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FOREWORD

The extensive hearings before the Temporary National Economic Committee, the Committee's monographs and reports, together with the Department of Justice's ambitious program of antitrust enforcement, highlight the great amount of attention being currently paid—and properly so—to existing impediments to a free competitive market that are the result of private machination. Save with respect to the interstate trade barrier,¹ little attention has been directed to marketing barriers that are the consequence of governmental, rather than private, action. It is the purpose of the present symposium issue to present an inclusive picture of the extent and character of internal American barrier walls as they have been erected through legislation and administration, to probe something of the economic implications of this relatively unnoticed development, and to suggest the important bearing of the publicly created barrier on the immediate national defense effort and on the ultimate imponderables of political and democratic solidarity.

Writing last year on *The Bottlenecks of Business*² the present aggressive head of the Antitrust Division tended to minimize the dangers inherent in "public seizure of power over the market." To him then ". . . the acquisition of power over the market by public legislative processes is not a serious danger in a democracy checked and balanced as ours is."³ This was ". . . because what has been granted by the democratic process can be safeguarded and can be taken away by the same democratic process."⁴ "It is the private seizure of industrial power that . . . can wreck a democracy. That power is subject to no election every four years."⁵ Even within his own official family, however, there was dissent from this view of things;⁶ and, "increasingly disturbed by the amount of state and local legislation" of restrictive character, Mr. Arnold, in his recent appearance before the Temporary National Economic Committee,⁷ testified to the ". . . close parallel between private restraints in proceedings under the antitrust laws and the public or quasi-public restraints which have become known as trade barriers"⁸ in recommending Congressional action to strengthen Antitrust's hand in so far as that is possible.⁹

¹ Part 29 of the *T. N. E. C. Hearings* is devoted to "Interstate Trade Barriers."

² ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940).

³ *Id.* at 107.

⁴ *Id.* at 110.

⁵ *Ibid.* But compare his discussion *id.* at 42-45, wherein he indicates the greater concern over public barriers that is evident in his more recent testimony, cited *infra* note 7, before the T. N. E. C.

⁶ See Edwards, *Trade Barriers Created by Business* (1940) 16 *IND. L. J.* 169.

⁷ See *Final Report and Recommendations of the T.N.E.C.*, SEN. DOC. NO. 35, 77th Cong., 1st Sess. (1941) 261 *et seq.*

⁸ *Id.* at 269.

⁹ *Id.* at 270.

The closeness of the parallel between the two types of restraint is strikingly revealed in the recent antitrust indictment brought against the West Coast Lumber Manufacturers Association because of alleged abuses in the grade-marking of lumber. Paragraph twenty-seven cites that the defendants, in furtherance of their conspiracy, ". . . have drafted, sponsored and urged the enactment by towns and cities . . . of building codes and ordinances, which provide for and result in the exclusive use in building construction in said towns and cities of lumber bearing" defendants' grade-mark. As often, legislation or administration constitutes but the barriers effected by groups which, routed in the competition of the market place, have been able to make up in political influence what they lacked in economic power. There is thus little to distinguish the public from the private barrier to attainment of the free-market ideal; in the words of an able commentator, "The distinguishing feature of governmental trade barriers is public sanction, not economic effect."¹⁰

Nevertheless, especially where, as here, the term barrier is comprehensively used to embrace all manner of devices impinging adversely on maintenance of free market access, governmental intervention does not necessarily import bad economic judgment. Public action may represent a justifiable effort to defeat or counterbalance a private market force which, unchecked, will eventually destroy the very institutional foundations of the free market. Care must therefore be had to distinguish between such defensive public measures and those which thinly cloak the prostitution of governmental processes for the benefit of private groups which seek to enjoy for their monopolistic ambitions the blessings of public entrenchment. Nor is differentiation between these two classes of intervention sufficient; gradations in economic desirability or undesirability are inevitable within each type. Each public as well as each private assertion of power over the market must be judged against a composite measure of values that mirrors the marketing ideal.

Against this background there are presented in this issue fifteen analyses which together probe, it is believed, at least the more important ramifications of the pervading problem of governmental marketing barriers. In structural scheme the symposium opens with two discussions, one general, the other specific, of interstate trade barriers; follows with an analysis of the myriad types of non-geographical barriers today raised to the entry of persons and goods into the market; pursues successively an investigation into the more special restrictions on products and those on persons; reunites the two streams of development in papers on effectuation of marketing barriers by municipalities and by administrative bodies; then considers the over-all meaning of the general judicial tolerance of public barrier activity regardless of its type and economic effect; and closes with two discussions which serve to emphasize the significance of governmental marketing barriers both to our efforts at defense against physical aggression from without and to the maintenance of a political and industrial democracy at home that will withstand the dry rot which in other places has so greatly facilitated foreign doctrinal penetration from within.

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¹⁰ Edwards, *supra* note 6.