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THE CASE FOR BILLBOARD CONTROL: PRECEDENT AND PREDICTION

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I

The Colorado General Assembly in its next session will probably again consider legislation[1] giving the department of highways jurisdiction over advertising signs outside the corporate limits of any municipality. In addition, the department is authorized to enter into agreements with the Secretary of Commerce of the United States to regulate and control billboards within 660 feet of the right-of-way of federal-aid highway systems.[2] This authorization is designed to meet the requirements of an amendment to the Federal-Aid Highway Act of 1956,[3] which increases the federal share of the

1 S.B. 150, 42d Colo. Assembly, 1st Sess. (1959) amending art. 5, ch. 120, Colo. Rev. Stat. (1953).
2 S.B. 150, 42d Colo. Assembly, 1st Sess., § 120-5-17 (1959).
3 Federal-Aid Highway Act of 1958, 23 U.S.C. §131 (1958), providing in part as follows:
"(a) . . . It is declared to be a national policy that the erection and maintenance of outdoor advertising . . . within six hundred and sixty feet of the edge of the right of way . . . should be regulated, consistent with national standards to be prepared and promulgated by the Secretary, (of Commerce) which shall include only the following four types of signs, and no signs advertising illegal activities:
(1) Directional or other official signs or notices that are required or authorized by law.
(2) Signs advertising the sale or lease of the property upon which they are located.
(3) Signs erected or maintained pursuant to authorization or permitted under State law, and not inconsistent with the national policy and standards of this section, advertising activities being conducted at a location within twelve miles of the point at which such signs are located.
(4) Signs erected or maintained pursuant to authorization in state law and not inconsistent with the national policy and standards of this section, and designed to give information in the specific interest of the traveling public."

cost of construction,[4] of the interstate highway system to those states enacting such billboard control legislation[5] and since considerable discussion has arisen as to the constitutionality of this amendment to the Federal Act, and of state enabling legislation, review of those cases sustaining legislative regulation of billboards seems appropriate.

Objections usually raised against such regulations are that they: are invalid as an attempt to impose unreasonable and purely aesthetic limitations upon the use of private property; are an invasion of personal rights; have no relation to public peace, health, safety or general welfare; are not zoning ordinances; authorize the taking of property for public or private use without compensation; prohibit one type of industry in an area where other types are permitted; and, are even discriminatory as between advertising signs.[6]

Despite these objections, the constitutionality of enactments of this nature has been sustained. This was not the case, however, at the turn of the century. Then the courts generally felt that such laws were an invalid attempt to achieve purposes other than those traditionally associated with the police power.[7] The first notable decision breaking from the traditional concept was handed down by the United States Supreme Court in 1916, in *Thomas Cusack Co. v. City of Chicago*.[8] There, the Court held that a city, in the interest of the safety, morality and health of the community, may prohibit the erection of billboards in residential areas. As against a charge of discrimination, use was made by the court of the then novel concept that a legislature might properly make a reasonable classification between structures. The Court reasoned that a legislature could place billboards, as distinguished from buildings and fences, in a separate class, upon the ground that they were offensive.[9]

A remaining question as to whether the holding in the *Cusack* case applied only to billboards in residential districts was presented to the Court in *St. Louis Poster Advertising Co. v. City of St. Louis*,[10] decided in 1918. In the lower court, the plaintiff urged that it had always complied with valid legislation and had constructed its billboards in a substantial, permanent, safe and workmanlike manner.[11] It was further urged that the ordinance was a denial of due process,

4 23 U.S.C. §131 (c) (1958), increases the federal share by one-half of one per cent of the total cost, a decrease from the five per cent originally proposed, see *Hearings on S. 963 Before a Subcommittee of the Senate Committee on Public Works*, 85th Cong. 1st Sess., 5-6; but nevertheless, a considerable amount for a state of the size of Colorado.

5 H.B. 469, also considered by the first session of the 42nd Assembly an insufficient enabling measure since § 131 (a) (3) of the federal law, note 3, *supra*, is omitted. And if H.B. 469 is enacted, would more stringent regulations contained in county zoning laws, enacted pursuant to Colo. Rev. Stat., ch. 106, art. 2 (1953) be superseded? See Ray v. Denver, 109 Colo. 74, 121 P.2d 886 (1942).

6 See, e.g., complaint, General Outdoor Advertising Co. v. Harter, No. B-19469, District Court, City and County of Denver, Colorado, September 25, 1958.

7 See Curran Bill Posting Co. v. Denver, 47 Colo. 221, 107 Pac. 261 (1910); Haskell v. Howard, 269 Ill. 550, 109 N.E. 992 (1915); Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911); City of Chicago v. Gunning, 214 Ill. 628, 73 N.E. 1035 (1905); Crawford v. City of Topeka, 51 Kan. 756, 33 Pac. 476 (1893); City of Passaic v. Paterson Bill Posting Advertising and Sign Painting Co., 72 N.J.L. 285, 62 Atl. 267 (1905); Bill Posting Sign Co. v. Atlantic City, 71 N.J.L. 72, 58, Atl. 342 (1904). The Curran case was based upon Phillips v. Denver, 19 Colo. 179, 34 Pac. 902 (1893), which the Colorado court was later to characterize as a "horse and buggy day decision", in Colby v. Board of Adjustment, 81 Colo. 344, 353, 255 Pac. 443, 446 (1927).

8 242 U.S. 826 (1916).

9 *Id.* at 830. Cited as authority for the novel idea was St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S.W. 929 (1911). In the *St. Louis* case also appears another concept; that the delegated power to legislate for the general welfare was not confined to those previously ennumerated, 137 S.W. at 943, a concept that the United States Supreme Court was not to adopt until sometime later in United States v. Butler, 297 U.S. 1, 65 (1936) and Helvering v. Davis, 301 U.S. 619, 640 (1937). *Cf.* Willison v. Cooke, 54 Colo. 320, 327, 130 Pac. 828, 831 (1913).

10 249 U.S. 269 (1918).

11 St. Louis Poster Advertising Company v. St. Louis, 195 S.W. 717, 718 (Mo. 1917).

because the prescribed maximum size was too small to be produced on standard sign fabricating machinery, and the machinery could not be changed without disastrously affecting the business.[12] The plaintiff pointed out that the fee for sign permits was more than five hundred times that exacted for other structures such as buildings, and argued in addition that the ordinance unreasonably imposed the same limitations upon advertising structures in the open and unsettled parts of the city as were imposed in the downtown and thickly settled portions.[13] Despite these arguments, however, and even though nothing in the ordinance limited its application to a residential area, the United States Supreme Court held that these questions had already been settled:

> "If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in the *Cusack Co.* case . . . . In view of our recent decision we think further argument unnecessary to show that the ordinance must be upheld."[14]

Thus, the Supreme Court extended the *Cusack* doctrine to sanction what was virtually an absolute prohibition of large billboards. Since the Court in *Cusack* had ruled that signs in one area could be offensive the next step was to uphold comprehensive regulation.

Following *Cusack,* the Supreme Court in *Village of Euclid v. Ambler Realty Co.*[15] used its billboard decision as precedent to sustain exclusion of certain industries by zoning. In this case Mr. Justice Sutherland, speaking for the Court, sanctioned a zoning ordinance imposing controls on structures, including billboards, on a city-wide basis as opposed to controls only in a residence area. In doing so, this now famous observation was made:

> "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."[16]

Then, in 1930, the Indiana Supreme Court, decided *General Outdoor Advertising Co. v. City of Indianapolis.*[17] In that case, an ordinance not pertaining to zoning, but which prohibited the operation or maintenance of any sign within 500 feet of certain parks and boulevards was held valid. The court observed:

> "Under a liberalized construction of the general wel-

12 *Id.* at 718-19.
13 *Ibid.*
14 St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269, 274-75 (1918).
15 272 U.S. 365 (1926).
16 *Id.* at 387.
17 202 Ind. 85, 172 N.E. 309 (1910).

> fare purposes of state and federal Constitutions there is a trend in the modern decisions (which we approve) to foster, under the police power, an aesthetic and cultural side of municipal development—to prevent a thing that offends the sense of sight in the same manner as a thing that offends the senses of hearing and smelling . . . . But this trend must be kept within reasonable limitations, for citizens must not be compelled under the police power to give up rights in property solely for the attainment of aesthetic objects."[18]

The court went on to say, however, that aesthetic considerations enter into the police power to a great extent where a regulation thereunder has a reasonable relation to the general welfare,[19] and continued:

> "As social relations become more complex, restrictions on individual rights become more common. Restrictions which years ago would have been deemed intolerable and in violation of the property owners' constitutional rights are now desirable and necessary, and zoning ordinances fair in their requirements are usually sustained . . . . A preponderant majority of the courts of the several states have upheld the validity of the so-called city planning or zoning laws . . . . Under laws and ordinances of this character many regulations and limitations of structural design and property use have been upheld which bear no closer relation to the public safety, health, morals, and general welfare, or public comfort, convenience, and prosperity (which latter terms are also included in the recent cases . . .), than does the ordinance concerning billboards in the instant case. . . . "[20]

The court then concluded, citing the earlier decisions opposing its view, saying:

> "Most of these cases were decided prior to the complete development of the law concerning the regulation of billboards, and all of them were decided prior to the decision of the many cases approving the so-called zoning laws. . . . [I]t is reasonable to presume that, if cases where laws and ordinances sought to prohibit billboards within close proximity to public parks and boulevards were to be decided today in those states, they would reach the same result . . . as is reached in the case at bar."[21]

The courts have continued to authorize the control of billboards by laws other than those controls imposed by zoning. Such a law was held valid in Utah, in *State v. Packer Corp.*[22] In this case, however, there was a distinction between advertising signs, a factor which had not heretofore been presented. The statute involved prohibited display of tobacco advertising. The statute, however, permitted two exceptions: (1) a tobacco dealer might have a sign in

18 172 N.E. at 312.

19 *Ibid.* And see International Co. v. City of Miami Beach, 90 So. 2d 906 (Fla. 1956); Ware v. City of Wichita, 113 Kan. 153, 214 Pac. 99 (1923); People v. Rubenfeld, 254 N.Y. 245, 172 N.E. 485, 487 (1930) (Opinion by Cardozo, J.: "One of the unsettled questions of the law is the extent to which the concept of nuisance may be enlarged by legislation so as to give protection to sensibilities that are merely cultural or aesthetic."); Perlmutter v. Greene, 259 N.Y. 27, 182 N.E. 5 (1932); Annots., 81 A.L.R. 1547 (1932); 58 A.L.R.2d 1314, 1327 (1956).

20 172 N.E. at 313.

21 172 N.E. at 315.

22 77 Utah 500, 297 Pac. 1013 (1931).

the front of his place of business, and (2) newspaper or magazine tobacco ads were permitted. Opposing argument was grounded upon the provisions in the constitution of Utah guaranteeing the inalienable rights of citizens and due process of law, and those prohibiting legislation which impaired the obligation of contracts.[23] The attack was also based upon the clauses in the federal constitution relating to interstate commerce, the obligation of contracts, the abridgement of privileges and immunities of citizens in the several states, and upon the due process and equal protection clauses of the fourteenth amendment.[24] When the statute was upheld by the Utah Supreme Court, appeal was taken to the United States Supreme Court in *Packer Corp. v. Utah*.[25] There Mr. Justice Brandeis, speaking for the Court, justified the exceptions briefly as follows:

> "It is a reasonable ground of classification that the State has power to legislate with respect to persons in certain situations and not with respect to those in a different one. . . ."[26]

Brandeis continued, however, adopting a new line of reasoning to sustain restrictions directly against billboards:

> "Moreover, as the state court has shown, there is a difference which justifies the classification between display advertising and that in periodicals or newspapers: 'Billboards, street car signs, and placards and such are in a class

23 297 Pac. at 1014.
24 *Ibid.*
25 285 U.S. 105 (1931).
26 *Id.* at 110.

> by themselves. They are wholly intrastate, and the restrictions apply without discrimination to all in the same class. Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines.' "[27]

It must be pointed out, however, that while this may explain why billboard advertisements may be treated differently from those in publications, it still does not explain, perhaps, why signs advertising a business conducted on the premises might be exempted. The latter, of course, have as much involuntary impact upon the public as do billboards. Since this decision, though, such an exemption has appeared quite frequently in the cases. One such case is *General Outdoor Advertising Co. v. Department of Public Works,*[28] decided in Masschusetts.

In that state, because an earlier case[29] had declared billboard regulation unconstitutional, an amendment to the state constitution had been deemed necessary to allow regulation of advertising on public ways, in public places and on private property. Statutes had been enacted giving to the state department of public works the power to issue regulations, and to cities and towns the power to regulate and restrict billboards. The statutes generally prohibited advertising devices on private property within public view, except those advertising a nearby business. Regulations had also been enacted requiring a setback of 300 feet for certain types of billboards from the boundary line of certain public ways and places (including the Boston Common). These proscriptions were disputed by the advertising company in fifteen equity suits as: (1) being beyond the scope of the constitutional amendment, in that to regulate and to restrict does not include the right to prohibit altogether; and, (2) violative of the federal constitution, particularly the equal protection clause of the fourteenth amendment.[30] In a general discussion of the issues, the Massachusetts Supreme Court observed:

> "The zoning ordinance which was held to be valid in Euclid, Ohio v. Ambler Realty Co., . . . absolutely prohibited billboards in several of the zones. . . . In one of the most recent discussions of the extent of the police power, Nebbia v. New York, 291 U. S. 502, 525 . . . occurs this language:

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27 *Ibid.*
28 289 Mass. 189, 193 N.E. 799 (1935); and see Gardner, *The Massachusetts Billboard Decision, 49* Harvard L. Rev. 869 (1936).
29 Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N.E. 601 (1905).
30 193 N.E. at 803.

> 'The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. . . . The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community. The state may control the use of property in various ways; may prohibit advertising billboards except of a prescribed size and location, certain kinds of advertising . . . .' "[31]

Then, in answer to the plaintiff's argument that regulation does not mean prohibition, the court replied:

> "The power 'To regulate Commerce with foreign Nations, and among the several States' is conferred upon Congress by article 1, § 8, of the Constitution of the United States. It was said respecting that power in United States v. Hill, 248 U. S. 420, 425, . . . 'That regulation may take the character of prohibition, in proper cases, is well established by the decisions of this court.' . . ."[32]

The court also felt constrained to use again the zoning analogy: "It is in substance exclusion of billboards and advertising devices by zoning."[33]

And, in answer to plaintiff's argument for equal protection, the court concluded:

> "The record, in our opinion, fails to show that the plaintiffs have not been accorded the equal protection of the laws. The classification of billboards and other outdoor devices for advertising, when carried on as a business, to be treated separately and apart from other business plainly is warranted. . . . The exempted signs do not contain any element of favoritism. The rules and regulations on their face are equal and operate indiscriminately. The statute exempts signs and devices advertising the person occupying or the business conducted on the premises. . . . There is a fundamental difference between these classes of advertising and the business of advertising as carried on by the plaintiffs."[34]

A final answer to this was not secured, however, for although appeals to the Supreme Court were taken, these were dismissed.[35] The question continued to be debated in the state courts despite *Packer Corp. v. Utah.*[36] Thus, in *Kelbro, Inc. v. Myrick,*[37] a Vermont zoning case, it was urged that extending greater privileges to an advertiser not engaged in the business of outdoor advertising was to deny to one so engaged the equal protection of the law and to deny due process of law. In overruling these contentions, the Vermont

31 *Id.* at 826-27.
32 *Id.* at 804.
33 *Id.* at 816.
34 *Id.* at 828.
35 General Outdoor Advertising Co. v. Hoar, 296 U.S. 543 (1935); *Id.*, 297 U.S. 725 (1936).
36 285 U.S. 105 (1931), discussed in text at notes 22-27 *supra.*
37 113 Vt. 64, 30 A.2d 527 (1943).

court cited cases reflecting the reasoning of Mr. Justice Brandeis in the *Packer* case:

> "It is necessary to consider the exact nature of the plaintiff's alleged property rights which it claims have been invaded. It is obvious that something more is claimed than the mere right to erect and maintain billboard structures upon lands adjacent to the highway. In its essence the right that is claimed is to use the public highway for the purpose of displaying advertising matter. This fact has been well stated by the Phillippine Supreme Court which has said that 'the success of billboard advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of private property . . . should require the advertiser to paste his posters upon the billboards so that they would face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares.' Churchill and Tail v. Rafferty, 32 P.I. 580, 609, appeal dismissed 248 U.S. 591. . . . In General Outdoor Adv. Co. v. Department of Public Works, 289 Mass. 149, 168, 169, 193 N.E. 799, 808, it is said: 'The only real value of a sign or billboard lies in its proximity to the public thoroughfare within public view. . . . The object of outdoor advertising in the nature of things is to proclaim to those who travel on highways and who resort to public reservations that which is on the advertising device, and to constrain such persons to see and comprehend the advertisement. . . . In this respect the plaintiffs are not exercising a natural right, . . . they are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways. . . . The right asserted is not to own and use

land or property, to live, to work, or to trade. While it may comprehend some of these fundamental liberties, its main feature is the super-added claim to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising. Without this super-added claim, the other rights would have no utility in this connection.' "[38]

The court concluded:

"That the Legislature has seen fit to extend these privileges cannot avail this plaintiff. They are a matter of sufferance rather than of right. The plaintiff is admittedly not in the excepted class, but is, rather, seeking to use the highway for commercial purposes analogous to the use made of it by common carriers. Such use, this Court has held, the Legislature in the exercise of its police powers may wholly deny, or may permit to some and deny to others as will best promote the general good of the public. There is no inherent right to use the highways for commercial purposes. . . . This is in accord with the holdings of the United States Supreme Court which has recently said: 'Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.' . . . "[39]

The free use by the people of their highways has thus become since the *Packer* decision an additional basis for sanctioning billboard control. Another instance of this is found in *Murphy Inc. v. Town of Westport.*[40] In this case, a zoning ordinance divided Westport, Connecticut, into residential and business districts. In residential districts, all advertising signs were forbidden except those, no more than eight square feet, which advertised a business on the premises. In business districts, billboards were prohibited unless they referred to a business conducted on the property. The plaintiff was permitted to enjoin enforcement of the ordinance by the lower court, but the case was remanded on appeal for a determination of whether the plaintiffs were entitled to such relief. The appeal court prefaced its decision with the observation that the Boston Post Road traversed the business district of Westport. Also, it was held that

38 30 A.2d at 529. See also Wilson, *Billboards and the Right to be Seen from the Highway*, 30 Geo. L. J. 723 (1942), and Comment, 42 Mich. L. Rev. 128 (1943).
39 *Id.* at 530. The case referred to is *Valentine v. Christensen*, 316 U.S. 52, 54-55 (1942).
40 131 Conn. 292, 40 A.2d 177 (1944).

it was not discriminatory to treat those signs relating to a business on the property differently from signs not so related.

If the reasoning contained in the *Packer* case for such classification between signs still remained obscure, the distinction was drawn in more detail in *Railway Express Agency v. New York.*[41] This decision concerned a traffic regulation which prohibited any advertising vehicle from being operated on city streets, but permitted business notices upon delivery vehicles engaged in the usual business of the owner. In an opinion by Mr. Justice Douglas, the United States Supreme Court held that such regulation did not violate the due process and equal protection clauses of the fourteenth amendment. The Court explained why a sign advertising a business on the premises where the sign is located may be exempted from prohibition as follows:

> "The question of equal protection of the laws is pressed more strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of the appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.
>
> "That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants."[42]

The court concluded:

> "The fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[43]

Mr. Justice Brennan while a member of the New Jersey Supreme Court further clarified the stand of the courts on this issue in

41 336 U.S. 106 (1948); see also Fifth Ave. Coach Co. v. City of New York, 221 U.S. 467 (1911).
42 *Id.* at 109-10.
43 *Id.* at 110.

United Advertising Corp. v. Borough of Raritan.[44] In this instance, a zoning ordinance excluded signs, other than those advertising a business on the premises, from all of the zoned districts of the borough, whether residential, business, or industrial. The court said:

> "The business sign is in actuality a part of the business itself, just as the structure housing the business is a part of it, and the authority to conduct the business in a district carries with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard as in the case of this ordinance. Plaintiff's placements of its advertising signs, on the other hand, are made pursuant to the conduct of the business of outdoor advertising itself, and in effect what the ordinance provides is that this business shall not to that extent be allowed in the borough. It has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards and similar outdoor structures located by persons in the business of outdoor advertising, justify the separate classification of such structures for the purposes of governmental regulation and restriction. . . .
>
> "And as such separate classification offends no constitutional provision, there also exists no invidious discrimination in the provisions of the ordinance barring plaintiff's signs in the business and industrial zones while allowing therein manufacturing plants, junk yards, coal and coke yards and other uses suggested by plaintiff, as also having undesirable attributes. It is enough that outdoor advertising has characteristic features which have long been deemed sufficient to sustain regulations or prohibitions peculiarly applicable to it."[45]

Then, as a synthesis, a recent case, *City of Los Angeles v. Barrett,*[46] sustained an enactment which combines the alternative reasons for control authored by Brandeis (outdoor advertising may be restricted because, unlike other forms of advertising, it cannot be avoided),[47] and Douglas (selective determination by local authorities that a sign not advertising a personal business is a pedestrian and vehicular distraction).[48] Here an ordinance provided that no outdoor advertising structure (defined to exclude premises-identifying signs of limited dimensions) could be erected or maintained if: (1) it was designed to have its advertising primarily viewed from a freeway, or (2) its location, size, nature or type constituted or tended to constitute a hazard to the safe and efficient operation of vehicles or to the safety of persons or property. It was further provided that no permit should be issued if it were determined by the local public works board that a proposed billboard was designed primarily to be viewed from such freeway, and that every application for a permit to erect such structure within 500 feet of any freeway must be approved by this board.[49] While this case was interlocutory in nature, sustaining a preliminary injunction against the

44 11 N.J. 144, 93 A.2d 362 (1952).
45 93 A.2d at 365-66.
46 115 Cal. App. 2d 776, 315 P.2d 503 (Dist. Ct. App. 1957).
47 Packer Corp. v. Utah, 285 U.S. 105 (1931), discussed in text, notes 22-27 *supra.*
48 Railway Express Agency v. New York, 336 U.S. 106 (1948), discussed in text, notes 41-43 *supra.*
49 City of Los Angeles v. Barrett, 115 Cal. App. 2d 776, 315 P.2d 503, 504-05 (1957).

defendant's placing a sign adjacent to a freeway, it is illustrative of the type of laws now coming into existence with the growth of limited-access urban highways. California, for example, prohibits the placing or maintaining of advertising displays on any property adjacent to landscaped freeways (except those advertising businesses conducted on the premises).[50] Similar statutes are found in Maryland[51] and Vermont.[52]

II

As a collateral inquiry, but no less important, possible effects upon freedom of speech and of the press must be considered in connection with the regulation of roadside advertising. Danger to these liberties, however, was not thought to be present in *United Advertising Corp. v. Borough of Raritan*,[53] where it was said:

> "Plaintiff urges further that there is an unconstitutional abridgement of the guaranties of freedom of speech and freedom of the press in a distinction which permits a business man to use a sign to advertise his business upon the premises, although 'he may not use that same sign to urge the public to purchase an automobile or a particular brand of ice cream or any other lawful article of commerce, at a store he owns across the street.' The short answer to this is that these guaranties impose no such restraint upon governmental regulations of purely commercial advertising."[54]

The billboard industry's answer, however, is that by the inclusion of many posters on behalf of civic and national programs, its medium is not of a purely commercial nature since the public services it renders are vital to the nation, its states and its communities.[55] And, indeed, there would appear, in view of this development, serious difficulty of apportioning for legitimate regulation, that which is of public interest and that which is for private profit. Nevertheless, the industry, although its public service is of great magnitude, probably may not rely on the first amendment. Otherwise, as the United States Supreme Court has observed in *Valentine v. Christensen*,[56] an occasional civic appeal could achieve immunity from the law's command.

Additional inquiry must also be made as to whether the inclusion of provisions against the remodeling of signs existing prior to a regulation's enactment may be unconstitutional. In zoning laws, however, "the customary method of eliminating non-conforming existing uses is to forbid any alterations or rebuilding."[57] Moreover, legislation which prohibits the maintenance and use of existing billboards has been upheld. In *Kansas City Gunning Advertising*

50 Cal. Business and Professions Code, §§5291-93.
51 8 Ann. Code of Md., art. 89B (1958).
52 Vt. Laws 288 (1957).
53 11 N.J. 144, 93 A.2d 362 (1952).
54 93 A.2d at 366.
55 See, *e.g.*, *Hearings*, *op. cit. supra* note 5 at 195-96.
56 316 U.S. 52, 55 (1942).
57 Comment, 39 Yale L.J. 735 (1930).

Co. v. Kansas City,[58] a state case later cited with approval by the United States Supreme Court,[59] it was pointed out:

> "This was an ordinance in pursuance of the police power of the city and enacted upon an adequate showing of public necessity. Such ordinances are enforceable, when otherwise valid, in praesenti as well as in futuro. They do not in a legal sense *take* the property of persons against whom they are directed. They simply regulate the use of such property by prohibiting its injurious or criminal use by the owner, and hence they do not offend (as claimed by plaintiff) any provision of the organic law protecting vested interests or inhibiting retrospective legislation. This is typified by the provisions of the ordinance under review. None of them either in words or by intendment deprived the plaintiff of the use of any of its property prior to the adoption of the ordinance. They merely require it and all others similarly situated to refrain from the use or maintenance of their property *after* the passage of the ordinance, in a manner which that enactment conclusively determines to be unlawful and injurious."[60]

And in the *St. Louis Advertising Co. v. St. Louis* decision, wherein an injunction was denied against the city's removal of the plaintiff's signs, it was concluded by the United States Supreme Court:

> "As to the plaintiff's contracts, so far as appears, they were made after the ordinance was passed; but if made before it they were subject to legislation not invalid otherwise than for its incidental effect on them."[61]

And in *Packer Corp. v. Utah,*[62] a conviction was again sustained by the United States Supreme Court against a billboard company which maintained and used an existing tobacco sign, in defiance of a statute.

III

Can a prediction, then, be made as to the future of enabling legislation in Colorado? It would seem that since no violation of the fourteenth amendment results from special legislation regulating billboards as contrasted with other structures[63] and other forms of advertisements,[64] probably no discrimination exists in contravention of the similar protection afforded by the state constitution.[65] So also, if there is no denial of the right of freedom of speech and of the press as guaranteed by the federal constitution, which guaranty is made applicable to the states under the fourteenth amendment,[66] there should be no denial of freedom of speech and press under article II, section 10, of the state constitution. Similarly, if sign control is not a taking of property under the fourteenth

58 240 Mo. 659, 144 S.W. 1099 (1912).
59 St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269, 274 (1918).
60 144 S.W. at 1103-04.
61 249 U.S. at 274.
62 285 U.S. 105 (1931).
63 Packer Corp. v. Utah, 285 U.S. 105 (1931), discussed in text at notes 22-27 *supra;* Railway Express Agency v. New York, 336 U.S. 106 (1948), discussed in text at notes 41-43 *supra.*
64 Thomas Cusack Co. v. City of Chicago, 242 U.S. 826 (1916), discussed in text at notes 8-9 *supra.*
65 Colo. Const., art. V. §25.
66 Murdock v. Pennsylvania, 319 U.S. 105 (1942).

amendment,[67] then it is probably not a taking of property as is prohibited in Colorado.[68] Even if a law contains provisions against the continued use and maintenance of non-conforming signs, since the federal constitution does not stand in the way,[69] it would seem there would also result no violation of the state's organic law.[70] And, if property rights, contractual and otherwise, and other privileges and immunities of citizens, are not violated, then there would appear to be no deprivation of inalienable or reserved rights as protected by a state constitution.[71]

On the other hand, in any prediction that is essayed, it must be remembered that the signboard industry has brightened our urban centers. Humor and art are displayed upon the familiar panels. In their maintenance and placing, employment to many families is afforded. Their commercial advertisement is a stimulus to an expanding economy. Political parties lease the boards to present candidates to one of the few remaining free societies in the world. So while it appears that the power to regulate billboards is constitutionally sanctioned to perhaps a surprising extent, the prediction would also have it that such power will be tempered with equity.

67 Thomas Cusack Co. v. City of Chicago, 242 U.S. 826 (1916); Packer Corp. v. Utah, 285 U.S. 105 (1931); Railway Express Agency v. New York, 336 U.S. 106 (1948).
68 Colo. Const., art. II, §14 (taking private property for private use); §15 (taking property for public use); §25 (due process of law).
69 See Packer Corp. v. Utah 285, U.S. 105 (1931).
70 Colo. Const., art. II, §11 as to legislation which is ex post facto or impairs the obligation of contracts.
71 State v. Packer Corp., 77 Utah 500, 297 Pac. 1013 (1931).