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# Historic Signs, Commercial Speech, and the Limits of Preservation

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# HISTORIC SIGNS, COMMERCIAL SPEECH, AND THE LIMITS OF PRESERVATION

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*The rate of obsolescence of a sign seems to be nearer to that of an automobile than that of a building.*[1]

## I. INTRODUCTION

In the nineteenth and early twentieth centuries, buildings were often heavily laden with storefront signs.[2] With the 1869 "development of 'hoardings,' or leased bill-posting walls," tiered displays of billboards emerged, which in turn came to be a source of legal battles over off-site general advertising signs.[3] Hoardings two- or three-levels high often encased sides, or even whole buildings, in

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1. ROBERT VENTURI ET AL., LEARNING FROM LAS VEGAS: THE FORGOTTEN SYMBOLISM OF ARCHITECTURAL FORM 34 (2000) (Massachusetts Institute of Technology 1977).

2. Diane Burant, Building Signs: A History That Defines Their Historical Significance In the Commercial Streetscape, 1900–1940, 18 (Jan. 1993) (unpublished M.A. thesis, Ball State University) (on file with the Ball State University Library).

3. George H. Kramer, Preserving Historic Signs in the Commercial Landscape: The Impact of Regulation 9-10 (Dec. 1989) (unpublished M.S. thesis, University of Oregon) (on file with the University of Oregon Library).

billboards.[4] The fight against billboards came to define how cities thought about signs, and early twentieth century City Beautiful programs typically sought to reduce or eliminate billboard advertisements.[5] Over the last century, such sign reduction regulations have garnered increasing citizen and legal support.

In the past half-century, however, historic preservation has also emerged as a force in defining the contours of the city. In that time, the scope of historic preservation has grown, and continues to grow remarkably. What was once a movement concerned primarily with landmarks and architecture has come to embrace a whole new scope of histories, including ordinary ephemera such as business signs. Once anathema, the preservation of business signs no longer in operation is now increasingly the subject of preservation advocates who are seeking to preserve a broader sense of a community's past.

The growth of historic preservation to include more ephemeral aspects of the built environment brings with it new legal questions. These efforts to retain historic signs are of particular interest because signage is never merely an aesthetic creature. Its purpose, from its origin, is to communicate a message, regardless of whether that is to propose a business transaction or to communicate a political or ideological message. The ability to reuse a sign for a different use is not as evident as with a building, as a building can often change its use without substantial alterations.

The National Park Service has consistently waffled on the question of signage. On the one hand, it has argued that historic signs[6] should be removed in order to highlight the architectural merit of buildings and to preserve the character of historic districts.[7] At the same time, the National Park Service has also embraced the retention of some signage as part of a broader definition of historic preservation that goes beyond mere landmarks and architectural significance.[8] In a technical preservation brief dedicated to historic signs, the National Park Service notes that:

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4. *Id.*

5. *Id.* at 12-13.

6. The term "historic sign" is used in this Article to designate signs listed on the National Register, as well as signs that may be eligible for, but which have not officially been listed on, the National Register.

7. H. WARD JANDL, NAT'L PARKS SERV., PRESERVATION BRIEF 11, REHABILITATING HISTORIC STOREFRONTS, *available at* http://www.nps.gov/history/HPS/tps/briefs/brief11.htm ("Removal of some signs can have a dramatic effect in improving the visual appearance of a building.").

8. MICHAEL J. AUER, NAT'L PARKS SERV., PRESERVATION BRIEF 25, THE PRESERVATION OF HISTORIC SIGNS, CONCLUSION, *available at* http://www.nps.gov/history/HPS/tps/briefs/brief25.htm.

> Historic signs once allowed buyers and sellers to communicate quickly, using images that were the medium of daily life. *Surviving historic signs have not lost their ability to speak. But their message has changed.* By communicating names, addresses, prices, products, images, and other fragments of daily life, they also bring the past to life.[9]

But the preservation of a sign, especially a historic business sign, presents unique problems for modern-day retailers. For businesses, especially retail operations, an on-site sign indicating the service or goods sold is an important part of attracting customers. A study by the U.S. Small Business Administration notes six primary functions for signs:

> 1. To develop brand equity[;] . . . . 2. To aid recall and reinforcement of other media advertising[;] . . . . 3. To prompt "impulse" purchases[;] . . . . 4. To change a purchasing decision once [a] customer is [on-site][;] . . . . 5. To promote traffic safety by notifying motorists where they are in relation to where they want to go, and assisting their entry to the premises should they decide to stop. . . . [; and] 6. To complement community aesthetic standards.[10]

Local retailers are especially beholden to signs, as these are the least-expensive means of advertising by several factors.[11] "[Q]uick-service" restaurants receive as much as 35% of their business from consumers who saw a sign,[12] while industry studies suggest that informational outdoor signage increases business an average of 15%.[13] Factors such as these make on-site business signs an important part of any business's message to consumers. Thus, signs that reference prior, no longer relevant uses can be challenging for some businesses.

Among these challenges is the fact that historic business signs typically advertised specific products, or even specific brands of products. These products may include those towards which societal norms have changed over time, such as cigarettes. For instance, imagine a children's clothing boutique that rents a commercial

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9. *Id.* (emphasis added).

10. R. James Claus & Susan L. Claus, U.S. SMALL BUS. ADMIN., SIGNS: SHOWCASING YOUR BUSINESS ON THE STREET (2001), *available at* http://www.comptonduling.com/images/pdfs/SBA%20Importance%20of%20Signs.pdf.

11. *Id.* (noting advertising cost per thousand impressions as $0.22 for an on-premise sign; $1.90 for an outdoor sign; $3.60 for newspaper; $5.90 for radio; $10.00 for television).

12. *Id.*

13. *Id.*

storefront beneath a large, elegant sign that reads "liquor" and "cigarettes." Alternatively, imagine a used car dealership that takes over a diner with a large sign that reads "Johnie's Broiler: Family Restaurant, Coffee Shop."[14] Should it matter that the historic sign does not reflect the current tenant's business and that preservation of the historic sign may, in fact, confuse or deter the clientele that the children's boutique or used car dealer wishes to attract? Similarly, historic signs can also directly dictate prejudice long after the architectural traces of that prejudice have disappeared. For instance, should a business be forced to retain historic segregation signage—such as for "Whites" and "Colored" water fountains or bathrooms—as an act of historic preservation, even though it could stigmatize the business or preserve a legacy of prejudice?[15] Can a state require a private party to retain a vestige of such a stark economic or social legacy, especially in the uniquely straightforward and unequivocal manner in which a sign operates?

The primary concern of this Article will be whether regulations that require preservation of historical signs limit the operation of present uses in a manner that constitutes compelled commercial speech under the First Amendment. This is not an easy issue to address—both commercial speech and historic preservation rest upon principles and purposes that are generally not well-defined, and even when they are defined, they are often controversial. Historic signs offer a unique situation in which to test the outer bounds of both doctrines. The forced association of business owners with historic signs can muddle or contradict a current business's advertising, or can even cause stigmatizing associations that the business would not otherwise choose. At the same time, signs can be important reminders of a community's past or fixtures of its

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14. *See* Roadside Peek, Preservation Alley: Johnie's Broiler, http://www.roadsidepeek.com/preserv/2002/johniesbroiler/index.htm (last visited Mar. 11, 2011).

15. Robert R. Weyeneth, *The Architecture of Racial Segregation: The Challenges of Preserving the Problematical Past*, 27 PUB. HISTORIAN 11, 38-39 (2005). Weyeneth states:

> In contemplating the survival of the material legacy of segregation, signage seems to have been especially evanescent. . . . Today it does not occur to many of us that [segregation] signs . . . that were disappearing in the 1960s had to come from somewhere. Some were hand-lettered, of course, but once upon a time segregation signage was a standard retail commodity widely available. As the legal foundation for segregation was steadily undermined, it became harder and harder to purchase signs that said "Colored" or "Whites Only." As an experiment, one white journalist set out in December 1961 to try to buy signs in Jacksonville, Florida. His visits to Woolworth's, Kress, Western Auto, and local hardware stores all proved fruitless. Clerk after clerk reported that the stores had returned their inventories to distributors. In this additional way—manufacturers discontinuing a line of heretofore popular merchandise—segregation signage passed further into history.

*Id.* (citations omitted).

physical typology, and may even subtly preserve a community's legacies—both good and bad—that might otherwise be forgotten or relegated to books.

This Article considers these implications by first reviewing commercial-speech doctrine jurisprudence, especially as applied to compelled speech of corporations, in Section II. Section III presents four methods for preserving historic signs proposed by the National Park Service. Section IV examines the last century of signage regulation. Section V reviews the purposes and findings that support historic preservation as a governmental interest. Finally, Section VI analyzes how the four approaches to preserving historic signs proposed by the National Park Service fare in light of the compelled speech case law, the purposes underpinning historic preservation, and the National Register's significance and integrity listing criteria.

## II. COMMERCIAL SPEECH AS APPLIED TO HISTORIC SIGNS

There has been little discussion relating commercial speech[16] to historic preservation. The silence on this topic is likely due to historic preservation's longstanding focus on landmarks and architecturally significant buildings. Only in the past few decades, as historic preservation has followed a broader mandate, has the question of freedom of speech—in this case, a business owner's freedom of commercial speech—become relevant.[17] Given the newness of the phenomenon, there are no known cases considering the question of how commercial speech should fare in light of mandated preservation of historic signs. In the absence of such case law, this Section offers a framework for evaluating how existing commercial speech precedent would address the issue of historic signs, especially in a situation in which a governmental action (i) mandates the preservation of a historic sign that obscures or contradicts an existing business owner's own on-site business signage; or (ii) mandates preservation of a historic sign that indirectly suggests a business's association with a historic legacy that is stigmatized in current social norms.

Commercial speech is a relatively new doctrine by constitutional standards;[18] discussion of the doctrine's merits has been heated, and the outer limits of its protections have not been easily

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16. U.S. CONST. amend. I (granting a broad freedom of speech to the people of the United States).

17. *See generally infra* note 25.

18. *See infra* note 25, at 761 (first unveiling the commercial speech doctrine in 1976).

defined.[19] Despite this controversy and uncertainty, both the courts and commentators are consistent in holding that true and factual advertising of a product is protected commercial speech.[20]

The United States Supreme Court's 1975 decision in *Bigelow v. Virginia* first extended First Amendment protection to advertising.[21] In *Bigelow*, the court struck down Virginia's attempt to ban newspaper advertisements announcing the availability of New York abortions, which were illegal in Virginia but legal in New York.[22] The Court noted that:

> [T]he advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or general interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. . . . Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.[23]

In offering First Amendment protection, the *Bigelow* court emphasized the informational importance of the advertisements, not simply the prospect of a commercial transaction.[24] *Bigelow* led the way to the Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, which formally announced the commercial speech doctrine.[25] In that case, the Court provided two distinct constitutional purposes for the commercial speech doctrine:

> Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest that those decisions, in the aggregate, be intelligent and well*

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19. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000-2001) (stating that commercial speech is a "notoriously unstable and contentious domain of First Amendment jurisprudence").

20. *See infra* notes 21, 26, 29, 42 and accompanying text.

21. *See* Bigelow v. Virginia, 421 U.S. 809 (1975).

22. *Id.* at 311, 318, 329.

23. *Id.* at 322.

24. *Id.*

25. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

> *informed.* To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also *indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.* Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[26]

*Virginia State Board of Pharmacy* announced two rationales for expanding free speech protection to commercial speech: commercial transactions in a free enterprise economy should be intelligent and well-informed, and regulation of the markets is better achieved when there is more information.[27] These two purposes speak to the importance of an existing business's sign as a means of communicating the existing business's proposed transaction.

The Court has further elaborated on this core protection of advertising in the commercial speech doctrine, noting that while "ambiguities may exist at the margins of the category of commercial speech"[28] and the bounds of commercial speech protected by the First Amendment are not precise, "it is clear enough that . . . advertising pure and simple . . . falls within those bounds."[29] The Court has also stated that the commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech."[30] These cases establish that a business has a constitutional right to advertising that promotes the elements of a commercial transaction at its most basic level—the product or service offered and at what price.

At the same time, such discussions do not address the more subtle issues that arise in the maintenance of a historic sign that does not propose a commercial transaction, but is maintained for the purpose of preserving a community's history or identity. Thus, while much discussion of commercial speech lingers on the definition of what constitutes "commercial speech," [31] this issue is inap-

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26. *Id.* at 765 (emphasis added) (citations omitted).

27. *Id.*

28. Edenfield v. Fane, 507 U.S. 761, 765 (1993).

29. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 637 (1985).

30. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 455-56 (1978).

31. Post, *supra* note 19, at 15 (asserting that commercial speech should be defined as "the set of communicative acts about commercial subjects that conveys information of relevance to democratic decision making, but that does not itself form part of public discourse.").

posite to historic signs. The issue is not whether the existing business's advertising is commercial speech, but whether the historic sign's representations to passers-by constitute a compelled-speech act.

The Court's compelled speech jurisprudence began with questions of ideological and political speech. In *West Virginia State Board of Education v. Barnette*, the Court invalidated a state board of education resolution requiring children of a Jehovah's Witness to salute the flag in order to be allowed to attend a public school.[32] In *Wooley v. Maynard*, the Court invalidated a New Hampshire statute requiring vehicle license plates to carry the state's motto, "Live Free or Die," which was challenged by a Jehovah's Witness.[33] The Court stated that:

> [T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."[34]

The Court also applied such limitations against compelled speech to corporations in the context of political speech.[35] In *Miami Herald Publishing Co. v. Tornillo,* the Court invalidated Florida's "right-of-reply" statute, which provided that if a newspaper assailed a candidate's character or record the candidate could demand that the newspaper print a reply of equal prominence and space.[36] The Court held that the statute interfered with the newspaper's right to speak because the statute penalized the newspaper's own expression[37] and interfered with its editorial control and judgment.[38]

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32. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

33. Wooley v. Maynard, 430 U.S. 705, 707, 717 (1977).

34. *Id.* at 714 (quoting *Barnette*, 319 U.S. at 633-634); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) ("The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.") (quoting Estate of Hemingway v. Random House, Inc., 23 N.Y. 2d 341, 348 (1968)).

35. *See* Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986).

36. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244 n.2 (1974).

37. *Id.* at 257 ("Government-enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.'") (emphasis added).

38. *Id.* at 258 ("[T]reatment of public issues and public officials—whether fair or unfair—constitute[s] the exercise of editorial control and judgment.").

*Barnette, Wooley*, and *Tornillo* are indicative of one of three strands of compelled speech cases, specifically those in which the State attempts to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[39]

Corporations have more often been addressed in a second line of compelled commercial-speech cases, in which the doctrine has been applied less rigorously than in relation to individuals.[40] These cases typically review whether a state may require warnings on advertisements for products or services.[41] Warning laws that require true and factual statements regarding products and services have been repeatedly upheld by lower courts.[42] In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the United States Supreme Court upheld disciplinary action against an attorney for failing to warn potential clients in advertisements that they were liable for litigation costs even if they lost.[43] The Court announced that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[44] The *Zauderer* Court justified this lower threshold on compelled speech for product warnings by noting that:

> The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising *purely factual and uncontroversial information* about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . , appellant's constitutionally protected interest in not

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39. W. Va. State Bd. of Educ. v. Barnette , 319 U.S. 624, 642 (1943).

40. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985) ("[T]he interests at stake in this case are not of the same order as those discussed in *Wooley, Tornillo*, and *Barnette*.").

41. *See id.* (requiring disclaimer on attorney ads); Nat'l. Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 116 (2d Cir. 2001) (upholding state requirement of warning label on mercury-containing light bulbs, and noting that "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information."); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 643 (7th Cir. 2006) (warnings on sexually explicit video games); Envt'l Def. Ctr. v. U.S. E.P.A., 344 F.3d 832, 848-49 (9th Cir. 2003) (warnings regarding waste discharge into municipal sewers); Rubin v. Coors Brewing Co., 514 U.S. 476, 483 (1995) (statement of alcohol content on the label of a beer bottle).

42. *See supra* note 41.

43. *Zauderer*, 471 U.S. at 636.

44. *Id.* at 651.

> providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because *disclosure requirements* trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of *consumer confusion or deception.*"[45]

And yet, even *Zauderer* does not seem to adequately address the question of historic signs. *Zauderer* affirms the Court's ongoing commitment to factual, truthful information, and extends that requirement even to the omission of a warning. However, this extension of disclosure requirements was itself based upon a concern for consumer confusion and deception.[46] By requiring the warning, the *Zauderer* Court sought to extend the reach of factual, truthful information and to better inform the public about the service offered.[47] Historic signs, however, do the exact opposite. Historic signs do not contribute to any factual or truthful understanding of the transaction that is offered; rather, they obfuscate that transaction based upon the governmental interest in historic preservation.

Thus far, perhaps the only Supreme Court case to offer guidance on this issue is *Pacific Gas and Electric Co. v. Public Utilities Commission of California* (*PG&E*).[48] In *PG&E*, the California Public Utility Commission decided that a utility provider must share the "extra space" left over in an envelope after including the bill and required notices with a citizen's utility advocacy group, because the "extra space" was the ratepayers' property.[49] The utility provider argued that it had a First Amendment right not to help spread a message with which it disagreed, and the Court agreed.[50] Relying on *Wooley* and *Tornillo*, the Court held that:

> The Commission's order forces appellant to disseminate [the citizen advocacy group's] speech in envelopes that [the utility] owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from [the citizen's advoca-

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45. *Id.* (emphasis added) (citations omitted).
46. *See id.*
47. *See id.*
48. Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986).
49. *Id.* at 4-6.
50. *Id.* at 4-6, 20-21.

> cy group] and risks forcing [the utility] to speak where it would prefer to remain silent.[51]

The Court went on to state:

> As the dissenting Commissioners correctly noted, . . . [the utility provider's] argument logically implies that the State may compel appellant or any other regulated business to use many different kinds of property to advance views with which the business disagrees. *"Extra space" exists not only in billing envelopes but also on billboards, bulletin boards, and sides of buildings and motor vehicles.* Under the Commission's reasoning, a State could force business proprietors of such items to use the space for the dissemination of speech the proprietor opposes. *At least where access to such fora is granted on the basis of the speakers' viewpoints, the public's ownership of the "extra space" does not nullify the First Amendment rights of the owner of the property from which that space derives.*[52]

The Court presciently notes that "extra space" exists not only in envelopes, but also on billboards, bulletin boards, and the sides of buildings.[53] The preservation of historic signs is based upon the notion that the past can be preserved in the interstices—the "extra space"—between the spaces necessary for today's commerce. Alternatively, and even more practically difficult, the preservation of historic signs is based upon the notion that the historic sign will be read by the viewer as a palimpsest—a faded image overwritten by the modern sign—that does not obscure, contradict, or otherwise interfere with the ability of the current business to convey its message. *PG&E* suggests, however, that the Court is dubious of such an "extra space" argument, not to mention a palimpsestic approach to interweaving modern and historic signage.[54]

On the other hand, *PG&E* can be distinguished in that the Court appears to limit its discussion to those instances in which there is viewpoint access granted, and thus a political or ideological overtone is permitted.[55] While the Court has not directly addressed the issue in a signage context, a ruling by the California

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51. *Id.* at 17-18.
52. *Id.* at 18 n.15 (emphasis added).
53. *See id.*
54. *See generally supra* note 48.
55. *See generally id.* at 17-18 n.5.

Supreme Court suggests that commercial speech should be considered broadly where advertising signage is concerned, and that the protections associated with commercial speech apply even where the advertisement may express some political or ideological viewpoint.[56]

Finally, it should be noted that a third line of compelled-commercial speech cases governs compelled-subsidy cases, in which individuals are not compelled to speak, but rather to subsidize a private message with which they disagree.[57] Such cases concern programs of compelled subsidization of generic advertising, typically for an agricultural or livestock product.[58] To the extent that these cases have held required subsidies to be unconstitutional, the Court does not consider them to affect the other "true" compelled-speech cases, and view them as their own distinct line of cases.[59] As such, they are not as relevant to the question of historic

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56. *See* Kasky v. Nike, Inc., 45 P.3d 243, 261-62 (Cal. 2002). In *Kasky*, the court stated:

> We now disapprove as ill-considered dicta two statements of this court in *Spiritual Psychic Science Church v. City of Azusa* . . . . There we remarked that commercial speech is speech "which has but one purpose—to advance an economic transaction," and we suggested that "an advertisement informing the public that the cherries for sale at store X were picked by union workers" would be noncommercial speech.
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> As we have explained, the United States Supreme Court has indicated that economic motivation is relevant but not conclusive and perhaps not even necessary. The high court has never held that commercial speech must have as its only purpose the advancement of an economic transaction, and it has explained instead that commercial speech may be intermingled with noncommercial speech. An advertisement primarily intended to reach consumers and to influence them to buy the speaker's products is not exempt from the category of commercial speech because the speaker also has a secondary purpose to influence lenders, investors, or lawmakers.
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> Nor is speech exempt from the category of commercial speech because it relates to the speaker's labor practices rather than to the price, availability, or quality of the speaker's goods. An advertisement to the public that cherries were picked by union workers is commercial speech if the speaker has a financial or commercial interest in the sale of the cherries and if the information that the cherries had been picked by union workers is likely to influence consumers to buy the speaker's cherries. Speech is commercial in its content if it is likely to influence consumers in their commercial decisions. For a significant segment of the buying public, labor practices do matter in making consumer choices.

*Id.* (citations omitted).

57. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005) (noting two types of compelled-speech cases: "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity.").

58. *See* U.S. v. United Foods, Inc., 533 U.S. 405 (2001); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997); Gerawan Farming, Inc. v. Kawamura, 90 P.3d 1179 (Cal. 2004) (plum farmers' association).

59. *United Foods*, 533 U.S. at 416 ("Our conclusions are not inconsistent with the Court's decision in *Zauderer v. Office of Disciplinary Counsel* . . . .").

signs because such signs do not require subsidization of an advertising campaign.[60]

This review of commercial speech doctrine indicates that questions of historic signs do not fit neatly within the contours of the delineated case law, and courts have developed a varied and disparate jurisprudence with regard to different types of signs.[61] If "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses[,] and dangers' of each method," then the historic sign will require its own jurisprudence, just as billboards and sound trucks have before them.[62] The remainder of this Article will attempt to propose an outline for that jurisprudence, including a review of historic sign regulation today, as well as a review of the governmental purposes that support such regulations.

## III. METHODS FOR PRESERVING HISTORIC SIGNS

*Preservation Brief Number 25, The Preservation of Historic Signs* (*Preservation Brief 25*), is the National Park Service's template for documenting and preserving historic signs,[63] and is therefore the most complete and influential document on how such preservation of historic signs should occur.

*Preservation Brief 25* provides that historic signs should be retained "whenever possible," and:

> [P]articularly when they are[] associated with historic figures, events or place[s]; significant as evidence of the histo-

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60. *Id.*

61. Courts have addressed a wide variety of sign issues, including signs at labor disputes (State v. DeAngelo, A.2d 1200 (N.J. 2009)); murals (Carpenter v. City of Snohomish, 2007 WL 1742161 (W.D. Wash. June 13, 2007)); whether a column of light constitutes a sign (Sutliff Enters., Inc. v. Silver Spring Twp. Zoning Hearing Bd., 933 A.2d 1079 (Pa. 2007)); lawn signs (Blum & Bellino, Inc. v. Town of Greenburgh, 872 N.Y.S.2d 172 (2009)); church signs (Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 941 A.2d 560 (Md. Ct. Spec. App. 2008)); electronic billboards (Naser Jewelers, Inc. v. City of Concord, 538 F.3d 17 (1st Cir. 2008)); favoring commercial speech over non-commercial speech (Covenant Media of S.C., LLC v. Town of Surfside Beach, 321 Fed. Appx. 251 (4th Cir. 2009)).

62. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (citing Kovacs v. Cooper, 336 U.S. 77, 97 (1949)). The *Kovacs* Court noted:

> I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of 'communication of ideas.' The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses[,] and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.

*Kovacs*, 366 U.S. at 97 (Jackson, J. concurring).

63. AUER, *supra* note 8 (conclusion).

> ry of the product, business or service advertised[;] significant as reflecting the history of the building or the development of the historic district[;] . . . characteristic of a specific historic period, such as gold leaf on glass, neon, or stainless steel lettering[;] integral to the building's design or physical fabric[;] . . . outstanding examples of the signmaker's art[;] local landmarks . . . [where the sign is] recognized as popular focal point in a community[;] [or] elements important in defining the character of a district, such as marquees in a theater district.[64]

*Preservation Brief 25* also provides four prescribed methods by which historic signs should be reused in their new capacity in the building.[65] First, the preferred alternative is to keep the historic sign unaltered.[66] The National Park Service prefers that the old sign be left in its historic location, although it acknowledges that, "sometimes . . . it may be necessary to move the sign elsewhere on the building to accommodate a new one."[67] The National Park Service also acknowledges that "it may be necessary to relocate new signs to avoid hiding or overwhelming historic ones, or to redesign proposed new signs so that the old ones may remain."[68] The National Park Service argues that:

> Keeping the old sign is often a good marketing strategy. It can exploit the recognition value of the old name and play upon the public's fondness for the old sign. The advertising value of an old sign can be immense. This is especially true when the sign is a community landmark.[69]

At the same time, *Preservation Brief 25* notes that "[t]he legitimate advertising needs of current tenants, however, must be recognized."[70] *Preservation Brief 25* offers no discussion of how to determine the legitimate advertising needs of current tenants.

The second approach to reusing a historic sign is "to relocate it to the interior of the building, such as in the lobby or above the bar in a restaurant."[71] The National Park Service considers this option

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64. *Id.* (retaining historic signs).
65. *See generally id.*
66. *Id.* (reusing historic signs).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

to be "less preferable than keeping the sign outside the building."[72] The third approach to reusing historic signs is to modify "the sign for use with the new business."[73] The National Park Service acknowledges that "[t]his may not be possible without destroying essential features, but in some cases it can be done by changing details only."[74] If none of the other options are possible, the fourth and least favored approach is to donate the sign "to a local museum, preservation organization or other group."[75] This approach preserves the sign, but typically at an off-site location that prevents the sign from retaining or contributing to its historical context.

Thus, *Preservation Brief 25* provides for a wide range of options for historic signs—from preserving the historic sign unaltered, to removing it and placing it in a museum—that would have dramatically different results both for the current business owner and for historic preservation.[76] Determining the validity of these approaches in light of the requirements of the commercial speech doctrine requires a consideration of the governmental interests that support historic preservation.

## IV. REGULATING SIGNS

The primary focus of sign regulation over the past century has been on eliminating signs, not preserving them.[77] Although some initial regulations were rejected by the courts, restrictions on signs—and especially billboards—were eventually held to be valid as exercises of the police power in preserving health and safety, and later, aesthetics.[78]

The billboard industry foresaw the coming regulation and as early as 1872 began the formation of trade groups, such as the St. Louis' International Bill Posters Organization of North America.[79] By 1909, such groups were attempting to regulate their own members and prevent them from indiscriminate posting.[80]

Nonetheless, regulation of the billboard increased commensurate with the industry's success. Initial cases, such as the 1905

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72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* Las Vegas may well be the capital of preserving historic signs in museums. *See, e.g.*, The Neon Museum, Las Vegas, *available at* http://www.neonmuseum.org/.
76. *See supra* notes 63-75.
77. *See infra* note 79.
78. *See infra* notes 82-83.
79. *See* Kramer, *supra* note 3, at 15; *see also* AUER, *supra* note 8 (sign regulation).
80. Kramer, *supra* note 3, at 15.

case of *City of Passaic v. Paterson Bill Posting, Advertising and Sign Painting Co.*, the New Jersey Court of Errors and Appeals rejected the use of the police power to regulate billboards solely on the basis of aesthetics.[81] However, with the 1954 case of *Berman v. Parker*, the Court first acknowledged aesthetic regulation as a proper concern of the police power for regulation of land uses and generally held that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy . . . ."[82] Subsequent cases have relied upon aesthetics as a legitimate purpose for regulating signage.[83]

Independent of aesthetics, use of the police power to regulate signs was also justified by more traditional concerns, such as "fire control, sanitation, traffic safety," or "morality."[84] The earliest success in this regard was the 1911 case of *St. Louis Gunning Advertising Company v. City of St. Louis*,[85] in which the Supreme Court of Missouri held, as part of an enumerated parade of horribles, that billboards 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."[86] While such elaborate findings may stretch the

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81. City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co., 287, 62 A. 267, 268 (N.J. 1905). The *Patterson* court held:

> It is probable that the enactment of . . . the ordinance was due rather to aesthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic [sic] 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 . . . .

*Id.*

82. Berman v. Parker, 348 U.S. 26, 33 (1954). The Court goes on to state: "If those who govern . . . decide that . . . [their community] . . . should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.*

83. *See. e.g.*, Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values.").

84. Kramer, *supra* note 3, at 19-20.

85. St. Louis Gunning Adver. Co. v. St. Louis, 137 S.W. 929 (Mo. 1911).

86. *Id.* at 942. The *St. Louis Gunnder Advertising Co.* court stated:

> The signboards and billboards 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 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

bounds of credulity, they did provide legal justification for the regulation of billboards, and have resulted in federal regulation such as the Highway Beautification Act of 1965[87] and numerous state and local regulations of the billboard industry.[88] Despite this century-long history of sign regulation, the compelled preservation of a historic sign does not yet appear to have been addressed in a reported decision.

## V. PURPOSES OF HISTORIC PRESERVATION

The modern legal justification for historic preservation—like that for the modern regulation of signage—is typically considered to derive from *Berman v. Parker*'s acceptance of using the police power for aesthetic considerations.[89] In addition to aesthetics, *Berman* provided a broad justification for use of the police powers, extending those powers beyond the typical aspects of public safety, health, and welfare.[90] However, as historic preservation has grown

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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. House signs and sky signs are similar to billboards, and are used for the same purposes, except they are attached to the walls of buildings or are constructed upon the roofs thereof. They endanger the public safety only in being liable to be blown down and injure people in their fall. They also assist in the spread of fire and greatly interfere with their extinction. The amount of good contained in this class of this business is so small in comparison to the great and numerous evils incident thereto that it has caused me to wonder why some of the courts of the country have seen fit to go as far as they have in holding statutes and ordinances of this class void, which were only designed for the suppression of the evils incident thereto and not to the suppression of the business itself. While advertising, as before stated, is a legitimate and honorable business, yet the evils incident to this class of advertising are more numerous and base in character than are those incident to numerous other businesses which are considered mala in se; and which for that reason may not only be regulated and controlled, but which may be entirely suppressed for the public good under the police power of the state. My individual opinion is that this class of advertising as now conducted is not only subject to control and regulation by the police power of the state, but that it might be entirely suppressed by statute, and that, too, without offending against either the state or federal Constitution.

*Id.*

87. Highway Beautification Act of 1965, 23 U.S.C. § 131 (2006) (controls outdoor advertising along 306,000 miles of Federal-Aid Primary, Interstate and National Highway System (NHS) roads).

88. *See, e.g.*, Outdoor Adver. Act, CAL. BUS. & PROF. CODE §§5200-5486 (1970); City S.F. ORDINANCE NO. 263-65 (Nov. 21, 1965) (city's first sign ordinance distinguishing between on-site and off-site advertising signage).

89. Berman v. Parker, 348 U.S. 26, 33 (1954). The irony, of course, is that the *Berman* decision permitted the razing of a whole area of historic buildings for urban renewal. *Id.* at 28-30.

90. *Id.* at 32. The *Berman* Court goes on to note:

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been

in scope from its consideration of architectural merit alone it is unclear whether historic preservation's purposes still fall within the broad mandates of *Berman*.[91] Consideration is due as to whether preservation's current enterprise fits within the police powers purposes on which it is traditionally seen to rest, and whether such purposes reach far enough to compel speech emanating from ephemera such as historic signs.

### *A. Monuments, Architecture, and Community Building*

Historic preservation has long neglected its own history.[92] Where attempts to document the history have been undertaken, investigations of the movement's origin are often more in line with the particular historian's focus than with anything definitive.[93] The perceived wide berth of origins is not surprising, however, given the wide stance of the current historic preservation movement, as well as the variety of influences that now rest under its mantle.[94]

Historic preservation's history is typically divided into three distinct phases. The nineteenth century's focus was on preserving monuments as part of creating a national identity.[95] The mid-twentieth century's efforts sought to protect buildings and historic districts that possessed architectural merit from the wrecking ball

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> declared in terms well-nigh conclusive. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

*Id.*

91. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 476 (1981) ("The phrase 'historic preservation' is so elastic that any sort of project can be justified—or any change vilified—in its name. In a sense, every event is 'history,' and it is a cliché among professional historians that views of 'historic significance' alter considerably with shifting social interests . . . .").

92. Max Page & Randall Mason, *Rethinking the Roots of the Historic Preservation Movement, in* GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES 3 (Max Page & Randall Mason eds., 2004).

93. Howard L. Green, *The Social Construction of Historical Significance, in* PRESERVATION OF WHAT, FOR WHOM? A CRITICAL LOOK AT HISTORICAL SIGNIFICANCE 86 (Michael A. Tomlan ed., 1998) ("Historic preservation as we know it, though it has earlier antecedents, is a piece of the environmental conservation movement of the 1960s and 1970s . . . ."); *cf.* Barbara Shubinski, *The Mechanics of Nostalgia: The 1930s Legacy for Historic Preservation, in* PRESERVATION OF WHAT, FOR WHOM? A CRITICAL LOOK AT HISTORICAL SIGNIFICANCE 69 (Michael A. Tomlan ed., 1998) ("The groundwork laid by Boasian anthropology [in the Works Progress Administration's efforts] affected, at least indirectly, and perhaps was necessary to the very formation of preservation efforts on a federal level.").

94. *See* Rose, *supra* note 91, at 476.

95. *Id.* at 481-84.

of urban renewal.[96] The current emphasis is on preservation as a means of memorializing and advancing a community's identity.[97]

The nineteenth century American interest in preserving monuments as a means of defining a national identity was not unusual. In fact, the importance of doing so was advocated by European intellectuals of the time,[98] many of whom were engaged in the restoration[99]—or plundering[100]—of sacred ruins and antiquities to define and strengthen nationalistic identity. Many of the "monuments" preserved in America during this time memorialized important figures of the Revolutionary War. For instance, the most iconic American nineteenth century preservation effort was that of George Washington's Mount Vernon estate by the Mount Vernon Ladies Association.[101] The Association purchased the home and two hundred-acre estate with contributions solicited from women in every state, thereby saving the home from demolition and the site from development.[102]

The second phase is typically defined as that call to arms resulting from the demolition of New York's Pennsylvania Station in 1963[103] and the destruction of large swaths of inner cities in accordance with post-World War II urban renewal programs.[104] This phase saw the rise of the most visible and institutionalized aspects of the historic preservation efforts—the federal, state, and local historic preservation laws.[105]

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96. *Id.* at 484-88.

97. *Id.* at 488-92.

98. Rudy J. Koshar, *On Cults and Cultists: German Historic Preservation in the Twentieth Century, in* GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES 45, 49 (Max Page & Randall Mason eds., 2004) (German historian Georg Dehio announced that "[w]e conserve a monument not because we consider it beautiful, but because it is a piece of our national life"); *see generally* JUKKA JOKILEHTO, A HISTORY OF ARCHITECTURAL CONSERVATION 69-100 (Andrew Oddy & Derek Linstrum eds. 1999) (2002).

99. *See* JOKILEHTO, *supra* note 98. For a consideration of modern European approaches, see Francois Quintard-Morenas, *Preservation of Historic Properties' Environs: American and French Approaches*, 36 URB. LAW. 137 (2004).

100. *See* CHRISTOPHER HITCHENS, THE PARTHENON MARBLES: THE CASE FOR REUNIFICATION (2008).

101. Page & Mason, *supra* note 92, at 6.

102. Diane Lea, *America's Preservation Ethos: A Tribute to Enduring Ideals, in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 2 (Robert E. Stipe ed., 2003); Page & Mason, *supra* note 92, at 6-7.

103. Page & Mason, *supra* note 92, at 7.

104. PETER HALL, CITIES OF TOMORROW 228-29 (2d ed. 1996) ("Using the powers to tear down slums asnd [sic] offer prime land to private developers with government subsidy, cities sought 'the blight that's right,' as Charles Abrams inimitably put it. In city after city—Philadelphia, Pittsburgh, Hartford, Boston, San Francisco—the areas that were cleared were the low-income, black sections next to the central business district . . . .").

105. *See infra* notes 106-117.

The most important of these new laws was the National Historic Preservation Act of 1966 (NHPA).[106] The NHPA became the "most far-reaching" federal regulation governing historical resources, and "expanded the National Register of Historic Places" (National Register) to include "historic properties of local and statewide significance."[107] At the time, President Johnson stated that the NHPA would "allow us . . . to take stock of the buildings and the properties that are a part of our rich history and to adequately preserve these treasures properly."[108] In the years since, more than 73,000 entries have been made to the National Register, as well as more than "11,000 . . . historic or architectural districts comprised of numerous individual buildings or sites."[109] The National Park Service estimates there are more than one million individual buildings or sites listed in the National Register.[110] Historic signs are included on National Register, such as the "Welcome to Fabulous Las Vegas" sign.[111]

At the local level, the city of Charleston, South Carolina, passed the nation's first zoning ordinance in 1931 for "the preservation and protection of historic places and areas of historic interest."[112] Although slow to gain momentum at the local level,[113] the number of local governments with historic preservation zoning ordinances rose dramatically in the middle part of the century. According to Weyeneth, "by the 1970s[,] more than two hundred American cities had enacted municipal ordinances to protect historically . . . significant private property."[114] By the 1990s, there were more than eighteen hundred such ordinances.[115] The rapid rise of local historic preservation ordinances is partly attributable to the U.S. Supreme Court's *Penn Central* decision, which upheld New York City's landmarks law that sought to prevent Penn Central's owners from building a skyscraper on top of the existing

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106. 16 U.S.C. § 470 – 470t (1966).

107. Lea, *supra* note 102, at 11 (citation omitted).

108. Green, *supra* note 93, at 86.

109. John M. Fowler, *The Federal Preservation Program, in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 42 (Robert E. Stipe ed., 2003).

110. *Id.*

111. Nat'l Parks Serv., National Register of Historic Places Registration Form, The "Welcome to Fabulous Las Vegas" Sign, Reference Number 09000284, listed 5/01/09, *available at* http://www.nps.gov/nr/listings/20090508.htm (last visited Mar. 11, 2011).

112. 1927-1931 JOURNAL OF THE CITY COUNCIL OF CHARLESTON, SOUTH CAROLINA 697-711 (1931); *see also* Robert R. Weyeneth, *Ancestral Architecture: The Early Preservation Movement in Charleston, in* GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES 268 (Max Page & Randall Mason eds., 2004) (citation omitted).

113. Weyeneth, *supra* note 112, at 273.

114. *Id.*

115. *Id.* at 275 (citation omitted).

Beaux Arts Grand Central train station.[116] For the first time, *Penn Central* established that historic preservation regulations were not only a legitimate use of the police power, but also that they were not subject to compensation as a taking so long as certain parameters were met.[117]

The third phase of the historic preservation movement is typically defined as arising in the 1980s and continuing to the present. In this era, preservation is, in the words of one commentator, "search[ing] for a new mandate."[118] This era has seen the rise of an effort to be inclusive of a diverse range of histories and to embrace a historicism far beyond the preservation of monuments or architecturally significant buildings.[119] This diverse scope of preservation has as its germinal seed the expansive list of objects eligible for listing on the National Register, which includes: "districts, sites, buildings, structures, and objects . . . that have made a significant contribution to the broad patterns of our history,"[120] as well as in the listing criteria and considerations for listing criteria.[121] While this expansiveness has been in the NHPA since its

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116. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see also* Lea, *supra* note 102, at 14-15.

117. *Penn Central*, 438 U.S. at 124. The *Penn Central* Court notes:

> [T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

*Id.* (citations omitted).

118. Lea, *supra* note 102, at 18.

119. *See id.*

120. *See* Dolores Hayden, *Placemaking, Preservation and Urban History*, 41 J. ARCHITECTURAL EDUC. 45, 46 (1984); *see also* 16 U.S.C. § 470 (1966).

121. *See* 36 C.F.R. § 60.4 (2009). The Regulation states:

> The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.
>
> *Criteria considerations.* Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria of [sic] if they fall within the following categories:

first passage, preservationists are now paying more attention to the non-building categories than before.

The findings for the National Register provide a broad mandate regarding the purposes of historic preservation, including cultural, educational, aesthetic, inspirational, economic, and energy benefits.[122]

Similarly, the National Trust's eight "Charleston Principles," adopted in 1990, also act as a guide for community conservation.[123]

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(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or (b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or (c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life. (d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or (e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or (f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or (g) A property achieving significance within the past 50 years if it is of exceptional importance.

*Id.*

122. The findings for the National Historic Preservation Act of 1966 state:

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage; (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people; (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency; (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans; (5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; (6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and (7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470(b)(1)-(7).

123. The Charleston Principles were first adopted by the National Trust for Historic Preservation's National Conference in October, 1990, and were subsequently adopted by the United States Conference of Mayors in June, 1991. The Charleston Principles are as follows: 1) Identify historic places, both architectural and natural, that give the community its special character and that can aid its future well-being; 2) Adopt the preservation of historic places as a goal of planning for land use, economic development, housing for all income levels, and transportation; 3) Create organizational, regulatory, and incentive mechanisms to

The Charleston Principles include such broad provisions as "use a community's heritage to educate citizens of all ages and to build civic pride" and "recognize the cultural diversity of communities and empower a diverse constituency to acknowledge, identify, and preserve America's cultural and physical resources."[124]

Proponents of a more inclusive historic preservation effort, such as Dolores Hayden, have emphasized that the movement should "celebrate the history of their citizens' most typical activities—earning a living, raising a family, carrying on local holidays, and campaigning for economic development or better municipal services."[125] Other commentators have similarly urged that historical significance should not be a matter for the experts and historic preservation professionals, but rather enshrine the values placed on an environment by the community that lives there.[126]

This increasing focus on the community—both in shaping the procedures of historic preservation and as the end users of the process—has become dominant in the field. Yet, such inclusivity is fraught with the same questions that the explosion of histories in the latter-half of the twentieth century brought to effective narratives: whose history are we telling? Whose heroes receive prominence? Does the celebration and enshrinement of "typical activities" ennoble the quotidian at the expense of rewarding achievement? Bringing these questions to the city landscape poses additional concerns, as they must compete with the evocation of archi-

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facilitate preservation, and provide the leadership to make them work; 4) Develop revitalization strategies that capitalize on the existing value of historic residential and commercial neighborhoods and properties, and provide well-designed affordable housing without displacing existing residents; 5) Ensure that policies and decisions on community growth and development respect a community's heritage and enhance overall livability; 6) Demand excellence in design for new construction and in the stewardship of historic properties and places; 7) Use a community's heritage to educate citizens of all ages and to build civic pride; 8) Recognize the cultural diversity of communities and empower a diverse constituency to acknowledge, identify, and preserve America's cultural and physical resources. *Charleston Charms Preservationists*, 12 HISTORIC PRESERVATION NEWS 8 (December 1990); see *also* Lea, *supra* note 102, at 18.

124. *Charleston Charms Preservationists*, 12 HISTORIC PRESERVATION NEWS 8 (December 1990).

125. Hayden, *supra* note 120, at 46. Hayden notes:

> One reason for the neglect of ethnic and women's history is that landmark nominations everywhere in the United States frequently have been the province of passionate rather than dispassionate individuals—politicians seeking fame or favor, businessmen exploiting the commercial advantages of specific locations, and architectural critics establishing their own careers by promoting specific persons or styles.

*Id.*

126. Rose, *supra* note 91, at 533 ("A major public purpose underlying modern preservation law is the fostering of community cohesion, and ultimately, the encouragement of pluralism."); Green, *supra* note 93, at 92 ("Meaning is socially made. Historical significance is about meaning in the public realm. It is all historical, but it is not all equally historically meaningful, i.e. significant.").

tectural style and ornament, as well as urban scale and methods of living, that raise equal passions independent of preserving personal and collective identities.

### *B. Harmony, Tourism, and Property Values*

The purposes announced by some of the most prominent historic preservation ordinances in the country speak not of health or safety, but of the more "genteel" purposes of tourism, aesthetics, and property values. The City of Charleston's historic preservation ordinance provides in part:

> In order to promote the economic and general welfare of the city and of the public generally, and to insure the harmonious, orderly and efficient growth and development of the municipality, it is deemed essential by the city council of the city that the qualities relating to the history of the city and a harmonious outward appearance of structures which preserve property values and attract tourist and residents alike be preserved . . . .[127]

The City of Alexandria, Virginia, similarly notes the importance of tourism, property values, and aesthetics as purposes of the city's historic preservation ordinance.[128]

When historic preservation is premised on such notions as tourism, property values, and aesthetics, the idea of a *harmonious* development in a historic district becomes an important requirement in support of these purposes.[129] Such a notion has become ubiquitous, and codes routinely require new development to demonstrate "appropriate[ness]" to the historic district.[130] Design guidelines are often created, as in New Orleans and Nantucket,[131] to maintain "indigenous" architectural legacies, which often evolved over hundreds of years, and are subsequently rigidly codified to prevent any further evolution.[132] This rigidity of design often accompanies the gentrification of a historic district.[133] Historic

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127. CHARLESTON, S.C., CODE § 54-230 (2003); David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289, 295 (2004) (quoting CHARLESTON, S.C., CODE § 54-230).

128. *See* ALEXANDRIA, VA., CODE § 2-4-32 (1982); *see also* Tipson, *supra* note 127, at 296-97.

129. Tipson, *supra* note 127, at 295.

130. *Id.* at 299-300.

131. *Id.*

132. *Id.* at 299-301.

133. *Id.* at 309.

signs are often regulated under such requirements, including both the maintenance of historic signs, as well as the dimensions of new signs in historic districts.[134]

These "purpose" clauses are viewed by some as being in opposition to a more inclusive approach to historic preservation, which should be, as Carol Rose proposed, focused on "the fostering of community cohesion, and ultimately, the encouragement of pluralism."[135] As Rose continues, "[p]reservation law encourages a physical environment that supports community; it also provides procedures that can themselves organize a community, both by focusing the members' attention on aspects of the physical environment that can make them feel at home and by defining a smaller community's contribution to a larger."[136] Others have similarly stated that the significance of a landscape feature should be evaluated:

> [N]ot as it exists in isolation, but for its capacity to corroborate the important narratives that constitute the specific history of a community. . . . [T]he primary criterion of review would be the extent to which such alterations demolish historic fabric or obscure narratives that the community wishes to be expressed in the landscape.[137]

In this way, purposes such as harmony, appropriateness, tourism, and property values stand in opposition to a more broad-based, community-focused preservation effort.

### *C. The City as Masterwork*

In his *Penn Central* dissent, Justice Rehnquist notes that one of the ironies of historic preservation is that "Penn Central is prevented from further developing its property basically because too good a job was done in designing and building it."[138] The *Penn Central* majority did not directly address this issue, although Joseph Sax has stated that the Court should not have shied away from recognizing the affirmative obligation of the *owner-as-steward*, because by engaging an artist to create a masterwork the owner has prevented the artist from otherwise engaging in commissions that

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134. Burant, *supra* note 2, at 67-73; Kramer, *supra* note 3, at 27-45.

135. Rose, *supra* note 91, at 533.

136. *Id.* at 533-34.

137. Tipson, *supra* note 127, at 314-15.

138. Penn Central Transp. Co. v. City of New York, 438 U.S. 103, 146 (1978) (emphasis omitted).

would have been preserved.[139] By making such an argument, Sax is in essence grafting the rule of law governing fine art, which prevents destruction of a masterwork without the artist's consent, onto the city itself.[140]

Lior Jacob Strahilevitz has responded, however, that owners of buildings must retain the ancient "right to destroy," and that "overprotection of existing buildings will result in some future buildings never getting built." [141] As Strahilevitz asserts, "[a]s society becomes increasingly hostile to the right to destroy, there is a strong possibility that the pendulum will swing too far toward overprotection of extant structures."[142] The Roman property right of "the *jus utendi fruendi abutendi*: the rights to use the principal (i.e., the property), to use the income generated by the property, or to completely consume and destroy the property,"[143] was absorbed by the prominent British legal commentator William Blackstone and was incorporated throughout much of the nation's legal history.[144] Strahilevitz cites the 1960 case of *State of Illinois ex rel. Marbro Corp. v. Ramsey*, in which an Illinois appellate court held that a "building owner was entitled to a demolition permit where the costs of repairing and maintaining a historically significant building were high and where the owner would still lose money operating the building if it were fully renovated at the public's expense."[145]

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139. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 58 (1999). Sax states:

> The question that the [*Penn Central*] majority declined to address is whether "ordinary standards" should apply to the owner of an architectural masterwork. Justice Rehnquist deserved a reply to the paradox he had identified. Perhaps the best answer is that while the patrons (or owners) of an important work of architecture were not obliged to engage with a masterwork, having done so they have by their own voluntary act potentially made the community *worse* off than it would have been if they had never acted. It is insufficient to say that the work would not have existed without their patronage. For they have diverted the time and effort of an artist from other work he might have done, and that—in other hands—might have been better protected or made more widely accessible. In that respect, to engage with an important artist or artifact is to make oneself responsible. In perhaps an even more obvious way, those who patronize a great architect not only divert that individual from other opportunities, but put a structure upon the landscape that inevitably shapes and changes the community around it. It is hardly a purely private act.

*Id.*

140. *Id.* at 21-34.

141. Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 816 n.142 (2005).

142. *Id.*

143. *Id.* at 787.

144. *Id.* at 816.

145. Illinois *ex rel.* Marbro Corp. v. Ramsey, 171 N.E.2d 246, 247-48 (Ill. App. Ct. 1960); Strahilevitz, *supra* note 141, at 816-17 (citing *Ramsey*, 171 N.E. 2d at 247-48).

Sax's proposed affirmative obligation to preserve city masterworks would seemingly create increasing uncertainty for the property owner, as its reach could ostensibly extend beyond any landmarking or designation of a building or structure, and its reach could lead to property owners being held accountable for the demolition or destruction of properties that have received no formal rating.[146]

### *D. City Taxidermy, the Image of the City, and the City as Palimpsest*

Proponents of city development in the early twentieth century often paraded brash boosterism as visionary ideas. Architects such as Louis Sullivan could state that a skyscraper "must be every inch a proud and soaring thing, rising in sheer exultation,"[147] City Beautiful planners like Daniel Burnham could demand that one "[m]ake no little plans," as "they have no magic to stir men's blood,"[148] and modernist visionaries could implore the destruction of whole cities on the basis of a metaphor. Le Corbusier famously sought to raze central Paris because its winding roads reflected "the Pack-Donkey's Way," while the linear, modernist lines of the city he proposed reflected elements of reason.[149] This ideological

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146. Works of a master are a means of finding historical significance alone. *See* NAT'L PARK SERV., NATIONAL REGISTER BULLETIN, HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 20 (1995) [hereinafter HOW TO APPLY THE NATIONAL REGISTER CRITERIA]. Sax's argument takes this one step further, however, in noting a legal obligation to preserve even prior to a determination of significance. *See* SAX, *supra* note 139.

147. Louis H. Sullivan, *The Tall Office Building Artistically Considered*, LIPPINCOTT'S MONTHLY MAGAZINE 403, AT PAR. II (Mar. 1896).

148. *See* THOMAS S. HINES, BURNHAM OF CHICAGO: ARCHITECT AND PLANNER 401 n.8 (2d ed. 2009) (1974). Hines notes:

> The origins of the 'Make No Little Plans' motto are ambiguous and difficult to document. Burnham apparently never wrote out or delivered the piece in the exact, and now famous, sequence quoted by Charles Moore in *Daniel H. Burnham, Architect, Planner of Cities*, II (Boston, 1921), 147. Moore's version, according to Daniel Burnham, Jr., was copied from the one used by Willis Polk, Burnham's San Francisco friend and junior associate, on Christmas cards that Polk sent out in 1912, following Burnham's death the previous June. Most of the statement was drawn directly from Burnham's address at the 1910 London Town Planning Conference, 'The City of the Future Under a Democratic Government,' *Transactions of the Royal Institute of British Architects* (October 1910), 368-78. Since Polk ascribed the entire statement to Burnham, the additional lines were probably drawn by Polk from conversations or correspondence with Burnham that are now lost. The entire statement is consistent with and appropriate to Burnham's views and values. Its sentiments, and frequently its phrasing, are reiterated throughout his correspondence, speeches, and published writing.

*Id.*

149. LE CORBUSIER, THE CITY OF TO-MORROW AND ITS PLANNING 11 (Frederick Etchells trans., Architectural Press, 3d ed. 1971) (1924). Le Corbusier states:

approach lent a moralism to razing the old parts of the city, even once described as eliminating the "cancer" of urban blight from the city.[150] Decisions such as *Berman* gave credence to these theories by expanding the police power to give cities the ability to enact these new ideas, often through vast redevelopment schemes that tore down older portions of cities.[151] Redevelopment, though, eventually engendered sustained revolts against both the racial divides such projects were premised upon and intent on fortifying,[152] and the super-block scale of the city that they were creating.[153]

Jane Jacobs was perhaps the best known figure to provide a voice for the small-scale city.[154] While Jacobs supported small-scale neighborhoods, such as New York's Greenwich Village and Boston's North End,[155] she was dubious of over-planning at this scale, even for preservation. Jacobs warned:

> When we deal with cities we are dealing with life at its most complex and intense. Because this is so, there is a basic esthetic limitation on what can be done with cities: *A city cannot be a work of art.*
>
> . . .
>
> To approach a city, or even a city neighborhood, as if it were a larger architectural problem, capable of being given order by converting it into a disciplined work of art, is to make the mistake of attempting to substitute art for life. The results of such profound confusion between art and life are neither life nor art. They are taxidermy. In its place, taxidermy can be a useful and decent craft. However, it goes too far when the specimens put on display are exhibitions of dead, stuffed cities. Like all attempts at art which get far away from the truth and which lose respect for what they

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> Man walks in a straight line because he has a goal and knows where he is going; he has made up his mind to reach some particular place and he goes straight to it. The pack-donkey meanders along, meditates a little in his scatter-brained and distracted fashion, he zigzags in order to avoid the larger stones, or to ease the climb, or to gain a little shade; he takes the line of least resistance.

*Id.*

150. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 18 (2003) (citing Joseph D. McGoldrick, *The Super-Block Instead of Slums*, N.Y. TIMES MAG. 54-55 (Nov. 19, 1944)).

151. *See* HALL, *supra* note 104; *see also* ROBERT HALPERN, REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES 57-82 (1995).

152. *See* CHESTER HARTMAN & SARAH CARNOCHAN, CITY FOR SALE: THE TRANSFORMATION OF SAN FRANCISCO 76-102 (2002).

153. *See* Joseph D. McGoldrick, *The Super-Block Instead of Slums*, N.Y. TIMES MAG. 54-55 (Nov. 19, 1944).

154. *See, e.g.*, JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 3-4 (Vintage Edition 1992) (1961).

155. *Id.* at 5-10, 125, 183.

> deal with, this craft of city taxidermy becomes, in the hands of its master practitioners, continually more picky and precious. This is the only form of advance possible to it.[156]

While Jacobs' was arguably the most notable voice on this issue, Kevin Lynch was the most influential planner to lay out an alternative vision for how the city could be imagined and maintained on a small scale.[157] Lynch conducted seminal studies on how citizens of cities referenced their urban landscape, and developed a typology to convey this "image of the city" that urban citizens used to locate themselves, both spatially and personally, within the city.[158] This typology was marked by paths, edges, districts, nodes, and landmarks.[159] With landmarks, Lynch noted that "[t]here seemed to be a tendency for those more familiar with a city to rely increasingly on systems of landmarks for their guides."[160] These landmarks were:

> [U]sually a rather simply defined physical object: building, sign, store, or mountain. . . . These are the innumerable signs, store fronts, trees, doorknobs, and other urban detail, which fill in the image of most observers. They are frequently used clues of identity and even of structure, and seem to be increasingly relied upon as a journey becomes more and more familiar.[161]

In other words, landmarks such as signs became more important to citizens familiar with a locale as a means of creating an identity of the city, which was increasingly important as cities metastasized into megalopolises in which form was less evident, and therefore the ability to *read* a city became harder.[162]

Lynch, like Jacobs, realized that historic preservation played a vital role in fighting the super-block. But both Jacobs and Lynch feared that historic preservation could reach too far and obstruct the present use of the city. Lynch noted that the aim of historic preservation "should be the conservation of present value as well

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156. *Id.* at 372-73.
157. *See* KEVIN LYNCH, THE IMAGE OF THE CITY (1960).
158. *See id.*
159. *Id.* at 47-48.
160. *Id.* at 78.
161. *Id.* at 48.
162. *Id.* at 119 ("Large-scale imageable environments are rare today. Yet the spatial organization of contemporary life, the speed of movement, and the speed and scale of new construction, all make it possible and necessary to construct such environments by conscious design.").

as the maintenance of a sense of near continuity."[163] Lynch goes on to note that "[t]hings are useful to us for their actual current qualities and not for some mystic essence of time gone by"[164] and that "[h]istorical areas are not so much irreplaceable as rarely replaced."[165] In proposing a method of historic preservation, Lynch stated:

> Public agencies will be more effective in guiding change than in preventing it. In addition . . . I prefer to emphasize the creation of a sense of local continuity—the tangible presentation of historical context, one or two generations deep, in all our living space—over the saving of special things. That continuity should extend to the near future as well as the near and middle-range past. In any changing area, I propose the retention of some elements, fragments, or symbols of the immediately previous state. Elements least likely to interfere with present function would obviously be chosen, but they should be significant ones, symbolically rich or directly connected with past human behavior or conveying a sense of the total ambience of the past.[166]

Jacobs and Lynch were concerned that the small-scale city needed to be preserved, but that did not necessarily entail preservation of the city as it was in any one moment in time. Rather, both Jacobs and Lynch promoted a view of the city as an evolving creature that needed to emphasize its present use. At the same time, Lynch was especially cognizant of the importance of maintaining a sense of time in the city, and doing so in a manner that facilitated the image of the city through use of landmarks to help citizens retain legibility of their space in a megalopolis. Historic signs, such as the weather vane atop Faneuil Hall or even a broken street clock, could be valuable[167] as both a defining means of reference and a connection to the city's history.

The approach of Jacobs and Lynch was later echoed by theorists such as Andreas Huyssen, who stated that:

> After the waning of modernist fantasies about *creatio ex nihilo* and of the desire for the purity of new beginnings, we have come to read cities and buildings as palimpsests of

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163. KEVIN LYNCH, WHAT TIME IS THIS PLACE? 55 (1972).
164. *Id.*
165. *Id.* at 57.
166. *Id.* at 235.
167. *Id.* at 138 (figures 37-38).

> space, monuments as transformable and transitory, and sculpture as subject to the vicissitudes of time. Of course, the majority of buildings are not palimpsests at all. As Freud once remarked, the same space cannot possibly have two different contents. But an urban imaginary in its temporal reach may well put different things in one place: memories of what there was before, imagined alternatives to what there is. The strong marks of present space merge in the imaginary with traces of the past, erasures, losses, and heterotopias.[168]

As with the sense of time that Lynch sought, retaining the multiple eras of writing upon the palimpsestic city[169] preserves its varied meanings and gives a new depth to the experience of the present city. The historic sign contributes not only as a vestige of previous commerce, but also to the modern experience of history that grounds an individual in the city. Such an approach would argue that the government maintains an interest in a public space that retains a historic context, not only to preserve the past, but for the present experience of time and memory. While more theoretical than other, tested purposes, this is arguably more honest in its intent and potentially still within the ambit of *Berman*.

## VI. APPROACHES TO PRESERVING HISTORIC SIGNS WITHIN THE FIRST AMENDMENT

Stacking the variety of public purposes supporting historic preservation ordinances—either individually or in wholesale fashion—against the Court's compelled speech analysis is unlikely to yield a dispositive answer as to whether the retention of historic signs are of a sufficient governmental interest to justify the burden they impose on current businesses. Post-*Berman* courts have clearly been lenient in upholding sign regulation and historic preservation,[170] but the limitations of preservation would likely surface

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168. ANDREAS HUYSSEN, PRESENT PASTS: URBAN PALIMPSESTS AND THE POLITICS OF MEMORY 7 (2003).

169. Felix Frankfurter has argued that constitutional analysis itself contains palimpsestic qualities. *See* Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 48 YALE L.J. 458, 486 (1939) (noting that the commerce clause is a "heavily encrusted palimpsest.").

170. For cases upholding sign regulation, see *supra* note 41; *see also* Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898 (9th Cir. 2009) (cert den'd, 130 S.Ct. 1014); World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676 (9th Cir. 2010). Facial challenges to historic preservation ordinances are increasingly rare, but *see* Kruse v. Town of Castle Rock, 192 P.3d 591 (Colo. 2008) (upholding historic preservation ordinance against facial and as-applied constitutional challenges). For a rare contemporary case finding a historic

where, as with historic signs, the issue of how such purposes align against compelled speech analysis is one of first impression for the courts.

In such a case, the Court would likely consider the fact-specific sign preservation scheme at issue, rather than weigh the issues in the abstract. A schematic analysis of the issues is possible by reconsidering the four methods of preserving historic signs in *Preservation Brief 25*, as outlined previously,[171] in light of the public purposes of historic preservation and commercial speech interests.

### *A. Historic Signs Retained*

*Preservation Brief 25* presents two approaches for retaining a historic sign on the exterior of the building: retaining the historic sign unaltered, or modifying the historic sign for use with the new business.[172] In evaluating such a scheme, analysis must begin with two questions arising from *PG&E*: whether the historic sign's preservation is a question of "extra space" as analyzed in that case and whether preserving the historic sign is tantamount to the State compelling the current business owner to advance views with which the business owner disagrees.[173]

*PG&E*'s discussion of "billboards" and "sides of buildings" is *dicta*, as the only issue before the Court was the use of the ratepayers' envelope. Nonetheless, the Court indicated its concern that, had it allowed the utility's adversaries to use the extra space in the envelope,[174] the concept of "extra space" could be used more broadly to justify any variety of compelled speech.[175] If the "side of [the] building[]" is a permissible measuring stick, as *PG&E* indicates,[176] then the mere fact that a property owner's signage for the current use can be accommodated and that the historic sign can also be accommodated in the extra space of the building's side is not enough. *PG&E* provides that such arguments of incidental accommodation are not persuasive in situations where the message that is being required advances a view with which the business owner would disagree.[177]

That begs the second question of *PG&E*: whether a historic sign could ever be held to advance views with which the business

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preservation ordinance facially unconstitutional, see Hanna v. City of Chicago, 388 Ill. App. 3d 909 (2009).

171. *See supra* notes 66-74 and accompanying text.

172. *See* AUER, *supra* note 8.

173. *See* Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986).

174. *See id.* at 1, 19 n.15.

175. *See id.* at 8 n.15.

176. *See id.*

177. *See id.*

disagrees.[178] As *Preservation Brief 25* argues, "[s]urviving historic signs have not lost their ability to speak. But their message has changed."[179] The preservation argument is that the historic sign is evocative of the past only, as its original communicative function has ceased and the passerby recognizes that the sign no longer proposes a transaction or otherwise intends to communicate its message. Skepticism of such an approach on a broad scale is warranted, in part because business signage has not changed uniformly over time. Many businesses still use historic signage to actively brand their products, as is especially true of products for which nostalgia is part of the brand, such as Coca-Cola. As a result, consumers viewing a faded Coca-Cola sign against a brick building do not assume that the sign no longer proposes a transaction simply because it is old. In other words, for some historic signs the meaning does not change whatsoever, especially where the branding itself has incorporated a sense of the passage of time.

Of more direct concern is the required maintenance of historic signage that constitutes a political or ideological viewpoint. For instance, the preservation of segregation signage by a private property owner, such as "white" and "colored" bathroom signs,[180] would likely be considered compelled speech, as it associates the business with a racial ideology in a manner not easily discernible from intended racism. In such cases it is not clear that the meaning has changed at all. While preservation of such signage may have the benefit of helping to remind Americans of a difficult and troubling part of their history, requiring preservation of such signs by private businesses would likely be deemed unconstitutionally compelled speech.

More difficult questions arise when examples such as the baby clothier below a historic business sign reading "liquor and cigarettes," or the used-car dealer beneath a historic business sign advertising "Johnie's Broiler: Family Restaurant, Coffee Shop"[181] are considered. The compelled-speech doctrine case law, such as *Zauderer*, has thus far focused on the question of whether the government may require truthful and factual information to be provided by the advertiser, such as warnings on attorney advertisements.[182] However, the Court has not addressed the question of whether the government may require non-truthful and non-factual information to be retained by a business owner where the purposes, even those

178. *See id.* at 19.
179. AUER, *supra* note 8 (conclusion).
180. *See* Weyeneth, *supra* note 15 and accompanying text.
181. *See supra* note 14 and accompanying text.
182. *See supra* notes 39-45 and accompanying text.

of historic preservation articulated in the ways outlined above, remain far more diffuse than the interests of the business owner. In such cases, the retained words, however stylized, indicate particular types of transactions that are still common today. A passerby still expects to encounter stores selling liquor, cigarettes, and coffee. Furthermore, signs for such products are often highly stylized, both in their historic and present forms, and a consumer does not immediately recognize that such transactions are no longer possible where he or she sees a historic sign advertising such a vacated use. More importantly to the current business, the passerby does not immediately recognize that the products for sale are baby clothes or used cars. Therefore, the current business owners may object to the confusing language of such historic signs, even if such historic signs could otherwise be accommodated in the "extra space" of the building's side.

If preserving a historic sign were not compelled speech per se and therefore must be removed, policy should trend towards ensuring that the business owner's signage is the primary business activity communicated and proposed, and the historic sign speaks in a manner that does not propose a business transaction. This can be achieved in a number of ways, some of which are outlined in *Preservation Brief 25*.[183] One common approach is to replace lettering on a historic sign to indicate the new business, such as replacing "coffee shop" with "used cars," or "liquor and cigarettes" with "baby clothes."[184] A number of solutions are likely possible depending on the facts of the signage.

This approach would likely satisfy a number of the purposes espoused by historic preservation. By retaining the historic sign in a manner that prioritizes the present business signage, preservation avoids the trap of "city taxidermy" that worried Jacobs.[185] It also preserves the landmark quality of the historic sign as a navigational device in the city's typology, as Lynch noted,[186] while also prioritizing the present use on which Lynch insisted.[187] A hard-line approach, such as that of Sax, would likely be unsatisfied, however, arguing instead that change to the historic sign is the equivalent of painting over a corner of a masterpiece (presume, for argument, Picasso's *Les Demoiselles d'Avignon*) to give a child space to draw.[188] Similarly, those that encourage preservation for its tourist

183. *See* AUER, *supra* note 8.
184. *See id.*
185. *See* Jacobs, *supra* notes 154-156.
186. *See* Lynch, *supra* notes 157-162.
187. *See id.*
188. *See* Sax, *supra* note 139.

draw may be equally disconcerted by prioritizing the present use where the historic sign contributes to the atmosphere that is the purpose of tourism. And yet, Lynch's proposal of prioritizing present use of signage while preserving elements of the sign that are symbols of the past seems very much in line with the Court's priorities of encouraging businesses to put forth truthful, factual information while requiring the state to avoid compelling businesses to advance ideas with which they disagree. Lynch's proposal is nothing more than a typology of true and factual commercial speech permitting a city to function in its present state, all-the-while resisting the forces of nostalgia and recreated pasts—those aspects of preservation that lean indelibly toward compelled speech.

There is a complicating factor, however. While such modifications to the historic sign may meet many of the purposes of historic preservation broadly conceived, modification of the sign could very easily prevent a sign from ever becoming designated a historic resource.[189] To become listed as a historic resource on the National Register, a sign must possess both significance and integrity, as with any other building or landmark.[190] However, changing the lettering on a historic sign may be deemed to weaken that sign's integrity of materials and, unless done very carefully, could also have the potential to compromise the sign's integrity of design, workmanship, feeling, and association.[191] That represents five of the seven components of integrity,[192] and thus a sign with changed lettering may be deemed to be too compromised to be a historic resource and thus ineligible for listing on the National Register. As a result, a legal consideration of a modified historic sign under the First Amendment would still face the issue of whether to prioritize commercial speech, historic preservation's purposes, or the technical dictates of the NHPA.

### *B. Historic Signs Removed*

Two other options are presented by *Preservation Brief 25*: removal of the sign from the site to donate it to a museum or preservation group, or relocation of the sign to the interior of the building, such as in the lobby or above the bar in a restaurant.[193] Such removal eliminates the compelled-speech dilemma—the historic sign is gone and speaks to the passerby no more. As indicated pre-

189. *See* HOW TO APPLY THE NATIONAL REGISTER CRITERIA, *supra* note 146, at 44-49.
190. *Id.* at 44.
191. *See id.* at 44-49.
192. *See id.*

viously, a solution shy of removal is most likely available to satisfy the strictures of compelled speech. On the other hand, complete removal, even if to a museum or inside, does not meet many preservation goals.

The preservation of the historic sign in an off-site location could arguably meet the purpose of preserving the masterwork as Sax argued, but in a manner that seems to substitute form for substance. The masterwork quality of the historic sign is, in part, its reference to the cityscape in which it was placed. Community history proponents may argue that removal eliminates the very purpose of preserving the sign—its civic prominence. Lynch would argue that the sign's complete loss eliminates a typological landmark and makes the city less legible to its citizens, and those prioritizing tourism would emphasize the loss of an element in the city that makes it attractive to visitors. In short, removal to a museum or to the interior of the building would satisfy few, if any, of the preservationists' purposes. In addition, historic preservationists would likely be unsatisfied with such an approach because it would compromise the sign's integrity of feeling and association, and thus would limit the sign's ability to be listed as a historic resource on the National Register.[194]

## VII. CONCLUSION

Perhaps the only approach that is not satisfied with any of the approaches in *Preservation Brief 25*[195] is that of Strahilevitz, who emphasizes the "right to destroy" property.[196] Strahilevitz's critique is important, as it illustrates the slow evolution from the unbridled ability to destroy buildings to a situation in which not only buildings, but also ephemera such as signage are the subject of government regulation.[197] Nonetheless, given the prominence of preservation in the public imagination, not to mention the broad police powers justifications put forth in *Berman*,[198] such unbridled right of destruction is unlikely to return any time soon. Rather, preservation is more likely to be reigned in as it encroaches on other rights, as has happened in recent years, where religious groups have asserted their right of religious freedom when battling preservationists in their efforts to destroy buildings they own.[199]

193. *See* AUER, *supra* note 8, at 52-63.

194. *See* HOW TO APPLY THE NATIONAL REGISTER CRITERIA, *supra* note 146, at 44-49.

195. *See* AUER, *supra* note 8.

196. *See* Strahilevitz, *supra* note 141.

197. *See id.*

198. *See* Berman v. Parker, 348 U.S. 26 (1954).

199. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); *see generally* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-1 to 2000cc-5

By considering historic signs in light of other rights, such as freedom of speech, the limits of preservation emerge in high relief. It becomes evident that even within the historic preservation movement, the question of what should be preserved remains open. However, that question is increasingly viewed as one more appropriate for public comment and public discourse. As the movement takes on a more egalitarian and democratic march, so too do its provisions reach deeper into the fabric of present-day life. The natural result of this growth will be that preservation will, in turn, bump up against other rights and freedoms held close. Whether that is freedom of speech in the commercial context, or some other right, preservation's battles in its era of democratization will not be only over its direction, but how it aligns with other, equally-valued institutions of freedom and expression.

(2000); *see also* CAL. GOV'T CODE § 25373(d) (preventing local landmarking of churches without their consent); Andie Ross, Historic Preservation: First Amendment Considerations (2005) (unpublished M.A. thesis, University of Pennsylvania) (on file with author) (reviewing historic preservation cases involving religious institutions).