermont's lead in adopting billboard regulation that parallels easement law), *with* Eller Media Co. v. City of Houston, 101 S.W.3d 668, 675-76 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (upholding a city ordinance that banned construction of new off-premise billboards within the city and its extraterritorial limits).

287. *See* Floyd, *supra* note 80, at 363 (noting, though in reference to community efforts, that the option of banning new billboards is "[t]he first and most essential step in reducing billboard clutter").

state could avoid the cost of removing billboards within the designated 660-foot corridor as required by the Federal Beautification Act.[288] Further, such an option would allow Texas companies that advertise on affected highways an opportunity to adjust before the adoption of more prohibitive measures.[289] In implementing more rigorous regulations along common highways through limitations on new billboards, scenic highways will be closer to unobstructed views while, in compromise, cities are left to their own devices to determine where billboards stand.[290]

VI. CONCLUSION TO COMPROMISE

Because of the necessary, inherent variations in Texas's local laws, perhaps stricter statewide legislation offers a counterweight to achieve some precision and uniformity in order to clarify the murky, extensive area of billboard regulation.[291] By attacking what the Beautification Acts left undone, namely exceptions within the legislation, Texas will preserve a unique landscape that includes the dense foliage of the east to the dusty plateaus of the west.[292] To account for the diversity among Texas cities, perhaps the answer to the city billboard battles is to keep the decision local—diversity must be accounted for in a state as large as Texas.[293]

Similarly, while the test for fixtures in the context of billboards may never reach a complete resolution, such ambiguities in definitions rely on argued facts and represent an opportunity for careful pleading.[294] Recognizing the variance in this area can encourage both sides of the billboard debate to achieve fairness, which was presumably just what Congress had in mind in its insistence on compensation under the Federal Beautification Act.[295] The decision of whether to utilize the *Logan* test, while an important consideration in order to fully comply with the mandate of compensation, currently depends on the judiciary.[296]

So, a malleable area for further statewide legislation is in the state's highways, which necessarily should be a collective, statewide responsibility.[297] Adopting some measures with more bite would help to beautify the countryside while leaving to local governments the decisions surrounding city

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288. *See* Gerencser, *supra* note 44, at 922.

289. *See generally Roads Protected from New Billbaord Construction*, SCENIC TEXAS, http://www.scenictexas.org/resources (follow "Protected Roads" hyperlink) (last visited Jan. 11, 2012) (highlighting the incredibly small number of roads in Texas that prohibit new billboard construction).

290. *See supra* note 284; *see also* discussion *infra* Part VI.

291. *See supra* Part VI.

292. *See supra* note 75.

293. *See supra* notes 273-77 and accompanying text.

294. *See supra* notes 278-79.

295. *See supra* Part III.A.

296. *See supra* Part IV.A.

297. *See supra* note 266 and accompanying text.

restrictions.[298] For a start, Texas can look to the success of other states, but in the end, what is best for Texas should prevail.[299] Compromise, but consistency, is the goal because after all, Texas itself means "friends."[300]

298. *See generally supra* notes 284-85 and accompanying text (emphasizing the importance of compromise on the issue of billboard regulation).

299. *See generally supra* notes 273-77 and accompanying text (highlighting unique characteristics of Texas that should be considered upon the implementation of new legislation).

300. *See* TEXAS ALMANAC 2010–2011, *supra* note 3, at 13.