Issues and Problems of Proof in Judicial Review of Roadside Advertising Controls

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• ANY ATTEMPT to generalize about the issues and problems of proof involved in judicial review of State laws and regulations relating to roadside advertising is subject to three hazards. First, because the substance of State laws and regulations differ, it is quite possible for the same fact situation to have different legal consequences in different States. Second, the choice of issues raised for judicial review is, at least in theory, a matter that is peculiarly within the power of the party bringing the action to control through his selection of language for his pleadings to the court. Third, various forms of action have their own procedural rules which affect the issues and proof of the case. Both the basis and scope of judicial review are affected by these variable factors.

It would be a mistake, however, to think that no precedents or guidelines can be cited for anticipating the issues and problems or proof that will be raised when roadside advertising is subjected to regulation. The extent to which highway counsel may expect to work with predictable and familiar law in such cases is illustrated most recently by the case of Fuller v Fiedler, decided in May 1961 by Circuit Court, Dane County, Wisc. This decision, now pending on appeal to the Wisconsin Supreme Court, puts for the first time under judicial review a State statute implementing the Federal-Aid Highway Act provisions relating to advertising along the Interstate System, and the national standards promulgated pursuant to this law by the U.S. Secretary of Commerce. At the same time, a series of three cases were brought in the Court of Common Pleas, Allen County, Ohio, calling for judicial review of the constitutionality of that State's law authorizing implementation of these same provisions of the Federal-Aid Highway Law. These cases, consolidated under the title of Ghaster Outdoor Advertising, Inc. v Preston, together with the Wisconsin case, Fuller v Fiedler, provide a testing place for application of the various possible constitutional claims and procedural principles heretofore spoken of more heatedly than enlighteningly in legislative debates on the efficacy of roadside advertising regulations.

The comments and comparisons herein are organized around the following aspects of these cases: (a) the possible issues for judicial review; (b) refinement of the issues; (c) the form of the action, and the parties; (d) proof of the issues; and (e) possible roles of amicus curiae in the trial of the case.

Before any discussion of these matters, however, the factual setting of the cases should be understood. In Wisconsin, Plaintiffs Warren and Wayne Fuller, as co-partners operated a roadside business establishment known as "The Highlands," which consisted of a motel, restaurant, and gas station. The site of this establishment was adjacent to State Trunk Highway 41 in Racine County, which highway formed part of the corridor serving the heavy volume of traffic traveling between Chicago and Milwaukee, and to Wisconsin's recreational areas further north. Plaintiffs maintained various on-premise and off-premise advertising signs which had been in their respective locations for many years when State Trunk Highway 41 was designated part of the Interstate 94 and converted into a controlled-access thoroughfare. Plaintiff's establishment and similarly situated roadside business along Interstate 94 in Racine County and adjoining Kenosha County represent a substantial investment in business catering to highway users, and produce substantial income from this source. Under Wisconsin's law of 1959 controlling roadside advertising along all segments of the Interstate System within the State, all of Plaintiff's signs not conforming with the statute and regulations of the State Highway Commission were subject to removal by that agency.[1] The State Highway

[1] Wisconsin Statutes, 1961, §84.30.

Commission's rules and regulations were promulgated in April 1960, thus completing the legislative structure necessary to begin enforcement and notice to remove the nonconforming signs was given. In September 1960, the Fullers, acting for themselves and as representatives of other similarly affecting landowners, initiated action to challenge the constitutionality of the statute and regulations.

In Ohio, Ghaster Outdoor Advertising, Inc., maintained a number of advertising signs facing Interstate 75 where this highway bypassed the city of Lima. Ghaster sought an injunction to prevent the director of highways from enforcing the State law and departmental regulations with respect to these signs. In the two other cases consolidated with the Ghaster case for trial,[2] landowners, were defendants in proceedings brought by the director of highways to abate nonconforming signs as nuisances under the terms of the State law and regulations.[3]

POSSIBLE ISSUES

Surveying the whole horizon of the law as it deals with the competing claims of public and private interest regarding the highway,, five theories might be suggested on which judicial review of roadside advertising controls might possibly be based:

1. The Act and the State Highway Commission's Regulations constitute a taking of plaintiff's property without just compensation and not for a public purpose. This theory rests on the claim that the legislation in question lacks "substantive due process of law" because the recited purpose of the statute to promote the safety, convenience, and enjoyment of public travel has no reasonable relationship in fact to the regulation of roadside advertising. The law is thus allegedly based on a legal distinction (or classification for regulatory purposes) that is not supported by any real factual difference, and so is arbitrary, discriminatory, and unreasonable in the constitutional sense.

2. The Act and Administrative Regulations violate constitutional guarantees of procedural due process of law applicable to the taking of private property. This refers to the statutory declaration that unauthorized signs and signs not conforming to the standards promulgated by the State highway commission are public nuisances, and therefore subject to summary abatement by the commission.[4] In contesting the validity of this provision of the law it may be argued that legislative declaration cannot make such signs a nuisance if they are not in fact a nuisance, and therefore a judicial trial is necessary to determine whether abatement is proper under the circumstances.

3. The Act violates constitutional guarantees of freedom of speech, the press, religion, and the right of assembly and petition. These claims may be supported by the argument that the guarantees of the First Amendment of the United States Constitution are incorporated into the due process clause of the Fourteenth Amendment, that all forms of communications and circulation of information enjoy the protection of these guarantees, and that restriction of the freedom to advertise violates the guaranteed freedom to communicate publicly. Freedom to carry on activities connected with religion, and to peaceably assemble and petition the government are allegedly impaired when church or political advertising signs are restricted.

4. The Act constitutes a bargain by the State relating to the use of its sovereign police power, which is contrary to the provisions of both the State and Federal Constitutions. This has reference to the fact that the Federal-Aid Highway Act of 1958 authorizes payment of additional funds (½ percent of the cost of the "project") to those States that enter into formal agreements with the Secretary of Commerce to control roadside advertising along the Interstate System in accordance with the National Standards and the Federal-Aid Law.[5] Under this arrangement, the State legislature allegedly surrenders its power to govern according to its own collective will and obligates itself to govern according to the terms of its contract with the Federal government.

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[2] Ghaster Properties, Inc. and Ghaster Outdoor Advertising, Inc. v Preston, Director of Highways, No. 46311; Preston v Troy and Consolite Corporation, No. 46970; Preston v Steiner and Wensinger Company, Inc., No. 47003. Court of Common Pleas, Allen County, Ohio.

[3] Ohio, Revised Code, §5515.23.

[4] Wisconsin Statutes, 1961, §84.30 (7).

[5] Title 23, U.S. Code §131.

5. The Act constitutes a delegation of power by the state legislature to the Congress and Secretary of Commerce in violation of the Constitution. This is distinguishable from the objection that the State has obligated itself in the use of its powers, and refers to the situation in which the State law adopts the standards of an outside body (in this case, the Congress and Secretary of Commerce) as controlling the administration of State law, and thereby abdicates to that outside body the legislative function of deciding policy and regulatory standards. Argument in support of this theory may be based either generally on the doctrine of the separation of powers, or specifically on the language of the Tenth Amendment.

The foregoing theories cover a wide front of the law, they allow room for presentation of almost every possible aspect of constitutional provisions dealing with the respective rights and powers of the individual citizen and his State regarding the use of roadside land, and with the operating relationships that must prevail among the Federal government, the States, and their political subdivisions. Of course, other objections may arise where defects in legislative drafting leave provisions unclear, or are too general to provide adequate guidance in administration. And, special grounds for judicial review may also be provided where there is failure to comply with jurisdictional limitations or procedural requirements laid down by statutory or constitutional provisions relating to the agencies charged with responsibility for administering the roadside advertising control program. These, however, are peculiarly dependent on the terms of local laws.

REFINEMENT OF ISSUES

It is necessary to refine the several possible theories on which judicial review might be based to a set of issues that will enable the court to adjudicate fully the question of constitutionality as it pertains to the rights of the parties. In this process of refinement the essential elements of the various theories must be noted more particularly and related to the statutes in question. When this is done it becomes apparent that some of these theories may as a matter of law, inappropriate to use in testing the validity of controls over roadside advertising.

Considered first is the theory that State legislation designed to implement the national policy on protection of the Interstate System's roadside areas, as declared in the Federal-Aid Act of 1958, and drafted so as to establish State standards parallel to or identical with these of the Federal law, results in an unconstitutional delegation of legislative power by the State to the Congress and the Secretary of Commerce, or a usurpation of the former's powers by the latter. Even if it is assumed for the sake of argument that a State has incorporated verbatim certain provisions of the Federal law setting forth standards concerning the extent and terms of regulation it does not follow as a matter of law that the State has surrendered its own power or forfeited its responsibility and opportunity to exercise its own judgment in this matter. Numerous other instances exist throughout the statutes dealing with Federal-aid for highways in which State legislation contains standards identical with or similar to those enacted by Congress. These deal not only with matters of physical design of the highway, but also with other matters more intimately related to the functioning of State government, such as highway finance and administration.

It may thus be said as a matter of law that so long as the State's draftsman avoids the pitfall of incorporating by reference the existing and future standards enacted by Congress or the Secretary of Commerce there is no reason to believe that State enactment of standards that conform to those enacted in Federal law constitutes an invalid delegation of State's sovereign power in violation of the Tenth Amendment or the underlying constitutional doctrine of the separation of powers.[6] If this were not so, the entire structure of State and Federal programs which utilizes the mechanism of condition-

[6] This application of Federal standards may go to considerable length within the State's own administrative structure, as in the case where Federal highway aid was withheld because of failure of the State to remove a member of its highway commission who engaged in political activity contrary to Federal law. Oklahoma v U.S. Civil Service Commission, 330 US 127, 142-144.

al grants-in-aid would have foundered on constitutional obstructions long ago.[7] Similarly, most of the so-called "uniform legislation" fostered by the Commissioners on Uniform State Laws, and various other national committees, and parallel legislative action of States under compact agreements would also be subject to objection.[8]

Considered next is the charge that an agreement between a State highway department and the Secretary of Commerce is an unconstitutional bargain regarding the use of the State's soverign powers—in this case, the police power. It is evident that the governments making up the Federal union could not carry on their functions long in the modern world of complex interrelationships unless their laws allowed them to enter into and perform many kinds of agreements, contracts, and bargains with each other. The public policy and constitutional principle against bargaining is, therefore, aimed at that class of agreements regarded as evil because their consequences destroy or subvert the integrity of the government, the public interest, or the supremacy of the law. Early in American constitutional history this issue came before the courts in Fletcher v Peck,[9] in which the U.S. Supreme Court considered the validity of a land grant made by a State legislature allegedly affected by bribery as against a subsequent bona fide purchaser without notice of this fact. In the long line of State and Federal cases that have passed on this question since Fletcher v Peck, the rationale has emerged quite clearly that the tendency to cause unacceptable results is an essential element in building a case for voiding any intergovernmental or interagency agreement that is otherwise proper and lawful.[10]

It is also settled as part of the constitutional doctrine relating to legislative bargains that the courts should not probe beyond the face of the statute except to disclose fraud or corruption; in other respects the character of the bargain must be judged from the terms as they appear on the face of the legislation.

Applying these propositions to the legislative framework enacted by Congress and the States for the control of outdoor advertising along the Interstate System, it is apparent that the charge of fraud or corruption cannot be sustained with respect to the type of agreement currently being executed between the State highway departments and the Secretary of Commerce. The Wisconsin Circuit Court expressed what can be the only possible way of looking at these agreements:[11]

> We cannot presume, from the record in this case, that our legislature, our Highway Commission, and our Attorney General have or will abdicate our sovereignty. We must presume the contrary. We do not regard Section 84.30 (Wisconsin Statutes) as imposing the positive requirement that the State bargain away its police power in order to participate in the federal highway program in accordance with national policy.

And, again:

> It is lamented that the State's interest in this (matter) might be influenced by the financial inducement offered by the federal government to fall in line with national policy. We can not, however, presume that this is the dominant force behind the state legislature's determination to regulate roadside advertising. Were the legislature interested in a 'windfall from Washington' it is possible that it might have seized upon an exercise of the power of eminent domain with a view toward federal replenishment of nine-tenths of its expenditure in acquiring such property rights from Wisconsin citizens.

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[7] Stewart Machine Co. v. Davis, 301 US 548 (1937).

[8] See: Lenhof, A., Comments, Cases and Other Materials on Legislation, (Buffalo, 1949), pp. 464-468. And, regarding incorporation by reference generally, see: Dickerson, R., Legislative Drafting (Boston, 1954), pp. 96-99 and Read, H., "Is Referential Legislation Worthwhile?" 25 Minn L Rev 261 (1941).

[9] 6 Cranch 87, 3 L.Ed. 162 (1810).

[10] In connection with use of the zoning power, see Zahodiakin Engineering Corp. v Zoning Board, 8 NJ 386, 86 A(2d) 127 (1952) and Board of Commissioners v Tallahassee, 108 So(2d) 74 (Fla 1958).

[11] Fuller v Fiedler, Cir. Ct. Dane County, Wisconsin, No. 107570, Opinion of Circuit Court, May 2, 1961.

The Wisconsin court also answered the possible argument that these agreements were of no effect because they were predicated on a Congressional attempt to regulate indirectly what it could not regulate directly. As to the validity of the objective sought and means used, the court declared:

> We do not conceive it our responsibility as a trial court to speculate upon the ultimate outcome of federal-state negotiations and strike down this very important legislation witnout a more substantial showing than has been made in the case at bar. After all, the federal government has important rights, powers, duties and responsibilities in the field of interstate commerce and in the area of national defense. The construction and maintenance of interstate highways is vital to our national economy.....The fact that the federal government has seen fit to cooperate with the states in the regulation of roadside areas along such highways is a recognition of state sovereignty and not an act in derogation of it.

As it appeared to the trial court in the Wisconsin case, neither the provisions of the Federal-Aid Highway Act of 1958 nor the provisions of the Wisconsin enabling statute of 1959 nor the combination of both read together in the light of their respective legislative histories constitute the basis for an unconstitutional bargain in which the State of Wisconsin undertook to exercise its police power according to the bidding of Congress to achieve an objective that Congress could not seek by direct action of its own.

Considered next is the theory that the current Federal and State legislation for control of outdoor advertising along the Interstate System is unconstitutional because it impairs the liberties guaranteed by the First Amendment of the Federal Constitution. The language of the First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The protection contained here against action by the Federal government has been applied to action by the States by identifying it with the concept of "liberty" covered by the Fourteenth Amendment.[12] The Wisconsin Constitution provides comparable guarantees to all persons.[13]

In understanding the nature of the rights and guarantees contained in these constitutional documents, it must be remembered that they were not written for the purpose of creating any new principles of government or imposing any novel limitations on governmental power. These bills of rights were, indeed, merely expressions of the law inherited from Blackstone's England in the 17th century.[14]

When one reviews the cases interpreting the scope of the First Amendment, it is apparent that its application to protection of commercial billboard advertising is a novel suggestion. The majority of cases decided by the U.S. Supreme Court in construing the First Amendment and relating the due process clause of the Fourteenth Amendment to freedom of speech and the press have involved the rights of the Federal and State governments to limit these freedoms in order to protect themselves against seditious utterences. The "clear and present danger test" has been the touchstone for these cases,

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[12] Gitlow v New York, 268 US 652 (1925); Fiske v Kansas, 274 US 380 (1927); Burstyn v Wilson, 343 US 495 (1952).

[13] Wisconsin Constitution, Art. I, provides: "Section 3. 'Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty or freedom of speech or press...' Section 4. 'The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged.' Section 18. 'The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed: ...nor shall any control of, or interference with, the rights of conscience be permitted....'"

[14] See, for example, the remarks of Justice Frankfurther in Dennis v United States, 341 US 494, 521-524 (1951).
The 14th Amendment did not alter this situation. See: Patterson v Colorado, 205 US 454, 462 (1907); Prudential Insurance Co. v Cheek, 259 US 530, 543 (1922).

and the very security of the Nation has been the interest at stake.[15] The question of how far commercial advertising as a form of communication and public dissemination of information may properly claim the protection traditionally recognized for such media as the newspaper, radio, television, motion picture, and soapbox orator is still largely a matter of scholarly speculation. Research in the cases has so far failed to disclose any decision that discusses this point squarely. In the recent Wisconsin billboard case, the Circuit Court found no infringement of these First Amendment freedoms in the record before it, but placed this issue in the general constitutional framework with the following comment:

> We do not discount the contention made that Section 84.30 [Wisconsin Statutes] and the federal law may operate to abridge freedom of the press. We must observe that all laws must be construed with due regard to all provisions of the constitution. It would appear reasonable that whenever roadside advertising regulations infringe upon the constitutional rights of freedom of speech and freedom of the press, they must give way. Freedom of speech and freedom of the press are very important rights basic to both our United States and state constitutions. There are times when they must give way to other constitutional rights, but, in the main, they must be preserved at tne expense of other provisions of the law, including other constitutional provisions. Whenever Section 84.30 of the Wisconsin statutes and the Highway Commission's promulgated rules thereunder constitute an unreasonable abridgement of freedom of speech and of the press they cannot be operative. They must, and can, give way, without emasculating the law or thwarting its fundamental purpose.

Although the question of how far commercial advertising when viewed as a medium of communication may claim a preferred position under the constitution is thus still unresolved by the Wisconsin case, there is little doubt as to the question of how far billboard advertising as a form of private commercial business may claim this advantage. The answer is "not at all." The outdoor advertising industry stands in no higher or more preferred position under the law than does any other form of commerce or business enterprise. And when it is carried on in a manner that adversely affects the public interest, it is properly subject to the same degree of control that applies to other industries. Fifty years of decisions starting with St. Louis Gunning Advertising v St. Louis in 1911[16] have not only reaffirmed this proposition but gradually broadened the vision of the courts in recognizing the grounds that justify regulation of advertising signs and devices. The advisory opinion of the Supreme Court of New Hampshire in 1961 is the most recent one to declare this principle and apply it to the case of roadside advertising along express-type highways.[17]

Evaluation of the claim that roadside advertising control is an infringement of freedom of speech and freedom of the press should, therefore, be cautious. The very novelty of the claim makes counsel hesitate until the case is one of communication rather than commerce. It may be suggested, however, that it is very late in the day to be told now that commercial billboard advertising embodies the characteristics of communication and performs communicative functions to such a great extent that it may be regulated as to form, location, and structural features without violating the First Amendment. The social values protected by the Bill of Rights are not made up of pure and unmixed elements. Communication enters into all commercial activities. Classification for purposes of constitutional interpretation depends on which element of the mixture predominates. Measuring the matter thus, the cases appear to have consistently viewed the regulation of commercial billboard advertising as being in no way in conflict with or subversive to the First Amendment freedoms.

Turning next to the possible claim that roadside advertising controls may infringe the advertiser's right to procedural due process, it must immediately be recognized that the possibility of this claim always exists wherever regulatory duties are delegated

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[15] Willoughby, W., Constitutional Law of tne United States, (2d ed., 1930), secs. 482-488.
[16] 235 Mo 99, 137 Sw 929 (1911).
[17] Opinion of tne Justices, — NH — 169 A(2d) 761 (1961).

by the legislative branch of government to administrative agencies. All good legislative draftsmen know this and guard against it when prescribing the manner in which private property is to be dealt with as the statutory mandate is enforced. The procedure of the administrative agency responsible for enforcement of the regulatory program is, therefore, always an appropriate subject of judicial review. Happily, however, the State laws enacted to date to implement the national policy favoring control of outdoor advertising along the Interstate System appear to have afforded fair and suitable procedures for carrying out this control. In the recent Wisconsin case the manner in which licenses shall be granted for authorized signboards is still a controverted issue to be decided on appeal.

The claim that procedural due process was denied by the legislature's action of declaring unauthorized or nonconforming signs to be public nuisances was urged in both the Ohio and Wisconsin cases. The Wisconsin Circuit Court's decision disposed of the claim as follows:

> While the language of the statute referring to certain outdoor advertising signs as a public nuisance is strong language, we do not regard the legislature as being without basis for such declaration. The record before us in this case affords sufficient basis for it. We are here dealing with a public nuisance as distinguished from a private nuisance. The law appears to us very clear that the state may so legislate under the police power and in the interests of the public welfare.

Thus, though the fairness of administrative action under its delegated powers may, as a matter of law, be re-examined on judicial review, the judgment of the legislature may not be questioned so long as the court finds any evidence in the record to support this judgment.

Considered finally is the claim that the Federal-Aid Act of 1958 and the State's action to implement the national policy for control of roadside advertising along the Interstate System results in a taking of private property without due process of law. This is the claim that has been pressed most vigorously and consistently in the billboard cases of the last fifty years, and was, as expected, the point that felt the main weight of attack in the case of the Ohio and Wisconsin laws. Essentially, the elements of this claim are two. To prove that the due process clause has been violated it must be shown that private property rights are involved, and also that the regulatory action constitutes a "taking" in the constitutional sense. In some States the constitutional mandate applies to "taking or damaging," but Ohio and Wisconsin happen not to be among these.

What manner of "taking" is contemplated here? Traditionally the courts have looked for two: (a) where regulations restrict the use of property rights so drastically that they are not only destroyed for all practical purposes but destroyed beyond the point justified by the needs of public health, safety, morals, or welfare; and (b) where an unreasonable or unfounded classification of the objects of regulation results in a denial of the equal protection of the law to property owners. The judicial problem of defining the scope of regulatory legislation permissible before property is "taken" thus involves an evaluation process in which the courts seek to discover the values intended to be secured by the legislature and by the constitutional concepts of private property, and determine, by comparing them with each other in the light of the factual background provided by the evidence, whether the former conflicts with the latter. Unless the process of refining the issues is carried on with this in mind, it confuses rather than clarifies the subsequent application of the due process issue to the business of maintaining billboards in roadside areas.

As one comes to grips with the question of whether regulation of roadside advertising constitutes a taking of private property without due process of law, numerous vexing legal problems arise. For example, how should the right to maintain roadside billboards be rated in the current scale of social values connected with property? The learned legal scholar Richard Powell has observed:[18]

> As one looks back along the historic road traversed by the law in England and in America, one sees a change from the viewpoint that he

[18] 5 Powell on Real Property, sec. 746.

> who owns may do as he pleases with what he owns, to a position, which hesitatingly embodies an ingredient of stewardship; which grudgingly but steadily broadens the recognized scope of social interest in the utilization of things.

This tendency can be most clearly traced in the cases dealing with land-use control and zoning.[19] Recently, it has been forthrightly expressed in State court decisions that declare certain forms of roadside advertising to be an intrusion and excessive uses of the public highway rather than a form of use of private roadside land at all.[20] These were evidently in the mind of the Wisconsin Circuit Court when it declared:

> We do not agree that plaintiffs have been deprived of their property without due process of law. In the first place, whatever values are derived from roadside advertising come from the construction of the highway and the exposition of the property along the highway to the view of persons traveling thereon. At bottom this is nothing more than an "intrusion" upon the way. And it follows that a person who has an advertising sign located upon the property of another adjacent to the highway derives no property right from the owner of such property, and hence neither he nor the owner of such property adjacent to the highway lose anything when such person's signs are taken down incident to zoning of the highway by the State Highway Commission acting within the statute.

It is similar with the current legal concept of taking. It is settled that private property may properly be subjected to reasonable regulation in the public interest. Ambler Realty Co. v Euclid[21] established the doctrine that the police power can be used positively and prospectively. Berman v Parker[22] has said that "it is within the power of the legislature to determine that the community should be beautiful as well as healthy....." The issue presented by roadside advertising control programs is whether the facts in the record show that the regulations enacted are reasonably related to these values, which, as a matter of law, are acknowledged as legitimate elements of the public interest.

Finally, as to the matter of whether application of controls to roadside advertising along highways of the Interstate System is a reasonable classification under the constitutional concept of equal protection of the law. Here the courts wisely have recognized that the possible bases of classification are almost unlimited, and the validity or invalidity of classifications cannot be determined without taking into account all the factors that have a natural relation to the purposes of the regulation in question and the differences in treatment that are used to accomplish these purposes.[23] This is the law governing the issue, and the decision depends on the record of facts built up on trial.

FORM OF ACTION

Before turning to questions of strategy and tactics in the proof of these issues, some attention should be directed to the form of action and the parties appropriate for judicial review of roadside advertising controls. In the recent Wisconsin case, plaintiffs sought a declaratory judgment on the constitutionality of the enabling statute and the highway commission's regulations, and an injunction to prevent the enforcement of these laws.[24]

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[19] E.g., Ambler Realty Co. v Euclid 272 US 364 (1926); State ex rel Saveland Park Holding Corp. v Wieland 269 Wis 262, 69 NW (2d) 217 (1955).

[20] Opinion of the Justices, — NH — 169 A(2d) 761 (1961); Kelbro, Inc. v Myrick, 113 Vt. 64, 30 A(2d) 627 (1943). See also: Wilson, R. "Billboards and the Right to Be Seen from the Highway" 30 Geo L J. 732 (1941).

[21] 272 US 365 (1926).

[22] Berman v Parker 348 US 26, 32-33 (1954).

[23] Rottschaeffer, H., American Constitutional Law (St. Paul 1939), sec. 254.

[24] In addition, plaintiff's initial pleading requested an injunction pendente litem to prevent removal of any signs from plaintiff's land. The court denied this petition when assured by the Commission that it had no intention of removing any of these signs during the pendency of the case. For a detailed account of these pre-trial proceedings, see Armstrong, J. "The Wisconsin Billboard Case," a paper delivered at the meeting of the Committee on Legal Affairs, AASHO, Denver, Colo., October 1961.

In the Ohio cases, Ghaster sought an injunction without at the same time asking for a declatory judgment, and was promptly faced with the procedural objection that an injunction was not a suitable form of relief because it was purely ancillary to the primary objective of determining the extent of the petitioner's rights and duties under the statutes involved. Where, as in Ohio, the statute provides that billboards need not be removed until there is a judicial determination that they are in violation of the law, the petition for injunction alone may be premature.

No such objection was made in the other Ohio cases initiated by the Director of Highways to abate nonconforming signs as nuisances under the statute. Here the constitutional issues arose naturally and properly in defendant's answer to the complaint.

Once enforcement of the control program has commenced, it is conceivable that an action for damages in the nature of inverse condemnation would be appropriate. Use of inverse condemnation to test the limit of the police power in regulating access rights where no physical appropriation of land occurs has already extended this form of action to alleged takings of various intangible rights, such as access. Also, it is possible that constitutional issues could be determined from the factual situations and legal relationships that are involved in appeals from administrative proceedings before the highway commission. This latter method appears most clearly involved where the highway commission is entrusted with powers and responsibilities for issuing licenses and renewals of license for authorized roadside signs and advertising devices.

The rule that, except where advisory opinions are authorized, courts protect constitutional rights only against actual or threatened invasion has led them to dismiss actions that are prematurely brought. This principle becomes particularly pertinent where, as in the Ohio and Wisconsin cases, the statutes were not self-executing in their provisions relating to removal of nonconforming signs. Considerable latitude exists, however, in recognizing the existence of a threat of injury as a basis for standing to seek judicial review. Thus, although the mere enactment of a statute does not ordinarily constitute a sufficient threat of injury to justify judicial review, the existence of that statute often involves economic burdens and legal consequences, which the courts recognize even before its enforcement actually begins. For example, in the landmark zoning case of Euclid v Ambler Realty Co., the action to enjoin enforcement of the zoning ordinance was entertained even before there was any specific threat of its enforcement against the complainant. Use of the declaratory judgment as a form of action has, of course, further liberalized the interpretation of the requirement that injury or the threat thereof must be at the basis of the plaintiff's claim.

There are other limitations imposed on the reviewability of constitutional questions by reason of the type of interest that the parties themselves have in the case. The issue of constitutionality may be raised by one whose conduct is directly regulated or whose legally protected interests are directly injured by the legislative or administrative restrictions placed on roadside advertising. The directness of the injury is the chief factor determining whether the requisite interest exists, and where the injury complained of is indirect or remote, it is not recognized. Understandably it is impossible to draw any exact line between direct and indirect injuries for this purpose, and each case must be considered in its own particular context. Under current doctrine courts will also refuse to review cases that are collusive suits, or where there is no actual assertion of adverse claims, or where plaintiff's legal position would be the same whether or not the statute is enforced against him. Except in a bona fide class suit, the courts will not permit one to contest the constitutionality of a statute on the score that it invades someone else's constitutional rights.[25]

The Wisconsin billboard case was brought by the owners of restaurant-motel-gas station property abutting Interstate 94, which was one of the segments of the highway system declared in the legislation to be subject to roadside advertising control. In establishing an interest requisite to raising the issue of constitutionality, these plaintiffs showed that they had a substantial investment in outdoor advertising structures located on their own premises and other roadside property owned by others along this highway. They further showed that they had made a substantial investment in their business for the purpose of catering to the patronage of motorists traveling on the adjacent highway,

[25]Asnwander v Tennessee Valley Authority, 297 US 288 (1935).

and that they presently derive substantial income from this source. In addition, they established that the highway commission had duly notified them to remove certain of their on-premise signs and billboards located on other premises along the highway. And finally, they showed that the locations of the signs ordered to be removed were neither within the public highway right-of-way, nor in an area where they constituted a nonconforming land use under county zoning ordinances. On the basis of this showing, plaintiff's standing to raise the constitutional issue on his own behalf was recognized, and, without objection from the State, they were permitted to claim to represent a class of other landowners "similarly situated and too numerous to include" as plaintiffs.

Much the same terms can appropriately describe the interest of commercial advertising companies that furnish or maintain billboards and other roadside advertising devices for hire by advertisers. On a showing of their investment, the lawfulness of such investment, and the adverse effect of the control program applied to their activities, a sufficient interest to raise the constitutional issue is present.

A sidelight of some interest is provided by the problem of establishing standing for amicus curiae in the Wisconsin case. In this case the court received requests from both the Roadside Business Association, Inc., and the American Automobile Association for leave to file briefs. Both organizations are voluntary associations of persons (both natural and corporate) engaged in activities having connections with the highway system in question. The Roadside Business Association described its interest more particularly as follows:[26]

> Members of said association have contractual relationships with owners of highway-abutting lands through which they obtain the use of such lands for the purpose of directing the users of the highway to such members' business locations, as well as informing said users of the nature and extent of the services available at such business places.
>
> Such contractual relationships not only increase the landowners' personal income realized from their lands, but also increase the real property tax bases wherein such lands are located.
>
> The constitutional issues involved are of vital interest for they deal with the very existence and continuation of such types of private uses of these private lands and business activities.

The American Automobile Association described its interest more particularly in these terms:[27]

> The motorist members of the American Automobile Association...pay the various highway user taxes, which as vehicle registration fees, fuel taxes, and excise taxes on tires, vehicles, and accessories, the proceeds of which are currently allocated to the financing of highway improvements under state and federal law...
>
> It is common knowledge that the great increase in motor vehicle use in the past 25 years and the national dependence upon highway transportation has made necessary an unprecedented increase in the expenditure of public funds for the expansion and modernization of highway facilities. It is equally clear that these circumstances have increased the need for vigilance to assure that public investment of highway user taxes in highway facilities shall not be subjected to conditions that will render these facilities prematurely obsolete and in need of replacement.
>
> Widespread public interest has been shown in the public policy regarding control of outdoor advertising along the National System of Interstate and Defense highways. Judicial determination of the issues

[26] Brief of Roadside Business Association, Inc., Amicus Curiae, in Fuller v Fiedler, Cir. Ct., Dane County, Wis., No. 107570, Aug. Term 1960, p.i.

[27] Brief of American Automobile Association, Amicus Curiae, in Fuller v Fiedler, Cir. Ct. Dane County, Wis., No. 107570, Aug. Term 1960, p. 2-3.

> raised in these proceedings will involve consideration of various factors relating to this policy. The American Automobile Association's interest in the safety, efficiency and convenience of motor vehicle use leads it to consider that the outcome of these proceedings will have an important effect upon the welfare of the motoring public.
>
> ...(T)he...association has no interest in the verdict as such. It has a vital interest, however, in the determination that this verdict, as well as those which in the future may rely upon it for guidance, shall uphold the constitutionality of legislation which promotes the safety, convenience and efficiency of the public highways, and protects the public investment in highways by control of outdoor advertising in areas adjacent to the highway right-of-way.

On the foregoing statements of interest, the Wisconsin court granted both associations permission to file briefs as friends of the court.

PROBLEMS OF PROOF

Preliminary to considering how the parties shall prove their cases, there should be an understanding of what facts each side is expected to prove. Allocation of the burden of proof of the constitutional issue is governed by the same rules that normally apply to the other basic substantive elements of the case under the particular form of action that is used. Thus the complaining party must assume the burden of proving the unconstitutionality as he has charged it. The fact that constitutionality is made an issue in the case, however, does have a particular bearing on the burden of going forward with evidence, for technically this burden does not shift from plaintiff to defendant until the former has successfully overcome the presumption of constitutionality which the legislation in question enjoys.

The presumption of constitutionality which exists for all properly enacted legislative acts is based in large measure on the respect that coordinate branches of government show for each others' actions. In a decision of the Wisconsin Supreme Court, this is explained as follows:[28]

> The rule is familiar that this court must presume that the legislature did not intend to pass any act that would be in conflict with any constitutional limitation upon the power of that body, and that it is the duty of the court to give the Acts of the legislature a construction that will bring them into harmony with the provisions of the constitution and not into conflict with the fundamental law.

Under this rule, courts may not invalidate a properly enacted statute except where its repugnance to the constitution is clear. If there is any reasonable basis on which the statute may constitutionally rest, the court must assume that the legislature had such basis in mind and acted on it. Furthermore, all facts necessary to sustain the statute's validity must be presumed as specifically and conclusively found by the legislature.[29]

One major effect the presence of this presumption, or principle of statutory construction, has on trial strategy where the constitutionality of roadside advertising control is involved is that it may set the standard of proof necessary to establish a prima facie case higher in the case of constitutional issues than in others where no presumptions apply to the acts of the parties. Where, as in the recent Ohio and Wisconsin cases, the complaining parties took the initiative in seeking an interpretation of the roadside advertising regulations as unconstitutional, this rule precludes them from merely establishing their interest, alleging injury, and thereupon requiring the State to show cause why its regulations are not unconstitutional. The complaining party must make out a positive case completely and conclusively proving the facts that form the essential elements of his theory of the case; and only after this is done may the presumption in favor of constitutionality be regarded as overcome.

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[28] State ex rel Sullivan v Dammann 227 Wis 72 181, 277 NW 687 (1938).

[29] 11 Am. Jur., "Constitutional Law" See 128, Rottschaeffer, H., American Constitutional Law, (St. Paul 1939), p. 18.

There is, of course, no single touchstone for determining when the plaintiff has overcome the presumption of constitutionality, and, except by motion for dismissal of the proceedings at the close of plaintiff's case, there is no reliable practical test to tell the dependent where it must go forward with affirmative evidence of its own. Normally, however, the dependent will have prepared himself to go forward with such evidence of his own in any event because he will have had to explore all the evidence available in his preparation to cross-examine plaintiff's case.

It is impractical to attempt to explore here the elements and methods of proving a prima facie case under each of the possible theories noted earlier. It may, however, be instructive to briefly review the process of proof carried on in the Ohio and Wisconsin cases because they illustrate the issue that has most frequently been urged; namely, that roadside advertising regulations constitute a taking of property without due process of law.

In marshaling his evidence, the plaintiff's objective is to discredit and discount the connection that control of roadside advertising has to the legitimate and recognized purposes of the police power; that is, public safety, health, morals, or welfare. If successful in showing conclusively that no relationship exists between the conditions that the legislature evidently intended to correct and the conditions that actually prevail, plaintiff will have proved that the regulation is unreasonable and arbitrary. Stated otherwise, plaintiff seeks to show that roadside advertising has no effect on the safety, convenience, and enjoyment of the highways to which the regulatory law applies.

In Fuller v Fiedler, plaintiff used two types of evidence; namely, traffic accident statistics for the highway segments in question, and testimony of traffic safety experts. As was to be expected, the traffic accident statistics from Racine and Kenosha Counties was largely negative in character, going to prove only that official records did not show any accidents attributed directly to billboards. In using expert testimony, however, trial counsel could attack in more positive fashion by eliciting the witness's opinion regarding the relationship between billboards and highway use. Thus in the Wisconsin case, the Assistant Director of the Michigan State University Center for Highway Traffic Safety testified that on the basis of a survey of a segment of State highway made in 1952, he was of the opinion that no relation existed between highway accidents and roadside advertising signs. He also stated that after having viewed the segment of highway in question (Interstate 94 in Racine and Kenosha Counties), he believed that the same conclusion could be drawn regarding it as it was drawn in the case of the Michigan survey in 1952. This was supplemented by testimony from a private research consultant who supported the credibility of the statistical methods used in the Michigan roadside study.[30]

Also offered as a part of plaintiff's expert testimony were numerous letters and messages from insurance companies, professional traffic safety organizations, and civic groups. The former contained statements that review of their records found no cases of claims attributing the cause of highway accidents to billboards; the latter commended the outdoor advertising industry for unselfish donation of billboard space to safety and civic advertising.[31] The possibilities of using physical evidence also deserve mention because plaintiff offered an intensive series of photographs of selected sites along the segment of Interstate 94 in Racine and Kenosha Counties. Some of these were selected to show a variety of disorderly farm yards, used car lots, junk piles and the like, and purported to prove that billboards were, by comparison, less offensive to the senses of the traveler. One such photograph showed how a dilapidated shed was being screened from roadway view by a billboard. Other photographs were selected to show signs giving information relating to churches and other noncommercial establishments in the vicinity, and carrying messages of a safety and civic character. The relevance of such

[30] On cross-examination, counsel for the State elicited that these witnesses had been hired in a similar capacity in the Ohio billboard case. See Armstrong, J., "The Wisconsin Billboard Case." A paper delivered at the meeting of the AASHO Committee on Legal Affairs, Denver, Colo. October 1961, p. 11.

[31] Similar testimony was made a part of the record of hearings on the Federal-Aid Highway Act of 1958. See: US Senate, Committee on Public Works, Hearings on S.963 (Control of Advertising on Interstate Highways) 85th Congress 1st Sess. (1957).

physical evidence was naturally challenged, but the trial judge admitted it "for what it was worth."

Cross-examination of plaintiff's evidence in the Wisconsin case reflected the State's strategic reliance on the presumption of constitutionality to aid in the defense of the law. Once the relevancy objection was made to such evidence as the photographs and letters of commendation, no further attempt was made to discredit them. As to the negative testimony from the traffic accident records of Racine and Kenosha Counties, the State cross-examined only so far as necessary to establish the negative character of the evidence and to limit its scope to the personal knowledge of the testifying witness. Greater attention was paid to the testimony of the expert witness from Michigan. Because his opinion was based mainly on the 1952 survey of a segment of Michigan highways, cross-examination emphasized the fact that an official study of 500 miles of Minnesota highways made at approximately the same time contained the conclusion that roadside advertising did distract highway drivers and constitute a safety hazard. Under this cross-examination plaintiff's witness admitted that there was a difference of opinion among experts on the question of the relationship between billboards and traffic safety.

At the close of plaintiff's case, motion was made for dismissal of the complaint on the ground that plaintiff had not made out prima facie case (that is, overcome the presumption of constitutionality). The trial judge reserved ruling on this motion until the State offered its evidence, and the State then offered certain affirmative evidence of its own. Witnesses from the State Highway Commission's technical staff, the State Planning Director, the Planning Director of the City of Milwaukee, and planning experts from the University of Wisconsin were called as expert witnesses to explain the functional relationship between the regulation of roadside advertising and the convenience and efficiency of the highway. Through these witnesses a factual foundation was established for relating aesthetic considerations to highway use and to the economy of the State through promotion of tourism.

On the relationship of billboards to traffic safety, the State called as an expert witness the Highway Commission's Traffic Engineer and certain other witnesses specially trained in traffic engineering work. These witnesses directed their testimony to the argument that roadside advertising is intended to and does attract the attention of car drivers, that the accident rate is higher at intersections where signs are numerous than at intersections where there are no signs, that the Interstate System's standards for advertising control contemplate regulation which will make it possible for drivers to read and react to authorized signs with safety, that too many roadside messages can overload a driver's capacity for comprehension under conditions of expressway driving, and that unregulated roadside commercial advertising can compete dangerously with necessary official signs.

This affirmative testimony on the relationship between conditions resulting from unregulated outdoor advertising in roadside areas and various legitimate objectives of the police power was designed to strengthen the presumption of constitutionality of the billboard control program. In rebuttal plaintiff called as an additional expert witness a planning consultant who expressed the opinion that roadside advertising could co-exist peacefully with community planning. On cross-examination, however, this testimony was clarified by the witnesses admission that good planning practice called for a certain amount of regulation of advertising signs.

Offerings of evidence in the Ghaster case were essentially similar to those just described in the Wisconsin case. Plaintiff relied heavily on expert witnesses who described and interpreted the Michigan roadside survey of 1949 which purported to minimize the effect of roadside signs on traffic accidents. Opposing this, the State offered evidence from the records of the State highway patrol showing that approximately 20 percent of the accidents reports indicated "inattention to driving" as a causal factor. This was related to other testimony dealing with vehicle braking and stopping distances at expressway cruising speeds, the capacity of drivers to see and comprehend roadside advertising messages at high speeds, and the assumptions relating to driver reaction that were used in designing the Interstate System.

A summary retrospective view of the experience gained in dealing with the problems of proof in the Ohio and Wisconsin cases suggests the following comments:

1. The task of assembling evidence relevant to the issue is a massive one, because the essence of the issue is the reasonableness of the State legislature's regulatory plan in the light of the prevailing relationship between use of the highway for travel and use of the roadside for commercial advertising.

2. The evidence relevant to this issue is bound to be technical in nature, and derived from the experience of the traffic engineer, the land-economist, the highway designer, the community planner, and, not least of all, the politician who evaluates current social and economic values held by the public at large.

3. In presenting this evidence within the framework of the existing judicial fact-finding process, counsel must rely on the opinion of expert witnesses. The main job of such witnesses will be to describe their experience with the factors bearing on the factual question of the effect of roadside advertising on roadway use, and interpret it so that it can be applied to the legal issue of the reasonableness of the regulatory law.

4. There is a serious shortage of documented information relevant to this question. Experts admit their differences of opinion particularly with respect to the factor of highway safety.

5. Accordingly, the strategic position of those defending the constitutionality of billboard regulation is significantly aided by the legal presumption of validity which all duly enacted statutes enjoy. It would, however, be a mistake to rely on this factor completely.

6. Finally, and because of the difficult evidentiary problems posed herein, there is a greater-than-ordinary danger that trials testing the reasonableness of roadside advertising regulations will become controversies over the wisdom of the legislature's policy decision to impose regulation at all. This latter is, of course, not a judicial question but a political one, and inevitably engulfs the court and the parties in a "yes-it-is, no-it-is not" argument (sometimes called a "popularity contest") which is wholly beside the point of the case or function of the proceedings.

A careful reading of the opinion of the Circuit Court in the Wisconsin case reveals that the court was well aware of these problems of proof and the strain they placed on the judicial fact-finding process. With due deliberateness in reviewing the evidence it concluded:

> There was adequate factual foundation upon which the legislature could exercise the police power in the interests of the public welfare so as to regulate roadside advertising.....the classification is reasonable and does no violence to constitutional rights.

Pointing up the problem of reasonableness throughout the administrative as well as the statutory structure of billboard control, the court went on, however, to state that in its opinion the record did not adequately support the reasonableness of certain of the State Highway Commission's rules and standards. Chief among the criticized rules was the procedure for licensing those advertising signs authorized by law. The "first-come-first-serve" rules for licensing

> ...do not treat fairly and equally all property owners and businesses located along and upon the highway. They tend to establish and create preferences in the fortunate parties who get there first.... The probabilities are that the Commission and its staff will fairly and honestly administer these provisions, but there is a built-in danger that they may not do so. It may be suggested that the Commission is confronted with a situation where it has no choice but to follow this procedure in its conscientious endeavor to restrict the total number of signs to a reasonable minimum. However, the law does not require this, and provision can be made for the inclusion of a limited advertising opportunity for all property owners adjacent to the highway and those fairly advertising their businesses nearby. If this cannot be done, then it would seem more reasonable to eliminate the [signs providing essential information in the public interest relative to lodging, food, recreation or automotive services adjacent to or within 12 miles of the highway] altogether, than to distribute favor to a few and exclude the others. In our view such

> elimination would not be a deprivation of property rights in violation of the constitution since all of the signs here referred to exist solely because of the highway and are purely derivative.

Here, again, the importance of establishing a record of reasonableness in relation to the prevailing factual situation becomes apparent. In this case, the proof called for had to do with the administrative process and posed the need for evidence of the economic effect of one governmental procedure over another, and reasoning by analogy between the business methods of one roadside activity compared with another. The trial record in the Wisconsin case is bare of any such evidence, and it may seriously be questioned whether this is a matter to which the court should extend judicial notice.

ROLE OF AMICUS CURIAE

Wholly aside from the substantive law that it contains, the Wisconsin billboard case furnishes an extremely interesting example of the role that the amicus curiae can play in highway law litigation. Read literally, the name "amicus curiae" means "friend of the court." This is not to be understood, however, as meaning that an amicus cannot have other friends, or be a partisan. Usually they are partisan; and in the Wisconsin case a brief friendly to the State's position was filed by the American Automobile Association, and a brief friendly to the plaintiffs was filed by the Roadside Business Association, Inc.[32] The court paid its respects to the contribution made by these briefs both by express mention and by addressing parts of the decision to the points presented therein. It may, therefore, be useful to examine more closely these briefs and their objectives and methods.

Turning first to the brief of the Roadside Business Association, one is presented with a massive, 180-page review and analysis of five distinct theories on which the statute or the Commission's administrative regulations might be held unconstitutional. In each case, the theory was set forth, and the law was cited and argued in general terms without attempting to relate it to the specific facts of the case or the trial record. It may be doubted whether there ever has been, since the famous Massachusetts Billboard Case in 1935, as thorough an examination of the theory of the police power as it may be applied to outdoor advertising, as that presented here.[33]

That this contribution toward bringing the theory of the case into focus was helpful to the court is clear. It is not so clear, however, that the Roadside Business brief was of direct assistance to counsel for the plaintiff in proving his case. It did, to be sure, argue strongly in favor of the theory on which plaintiff elected to place his main reliance; namely, that the Wisconsin statute and administrative regulations deprived him of property without due process of law. But it also raised issues that plaintiff's counsel was not prepared to deal with and did not deal with in his evidence. It did not, therefore, materially aid plaintiff in the basic job of proving the alleged unreasonableness of the law as applied to his situation. This is not to say that the role of the Roadside Business brief was less than what plaintiff could have wished. It was not, after all, the role of amicus curiae to try plaintiff's case for him. For the plaintiff, the chief value of amicus curiae was to try to soften the court's attitude toward the outdoor advertising industry in general and create an atmosphere of suspicion regarding the soundness of the entire legislative framework of the State's roadside advertising control program. It was, in a phrase, an attack aimed at basic strategic targets in the case rather than an attack aimed at supporting the tactics of trial counsel.

Looking at the division of labor between counsel for the defendant State and its amicus curiae, the American Automobile Association, a contrast is clearly apparent. In its brief the AAA reviewed the history and rationale of the national policy regarding roadside advertising as set forth in the Federal-Aid Highway Act of 1958, and analyzed the development of police power doctrine relating to zoning of land uses and outdoor

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[32] The interest of each of these organizations in the case is noted earlier in connection with the discussion of parties and form of action.

[33] General Outdoor Advertising Co. v Department of Public Works, 289 Mass. 149, 193 NE 799 (1935). See also, Gardner, G.K., "The Massachusetts Billboard Case." 49 Hew. L. Rev 869 (1936).

advertising; it particularly emphasized the view that recent decisions take of the place that aesthetic factors occupy in the current concept of the public welfare.

Each of these three segments of the AAA brief served a particular purpose. The review of the legislative history of the national policy on roadside advertising control lent specific support to the presumption of constitutionality applying to the statute, and thus might be regarded as supporting both the strategic and tactical position of the State in the case. The interpretation of the basis of the police power as applied to roadside advertising served a more long-range need, specifically to emphasize the fact that police power doctrine now accepts the premise that roadside zoning may legitimately be used positively and prospectively to achieve an amenable relationship between private use of roadside land and public use of the highway. Acceptance of this premise by the trial court is clearly an important strategic objective of the defendant. Similarly, an important strategic advantage results from establishment of acceptance for the proposition that aesthetic considerations, or "amenities," can legitimately be objectives of police power action by the community, and that, on careful analysis, the amenities of a community can become a proper and practical standard by which to regulate various land uses including outdoor advertising.

The contrasting roles of the two friends of the court in the Wisconsin case reflect to some extent the different tasks assumed by those who attack the constitutionality of a law and those who defend it. The defense can afford to be somewhat more selective in its targets. It is also possible that trial strategy enters into this choice. Issues that are not raised in the parties' pleadings need not be considered by the court merely because they are raised by amicus curiae.[34] Therefore, though trial counsel may run some risk in ignoring an issue raised by amicus curiae, he may choose not to answer it and thereby expand the scope of controversy still further. This consideration was apparent in the Wisconsin case, and, although the court's decision commented on various issues raised by the Roadside Business Association brief which were outside the scope of plaintiff's pleadings, its comments necessarily reflected the court's view of the matters of law involved rather than any relation of these issues to the trial record.

SUMMARY

Novel and significant questions of substantive law and evidence are presented by cases involving judicial review of the constitutionality of laws regulating outdoor advertising along the National System of Interstate and Defense Highways. The history of one-half a century of legislation and litigation relating to the regulation of billboards reveals the steady evolution of a rationale for regulation of roadside advertising which is based on a recognition of the functional relationship between the roadside and the roadway. Highway and traffic engineers saw this relationship before lawyers and judges did; but the latter are catching up in this respect and rapidly developing legal tools to make it possible for highway engineering judgments to be reflected in highway laws and court decisions. It is for this reason that the recent proceedings to determine the constitutionality of the Ohio and Wisconsin laws regulating billboards along their segments of the Interstate System may well, when they are finally concluded, become landmark decisions in American highway law.

From a review of the pre-trial and trial proceedings certain preliminary conclusions may be drawn.

As to the range of constitutional issues that may be raised for judicial review, it now seems clear that counsel must gear his thinking to a broader field than the familiar claim that billboard regulation deprives the advertising company and the roadside landowner of property rights without due process of law. This is due in part to the fact that constitutional concept of property is evolving in such a manner as to reduce the extent to which the right to advertise is a form of property for which constitutional protection can be claimed. And it is also due to the fact that other aspects of these laws than the property aspect threaten to emerge as sensitive legal issues. Foremost among these may be the complex issue of how far grants-in-aid on conditions may go before the vital balance of power expressed in the Tenth Amendment is upset. Additionally there is

[34] Knetsch v United States, 81 SCT. 132 (1960).

always the danger that issues involving procedural due process may arise where legislative draftsmen do not provide adequately for fair and efficacious administration to implement statutory mandates.

An evaluation of current rules and methods which govern the process of refining theories about roadside advertising laws into issues that are suitable to permit judicial review to be carried on effectively shows the law to be in relatively good shape. Similarly, the forms of action available to the public and the rules relating to the interest required to give parties the standing to raise constitutional issues appear to be fair and effective.

It is with respect to the problems of proof, however, that counsel and court may have to prepare themselves to do a more thorough job of analysis than has heretofore been revealed in the case histories. Reasonableness is, according to the late great scholar, Ernst Freund, the key to American constitutional doctrine regarding the police power. And in the coming era of billboard law reasonableness will have to be proved or disproved by the use of technical evidence drawn from the experience of highway engineers, economists, land-use planners, and others whose work has largely been ignored in legal opinions. If it seems presumptuous to say "ignored," it may be more accurate to say "obscured," for certainly the courts have translated the economic and engineering facts of life into law only on a limited and hesitant scale so far. As a result, proof of the functional relationship between roadside advertising and roadway use by means of expert testimony or a "Brandeis Brief" should at the present time be an extremely difficult undertaking. This difficulty can be overcome only as broadly based data are systematically collected and soundly analyzed and documented for counsel to use in the courtroom.

The fact-finding process of the courts has its limitations, but it also has features that give it strength. There is no suggestion in the history of the Ohio or Wisconsin cases that these limitations dominated. Indeed, they were in that case the major effective safeguard which prevented the proceedings from being turned into a popularity contest, as some legislative hearings have tended to be. But the Wisconsin case does, nevertheless, point up the importance of doing a better job in spelling out more completely and more precisely the factual basis for determining the reasonableness of the law in question.

Consideration of the problems of proof just mentioned reinforces the conclusion that amicus curiae can perform a useful function in judicial review of roadside advertising laws. In the Wisconsin case, the amicus curiae briefs were directed chiefly at clarifying problems of law. They could have served an equally valuable function by compiling for the court data on matters of fact without trespassing on the responsibility of trial counsel to prove the particular elements of his case. There are currently large areas of technical information to which courts can properly give judicial notice. These should literally beckon to the amicus curiae whose interest in the outcome, if not the verdict, of the case is substantial.

The evolutionary process of the law is not self-starting, also, once started, it is not self-sustaining. If the Ohio and Wisconsin billboard cases reveal anything about the continued evolution of legal doctrine relating to control of roadside advertising, it is a critical need for more and better evidence of the various factors, many of them non-legal in nature, which form the foundation of present national policy and the present policy of many more State laws calling for regulation of commercial roadside advertising.