NOTES AND COMMENTS

CONSTITUTIONAL LAW

MUNICIPAL MARKETING BARRIERS—"STICKER" ORDINANCES

Bill by a large mail-order house and a direct plumbing supply company to enjoin enforcement of a so-called "sticker" ordinance.[1] Under the ordinance, affixation of stickers, marked for "resale" or "installation," was required on all plumbing fixtures sold, the application for stickers to show applicant's right to sell or install such fixtures. A further provision required a weekly report by the seller of all fixtures sold, the report to carry names and addresses of purchasers and sticker serial numbers. Upon the authority of a previous decision[2] involving a similar, but earlier, Dayton ordinance, the Court of Appeals, reversing the trial court ruling, granted a permanent injunction. On appeal to the Ohio Supreme Court, *held,* three judges dissenting, affirmed; the ordinance constituted an unwarranted interference with private rights, beyond the necessities of the situation. *Direct Plumbing Supply Co.* v. *City of Dayton,* 138 Ohio St. 540, 38 N. E. (2d) 70 (1941).

Although commonplace, the assertion bears repeating that the United States has been witnessing a revolution in marketing comparable, in resulting dislocation of established business *mores,* to the earlier transition from small-scale to mass production. Manifestations are numerous; witness, for instance, the challenge of such competitive products as oleomargarine for butter, natural gas and fuel oil for coal, industrial alcohol for petroleum gasoline,[3] and the attempted integration of unrelated lines by the meat packers and the small automobile retailers in response to the impact of overhead cost

[1] Dayton Ordinance No. 15052, reproduced in the concurring opinion of Matthias, J., in the principal case.

[2] City of Dayton v. Bohochek, 26 Ohio L. Abs. 417 (Ohio App. 1938), *appeal dismissed,* Ohio Sup. Ct. May 4, 1938. *Mound City Plumbing Supply Co.* v. *Dickman,* an unreported Missouri decision, had also invalidated the "sticker"-type ordinance.

[3] *See, e. g.,* the testimony on the oleomargarine-butter conflict in 29 T. N. E. C. HEARINGS, (1940) 15823-15866.

upon the marketing structure.[4] Conflicts between new and the more orthodox channels of distribution constitute another phase of the marketing revolution. Most colorful has been the struggle between independent and chain; but equally intense has been the economic rivalry born of inroads by the mail-order house and the direct-supply company upon the established hierarchy of wholesaler-jobber-retailer. Thus in the marketing area involved in the principal litigation, an apparently authoritative estimate places at 25 percent the amount of plumbing, heating and roofing business now done by the two types of concerns, while indicating that failure has attended efforts to meet their growing challenge by pledging master plumbers and heating contractors to a code of honor forbidding installation of fixtures so marketed.[5] Failures such as this in the economic arena of self-help have, along with other factors, stimulated a resort to legislative halls that has placed on the statute books of federal, state and municipal governments a vast amount of marketing barrier legislation.[6] Anti-chain statutes of varying types testify to the vigor of the effort legislatively to place hazards, if not complete barriers, in the path of chain access to the market; the sticker ordinance represents a comparable attempt by law to stay the economic hand of the direct-seller of major plumbing supplies. Enacted ostensibly to curb the sale of second-hand, "insanitary" fixtures, such ordinances serve very nicely as competitive impedimenta; their requirements are little more than a minor irritation to the local trade, yet represent a major harassment to sales operations by mail-order and direct-supply companies.

Judicial reaction to the inevitable appeal to constitutional guaranty may take two general forms. Acceptance of the legislation for what it purports to be, refusal to inquire into ulterior legislative motive, and emphasis upon current conceptions of the weight to be accorded the presumption of constitutionality produce judgments finding in barrier legislation a not unreasonable relation to the public health, safety or morals. Thus billboard regulation has been validated in the name of public morals,[7] prohibition of street vending of

[4] *See* Comment (1932) 42 YALE L. J. 81, on the former; note (1939) 5 OHIO ST. L. J. 377, on the latter.

[5] (March, 1940) 21 FORTUNE 57-62, 158.

[6] A survey and economic analysis of such legislation is to be found in the symposium on *Governmental Marketing Barriers* (1941) 8 LAW & CONTEM. PROBS. 234-409.

[7] Thomas Cusack Co. v. City of Chicago, 242 U. S. 526 (1909). More recently, however, billboard regulation has been judicially examined on the basis of its true, æsthetic purpose. *See,* Gardiner, *The Massachusetts Billboard Decision* (1936) 49 HARV. L. REV. 869.

ice cream products as a safety measure,[8] and limited hours for barber shops by invocation of both these attributes of police power.[9] Contemporary law review comment would decide, as though it were a public health problem, the issue of legislative intervention in the competitive struggle between paper and glass for the right to carry the nation's retail milk supply.[10] Similar satisfaction with a rule-of-thumb of objective constitutionality would, in the instant litigation, halt judicial scrutiny at the ordinance's declaration, by way of preamble, that the municipal purpose was to promote sanitation and discourage thievery. In vivid contrast is judicial treatment of the challenged legislation for what it is—governmental favoritism in an economic struggle of institutional life and death. Such judicial realism does not necessarily mean the invalidation of statutes which by the other view would escape unscathed; much of this legislative bulk can pass muster before today's economic thinking,[11] and even when it cannot it is not for the courts to sit in judgment provided it possesses some tolerable basis. But judicial repudiation of its own ostrichification would force analysis of governmental intervention in terms of the true issue of its relationship to, or lack of rational connection with, the general welfare, with, it may be argued, a consequent improvement of the courts' record in the matter.[12] While in decision the present action of the Ohio Supreme Court is in line with adverse judgment on barrier legislation in several other prototype cases,[13] it scarcely proves complete conversion[14] to the realistic judicial approach there apparent. Rather, the principal case falls in an in-between category of court attitude which on appropriate factual occasion will turn against itself the superficial legislative claim of concern for public health, safety or morals; it was the prior existence of seemingly adequate health and crime controls that led this court to denounce the sticker ordinance as unwarranted interference with private rights beyond the necessities of the situation. How it would react to a fact pattern in which such a contradiction was not so clearly apparent remains a matter of conjecture. J. C. B.

[8] X-cel Dairy v. City of Akron, 63 Ohio App. 147, 25 N. E. (2d) 700 (1939).

[9] Wilson v. City of Zanesville, 130 Ohio St. 286, 199 N. E. 187 (1936); Feldman v. City of Cincinnati, 20 F. Supp. 531 (S. D. Ohio 1937).

[10] Note (1942) 26 ILL. L. REV. 578, annotating Fieldcrest Dairies v. City of Chicago, 122 F. (2d) 132 (C. C. A. 7th 1941), *cert. granted*, 62 S. Ct. 301 (1941.)

[11] *See* the economic analyses in the symposium on *Governmental Marketing Barriers*, *supra*, note 6, especially that of Wolff, *Monopolistic Competition in Distribution*, *id.* at 303.

[12] Isaacs, *Barrier Activities and the Courts: A Study in Anti-Competitive Law* (1941) 8 LAW & CONTEMP. PROBS. 382. But *cf*, note (1939) 5 OHIO ST. L. J. 377 at 382.

[13] Good Humor Corp. v. City of Long Beach, 22 N. Y. S. (2d) 382 (1940); New Jersey Good Humor, Inc. v. Board of Comm'rs., 124 N. J. L. 162, 11 Atl. (2d) 113 (1940).

[14] Compare the court's handling of Wilson v. City of Zanesville, *supra*, note 9.