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Billboard Control under the Highway Beautification Act of 1965

Roger A. Cunningham
University of Michigan Law School

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BILLBOARD CONTROL UNDER THE HIGHWAY BEAUTIFICATION ACT OF 1965

Roger A. Cunningham

TABLE OF CONTENTS

I. THE FEDERAL LEGISLATION	1296
A. <i>Title I of the Highway Beautification Act of 1965</i>	1296
B. <i>Title I: Some Problems of Construction</i>	1299
1. <i>"Effective Control" of Outdoor Advertising Under Subsection (b) and (c), in Light of Subsection (k)</i>	1300
2. <i>Subsection (d): The Commercial and Industrial Area Exceptions</i>	1301
3. <i>Subsections (e) and (n): Time for Removal of "Nonconforming" Signs</i>	1307
4. <i>Subsection (g): "Just Compensation" upon Removal of Advertising Signs</i>	1309
C. <i>The Constitutionality of Title I</i>	1325
II. THE STATE LEGISLATION	1327
A. <i>In General</i>	1327
B. <i>Areas Subject to "Effective Control"</i>	1329
C. <i>Police Power Controls, Exceptions, and Permits</i> ..	1330
D. <i>Nonconforming Signs: Removal and Determination of Just Compensation</i>	1334
E. <i>Constitutionality of State Legislation</i>	1346
1. <i>Police Power Controls</i>	1346
2. <i>Control by Means of the Spending Power and the Eminent Domain Power</i>	1356
3. <i>State Constitutional "Antidiversion" Provisions</i> ..	1359
III. CRITIQUE AND CONCLUSION	1363

BILLBOARD CONTROL UNDER THE HIGHWAY BEAUTIFICATION ACT OF 1965

*Roger A. Cunningham**

I. THE FEDERAL LEGISLATION

A. *Title I of the Highway Beautification Act of 1965*

In a nation of continental size, transportation is essential to the growth and prosperity of the national economy.

But that economy, and the roads that serve it, are not ends in themselves. They are meant to serve the real needs of the people of this country. And those needs include the opportunity to touch nature and see beauty, as well as rising income and swifter travel.

Therefore, we must make sure that the massive resources we now devote to roads also serve to improve and broaden the quality of American life.¹

THIS statement by President Johnson signified an important change in federal-aid highway policy. As two leading commentators observed, "[i]t clearly implied that henceforth highways should be viewed not only as facilities of transportation but as features of the community and environment, and that environmental quality ranked with engineering quality in roadbuilding."² To carry out the new policy, the Johnson Administration, in May 1965, submitted a bill to Congress requiring each state to establish, by January 1, 1968, controls over roadside advertising and junkyards along interstate and primary federal-aid highways, on penalty of forfeiting all federal highway funds to which the state would otherwise be entitled.³ In addition, the Administration bill included provisions allocating to each state, on a nonmatching basis, federal funds for "acquisition of interests in and improvement of strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such roads."⁴ This bill, with congressional revisions, became the Highway Beautification Act of 1965.⁵

While the Highway Beautification Act as a whole is designed to

* Professor of Law, University of Michigan. S.B., J.D., Harvard University.—Ed.

1. H.R. Doc. No. 191, 89th Cong., 1st Sess. 2 (1965) (letter of President Johnson).

2. R. NETHERTON & M. MARKHAM, *ROADSIDE DEVELOPMENT AND BEAUTIFICATION: LEGAL AUTHORITY AND METHODS* pt. II, at 12 (Highway Research Board, 1966).

3. S. 2084, 89th Cong., 1st Sess. (1965). Title I of the bill dealt with highway advertising; title II contained junkyard control provisions.

4. S. 2084, 89th Cong., 1st Sess. tit. III, § 3 (1965).

5. Pub. L. No. 89-285, 79 Stat. 1028 (codified at 23 U.S.C. §§ 131, 136, 319 (1970)). The Highway Beautification Act became effective on October 22, 1965.

be a comprehensive program to promote the scenic enhancement of highways, this Article will focus on title I,⁶ which deals with control of outdoor advertising. Title II, which deals with junkyard control, is similar to title I, but it has not given rise to the problems and controversy produced by title I. Title III, which provides for landscaping and scenic enhancement of federal-aid highways, is quite different from titles I and II.

The main thrust of title I is reasonably clear. Unless a state is willing to accept a ten per cent reduction in its portion of federal highway funds it must establish "effective control" of outdoor advertising along the interstate and primary federal-aid highways within its boundaries.⁷ "Effective control" means that no signs visible from the

6. Highway Beautification Act of 1965, Pub. L. No. 89-285, tit. I, 79 Stat. 1028. Section 101 of title I completely changed the substance of section 131 of title 23 of the United States Code (originally codified by the Act of Aug. 27, 1958, Pub. L. No. 85-767, 72 Stat. 904). Section 102 simply amended the table of section headings in 23 U.S.C. by striking out the old section heading, "131. Areas adjacent to the Interstate System," and inserting in lieu thereof, "131. Control of outdoor advertising." Although technically all the lettered paragraphs of title I are subsections of section 101, for convenience they will be referred to in this Article as subsections of title I, since section 102 of the Act contains no substantive provisions.

7. Title I, subsection (a), 23 U.S.C. § 131(a) (1970), states the congressional finding and declaration that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."

Subsection (b) states that if a state has not, by January 1, 1968, provided for effective control of the erection and maintenance along the interstate and primary systems of outdoor advertising signs within 660 feet of the nearest edge of the right-of-way and visible from the main traveled way, that state's annual apportionments of highway construction funds under section 104 of title 23 of the United States Code shall be reduced by ten per cent of the amount that would otherwise be apportioned, until the state provides for such control. The ten per cent penalty applies to the state's portion of funds, not only for the interstate and federal-aid primary systems, but also for the federal-aid secondary system and the urban extensions of the primary and secondary systems. Any amount withheld under subsection (b) is to be reapportioned to the other states. The Secretary of Transportation is to determine whether a state has made provision for the effective control of outdoor advertising. Whenever he determines it to be in the public interest, he may suspend, for such periods as he deems necessary, the application of the ten per cent penalty to a state.

It should be noted that the decision to use a penalty provision represented a major change in federal-aid policy, since use of financial penalties was considered and rejected by Congress in 1958, see R. NETHERTON & M. MARKHAM, *supra* note 2, pt. II, at 48-49, in favor of encouraging state implementation of the national policy on roadside advertising by increasing financial aid to states that enacted sign controls. This approach was embodied in the Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, § 12, 72 Stat. 96, which provided for a bonus of one half of one per cent of the federal-aid highway funds otherwise allocated to a particular state. For a discussion of the 1958 law and the national standards promulgated thereunder, see Enfield, *Control of Outdoor Advertising: Federal Law and Standards*, in 1961 REPORT OF THE COMMITTEE ON ROADSIDE DEVELOPMENT 54 (Highway Research Board); BLACK, NATIONAL POLICY AND STANDARDS RELATING TO CONTROL OF ROADSIDE ADVERTISING ALONG THE INTERSTATE SYSTEM 3-6 (Highway Research Board Bulletin No. 337, 1962); R. NETHERTON & M. MARKHAM, *supra*,

main travelled way shall be permitted within 660 feet of the highway right-of-way unless exempted by the Act.⁸ The several broad exemptions that are created by the Act include all advertising signs in zoned and unzoned commercial and industrial areas,⁹ as well as official signs and signs advertising the sale or lease of the property on which they are located or other activity "conducted on the property in which they are located."¹⁰ In practice, this means that almost all existing off-premises advertising signs in rural areas will be prohibited,¹¹ since few rural areas contain sections zoned or developed for commercial or industrial use. In urban areas, most of the existing off-premises advertising signs are located in areas zoned for commercial or industrial use and consequently will not be subject to removal under title I unless they fail to conform to certain size, lighting, and spacing standards.¹² New off-premises advertising signs may be established in commercial and industrial areas so long as they conform to such standards, which must be "consistent with customary use."¹³

In areas zoned for commercial or industrial use what is "customary use" with respect to the size, lighting, and spacing of off-premises advertising signs may be determined either by the local zoning authority or by agreement between the state and the Secretary of Transportation.¹⁴ The definition of an unzoned commercial or industrial

pt. II, at 48-50. The national standards, as promulgated by the Secretary of Commerce, were published in 23 Fed. Reg. 8793 (1958), and may now be found, as amended, in 23 C.F.R. §§ 750.101-110 (1973). Pertinent administrative directives were issued by the Bureau of Public Roads. See U.S. Bureau of Public Roads, Dept. of Commerce, Policy and Procedure Memorandum 21-4.S (January 22, 1963) (relating to acquisition of advertising rights); U.S. Bureau of Public Roads, Dept. of Commerce, Policy and Procedure Memorandum 30-8 (January 22, 1963) (dealing with incentive payments for controlling outdoor advertising on the interstate system).

The House Public Works Committee's decision to impose only a ten per cent penalty instead of the one hundred per cent penalty proposed in the Administration bill (compare H.R. REP. NO. 1084, 89th Cong., 1st Sess. 3 (1965) [hereinafter 1965 HOUSE REPORT], with S. 2084, 89th Cong., 1st Sess. tit. I, § 1 (1965)), represents a significant modification of the policy, since it substantially reduces the pressure for state compliance with title I.

8. Title I, subsection (d), 23 U.S.C. § 131(d) (1970). Since the lettered paragraphs of title I correspond to those in 23 U.S.C. § 131 (1970), this Article will refer to the subsections of title I and section 131 interchangeably.

9. 23 U.S.C. § 131(d) (1970).

10. 23 U.S.C. § 131(c) (1970).

11. See *Hearings on S. 561 and S. 1442 Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 91st Cong., 1st Sess. 86 (1969) [hereinafter 1969 Senate Hearings] (exhibit submitted for the record by the Roadside Business Association), indicating that in rural areas approximately 839,000 signs (seventy-one per cent of the off-premise signs in the United States) would have to be removed.

12. But see *id.*, indicating that, by means of the agreements entered into by the former Bureau of Public Roads and the states, existing signs that are nonconforming only because they violate size, lighting, or spacing regulations will be allowed to remain.

13. 23 U.S.C. § 131(d) (1970).

14. 23 U.S.C. § 131(d) (1970).

area, as well as the standards for signs in these areas, is to be determined "by agreement between the several States and the Secretary."¹⁵

Off-premises advertising signs erected in areas not exempt under title I are to be removed whether they were erected before or after enactment of the Act and whether they were lawfully or unlawfully erected. The states are to use their police power, to the extent constitutionally possible, to remove any signs that were unlawfully erected either before or after the enactment. But, as a general rule, "just compensation" is to be given upon removal of lawfully erected off-premises signs.¹⁶

B. *Title I: Some Problems of Construction*

Unfortunately, title I is not well drafted, in part because it represents an uneasy compromise between those members of Congress who wanted little, if any, control of outdoor advertising along the highways and those members who wanted very stringent controls. For example, the provisions of subsection (d) allowing advertising signs within 660 feet of the right-of-way in areas zoned or established (though unzoned) as industrial or commercial areas were a response

15. 23 U.S.C. § 131(d) (1970).

16. 23 U.S.C. § 131(g) (1970). In all cases, the federal share of compensation is to be 75 per cent. But a new subsection (n), added by amendment in 1968, Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 6(d), 82 Stat. 817, provides that no advertising sign shall be required to be removed if the federal share is not available.

The rest of title I can be summarized as follows: Subsection (e) provides that no sign lawfully in existence along the interstate or primary systems on September 1, 1965, which does not conform to the requirements of title I, shall be required to be removed until July 1, 1970, and that no other lawfully erected sign shall be required to be removed until the end of the fifth year after it becomes nonconforming.

The Secretary is expressly authorized by subsection (j) to continue the bonus payments provided for by the Federal-Aid Highway Act of 1958 to any state highway department that, prior to July 1, 1965, entered into an agreement with the Secretary to control outdoor advertising signs in areas adjacent to the interstate system. Subsection (j) originally provided for continuation of bonus payments provided "the State maintains the control required under such agreement or the control required by this section, whichever control is stricter." A 1968 amendment eliminated the requirement that the state meet the stricter of the two standards, thus assuring that bonus payments will be continued so long as a state "maintains the control required under such agreement." Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 6(b), 82 Stat. 817. However, the final sentence in subsection (j) provides that nothing in that subsection shall be "construed to exempt any State from controlling outdoor advertising as otherwise provided in" title I. Thus, a state may continue to qualify for bonus payments of one half of one per cent under the 1958 Act and at the same time be subject to the ten per cent penalty for failure to comply with the requirements of title I of the 1965 Act.

Subsection (k) provides that nothing in title I shall prohibit a state from establishing stricter standards than those established under that title.

Subsection (l) provides for judicial review in the United States district courts of any final determination by the Secretary of Transportation to withhold funds from a state under subsection (b) because of its failure to provide for effective control.

to pressure from the billboard industry and the roadside business associations. Pressure from these interests is also evident in the explanatory language that introduces subsection (d)—“In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purpose of this section . . .”—a phrase that may cause much difficulty because it can be construed as stating a second congressional purpose for enactment of title I, in addition to that stated in subsection (a).¹⁷ Moreover, the Administration bill, as originally introduced in May 1965, merely authorized the use of the states' police power to control roadside advertising; but in response to pressure from the billboard and roadside business interests, the Senate Public Works Committee inserted the compensation provision now found in subsection (g).¹⁸

In part, however, the poor draftsmanship of title I is a result of the lack of adequate consideration that characterized its passage by Congress. One consequence of this was that the draftsmen frequently used unclear or ambiguous language, thus leaving a number of difficult constructional problems, none of which has been authoritatively resolved by the United States Supreme Court. I propose to deal here with the following problems of construction: (1) What does “effective control” of outdoor advertising under subsections (b) and (c) mean in light of subsection (k)? (2) What is the meaning and effect of subsection (d)? (3) What is the meaning and effect of subsections (e) and (n) in light of subsection (k)? (4) What is the meaning and effect of the provision in subsection (g) for payment of “just compensation” upon removal of nonconforming outdoor advertising signs?

1. *“Effective Control” of Outdoor Advertising Under Subsections (b) and (c), in Light of Subsection (k).*

Subsection (b), the operative provision of title I, requires the states to provide for “effective control” of certain signs in order to

17. The provisions of subsection (d), as finally adopted, were hailed by the billboard industry: “For the first time, it is an admission by a governmental body that outdoor advertising can legitimately conduct business in commercial and industrial areas of this country. And it will help to weed out the fly-by-night operators who have been the bane of the industry.” Editorial, *Seize the Moment*, PENNSYLVANIA OUTDOOR NEWS, November 1965, at 2. Although subsection (d) is drawn in such broad terms as to include all kinds of advertising signs, its principal impact is to permit “off-premises” signs—i.e., signs not within the classes exempted by subsection (c)—in zoned and unzoned commercial and industrial areas.

18. The explanation given for this change was that the Highway Beautification Act would apply to the federal-aid primary system as well as to the interstate system and that payment of compensation would be necessary to avoid disastrous economic effects on the billboard industry and the small roadside businesses that had developed together with the primary road system over a period of 40 to 50 years. 111 CONG. REC. 12797-98 (1965) (remarks of Sen. Cooper).

avoid the ten per cent penalty. Subsection (c) defines "effective control" as described above.¹⁹ But subsection (k) provides that nothing in title I "shall prohibit a state from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the federal-aid highway systems than those established under" title I. The legislative history indicates that this provision was "to make it clear that there is no attempt by the federal government to pre-empt the field to the extent that only federal regulation may be used to control advertising along the highways."²⁰ It is not clear, however, exactly what Congress meant by the use of the terms "standards" and "limitations."

After a perusal of all the committee hearings,²¹ committee reports,²² and floor debates²³ that preceded enactment of the Highway Beautification Act, I have concluded that subsection (k) was designed to allow the states to impose stricter limitations than those *required* by subsections (b) and (c), by means of standards embodied in state statutes or local ordinances enacted pursuant to state enabling legislation. That is, subsection (k) makes it clear that none of the provisions of subsections (b) and (c) are intended to give commercial sign owners a federal *right* to maintain advertising signs either more than 660 feet from the right-of-way or within the 660 foot strip.

2. Subsection (d): The Commercial and Industrial Area Exceptions

No part of title I has generated more controversy than subsection (d), which permits outdoor advertising signs

whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, . . . within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State

19. See text accompanying note 8 *supra*.

20. 1965 HOUSE REPORT, *supra* note 7, at 9. See also S. REP. NO. 709, 89th Cong., 1st Sess. 6 (1965) [hereinafter 1965 SENATE REPORT]: "The committee emphasizes that where State or local law imposes more stringent controls than S. 2084 over outdoor advertising signs, displays, or devices—both on and off premise—the intent is that State or local law shall prevail. It is not the intent of the committee that the provisions of this section shall preempt or weaken State or local laws imposing more rigid requirements."

21. See, e.g., *Hearings on S. 2084 Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 89th Cong., 1st Sess. 48, 72-73, 102-03, 107-10, 114, 391 (1965) [hereinafter 1965 Senate Hearings]; *Hearings on H.R. 8487 Before the Subcomm. on Roads of the House Comm. on Public Works*, 89th Cong., 1st Sess. 69-70, 128-31, 247-50 (1965) [hereinafter 1965 House Hearings].

22. See note 20 *supra* and accompanying text.

23. See, e.g., 111 CONG. REC. 23878-79 (remarks of Sen. Fong), 26164 (letter from Undersecretary of Commerce Boyd to Rep. Edmondson), 26263-65 (colloquy between Reps. Meeds, Edmondson, and Adams), 26279 (remarks of Rep. McVicker) (1965).

law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary,

and which further provides that the states

shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act.²⁴

The language of subsection (d) is permissive rather than mandatory. Therefore, even without subsection (k), I would conclude that a state statute or local ordinance dealing with control of outdoor advertising need not include the blanket exemption for off-premises signs in commercial and industrial areas that is permitted by subsection (d).

Unfortunately, subsection (d) presents more difficult interpretative problems: What is "customary use"? How is "agreement between the several States and the Secretary" to be effected? Is the authority of the states to zone areas for commercial and industrial use absolute for title I purposes?

On January 10, 1967, after holding fifty-two public hearings throughout the United States, the former Bureau of Public Roads presented to Congress a set of "proposed standards and criteria for size, lighting and spacing of signs permitted in commercial or industrial zones and areas," including a proposed definition of an "unzoned commercial or industrial area" for outdoor advertising control purposes.²⁵ These proposed standards and criteria were expressly stated to be merely "a basis on which to establish agreements between the several States and the Secretary."²⁶ But they were met with massive objections and criticism from the advertising industry during the 1967 hearings of the Subcommittee on Roads of the House Public Works Committee,²⁷ principally on the grounds that they were too restrictive and that the Bureau was seeking to force the states to accept them instead of trying to work out standards and criteria through a true process of negotiations. The attitude of the House Subcommittee during the hearings was markedly hostile toward the whole highway beautification program in general and title I in particular. As a consequence of this pressure, Secretary Boyd on May 24,

24. 23 U.S.C. § 131(d) (1970).

25. S. Doc. No. 6, 90th Cong., 1st Sess. 46-49 (1967).

26. *Id.* at 45.

27. *Hearings on H.R. 7797 Before the Subcomm. on Roads of the House Comm. on Public Works*, 90th Cong., 1st Sess. 2 (1967) [hereinafter *1967 House Hearings*] (opening statement of Chairman Kluczynski).

1967, shortly after the conclusion of the Subcommittee hearings, sent a letter to Chairman Kluczynski in which he made the following concessions on behalf of the Department of Transportation in regard to zoned areas:

1. As the law directs, we are fully prepared to accept state determinations with respect to zoned commercial and industrial areas.

2. Concerning unzoned commercial and industrial areas, we shall be happy to request the guidance and suggestions of the several States with respect to designating these areas. The only absolute requirement upon which we would insist would be the existence of at least one commercial activity in any such area. Surely this could not be considered unreasonable.

3. With regard to the determination of what constitutes "customary use" in the zoned commercial and industrial areas, we shall be glad to look to the states for certification that either the state authority or a bona fide local zoning authority has made such a determination. With respect to unzoned areas, we will recognize local practice on customary use as mutually agreed to by State and Federal agencies. It will be our policy to assume the good faith of the several states in this regard.

The only exception to the above would be a situation in which a State or local authority might attempt to circumvent the law by zoning an area as "commercial" for billboard purposes only. We think you will agree that this is a reasonable position, since we know that the Congress does not wish for the law to be deliberately evaded by subterfuge.

4. What is determined in good faith by a bona fide local or state zoning authority as "customary use" will be an acceptable basis for standards as to size, spacing, and lighting in the commercial and industrial areas within the geographical jurisdiction of that state or local authority.²⁸

The concessions in Secretary Boyd's letter marked a substantial retreat from the positions previously taken by the Bureau of Public Roads, but opponents of title I (both in and out of Congress) were not satisfied. The House version of the 1968 Federal-Aid Highway Act²⁹ would virtually have killed title I by eliminating the ten per cent penalty provided by subsection (b) and making the control of outdoor advertising entirely voluntary on the part of the states.³⁰ In addition, the House version would have vested in the states or their political

28. Letter from Alan S. Boyd, Secretary of Transportation, to Rep. John Kluczynski, May 24, 1967, in *Hearings on S. 1467 Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 90th Cong., 1st Sess. 6 (1967) [hereinafter *1967 Senate Hearings*].

29. H.R. 17134, passed by the House, July 3, 1968, in 114 CONG. REC. 19945 (1968).

30. H.R. 17134, § 6(a), passed by the House, July 3, 1968, in 114 CONG. REC. 19945 (1968).

subdivisions the power to define "unzoned commercial and industrial areas" and to determine "customary use" with respect to the size, lighting, and spacing of advertising signs in both zoned and unzoned commercial and industrial areas.³¹ However, the bill that emerged from the Conference Committee and was finally enacted³² left subsection (b) of title I without change and amended subsection (d) only by adding the following provision: "Whenever a bona fide State, county or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority."³³

As subsection (d) now stands, regulation of off-premises advertising in areas zoned for commercial or industrial use would seem to be entirely within the discretion of the state or local zoning agency that has jurisdiction over the area. Presumably, the state or local agency may either include regulations with respect to the size, lighting, and spacing of advertising signs within its general regulations dealing with commercial and industrial districts, or adopt a special set of regulations defining "customary use." The only possible limitation on state or local zoning agency powers would seem to be the exception noted in Secretary Boyd's letter of May 24, 1967: that the Department would not allow "a State or local authority [to] attempt to circumvent the law by zoning an area as 'commercial' for billboard purposes only."³⁴

However, it is not clear whether the Department of Transportation may ignore such state or local action. The original subsection (d) grant of authority to the states "to zone areas for commercial or industrial purposes" concludes with an express stipulation that "the actions of the States in this regard will be accepted for the purposes of this Act." And the sentence, added by the 1968 amendment, that authorizes state or local zoning authorities to determine "customary use" contains no limitation on their discretion.³⁵ But the first sentence of subsection (d), which contains the basic grant of permission for off-premises advertising signs in commercial and industrial areas, does

31. H.R. 17134, § 6(c), passed by the House, July 3, 1968, in 114 CONG. REC. 19945 (1968).

32. The conference bill appears in 114 CONG. REC. 23692 (1968). As enacted, it was the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 815 (codified in scattered sections of 23 U.S.C.).

33. Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 6(a), 82 Stat. 817 (codified at 23 U.S.C. § 131(d) (1970)).

34. See text accompanying note 28 *supra*.

35. See text accompanying note 33 *supra*.

impose a significant limitation by means of the phrase "consistent with the purposes of this section." The congressional purposes are generally set forth in subsection (a), which states that outdoor advertising signs in areas adjacent to the interstate and primary systems "should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." Thus, it can be argued that state or local action that zones an area as "commercial" or "industrial" solely or primarily to allow location of off-premises advertising signs within 660 feet of an interstate or primary federal-aid highway is *not* consistent with the purposes stated in subsection (a), and that the Department of Transportation therefore need not accept such action as complying with the "effective control" requirement laid down in subsection (b). Presumably Secretary Boyd had this in mind when he said, in his letter of May 24, 1967, "we know that the Congress does not wish for the law to be deliberately evaded by subterfuge."³⁶ The current guidelines issued by the Federal Highway Administration substantially reiterate the minimum standard laid down in Secretary Boyd's letter.³⁷ The Administration's position was recently upheld in a significant United States district court case sustaining the Secretary's determination to withhold ten per cent of the federal-aid highway funds that would otherwise have been allocated to South Dakota for the fiscal year 1973.³⁸

36. See text accompanying note 28 *supra*. See also the remarks of Sen. Randolph during the debates on the Highway Beautification Act of 1965: "When state or local governments act to zone areas for commercial or industrial purposes, in accordance with the state's traditional exercise of authority on zoning, these determinations will be accepted for purposes of billboard or junkyard control. This language, of course, does not mean that a state or local authority could place a label 'zoned commercial or industrial' on land adjacent to the Interstate and primary systems solely to permit billboards or junkyards and thereby frustrate the intent of Congress stated in section 131(a)." 89 CONG. REC. 26820 (1965).

37. 23 C.F.R. § 750.305(c) (1973).

38. *South Dakota v. Volpe*, 353 F. Supp. 335 (D.S.D. 1973). The *South Dakota* case holds that the South Dakota statute, S.D. COMP. LAWS ANN. §§ 31-29-1 to -60 (1970), is not in compliance with title I on several grounds. The case is discussed in note 131 *infra* and accompanying text.

Since the original Wyoming "compliance" law, ch. 242, [1967] Wyo. Laws 697, zoned all agricultural lands outside of municipalities and lying within 660 feet of the edge of any interstate or primary highway as "commercial," subject to rezoning by the several boards of county commissioners, it is not surprising that the Federal Highway Administration did not consider it to be consistent with title I requirements. If the Federal Highway Administrator had formally determined to impose the ten per cent penalty provided by subsection (b) on Wyoming, Wyoming could have invoked the judicial review provisions of subsection (d). But the Administrator never made the necessary decision to withhold funds and the issue was not judicially reviewed prior to the repeal of the law by ch. 250, § 16, [1971] Wyo. Laws 568. The current "compliance" law is found in WYO. STAT. ANN. §§ 24-110 to -124 (1971).

There was, initially, also a bitter controversy over the definition of "unzoned commercial and industrial areas." Subsection (d) states that such definition is to be made "by agreement between the several States and the Secretary." The proposed standards and criteria for resolving this question that were transmitted to Congress by the Bureau of Public Roads on January 10, 1967,³⁹ were, in effect, abandoned when Secretary Boyd sent his letter of May 24, 1967, to Chairman Kluczynski of the House Subcommittee on Roads.⁴⁰ That letter said in part: "Concerning unzoned commercial and industrial areas, we shall be happy to request the guidance and suggestions of the several States with respect to designating these areas. The only absolute requirement upon which we would insist would be the existence of at least one commercial activity in any such area." As far as can be ascertained, this is still the position of the Federal Highway Administration,⁴¹ and, although many of the state laws in their original form did not comply with even this requirement,⁴² it now appears that all but one of the fifty states have statutes that do comply with it.⁴³

39. S. Doc. No. 6, *supra* note 25, at 46-47.

40. See text accompanying note 28 *supra*.

41. U.S. Federal Highway Administration, Dept. of Transportation, Policy and Procedure Memorandum 80-5.2, ¶ 5(d) (Dec. 12, 1972) [hereinafter Policy and Procedure Memorandum 80-5.2], simply states: "[a]ctual industrial or commercial use at any given time will determine the classification of unzoned commercial or industrial areas."

42. See R. CUNNINGHAM, CONTROL OF HIGHWAY ADVERTISING SIGNS: SOME LEGAL PROBLEMS 26-27 (Highway Research Board, NCHRP Report No. 119, 1971).

43. See text accompanying notes 129-31 *infra*. Opposition to the "absolute requirement" that any area to be defined as an "unzoned commercial or industrial area" must have "at least one commercial [or industrial] activity" already in existence in the area has been based primarily on two separate but closely related arguments. First, it is argued that such a requirement would eliminate about 90 per cent of the existing off-premises advertising signs in rural areas, and that Congress could not have intended such a drastic result in view of the introductory clause of subsection (d). Second, it is argued that such a drastic elimination of off-premises advertising signs in rural areas is not essential to the achievement of the stated scenic purpose of title I ("to preserve natural beauty"), since many rural areas that presently have no commercial or industrial uses are not naturally beautiful. Hence, it is argued, it would be more consistent with congressional intent for the Secretary of Transportation to accept proposals from the states for defining as "unzoned commercial and industrial areas" certain rural areas that are not naturally beautiful and that would be appropriate for commercial or industrial uses although no such uses are presently in existence. See 1967 Senate Hearings, *supra* note 28, at 102-31; 1967 House Hearings, *supra* note 27, at 213-29 (statement of R.D. Hetrick, President, Roadside Business Association); Hearings on S. 3418 Before the Subcomm. on Roads of the Senate Comm. on Public Works, 90th Cong., 2 Sess. 322-30, 342-45 (1968); Hearings on H.R. 17134 Before the Subcomm. on Roads of the House Comm. on Public Works, 90th Cong., 2d Sess. 593-98, 610-13 (1968) (statement of Donald S. Barbour, member of the Executive Committee, Roadside Business Association); 1969 Senate Hearings, *supra* note 11, at 61-67, 71-89; Hearings on Highway Legislation Before the Subcomm. on Roads of the House Comm. on Public Works, 91st Cong., 1st Sess. 146-61 (1969) [hereinafter 1969 House Hearings] (statement of Paul Spooner, General Counsel, Roadside Business Association).

3. Subsections (e) and (n): Time for Removal of "Nonconforming" Signs

Subsection (e) of title I states flatly that

[a]ny sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

The House report explains that the purpose of this subsection "is to allow the advertising business to amortize, in so far as possible, its existing investment in the signboards before they are removed."⁴⁴ The Report also states that the subsection provides a "5-year period before existing signs [made nonconforming by title I] actually will have to come down,"⁴⁵ and that the last sentence is designed to cover lawfully existing signs that become nonconforming in the future as a result of (1) incorporation of a part of the secondary highway system into the primary system and (2) later revision of regulations issued at the outset of the advertising control program.⁴⁶

The reference in the House report to the five-year grace period as designed to allow amortization is puzzling. In zoning law the concept of "amortization" has generally been used to allow the owner of a nonconforming building or of the situs of any nonconforming use to continue the nonconformance for a designated period of time before being compelled to discontinue it, without compensation, by an application of the police power.⁴⁷ Since subsection (g) of title I pro-

By the time of the 1969 hearings of the Senate and House Subcommittees on Roads, the Roadside Business Association, representing the major commercial interests opposed to the Secretary's "absolute requirement" of "at least one commercial activity" as a basis for defining "unzoned commercial and industrial areas," was advocating a major revision of title I, under which off-premises advertising signs would be excluded only from scenic areas, areas zoned for residential use, or other locations designated by state statute or local ordinance. The principal effect of such a revision, of course, would be to open up all nonscenic rural areas to off-premises advertising. It is conceivable that the Commission on Highway Beautification, *see* text accompanying notes 317-24 *infra*, may recommend a shift to this approach, but it seems unlikely in view of the federal highway authorities' recent success in overcoming the resistance of many states to the restrictive definition of "unzoned commercial and industrial areas" championed by the former Bureau of Public Roads and the present Federal Highway Administration.

44. 1965 HOUSE REPORT, *supra* note 7, at 5.

45. *Id.*

46. *Id.* at 5-6.

47. For a good judicial discussion of the "amortization" concept in connection with nonconforming uses under zoning ordinances, see *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).

vides for the payment of just compensation when nonconforming signs are removed, it is hard to see the relevance of the amortization concept. It is possible that the House committee had in mind the fact that most advertising "leases" initially run for five years. But since the value of all periods for which the "lessee" has the option to renew must be included in valuing the "leasehold," it is still difficult to see the relevance of the five-year period. It is also possible that the House committee thought that advertising sign owners, when faced with a requirement that all nonconforming signs should ultimately be removed, might allow their nonconforming signs to deteriorate during the five-year minimum period allowed under subsection (e), thus reducing the amount of compensation that would ultimately have to be paid.⁴⁸ But it is hard to see why a sign owner would find it advantageous to allow its signs to deteriorate during the grace period, since in any case it would be assured of just compensation based on their value at the date of removal. And, for reasons which will be stated in the next section of this Article,⁴⁹ it does not seem that the Committee intended that partial, or even full, amortization of the sign owners' interests might be accomplished so that full payment would become unnecessary. It seems probable, therefore, that the five-year grace period was provided to allow the states a reasonable time in which to adopt compliance laws, make inventories of conforming and nonconforming signs, enact desired zoning regulations for industrial and commercial areas, negotiate necessary agreements with the federal authorities, set up plans for the orderly removal of nonconforming signs, and actually carry out the removal. The adoption in 1968 of subsection (n), which provides that no removal shall be required under title I until the federal compensation funds are available,⁵⁰ further extended the time, since substantial federal funding of the removal program was delayed until fiscal 1970.⁵¹ The Federal Highway Administration now estimates that, at the 1973

48. For a discussion favoring this theory, see Lamm & Yasinow, *The Highway Beautification Act of 1965: A Case Study in Legislative Frustration*, 46 DENVER L.J. 437, 444-45 (1969).

49. See text accompanying notes 53-114 *infra*.

50. Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 6(d), 82 Stat. 817 (codified at 23 U.S.C. § 131(n) (1970)).

51. See 23 U.S.C. § 131(m) (1970), which now provides:

There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed \$20,000,000 for the fiscal year ending June 30, 1966, not to exceed \$20,000,000 for the fiscal year ending June 30, 1967, not to exceed \$20,000,000 for the fiscal year ending June 30, 1970, not to exceed \$27,000,000 for the fiscal year ending June 30, 1971, not to exceed \$20,500,000 for the fiscal year ending June 30, 1972, and not to exceed \$50,000,000 for the fiscal year ending June 30, 1973.

fiscal year funding level, the sign removal program, nationwide, will take five to six years.⁵²

Although it may be largely academic in view of the understandable reluctance of most states to proceed with compensated removal of nonconforming signs before funding of the seventy-five per cent federal share, it seems clear that the states remain free, under subsection (k) of title I, to require removal of nonconforming signs within a shorter period than is required by subsections (e) and (n). Neither subsection (e) nor subsection (n) was intended to give sign owners a federal right to maintain nonconforming signs for the maximum period allowable under these provisions if a state wishes to require earlier removal and can satisfy the just compensation requirements of subsection (g). Both subsection (e) and subsection (n) were merely intended to make it clear that no state need require removal of nonconforming signs prior to the times specified therein in order to avoid the ten per cent penalty provided by subsection (b).

4. Subsection (g): "Just Compensation" upon Removal of Advertising Signs

It seems reasonably clear that a state must provide for the payment of just compensation upon the removal of outdoor advertising signs if it is to avoid the ten per cent penalty, although this point will not be conclusively established until it has been determined by the Supreme Court of the United States. The point was sufficiently troublesome that, in 1966, the Secretary of Commerce sought an opinion from the U. S. Attorney General on (a) whether title I may be read as granting to the states the option of using their police power to

52. Policy and Procedure Memorandum 80-5.2, *supra* note 41, ¶ 10(c), which also recommends the following order of priority in removal:

- (1) Illegal and abandoned signs.
- (2) Hardship situations.
- (3) Minimum value signs.
- (4) Signs in areas which have been designated as scenic under authority of State law.
- (5) Product advertising on:
 - (a) Rural interstate highway.
 - (b) On rural primary highway.
 - (c) Urban areas.
- (6) Nontourist-oriented directional advertising.
- (7) Tourist-oriented directional advertising.

These are only recommended priorities; selection and programming of sign removal projects is the responsibility of the states. 23 C.F.R. § 750.310(c) (1973). The general provision authorizing removal projects is 23 C.F.R. § 750.310(a) (1973):

A sign removal project may consist of any group of proposed sign removals selected in a reasonable fashion. The signs may be those belonging to one company of those located along a single route, all of the signs in a single county or other locality, or any other similar grouping. Generally speaking, a single project should not include signs along both Interstate and Primary highways unless the number of signs along one system is so small that it would be more logical to include these in the project than on the other system.

remove outdoor advertising signs, without payment of compensation, and without incurring the ten per cent penalty; and (b) whether, if title I is construed as foreclosing such an option, the Congressional requirement that just compensation be paid upon removal of outdoor advertising signs is invalid as applied to a state where the removal can constitutionally be effected under the police power.

Ramsey Clark, then Acting Attorney General, in an opinion issued November 16, 1966,⁵³ concluded (a) that title I must be read as requiring each state to afford just compensation upon removal of outdoor advertising signs as a condition of avoiding the ten per cent penalty and (b) that there is no basis for concluding that this requirement is unconstitutional as to any state.

Clark's opinion points out, with respect to the first question, that title I does not by express language either require or forbid the application of the ten per cent penalty in the event of an election by a state to rely upon its police power in removing outdoor advertising signs. But the intent of Congress that the penalty should be applied if the state so elects is reasonably inferable from the language of the Act and the legislative history of title I.⁵⁴ Subsection (c) defines "effective control" to mean that, after January 1, 1968, advertising signs "shall, *pursuant to this section*, be limited to" ⁵⁵ specified types. The italicized words may reasonably be interpreted to require that, where the control of signs requires removals, the standard of effective control has not been met unless just compensation has been paid in accordance with subsection (g). Moreover, title IV of the Highway Beautification Act includes section 401, which, although it is poorly drafted, clearly indicates the intent of the Congress to assure, so far as possible, that just compensation should be paid whenever lawfully existing advertising signs are "taken" or an existing and reasonable use of land for advertising purposes is "restricted."⁵⁶

Even if the language referred to in the preceding paragraphs is not deemed sufficiently clear to establish the congressional intent to require compensation, the legislative history of the Highway Beautification Act removes all reasonable doubt. The Administration-sponsored bill, S. 2084, which originated title I, did not require compensation. It originally contained the following subsection:

53. 42 OP. ATTY. GEN. NO. 26 (1966).

54. *Id.* at 2-5.

55. 23 U.S.C. § 131(c) (1970) (emphasis added).

56. See Highway Beautification Act of 1965, Pub. L. No. 89-285, tit. IV, § 401, 79 Stat. 1033: "Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act."

(g) Whenever a State shall submit evidence satisfactory to the Secretary that it is unable to secure effective control, as herein provided, under its police powers, Federal-aid funds may be used to pay the Federal pro rata share of the costs of providing effective control by purchase or condemnation.⁵⁷

It is apparent from the hearings that this provision was quite unsatisfactory to the members of both the House and the Senate committees.⁵⁸ The Senate Committee on Public Works rewrote it to include a flat provision for the payment of just compensation upon removal of outdoor advertising signs and explained that action as follows:

This section, as originally proposed, would have required the States, wherever the authority exists, to exercise their police power in acquiring advertising rights. The committee emphatically and unanimously rejects the use of police power in acquiring these rights, and has provided for the use of Federal funds for paying the Federal pro rata share of the acquisition costs of such rights through purchase or condemnation. Such payment is mandatory, not permissive, on the States.⁵⁹

Similar remarks appear in the report of the House Committee on Public Works.⁶⁰ It is thus clear that the revision of the bill to provide for payment of just compensation to those who suffered loss as a result of removal of outdoor advertising signs was intended by the Senate and House committees to leave no room for a penalty-free election by any state to rely upon its police power and avoid payment of compensation.

It is also clear from the floor debates that the "mandatory" character of the just compensation provision was understood by the members of Congress. For example, in response to a question as to what would happen if a state decided not to pay its twenty-five per cent share of the just compensation, Senator Randolph, Chairman of the Senate Committee on Public Works and floor manager of S. 2084, stated that ten per cent of the state's federal-aid highway funds would be withheld until the state complied.⁶¹ And section 401 was added to

57. S. 2084, 89th Cong., 1st Sess., tit. I, § 101(g) (1965).

58. See, e.g., 1965 Senate Hearings, *supra* note 21, at 43, 69-72, 98, 226, 278-81, 286-87; 1965 House Hearings, *supra* note 21, at 22-24, 39-41, 43-51, 107-08, 207-08, 250-52, 391.

59. 1965 SENATE REPORT, *supra* note 20, at 7.

60. 1965 HOUSE REPORT, *supra* note 7, at 71.

61. 111 CONG. REC. 23874 (1965). See also discussion of "compensation" in 111 CONG. REC. 23869 (Sen. Randolph), 23872 (Sen. Cooper and Sen. Muskie), 23875 (Sen. Randolph), 23880 (Sen. Randolph), 23883 (Sen. Cooper and Sen. Randolph), 23887-88 (Sen. Fong), 24126 (Sen. Dirksen and Sen. Randolph), 23134 (Sen. Allott), 26259 (Rep. Karth: "[I]f the States do not pay the 25 percent they will be subject to a loss of money"), 26261 (Rep.

the Highway Beautification Act on the floor of the Senate at the insistence of the late Senator Dirksen for the express purpose of making it absolutely clear that it was the congressional policy to encourage the payment of compensation rather than to authorize the states to rely on their police power to implement titles I and II.⁶²

Even if the only clues to congressional intent in enacting subsection (g) of title I were the subcommittee hearings, the Committee reports, and the floor debates with regard to the original Act, I would conclude that the Attorney General's opinion is correct in stating that "in order to receive a full allocation of highway funds, a State must provide compensation in accordance with section 131(g) even though it is in a position to accomplish the required removals of billboards by other means."⁶³ But title I has been the subject of subcommittee consideration every year from 1967 through 1969, and there were extensive floor debates in both the Senate and House before enactment of the 1968 amendments to title I. Without exception, these hearings and floor debates reinforce the conclusion that Congress intended to require the payment of compensation upon removal of advertising signs as a condition of avoiding the ten per cent penalty.⁶⁴

In light of the legislative history and subsequent congressional treatment of the just compensation requirement of subsection (g), I find quite unpersuasive the argument of Lamm and Yasinow that Congress did not really intend by that subsection to require *full* compensation for the value of sign owners' and landowners' interests when nonconforming signs were removed, but rather "thought that partial or even full amortization of both sign owner and property

Kluczynski), 26262 (Rep. Edmondson), 26272 (Rep. Wright), 26274 (Rep. Blatnik), 26281-82 (Rep. Pelly), 26318 (colloquy on "compensation") (1965).

62. For the text of section 401, see note 56 *supra*. When Senator Dirksen originally proposed the amendment that became section 401, he said: "[T]his is a restatement of the principles laid down in article V of the Bill of Rights in the Constitution." In response, Senator Randolph said, "I believe that the just compensation features of the Senate bill 2084 are clear and conclusive on this point; but it is a restatement, and I agree, and join the Senator from Illinois in accepting the amendment." 111 CONG. REC. 24126 (1965). Before final passage, the amendment as offered by Senator Dirksen was slightly altered by a substitute proposed by Senator Randolph. 111 CONG. REC. 24139 (1965).

63. 42 OP. ATTY. GEN. No. 26, at 4-5 (1965).

64. See, e.g., 1969 House Hearings, *supra* note 43, at 155. Paul Spooner, General Counsel, Roadside Business Association, stated he had been informed that the Federal Highway Administration had informed at least one State "that the just compensation provisions of the Federal act are not really binding and that there are ways to evade it." In response, Rep. Cramer said, "We very clearly stated . . . that when signs are removed there is to be just compensation. I do not think there is any doubt in the mind of any member of this committee that that was the intention and purpose and the only fair way to require the removal of signs."

owner interests could be accomplished during [the 5-year grace period allowed under subsection (e)], thus making 'compensation' as described in the act partially or totally unnecessary."⁶⁵ It may well be, as Lamm and Yasinow assert, that "[m]any people . . . assumed that the use of the state police power to impose billboard control restrictions, which were the same or greater than those imposed by the federal statute, would continue to be available and would not impose an obligation to 'justly compensate' upon either Federal or state Government," and that "[f]or these people the opinion of the Attorney General declaring that a state risked losing its Federal-Aid Highway funds if it did not provide 'just compensation' came as no small shock."⁶⁶ But this assumption, and the shock that ensued when the Attorney General's opinion was issued, were primarily due to a failure to read carefully the legislative history of title I, subsection (g) of the 1965 Act. That the state highway agencies have generally accepted the Attorney General's opinion on this point is evidenced by the fact that no state has challenged his interpretation, either in an action under subsection (l) contesting a determination to withhold funds or in a declaratory judgment action under the judicial review provisions of the federal Administrative Procedure Act⁶⁷ to determine whether it conflicts with the tenth amendment.

It should be emphasized that Congress, in including the just compensation requirement in title I, intended to do more than simply affirm state and federal constitutional guarantees of just compensation when private property is taken for public use.⁶⁸ If that were all that subsection (g) was intended to do, any state that can constitutionally use its police power to effect the removal of highway advertising signs would be free of the federal compensation requirement, because in such a case there would be no "taking" of private property in the constitutional sense. But Congress intended virtually to rule out use of state police power and to require the states, when highway

65. Lamm & Yasinow, *supra* note 48, at 444.

66. *Id.* at 443.

67. 5 U.S.C. §§ 701-06 (1970).

68. Section 401 of the Highway Beautification Act, set out in note 56 *supra*, is not very helpful, but on the whole I believe it supports the position stated in the text. It is clear that section 401 was added during consideration of the Act on the floor of the Senate simply to satisfy the late Senator Dirksen. I do not believe much weight should be given to Senator Dirksen's statement that "this is a restatement of the principles laid down in article V of the Bill of Rights in the Constitution." 111 CONG. REC. 24126 (1965). See note 62 *supra*. Certainly it does not indicate that Senator Dirksen favored the use of the police power in any state where state and federal constitutions permit the removal of nonconforming signs without compensation. Indeed, it is likely that Senator Dirksen interpreted the due process clause of the United States Constitution to require payment of compensation upon removal of *any* lawfully erected nonconforming sign.

advertising signs are removed, either to pay the sign owners and landowners affected by the removal just compensation determined by mutual agreement or to utilize their power of eminent domain. If a state uses its power of eminent domain, "just compensation" must, of course, be determined by the state courts in accordance with their usual rules in eminent domain cases.

The legislative history of title I includes many instances in which proponents of the legislation stated that subsection (g) makes the payment of just compensation upon removal of highway advertising signs "mandatory."⁶⁹ Consequently, it is necessary to determine whether subsection (g) was intended to create an absolute federal right to compensation on the part of the affected sign owners and landowners, even if a state might prefer to use its police power to bring about removal of highway advertising signs and run the risk of incurring the ten per cent penalty provided by subsection (b).

This issue was in fact raised and decided in *Markham Advertising Co. v. State*,⁷⁰ although in a strict sense what the court said with respect to it was only a dictum. In the *Markham* case a large group of outdoor advertising companies challenged the constitutionality of the Washington Highway Advertising Control Act of 1961⁷¹ on various grounds. The Washington statute provided for the regulation of outdoor advertising in line with the Federal-Aid Highway Act of 1958.⁷² The Washington statute, *inter alia*, prohibited all off-premises advertising signs within designated scenic areas, and in certain other areas permitted off-premises advertising signs only within twelve miles of the activity advertised.⁷³ The statute specifically declared it unlawful to maintain after March 11, 1964, or, in areas zoned for commercial or industrial use, after March 11, 1965, any signs erected prior to

69. See text accompanying notes 59-62 *supra*. See also S. REP. NO. 542, 90th Cong., 1st Sess. 10 (1967) (the Senate Committee "reaffirmed its belief that mandatory compensation was necessary as a matter of simple justice"); H.R. REP. NO. 713, 90th Cong., 1st Sess. 5 (1967):

The committee believes that a clear statement of Congressional intent, as expressed in the law, is called for.

Section 131(g) and section 136(j) . . . clearly and unequivocally require that just compensation shall be paid

Other alternative methods of handling the compensation requirement . . . were considered and rejected The language of the law is explicit, and it is not really susceptible of misinterpretation. "Just compensation shall be paid * * *" is what the law says, and that is what it means.

70. 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).

71. Ch. 96, [1961] Wash. Laws 1575, WASH. REV. CODE ANN. § 47.42.010-.910 (1961), as amended, WASH. REV. CODE ANN. § 47.42.020-.911 (Supp. 1972).

72. Pub. L. No. 85-381, 72 Stat. 89.

73. WASH. REV. CODE ANN. § 47.42.040 (Supp. 1972).

March 11, 1961, that did not comply with the statute and regulations issued thereunder.⁷⁴

All the nonconforming signs owned by the plaintiffs and involved in the *Markham* case were lawfully erected prior to March 11, 1961,⁷⁵ and became unlawful, at the latest, on March 11, 1965.⁷⁶ Thus, the just compensation requirement of subsection (g) of title I of the Highway Beautification Act was inapplicable, since the signs in question were not "lawfully in existence" on October 22, 1965, the date of the enactment of that Act. Notwithstanding this obvious fact,⁷⁷ however, the plaintiffs in the *Markham* case argued that the just compensation requirement under subsection (g) is absolutely mandatory—that Congress intended thereby "to displace contrary or inconsistent provisions in the laws of this state [Washington], and in that respect has preempted, under the supremacy clause of the federal constitution, this field of legislation"—and hence that the signs in question could not be removed under the Washington statute without payment of just compensation therefor.⁷⁸ Both the trial court and the Supreme Court of Washington dealt with this argument on the merits, apparently overlooking the fact that, even if the argument were accepted, subsection (g) had no application to the signs of the plaintiffs.

The trial court rejected the argument that Congress had preempted the field by imposing an absolutely mandatory requirement of just compensation upon removal of advertising signs: "In passing the Highway Beautification Act of 1965 . . . Congress did not intend to pre-empt the subject of highway advertising control. Rather, Congress intended to encourage the states to control highway advertising

74. WASH. REV. CODE ANN. § 47.42.100(1) (Supp. 1972). The original act required removal of all signs by March 11, 1964, ch. 96, § 10(1), [1961] Wash. Laws 1579, but a 1963 amendment extended the grace period to March 11, 1965, for nonconforming signs located in areas zoned for commercial or industrial use within any city or town. Ch. 3, § 55(4), [1963] Wash. Laws Extraordinary Sess. 1323.

75. 73 Wash. 2d at 414, 439 P.2d at 254.

76. WASH. REV. CODE ANN. § 47.42.080 (Supp. 1972) expressly declares that "[a]ny sign erected or maintained contrary to the provisions of this chapter or regulations promulgated hereunder . . . shall be a public nuisance" subject to removal on fifteen days' notice to the "permittee" or the owner of the land on which the sign is located.

77. This point was completely missed by counsel for the advertising companies, who asserted in their brief that "virtually all of appellants' signs involved in this case were 'lawfully in existence' on October 22, 1965, by virtue of permits from the State Highway Commission." Brief for Appellants at 22-23. In fact, the Highway Commission had ordered appellants to remove their nonconforming signs because their "amortization" periods of either three or four years had all expired. If the use of the police power to require removal was otherwise valid, it is clear that none of the signs involved in the suit were "lawfully in existence" on October 22, 1965.

78. Brief for Appellants at 22-25; Appellants' Petition for Rehearing at 2-8, apps. A, B & C.

by making it financially advantageous for a state to do so.”⁷⁹ When the plaintiffs urged the same argument on appeal, the Washington Supreme Court also rejected it.⁸⁰ In a petition for rehearing before the supreme court, the appellants repeated the argument.⁸¹ The petition was denied.⁸²

The plaintiffs’ appeal to the United States Supreme Court was dismissed per curiam “for want of a substantial federal question”;⁸³ a subsequent petition for rehearing was also denied.⁸⁴ Unfortunately, a per curiam dismissal of an appeal “for want of a substantial federal question” is not the equivalent of a decision upholding a challenged state statute on the merits. But even though the issue has not yet been conclusively decided, it is reasonably clear that the Washington Supreme Court’s interpretation of subsection (g) of title I of the Highway Beautification Act is correct.

Subsection (g) must, of course, be read in context, as part of the Highway Beautification Act as a whole, and as part of chapter 1 of title 23 of the United States Code. All of the provisions of chapter 1 of title 23 define the position of the federal government as passive, except that it is to supply, and to specify conditions for the use of, funds for the states to use for highway purposes. Under this chapter the federal government builds no highways; that has historically been a responsibility of the states. All the provisions of chapter 1 of title 23, including section 131 as a whole (title I of the Highway Beautification Act) and subsection (g) thereof, are a part of that web of specifications and conditions; the only inducement for the states to comply is the grant of federal funds. The Highway Beautification Act, clearly based on the same premise as the earlier provisions of chapter 1, title 23 of the United States Code, utilizes both the whip and the carrot to induce the states to build and maintain interstate and primary highways in accordance with certain federal conditions. Both title I and title II (dealing with control of highway junkyards) of the Highway Beautification Act use the whip—a ten per cent penalty—while title III (dealing with landscaping and scenic enhancement) uses the carrot—a three per cent bonus. To single out subsection (g) of title I and argue that it proceeds on an entirely different premise is absurd.

79. 73 Wash. 2d at 417, 439 P.2d at 256. *Accord*, *Southeastern Displays, Inc. v. Ward*, 414 S.W.2d 573 (Ky. 1967).

80. 73 Wash. 2d at 419, 439 P.2d at 257.

81. Appellants’ Petition for Rehearing at 2-8, apps. A, B, & C.

82. 73 Wash. 2d at 433, 439 P.2d at 257.

83. 393 U.S. 316 (1969).

84. 393 U.S. 1112 (1969).

Title I of the Highway Beautification Act deals with only one aspect of the federal program of grants-in-aid for highway construction and merely imposes certain conditions as a prerequisite to a state's receiving its full allocation of federal funds. There is no suggestion anywhere in the language of title I that Congress intended to impose any absolute, mandatory requirements with respect to highway beautification by virtue of its power to regulate interstate commerce. The use of the word "shall" in subsection (g) certainly cannot be read as imposing such a requirement. The word "shall" occurs throughout chapter 1 of title 23 of the United States Code, but provisions containing the word are mandatory only if the state wants to obtain a certain share of the federal-aid highway funds. This has been the universal interpretation and uniform theory of administrative practice under the federal-aid highway laws since their inception in 1916. Similarly, as we have already seen,⁸⁵ the phrase "shall not be required to be removed" in subsection (e) of the same title of the Highway Beautification Act does not prohibit removal of nonconforming signs by the states in less than the stated period of time but merely indicates that no state is required to remove such signs in less than such period in order to avoid the ten per cent penalty imposed under subsection (b).

All of the subcommittee hearings in 1965 proceeded on the assumption that the title I requirements were mandatory on the states only in the sense that the states must comply with them in order to avoid the ten per cent penalty. There is nothing in the hearings to indicate that the subcommittee members intended to forbid absolutely the use of any state's police power to eliminate highway advertising signs, although it was clearly assumed that few, if any, states would be willing to suffer the ten per cent penalty in order to avoid payment of just compensation to sign owners and landowners. Consequently, the statement in the Senate committee report that "[s]uch payment is mandatory, not permissive, on the States"⁸⁶ and the statement in the House committee report that "compensation must be paid to those individuals who will lose their signs"⁸⁷ must both be read as meaning that payment of just compensation is mandatory if, and only if, a state wishes to receive its full share of federal funds.

The floor debates proceeded on the same assumption as the subcommittee hearings.⁸⁸ The amendment on the floor that added sec-

85. See text following note 52 *supra*.

86. See text accompanying note 59 *supra*.

87. 1965 HOUSE REPORT, *supra* note 7, at 7.

88. See text accompanying note 61 *supra*.

tion 401 to the Highway Beautification Act⁸⁹ can be considered an admonition to the states not to take property unconstitutionally in the course of implementing the Act, but it cannot reasonably be read as imposing on them an absolute duty to compensate in the absence of a constitutional requirement.

As previously suggested,⁹⁰ subsection (g) does not require the states to pay just compensation upon removal of advertising signs that were already unlawful on the date of the enactment of title I, whether the signs were unlawful because they were erected in violation of an existing state law or local ordinance or because they were maintained after the date set for removal by a valid state law or local ordinance enacted under the state's police power. Subsection (g) only directs that "just compensation shall be paid upon the removal of" advertising signs either (1) lawfully in existence on October 22, 1965,⁹¹ or (2) lawfully on any highway made a part of the interstate or primary system between October 22, 1965, and January 1, 1968, or (3) lawfully erected on or after January 1, 1968. Category (1) is designed to include signs lawfully in existence along interstate or primary highways on October 22, 1965, that became nonconforming as a result of the enactment of title I. Category (2) is designed to include signs lawfully erected along federal-aid secondary or other highways that became nonconforming when the highways were incorporated into the interstate or primary systems during the period between October 22, 1965, and January 1, 1968. Category (3) includes all signs lawfully erected on or after January 1, 1968, that later became nonconforming for whatever reason.

Even assuming that just compensation is clearly required in a given case by subsection (g), how is the amount of compensation to be determined? Subsection (g) provides that compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

89. See note 56 *supra* and accompanying text.

90. See text accompanying notes 70-84 *supra*.

91. Note the discrepancy between subsection (e) with its cut-off date of September 1, 1965, and subsection (g) with its cut-off date of October 22, 1965. This discrepancy appears to be inadvertent.

This provision, unfortunately, is perhaps the most ambiguous of many ambiguous provisions in title I of the Highway Beautification Act. Only one thing is really clear: Congress intended that compensation should be paid to both the sign owner and the landowner in the usual case where the sign itself is not owned by the owner of the land on which it is located and that, where one person owns both the sign and the land, he is to receive all the compensation.

With respect to the interests of both the sign owner and the landowner, it seems clear that any amount of compensation agreed upon and accepted will satisfy the subsection (g) requirement of just compensation.⁹² But the agreed compensation will normally approximate what the parties believe the sign owner and the landowner would receive in an eminent domain proceeding. Eminent domain proceedings themselves will probably have to be used in at least some cases, because the state will be unable to reach an agreement on compensation with the sign owner, the landowner, or both. Consequently, it is necessary to try to ascertain what property interests are to be paid for under subsection (g).

Subsection (g) says, first, that the sign owner is to be compensated for the "taking . . . of all right, title, leasehold, and interest in" his signs. The reference to the sign owner's "leasehold" in the sign is confusing, since ownership implies an absolute property interest rather than simply a leasehold. Probably the draftsman intended to require compensation for the taking of the sign owner's "leasehold" *in the land* in those cases where the sign is erected pursuant to a lease on land not owned by the owner of the sign. Presumably the reference to a "leasehold" will be so construed, despite the defective draftsmanship.⁹³ It should be noted, however, that the so-called "leasehold" of the sign owner is usually not really a leasehold estate carrying with it an exclusive right to possession of a defined area for a term of years. Instead, it commonly is some sort of easement or license.⁹⁴ Since "leases" that authorize the maintenance of signs on vacant land usually purport to lease "as much of the premises . . . as may be necessary for the construction of advertising structures or displays and supports

92. The criteria of the former Bureau of Public Roads for federal participation may not, of course, allow full payment of 75 per cent of the amount agreed upon. See U.S. Bureau of Public Roads, Dept. of Commerce, Policy and Procedure Memorandum 80-9, ¶ 5 (March 31, 1967) [hereinafter Policy and Procedure Memorandum 80-9].

93. The California compliance law uses language based on the suggested construction. See text accompanying note 191 *infra*.

94. 1 AMERICAN LAW OF PROPERTY § 3.4, at 184-85 (A.J. Casner ed. 1952). *Accord*, Wilson, *Billboards and the Right To Be Seen from the Highway*, 30 GEO. L.J. 723, 745-47 (1942).

therefor,"⁹⁵ without designating very precisely where within the tract leased such structures are to be erected, and allow the lessor to use the land for any purpose that will not interfere with its use for advertising purposes, it seems clear that such an arrangement really creates an "easement for a term of years" rather than a true leasehold estate. Some cases describe the interest created as a "license," but a license by definition is revocable at the will of the landowner. Whenever the advertising lease is for a definite term and indicates the intent of the parties that it should not be revocable at the landowner's will, it should be deemed to create an easement rather than a license.⁹⁶

What about the sign owner's interest in the sign itself? When an advertising sign is "annexed" to the land or to a building on the land by the landowner himself, it seems clearly to meet the test of a "fixture," and thus to be real property, under either the strict English rule⁹⁷ or the American rule as stated in *Teaff v. Hewitt*.⁹⁸ But most

95. This wording is from standard lease forms used by Central Advertising Company of Michigan. Other outdoor advertising companies use lease forms with slightly different language, but the substance is generally similar.

96. Sometimes the instrument gives the outdoor advertising company the right to use the land for advertising purposes for a short term, subject to the landowner's power to terminate the company's rights on 30 days' notice in the event the property is sold, leased for anything other than advertising use, or desired for building construction. Even such an instrument—often termed a "letter of permission" rather than a "lease"—seems to create an easement rather than a mere license, although the easement is subject to a power of termination upon the occurrence of specified events. In some states, certain rural advertising signs have been erected on the basis of a mere revocable permission or license, but my understanding is that such licenses have generally been replaced by leases creating easements since enactment of the Highway Beautification Act of 1965.

Whether the easement created by an advertising lease should be classified as an "easement appurtenant" or an "easement in gross" is a more difficult question. In the case of an off-premise advertising sign maintained by a roadside business establishment, it can reasonably be argued that the easement created by the advertising lease is appurtenant to the property where the business is conducted. But it is more difficult to regard the advertising plant of a standardized outdoor advertising company as a dominant tenement to which the easement created by an advertising lease is appurtenant—especially since the plant consists largely of the very advertising structures that are erected and maintained at various locations by virtue of the company's advertising leases. On the whole, it would seem that the easement created by a lease to a standardized outdoor advertising company is an easement in gross rather than an easement appurtenant. *See, e.g.,* *Whitmier & Ferris Co., Inc. v. State*, 12 App. Div. 2d 165, 166, 209 N.Y.S.2d 247, 248 (1961); *Rochester Poster Advertising Co. v. Smithers*, 224 App. Div. 435, 436, 231 N.Y.S. 315, 318 (1928); *Borough Bill Posting Co. v. Levy*, 144 App. Div. 784, 789, 129 N.Y.S. 740, 743 (1911); *Rochester Poster Advertising Co. v. State*, 27 Misc. 2d 99, 102, 213 N.Y.S.2d 812, 815 (Ct. Cl. 1961). The same conclusion is reached in *Wilson*, *supra* note 94, at 74. It is entirely possible, however, that some courts may classify these as easements appurtenant in response to the claims of the outdoor advertising companies for severance damages.

97. The English rule requires attachment or affixation to the land. *See* 5 AMERICAN LAW OF PROPERTY § 19.2 (A.J. Casner ed. 1952).

98. The court in *Teaff v. Hewitt*, 1 Ohio St. 511, 530 (1853), defined a fixture as possessing the following characteristics:

1st. Actual annexation to the realty, or something appurtenant thereto.

2d. Appropriation to the use or purpose of that part of the realty with which it is connected.

advertising signs are erected on land owned by someone other than the owner of the sign, pursuant to an advertising lease. In this situation of divided ownership, the American rule may create difficulties.

In the English common law, an exception to the rule that fixtures become part of the realty and cannot be removed was made in the case of tenants' "trade fixtures," which—although they were held to belong to the landlord while in place—could be removed by the tenant at or before the end of his tenancy.⁹⁹ In the United States, most courts have liberalized the English "trade fixture" doctrine substantially.¹⁰⁰ However, in the process American courts have had great difficulty in dealing with the question of whether fixtures that are removable by a tenant are real or personal property while they are in place. Courts have generally refrained from laying down a rigid rule for determining their character in all situations,¹⁰¹ but frequently, when their precise legal character is not really in question, courts speak of removable fixtures as personalty, apparently thinking that this legal status necessarily follows from the fact that the tenant can remove them.¹⁰² Strictly speaking, however, it would seem that removable tenant fixtures, like other fixtures, are part of the realty until removed, with the tenant's right of removal existing apart from, and independently of, his unquestioned right to remove any personal chattel that, although it is on the land, has not become a part of the realty for any purpose.¹⁰³ The view that removable tenant fixtures are personal property while in place is certainly inconsistent with the generally accepted rule that the tenant loses his right to remove fixtures, but not mere personal chattels, if he fails to remove them from the leased premises at or before the end of the lease term.¹⁰⁴

In practice, most courts recognize that removable tenant fixtures are on the dividing line, in the "twilight zone" between real and personal property.¹⁰⁵ However, the view that a removable tenant fixture

3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

(Emphasis original.) See generally 5 AMERICAN LAW OF PROPERTY § 19.3 (A.J. Casner ed. 1952).

99. See 5 AMERICAN LAW OF PROPERTY § 19.2, at 11-14 (A.J. Casner ed. 1952).

100. *Id.* § 19.11, at 41-42. See generally 36A C.J.S. *Fixtures* §§ 33-42 (1961).

101. See, e.g., *Pennington v. Black*, 261 Ky. 728, 88 S.W.2d 969 (1935).

102. See, e.g., cases cited in 36A C.J.S. *Fixtures* § 37, at 686 n.48 (1961).

103. See, e.g., cases cited in *id.* § 37, at 686 n.50.

104. See 5 AMERICAN LAW OF PROPERTY § 19.11, at 43-44 (A.J. Casner ed. 1952); 36A C.J.S. *Fixtures* § 41, at 693-94 (1961).

105. See, e.g., *Frost v. Schinkel*, 121 Neb. 784, 238 N.W. 659 (1931). See also 5 AMERICAN LAW OF PROPERTY § 19.11, at 42-43 (A.J. Casner ed. 1952).

is realty has generally been applied in connection with the taking of land for public use, so that the condemnor must pay for the fixtures as part of the realty but the compensation will go to the tenant because of his right of removal.¹⁰⁶ Even if a removable tenant fixture is considered as personalty between the landowner and the tenant, the courts almost uniformly take the position that this rule is entirely for the protection of the tenant and cannot be invoked by the condemnor. As Nichols says, "[i]f the fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant."¹⁰⁷ The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 now makes this rule binding on the states "to the greatest extent practicable under State law."^{107a} Thus, if signs erected pursuant to an advertising lease are classified as removable tenant fixtures, as they will be in most jurisdictions, a state highway agency taking such signs pursuant to an advertising control statute would generally be compelled to pay for them as part of the realty.¹⁰⁸

Suppose, however, that in a particular state it is determined that an advertising sign is personalty rather than realty. In that case, after the sign owner's leasehold in the land on which the sign is located has been taken by the state, it may require him to remove the sign at his

106. This rule—stated in 2 P. NICHOLS, EMINENT DOMAIN §§ 5.81[2], 5.83 (rev. 3d ed. J. Sackman 1970); 4 *id.* § 13.12 (1971)—is supported by many cases. *See, e.g.*, *United States v. Certain Property*, 344 F.2d 142 (2d Cir. 1965); *Carmichael v. United States*, 273 F.2d 392 (5th Cir. 1960); *Gilbert v. State*, 85 Ariz. 321, 338 P.2d 787 (1959); *City of Los Angeles v. Hughes*, 202 Cal. 731, 262 P. 737 (1927); *Roffman v. Wilmington Housing Authority*, 179 A.2d 99 (Del. 1962); *Bales v. Wichita M.V.R.R.*, 92 Kan. 771, 141 P. 1009 (1914); *Cornell-Andrews Smelting Co. v. Boston & P.R.R.*, 209 Mass. 298, 95 N.E. 887 (1911); *Sheehan v. City of Fall River*, 187 Mass. 356, 73 N.E. 544 (1905); *State v. Peterson*, 134 Mont. 52, 328 P.2d 617 (1958); *Poillon v. Gerry*, 179 N.Y. 14, 71 N.E. 262 (1904); *In re City of New York*, 256 N.Y. 236, 176 N.E. 377 (1931); *Consolidated Ice Co. v. Pennsylvania R.R.*, 224 Pa. 487, 73 A. 937 (1909); *North Coast R.R. v. Kraft Co.*, 63 Wash. 250, 115 P. 97 (1911).

107. 2 P. NICHOLS, *supra* note 106, § 5.81[2], at 5-414.

107a. Pub. L. No. 91-646, § 305(1), 84 Stat. 1906 (codified at 42 U.S.C. § 4655(1) (1970)).

108. *City of Buffalo v. Michael*, 16 N.Y.2d 88, 92, 209 N.E.2d 776, 777, 262 N.Y.S.2d 441, 442-43 (1965); *Whitmier & Ferris Co. v. State*, 12 App. Div. 165, 167, 209 N.Y.S.2d 247, 249 (1961); *Rochester Poster Advertising Co. v. State*, 27 Misc. 2d 99, 103, 213 N.Y.S.2d 812, 816 (Ct. Cl. 1961), *affd. mem.*, 11 N.Y.2d 1036, 230 N.Y.S.2d 30 (1962); *Stein Brewery Co. v. State*, 200 Misc. 424, 426, 103 N.Y.S.2d 946, 949 (Ct. Cl. 1951). Some of the state advertising control laws expressly provide that advertising signs shall be deemed to be trade fixtures. *See, e.g.*, N.M. STAT. ANN. § 55-11-6(C)(1) (Supp. 1971); OKLA. STAT. ANN. tit. 69, § 1280(b) (Supp. 1972). In a few states, however, the very existence of the right of removal is a proper basis for the denial of compensation to the lessee for the value of improvements in their unsevered condition. *See, e.g.*, *Mayor of Baltimore v. Gamse*, 132 Md. 290, 104 A. 429 (1918).

own expense by virtue of the police power.¹⁰⁹ Would this be inconsistent with the just compensation requirement of subsection (g) on the ground that subsection (g) requires either that the "title" of the sign owner to the sign be taken and paid for before the sign is removed, or that, if the sign owner does retain his title, he be compensated for the cost of any removal that he is required to perform himself? The language of subsection (g) provides no clear answer to this problem, but I think it likely that the subsection will be held to require compensation of the sign owner for his interest in the sign on one basis or the other, even though it would be both constitutional and in accord with state law to require removal of the sign without further compensation once the sign owner's leasehold has been taken.¹¹⁰ In any case, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 now requires state highway agencies to pay for "actual reasonable expenses in moving . . . personal property" or "actual direct losses of tangible personal property as a result of moving . . . a business . . . operation" pursuant to any federally assisted programs.^{110a}

That portion of subsection (g) defining the compensation due to the owner of the land on which an advertising sign is located when the sign is removed is also quite ambiguous. It is clear that the landowner must be compensated for the loss of his rights under the existing advertising lease or other rental agreement with the sign owner. But what about the landowner's right to erect and maintain, or to authorize others to erect and maintain, advertising signs in the future? The use of the plural in the final phrase of subsection (g)¹¹¹ suggests

109. *Cf. Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328 (1964), where, in dealing with the question whether the police power could be used to eliminate lawfully erected signs made nonconforming by a state law designed to implement the Federal-Aid Highway Act of 1958, the court said, "There is nothing to indicate that they ever became fixtures so as to be part of the real estate." 176 Ohio St. at 440, 200 N.E.2d at 339. The implication was that if the signs were not "part of the real estate" there would be no right to compensation for them when removal was required. But *Ghaster Properties* involved the constitutionality of a statute that did not provide for compensation.

110. This conclusion is based mainly on the repeated statements during the Senate and House hearings and debates, by proponents of compensation, that equity or fairness requires payment of compensation even if the federal or state constitutions do not. *See, e.g., 1965 Senate Hearings, supra* note 21, at 43 (Sen. Randolph: "Perhaps [use of police power without compensation] is legal, we would say, but is it equitable?"); *1965 House Hearings, supra* note 21, at 46 (Rep. Edmondson: "The problem . . . may not be so much constitutional as moral . . .").

110a. Pub. L. No. 91-646, § 202(a), 84 Stat. 1895 (codified at 42 U.S.C. § 4622(a) (1970)). This provision is made applicable to state agencies under certain circumstances by 42 U.S.C. § 4628 (1970).

111. In paragraph (A) of subsection (g), dealing with the sign owner's interest, the singular is used: "all right, title, leasehold, and interest in such *sign, display, or device*"

that Congress intended to require payment of just compensation for the taking of what would amount to a *permanent* negative easement in the land—that is, a perpetual restriction against erection and maintenance of “such signs, displays and devices thereon.” But the congressional intent is not clear from the language of subsection (g), and the legislative history is of little assistance on this point.¹¹² Perhaps it would be more consistent with the traditional zoning law approach to nonconforming uses to construe subsection (g) as requiring compensation only for the loss of the landowner’s rights under the *existing* lease or other rental agreement, thus permitting the state to prohibit *future* erection of signs within the control area through police power regulation. The former Bureau of Public Roads seems initially to have adopted this construction, with one minor qualification,¹¹³ but the current position of the Federal High-

(emphasis added). But in paragraph (B), dealing with the landowner’s interest, the plural is used: “the right to erect and maintain such *signs, displays, and devices thereon*” (emphasis added).

112. The colloquy between Senators Holland and Randolph, 111 CONG. REC. 23879 (1965), is inconclusive. Senator Holland said, “The Senator realizes that when it comes to condemnation along the primary roads, it involves buying up easements of 600 feet on each side of the roadway; does he not?” Senator Randolph replied, “Yes, where advertising structures are now maintained under agreements in effect on date of enactment of the pending measure.” Shortly thereafter, Senator Randolph said, “It is estimated that we shall need approximately \$180 million for the advertising rights for the interstate and the primary systems. This means that signs, as well as easements, where the areas have been used for advertising, would be involved. We do not contemplate the payment for easements over all systems, but only where the rights-of-way have been exercised.” 111 CONG. REC. 23880 (1965).

Later in the Senate debate, Senator Allott said:

Mr. President, it is fairly easy to ascertain the cost of a sign. There is an invoice somewhere; there is a check somewhere which will show how much the sign cost. In addition to the sign, there is also the cost that the sign owner pays to the landowner for the use of the land for the erection of the sign.

But I point out also that included here—and it cannot possibly be avoided—is payment to the landowner for the leasehold he has lost. No one can possibly begin to estimate the cost to this country, when these particular items are capitalized—and paid for—and capitalization is the only way that these values can be ascertained.

For example, if an owner rents a space for the sum of \$250 a year, the only possible way that the owner can be compensated for the loss of his lease to the sign owner is by the capitalization of that \$250 or \$500, or whatever it may be.

111 CONG. REC. 24234. This statement clearly indicates that Senator Allott, at least, thought that the interest taken from the landowner would be a perpetual negative easement. Otherwise, there would be no need to capitalize the annual sign rental to determine the landowner’s compensation.

113. Policy and Procedure Memorandum 80-9, *supra* note 92, ¶ 5(a)(6), includes the following provision: “Federal funds may participate in payments made to landowners where existing signs are removed. While this payment is for *the right to erect and maintain the existing signs*, it may, insofar as Federal reimbursement is concerned, include purchase of the right to erect *future signs in the control area under a single ownership until such time as the State control law is effective* and an agreement with Public Roads is executed or January 1, 1968, whichever is earlier” (emphasis added).

way Administration is not clear.¹¹⁴ If subsection (g) is construed as requiring the state to take a permanent negative easement, the seventy-five per cent federal share that the state will be entitled to receive will be based on the amount required to compensate the landowner for the taking of such an easement, but if subsection (g) is construed as requiring the state to take only the landowner's rights under the existing advertising lease, the federal share will be calculated only with respect to such rights.

C. *The Constitutionality of Title I*

The constitutionality of federal grants-in-aid to the states, including grants for highway purposes, is so well-settled as not to require discussion. But the just compensation provision in subsection (g) of title I of the Highway Beautification Act could raise a tenth amendment issue¹¹⁵ in so far as it directs the states to pay compensation upon removal of nonconforming signs, even though the signs might constitutionally be removed by use of the police power without compensation.¹¹⁶ If subsection (g) were construed to make the payment of compensation absolutely mandatory, the tenth amendment issue would indeed be substantial. As we have seen, however, that construction must be rejected in favor of one that makes payment mandatory only to the extent that the states must pay just compensation if they wish to obtain a full allocation of federal-aid highway funds and avoid the ten per cent penalty provided by subsection (b) of title I.¹¹⁷ Under this construction of subsection (g), the tenth amendment argument is difficult for the states to make. As the Acting Attorney General pointed out in his opinion sustaining the constitutionality of subsection (g),¹¹⁸ the Supreme Court has consistently upheld statutory provisions conditioning the grant of federal funds upon state com-

114. 23 C.F.R. §§ 750.303(c), .311(c), .312 & pt. 750, app. A, pts. V, VII (1973).

115. The tenth amendment provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the states, respectively, or to the people." Tenth amendment arguments typically raise the question whether a federal program impinges upon the states' right of self-government or their right to exercise the police power.

116. This is the second point discussed in the opinion of Acting Attorney General Clark, issued in response to a request from the Secretary of Commerce. *See* 42 OP. ATTY. GEN. No. 26, at 5-9 (1966). In *Lamm v. Volpe*, 449 F.2d 1202 (10th Cir. 1971), the court affirmed a summary judgment in favor of defendants, holding that plaintiff had no standing as a Colorado citizen and taxpayer to raise the tenth amendment issue, and that the case was moot because of the enactment in Colorado of "a just compensation statute in compliance with . . . the Federal Act." 449 F.2d at 1205.

117. *See* text accompanying notes 85-88 *supra*.

118. 42 OP. ATTY. GEN. No. 26, at 5-9 (1966).

pliance with certain federal standards.¹¹⁹ The only requirements appear to be that the "means . . . are appropriate and plainly adapted to the permitted end"¹²⁰ and that they not be arbitrary.¹²¹

The Acting Attorney General concluded that a ten per cent reduction in federal highway funds was an appropriate and well adapted means to achieve one of the goals of the Highway Beautification Act.¹²² I concur. The argument of Lamm and Yasinow that withholding federal highway funds is an arbitrary and unreasonable method of securing compliance with the Act's beautification program¹²³ is ill-conceived: It ignores the traffic safety argument for billboard removal and does not recognize that aesthetic considerations may be as important as engineering considerations in the creation of a national highway system. Withholding federal highway funds to induce compliance with the billboard removal provisions of the Highway Beautification Act is not unrelated to the federal objectives of the entire federal-aid highway program, although withholding highway funds as a means of achieving nonhighway objectives would lack the requisite relatedness and therefore be arbitrary and unreasonable.¹²⁴ Given the close nexus between the objectives of the Highway Beautification Act and the more general purposes of the federal-aid highway program, it is unlikely that subsection (g) or any other part of title I of the Act could be found to be constitutionally defective.

119. *E.g.*, *Oklahoma v. United States Civil Serv. Commn.*, 330 U.S. 127 (1947); *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

120. *United States v. Darby*, 312 U.S. 100, 124 (1941), *quoted in Oklahoma v. United States Civil Serv. Commn.*, 330 U.S. 127, 143 (1947). *See also Steward Mach. Co. v. Davis*, 301 U.S. 548, 590-191 (1937).

121. 42 OP. ATTY. GEN. No. 26, at 8 (1966).

122. *Id.* at 8-9.

123. The distinguishing element between the two cases cited by former Attorney General Clark and a case which could arise under the Highway Beautification Act of 1965 is obvious. In *Massachusetts [v. Mellon]*, 262 U.S. 447 (1923) matching funds for maternal and child health care were to be denied where federally-approved programs designed for that purpose were not utilized. In *Oklahoma [v. United States Civil Serv. Commn.]*, 330 U.S. 127 (1947) a state highway official could be dismissed by the Federal Government for violation of a federal law, where the Federal Government participated in highway development in that state. But under the 1965 Act, a state which refuses to participate in a national program of beautification not only forfeits Federal Government participation in the state's beautification effort, *i.e.*, a 75 percent share of compensation payments, but must also sustain a 10 percent loss of federal funds for a defense-commerce project, the construction of highways. Analogous to the situation at hand would be a forfeiture of federal funds used in the construction of a state's medical facilities as a result of the state's unwillingness to comply with a federal program of recreation-area development. The two contentions appear equally preposterous.

Lamm & Yasinow, *supra* note 48, at 446 (emphasis original).

124. With all due respect, the "analogy" drawn by Lamm and Yasinow, *supra* note 123, is "preposterous."

II. THE STATE LEGISLATION

A. *In General*

The reaction of the state legislatures to title I of the Highway Beautification Act was mixed. Some states rushed to enact compliance laws, while others delayed the adoption of any implementing legislation for several years. By mid-1970, only thirty-two states had enacted compliance laws. Only eighteen of these had legislation that, as of July 1, 1970, was deemed by the Secretary of Transportation to be in full compliance with title I; of the remaining fourteen, nine had legislation that clearly did not comply with title I, and five had legislation raising substantial doubts as to its compliance. Fifteen additional states had highway advertising control legislation enacted for purposes other than that of complying with title I, the legislation in ten of these fifteen states having been adopted wholly or partly to qualify for the bonus provided by the Federal-Aid Highway Act of 1958. Three states had no highway advertising control legislation at all.¹²⁵

The delays in state legislative implementation of title I seem to have been due to a number of factors, including the following:

- (1) The bitter opposition of the billboard industry;
- (2) Initial uncertainties as to whether title I would be construed as mandating the payment of just compensation when lawfully erected nonconforming signs were removed from control areas;¹²⁶
- (3) The unwillingness of many states to authorize payment of just compensation unless (a) funds were available to cover the seventy-five per cent federal share and (b) there was a serious threat that the Federal Highway Administrator would impose the ten per cent penalty provided by subsection (b) of title I;
- (4) The failure of Congress to provide substantial funds for the billboard program prior to fiscal year 1970, coupled with the 1968 amendment of title I adding subsection (n), which provides that no advertising signs "shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal . . . is not available to make such payment";¹²⁷ and

125. See R. CUNNINGHAM, *supra* note 42, at 23-29, for a detailed discussion of the state compliance laws.

126. This uncertainty was not resolved until (a) the Acting Attorney General issued his opinion of November 16, 1966, 42 OP. ATTY. GEN. No. 26 (1966), discussed in text accompanying notes 53-67 *supra*, and (b) the decision in *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969), discussed in text accompanying notes 70-84 *supra*.

127. Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 6(d), 82 Stat. 817 (codified at 23 U.S.C. § 131(n) (1970)).

(5) The unwillingness of the Federal Highway Administrator to impose the ten per cent penalty provided by subsection (b) even where a state made no attempt to comply with title I.¹²⁸

Beginning in 1970, however, Congress provided substantial federal funds for the billboard removal program, and the Federal Highway Administrator put increasing pressure on the recalcitrant states to adopt compliance laws, if they had not previously done so, and to revise existing billboard control legislation that did not fully comply with title I requirements. As a result of this pressure, every state but one now has a compliance law¹²⁹ that the Secretary of Transportation has found to meet the requirements of title I.¹³⁰ The one exception, South Dakota, brought suit in 1972 to challenge the Secretary's determination that its billboard control statute was not in compliance with title I of the Highway Beautification Act as of January 1, 1972,

128. The Secretary for the first and only time imposed the ten per cent penalty on South Dakota, with respect to its fiscal-year allocation of federal-aid highway funds, on March 1, 1972, to be effective March 31, 1972. His action was sustained in *South Dakota v. Volpe*, 353 F. Supp. 335 (D.S.D. 1973), discussed in note 131 *infra* and accompanying text.

129. ALA. CODE tit. 23, §§ 64(17)-(35) (Supp. 1971); ALAS. STAT. §§ 19.25.080-.180 (1972); ARIZ. REV. STAT. ANN. §§ 18-711 to -720 (Supp. 1972); ARK. STAT. ANN. §§ 76-2501 to -2512 (Supp. 1971); CAL. BUS. & PROF. CODE §§ 5200-5486 (West Supp. 1973); COLO. REV. STAT. ANN. §§ 120-5-1 to -28 (Supp. 1971); CONN. GEN. STAT. ANN. §§ 13a-123 to -123b (Supp. 1973); DEL. CODE ANN. tit. 17, §§ 1101-25 (Supp. 1970); FLA. STAT. ANN. §§ 479.01-24 (1965), *as amended*, FLA. STAT. ANN. §§ 479.01-24 (Supp. 1972); GA. CODE ANN. §§ 95-2001 to -2020a (1972); HAWAII REV. STAT. §§ 264-71 to -90 (1968); IDAHO CODE §§ 40-2811 to -2833 (Supp. 1972); ILL. ANN. STAT. ch. 121, §§ 501-16 (Supp. 1973); IND. ANN. STAT. §§ 36-3501 to -3545 (Supp. 1972); IOWA CODE ANN. §§ 306B.1-8, 306C.10-21 (Supp. 1973); KAN. STAT. ANN. §§ 68-2231 to -2243 (1972); KY. REV. STAT. §§ 177.830-.890 (1971); LA. REV. STAT. ANN. §§ 48.461-.461.8 (Supp. 1973); ME. REV. STAT. ANN. tit. 32, §§ 2711-23 (Supp. 1972); MD. CODE ANN. art. 89B, §§ 226-35, 250-62 (1969), *as amended*, MD. CODE ANN. art. 89B, § 252 (Supp. 1972); ch. 1070, [1971] Mass. Acts 1016 (partially codified at MASS. ANN. LAWS ch. 93D, §§ 1-7 (Supp. 1972)); MICH. COMP. LAWS ANN. §§ 252.301-.324 (Supp. 1973); MINN. STAT. ANN. §§ 173.01-.27 (Supp. 1973); MISS. CODE ANN. §§ 8059.5-01 to -17 (Supp. 1972); MO. ANN. STAT. §§ 226.500-.600 (Supp. 1973); ch. 2, [1971] Mont. Laws 2d Extraordinary Sess. 1816; NEB. REV. STAT. §§ 39-1302-(36) to -(39), 39-1320.01 to .11 (Supp. 1972); NEV. REV. STAT. §§ 410.220-.410 (1971); N.H. REV. STAT. ANN. §§ 249-A:1 to :19 (Supp. 1972); N.J. STAT. ANN. §§ 27:7A-11 to -22 (Supp. 1973); N.M. STAT. ANN. §§ 55-11-1 to -7.1 (Supp. 1971); N.Y. HWY. LAW § 88 (McKinney Supp. 1972); N.C. GEN. STAT. ANN. §§ 136.126-.140 (Supp. 1971); N.D. CENT. CODE ANN. §§ 24-17-01 to -15 (1970); OHIO REV. CODE ANN. §§ 5516.01-.99 (Page Supp. 1972); OKLA. STAT. ANN. tit. 69, §§ 1272-84 (Supp. 1972); ORE. REV. STAT. §§ 377.505-.545, .700-.992 (1971); PA. STAT. ANN. tit. 36, §§ 2718.101-.115 (Supp. 1973); R.I. GEN. LAWS ANN. §§ 24-10.1-1 to -12 (1968), *as amended*, R.I. GEN. LAWS ANN. §§ 24-10.1-3, -6 (Supp. 1972); No. 930 [1971] S.C. Acts 2061; TENN. CODE ANN. §§ 54-2601 to -2617 (Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6674v-1, §§ 1-8, 10-15 (Supp. 1972); UTAH CODE ANN. §§ 27-12-136.1 to .13 (1969), *as amended*, UTAH CODE ANN. §§ 27-12-136.2 to .11 (Supp. 1973); VT. STAT. ANN. tit. 9, §§ 3683a, 3688 (1970), tit. 10, §§ 321-45 (Supp. 1972); VA. CODE ANN. §§ 33.1-351 to -381 (1970), *as amended*, VA. CODE ANN. § 33.1-355 (Supp. 1973); WASH. REV. CODE ANN. §§ 47.42.020-.911 (Supp. 1972), *amending* WASH. REV. CODE ANN. §§ 47.42.010-.910 (1961); W. VA. CODE ANN. §§ 17-22-1 to -25 (Supp. 1970); WIS. STAT. ANN. § 84-30 (Supp. 1973); WYO. STAT. ANN. §§ 24-110 to -124 (Supp. 1971).

130. S. REP. NO. 92-1081, 92d Cong., 2d Sess. 15 (1972) [hereinafter 1972 SENATE REPORT].

and to compel the Secretary to pay the portion (ten per cent or \$3,-361,546.60) of the federal-aid highway funds withheld for fiscal 1973 to which South Dakota would otherwise have been entitled. In addition, South Dakota sought to overturn the Secretary's proposed determinations that, despite an amendment to the state's compliance law enacted on February 17, 1972, and effective on July 1, 1972, the law was still not in compliance with title I and that the ten per cent penalty should consequently be assessed against the funds to be apportioned to South Dakota for fiscal 1974 as well. In a recent decision the United States District Court for the Southern District of South Dakota entered a summary judgment upholding the Secretary's determinations on all points.¹³¹

B. Areas Subject to "Effective Control"

The areas adjacent to highways that are subject to "effective control" are generally defined in the state compliance laws in substan-

131. *South Dakota v. Volpe*, 353 F. Supp. 335 (D.S.D. 1973). In holding S.D. COMP. LAWS ANN. §§ 31-29-15 to -60 (1967), as amended, S.D. COMP. LAWS ANN. §§ 31-29-20 to -40 (Supp. 1972) (in force on Jan. 1, 1972), not to be in compliance with title I of the Highway Beautification Act, the court sustained the Secretary's determinations that

(1) The statute's highway corridor zoning provisions (section 31-29-20), which establish mileage zones along the interstate and primary highways, did not satisfy "traditional zoning requisites" and were "not consistent with the Act's purpose." 353 F. Supp. at 341. For example, on Interstate 90, crossing the state from east to west, there would be only two short segments, each about two miles long, in which billboards would not have been permitted.

(2) Section 31-29-42 of the statute "precludes meaningful negotiations" for an agreement with the Secretary as to "unzoned" commercial and industrial areas by virtue of the restrictive conditions contained therein. 353 F. Supp. at 341.

(3) The statute's "customary use" standards as to size, lighting, and spacing of permitted signs were "unacceptable" because they "failed to attain the level of any standards between a state and the Administrator previously accepted" by the Federal Highway Administrator. 353 F. Supp. at 341.

The court also held that the Secretary's "proposed determination" as to the 1972 amendments to the statute, ch. 171, [1972] S.D. Laws 198 (codified at S.D. COMP. LAWS ANN. §§ 31-29-20 to -40 (Supp. 1972)), should not be reviewed de novo. 353 F. Supp. at 342-43. However, "in an effort to clarify the existing conflicts between the Secretary and the State and to prepare a foundation for future acceptable legislation," the court gave what seems in substance to be a declaratory judgment as to the 1972 amendments, as follows:

(a) Section 31-29-20, despite the 1972 amendment, remains "arbitrary."

(b) The 1972 amendment to § 31-29-40 has partially corrected deficiencies in the size and lighting provisions of the statute, "leaving spacing for further negotiations."

(c) The definition of "unzoned" commercial and industrial areas in § 31-29-39 remains unacceptable.

(d) Section 31-29-42 "locks the state negotiators in" and is still "too restrictive to promote meaningful negotiations." 353 F. Supp. at 343.

In conclusion, the court "strongly" suggested "that the South Dakota Legislature initiate immediate steps for appropriate legislation to correct these objectionable provisions," adding that it did so because, "even if I had the authority to rule on the 1972 laws which sought to bring the State into compliance with the Federal Act, I would find them not in compliance, therefore placing the State in jeopardy of losing a second ten per cent in its federal highway appropriations." 353 F. Supp. at 343-44.

tially the same way as in title I of the Highway Beautification Act: as areas "along the Interstate System and the primary system . . . within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system."¹³² However, a few of the state compliance laws are more restrictive. In Colorado,¹³³ Oregon,¹³⁴ Vermont,¹³⁵ Washington,¹³⁶ and Wyoming,¹³⁷ the controls extend to any off-premises signs visible from the highway, and in Utah,¹³⁸ to any off-premises signs "capable of being read or comprehended with respect to advertising or informational content . . . from any place on the main-traveled way." The Oregon statute exempts signs more than 660 feet from the highway within city limits "unless the sign is designed to be viewed primarily from the state highway,"¹³⁹ but it prohibits even on-premises signs "where one or more parts or sides of the sign are so located as to be readable primarily by the traveling public from any point on a limited access state highway if there is no access to the sign premises within a distance of one mile of such point on either side of the sign."¹⁴⁰

Some of the state laws impose controls on areas adjacent to turnpikes,¹⁴¹ limited-access highways,¹⁴² secondary highways,¹⁴³ or specially designated scenic highways,¹⁴⁴ as well as on areas adjacent to interstate and federal-aid primary highways.

C. Police Power Controls, Exceptions, and Permits

The state compliance laws without exception rely on the police power to control future billboard construction along the interstate and federal-aid primary highway systems. In accordance with title I of the Highway Beautification Act, construction of new billboards is prohibited within the controlled areas, with the common exceptions of (1) "directional and other official signs and notices,"¹⁴⁵ (2)

132. 23 U.S.C. § 131(b) (1970).

133. COLO. REV. STAT. ANN. §§ 120-5-2, -12, -18 (Supp. 1971).

134. ORE. REV. STAT. §§ 377.715, .720 (1971).

135. VT. STAT. ANN. tit. 10, §§ 328-35 (Supp. 1972).

136. WASH. REV. CODE ANN. §§ 47.42.030, .040, .062 (Supp. 1972).

137. WYO. STAT. ANN. § 24-113 (Supp. 1971).

138. UTAH CODE ANN. § 27-12-136.4 (Supp. 1971).

139. ORE. REV. STAT. § 377.735(3) (1971).

140. ORE. REV. STAT. § 377.720(2) (1971).

141. *E.g.*, KY. REV. STAT. § 177-840 (1971).

142. *E.g.*, KY. REV. STAT. § 177-840 (1971).

143. *E.g.*, ALAS. STAT. § 19.25.105 (1972).

144. *E.g.*, WASH. REV. CODE ANN. §§ 47.42.020(7), .030 (Supp. 1972).

145. 23 U.S.C. § 131(c)(1) (1970).

"signs . . . advertising the sale or lease of property upon which they are located,"¹⁴⁶ (3) "signs . . . advertising activities conducted on the property on which they are located,"¹⁴⁷ (4) all signs in areas "zoned industrial or commercial under authority of State law,"¹⁴⁸ and (5) all signs in "unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary [of Transportation]."¹⁴⁹

All the state compliance laws, except those in Alaska, Hawaii, and Vermont, allow off-premises signs in areas "zoned industrial or commercial under authority of State law." The Kentucky statute, however, only allows off-premises signs "which otherwise comply with the applicable zoning ordinances and regulations of any county or city, and which are to be located in a commercially or industrially developed area, in which the Commissioner of Highways determines, in exercise of his sound discretion, that the location of such advertising devices is compatible with the safety and convenience of the traveling public."¹⁵⁰ Both Idaho and Texas have somewhat similar restrictions on the location of signs in zoned commercial or industrial areas. The Idaho statute provides that "areas abutting interstate and primary highways . . . which are zoned commercial or industrial by counties and municipalities shall be valid as commercial or industrial zones only as to the portions actually used for commerce or industrial purposes and [do] not include areas so zoned in anticipation of such uses at some uncertain future date nor does it include areas so zoned for the primary purpose of allowing advertising structures."¹⁵¹ The Texas statute allows off-premises signs "in areas in which the land use is designated industrial or commercial under authority of law, such areas to be determined from actual land uses and defined by regulations established by the [highway] commission."¹⁵² In all three states, it would seem that commercial or industrial zoning by local governments is irrelevant unless the area is actually developed for commercial or industrial uses.

All the states except Alaska, Colorado, Hawaii, Iowa, Vermont, and Washington (as to interstate highways only) allow off-premises signs in unzoned commercial and industrial areas. All the states,

146. 23 U.S.C. § 131(c)(2) (1970).

147. 23 U.S.C. § 131(c)(3) (1970).

148. 23 U.S.C. § 131(d) (1970).

149. 23 U.S.C. § 131(d) (1970).

150. KY. REV. STAT. § 177.860(4) (1971).

151. IDAHO CODE § 40-2829 (Supp. 1972).

152. TEX. REV. CIV. STAT. ANN. art. 6674v-1, § 4(A)(4) (Supp. 1972).

except those listed above and South Dakota, now have statutes that either contain firm definitions of unzoned commercial and industrial areas that are satisfactory to the Federal Highway Administration as a basis for the agreement between the state and the Secretary of Transportation required by title I,¹⁵³ or define such areas by reference to a previously executed¹⁵⁴ or prospective¹⁵⁵ agreement between the state and the Secretary.

All the states in which off-premises signs are permitted, except South Dakota, now have either (1) firm statutory standards as to the size, lighting, and spacing of such signs,¹⁵⁶ (2) provisions for the definition of such standards by negotiation and agreement between the state and the Secretary of Transportation,¹⁵⁷ or (3) provisions for the definition of such standards by regulations, consistent with national standards or national policy, to be promulgated by the state highway director or agency.¹⁵⁸ The latter provisions have apparently been construed to mean "determined by agreement between the several States and the Secretary," since the Secretary has found all these states, except South Dakota, to be in full compliance with title I of the Act.¹⁵⁹ In many cases, a statute first sets out firm standards and then authorizes agreements with the Secretary without indicating what the state highway agency is to do if the Secretary will not agree to the statutory standards.¹⁶⁰ In a few instances, the statute first sets out "firm" standards and then authorizes the state highway agency to "modify, vary or supplement" such standards in order to insure receipt of the maximum amount of federal-aid highway funds.¹⁶¹ Other statutes authorize the state highway agency to promulgate regulations setting standards consistent with "customary use" and the policy of the statute, and in agreement with the Secretary.¹⁶² In some states, the standards in zoned commercial and industrial areas may be different from those in unzoned commercial and industrial areas if the local

153. See, e.g., CAL. BUS. & PROF. CODE § 5223 (West Supp. 1973).

154. See, e.g., N.Y. HWY. LAW § 88(3) (McKinney Supp. 1972).

155. See, e.g., ARK. STAT. ANN. § 76-2505 (Supp. 1971).

156. See, e.g., KAN. STAT. ANN. § 68-2234 (1972).

157. See, e.g., IND. ANN. STAT. § 36-3504 (Supp. 1972).

158. See, e.g., IDAHO CODE § 40-2833 (Supp. 1972).

159. See 1972 SENATE REPORT, *supra* note 130, at 15.

160. See, e.g., KAN. STAT. ANN. §§ 68-2234, -2235 (1972); KY. REV. STAT. §§ 177.863, .890 (1971).

161. See, e.g., LA. REV. STAT. ANN. § 48.461.4 (Supp. 1973).

162. See, e.g., ARK. STAT. ANN. § 76-2505 (Supp. 1971).

zoning regulations contain standards consistent with the statutory policy.¹⁶³

"[D]irectional and other official signs and notices . . . which are required or authorized by law" are generally excepted from the title I ban on new signs in controlled areas but must "conform to national standards . . . authorized to be promulgated by the Secretary . . . which standards shall contain provisions concerning the lighting, size, number, and spacing of signs . . ."¹⁶⁴ Title I also authorizes the Secretary, "in consultation with the States," to "provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained," such signs to "conform to national standards to be promulgated by the Secretary."¹⁶⁵ With respect to these classes of signs, most of the state statutes either incorporate the national standards promulgated by the Secretary,¹⁶⁶ authorize the promulgation of regulations consistent with the "national standards" or "national policy,"¹⁶⁷ or provide a general authorization for the highway director or agency to enter into an agreement with the Secretary to implement the statute.¹⁶⁸ Georgia, however, has more restrictive standards for directional signs than those promulgated by the Secretary.¹⁶⁹

Most of the states use a permit system to regulate the erection of new billboards of the types permitted by their compliance laws.¹⁷⁰

163. See, e.g., DEL. CODE ANN. tit. 17, § 1110 (Supp. 1970).

164. 23 U.S.C. § 131(c)(1) (1970).

165. 23 U.S.C. § 131(f) (1970).

166. See, e.g., N.J. STAT. ANN. § 27:7A-16(a) (Supp. 1972). The national standards for "directional and other official signs" are set out in 23 C.F.R. §§ 750.151-.155 (1973); the national standards for "official highway signs within interstate rights-of-way giving specific service information for the traveling public" are set out in 23 C.F.R. §§ 750.201-.210 (1973).

167. See, e.g., COLO. REV. STAT. ANN. § 120-5-12(b) (Supp. 1971) ("directional and other official advertising devices and notices"); CONN. GEN. STAT. ANN. § 13a-123(c) (Supp. 1973) (applicable to "directional or other official signs and notices" permitted by § 13a-123(c)(1)).

168. See, e.g., DEL. CODE ANN. tit. 17, § 1124 (Supp. 1970) ("signs, displays, and devices providing information in the interest of the traveling public").

169. See GA. CODE ANN. § 95-2005a (1972).

170. See, e.g., COLO. REV. STAT. ANN. §§ 120-5-18 to -21 (Supp. 1971); DEL. CODE ANN. tit. 17, §§ 1104, 1106 (Supp. 1970); FLA. STAT. ANN. §§ 479.07-.10 (Supp. 1972); GA. CODE ANN. §§ 95-2008a to -2010a (1972); IDAHO CODE §§ 40-2820 to -2826 (Supp. 1972); ILL. ANN. STAT. ch. 121, § 508 (Supp. 1973); ME. REV. STAT. ANN. tit. 32, § 2714 (Supp. 1972); MINN. STAT. ANN. §§ 173.03, .06, .07, .13 (Supp. 1973); MISS. CODE ANN. § 8059.5-06 (Supp. 1972); MO. ANN. STAT. § 226.530 (Supp. 1973); N.H. REV. STAT. ANN. § 249-A:4 (Supp. 1972); N.J. STAT. ANN. §§ 27:7A-14 to -17 (Supp. 1973); OHIO REV. CODE ANN. § 5516.10

In some of these states on-premises signs are exempt from the permit requirement.¹⁷¹ All the states that use a permit system provide that a new billboard erected without the required permit is "illegal" and may be removed in a relatively summary manner unless a permit is obtained within a short grace period.¹⁷² In some states the permit requirement also applies to existing billboards—conforming, non-conforming, or both.¹⁷³ In some cases, permit provisions applicable to existing signs appear to be designed to create so much red tape that the sign owner will not bother to comply unless his sign is really valuable.¹⁷⁴ Some of the statutes provide that failure to apply for a permit within a stated period creates a conclusive presumption of abandonment of the sign.¹⁷⁵

D. *Nonconforming Signs: Removal and Determination of Just Compensation*

The provisions in the state compliance laws relating to removal of nonconforming advertising signs and payment of just compensation tend to incorporate some or all of the language of title I, subsection (g) of the Highway Beautification Act. For example, the New York compliance law authorizes the commissioner of transportation to acquire and pay compensation for nonconforming signs "lawfully in existence" on October 22, 1965 (the date of the enactment of the federal Act), "lawfully along any highway made a part of the interstate or primary highway systems on or after" October 22, 1965, or "lawfully erected on or after" January 1, 1968. Compensation is to be paid for "(a) the taking from the owner of such sign . . . of all right, title, leasehold and interest in such sign, . . . and (b) the taking from the owner of the real property on which such sign . . . is located, of the right to erect and maintain such signs . . . thereon."¹⁷⁶

It should be noted that the New York statutory language almost—

(Page Supp. 1972); OKLA. STAT. ANN. tit. 69, § 1277 (Supp. 1972); ORE. REV. STAT. § 377.725 (1971); PA. STAT. ANN. tit. 36, § 2718.107 (Supp. 1973); TENN. CODE ANN. 54-2604 to -2607 (Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6674v-1, §§ 6-7 (Supp. 1972); UTAH CODE ANN. § 27-12-1367 (Supp. 1971); WASH. REV. CODE ANN. § 47.42.120 (Supp. 1972); WYO. STAT. ANN. §§ 24-116 to -117 (Supp. 1971).

171. See, e.g., FLA. STAT. ANN. § 479.16 (1965); GA. CODE ANN. § 95-2009a (1972); KAN. STAT. ANN. §§ 68-2236(a)-(c) (1972); ME. REV. STAT. ANN. tit. 32, § 2715(1) (Supp. 1972).

172. See, e.g., MICH. COMP. LAWS ANN. § 252.319 (Supp. 1973).

173. See, e.g., COLO. REV. STAT. ANN. § 120-5-18(1) (Supp. 1971); DEL. CODE ANN. tit. 17, § 1104 (Supp. 1970); GA. CODE ANN. § 95-2009a (1972).

174. See, e.g., MICH. COMP. LAWS ANN. §§ 252.305-.312 (Supp. 1973).

175. See, e.g., COLO. REV. STAT. ANN. § 120-5-22(3)(b)(iii) (Supp. 1971).

176. N.Y. HWY. LAW § 88(7) (McKinney Supp. 1972).

but not quite—literally reproduces the language of title I, subsection (g) of the Act, with the result that no compensation is payable upon removal of outdoor advertising signs lawfully erected along existing interstate and primary highways between October 22, 1965, and January 1, 1968, although compensation is payable upon removal of signs lawfully erected along such highways before October 22, 1965, and after January 1, 1968—including those erected between January 1, 1968, and the effective date of the New York statute, June 16, 1968. But the New York statute requires payment of compensation upon removal of all signs lawfully erected along secondary or other highways that become part of the interstate or federal-aid primary systems at any time after October 22, 1965—whether before or after January 1, 1968. Many other state compliance laws literally repeat the language of title I, subsection (g), which does not cover those highways converted after January 1, 1968, and, consequently, exclude payment of compensation upon removal of signs along such highways.¹⁷⁷

The New York statute and others like it obviously discriminate against persons with property interests in signs lawfully erected between October 22, 1965, and January 1, 1968. A number of states,¹⁷⁸ perhaps cognizant of the unfairness of this discrimination, have enacted compliance laws that provide for compensation upon the removal of any nonconforming sign lawfully in existence at the date of enactment of the compliance law, although it appears that the Federal Highway Administration will not authorize payment of the federal share with respect to signs lawfully erected in the period between October 22, 1965, and January 1, 1968.¹⁷⁹ At least one state, Florida, compensates for this latter fact with a statutory provision that the general prohibition of removal of nonconforming signs unless the federal share of the mandated just compensation is available “shall not apply to signs erected between October 22, 1965, and January 1, 1968.”¹⁸⁰ The Georgia statute, on the other hand, author-

177. See, e.g., CAL. BUS. & PROF. CODE § 5412(b) (West Supp. 1973); CONN. GEN. STAT. ANN. § 13a-123(f)(2) (Supp. 1973); KY. REV. STAT. § 177.867(1)(b) (1971); MISS. CODE ANN. § 8059.5-09 (Supp. 1972); VA. CODE ANN. § 33.1-370(e)(2) (1970).

178. ALAS. STAT. § 19.25.140 (1972); ARK. STAT. ANN. § 76-2508 (Supp. 1971); GA. CODE ANN. § 95-2011(a) (1972); HAWAII REV. STAT. § 264-75 (1968); IDAHO CODE § 40-2831 (Supp. 1972); KAN. STAT. ANN. § 68-2238 (1972); LA. REV. STAT. ANN. § 461.6 (Supp. 1973); MD. ANN. CODE art. 89B, § 254 (1969); MICH. COMP. LAWS ANN. § 252.322 (Supp. 1973); ch. 2, § 9, [1971] Mont. Sess. Law 2d Extraordinary Sess. 1816; N.H. REV. STAT. ANN. § 249-A:11 (Supp. 1972); N.C. GEN. STAT. ANN. § 136-131 (Supp. 1971); N.D. CENT. CODE ANN. § 24-17-05 (1970); R.I. GEN. LAWS § 24-10.1-6 (Supp. 1972); S.D. COMP. LAWS ANN. § 31-29-50 (1967); UTAH CODE ANN. § 27-12-136.11 (Supp. 1973); W. VA. CODE ANN. § 17-22-5 (Supp. 1970).

179. 23 C.F.R. § 750.308(a) (1973), restating the substance of title I, subsection (g).

180. FLA. STAT. ANN. § 479.24(3) (Supp. 1972).

izes payment of compensation for the taking of "any property rights in outdoor advertising signs . . . lawfully in existence on the effective date of this Chapter but which do not conform to the provisions of this Chapter" and then goes on to provide that the State Highway Department "shall be prohibited from paying more than 25 per cent of any award for just compensation."¹⁸¹ Since the seventy-five per cent federal share is not available for nonconforming signs erected between October 22, 1965, and January 1, 1968, Georgia will not be able to comply with both provisions if the signs are to be removed. Nor can the signs be left in place, for in that case Georgia will not be in compliance with title I of the Highway Beautification Act and will be subject to the ten per cent penalty for failure to provide "effective control" of highway advertising.¹⁸²

Several other state compliance laws contain provisions that seem to be inconsistent with the provisions on the removal of nonconforming signs in title I of the Act. For example, the Minnesota statute contains a declaration that "each advertising device in existence in a business area on June 8, 1971, and which fails to comply with the provisions of Laws 1971, Chapter 883, only as to size, lighting or spacing may remain in place."¹⁸³ The Nebraska statute contains a similar provision.¹⁸⁴ But these provisions are in accord with the agreements entered into between the states and the Secretary of Transportation.¹⁸⁵

Many of the state compliance laws allow a maximum of five years for the removal of any nonconforming signs; the five years are to be measured from the date when the signs became nonconforming under the state law.¹⁸⁶ Some state laws establish a date or a period prior to

181. GA. CODE ANN. § 95.2011a (1972).

182. See 23 U.S.C. §§ 131(b)-(c) (1970).

183. MINN. STAT. ANN. § 173.26 (Supp. 1973).

184. "Nothing contained in this act shall be construed to require the removal of signs in zoned and unzoned commercial and industrial areas . . . lawfully in existence on the effective date of this act, which signs may under this act remain and continue in place *even if nonconforming*." No. 1181, § 7(2)(b)(vi), [1972] Neb. Laws 718 (emphasis added).

Signs "erected prior to the effective date of this act may continue in zoned or unzoned commercial or industrial areas, notwithstanding the fact that such . . . signs . . . do not comply with standards and criteria established by this act or regulations of the department as promulgated from time to time." No. 1181, § 9, [1972] Neb. Laws 718.

185. See note 12 *supra*.

186. See, e.g., COLO. REV. STAT. ANN. § 120-5-28(3) (Supp. 1971) ("before January 1, 1976" but not until federal share is available, and no state funds to be used unless the federal share is available); FLA. STAT. ANN. § 479.23 (Supp. 1972) ("by the end of the fifth year after they have become nonconforming"); NEV. REV. STAT. § 410.340 (1971) (with the exception that signs lawfully in existence on Sept. 1, 1965, must be removed

which the removal of nonconforming signs may not be required.¹⁸⁷ And other state compliance laws establish at least a general schedule for the removal of nonconforming signs of different classes.¹⁸⁸

As for the interests to be taken, many of the state compliance laws, like the New York statute discussed above,¹⁸⁹ simply repeat the title I language with respect to the sign owner's interest for which compensation is to be paid: "all right, title, leasehold, and interest in such sign."¹⁹⁰ But a few of the statutes spell out the interest more precisely. For example, the California statute says, "all right, title, and interest, including any leasehold interest, of the owner of the advertising display."¹⁹¹ Some of the state statutes, again like the New York statute,¹⁹²

no later than July 1, 1973, or three years from the date funds are available for such removal); OKLA. STAT. ANN. tit. 69, § 1278(a) (Supp. 1972); WIS. STAT. ANN. § 84-30(5) (Supp. 1973). For a three-year deadline, see WASH. REV. CODE ANN. § 47.42.100(4) (Supp. 1972).

187. See, e.g., IDAHO CODE § 40-2830 (Supp. 1972) ("may not be required to be removed until July 1, 1970, unless required to be removed prior thereto by order of the department," but "shall be removed on or before the end of the 60th month after it shall become nonconforming, . . . provided . . . matching federal-aid funds are available"); ILL. ANN. STAT. tit. 121, § 509 (Supp. 1973) (only "after July 1, 1973"); IND. ANN. STAT. § 36-3506 (Supp. 1972) (not within 60 months after erection and not before July 1, 1970, if sign was lawfully in existence on October 22, 1965; "any other sign lawfully erected which does not on January 1, 1968, or at any time thereafter, conform to this act, shall not be required to be removed until the fifth year after it becomes nonconforming"); KAN. STAT. ANN. § 68-2237 (1972) (not until March 31, 1974, if "lawfully in existence" on effective date and "not located in a business area"; removal of signs later becoming nonconforming because located on a highway made part of the interstate or primary system after March 31, 1972, not be required to be removed until end of the fifth year after they become nonconforming); ch. 1070, § 4, [1971] Mass. Acts 1017 (signs lawfully in existence on effective date of state act "shall not be required to be removed . . . until five years after" that date); MISS. CODE ANN. § 8059.503 (Supp. 1972) (signs lawful but nonconforming on date of state act, not before July 1, 1970; other signs, not until fifth year after they become nonconforming); MO. STAT. ANN. § 226.570 (Supp. 1973) (not "until such removal is required by the secretary of transportation"); OHIO REV. CODE ANN. § 5516.07 (Page Supp. 1972) ("director shall not require the removal of any advertising device for which federal reimbursement is contemplated . . . unless, until, and to the extent that federal funds for the federal share have been appropriated . . . and made available").

188. See, e.g., ORE. REV. STAT. §§ 377.765(2)-(4) (1971).

189. See text accompanying note 176 *supra*.

190. 23 U.S.C. § 131(g)(A) (1970). See, e.g., COLO. REV. STAT. ANN. § 120-5-28(3) (Supp. 1971); DEL. CODE ANN. tit. 17, § 1122(b)(1) (Supp. 1970); GA. CODE ANN. § 95-2012a(a) (1972); IDAHO CODE § 40-2831(2)(a) (Supp. 1972); ILL. ANN. STAT. tit. 121, § 509 (Supp. 1973); IND. ANN. STAT. § 36-3507 (Supp. 1972); KAN. STAT. ANN. § 68-2238(b)(1) (1972); MISS. CODE ANN. § 8059.5-09(2)(a) (Supp. 1972); MO. STAT. ANN. § 226.5701(1) (Supp. 1973); No. 1181, § 4, [1972] Neb. Laws 714, *amending* NEB. REV. STAT. § 39-1320.01 (1968); PA. STAT. ANN. tit. 36, § 2718.109(b) (Supp. 1973); TENN. CODE ANN. § 54-2608(b) (Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6674v-1, § 4(E) (Supp. 1972); WASH. REV. CODE ANN. 47.42.102(2) (Supp. 1972).

191. CAL. BUS. & PROF. CODE § 5412 (West Supp. 1973).

192. See text accompanying note 176 *supra*. See also, to the same effect, DEL. CODE ANN. tit. 17, § 1122(b)(2) (Supp. 1970); GA. CODE ANN. § 95-2012a(b) (1972); IDAHO CODE § 40-2831(2)(a) (Supp. 1972); IND. ANN. STAT. § 36-3507 (Supp. 1972); KAN. STAT. ANN.

also simply repeat the title I, subsection (g) language with respect to the landowner's interest for which just compensation must be paid: "the right to erect and maintain *such signs, displays, and devices*."¹⁹³ This sounds as if the legislature intended payment to be made for all future rights, in perpetuity, to erect and maintain such signs. But other states, such as California,¹⁹⁴ use the singular in referring to the landowner's interest: "the right of the owner of the real property on which the advertising display is located to erect and maintain *such advertising display thereon*."¹⁹⁵ This sounds as if the legislature intended to provide compensation only for the taking of the right to maintain the existing advertising sign on the land in question. As previously indicated,¹⁹⁶ one of the difficult and still unsolved questions arising under title I, subsection (g) of the Highway Beautification Act is whether the states must pay compensation for the taking of all of the landowners' present and future rights to maintain highway advertising signs on their land, or whether the landowners need only be compensated for the taking of the present right to maintain the existing advertising sign under the existing lease. Since the Federal Highway Administration regards both the California and the New York statutes, and statutes similar to either of them, as in compliance with title I, it apparently does not consider the difference in statutory language to be significant.

A number of the state compliance laws state categorically that any removal of a nonconforming advertising sign shall be deemed a "taking" of the interests of the sign owner and the owner of the land on which the sign is located.¹⁹⁷ This language surely is not intended to prohibit the state from negotiating agreements with the owners of nonconforming signs and the land upon which such signs are located for the purchase of their interests,¹⁹⁸ or providing for the

§ 68-2238(b)(2) (1972); MISS CODE ANN. § 8059.09(2)(b) (Supp. 1972); MO. STAT. ANN. § 226.570(1) (Supp. 1973); NO. 1181, § 4, [1972] Neb. Laws 714, *amending* NEB. REV. STAT. § 39.1320.01 (1968); TENN. CODE ANN. § 54-2608(b)(2) (Supp. 1972); WASH. REV. CODE ANN. § 47.42.102(2) (Supp. 1972).

193. 23 U.S.C. § 131(g)(B) (1970) (emphasis added).

194. See text accompanying note 191 *supra*. See also, to the same effect, COLO. REV. STAT. ANN. § 120-5-28(3) (Supp. 1971); ILL. ANN. STAT. tit. 121, § 509 (Supp. 1973); N.H. REV. STAT. ANN. § 249-A:11(I)(b) (Supp. 1972); ORE. REV. STAT. § 377.780(3)(b) (1971); PA. STAT. ANN. tit. 36, § 2718.109(b) (Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 6674v-1, § 4(E) (Supp. 1972).

195. CAL. BUS. & PROF. CODE § 5412 (West Supp. 1973) (emphasis added).

196. See text accompanying notes 111-14 *supra*.

197. See, e.g., CAL. BUS. & PROF. CODE § 5412 (West Supp. 1973); IND. ANN. STAT. § 36-3507 (Supp. 1972).

198. Indeed, most of the state compliance laws expressly provide for either purchase or condemnation of signs and advertising rights. See, e.g., ALAS. STAT. § 19.25.140

removal of such signs without acquisition of title thereto and compensating the sign owners on some other basis, such as the cost of relocating the sign. Rather, this statutory language seems designed to require the state to exercise the power of eminent domain in all cases where a purchase or removal agreement cannot be negotiated and to "take" and pay for all the property interests specified in the statute, including the sign owner's interest in the sign itself. This will prevent state highway agencies from acquiring all the real property interests of landowners and sign owners by negotiated purchase or condemnation and then utilizing the police power to compel removal of the signs without payment for the sign owners' interests in the signs themselves.¹⁹⁹ The same objective is apparently also sought by provisions—found in several state compliance laws—that all nonconforming highway advertising signs shall be deemed to be "trade fixtures" and that sign owners shall be compensated for the signs' "fair market value" when they are removed.²⁰⁰ Such provisions will assure that, in the valuation of the sign owner's property interest in eminent domain proceedings, the value of the sign itself, "as part of the realty," will be included. Presumably these provisions are intended to settle an issue left unsettled by the states' existing case law. In any case, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 now requires the states, "to the greatest extent practicable under State law," to treat as real property any "structure" on real property to be acquired pursuant to any federally assisted program, "notwithstanding the right or obligation of the tenant . . . to remove such . . . structure."^{200a} The Act also requires payment of the cost of moving "personal property."^{200b}

West Virginia's compliance law expressly provides for determina-

(1972); CONN. GEN. STAT. ANN. § 13a123(f)(2) (Supp. 1973); GA. CODE ANN. § 95-2011 (1972); IND. ANN. STAT. § 36-3507 (Supp. 1972); KAN. STAT. ANN. § 68-2239 (1972); KY. REV. STAT. § 177.867(1) (1971); LA. REV. STAT. ANN. § 48.461.6 (Supp. 1973); ME. REV. STAT. ANN. tit. 32, §§ 2719(1)-(3) (Supp. 1972); MISS. CODE ANN. § 80595-09(1) (Supp. 1972); N.D. CENT. CODE ANN. § 24-17-05 (1970); UTAH CODE ANN. § 27-12-136.11(1) (Supp. 1971); W. VA. CODE ANN. § 17-22-6 (Supp. 1970); WYO. STAT. ANN. § 24-119 (Supp. 1971).

199. See text accompanying notes 109-10 *supra*.

200. See, e.g., N.M. STAT. ANN. § 55-11-6(B)(1) (Supp. 1971); OKLA. STAT. ANN. tit. 69, § 1280(b) (Supp. 1972). See also OHIO REV. CODE ANN. § 5516.08 (Page Supp. 1972) (compensation shall be paid as in other highway acquisition cases, "notwithstanding the right or obligation of the owner of such advertising device, as against the owner of the real property on which the . . . device is located, to remove such device at any time").

200a. Pub. L. No. 91-646, § 302, 305, 84 Stat. 1905-06 (codified at 42 U.S.C. § § 4652, 4655 (1970)).

200b. Pub. L. No. 91-646, § 202(a)(1), 84 Stat. 1895 (codified at 42 U.S.C. § 4622(a)(1) (1970)).

tion of "the compensation to which the owner of the sign and leasehold interest is entitled, separate and apart from the compensation to which the owner of the real property is entitled."²⁰¹ This provision was apparently included to prevent the application of the "unit rule," which ordinarily requires that the entire interest taken by eminent domain (usually a fee simple estate) be valued as a unit, without regard to division of ownership between lessor and lessee or life tenant and remainderman. The New Mexico statute contains a similar provision.²⁰²

Perhaps the most interesting state statutory variation from the language of title I, subsection (g) is the provision for payment of severance damages found in the compliance laws of at least three states—Utah, Wisconsin, and Wyoming. The Utah statute provides: "For the purposes of this act, just compensation shall include, the consideration of damages to remaining properties, contiguous and non-contiguous, of an outdoor advertising sign company's interest, which remaining properties, together with the properties actually condemned, constituted an economic unit."²⁰³ The Wyoming provision provides that "just compensation shall be deemed to include severance damages to the remaining property, taking into consideration the unique nature of outdoor advertising as affected by this act . . ."²⁰⁴ The Wisconsin statute provides that compensation shall include "severance damages to the remaining signs which have a unity of use and ownership with the sign taken . . . excluding any damage to factories involved in manufacturing, erection, maintenance or servicing of any outdoor advertising signs or displays."²⁰⁵

No prior law in these states either holds or suggests that an advertising plant is an entity for eminent domain purposes in such a way that the taking of one or more signs would give rise to severance damages consisting of the "damages to the remainder of the outdoor advertising plant."²⁰⁶ Therefore, the question may fairly be raised whether federal funds can be made available under title I, subsection (g) for payment of seventy-five per cent of the "severance damages" determined in accordance with the Utah, Wisconsin, and Wyoming

201. W. VA. CODE ANN. § 17-22-6 (Supp. 1970).

202. See N.M. STAT. ANN. § 55011-6(b) (Supp. 1971).

203. UTAH CODE ANN. § 27-12-136.11(2) (Supp. 1973).

204. WYO. STAT. ANN. § 24-119(b) (Supp. 1971).

205. WIS. STAT. ANN. § 84.30(7) (Supp. 1973).

206. Severance damages may arise in cases of partial taking if the difference between the value of the entire property before and after the taking is greater than the value of the part taken. The outdoor advertising plant includes all the advertising company's signboards, sign structures, storage buildings and areas, and office buildings.

statutes. The position of the former Bureau of Public Roads was made clear in its *Policy and Procedure Memorandum 80-9*, issued on March 31, 1967, which stated: "Each sign shall be treated as a separate entity without regard to the effect its removal will have on the business operation of the owner."²⁰⁷ However, Federal Highway Administrator Bridwell apparently moderated the Bureau's position during his testimony at the 1967 Senate Hearings, in the course of which he said that the Department of Transportation had "no policy against" the payment of severance damages and that the Department's policy was to "pay for what a court determines to be just compensation."²⁰⁸ He was less certain, however, as to the effect of a state statute mandating payment of severance damages.²⁰⁹ The current position of the Federal Highway Administration is as follows:

Generally, Federal participation will not be allowed in the payment of damages to remaining signs, or other property of a sign company alleged to be due to the taking of some of the company's signs. Unity of use of the separate properties, as required by applicable principles of eminent domain law, must be shown to exist before participation in severance damages will be allowed. Moreover, the value of the remaining signs or other real property must be diminished by virtue of the taking of such signs. Payments for damages to economic plants or loss of business profits are not compensable. The State shall have the burden of justifying the recognition of severance damages pursuant to FHWA right-of-way procedures and the law of the State before Federal participation will be allowed.²¹⁰

A complicating factor in Utah, Wisconsin, and Wyoming is that all three compliance laws appear to prohibit the removal of any non-conforming sign unless federal participation in the payment of the required compensation is assured.²¹¹ There are obvious possibilities for substantial delay in the removal of nonconforming signs if these states attempt to carry out their statutory mandates to pay severance damages to highway advertising companies and the Federal Highway Administration is unwilling to participate in the payment of such damages.²¹²

207. Policy and Procedure Memorandum 80-9, *supra* note 92, ¶ 5a(7).

208. 1967 Senate Hearings, *supra* note 28, at 33.

209. *Id.* See also *id.* at 457.

210. 23 C.F.R. § 750.311(d) (1973). The Federal Highway Administration's prohibition against compensation for "loss of business profits" is echoed in OHIO REV. CODE ANN. § 5516.08 (Page Supp. 1972), which provides that in any action to appropriate advertising signs and associated property rights "loss of business shall not be considered an item of compensable damages."

211. UTAH CODE ANN. § 27-12-136.11(2) (Supp. 1971); WIS. STAT. ANN. § 84.30(15) (Supp. 1973); WYO. STAT. ANN. § 24-119(c) (Supp. 1971).

212. It should be noted that several other states have statutory provisions that

Several other state compliance laws contain provisions relating to payment of just compensation that raise doubts either as to their validity under state constitutional limitations or their compliance with title I of the Highway Beautification Act. The Florida statute, for example, provides that compensation shall be paid for removal of "signs lawfully in existence on December 8, 1971 or signs which later became nonconforming," but compensation for any sign erected or completed after December 8, 1971, "shall be limited to the actual replacement value of the materials in such sign."²¹³ And another subsection provides: "It is presumed that any party erecting a sign after July 1, 1971 did so with the knowledge of the existing federal legislation and the pendency of this legislation. The measure of damages on condemnation of any such sign shall be limited to the replacement value of the materials used in construction of such signs."²¹⁴ If payment of compensation is not constitutionally mandated and is provided only to comply with subsection (g) of title I of the federal Act, it is probable that the legislature may prescribe and limit the method of valuation to be applied, even though the form of an eminent domain proceeding is used. But in a state where it is held that the state constitution requires payment of compensation when lawfully erected nonconforming signs are removed, it is at least arguable that the legislature cannot constitutionally restrict the exercise of the judicial function by prescribing a particular method of valuation in eminent domain proceedings to the exclusion of other judicially sanctioned methods.²¹⁵

In contrast to the Florida law, the Georgia statute requires payment of "the actual financial loss suffered by the lessee under a written

preclude removal of nonconforming advertising signs unless and until federal matching funds are available under title I, subsection (g). *See, e.g.*, COLO. REV. STAT. ANN. § 120-5-28(4) (Supp. 1971); DEL. CODE ANN. tit. 17, § 1122(b)(2) (Supp. 1970); IDAHO CODE § 40-2830 (Supp. 1972); ILL. ANN. STAT. tit. 121, § 509 (Supp. 1973); IND. ANN. STAT. § 36-3513 (Supp. 1972); KAN. STAT. ANN. § 68-2242 (1972); MINN. STAT. ANN. § 173.25 (Supp. 1973); MO. STAT. ANN. §§ 226.570(1)-(2) (Supp. 1973); N.Y. HWY. LAW § 88(7) (McKinney Supp. 1972); N.D. CENT. CODE ANN. § 24-17-05 (1970); OHIO REV. CODE ANN. § 5516.07 (Page Supp. 1972); OKLA. STAT. ANN. tit. 69, § 1283 (Supp. 1972); PA. STAT. ANN. tit. 36, § 2718.109(d) (Supp. 1973); TENN. CODE ANN. 54-2608(b) (Supp. 1972); WASH. REV. CODE ANN. § 47.42.105 (Supp. 1972).

CAL. BUS. PROF. CODE § 5417 (West Supp. 1973), and VT. STAT. ANN. tit. 10, § 336 (Supp. 1972), provide, in substance, that no compensation is to be paid upon removal of nonconforming signs unless and to the extent that such payment is required by federal law as a condition for payment to the state of a full share of federal highway funds.

213. FLA. STAT. ANN. § 479.24(1) (Supp. 1972).

214. FLA. STAT. ANN. § 479.24(5) (Supp. 1972).

215. Courts have generally sanctioned use of the "comparable sales" and "income" methods of valuation, as well as the "cost" method, and have ordinarily rejected the view that any one method must be used to the exclusion of the others.

lease expressly and solely permitting the erection and maintenance of a sign . . . (which was lawful on the date such lease was executed)," even if the sign was never in fact erected because the State Highway Department refused to issue a permit for its erection.²¹⁶ The Georgia statute thus recognizes the lease itself as a kind of lawful nonconforming use and requires payment of compensation when the lease is rendered valueless because the enactment of the compliance law precluded erection of a sign at the lease site. But it seems clear that such payments are not eligible for federal participation under title I, subsection (g) of the Highway Beautification Act,²¹⁷ and this fact is likely to cause serious difficulties since another provision of the Georgia statute prohibits the State Highway Department "from paying more than 25 per cent of any award for just compensation."²¹⁸ Moreover, the prohibition in the Georgia compliance law against payment of any compensation "for any leasehold interest to land more than 100 feet from the public highway right-of-way"²¹⁹ is clearly inconsistent with title I, subsection (g), unless the prohibition is construed to apply only to the additional compensation provided for lessees and lessors unable to obtain a permit for the erection of a sign.

The Maine statute authorizes payment of compensation when the immediate removal of nonconforming signs is required, but

when immediate removal of nonconforming advertising signs is not required but removal via regulation over an extended period of time is satisfactory, the [state highway] commission is authorized to use the police power of the State to establish a reasonable amortization period which will be long enough to allow recoupment of the capital investment which these nonconforming signs represent but which contemplates that at the end of this period the nonconforming sign will be removed by the owner without compensation.²²⁰

The New Hampshire statute provides that "[i]n calculating just com-

216. GA. CODE ANN. §§ 95-2012a(c)-(d) (1972). Both subsections (c) and (d) contain the proviso "that the amount of compensation paid may not exceed the pro rata part of the entire rental paid and to be paid under such leases for the unexpired portion thereof remaining on the effective date of this Chapter."

217. The title I, subsection (g) requirement of payment of just compensation applies only "upon the removal of . . . outdoor advertising signs, displays, and devices," and the federal share of the required just compensation is to be paid only for the taking of the property rights of "the owner of such sign, display, or device" and "the owner of the real property on which the sign, display, or device is located." 23 U.S.C. § 131(g) (1970). This clearly precludes any federal participation where only lease rights, unconnected with an actual sign located on a particular tract of land, are compensated.

218. GA. CODE ANN. § 95-2011a (1972).

219. GA. CODE ANN. §§ 95-2012a(c)-(d) (1972).

220. ME. REV. STAT. ANN. tit. 32, § 2719(7) (Supp. 1972).

pensation to be paid to the owner of an advertising device to be removed by reason of nonconformity . . . after January 1, 1975, it is intended that the five year period of nonconforming use shall be considered as whole or partial compensation to said owner for his loss."²²¹

If the Maine and New Hampshire statutory provisions are construed simply to mean that depreciation is to be taken into account in determining the value of a nonconforming sign at the time of its removal, there is no problem. But if these provisions are construed to mean that the "value" of a sign may be reduced in accordance with a schedule that bears no relation to the actual depreciation and that the period of non-conforming use may be considered to be the full compensation to which the owner of the sign is entitled even though the sign still has actual value at the time of removal, they are clearly inconsistent with the mandate of title I, subsection (g) for payment of just compensation. Since the Federal Highway Administration now regards both the Maine and New Hampshire statutes as complying with title I, it has apparently adopted the first construction.

Washington, which, in 1961, adopted legislation to implement the bonus provisions of the Federal-Aid Highway Act of 1958 by providing for the elimination of nonconforming billboards through the use of the police power,²²² has provided in its compliance law under the Highway Beautification Act that no compensation shall be paid for signs "which became subject to removal pursuant to" the 1961 legislation "prior to May 10, 1971."²²³ This provision would clearly be consistent with title I of the Highway Beautification Act if it exempted from the compensation requirement only those signs that became unlawful and subject to removal under the 1961 Washington billboard legislation prior to October 22, 1965, the date of the enactment of the Highway Beautification Act. If that were the case, indeed, the provision would simply codify the holding in *Markham Advertis-*

221. N.H. REV. STAT. ANN. § 249A:11(VI) (Supp. 1972). The following language appears immediately after the provision quoted in the text:

It is further intended that, in calculating just compensation to the owner of the land for which rental compensation has been paid for the five preceding years, such rental income during the period of nonconforming use be taken into consideration as whole or partial compensation. If funds become available, the commissioner of public works and highways is authorized to negotiate the removal of advertising devices prior to the end of the five-year period and is authorized to pay just compensation.

222. Ch. 96, [1961] Wash. Laws 1575, as amended, ch. 3, § 55, [1963] Wash. Laws Extraordinary Sess. 1323, as amended, WASH. REV. CODE ANN. § 47.42.100 (Supp. 1972).

223. WASH. REV. CODE ANN. § 47.42.102(3) (Supp. 1972).

ing *Co. v. State*²²⁴ that title I does not require that compensation be paid upon the removal, pursuant to the 1961 legislation, of signs that became unlawful and subject to removal on March 11, 1964 (signs not located in areas zoned commercial or industrial), or on March 11, 1965 (signs located in areas zoned commercial or industrial). But the exemption from the compensation requirement of all signs, if any, that became subject to removal, pursuant to the 1961 legislation, "prior to May 10, 1971," seems inconsistent with title I. This conclusion follows not only from the language of title I, subsection (g)(1)-(3), but even more clearly from the final sentence in subsection (j), which expressly states that the provisions of that subsection relating to continuation of bonus payments under the 1958 Federal-Aid Highway Act "shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in [title I]."

Perhaps the strangest statutory treatment of the just compensation requirement is to be found in the Michigan compliance law. Although the statute clearly implies that off-premises signs not located in commercial or industrial areas "may be removed" by the state highway department, the section dealing with just compensation requires that compensation be paid only "upon the removal . . . of any sign or sign structure lawfully in existence on the effective date of this act but which does not comply with the requirements of sections 15, 16 and 17 and any sign or sign structure lawfully erected after the effective date of this act but which thereafter becomes unlawful because of a change in the designation of the highway or in the zoning of the area in which it is located."²²⁵ Since sections 15, 16, and 17 of the Michigan statute relate only to standards for size, lighting, and spacing of signs in commercial or industrial areas,²²⁶ the Michigan statute does not expressly require payment of any compensation upon the removal of off-premises signs lawfully in existence on the effective date of the act in areas other than commercial or industrial areas; these are illegal simply by virtue of section 13 of the statute.²²⁷ In view of this strange omission it is hard to see how the Michigan statute can be deemed to be in compliance with title I of the Highway Beautification Act, although the Federal Highway Administration has found that it complies.²²⁸

224. 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969). See text accompanying notes 70-84 *supra*.

225. MICH. COMP. LAWS ANN. § 252.322 (Supp. 1973).

226. MICH. COMP. LAWS ANN. §§ 252.315-.317 (Supp. 1973).

227. MICH. COMP. LAWS ANN. § 252.313 (Supp. 1973).

228. See 1972 SENATE REPORT, *supra* note 130, at 15.

The Michigan statute, which is in many other respects poorly drafted, also leaves in doubt the status of advertising signs that were unlawfully erected between September 14, 1966, the effective date of an earlier compliance law,²²⁹ and March 31, 1972, the effective date of the current compliance law.²³⁰ No attempt was made to enforce the police power prohibition against erection of new off-premises billboards in areas other than commercial and industrial areas after September 14, 1966; in fact, a very large number of new, "illegal" billboards were erected. Since the current compliance law repeals the earlier law but makes no express reference to billboards erected in violation of the earlier statute, it is impossible to be sure whether such billboards are to be deemed "lawfully in existence on the effective date of" the current statute. The Michigan billboard industry, as might be expected, has taken the position that the billboards are to be regarded as "lawfully in existence." Of course, if the current Michigan statute is literally construed as not requiring payment of compensation upon removal of such signs, even though lawfully in existence on its effective date, the issue becomes unimportant.

E. *Constitutionality of the State Legislation*

1. *Police Power Controls*

All the current state outdoor advertising control laws rely on the police power in some measure to control the erection and maintenance of signs within specified areas adjacent to various types of highways. A determination that a given regulation is a valid police power measure ipso facto establishes that it is not a taking of private property for public use that gives rise to a constitutional right of just compensation. The case law dealing with the regulation of outdoor advertising is now extensive enough to justify the conclusion that state laws prohibiting erection of new advertising signs within specified areas adjacent to public highways are constitutionally valid even if they make no provision for compensating landowners for the loss of the right to devote their land to advertising uses.

The business of outdoor advertising on a commercial basis dates from the 1880's. Under the common law, advertising posters that for any reason were regarded as offensive or dangerous were dealt with under the doctrine of nuisance. From the 1890's onward, however, large-scale commercial promotion of billboard advertising became

229. No. 333, [1966] Mich. Acts 613.

230. MICH. COMP. LAWS ANN. §§ 252.301-324 (Supp. 1973).

so aggressive and its methods so crude as to provoke prohibitory legislation, usually in the form of municipal ordinances.²³¹

In the early cases the courts were generally hostile to these prohibitory ordinances, and numerous billboard ordinances were declared unconstitutional. The courts said that billboards were not nuisances in fact and could not be made so by legislative fiat. Aesthetic considerations were held insufficient to support use of the police power to impose rather modest restrictions upon the location of billboards.²³² Even ordinances with the limited purpose of protecting the appearance of public parks and boulevards by restricting the placing of billboards near such places were disapproved.²³³ The rationale of many of these early court decisions was stated by a conservative New Jersey court as follows: "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."²³⁴

Even in the early 1900's, however, cases may be found upholding the validity of municipal billboard regulation on the dual grounds of safety and amenity.²³⁵ The decision generally credited with having the greatest influence in changing judicial attitudes toward billboard regulation is *St. Louis Gunning Advertising Co. v. City of St. Louis*.²³⁶ In an opinion covering 124 pages, the Missouri court discussed the evolution of the law up to that time and upheld a municipal ordinance regulating the size, height, and location of billboards. In an oft-quoted passage, the court said:

231. See generally Proffitt, *Public Esthetics and the Billboard*, 16 CORNELL L.Q. 151 (1931); Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124 (1926).

232. E.g., *Anderson v. Shackleford*, 74 Fla. 36, 76 S. 343 (1917), *overruled in part on other grounds*, *Sunad, Inc. v. City of Sarasota*, 122 S.2d 611 (Fla. 1960); *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N.E. 601 (1905), *overruled by* *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935); *St. Louis Gunning Advertising Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911), *dismissed per stipulation*, 231 U.S. 761 (1913); *Kansas City Gunning Advertising Co. v. City of Kansas City*, 240 Mo. 659, 144 S.W. 1099 (1912); *Bill Posting Sign Co. v. City of Atlantic City*, 71 N.J.L. 72, 58 A. 342 (Sup. Ct. 1904); *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 62 A. 267 (Ct. Err. & App. 1905); *State v. Whitlock*, 149 N.C. 542, 63 S.E. 123 (1908); *Bryan v. City of Chester*, 212 Pa. 259, 61 A. 894 (1905).

233. *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 94 N.E. 920 (1911); *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N.E. 601 (1905), *overruled by* *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935).

234. *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (Ct. Err. & App. 1905).

235. See, e.g., *In re Wilshire*, 103 F. 620, 623-24 (C.C.S.D. Cal. 1900).

236. 235 Mo. 99, 137 S.W. 929 (1911), *dismissed per stipulation*, 231 U.S. 761 (1913). See also *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919).

[T]here is but one virtue connected with this entire [outdoor advertising] business, and that is the advertising itself. This is a legitimate and honorable business, if honorably and legitimately conducted, but every other feature and incident thereto have evil tendencies, and should for that reason be strictly regulated and controlled. The signboards upon which this class of advertisements are displayed are constant menaces to the public safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants. They are also inartistic and unsightly.

In cases of fire they often cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure and broad surface, render them liable to be blown down and to fall upon and injure those who may happen to be in their vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and the dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine and air, which are so conducive to health and comfort.²³⁷

Although the Missouri court, in the passage set out above, expressly mentioned the fact that signboards are "inartistic and unsightly," at a later point in its opinion it made it clear that, in its view, aesthetic considerations alone were insufficient to sustain the regulatory ordinance:

As to the third class of cases, . . . those which hold such ordinances invalid because they show upon their faces that they were enacted solely for aesthetic considerations and not for the good of the public, they are unquestionably sound; and no court should uphold an ordinance which has no better reason than that to commend it to the lawmaker and the courts. If the necessity or reasonableness of such an ordinance should be tested by such a standard, then the standard itself would be hard to establish, for the reason that all do not have the same tastes or ideas of beauty; what would please one might not please another. . . . A statute or ordinance conforming to the tastes and ideas of beauty passed [*sic*] by the body of lawmakers who enacted it might and probably would in most instances be distasteful to a majority of the people of the city; and especially is that true as regards this class of legislation. . . . Property rights should never be subjected to such fickle standards of regulation, especially when they are devoid of all substantial benefit to the citizens.²³⁸

237. 235 Mo. at 144-45, 137 S.W. at 942.

238. 235 Mo. at 202, 137 S.W. at 961.

The fact that the record of *St. Louis Gunning* and similar billboard cases supplied little evidence to support the health, safety, and morals justifications for regulatory legislation has been demonstrated by other writers.²³⁹ But many courts followed the lead of the Missouri court in upholding, on health, safety, and morals grounds, billboard regulations that were, in fact, primarily based on aesthetic grounds.²⁴⁰ The rationale was widely employed even under circumstances that rendered its factual basis less convincing than it was in *St. Louis Gunning*.²⁴¹ Nor was it discarded in later cases that exposed and gave substantial weight to the aesthetic considerations that were in large part the motivation for such regulatory legislation.²⁴²

Growing appreciation of the close relationship between the value of property and the amenity of its surroundings had a significant practical effect on judicial views as to the scope of the police power. This relationship was noted when the United States Supreme Court, in *Village of Euclid v. Ambler Realty Co.*,²⁴³ provided a solid constitutional footing for comprehensive zoning and thus made available a natural framework for including outdoor advertising regulations in ordinances that regulated land use in other respects. The past sixty years have witnessed a gradual acceptance by the courts of a broader definition of general welfare than prevailed at the time of the *St. Louis Gunning* case. One aspect of this change in judicial attitude is the increasing number of opinions sustaining outdoor advertising controls that frankly expose their primary aesthetic purpose.²⁴⁴ Recent

239. See, e.g., Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Proffitt, *supra* note 231, at 151.

240. See, e.g., *Thomas Cusack Co. v. City of Chicago*, 267 Ill. 344, 108 N.E. 340 (1914), *affd.*, 242 U.S. 526 (1917); *People ex rel. Publicity Leasing Co. v. Ludwig*, 218 N.Y. 540, 113 N.E. 532 (1916); *State v. Staples*, 157 N.C. 637, 73 S.E. 112 (1911); *Horton v. Old Colony Bill Posting Co.*, 36 R.I. 507, 90 A. 822 (1914); *Cream City Bill Posting Co. v. City of Milwaukee*, 158 Wis. 86, 147 N.W. 25 (1914).

241. See, e.g., *Whitmier & Filbrick Co. v. City of Buffalo*, 118 F. 773 (C.C.N.Y. 1902); *Murphy v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *Hav-A-Tampa Cigar Co. v. Johnson*, 149 Fla. 148, 5 S.2d 433 (1941); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 297 U.S. 725 (1936); *State v. Staples*, 157 N.C. 637, 73 S.E. 112 (1911); *Landau Advertising Co. v. Zoning Bd. of Adjustment*, 387 Pa. 552, 128 A.2d 559 (1957); *Liggett's Petition*, 291 Pa. 109, 139 A. 619 (1927).

242. E.g., *National Advertising Co. v. County of Monterey*, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962); *Murphy v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 297 U.S. 725 (1936).

243. 272 U.S. 365 (1926). The Supreme Court had previously held that billboards may be excluded from residence zones. *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919).

244. The rationale for basing billboard regulations on a broader concept of the general welfare that would include aesthetic factors was first stated in *Churchill &*

cases sustaining aesthetic controls tend to rely at least in part on the ground that such controls promote the general welfare by preserving property values or valuable tourist attractions.²⁴⁵ A recent New Jersey Supreme Court opinion epitomized the aesthetic-property value rationale as follows: "There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound. We refer not to some sensitive or exquisite preference but to concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property."²⁴⁶

The aesthetic-property value rationale is probably most persuasive when it is used to sustain municipal land use regulations (usually zoning regulations) that apply to urban areas²⁴⁷ or land use restrictions designed to maintain scenic beauty in areas that attract large numbers of tourists; it is least persuasive when used to sustain land use regulations in rural areas with little scenic value. But it is pretty clear that preservation of scenic beauty along highways, both to pro-

Tait v. Rafferty, 32 Philippines 580 (1915), *appeal dismissed*, 248 U.S. 591 (1918). Other important cases include *Murphy v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *Merritt v. Peters*, 65 S.2d 861 (Fla. 1953); *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967); *Outdoor Advertising Co. v. City of Indianapolis*, 202 Ind. 85, 172 N.E. 309 (1930); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935), *appeal dismissed*, 297 U.S. 725 (1936); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5 (1932); *People v. Sterling*, 128 Misc. 650, 220 N.Y.S. 315 (Sup. Ct. 1927); *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923). *See also* *State v. Buckley*, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968) (junkyard); *Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965) (auto wrecking yard). *Cf. State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 S. 440 (1923). The broadest general welfare rationale for aesthetic regulation is provided by *Berman v. Parker*, 348 U.S. 26 (1954).

245. *Murphy v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944) (billboards—property values); *Sunad, Inc. v. City of Sarasota*, 122 S.2d 611 (Fla. 1960) (advertising signs—tourism); *Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 S.2d 364 (1941) (exclusive hotel and apartment zone—esthetic appeal, tourism); *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 97 S. 440 (1923) (architectural control—property values); *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 563 (1955) (historic district, architectural control—tourism); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955) (historic district, architectural control—tourism); *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964) (outdoor advertising—property values); *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963) (front-yard clothes lines—property values); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955) (architectural controls—property values).

246. *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

247. *See, e.g.,* *Murphy v. Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955).

tect the right of the traveling public to aesthetic enjoyment and to preserve the tourist industry as an economic asset of the state, is a legitimate police power goal.²⁴⁸ And closely linked with use of the police power to preserve scenic beauty along highways is the idea that travelers on a public highway constructed with public funds have a right to be free from the intrusion of unwelcome advertising that derives its value to the advertiser entirely from the public investment in the highway.²⁴⁹

Judicial recognition that the highway advertiser is essentially "seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways"²⁵⁰ and that "the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares"²⁵¹ led ultimately, in *Kelbro, Inc. v. Myrick*,²⁵² to a holding that "the right of view [from the highway] of the owner or occupant of the abutting property 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."²⁵³ In addition, the growth in the number of automobiles on the highways and the increase in normal highway driving speeds has led to the development of a new public safety rationale for the regulation of outdoor advertising—that regulation of highway advertising may reasonably be deemed to promote traffic safety, clearly a legitimate objective of police power regulations.

All of the grounds mentioned in the preceding two paragraphs have been relied upon by the courts in decisions upholding the regulation of outdoor advertising along the highways. These include a number of important recent decisions upholding the prohibition of off-premises advertising along interstate and other limited-access highways by statutes enacted in the early 1960's to take advantage

248. See, e.g., *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 184-88, 193 N.E. 799, 815-17 (1935), *appeal dismissed*, 297 U.S. 725 (1936).

249. See, e.g., *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 167-69, 193 N.E. 799, 808 (1935), *appeal dismissed*, 297 U.S. 725 (1936).

250. *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 169, 193 N.E. 799, 808 (1935), *appeal dismissed*, 297 U.S. 725 (1936).

251. *Churchill & Tait v. Rafferty*, 32 Philippines 580, 609 (1915), *appeal dismissed*, 248 U.S. 591 (1918).

252. 113 Vt. 64, 30 A.2d 527 (1943).

253. 113 Vt. at 70, 30 A.2d at 530. See Wilson, *supra* note 94, for an exhaustive discussion of this "property rights" approach to outdoor advertising regulation. *Kelbro* was reaffirmed in *Micalite Sign Corp. v. State Highway Dept.*, 126 Vt. 498, 236 A.2d 680 (1967).

of the bonus provision of the Federal-Aid Highway Act of 1958.²⁵⁴ These cases have held the goals of legislation very similar to the current compliance laws to be well within the police power, and all of them have sustained the statutes before the courts against attack on equal protection and free speech grounds.

In dealing with the police power issue, all of these recent cases have relied upon both a traffic safety and an "aesthetic values" rationale. In addition, two cases relied in part upon the rationale of *Kelbro, Inc. v. Myrick*, discussed above.²⁵⁵ Since all of these cases involved statutes that provided for the removal of lawfully erected nonconforming advertising signs without compensation, they furnish very strong a fortiori support for use of the police power to prevent erection of new signs in controlled areas adjacent to interstate and primary highways.

The distinction between off-premises and on-premises signs was expressly held to be valid in *Opinion of the Justices*²⁵⁶ and *Ghaster Properties, Inc. v. Preston*,²⁵⁷ against an attack on equal protection grounds, and has almost uniformly been sustained as reasonable in other cases.²⁵⁸ The distinction between interstate highways (and, in some cases, certain other limited-access highways) and other highways has been upheld in all the recent highway advertising cases.²⁵⁹

Certain equal protection objections can be leveled against compliance laws stimulated by the Highway Beautification Act that could not be asserted against the earlier state legislation sustained in the recent cases discussed above. For example, it can be argued that the compliance laws discriminate arbitrarily between rural and urban signs—and hence between roadside business advertising and standardized outdoor advertising—because off-premises advertising is allowed

254. *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762 (1961); *New York State Thruway Authority v. Ashley Motor Ct., Inc.*, 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328 (1964); *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 429 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).

255. See text accompanying notes 252-53 *supra*.

256. 103 N.H. 268, 169 A.2d 762 (1961).

257. 176 Ohio St. 425, 200 N.E.2d 328 (1964).

258. *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 417 (1964); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952); *Kelbro, Inc. v. Myrick*, 113 Vt. 64, 30 A.2d 527 (1943). Cf. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949). *Contra*, *Sunad, Inc. v. City of Sarasota*, 122 S.2d 611 (Fla. 1960).

259. Similarly, the distinction between land within 660 feet of interstate highways (and other controlled highways) and land located farther from such highways has been sustained either by implication or, in one case, by express language. See *Moore v. Ward*, 377 S.W.2d 881, 886 (Ky. 1964).

only in zoned and unzoned commercial and business areas.²⁶⁰ It can also be argued that the regulation of advertising signs in areas adjacent to interstate and federal-aid primary highways but not in areas adjacent to federal-aid secondary highways or other highways involves an arbitrary discrimination. I believe it is very unlikely, however, that state laws enacted to comply with the Highway Beautification Act will be held invalid on the basis of such equal protection arguments.

There would appear to be a rational basis for the separate classification²⁶¹ of zoned and unzoned commercial or industrial areas, on the one hand, and all other areas, on the other, at least to the extent that aesthetic considerations are deemed a proper basis for regulation of highway advertising. It is obvious that, in general, few aesthetic features will be found in zoned or unzoned commercial or industrial areas, while rural and residential areas are more likely to include places of scenic beauty and historic interest.²⁶² Similarly, there would seem to be a rational basis for classifying interstate and federal-aid primary highways differently than federal-aid secondary highways and other highways. Interstate highways, as a class, carry more high-speed traffic than any other class of highways, so the traffic safety rationale for regulation of outdoor advertising along these highways is particularly persuasive. It also seems clear that the federal-aid primary system, which by statute "shall consist of an adequate system of connected main highways, selected or designated by each State,"²⁶³ can reasonably be given a separate classification on the ground that these highways are more heavily traveled than federal-aid secondary highways or other state highways.²⁶⁴

A further equal protection issue may arise because so many of the state compliance laws do not provide for payment of compensation upon removal of nonconforming signs lawfully erected in areas adjacent to existing interstate or federal-aid primary highways between

260. See, e.g., 1967 House Hearings, *supra* note 27, at 215-18 (letter from Paul Spooner, General Counsel, Roadside Business Association, to members of the Subcommittee on Roads, April 27, 1967).

261. As the United States Supreme Court has held, equal protection of the laws "only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954).

262. See, e.g., 1967 House Hearings, *supra* note 27, at 146-47 (colloquy between Rep. Cramer and Archibald C. Rogers, architect).

263. 23 U.S.C. § 103(b) (1970).

264. For the distinction between federal-aid primary and secondary systems, see 23 U.S.C. §§ 103(b)-(c) (1970).

October 22, 1965, and January 1, 1968. As previously indicated,²⁶⁵ this omission results from the adoption in state compliance laws of the language of subsection (g) of title I of the Highway Beautification Act, but it obviously discriminates against owners of property interests in those signs and the realty upon which those signs are located. The only rational basis for this discrimination is the fact that, under subsection (g) of title I, no federal funds are available for compensation of the holders of such property interests, while the federal government will contribute seventy-five per cent of the compensation required to be paid upon removal of nonconforming signs "(1) lawfully in existence on the date of enactment of this subsection [October 22, 1965], (2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and (3) those lawfully erected on or after January 1, 1968."²⁶⁶ It is doubtful that this fact alone justifies the states in discriminating between property owners otherwise similarly situated. The equal protection issue, however, is unlikely to arise if payment of compensation is required by federal or state courts on due process or "taking" grounds.^{266a}

Another possible equal protection problem should be mentioned here. The state compliance laws enacted in response to title I of the Highway Beautification Act all provide, broadly, for the prohibition of future advertising signs by means of the police power, without compensation to landowners for the loss of their right to erect signs in the future. However, landowners are to be compensated for the loss of present rights under existing advertising leases when existing signs are removed; in many (perhaps most) states, it is not clear whether the statutory compensation provisions will be construed to require payment of compensation to the landowner for loss of the right to erect future signs when an existing sign is removed.²⁶⁷ If the latter construction is adopted, it can be argued that these compliance laws deny the equal protection of the laws in so far as they provide that some landowners will be compensated for the loss of a property right, while other landowners will not.

265. See text accompanying notes 176-77 *supra*.

266. 23 U.S.C. § 131(g) (1970).

266a. For an indication that uncompensated removal requirements may be constitutionally invalid on such grounds, see *Art Neon Co. v. City & County of Denver*, 357 F. Supp. 466 (D. Colo. 1973); *State Highway Dept. v. Branch*, 222 Ga. 770, 152 S.E.2d 372 (1966).

267. If state compliance laws are so construed, the problem presented will be similar to the one discussed in D. SUTTE & R. CUNNINGHAM, SCENIC EASEMENTS: LEGAL, ADMINISTRATIVE, AND VALUATION PROBLEMS AND PROCEDURES 45-46 (Highway Research Board, NCHRP Report No. 56, 1968).

Although there seems to be no judicial authority directly in point, several early zoning cases raised a similar problem. In these cases, zoning ordinances were attacked as unconstitutionally discriminatory because they permitted existing nonconforming uses to continue but prohibited the establishment of the same uses in the future by landowners similarly situated. As early as 1925, however, a California decision, affirmed by the United States Supreme Court, upheld a zoning ordinance that permitted existing uses to continue although they did not conform to the use restrictions of the district in which they were located.²⁶⁸ The court said that the ordinance was not invalid because it was not retroactive and permitted the continuance of existing nonconforming uses. In 1927, the Tennessee Supreme Court also held that zoning ordinance provisions allowing continuance of existing nonconforming uses did not discriminate unfairly in favor of the nonconforming user.²⁶⁹ Within the next decade, the courts of eight states reached the same conclusion.²⁷⁰ The courts have generally said that the distinction between existing and future uses of land is not arbitrary or unreasonable, has a rational basis,²⁷¹ and affects in a similar manner all persons similarly situated.²⁷² In short, it is reasonable to place in separate classes those landowners with existing nonconforming uses on their land and those without such uses. In addition, the courts have said that a municipality can protect existing uses so that the zoning ordinance is not unnecessarily harsh and burdensome²⁷³ and that it "would seem almost, if not quite, necessary" to include in zoning ordinances provisions allowing continuance of nonconforming uses.²⁷⁴

These early zoning cases would seem, at least by analogy, to pro-

268. *Zahn v. Board of Pub. Works*, 195 Cal. 497, 234 P. 388 (1925), *affd.*, 274 U.S. 325 (1927).

269. *Spencer-Sturla Co. v. City of Memphis*, 155 Tenn. 70, 290 S.W. 608 (1927).

270. *Marquis v. City of Waterloo*, 210 Iowa 439, 228 N.W. 870 (1930); *City of Norton v. Hutson*, 142 Kan. 305, 46 P.2d 630 (1935); *Sampere v. City of New Orleans*, 166 La. 776, 117 S. 827 (1928), *affd. per curiam*, 279 U.S. 812 (1929); *Stone v. Cray*, 89 N.H. 483, 200 A. 517 (1938); *City of Elizabeth City v. Aydlett*, 201 N.C. 602, 161 S.E. 78 (1931); *Baxley v. City of Frederick*, 133 Okla. 84, 271 P. 257 (1928); *Huebner v. Philadelphia Sav. Fund Socy.*, 127 Pa. Super. 28, 192 A. 139 (1937); *Lombardo v. City of Dallas*, 47 S.W.2d 495 (Tex. Civ. App. 1932), *affd.*, 124 Tex. 1, 73 S.W.2d 475 (1934).

271. *See, e.g., Vendley v. City of Berkeley*, 21 Ill. 2d 563, 566, 173 N.E.2d 506, 508 (1961); *Kinney v. Sutton*, 230 N.C. 404, 411, 53 S.E.2d 306, 310 (1949).

272. *Sampere v. City of New Orleans*, 166 La. 776, 780, 117 S. 827, 828 (1928), *affd. per curiam*, 279 U.S. 812 (1928).

273. *State ex rel. Manhein v. Harrison*, 164 La. 564, 570, 114 S. 159, 161 (1927).

274. *Momeier v. John McAlister, Inc.*, 203 S.C. 353, 372, 27 S.E.2d 504, 511 (1943). A number of cases hold that attempts to eliminate nonconforming uses by means of the police power are unconstitutional. *E.g., Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930).

vide adequate authority to sustain the different treatment under state compliance laws of those landowners who have advertising signs on their land under existing leases and those who do not. Moreover, where advertising signs were erected before the compliance law became effective, the value of the landowner's right to use his land for outdoor advertising has been factually demonstrated; where advertising signs have not been erected by that date, the value of his right has not been factually demonstrated. This difference alone seems sufficient to justify a different classification for land on which lawful advertising signs have already been erected when the compliance law becomes effective.²⁷⁵

2. *Control by Means of the Spending Power and the Eminent Domain Power*

One question that immediately comes to mind is whether acquisition of nonconforming highway advertising signs and the associated property rights can be deemed to promote a public purpose and to result in a public use of the property acquired. This problem is important because (1) expenditure of public funds for other than public purposes is generally prohibited by state constitutions,²⁷⁶ (2) almost all state constitutions allow the taking of private property by eminent domain only for public use,²⁷⁷ and (3) a statute authorizing the taking

275. Cf. D. SUTTE & R. CUNNINGHAM, *supra* note 267, at 46.

276. Some state constitutions expressly prohibit expenditures of public funds or levying taxes for other than public purposes. See ALAS. CONST. art. IX, § 6; HAWAII CONST. art. VI, § 2; ILL. CONST. art. VIII, § 1; LA. CONST. art. IV, § 8; MO. CONST. art. X, § 3; MONT. CONST. art. XII, § 11; TEX. CONST. art. VIII, § 3; WASH. CONST. art. VII, § 1. Other state constitutions prohibit either a grant of public money or a loan of the state's credit to private individuals, associations, or corporations. See ARIZ. CONST. art. 9, § 7; CAL. CONST. art. 4, § 31; COLO. CONST. art. XI, §§ 1-2; MO. CONST. art. III, § 38(a); NEV. CONST. art. 8, § 9 (purchase of stock of corporations, companies, associations prohibited); N.J. CONST. art. VIII, § III, ¶ 3; N.M. CONST. art. IX, § 14; N.Y. CONST. art. VII, § 8; OKLA. CONST. art. X, § 15. And many state constitutions simply prohibit the giving or lending of the state's credit to private individuals, associations, or corporations. See ALA. CONST. art. 4, § 93; ARK. CONST. art. 16, § 1; FLA. CONST. art. 7, § 10; GA. CONST. art. VII, § III, ¶ IV; IDAHO CONST. art. VIII, § 2; IOWA CONST. art. VII, § 1; KY. CONST. § 177; ME. CONST. art. IX, § 14 (except for insuring industrial development mortgage loans); MD. CONST. art. III, § 34; MINN. CONST. art. IX, § 10; MISS. CONST. art. 14, § 258; N.J. CONST. art. VIII, § 2, ¶ 1; OHIO CONST. art. VII, § 4; PA. CONST. art. VIII, § 8; S.C. CONST. art. X, § 6; TENN. CONST. art. II, § 31; TEX. CONST. art. III, § 50; UTAH CONST. art. 6, § 31; VA. CONST. art. X, § 10 (except insuring industrial development loans); WASH. CONST. art. VIII, § 5; W. VA. CONST. art. X, § 6; WIS. CONST. art. VIII, § 3; WYO. CONST. art. XVI, § 6. Provisions of this third type, merely prohibiting the giving or lending of the state's credit, have generally been construed to prohibit the expenditure of public funds for any nonpublic purpose.

277. The federal constitution and all but three of the state constitutions contain provisions that have been construed to protect the owner of private property from an exercise of the power of eminent domain for purposes that do not involve a public use. In some cases the state constitutions expressly forbid the taking of private prop-

of private property for other than public use will violate the fourteenth amendment's prohibition against deprivation of property without due process of law.²⁷⁸

There would appear to be at least two possible lines of attack on the public use issue. First, the courts can rely on cases like *Berman v. Parker*,²⁷⁹ which hold, in substance, that public use means simply public purpose or public benefit. This is essentially what the state courts have done in the many cases challenging state urban renewal enabling acts.²⁸⁰ In at least twenty-nine states, the courts, without the aid of special constitutional provisions, have sustained urban renewal statutes that authorize the use of eminent domain to acquire land and the resale of the land to private agencies for redevelopment in accordance with a publicly approved plan and subject to land-use restrictions designed to assure continued compliance with that plan.²⁸¹ The courts of these states have, in effect, though not always in express terms, equated public use with substantial public purpose. Although most of the cases emphasize the public purpose and public use (the terms are used interchangeably) involved in the clearance of slum and blighted areas,²⁸² some cases also recognize that

erty for private uses. In a majority of cases the negative implication of the conventional condemnation clause—that private property shall not be taken for public use without payment of just compensation—is used to protect the property owner from a taking for private use. Even in the three states that have no express constitutional provision as to eminent domain, it has been held that other constitutional provisions preclude the taking of private property for private use or without payment of just compensation. Moreover, most state constitutions contain a clause prohibiting the taking of property without due process of law, or equivalent provisions; in some instances the state courts have relied on these clauses in holding a taking for private use unconstitutional, either because the state constitution did not contain the usual eminent domain clause or because the court was not satisfied with the implied prohibition contained in that clause. For a more extended discussion with citation of authorities, see 2 P. NICHOLS, *supra* note 106, § 7.1.

278. *Hairston v. Danville & W. Ry.*, 208 U.S. 598 (1908); *Clark v. Nash*, 198 U.S. 361 (1905). For discussion, see 1 P. NICHOLS, *supra* note 106, § 4.7.

279. 348 U.S. 26 (1954).

280. See 2A P. NICHOLS, *supra* note 106, § 7.51561 n.1, at 188-203, citing cases from 36 states upholding urban renewal enabling acts. For a similar list of cases from 31 jurisdictions upholding such acts, with a useful classification of the cases, see the appendix to *Miller v. City of Tacoma*, 61 Wash. 2d 374, 393-95, 378 P.2d 464, 475-77 (1963).

281. These states are Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wisconsin. The only state that is still clearly contra is South Carolina. See 2A P. NICHOLS, *supra* note 106, § 7.51561 n.1, at 188-203.

282. See, e.g., *Zurn v. City of Chicago*, 389 Ill. 114, 128-29, 59 N.E.2d 18, 25 (1945).

All the state court decisions on the constitutionality of urban renewal acts authorizing the exercise of the eminent domain power have been significantly influenced by the United States Supreme Court's opinion in *Berman v. Parker*, 348 U.S. 26 (1954), discussed in text accompanying note 279 *supra*.

resale of urban renewal project land subject to restrictions that limit its future use to publicly authorized purposes creates a kind of continuing public use of the land.²⁸³ The parallel with a highway advertising control program is clear, since the essence of such a program is restriction of the use of privately owned land to achieve a purpose declared by the legislature to be a public purpose. Indeed, the urban renewal cases actually go further than is necessary to sustain a highway advertising control program, since the latter does not involve the resale of land for what is clearly private use in the ordinary sense of the term.

Second, since the purpose of the highway advertising control program is, in part at least, identical to the purpose of the scenic easement acquisition program, and the restrictions against advertising use to be imposed under the advertising control program are essentially similar to scenic easements (though more limited in scope), state courts could simply follow the holding in *Kamrowski v. State*²⁸⁴ that "[t]he enjoyment of the scenic beauty by the public which passes along the highway" is "a direct use by the public of the rights in land which have been taken in the form of a scenic easement."²⁸⁵

Assuming that the issue of public use is resolved on the *Berman* theory, the question of public purpose or public benefit still remains. It seems clear that acquisition of highway advertising signs and the associated rights of sign owners and landowners will be held to be for a public purpose and to produce a public benefit in any state where the courts have accepted aesthetic zoning as a valid exercise of the police power, since the cases supporting aesthetic zoning are based on judicial recognition of the fact that the preservation of aesthetic values is an appropriate goal of governmental action.²⁸⁶ And, if police-power regulation, without compensation, is an appropriate means of achieving this governmental objective, then a fortiori the expenditure of public funds and the use of the eminent domain power are appropriate where nonconforming highway signs and the associated property rights must be acquired by the state. Indeed, the acquisition of such signs and the associated rights is likely to be held to involve a public purpose and to produce a public benefit in many states where aesthetic zoning has not yet been fully accepted, since

283. See, e.g., *Gohld Realty Co. v. City of Hartford*, 141 Conn. 135, 143-44, 104 A.2d 365, 369-70 (1954).

284. 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

285. 31 Wis. 2d at 265, 142 N.W.2d at 797.

286. See text accompanying notes 244-46 *supra*.

there are many cases in these states directly upholding the control of highway advertising under the police power.²⁸⁷ Moreover, as the states shift from the uncompensated control of land use under the police power to acquisition of nonconforming signs and related property rights by means of eminent domain, with payment of just compensation, it becomes much less necessary for courts to oversee the legislative or administrative definition of "beauty" or "scenic"—a problem of definition that underlies much of the judicial reluctance to accept aesthetic zoning as a valid exercise of the police power.²⁸⁸ In any case, the traffic safety rationale of highway advertising control is almost certainly adequate to satisfy the public purpose requirement.

In light of the foregoing discussion, it seems clear that in all, or almost all, states the acquisition of nonconforming highway signs and the associated property rights of both the sign owners and the landowners pursuant to state advertising control laws will be held (if challenged in the courts) to involve both a public use and a public purpose sufficient to justify the expenditure of public funds and the use of the power of eminent domain.

3. State Constitutional "Antidiversion" Provisions

Assuming that the acquisition of nonconforming highway signs and the associated property rights by means of eminent domain and the use of public funds to pay just compensation therefor are constitutionally justifiable under the public use and public purpose tests, there remains in many states the question whether it is lawful for a state highway agency to use dedicated highway funds to pay the state's twenty-five per cent share of the just compensation required by title I of the Highway Beautification Act.

Some twenty-eight states have constitutional provisions that earmark certain state revenues—typically the motor fuel excise taxes and the vehicle registration fees—for specified highway purposes.²⁸⁹ These provisions are generally known as "antidiversion amendments" and have prevented highway user taxes from being appropriated for

287. See text accompanying notes 235-42, 248-55 *supra*.

288. "Whatever may be the law with respect to zoning restrictions based upon aesthetic considerations, a stronger argument can be made in support of the power to take property, in return for just compensation, in order to fulfill aesthetic concepts, than for the imposition of police power restrictions for such purposes." *Kamrowski v. State*, 31 Wis. 2d 256, 265-66, 142 N.W.2d 793, 797 (1966).

289. The provisions are as follows: ALA. CONST. amend. 93; ARIZ. CONST. art. 9,

the support of governmental programs that have nothing to do with highways and thus confer no benefit on the highway user *qua* highway user. Although the forces that were originally mobilized in the 1920's to promote these amendments were, and still are, energetic in their efforts, they were not able to secure uniformity of language in the amendments that were adopted. As a result, each state legislature that faces the problem of squaring its highway advertising control program with its state constitution must look carefully to the wording of the antidiversion amendment in its own constitution.

All the amendments, naturally, are chiefly concerned with directing highway user funds into road construction and maintenance. The most liberal simply specify "highway purposes,"²⁹⁰ "highway purposes as defined by law,"²⁹¹ or the creation of a special highway fund²⁹² or add "other statutory highway purposes" to the list of specified highway purposes.²⁹³ In these states it seems clear that the legislature, by designating the acquisition of nonconforming signs and associated property rights as a "highway purpose," can make dedicated highway funds available for acquisition of signs and associated rights if it wishes. Many of the current highway advertising control laws contain such a designation.

A few states have other general language in their antidiversion amendments that could be interpreted to permit the use of highway user funds for billboard acquisition. For example, the California and Utah provisions speak of "construction, *improvement*, repair and maintenance of highways."²⁹⁴ Georgia's provision refers to "all activ-

§ 14; CAL. CONST. art. 26; COLO. CONST. art. X, § 18; GA. CONST. art. VII, § IX, ¶ IV(b); IDAHO CONST. art. VII, § 17; IOWA CONST. art. VII, § 8; KAN. CONST. art. 11, § 10; KY. CONST. § 230; LA. CONST. art. VI, §§ 22-23; ME. CONST. art. IX, § 19; MASS. CONST. amend. LXXIII; MICH. CONST. art. IX, § 9; MINN. CONST. art. XVI, §§ 5, 9, 10; MO. CONST. art. IV, § 30(b); MONT. CONST. art. XII, § 1(b); NEV. CONST. art. 9, § 5; N.H. CONST. pt. II, art. 6-a; N.D. CONST. amend. 56; OHIO CONST. art. XII, § 5a; ORE. CONST. art. IX, § 3; PA. CONST. art. VIII, § 11; S.D. CONST. art. XI, § 8; TEX. CONST. art. VIII, § 7-a; UTAH CONST. art. 13, § 13; WASH. CONST. art. II, § 40; W. VA. CONST. art. VI, § 52; WYO. CONST. art. XV, § 16.

290. KAN. CONST. art. 11, § 10.

291. MICH. CONST. art. IX, § 9.

292. LA. CONST. art. VI, § 23.

293. OHIO CONST. art. XII, § 5(a).

294. CAL. CONST. art. 26; UTAH CONST. art. 13, § 13. (Emphasis added.) The Missouri provision similarly authorizes use of dedicated highway funds to complete, widen or *improve* the state highway system, and also for "such *other purposes* and contingencies relating . . . to the construction and maintenance of such highways . . . as the commission may deem necessary and proper." Mo. CONST. art. IV, § 30(b) (emphasis added).

ities incident to providing and maintaining an adequate system of public highways.”²⁹⁵ And Washington’s provision speaks of “construction, reconstruction, repair and *betterment* of public highways.”²⁹⁶

In many states, the antidiversion amendments simply prescribe in substance that the “construction, reconstruction, maintenance and repair” of highways are the only permissible uses of highway user funds.²⁹⁷ Even under such amendments, however, it would seem that highway user funds could be properly expended for acquisition of nonconforming highway signs and the associated rights if the enabling legislation expressly states that such acquisition may be deemed to constitute “a part of the establishment, construction, or reconstruction of State highways on the Federal-aid Highway System”²⁹⁸ or that “[l]and, or any interest therein, acquired under . . . this act is hereby declared to be part of the adjacent or nearest highway.”²⁹⁹

Up until the late 1950’s there was practically no case law interpreting the antidiversion amendments. Following the authorization by Congress in 1956³⁰⁰ of the use of federal-aid highway funds to reimburse the states for ninety per cent of the cost of relocating utility facilities away from highway rights-of-way, however, there was a rash of state legislation designed to liberalize existing state limitations on payments of this type. In those states with constitutional antidiversion provisions where the constitutionality of making utility relocation payments from the highway trust funds has been litigated, the decisions are divided, but a majority has sustained the legislation and has expressly held that such payments do not violate the constitutional provisions.³⁰¹

Even more significant is the decision in *Newman v. Hjelle*,³⁰² sustaining the use of highway trust funds to purchase highway advertis-

295. GA. CONST. art. VII, § IX, ¶ IV(b).

296. WASH. CONST. art. II, § 40 (emphasis added).

297. This is the case in Alabama, Colorado, Idaho, Iowa, Kentucky, Maine, Massachusetts, Montana, Nevada, New Hampshire, North Dakota, South Dakota, Texas, West Virginia, and Wyoming.

298. PA. STAT. ANN. tit. 36, § 670-413.1 (Supp. 1966).

299. UTAH CODE ANN. § 27-12-109.3 (Supp. 1967).

300. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, § 111, 70 Stat. 383 (codified at 23 U.S.C. § 123 (1970)).

301. *Minneapolis Gas Co. v. Zimmerman*, 253 Minn. 164, 91 N.W.2d 642 (1958); *Jones v. Burns*, 138 Mont. 268, 357 P.2d 22 (1960); *Opinion of the Justices*, 101 N.H. 527, 132 A.2d 613 (1957); *Northwestern Bell Tel. Co. v. Wentz*, 103 N.W.2d 245 (N.D. 1960); *State v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737 (1960).

302. 133 N.W.2d 549 (N.D. 1965).

ing rights in connection with the bonus provisions of the Federal-Aid Highway Act of 1958. The diversion issue was squarely raised in *Newman* by the plaintiff's attempt to enjoin the state's use of revenue from motor fuel taxes and vehicle license and registration fees for the purchase of advertising rights. The opinion of the court carefully traced the history of the North Dakota antidiversion amendment and concluded by saying:

It is clear the purpose of the amendment was to prevent any use of the earmarked revenues for anything but highway purposes and not to restrict the terms of the amendment by a narrow construction of the purpose for which the revenue may be used within the area designated.

. . . .

In view of this history and statutes in effect at the time the constitutional amendment was voted upon, it is clear that the people intended . . . to make the scope broad enough to include such matters as were considered within the area of the powers of the State Highway Department, as those powers may exist in relation to public highways. We find this included the right to control advertising signs, billboards, and other signs erected on the right of way, as well as on lands abutting thereon, if such control was provided by law.³⁰³

303. 133 N.W.2d at 557-58. In 1963, the Attorneys General of North and South Dakota were asked to render opinions on the constitutionality of proposals that would have authorized the state highway departments to enter into agreements with the Secretary of Commerce under the 1958 federal-aid legislation providing for billboard control along the interstate system.

South Dakota's Attorney General was of the opinion that use of dedicated highway funds to purchase outdoor advertising rights would violate the state constitutional provision that requires that such funds be spent "exclusively for the maintenance, construction and supervision" of highways and bridges. In passing, he distinguished the use of highway funds to pay for the relocation of utilities from the highway right-of-way by noting that no vested property rights were disturbed by relocation and that it was merely incident to actual highway construction. *See* 1963-64 S.D. ATTY. GEN. REP. 34.

Shortly after the South Dakota opinion was issued, the Attorney General of North Dakota issued his opinion. He noted that North Dakota's constitution limits the use of dedicated highway funds to "construction, reconstruction, repair and maintenance of public highways"—a limitation that he felt was even tighter than South Dakota's, which also mentions "supervision." He also noted North Dakota's legislation providing for payment of utility relocation costs and cited the North Dakota court's approval of that law on the ground that "'construction' embraces everything appropriately connected with and necessarily incidental to the complete accomplishment of the general purpose for which the fund exists." However, the Attorney General found no authority for regarding the acquisition of outdoor advertising rights, either in the form of additional right-of-way or rights in land adjacent to the right-of-way, to be part of highway "construction." Instead, he viewed control of roadside advertising as an independent project and expressed "serious doubts" that dedicated highway funds could lawfully be spent for this purpose. *See* 1962-64 N.D. ATTY. GEN. REP. 148.

Two years later, however, the Attorney General of North Dakota was compelled to argue in support of the state's program of billboard control through purchase of advertising rights and, in *Newman v. Hjelle*, succeeded in convincing the court that this practice should be sustained.

Although the case law dealing with the antidiversion amendments is certainly not conclusive, on the whole it gives reason to believe that these amendments will generally not be construed so narrowly as to preclude the use of dedicated highway funds for the acquisition of nonconforming highway signs and the associated property rights of sign owners and landowners.

III. CRITIQUE AND CONCLUSION

Although the advertising control provisions of the Highway Beautification Act of 1965 have been the subject of unremitting controversy from the date of enactment until the present time, only three substantive amendments to title I have been adopted in the intervening years. These are the amendments to subsections (d)³⁰⁴ and (j)³⁰⁵ and the addition of a new subsection (n),³⁰⁶ all of which were adopted in 1968.³⁰⁷

In 1969, several abortive attempts were made to amend title I further. A Senate bill³⁰⁸ would have authorized the Secretary to enter into agreements with one or more states for the purpose of carrying out pilot programs to determine the best means of accomplishing the objectives of title I and would have appropriated fifteen million dollars for such programs. The legislative history of the bill clearly indicates that it was primarily designed to allow Utah to proceed with removal of nonconforming billboards pursuant to the "Snarr plan."³⁰⁹ The 1969 House bill³¹⁰ would have (1) changed the deadline for compliance with subsection (b) of title I from January 1, 1968, to January 1, 1971,³¹¹ (2) appropriated a mere 1.5 million dollars for highway

304. See text accompanying note 33 *supra*.

305. See note 16 *supra*.

306. See text accompanying notes 50-51 *supra*.

307. Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, §§ 6(a)-(b),(d), 82 Stat. 817.

308. S. 1442, 91st Cong., 1st Sess. (1969).

309. See 1969 Senate Hearings, *supra* note 11, at 51-60 (testimony of Douglas T. Snarr); 1969 House Hearings, *supra* note 43, at 185-90. See also 1969 Senate Hearings, *supra*, at 4-51 (testimony and statements of Senator Frank E. Moss, Henry C. Helland, Larry Wimmer, and F. John Francis); 1969 House Hearings, *supra*, at 161-84 (testimony and statements of Henry C. Helland, Merrill Bateman, and F. John Francis).

In substance, the "Snarr plan" envisaged that the state highway agencies would buy, and each advertising company would sell, all nonconforming signs within a given state pursuant to a single contract negotiated by the state and the company instead of requiring the state agency to buy or condemn nonconforming signs one at a time. For a more detailed description, see R. CUNNINGHAM, *supra* note 42, at 62.

310. H.R. 14741, 91st Cong., 1st Sess. (1969).

311. H.R. 14741, 91st Cong., 1st Sess. § 3 (1969).

beautification programs in fiscal 1971,³¹² and (3) required the Secretary, in cooperation with the state highway departments, to "make a full and complete investigation and study of how such programs should be carried out to effectively provide the desired public and private benefits and submit to Congress a report based on such investigation and study, including his recommendations, not later than April 15, 1970."³¹³

Neither bill became law, but the Department of Transportation nevertheless conducted a new study of the problems arising under title I and issued a report in June 1970.³¹⁴ A bill encompassing its recommendations was introduced in the Senate on July 1, 1970,³¹⁵ and another bill with the same provisions as the abortive 1969 Senate bill was introduced on August 18, 1970.³¹⁶ However, neither of these was enacted by Congress. Ultimately, Congress included in the Federal-Aid Highway Act of 1970³¹⁷ a provision creating an eleven-member Commission on Highway Beautification,³¹⁸ to be composed of two majority and two minority members from each of the two congressional Public Works Committees and three members to be appointed by the President "from among persons who are not officers or employees of the United States."³¹⁹

Although the authorizing legislation provided that the Commission should make a final report not later than one year after it was

312. H.R. 14741, 91st Cong., 1st Sess. § 3 (1969).

313. H.R. 14741, 91st Cong., 1st Sess. § 4 (1969).

314. HOUSE COMM. ON PUBLIC WORKS, 91ST. CONG., 2D SESS., *RE STUDY OF THE HIGHWAY BEAUTIFICATION PROGRAM* (Comm. Print 1970).

315. S. 4055, 91st Cong., 2d Sess. § 108 (1970).

316. S. 4260, 91st Cong., 2d Sess. § 113 (1970).

317. Pub. L. No. 91-605, 84 Stat. 1713 (codified in scattered sections of 23 U.S.C.).

318. Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 123, 84 Stat. 1727.

The Commission of Highway Beautification is charged to

(1) study existing statutes and regulations governing the control of outdoor advertising and junkyards in areas adjacent to the Federal-aid highway system; (2) review the policies and practices of the Federal and State agencies charged with administrative jurisdiction over such highways insofar as such policies and practices relate to governing the control of outdoor advertising and junkyards; (3) compile data necessary to understand and determine the requirements for such control which may now exist or are likely to exist within the foreseeable future; (4) study problems relating to the control of on-premise outdoor advertising signs, promotional signs, directional signs, and signs providing information that is essential to the motoring public; (5) study methods of financing and possible sources of Federal funds, including use of the Highway Trust Fund, to carry out a highway beautification program; and (6) recommend such modifications or additions to existing laws, regulations, policies, practices, and demonstration programs as will, in the judgment of the Commission, achieve a workable and effective highway beautification program and best serve the public interest.

Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 123(h), 84 Stat. 1727.

319. Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 123(b), 84 Stat. 1727.

funded³²⁰ (August 1971), for various reasons the Commission did not become fully operational until December 1971.³²¹ The Commission then held public hearings throughout the country and amassed a considerable amount of data and information about highway beautification. In the latter part of 1972, it prepared an interim report recommending certain statutory amendments and requesting an extension of time to enable it to complete a number of investigations relating, *inter alia*, to (1) the reconsideration of agreements where there is dissatisfaction with terms on such matters as definition of unzoned commercial areas, interchanges, and spacing; (2) examination of methods of getting information to motorists efficiently and in a manner consistent with highway beautification, including implementation of pilot projects on official information centers and radio transmissions; (3) methods for calculating compensation for sign removals and the effect of such compensation on state and local sign control programs; (4) the clarification of the effective date of controls imposed by the Highway Beautification Act of 1965; (5) the clarification, and possible modification, of the relationship of controls under the 1958 Bonus Act to controls under the 1965 Highway Beautification Act; (6) revisions in the Secretary of Transportation's authority to impose a ten per cent penalty for failure to comply with federal requirements for highway beautification; (7) the clarification of the legality of federal participation in certain payments made under laws covering outdoor advertising; (8) modifications in state-local relationships in sign control programs; (9) the feasibility of Highway Corridor Boards in sign control programs, zoning, and other land use planning; (10) the relationship of the Uniform Relocation Assistance Act to compensation paid under a state's laws enacted to comply with the Highway Beautification Act; (11) the development of scenic routes; and (12) relative priorities in the highway beautification program.³²²

A provision for the extension of the date for completion of the Commission's work to December 31, 1973, was embodied in both the Senate and House versions of the ill-fated Federal-Aid Highway Act of 1972.³²³ However, in the current session of the Congress, the issue

320. Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 123(i), 84 Stat. 1727.

321. 1972 SENATE REPORT, *supra* note 130, at 13.

322. The interim report has not been published, but copies may be obtained from the Commission on Highway Beautification, 1121 Vermont Ave., N.W., Washington, D.C. 20005.

323. S. 3939, § 146(a), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15336 (daily ed. Sept. 19, 1972); H.R. 16656, § 133(a), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9300 (daily ed. Oct. 6, 1972).

of the continuation of the Commission was separated from other highway legislation, and a joint resolution was passed extending the Commission's life until December 31, 1973.³²⁴

The unenacted Federal-Aid Highway Act of 1972 also contained several proposed amendments to title I of the Highway Beautification Act of 1965. Both the Senate and House versions of the Act would have amended subsection (m) of title I to authorize the expenditure of 50 million dollars in each of the fiscal years 1974 and 1975 for the removal of nonconforming advertising signs,³²⁵ and both versions would have required the states to purchase all nonconforming signs voluntarily offered by the owner for removal if federal funds were available.³²⁶ Both versions would have amended subsection (b) to extend highway advertising controls beyond the present 660 feet from the edge of the right-of-way to cover all signs visible from and erected with the purpose of being read from the main traveled way of the interstate or federal-aid primary system³²⁷ and would have eliminated any reference in subsection (d) to the 660 feet setback requirement.³²⁸

Both the Senate and House versions of the 1972 Act would also have amended (1) subsection (e) so as to provide simply that "[a]ny nonconforming sign under State law enacted to comply with this section shall be removed no later than the end of the fifth year after it

324. Pub. L. No. 93-6, 87 Stat. 6.

325. S. 3939, § 122(g), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15332 (daily ed. Sept. 19, 1972); H.R. 16656, § 120(g), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9298 (daily ed. Oct. 6, 1972).

326. S. 3939, § 122(h), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15332 (daily ed. Sept. 19, 1972); H.R. 16656, § 120(h), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9298 (daily ed. Oct. 6, 1972).

327. The Senate bill would have required imposition of the ten per cent penalty with respect to

Federal-aid highway funds apportioned on or after January 1, 1973, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary [of Transportation] determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs . . . which are more than six hundred and sixty feet off the nearest edge of the right of way, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way . . . until such time as such State shall provide for such effective control.

S. 3939, § 122(a), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15331-32 (daily ed. Sept. 19, 1972).

The House bill would have imposed the ten per cent penalty only beginning with "Federal-aid highway funds apportioned on or after January 1, 1974, or after the expiration of the next regular session of the State legislature . . ." H.R. 16656, § 120(a), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9297 (daily ed. Oct. 6, 1972).

328. S. 3939, § 122(c), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15332 (daily ed. Sept. 19, 1972); H.R. 16656, § 120(c), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9297-98 (daily ed. Oct. 6, 1972).

becomes nonconforming, except as determined by the Secretary;"³²⁹ (2) subsection (f) by giving the Secretary the power to include areas "within the rights-of-way of the primary system" as areas "in which signs . . . giving specific information in the interest of the traveling public may be erected and maintained;"³³⁰ (3) subsection (g) to read, "[j]ust compensation shall be paid upon the removal of any outdoor advertising sign . . . lawfully erected under State law;"³³¹ and would have added a new subsection (o):

No directional sign . . . lawfully in existence on June 1, 1972, giving specific information in the interest of the traveling public shall be required to be removed until December 31, 1973, or until a State in which the sign . . . is located certifies that the directional information about the service or activity advertised on such sign . . . may reasonably be available to motorists by some other method or methods, whichever shall occur first.³³²

In the current session of Congress, the federal-aid highway bill originally passed by the Senate³³³ contained amendments to title I of the Highway Beautification Act similar to those in the abortive 1972 Act, and other amendments were proposed by the House committee.^{333a} But the bill that emerged from the conference committee and was finally enacted into law contains no provisions relating to control of outdoor advertising, and it provides no new funding for fiscal years 1974-76.^{333b}

329. S. 3939, § 122(d), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15332 (daily ed. Sept. 19, 1972); H.R. 16656, § 120(d), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9298 (daily ed. Oct. 6, 1972).

330. S. 3939, § 122(e), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15332 (daily ed. Sept. 19, 1972); H.R. 16656, § 120(e), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9298 (daily ed. Oct. 6, 1972). The House also would have prevented erection of such signs along the interstate and primary systems in urban or suburban areas in lieu of signs permitted by subsection (d) and where adequate information is provided by signs permitted by subsection (c).

331. S. 3939, § 122(f), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15332 (daily ed. Sept. 19, 1972); H.R. 16656, § 120(f), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9298 (daily ed. Oct. 6, 1972).

332. S. 3939, § 122(h), passed by the Senate, Sept. 19, 1972, in 118 CONG. REC. S15332 (daily ed. Sept. 19, 1972); H.R. 16656, § 120(h), passed by the House, Oct. 6, 1972, in 118 CONG. REC. H9298 (daily ed. Oct. 6, 1972).

333. S. 502, § 124, passed by the Senate, March 15, 1973, in 119 CONG. REC. S4985 (daily ed. March 15, 1973).

333a. S. 502, § 120, reported by the House Comm. on Public Works, April 10, 1973. See H.R. REP. NO. 93-118, 93d Cong., 1st Sess. 78-81 (1973).

333b. Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250. However, the conference report stressed: "The deletion of these provisions should not be construed as discontinuing the programs or affecting the existing law. The present programs remain in effect. It is the expectation of the conferees that the Congress will consider additional authorizations and possible modifications in separate legislation." H.R. REP. NO. 93-410, 93d Cong., 1st Sess. 65 (1973).

Is title I of the Highway Beautification Act of 1965, as some have declared, a "case study in legislative frustration"?³³⁴ With the benefit of hindsight, it is easy to say that our national policy with regard to highway advertising along the interstate system would have been better served by a ban on advertising visible from the highways right from the start of the interstate construction program in the mid-1950's. Such a ban—with perhaps an exception for commercially or industrially zoned areas and areas actually developed for commercial or industrial use, as under the 1965 Act—would certainly have been justifiable in view of the facts that the federal government was to supply ninety per cent of the funding for the interstate system and that any advertising value attached to adjacent land would be entirely a result of the construction of the system with funds contributed by federal and state taxpayers. No landowner along a new interstate highway could reasonably claim any vested right to profit from the construction of the highway by using or leasing his land for advertising purposes, nor could any outdoor advertising company claim a vested right to profit from the construction of the highway by leasing adjacent land for advertising displays.

Had the Congress originally decided to condition federal funding of the interstate system upon a state's total prohibition of advertising within view of the interstate highways (with the possible exceptions of the areas described above), there can be little doubt that construction of the system would have gone forward on schedule and the problem of eliminating lawfully erected but nonconforming signs along the interstate system—a problem that has seriously obstructed attempts to implement the Highway Beautification Act of 1965—would have been largely avoided. Thus, the congressional decision in 1958 to use the bonus approach to billboard control³³⁵ seems, in retrospect, to have been a serious mistake. Perhaps a larger bonus would have been more effective,³³⁶ but prior to the passage of the Highway Beautification Act of 1965 only twenty-five states had enacted billboard control legislation to qualify for the 1958 Act bonus,³³⁷ and some of these did not enact implementing legislation until 1965.³³⁸ Consequently, a

334. See Lamm & Yasinow, *supra* note 48.

335. See note 7 *supra*.

336. The Federal-Aid Highway Act of 1958, Pub. L. No. 85-381, § 12, 72 Stat. 96, provided a bonus of only one half of one per cent for states that complied with the advertising control provisions of the Act.

337. Lamm & Yasinow, *supra* note 48, at 441.

338. *E.g.*, Ch. 828, [1965] Minn. Laws 1524, as amended, MINN. STAT. ANN. §§ 173.

large number of billboards were in place along the interstate system by 1965, when the Highway Beautification Act came before the Congress, and Congress then had to deal with the problem of eliminating existing billboards as well as the problem of preventing the future erection of billboards along interstate highways. Faced with these problems, it was probably inevitable that Congress would adopt the penalty approach, rather than the bonus approach, in the Act of 1965.

Having settled on the penalty approach, should not Congress have adhered to the original proposal made by the 1965 Act's sponsors to allow the several states, to the extent constitutionally permissible, to remove existing billboards by the use of their police power, without payment of compensation? It seems fairly clear that the United States Constitution does not require payment of compensation, either to the owner of the sign or to the owner of the land on which the sign is located, upon removal of a nonconforming sign.³³⁹ Moreover, there is impressive authority in several states that state constitutional provisions do not require payment of compensation upon the removal of such signs.³⁴⁰ Indeed, twenty-three of the twenty-five states that adopted legislation to qualify for the bonus under the Federal Highway Act of 1958 chose to use the police power to eliminate existing nonconforming signs without payment of compensation.³⁴¹ Arguably, therefore, Congress, in enacting the Highway Beautification Act of 1965, should have allowed these twenty-three states, and any other

01-27 (Supp. 1973); ch. 260, [1965] Iowa Acts 408, as amended, IOWA CODE ANN. §§ 306B.1-8 (Supp. 1972).

339. See, e.g., *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919); *Hadacheck v. Sebastian*, 239 U.S. 394, 411-12 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915). See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). But see *Art Neon Co. v. City & County of Denver*, 357 F. Supp. 466 (D. Colo. 1973).

340. *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762 (1961); *New York State Thruway Authority v. Ashley Motor Ct., Inc.*, 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961); *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328 (1964); *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969); *Kelbro, Inc. v. Myrick*, 113 Vt. 64, 30 A.2d 527 (1943). It is obvious that, if the courts should generally accept the *Kelbro* rationale, holding that there is no property right in the use of land for off-premises advertising, no compensation would be constitutionally required when such advertising is removed. There are cases upholding zoning ordinance provisions that require the discontinuance of nonconforming uses after an amortization period in the following states: California, Connecticut, Florida, Kansas, Maryland, Nebraska, New Hampshire, New York, and Washington; unfavorable decisions in zoning cases have been handed down in Illinois, Michigan, Missouri, New Jersey, Ohio, South Carolina, and Texas. See R. CUNNINGHAM, *supra* note 42, at 42-43 nn.349-68 and accompanying text. Elimination of nonconforming highway advertising signs without payment of compensation was held unconstitutional in *State Highway Dept. v. Branch*, 222 Ga. 770, 152 S.E.2d 372 (1966).

341. *Lamm & Yasinow*, *supra* note 48, at 441 n.23.

states that wished to follow their lead, to rely upon the police power, while providing financial assistance for those states where judicial interpretation of state constitutional provisions might require the payment of just compensation upon the removal of nonconforming signs. This approach was contemplated in the 1965 Act as originally introduced.

Despite the apparent advantages of this approach, Congress' decision to require payment of compensation upon the removal of nonconforming billboards is both understandable and defensible. In the first place, the Highway Beautification Act of 1965 was intended to control billboards along the federal-aid primary highways, as well as along the interstate system. The highway advertising industry, and the roadside businesses dependent on highway advertising, had grown up with the primary system over a period of forty to fifty years, and there was a strong feeling in the Congress that advertising rights along these highways were vested property rights, which ought not be destroyed without payment of just compensation.³⁴² This feeling was frequently expressed in committee hearings and in the floor debates with respect to existing signs along both systems,³⁴³ but the feeling seems to have been stronger with respect to the primary system. And this feeling has a strong jurisprudential basis in the fundamental considerations of fairness so well analyzed by Professor Michelman in his recent article on the ethical foundations of just compensation law.³⁴⁴

It would have been possible, of course, to treat nonconforming billboards along the interstate system differently from those along the primary system, authorizing billboard removal along the interstate system by means of the police power, without compensation, while requiring payment of compensation for removal of billboards along the primary system. But this would certainly have raised a serious equal protection problem.

All things considered, the basic pattern of title I of the Highway Beautification Act, as finally enacted, may well be the best that could be devised, given the failure of the Congress to prohibit the erection of billboards along the new interstate system from the time of its inception in the mid-1950's and the strong desire of the Johnson Administration to make billboard controls along the interstate system more effective and to extend such controls to the federal-

342. 1965 SENATE REPORT, *supra* note 20, at 15 (individual views of Sen. Cooper).

343. See text accompanying notes 58-62 *supra*.

344. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

aid primary system. In any case, the billboard control program now appears, after a seven-year delay, to be a going concern, with all but one of the states (according to the Secretary of Transportation) now fully in compliance with title I,³⁴⁵ substantial federal funding available,³⁴⁶ and many states actively engaged in removing nonconforming billboards as contemplated by the 1965 Act. The Federal Highway Administration expects the removal process to be completed by the end of 1978 if federal funding continues at the current level, with a total cost of 250 to 300 million dollars.³⁴⁷

It must be conceded, however, that title I of the Highway Beautification Act is one of the worst-drafted pieces of legislation ever to emerge from the Congress. Most of its defects have been discussed in detail earlier in this Article.³⁴⁸ One major defect not yet discussed should now be mentioned: the fact that, although it was generally expected that the 660-foot setback requirement would be sufficient to achieve the purposes of title I, congressional expectations have been frustrated by the erection of giant billboards just beyond that setback. As the Senate Committee on Public Works reported last fall, "Clearly readable from the highways, these signs are visible for a longer period of time and dominate landscape to a greater degree than do signs of conventional size located closer to the highways."³⁴⁹ In view of this fact, it would certainly be highly desirable for Congress at its current session to adopt the amendment to title I proposed in the abortive Federal Highway Act of 1972 changing the definition of "effective control . . . of outdoor advertising" in subsection (b) to cover all billboards visible from the main traveled way and erected with the purpose of being read from the highway.³⁵⁰

Congress should also adopt a second proposed amendment, which

345. 1972 SENATE REPORT, *supra* note 130, at 15.

346. Total funding for the fiscal years 1971-73 is 97.5 million dollars. Although the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250, provides no new funds, there are about 35 million dollars in prior authorizations that can be carried over. Of the 61 million dollars that has been allocated to the states, about 56 million dollars has been committed to projects. Telephone conversation with George McInturff, Chief, Scenic Enhancement Division, Federal Highway Administration, Aug. 29, 1973.

347. Policy and Procedure Memorandum 80-5.2, *supra* note 41, ¶ 10(c).

348. See text accompanying notes 17-114 *supra*.

349. 1972 SENATE REPORT, *supra* note 130, at 14. This statement and the Committee's recommendation that title I be amended to control signs visible from the main traveled way of the interstate and federal-aid primary systems were based on the interim report of the Commission on Highway Beautification, *supra* note 322, at 3.

350. It would seem that the word "visible" supplies a sufficiently definite standard. *But see* *Ellis v. Ohio Turnpike Commn.*, 162 Ohio St. 86, 120 N.E.2d 719 (1954).

provides for seventy-five per cent federal participation in paying compensation for the removal of nonconforming signs lawfully erected after October 22, 1965, and prior to January 1, 1968, thus rendering it unnecessary for the states to pay the entire cost of removing such signs.³⁵¹ This latter problem is a result of the fact that the just compensation directive of subsection (g) of title I does not apply to such signs. Apparently the omission was intentional, since the lack of any federal participation in the payment of compensation for removal of signs erected in that period might be expected to induce the states to move rapidly to enact legislation implementing title I, thereby reducing the period in which signs could be lawfully erected. However, many states did not enact implementing legislation for several years, and although highway advertising companies and other highway advertisers were put on notice by subsection (g) that there would be no federal funds to pay compensation for new signs erected along the interstate and primary highways between October 22, 1965, and January 1, 1968, many signs were erected during that period. It will be very hard for any state to deny compensation to sign owners and landowners if and when these lawfully erected nonconforming signs are removed,³⁵² particularly since the Act requires each state to pay compensation upon the removal of any sign lawfully erected on or after January 1, 1968, even though no state advertising control statute was in force when the sign was erected.³⁵³ If a state refuses compensation for signs erected between October 22, 1965, and January 1, 1968, and pays compensation for signs erected on or after the latter date, the equal protection problem will certainly be substantial.³⁵⁴ Such a distinction is quite illogical. And it is grossly unfair to deny federal participation in the payment of compensation for the removal of signs erected between October 22, 1965, and the date when a particular state enacted an advertising control statute—especially where the state legislature did not meet until 1967 and hence had no opportunity to adopt an advertising control statute making certain signs unlawful until more than a year after the enactment of title I.³⁵⁵

351. 1972 SENATE REPORT, *supra* note 130, at 14-15.

352. Many state compliance laws do, in fact, provide for payment of compensation upon removal of any nonconforming sign lawfully in existence at the date of enactment of the statute. *See* text accompanying note 178 *supra*.

353. This is required under subsection (g) if the state is to comply with title I and avoid the ten per cent penalty provided by subsection (b).

354. *See* text accompanying notes 265-66 *supra*.

355. *See* text accompanying note 331 *supra*, dealing with the proposed 1972 amend-

Subsection (c) of title I should be amended to subject on-premises advertising signs within areas adjacent to the interstate and federal-aid primary systems to reasonable size, lighting, and spacing standards. Since subsection (c) contains no such standards and does not authorize the Secretary to promulgate such standards, it would appear that on-premises signs are not now subject to any such controls unless state or local governments on their own initiative impose them. The federal standards for spacing of on-premises advertising signs, originally promulgated to implement the bonus provisions of the 1958 Federal-Aid Highway Act, do not seem to apply to the on-premises advertising signs permitted by title I of the Highway Beautification Act. Yet, it would seem essential with respect to the preservation of natural beauty and scenic amenity that on-premises signs be subject to reasonable standards.³⁵⁶ Perhaps these should be left for development through negotiated agreements between the states and the Secretary of Transportation, but unhappy experience with the negotiating process suggests the desirability of promulgating federal standards, as in the case of directional and other official signs.

Subsection (g) should be amended to make it clear whether the owner of land on which a nonconforming sign is located is to be compensated for the taking of his advertising rights in perpetuity, or only for the taking of his rights under an existing advertising lease.³⁵⁷ The latter alternative would seem to be preferable, since the states can use their police power to prohibit the making of any new advertising leases after expiration of existing leases. And, finally, the relationship of the recently enacted Uniform Relocation Assistance and Real Property Acquisition Act of 1970³⁵⁸ to the compensation requirements of subsection (g) should be clarified.

If the suggested changes are made in title I of the Highway Beau-

ment of the first sentence of subsection (g) of title I to provide simply that "[j]ust compensation shall be paid upon the removal of any outdoor advertising sign . . . lawfully erected under State law." In addition to the objections to the present language of subsection (g) pointed out in the text, the report on S. 3939 points out that "[a]nother problem has arisen because of a misunderstanding over the meaning of the term 'lawfully erected' for signs erected after January 1, 1968." 1972 SENATE REPORT, *supra* note 130, at 14.

356. The Commission on Highway Beautification in its interim report, *supra* note 322, at 8, says: "From testimony at the Commission's hearings, it appears that in some jurisdictions there is a need for improved control over location, design, construction and maintenance of on-premise signs."

357. See text accompanying notes 111-14 *supra*.

358. Pub. L. No. 91-646, 84 Stat. 1894 (codified at 42 U.S.C. §§ 1601-55 (1970)).

tification Act, it would seem that the final elimination of the billboard blight that has for so long afflicted American highways may at last be in sight. The estimated cost of 250 to 300 million dollars would be a modest price to pay to achieve that elusive goal.