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CONSTITUTIONAL LAW—DUE PROCESS—RESTRICTIONS UPON ADVERTISING—
In its efforts to combat gasoline price wars and the fraud that allegedly accompanied them, the City of Pontiac enacted an ordinance designed to restrict the scope of gasoline advertising. It provided that: "No sign or placard stating the price or prices of gasoline other than such signs or placards as hereinabove provided [signs not larger than 12 by 12 inches attached to pumps] shall be posted or maintained on the premises on which said gasoline is sold or offered for sale."¹ Defendant retailed gasoline; by combining hauling and retailing into one operation, savings of about four cents a gallon were effected which were passed on to the consumer. Defendant advertised these savings on signs larger than the ordinance specified. The city prosecuted defendant for violation of the ordinance and the circuit court found that the ordinance was unconstitutional. On appeal, *held*, affirmed. The ordinance was in conflict with Article 2, Section 4, of the Michigan Constitution and the Fourteenth Amendment to the Constitution of the United States in that it bore no reasonable relation to public peace, health, morals, welfare, or safety. *Levy v. City of Pontiac*, 331 Mich. 100, 49 N.W. (2d) 80 (1951).

The Michigan decision has the support of three other state courts.² By affirming the lower court's decision, the Michigan Supreme Court relied upon the free speech clause in the state constitution, rather than upon the due process clause.³ This would indicate that the court looks upon commercial advertising more as a personal liberty than as economic activity. It would seem that the theory of these decisions revolves about the fact that the gasoline retailing industry is not affected per se with a public interest;⁴ it therefore becomes necessary to point up a specific abuse before the police power can be invoked. Thus these decisions reduce themselves to an unwillingness, on the part of the courts, to allow any use of the police power where there is not a readily definable, pri-

¹ Section 5, ordinance no. 985, City of Pontiac, Michigan (1941).

² On strikingly similar facts, all three courts found that the restrictions upon the size of gasoline price signs were unconstitutional. The Supreme Court of Connecticut based its decision upon the federal due process clause and a due process clause in the state constitution. See *State v. Miller*, 126 Conn. 373, 12 A. (2d) 192 (1940). In Ohio, the court found that such regulation was unreasonable and therefore unconstitutional, although it did not indicate which clause of the state or federal constitution the ordinance violated. *Moreson v. City of Akron*, 20 Ohio Op. 298 (1941). The New Jersey court concluded that small independent dealers have only one weapon of competition, a slightly lower price. Thus, the court reasoned, any restriction upon the size of price signs would completely destroy this one advantage and force the small dealers out of business. The court held the statute to be an unreasonable use of the police power and therefore a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution. See *Regal Oil Co. v. State*, 123 N.J.L. 456, 10 A. (2d) 495 (1939).

³ Article 2, §4, of the Constitution of the State of Michigan (1908). This section provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

⁴ *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 49 S.Ct. 115 (1929).

mary evil.⁵ The New York Court of Appeals, following the Massachusetts court in ruling upon a similar statute, observed that: "Restriction is implicit in police power however exercised. The problem is to ascertain whether the restriction, as an incident to the accomplishment of the legislative purpose, is reasonable in degree." The court went on to hold that regulation of the size of gasoline price signs is not unreasonable or oppressive and is therefore constitutional.⁶ The emphasis in these decisions tends more towards judicial leniency of the legislative and municipal attempts to curb abuses in a field where guideposts are few and the path tricky at best. Oftentimes the evil may not weigh as heavily as the damage which the corrective measures would inflict upon individual rights. Yet, in many instances the line separating individual rights from a common right to live in a regulated and beneficial society is not clear. It is within this hazy area that the courts come into conflict, for in essence each decision is a value judgment predicated upon shifting considerations of the individual and society. It would seem that while the Michigan decision has the support of a majority of jurisdictions, the question is by no means conclusively settled. If the case were heard before the Supreme Court of the United States, much would depend upon whether the Court looked upon the ordinance as a restriction of free speech or economic activity, since the Court has displayed an open reluctance to hold that legislative attempts to regulate economic activity are an infringement of substantive due process.⁷ Yet the Court has not displayed the same reluctance in the field of personal liberties.⁸ The question as to whether the ordinance restricted freedom of speech or economic activity would thus become all important. The Court has already indicated that it regards commercial advertising as quite distinct from the individual's right to speak freely. It is submitted that the United States Supreme Court well might differ from the Michigan court on the federal question involved in the decision.

Joseph M. Kortenhof

⁵ Not so in Massachusetts, however. Holding that the legislature is competent to determine whether gasoline advertising, as it then existed, is conducive to fraud, the supreme court ruled that a statute, similar in all respects to the ordinance in question, was not oppressive or arbitrary. See *Merit Oil Co. v. Director of the Division on the Necessaries of Life*, 319 Mass. 301, 65 N.E. (2d) 529 (1946). An earlier decision of the same court contained this language: "As the judgment of the Legislature, that the regulation of the price signs will prevent deception to the public, cannot be pronounced irrational, the individual citizen cannot substitute his judgment for it He must conform to the statutory standard." *Slome v. Chief of Police of Fitchburg*, 304 Mass. 187 at 193, 23 N.E. (2d) 133 (1939).

⁶ *People v. Arlen Service Stations*, 284 N.Y. 340 at 345, 31 N.E. (2d) 184 (1940).

⁷ This is well illustrated in *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 69 S.Ct. 550 (1949).

⁸ See *Thomas v. Collins*, 323 U.S. 52 at 54, 62 S.Ct. 920 (1942). The Court in distinguishing commercial advertising from an individual's right to advertise his beliefs said: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."