[Vanderbilt Law Review](https://scholarship.law.vanderbilt.edu/vlr)

Volume 3
Issue 1 *Issue 1 - December 1949*

Article 2

12-12-1949

Resale Price Maintenance

Stanley D. Rose

RESALE PRICE MAINTENANCE

STANLEY D. ROSE *

There was a tide in the affairs of men that was taken at its flood by the National Association of Retail Druggists—and it led on to fortune. For this band of little men the Miller-Tydings Amendment to the Sherman Act [1] was the end of a thirty years war. Enjoined in 1907 from attempting to force up retail price margins and maintain retail drug prices at a uniform level,[2] this association joined with other groups desirous of achieving similar ends in an effort, year after year, to persuade Congress to permit the making of contracts between manufacturers and retailers that would fix minimum resale prices. With the beginning of the depression in the thirties, the Association shifted its efforts to the states, where the first success in retail price control came with the passage of the California Fair Trade Act in 1931.[3] In the ten succeeding years 45 states [4] passed resale price maintenance laws [5]—the so-called Fair Trade Acts—and the Federal Government bestowed its blessing on such laws when the contracts they legitimated concerned goods in the course of commerce.[6]

This tremendous measure of success, legislative as well as judicial, should raise a presumption of merit. And yet influential organizations have not only withheld their approbation but have expressly disapproved the principles upon which all this legislation is based. The Temporary National Economic Committee [7] and the Department of Justice [8] have recommended the repeal of the Miller-Tydings Act. The Federal Trade Commission in a lengthy study demonstrated the undesirable effects of the laws.[9] President Roosevelt on three

---

* Attorney, Antitrust Division, Department of Justice. Former Note Editor, VANDERBILT LAW REVIEW.

The views expressed in this article are personal to the writer and are not necessarily those of the Department of Justice.

1. 50 STAT. 693 (1937), 15 U. S. C. A. § 1 (1946).
2. United States v. National Association of Retail Druggists (C. C. Ind. May 9, 1907). The decree is reprinted in DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, JULY 2, 1890-JAN. 1, 1918, 115 (1918).
3. Cal. Stats. 1931, c. 278.
4. Fair Trade laws have been passed in every state except Missouri, Vermont, Texas and the District of Columbia. The texts of the various acts will be found most conveniently in 2 CCH TRADE REG. ¶¶ 8000 *et seq.* (1949).
5. REPORT OF THE FEDERAL TRADE COMMISSION ON RESALE PRICE MAINTENANCE xxvii (1945). The report will hereinafter be cited as FTC REPORT (1945).
6. See note 1 *supra.*
7. FINAL REPORT AND RECOMMENDATIONS OF THE TEMPORARY NATIONAL ECONOMIC COMMITTEE 33 (1941). This report will hereinafter be cited as TNEC FINAL REPORT (1941).
8. Testimony of Herbert A. Bergson, Assistant Attorney General, before the Subcommittee of the House Judiciary Committee, July 27, 1949.
9. FTC REPORT lxiv (1945). The Commission had indicated its disapproval of this type of legislation in a previous report. FEDERAL TRADE COMMISSION REPORT ON RESALE

occasions publicly expressed his dissatisfaction with this type of legislation.[10] Last spring, the Florida Supreme Court overturned the Fair Trade Act of that state.[11] These are all signs that the tide of affairs may be changing and that perhaps the fortunes of resale price maintenance are declining. In any event, the subject seems important enough to merit another consideration. Admittedly there are already thousands of articles and hundreds of arguments on the subject.[12] Yet the field must be revisited again and again. Since 1911, when the real debate on resale price maintenance in this country began, the forces in opposition have always been weak numerically. If all this legislation is actually the work of pressure groups—and, as will be seen, this is a justifiable claim,—then the best means of reversing the process of the last two decades is to alert those whose interests are adversely affected.

The Scope of the Problem

Resale price maintenance is one form of legislation dealing with prices. The various state statutes passed to reach this particular result not only do the same thing, they also do it the same way. They legalize contracts which *may* [13] be made between manufacturers of trademarked goods and their retailers for the purpose of setting either the only price or the minimum price at which the retailer may resell the commodities. The commodities involved are trademarked goods only or commodities which bear the name of the producer.[14] These laws do not relate to patented [15] or copyrighted goods.[16] To be the

PRICE MAINTENANCE, PART II, 165 (1931). This report will hereinafter be cited as FTC REPORT, PART II (1931).

10. When Congress was holding hearings on the bills that later became the Miller-Tydings Act, President Roosevelt requested Congress to forego consideration of the bills and to authorize the Federal Trade Commission to make further studies of the subject. 81 CONG. REC. 3838 (1937). When the Miller-Tydings Act was passed as a rider to the District of Columbia appropriations bill, the reluctance of the President's approval was evident. N. Y. Times, Aug. 19, 1937, p. 26, col. 1. In 1939, when a Senate committee was considering a Fair Trade Act for the District of Columbia, the President wrote to Vice-President Garner asking that the Senate delay action on this bill until after the TNEC and the FTC had completed their studies of the problem. 84 CONG. REC. 6114 (1939).

11. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

12. *See* Ely Lilly & Co. v. Saunders, 216 N. C. 163, 181, 4 S. E. 2d 528, 125 A. L. R. 1308 (1939).

13. The permissive character of the statutory legalization of these contracts must be emphasized. A number of states have compulsory resale price maintenance laws governing the sale of liquor in such states. See Note, *Compulsory Resale Price Maintenance in Liquor: A New York Experiment in Controlled Competition*, 57 YALE L. J. 459 (1948). Section 17 of the New York Alcoholic Beverage Control Law, authorizing the State Liquor Authority, in its discretion, to prohibit the sale of alcoholic beverages by retailers except pursuant to Fair Trade contracts was declared an invalid delegation of legislative authority. Levine v. O'Connell, 275 App. Div. 217, 88 N. Y. S. 2d 672 (1st Dep't 1949).

14. The first of a series of processors may not fix the final resale price even though the article before processing is trademarked. United States v. Univis Lens Co., 316 U. S. 241, 62 Sup. Ct. 1088, 86 L. Ed. 1408 (1942).

15. Where a patentee makes the patented article and sells it, he can exercise no future control over the article after such sale. It has passed beyond the scope of the patentee's rights. Boston Store v. American Graphophone Co., 246 U. S. 8, 38 Sup. Ct.

subject of retail price maintenance contracts, merchandise must be in free and open or fair and open competition with other goods of the same class manufactured by persons other than the contracting parties.[17]

The competition that the drafters of the state bills had in mind was called horizontal competition. The contract prices may not be fixed by horizontal agreements between manufacturers or between wholesalers. Vertical agreements down the distribution hierarchy, however, are being legalized by these contracts. The nature of the arguments concerning the propriety of ruling out this vertical competition will be discussed later.

The conditions under which there may be deviations from the prices fixed in the contracts are expressly stated in the statutes. They are, with a few minor exceptions,[18] limited to four, and not all the states have even these four. Exemptions are permitted (1) at a bona fide closing out sale and if the producer is given an opportunity to repurchase, (2) when the goods are damaged or deteriorated and notice of such condition is given to the public, (3) if the sale is being made by an officer under a court order, and (4) when the trademark or name has been obliterated.[19]

The most unusual feature of these acts is the nonsigner clause. The wording of it is almost exactly the same in all 45 statutes. The original and still standard form was introduced in the 1933 Amendment to the 1931 California Fair Trade Act.[20] This clause provides that:

> "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of

257, 62 L. Ed. 551 (1918); Bauer & Cie. v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041 (1913). But if the patentee licenses the patent and permits the sale of the product under the license, the patentee as licensor may limit or fix the selling price set by the licensee. United States v. General Electric Co., 272 U. S. 476, 47 Sup. Ct. 192, 71 L. Ed. 362 (1926), approving Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058 (1902). This may appear to be a simple condition attached to the license, but query: What is the difference between a sale and a license to manufacture and sell that permits resale price maintenance in the latter and not in the former? The *General Electric* case, *supra*, seems certain to be overruled. See United States v. Line Material Co., 333 U. S. 287, 68 Sup. Ct. 550, 92 L. Ed. 701 (1948), 1 VAND. L. REV. 664. If the patent is invalid, the price-fixing arrangement with the licensee is illegal. Katzinger Co. v. Chicago Metallic Co., 329 U. S. 394, 67 Sup. Ct. 416, 91 L. Ed. 374 (1947). When several licensees are involved, the arrangements are closely scrutinized because the result must inevitably be a price-fixing arrangement likely to substantially lessen competition. United States v. Line Material Co., *supra* at 315. See also United States v. Trenton Potteries Co., 273 U. S. 392, 47 Sup. Ct. 377, 71 L. Ed. 700 (1927).

16. To secure to the author the exclusive right to multiply copies of his work is the main purpose of the copyright statutes, but this does not give the author the right to fix the subsequent resale price. Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086 (1908). Books may be covered by Fair Trade contracts if they bear the name of the publisher.

17. Eastman Kodak Co. v. Federal Trade Commission, 158 F. 2d 592 (2d Cir. 1946), *cert. denied,* 330 U. S. 828 (1947), 15 GEO. WASH. L. REV. 511.

18. Tennessee exempts sales of books to libraries located within the state. TENN. CODE ANN. § 6770.4a (Williams, Supp. 1948).

19. An analysis by states of these exemptions is contained in 2 CCH TRADE REG ¶ 7012 (1949).

20. Cal. Stats. 1933, c. 260, amending Cal. Stats., 1931, c. 278.

Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

This provision obviously binds non-contracting parties to the price stipulated in the contract. It was destined to arouse strong feeling, and its validity will be discussed later in this article.

In the last fifteen years there have been passed by State and Federal governments a number of different types of statutes expressly dealing with prices. These will be briefly mentioned here and distinguished from the Fair Trade Acts.

The Robinson-Patman Act,[21] passed in 1936 as an amendment to the Clayton Act, forbade any discrimination in price between different purchasers of commodities of like grade and quality when such goods were in the course of interstate commerce and the discrimination tended to prevent or lessen competition or create a monopoly. By express proviso, differentials were permitted which make due allowance only for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such commodities are sold or delivered to purchasers. This act was aimed at chain stores and mail order houses.[22] It was designed to protect the small retailer from the giants of distribution,[23] and in this fact alone is there any connection between the Robinson-Patman Act and the Fair Trade Acts. Both have had an effect upon vertical competition: the former in the cost to the retailer, and the latter, in the retail price itself.

A substantial number of states have enacted Unfair Sales Acts or Unfair Practices Acts.[24] These statutes refer to all merchandise sold at retail, and some are written in very terse language. For example, the New Jersey statute simply says: "It is hereby declared that the advertisement, offer for sale, or sale of any merchandise at less than cost by retailers is prohibited." [25] Other, perhaps more sophisticated, legislatures have qualified the prohibition somewhat.[26] The linkage by statute between prices and retailing costs as an accounting problem, is of doubtful practicality.[27] The constitutionality of the attempt

21. 49 STAT. 1526 (1936), 15 U. S. C. A. § 13 (1941).
22. McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction*, 4 LAW & CONTEMP. PROB. 410, 413 (1937); Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A & P Case*, 58 YALE L. J. 969, 970 (1949). For a more conservative view of the Act, see PATMAN, THE ROBINSON-PATMAN ACT (1938).
23. McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 (1937).
24. For an excellent note on this subject, see Note, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 YALE L. J. 391 (1948).
25. N. J. STAT. ANN. § 56:4-8 (1940).
26. *E.g.*, TENN. CODE ANN. § 6770.8 (Williams, 1941).
27. Note, *Sales Below Cost Prohibitions*, *supra* note 24, at 396; Hamilton, *Cost as a Standard for Price*, 4 LAW & CONTEMP. PROB. 321 (1937).

is also doubtful, although the challenges have not been many.[28] Opponents of resale price maintenance have upon occasion argued that if the proponents of such legislation were being frank in stating their grievances, then price floors at the point of costs would be the solution of all their troubles; and a number of such opponents would have gone along with such legislation, even though they would not support the Fair Trade contracts.[29] These statutes were depression-born and represent another method used to protect the small retailer. Basically the arguments advanced for and against such statutes are the same as are used in the Fair Trade debate, but the two types of legislation should be kept clearly distinguished, because all was not said that was meant or designed.

It is anticipated that the courts will strictly construe these pricing statutes. The *Univis Lens* case is an example.[30] Another is *Mennen Co. v. Krauss Co.*,[31] in which a federal district court considered the Louisiana Fair Trade law. As will be seen later, there are two distinct types of Fair Trade laws in which resale price maintenance contracts are legalized. The Louisiana statute permitted contracts in which the buyer agreed not to sell commodities except at prices stipulated by the vendor. In the *Mennen* case, the court declared invalid contracts in which the buyer agreed not to resell at less than a stipulated minimum price. This case is of interest because the contracts invalidated were of the type recognized by the Miller-Tydings Act, which speaks only of contracts "prescribing minimum prices for the resale of a commodity."

This survey of pricing laws was undertaken to limit the background preparatory to an extended consideration of the Fair Trade laws. The following study will first consider the legal foundation of the problem to show why all this legislation was necessary. The history of the organized drive to legalize retail price maintenance will then be considered. In the process of tracing this history, the arguments of the proponents of the laws will be examined. The end of the story will be to indicate the proper place within a competitive economy of the Fair Trade movement. What was illegal without statute may, of course, become legal with legislation. This is what happened with the Fair Trade laws.

---

28. Thatcher, *The Constitutionality of the Unfair Practices Acts*, 30 Minn. L. Rev. 559 (1946).

29. *Hearings before Judiciary Committee on H. R. 1611*, 75th Cong., 1st Sess. 103, 110, 167 (1937) (Hereinafter cited as *"Hearing on H. R. 1611* (1937)"). Senator Tydings declared that he wanted to eliminate loss-leader selling, but that he avoided proposing a bill that would prohibit sales below costs because (1) few states had such laws, (2) there was doubt as to the constitutionality of such laws, and (3) such laws could not be made permissive. *Hearings before Subcommittee of the Committee on the Judiciary on S. 100*, 75th Cong., 1st Sess. 43 (1937) (Hereinafter cited as *"Hearings on S. 100* (1937)").

30. 316 U. S. 241, 62 Sup. Ct. 1088, 86 L. Ed. 1408 (1942).

31. 37 F. Supp. 161 (E. D. La. 1941). In spite of the strict construction, one writer expects that the nonsigner clauses of the state statutes will be read into the Miller-Tydings Act, because without such an interpretation the Act would be valueless. Callmann, *"Fair Trade" and Anti-Trust Law*, 10 U. of Pitt. L. Rev. 443, 453 (1949).

The legal problem being momentarily resolved, the major consideration today centers about the wisdom of these laws.

THE LEGAL BACKGROUND LEADING UP TO THE LEGISLATION

What was later to be termed the "Miles Park blunder" [32] precipitated national discussion of resale price maintenance. The Dr. Miles Medical Company tried by a thinly disguised attempt at retention of title to control the final resale price of their medicines. In 1911, in *Dr. Miles Medical Co. v. Park & Sons Co.*,[33] Justice Hughes, speaking for the Supreme Court, told the company that it could not legally continue its efforts at control of the price of its product to the final consumer. The company's contracts were illegal both as a restraint upon alienation and as a restraint of trade. No special public interest was to be served by permitting these contracts. The Court declared that "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." [34]

An unexpected voice appeared in dissent in this case. Justice Holmes declared that the Court's opinion was not based upon statute or authority and was merely judicial policy making. The company appeared to be charging reasonable prices, and certainly the public would not benefit from "knaves" [35] cutting these prices. Prices are determined by conflicting desires anyway and there was no evident reason why the Court should interfere with these contracts. The force of the prose of Justice Holmes struck a note that was to be repeated at almost every subsequent hearing upon the subject of resale price maintenance.

It should be noted that in this leading case both sides were well represented and that, as was always to be the case, no issue was joined. Justice Hughes opposed resale price maintenance contracts because they were in restraint of trade. He paid no heed to the commercial practices that allegedly made such contracts desirable. Justice Holmes spent no great time discussing the effect of such contracts upon competition; he simply believed these devices to be legitimate methods of preventing unfair competitive practices. The majority

32. *Hearings on H. R. 1611*, 13 (1937).

33. 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 (1911). The Court gave express approval to Judge Lurton's opinion in Park & Sons v. Hartman, 153 Fed. 24 (6th Cir. 1907). Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67 (1889), was declared in the *Dr. Miles* case (220 U. S. at 402) to stand for the proposition that the secret process itself may be burdened with restrictions as to territory or prices. The case seems readable as a situation similar to the *Dr. Miles* case which forbade restrictions on the products manufactured from the process.

34. 220 U. S. at 409.

35. "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get." Holmes, J., dissenting, 220 U. S. at 412.

of the Court would have argued that it was no part of the Court's task to consider the wisdom or the desirability of these contracts. They would then be faced with a rule that a few months later this same Court was to announce: that only unreasonable restraints of trade were in violation of the Sherman Act.[36] The majority evidently thought these contracts were unreasonable restraints of trade. This is actually the one issue. If it be true that all price cutters are "knaves," then efforts to control them might well be regarded as reasonable. The truth of the claim that all price cutters are dishonest has been generally assumed by the proponents of resale price maintenance, but the studies that are available do not support the claim nor does it stand up upon analysis. This point is discussed later in this article, where an extended consideration is given to the arguments for legislation on this form of price control.

The *Dr. Miles* case aroused a great deal of opposition. Louis D. Brandeis, then a Boston attorney, called the decision "judicial legislation." [37] One writer pointed out that Justice Hughes in the *Dr. Miles* case failed to consider the distinction between horizontal and vertical agreements.[38] Again the assumption is evident that vertical agreements are permissible.[39] This assumption, it should be clear, begs the very question at issue. If vertical agreements were *per se* valid, these resale price maintenance contracts might be valid. But are vertical agreements valid, especially when designed to fix prices? [40] A more practical result traccable to this case was the formation in 1913 by a group of manufacturers of the American Fair Trade League, of which Brandeis was certainly the intellectual leader.[41] Less than a year later, the Stevens bill was introduced into Congress. This bill would have legalized contracts between manufacturers and retailers to fix the retail sale price. The fate of this and subsequent bills will be considered later, but it was certain that until such a bill was passed, price maintenance contracts would be invalid. This certainty came from the action of the Supreme Court in reaffirming, whenever it could, its stand in the *Dr. Miles* case.[42]

36. Standard Oil Co. v. United States, 221 U. S. 1, 63, 31 Sup. Ct. 502, 55 L. Ed. 619 (1911).

37. Brandeis, *Cutthroat Prices—The Competition That Kills,* HARPER'S WEEKLY 11 (Nov. 15, 1913). See also Miller, *The Maintenance of Uniform Resale Prices,* 63 U. OF PA. L. REV. 22 (1914). The failure to consider practical business conditions is scored in Waite, *Public Policy and Personal Opinion,* 19 MICH. L. REV. 265, 280 (1921).

38. Sayre, *Maintenance of Resale Prices,* 6 ORE. L. REV. 241 (1927).

39. The extent to which chattels may be burdened with restrictive covenants is discussed in Chafee, *Equitable Servitudes on Chattels,* 41 HARV. L. REV. 945 (1928); Wade, *Restrictions on User,* 44 L. Q. REV. 51 (1928).

40. In dissenting from an opinion upholding the state Fair Trade law, a Washington judge said: "It is only by the judicial invention of such artificial formulae as 'vertical arrangements' and 'horizontal arrangements' that the plain provisions of the constitution are circumvented." Sears v. Western Thrift Stores, 10 Wash. 2d 372, 392, 116 P. 2d 756, 765 (1941).

41. FTC REPORT 43-44 (1945).

42. Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866 (1917); United States v. A Schrader's Son, Inc., 252 U. S. 85, 40 Sup. Ct. 251, 64 L. Ed. 471 (1920).

But surely, it will be said, a manufacturer has a right to do something to protect himself from the "knaves" who cut prices. The extent of the powers of a producer in this respect, as one court has said, "may rightly be said to be in confusion." [43]

The most extreme power that a producer of trademarked goods has at his disposal is the right to refuse to deal with a retailer who will not maintain prices suggested or recommended by such a producer. Justice McReynolds, speaking for the Court in *United States v. Colgate & Co.*,[44] declared that in the absence of any intent to create a monopoly,[45] the Sherman Act does not prevent a manufacturer from announcing in advance the prices at which his goods may be resold and that such a manufacturer may refuse to deal with wholesalers or retailers who do not conform to such prices.[46] One writer has called this power to refuse to sell a power to boycott,[47] but this seems to be a misnomer.[48] *A priori,* it would not seem conducive to happiness to advise a harried manufacturer that he need not sell to a recalcitrant retailer. It appears all too evident that this technique of controlling retailers is likely to be available only to the larger producers and, as such, is apt to become an instrument for furthering a monopolistic position.[49]

These are the two ends of this particular problem. A manufacturer may not make contracts with a retailer to maintain retail prices, but such a manufacturer may refuse to sell to a retailer who does not maintain suggested retail prices. The surprising fact now emerges that there is no middle ground. A manufacturer may give warning of a refusal to sell unless retail prices are maintained,[50] but almost every other form of affirmative action taken by a producer to keep up the resale prices of his product is invalid. The Beechnut Company had an elaborate system, aggressively enforced, of checking on its retailers and weeding out those who cut prices. The retailers were classified and those with a bad record of cutting prices on Beechnut products were denied the further right to purchase such products. In 1922, the company was advised that its efforts constituted unfair competition.[51] The Court pointed out

43. Toledo Pipe-Threading Mach. Co. v. Federal Trade Commission, 11 F. 2d 337, 340 (6th Cir. 1926).

44. 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992 (1919).

45. If done with intent to create a monopoly, refusal to sell is unlawful. United States v. Klearflax Linen Looms, 63 F. Supp. 32 (D. Minn. 1945).

46. This seems to have been established as law before the *Colgate* case. See Brown, *The Right to Refuse to Sell,* 25 YALE L. J. 194 (1916); Slichter, *The Cream of Wheat Case,* 31 POL. SCI. Q. 392 (1916).

47. Sayre, *Maintenance of Resale Prices,* 6 ORE. L. REV. 241, 243 (1927).

48. A boycott requires concerted action and is prima facie unlawful. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80, 84 (2d Cir. 1940).

49. See Note, *Refusals to Sell and Public Control of Competition,* 58 YALE L. J. 1121 (1949).

50. United States v. Hudnut, 8 F. 2d 1010 (S. D. N. Y. 1925), 35 YALE L. J. 1017 (1926).

51. Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441, 42 Sup. Ct. 150, 66 L. Ed. 307 (1922). Counsel for Beechnut reviewed the background of this case and its implications in Dunn, *Resale Price Maintenance,* 32 YALE L. J. 676 (1923).

that the company's practices went beyond a mere refusal to sell, for the "system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade. . . ." [52] The Court found that it could "infer, indeed cannot escape the conclusion, that competition among retail distributors is practically suppressed." [53] Once again Justice Holmes dissented and this time was joined by Justice Brandeis who had been appointed to the Court in 1916.[54] The dissent saw nothing wrong in making a condition of sale to a retailer that the retailer accept whatever terms of resale that the manufacturer might set.

Not only could a company not take measures to assure itself that its products were being sold at the suggested resale prices, but it could not even solicit information from its customers as to resale price maintenance by these customers or other customers.[55] The producers, further, could not require the assurance of the retailers that resale prices would be maintained.[56] Thus all effective measures of control over prices subsequent to sale were outlawed because the Court in the *Dr. Miles* case had refused to apply the test of the rule of reason to the entire field of resale price maintenance.

In 1926, however, the Court did approve of one form of resale price maintenance. In *United States v. General Electric Co.*,[57] it was held that if a true agency relation existed, the principal could fix the prices at which the agent might sell at retail. The proposition was clear. It was also certain that the establishment of an agent in every retail outlet was a burden that could only be assumed by an industrial giant. It was like "an Achilles' bow. The small man cannot bend it." [58] What was deemed worse was the establishment by an able student of the thesis that: "The difference between the Dr. Miles marketing scheme and the General Electric marketing scheme is in no important practical aspect more than verbal." [59] This student also confirmed the belief that the *General Electric* case gave only the larger and wealthier firms the right to control resale prices. But, he pointed out, even General Electric would have preferred the simpler and easier way and was in 1928 "one of the largest contributors of funds to the American Fair Trade League," [60] which for so

See also Note, *The Attitude of the Federal Courts Toward Resale Price Maintenance since the* Beechnut *Decision*, 27 COL. L. REV. 183 (1927).

52. 257 U. S. at 454.

53. *Id.* at 455.

54. Justice McKenna also concurred in this dissent. 257 U. S. at 457. Justice McReynolds dissented separately.

55. Cream of Wheat Co. v. Federal Trade Commission, 14 F. 2d 40 (8th Cir. 1926).

56. Toledo Pipe-Threading Mach. Co. v. Federal Trade Commission, 11 F. 2d 337 (6th Cir. 1926).

57. 272 U. S. 476, 47 Sup. Ct. 192, 71 L. Ed. 362 (1926). See Note, *Effect of Sherman Act on Fixing Prices of Patented Goods By Agency Licensing Agreements*, 51 YALE L. J. 299 (1941).

58. *Hearings before Committee on Interstate and Foreign Commerce on H. R. 11*, 69th Cong., 1st Sess. 36 (1926) (Hereinafter cited as "*Hearings on H. R. 11* (1926).")

59. Klaus, *Sale, Agency, and Price Maintenance*, 28 COL. L. REV. 312, 315; 441 (1928).

60. *Id.* at 463-64.

many years had been lobbying in Congress for resale price maintenance laws.

This survey of the status of resale price maintenance in the federal courts is sufficient to show that only an act of Congress could make it permissible when applied to goods passing in interstate commerce. Because of the *General Electric* case, several writers have commented that the federal courts made the legality of maintaining resale prices depend upon the method used,[61] holding written contracts to achieve this end invalid but upholding the practice when the marketing method used was one of agency. It seems inconceivable that a principal would ever be denied the right to fix the price at which his agent might sell the principal's product. But practically, as indicated above, the agency method of marketing is not desirable for a number of reasons, of which it is sufficient to mention anti-chain store legislation, social security and other tax burdens, and liability for the torts of an agent. Thus until the Miller-Tydings Act was passed, resale price maintenance for goods in interstate commerce was not generally possible.

An account will now be had of the more limited but no less competitive field of intrastate commerce. Prior to 1933, the legislative and judicial records of state attempts at resale price maintenance were few and their importance as precedents was therefore magnified. As early as 1885, Missouri had approved of a contract to maintain resale prices.[62] It should be noted, however, that when such contracts were upheld, a statute containing a nonsigner clause was not being upheld. The early state cases recognized that a restraint of trade was present in the factual situation, but they were distinguished from the *Dr. Miles* case by the finding of the state courts that only a part of the available supply of ground chocolate [63] or trademarked flour [64] was being subjected to these contracts and that therefore no tendency towards a monopoly was to be expected. This tendency towards a monopoly being the test for an unreasonable restraint of trade, the court approved of these particular contracts. In the flour case, the Washington court expressly stated that these contracts would not bind anyone except the parties to the contracts.[65] But in the chocolate case, for one of the few recorded instances, the California court justified binding a purchaser from one of the parties to the resale price agreed upon in the contract, and further, did so as a matter of contract law. As will be seen, the statutory nonsigner clauses were later validated as a proper exercise of the state police power. In this latter case, the commodities in question, bottles of ground chocolate, had notices attached declaring that an express condition for the resale of these bottles was that the fixed resale price be maintained.

61. 35 YALE L. J. 1017 (1926); 41 MICH L. REV. 747 (1943). See also BURNS, THE DECLINE OF COMPETITION 430 (1936).
62. Clark v. Frank, 17 Mo. App. 602 (1885).
63. Ghirardelli v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912).
64. Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522 (1913).
65. *Id.* at 668, 137 Pac. at 151.

The original contract was between manufacturer and wholesaler. The court said that when a retailer bought from the wholesaler with knowledge of the attached notice, an implied contract was created and that the manufacturer was a third party beneficiary who could sue to enforce this second contract. This is a novel view of the concept of third party beneficiary[66] and seems doubtful as an authority. This rationale does not appear to have been tested in subsequent cases.

The same issues arose in Massachusetts under different circumstances. First of all, it was decided that if *A* and *B* contracted to maintain prices and *B* sold to *C*, *A* had no power to control the resale price set by *C*.[67] But if *B* has *C* buy from *A* and sell what he buys to *B* so that *B* may resell what he got from *C* unrestricted by the resale price limits set under his own contract with *A*, the court will permit *A* to sue *B* to force him to observe the prices set under the original *A-B* contract.[68] The basis of the enforcement in this latter instance was *B*'s fraud.

Judicial Reception of the Legislation

The first state statute which made resale price maintenance possible was passed in 1913 in New Jersey.[69] The statute did not expressly legalize price maintenance contracts but instead forbade discrimination against the owner of a trademark by depreciating its value in the public mind. Since, as will be seen, the standard argument is that price cutting destroys the property value of a trademark by causing depreciation of its value in the public mind, this statute was broad enough to support efforts at resale price maintenance. In *Ingersoll v. Hahne & Co.*,[70] the New Jersey court declared that contracts designed to prevent price cutting of standard articles, well known to the public, not the subject of monopoly and not necessaries of life, were not opposed to public policy. The main authority for this holding was the dissent of Justice Holmes in the *Dr. Miles* case.

In 1931, California started the final step in the development of the Fair Trade movement. A statute passed that year permitted contracts between manufacturers and retailers which stipulated the resale price.[71] As a leading student of the question states it: "This act aroused no great interest . . . because it added nothing to the existing law under judicial interpretation in the state. But in 1933 the California legislature added a brief amendment which incited renewed activity, interest, and enthusiasm; so much so that the movement quickly swept the states piecemeal and forced an amendment to the federal

66. See Restatement, Contracts, § 133 (1933).
67. Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219 (1901).
68. Garst v. Charles, 187 Mass. 144, 72 N. E. 839 (1905).
69. N. J. Laws 1913, c. 210. The text of the statute is reprinted in Rogers, *Predatory Price Cutting as Unfair Trade*, 27 Harv. L. Rev. 139, 154-55 n. 25 (1913).
70. 88 N. J. Eq. 222, 101 Atl. 1030 (Ch. 1917).
71. Cal. Stats. 1931, c. 278.

law in August 1937, over the objections of the President." [72] The cause of all this disturbance was the addition to the California Fair Trade Act of the nonsigner clause,[73] which, as seen above, was included almost verbatim in the 44 subsequent Fair Trade acts. The validity of this provision had to be assured before the Fair Trade program was certain of success. California courts upheld the statute, including the nonsigner clause.[74] About the same time, however, the New York Court of Appeals declared the Fair Trade Act of that state unconstitutional.[75]

The New York Court objected to this law on the ground that it was an arbitrary price-fixing statute. *Nebbia v. New York* [76] had established the principle that there was no closed category of businesses affected with the public interest which alone were subject to state price regulation. But that case, the Court of Appeals held, had not suggested that the field was now clear for a general price-fixing law without a reasonable necessity being demonstrated, and such necessity had not been shown in the instant case. Further, the New York court continued, if the power to fix these prices does exist, it cannot be delegated, as attempted under this statute, to private parties whose agreement will bind other purchasers who had not contracted.[77]

This direct clash was soon resolved. The Supreme Court, without qualifications, unanimously upheld the Fair Trade Act of Illinois in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*[78] The facts in that case raised the issue squarely. A nonsigner had failed to maintain the resale prices set in contracts between the company and other retailers and a petition for an injunction was presented. Justice Sutherland, speaking for the Court, declared that these statutes, which applied only to trademarked goods, embodied a reasonable classification of commodities. The trademark is an identifying brand which in the course of trade has attached to it a goodwill which is a valuable property right. The states are well within a reasonable exercise of their police power when they act to protect this property right. The legitimizing of these contracts to restrict prices is an appropriate means to this end. Such contracts are not to be considered as legislative price-fixing because they are permissive and a producer always had the right to fix the price of his products.

72. GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 18 (1939).
73. Cal. Stats. 1933, c. 260.
74. Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P. 2d 177 (1936); Pyroil Sales Co. v. The Pep Boys, 5 Cal. 2d 784, 55 P. 2d 194, 1186 (1936).
75. Doubleday, Doran & Co. v. R. H. Macy, 269 N. Y. 272, 199 N. E. 409, 103 A. L. R. 1325 (1936).
76. 291 U. S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).
77. This case was criticized in 22 VA. L. REV. 556 (1936) on the ground that price-fixing is beyond the state police power only when arbitrary and, further, that a study of the facts would have shown that this exercise of the police power was not unreasonable.
78. 299 U. S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936). On the authority of this case the California statute was upheld on the same day. The Pep Boys v. Pyroil Sales Co., 299 U. S. 198, 57 Sup. Ct. 147, 81 L. Ed. 122 (1936).

In the light of the discussion which follows in this article, it is well to emphasize that Justice Sutherland firmly expressed the opinion that the sole purpose of this state statute was to afford a legitimate remedy for an injury to the goodwill of the manufacturer which resulted from the price-cutting of trademarked goods. It may be suggested that the facts of commercial life were not considered here either.

With the handing down of the *Old Dearborn* opinion, state judicial objection to the Fair Trade acts collapsed.[79] The New York statute was tested again and, on the basis of the Supreme Court decision, the Court of Appeals reversed itself.[80] The other states fell into line [81] with only rearguard actions being fought by a few dissenting judges.[82]

Florida deserves some special mention. Twice now, the Florida Supreme Court has invalidated the Fair Trade Act of that state. Both times, the rejection of the statute was on relatively narrow and technical grounds and on both occasions the state legislature promptly re-enacted the statute with minor modifications. In the first case,[83] the action was against a nonsigner. The action was dismissed because the title of the Act "restricts the subject of the Act and implies that its provisions will be applicable only to retailers who voluntarily enter into such contracts, and not to retailers who refrain from doing so." [84] The second case,[85] which overturned the statute last spring, revealed a severe struggle within the court. The points upon which the case seems to have turned were that this was admittedly a price-fixing statute, that a state price-fixing statute required a showing within the statute of public necessity, that there was no such declaration in this statute, and therefore the act could not be permitted to stand as a general law.[86] The Florida legislature

79. The various state constitutional and legal problems connected with these statutes are considered in Note, *Resale Price Maintenance Statutes*, 45 YALE L. J. 672 (1936); Legis., *The Fair Trade Laws: State Validation of Resale Price Maintenance*, 36 COL. L. REV. 293 (1936); Note, *Prices: Resale Price Control Under State Fair Trade Acts*, 28 CALIF. L. REV. 477 (1940).

80. Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 7 N. E. 2d 30, 110 A. L. R. 1411 (1937). The New York Fair Trade Act is discussed in Martin, *The Fair Trade Act*, 5 FORD. L. REV. 50 (1936). The New York Fair Trade Act is indexed in the New York code under "Price Fixing." Index M-Z (McKinney, 1941).

81. The usual reason for upholding the state statutes was the authority of the *Old Dearborn* case. Among other cases see Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N. W. 426 (1937); Miles Laboratories, Inc. v. Owl Drug Co., 67 S. D. 523, 295 N. W. 292 (1940). An elaborate and ornate opinion upheld the North Carolina act upon a basis of "parallelism of precedent" and "a degree of perpendicular thinking." Ely Lilly & Co. v. Saunders, 216 N. C. 163, 170, 4 S. E. 2d 528, 533, 125 A. L. R. 1308 (1939).

82. An obvious but seldom heard objection to these acts was stated in a dissenting opinion in Sears v. Western Thrift Stores, Inc., 10 Wash. 2d 372, 389, 116 P. 2d 756, 764 (1941). This dissenting judge said: "The Fair Trade Practices Act of this state thus confers upon the manufacturer the right by operation of law to force all retailers to conform to a contract made with one retailer."

83. Bristol-Myers Co. v. Webb's Cut Rate Drug Co., 137 Fla. 508, 188 So. 91 (1939).

84. *Id.* at 511, 188 So. at 92.

85. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

86. One statement in the majority opinion was: "A state may not prohibit and make punishable those who enter into agreements in restraint of trade or which tend to

quickly passed a statute embodying what was deemed to be the requisite declaration of public necessity.[87]

This survey of the legal foundation of the state Fair Trade movement indicates that so far as the constitutionality of these state statutes is concerned, the problem is now settled. Space limitations prevent any consideration of the many legal problems that have arisen under these laws. What is of more significance is that if no aid can be expected from the courts, any opponent of these acts must devote his attention to the wisdom of the legislatures in passing the acts. It is to this problem that this study will now turn. At the beginning of this Fair Trade movement, there were men who advanced arguments in which they sincerely believed and which they felt showed irrefutably the necessity for protecting the manufacturers by the method of resale price maintenance. Louis D. Brandeis was the most eminent member of this group. There is ample reason to doubt this sincerity today and this doubt is a major factor in questioning the whole Fair Trade program. Furthermore, sufficient evidence exists to rebut the formal arguments of the proponents of this legislation. This formal presentation of the case for resale price maintenance will now be examined in conjunction with a commentary upon the history of the movement to persuade Congress to enact national legislation. When the case for the legislation is fairly before us, an analysis will then be made of the adequacy of that case in the light of available evidence. Whatever one may think of the result of this analysis, the defense of the Fair Trade movement in action will be a more difficult task. This difficulty will be demonstrated by an examination of pressure groups operating upon our economy which have used a conceptual lag to disguise a veritable tumor. It will be shown that what was once a sincere defense of a property right by the property-right owner has become the pretext for the bludgeoning of one economic group for the benefit of another.

The Case for Resale Price Maintenance

The premises upon which the debate over resale price maintenance has been based appeared on the scene fully grown. The finest mind ever to support the movement was the first speaker to gain a national hearing and nobody has materially improved upon his arguments since they were first given. Sometime in 1913, Louis D. Brandeis came to the conclusion that the manufacturers of trademarked goods needed some power of protection against retailers who used these nationally known brands to attract customers into their stores by

restrict competition and then grant immunity to a class consisting of those who enter into vertical contracts and agreements having the same obnoxious impact upon the public interest. It is the effect of the contract or agreement that is to be considered." 40 So. 2d. at 385.

87. The text of this new statute is in 2 CCH TRADE. REG. SERV. ¶ 8164 (1949).

sharply cutting the prices on goods bearing such brands. In November of 1913, Brandeis had published in *Harper's Weekly*[88] an article that was to be reprinted time and again by the advocates of these laws.[89]

Brandeis' mature life had spanned the period in our history in which the great trusts and combinations had come to power and he had seen that power curbed by the imposition of a small measure of control. Suspicious of bigness in business, Brandeis thought that he saw in some common retailing practices the elements of a growth, which, if unchecked, would create a retailing monopoly. This trend, he thought, had been aided by judicial legislation in the *Dr. Miles* and other cases which had blocked the exercise of a basic power of the manufacturer to protect his goodwill. If the manufacturer could not protect his goodwill, the many small and independent retailers could not protect it for him.

It was Brandeis' contention, in his now famous article, that a contract to maintain resale prices on trademarked goods was not an unreasonable restraint of trade. The manufacturer using a trademark has a property interest in that mark which needs protection. This property interest was the goodwill that went with a nationally known brand for which the producer had, by national advertising, built up a large consumer demand. This goodwill, he asserted, is destroyed by price cutting. A well-known trademarked brand that everybody knows and wants will be used as low-priced "bait" to entice customers into the store. Brandeis maintained that this use of another's property as a "misleader" was dishonest. He said that "ordinarily the very purpose of the cut-price is to create a false impression,"[90] meaning by this that the deluded patron of such a store was led to believe that all the prices in this store were equally low. When prices are cut for this purpose, the cut-rate store makes its profit by abnormally high price margins on its other goods. The other retailers can meet this competition by also selling the same brands at a loss, but they are more apt just to stop selling them at all or, at least, not make any selling effort to move such products. The net result is that cut prices hurt everyone and the conclusion Brandeis draws is that when such a situation is created, "it is better policy for the regular dealer to drop the line altogether."[91]

To permit the producer to protect his branded merchandise by means of attaching price conditions for resale will not tend to create a monopoly, Brandeis claimed, because the individual producer would fix unreasonable prices at his

88. Brandeis, *Cutthroat Prices—The Competition That Kills*, HARPER'S WEEKLY 10 (Nov. 15, 1913).

89. Reprinted in *Hearings before Committee on Interstate and Foreign Commerce on H. R. 13305*, 63rd Cong., 2d & 3d Sess. 67 (1915) (Hereinafter cited as "*Hearings on H. R. 13305* (1915)"); *Hearings before Committee on Interstate and Foreign Commerce on H. R. 13568, Part 2, 243* (1916) (Hereinafter cited as "*Hearings on H. R. 13568, Part 2* (1916)"); *Hearings on H. R. 11, 126* (1926).

90. Brandeis, *supra* note 88, at 11.

91. *Ibid.*

peril, if his products were in competition. But the unrestricted cutting of resale prices was making the lot of the independent retailer worse. These independents were being pushed to the point where they would have to combine themselves or be destroyed by the monopolistic giants in the distribution field. He said that the process of exterminating the small independent retailer already hard pressed by capitalistic combinations, such as mail order houses and chain stores, was accelerating. And finally, Brandeis posed his point as a grand climax: "Shall we, under the guise of protecting competition, further foster monopoly by creating immunity for the price-cutters?" [92]

This article was only three pages long and could not elaborate upon all the issues raised in it. But writers contemporary with its publication developed some of the ideas there presented.[93] For instance, if price cutting was unfair and dishonest, the practices should be tortious conduct. This argument was developed, in a somewhat oversimplified fashion, in the *Harvard Law Review* by one who was to be an able and aggressive proponent of this legislation for decades.[94] It was the contention of this writer that if price cutting is to be classified as unfair competition, and therefore tortious, it should be based not upon deception of the public, as in trademark infringement cases, but upon the damage to the goodwill of the trademark owner and the test should be: Is business or goodwill being diverted from one who has created it, to his injury and to the benefit of the parasite? [95] The extent to which this suggestion was embodied in the law will be indicated later.

One loose end appears evident in these arguments. If the same article is being sold for different prices, is the seller at the lower price a price cutter? Is there any difference in prices possible that falls short of "predatory price cutting?" [96] In short, is there no place for price competition among retailers? Fantastic as it may seem, to this day the proponents of resale price maintenance insist that there is no place for competition over prices in the field of retail distribution.[97] Again in 1913, this point was made, and with some authority,

92. *Id.* at 12.

93. See Miller, *The Maintenance of Uniform Resale Prices,* 63 U. OF PA. L. REV. 22 (1914).

94. Rogers, *Predatory Price Cutting as Unfair Trade,* 27 HARV. L. REV. 139 (1913). See also ROGERS, GOOD WILL, TRADEMARKS AND UNFAIR TRADING 277 *et seq.* (1914).

95. Rogers, *supra* note 94, at 150.

96. Twenty-five years later the question was raised as to where the distinction was between "good" price cutting based upon business efficiencies and "bad" price cutting which was unfair competition. This remained an unresolved and fundamental question throughout all of this period. McLaughlin, *Fair Trade Acts,* 86 U. OF PA. L. REV. 803, 812 (1938).

97. A distinguished writer recently asserted that the restraints imposed by resale price maintenance are not those contemplated by the antitrust acts. Resale price maintenance is supposedly just another method of merchandising. The retailer no longer sells his goods. Trademarks and national advertising do this work for him. The elimination of the retailer would have no effect upon prices which are created by the competition between producers of rival products. Callmann, *"Fair Trade" and Anti-Trust Law,* 10 U. OF PITT. L. REV. 443, 458 (1949). Even assuming that the part played by national advertising in creating consumer demand is as great as is here claimed, it does not follow that no resale price differences should result. As always, the best proof

since the following quotation is from an opinion of the Supreme Court of Washington:

> "It seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product.[98] . . . It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement." [99]

Three months after the publication of Brandeis' article, the Stevens bill was introduced into Congress. This was the first attempt to legalize in interstate commerce contracts to maintain resale prices.[100] Under this bill the prices were to be stated upon the article and also filed with the Bureau of Corporations. In the House hearings that began shortly thereafter, Brandeis was the first and principal witness. Brandeis had previously been consulted by the American Fair Trade League under whose auspices the bill had been drafted.[101] At the time of this hearing,[102] resale price maintenance was still understood to be designed to protect primarily the manufacturer, but Brandeis inserted in the record the names of scores of retail associations who favored the bill. At these hearings, Brandeis added little more to the basic arguments except that he felt that nothing should be done about making sure that reasonable prices were set in these contracts. He asserted that competition would guarantee reasonable contract prices, meaning, of course, competition among the manufacturers only.[103] This belief has survived to the present time and only Wisconsin among all the states that have passed Fair Trade laws has made any provision for handling complaints that the prices set in resale price maintenance contracts are unreasonable.[104]

---

of this is the opposition of the department stores and the mail order houses to resale price maintenance.

98. Hence the slogan: "Demoralize the price and you demoralize the product." *Hearings on H. R. 13305*, 159 (1915).

99. Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 668-69, 137 Pac. 144, 151, 51 L. R. A. (N. S.) 522 (1913).

100. FTC REPORT 39-40 (1945).

101. William H. Ingersoll, one of the organizers of the Fair Trade League, was closely examined as to his knowledge of Brandeis' association with the League. Apparently Brandeis got no fee for his work on behalf of resale price maintenance. *Hearings before Subcommittee of the Committee on the Judiciary of the Senate on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court*, 64th Cong., 1st Sess. 976 *et seq.* (1916). Brandeis' biographer claims that Brandeis was the author of the Stevens bill. MASON, BRANDEIS, A FREE MAN'S LIFE 502 (1946).

102. *Hearings on H. R. 13305*, 65 (1915).

103. *Id.* at 63.

104. WIS. STAT. § 133.25(7) (1945).

Brandeis did contribute at this hearing the statement of a seductive proposition: "The American principle is that a man has a right to do anything he pleases with the article he buys unless he has an agreement with the man from whom he bought it that he shall do something else." [105] The reasonableness of this view hides its doubtful universality.

As in every subsequent hearing, the members of the committee tried to pin one of the witnesses down about these "loss leaders" that were deluding the public. Both extremes on this issue were stated at this time. The witness representing the National Association of Retail Druggists asked for the passage of the bill to protect "the ignorant and careless purchasers, who in reality constitute a large portion of the consuming public." [106] A man, renowned for half a century for his common sense, Congressman Alben Barkley of Kentucky, replied to this that, "I think if I get fooled that is my own misfortune, and I do not think the Congress of the United States will ever pass a law that will put intelligence in the people and keep them from being gulled by somebody who is slick enough to gull them." [107]

The Stevens bill failed to pass, but 1914 did see the passage of the Federal Trade Commission Act, section 5(a) of which has particular significance in this narrative. This section declared: "Unfair methods of competition in commerce, are hereby declared unlawful." [108] What this meant was, of course, to be determined by the courts. It was not to be an easy task.[109] In the field of

105. *Hearings on H. R. 13305*, 63 (1915).

106. *Id.* at 112. A counterpart of this attitude was that of the manufacturer who, selling throughout the country at one price, fixed by Fair Trade contract different resale prices in different states. The company decided what price margin was proper under the existing local competitive conditions. The president of the company said that this was done because "you have a group of unintelligent retailers and you have to do something to protect them from themselves." *Hearings before Temporary National Economic Committee, Part 6*, 2558 (1939) (Hereinafter cited as *"TNEC Hearings* (1939)").

107. *Id.* at 99. The only discovered discussion on the enforcement of these contracts made before a Congressional committee was had in this first hearing and the question was raised by Congressman Barkley. He asked (p. 31): "Does this bill undertake to punish a man who violates that agreement?" Brandeis answered: "No; I say it does not undertake to punish him; but undertakes to give the maker or producer the right to make a contract establishing a standard price, and if such a contract is valid the ordinary means of enforcing it will exist." It is doubtful that Brandeis had in mind any device like a nonsigner clause, and the ordinary law of contracts would not give any right against a nonsigner. The failure ever to consider the effect of the nonsigner clause in the state laws apparently led the Senate to misjudge the effect of what it was doing in the Miller-Tydings Act. The Committee reported to the Senate, that passage of the Act would "not commit the Congress to a national policy on the subject matter of the State laws." SEN. REP. No. 879, 75th Cong., 1st Sess. 6 (1937).

108. 38 STAT. 717 (1914), 15 U. S. C. A. § 44 (1941).

109. See Haines, *Efforts to Define Unfair Competition*, 29 YALE L. J. 1 (1919). An introductory historical note is in Jones, *Historical Development of the Law of Business Competition*, 35 YALE L. J. 905 (1926); 36 *id.* 42, 207, 351 (1926-27). For unfair competition as a common law crime see Herbruck, *Forestalling, Regrating and Engrossing*, 27 MICH. L. REV. 365 (1929). The effect of these common law crimes was to deny recognition to the middle man which is an approach continued by resale price maintenance. For information on engrossing laws in the United States, see McAllister, *Price Control by Law in the United States: A Survey*, 4 LAW & CONTEMP. PROB. 273, 274-76 (1937).

pricing laws, however, the issue was pointed to whether or not predatory price cutting was to be included within the scope of unfair competition. The efforts in this direction and the result will be considered later in this article.

In 1915, the Stephens bill was introduced in Congress to authorize the prescribing of uniform prices and manners of settlement at which the different qualities and quantities of each article covered by a contract might be resold. A hearing was held but no action was taken.[110]

Three years later, the Federal Trade Commission sent a special report to Congress [111] on resale price maintenance, pointing out that since its inception the Commission had been dealing with cases involving the validity of the resale price contracts. The dilemma that faced the Commission seemed worthy of Congressional consideration. The Supreme Court had outlawed these contracts as restraints of trade and yet the manufacturer seemed entitled to some protection when the cutting of the retail prices of his trademarked products was indulged in by others for unfair trade purposes. The Commission acknowledged that the right of the manufacturer to fix the resale prices of his products should not be permitted without some safeguard for the public interest. Accordingly, the Commission proposed for Congressional consideration a law which would read that "if the manufacturer of an article produced and sold under competitive conditions desires to fix and maintain resale prices, he shall file with an agency designated by Congress a description of such article, the contract of sale, and the price schedule which he proposes to maintain, and that the agency designated by the Congress be charged with the duty, either upon its own initiative or upon the complaint of any dealer or consumer . . . to review the terms of such contract and to revise such prices. . . ." [112]

No action was taken on this proposal and nothing like it was ever suggested again by the Commission. Meanwhile, in each term of Congress until 1933, what became known as the Capper-Kelly bill was introduced with the same negative results.[113] The hearing on this bill held in 1926 brought forth some refinements in the theory of resale price maintenance. When the inquiry was centered on the different costs of operation among various types of retailers, the question was asked how a uniform price could be fixed to avoid either exorbitant profits for some or destruction for others. The answer to this was given with some assurance since the witness was certain that the question related to a theoretical situation only. The reply was that "The price-cutter is the high-rent man. He does not cut prices on branded goods as a means of lowering prices to the public or passing on any economies. Quite the opposite. He cuts branded-goods prices as a means of gouging the public. He has high costs and

110. See *Hearings before Committee on Interstate and Foreign Commerce on H. R. 13568*, 64th Cong., 1st Sess. (1916).
111. H. R. Doc. No. 1480, 65th Cong., 3d Sess. (1918).
112. *Id.* at 2.
113. FTC REPORT 41, 43 (1945).

high rents to pay and he wants to conceal them from the public." [114] These practices are typical of the metropolitan department stores. Statistics were available, this witness claimed, to show that the large chains were also high cost retailers. Nevertheless, they have created an impression with the public, by extensive advertising of national brands as loss leaders, that they are economical sources for household purchases.[115] This price differential point continued to be pressed and another example was proposed. Suppose *A* insisted that the price set by a manufacturer was too high and that he, *A*, would be satisfied with a smaller profit. What should be done about *A*? The answer was logical. *A* probably didn't exist but if he did, treatment should be accorded him with the goal in mind of the greatest good of the greatest number. "I would say we had better let him put that additional profit in his pocket and make him keep it than by cutthroat competition permit him to put out of business a lot of other folks whose injury will be much greater than the slight good he can do the consumer on a few cases of Colgate's soap." [116] It is clear from this that the "greatest number" was limited to members of the class of retailers.

The elements of a contradictory argument first appeared in this hearing. One witness maintained that low cost stores under the proposed bill need not raise their prices on trademarked products because they are perfectly free to deal in unbranded goods.[117] Contrasted with this is the contention that the consumer demand for these goods is created by national advertising. This means that such goods must be carried in stock to sustain the store's reputation as a retail outlet [118] and, further, that the price must be met that is set by any competitor or again the store's reputation suffers by gaining the name of being high-priced. This latter situation was supposed to have created the urgency for this legislation. The small retailers could not afford to sell the products that they could not afford not to carry in stock. The reality of this dilemma will be examined later. It may be suggested that the answer will be to query why the retailer cannot lower his price.

This ultimate issue after these views must be the place of competition under this program. The proponents of this bill answered this flatly by claiming that the only place for competition was in the setting of the price which will be made uniform among retailers by this bill.[119] To assure this competition,

114. *Hearings on H. R. 11*, 29-30 (1926). The Federal Trade Commission, on the basis of admittedly unsatisfactory data, found the average breakeven point for independent retailers to be a 34% markup. An average markup of 33% among 50 department stores gave an average return of 12% net profit on investment. FTC REPORT, Part II, 94 (1931).

115. *Id.* at 42 *et seq.*

116. *Id.* at 202.

117. *Id.* at 14. This argument was used by Justice Sutherland in the *Old Dearborn* case when he found nothing wrong in binding a retailer to a contract made by another. Such a retailer was not bound to use such trademarked goods. 299 U. S. 183, 193-94, 57 Sup. Ct. 139, 81 L. Ed. 109 (1936).

118. *Hearings on H. R. 1611*, 111 (1937).

119. *Id.* at 69.

the good name of the manufacturers must be protected.[120] One of the Congressmen then pointed out that the value of this brand name was created by national advertising and might or might not actually be a mark of quality and yet this doubtful attribute was to be the sole point of competition because this bill would cut off all other competition among the dealers. At this there was no hesitation: the reply was that the retail level was no place for competition because experience had proved that competition, spread among so many hundreds of thousands of dealers, becomes an irresponsible competition which breeds unfair practices and really interferes with the productive function and raises costs there.[121] All competition among retailers produces what the sponsor of this bill, Congressman Kelly, called "malignant price warfare." [122]

At the time these arguments were being made, there had been little actual experience with resale price maintenance laws. As pointed out above, the first of the Fair Trade acts was passed in California in 1931. Federal legislation lay years ahead, but there was a practice run of a few years under the N. R. A. codes. When examination is made of the codes, the most noticeable fact is that resale price maintenance clauses appear, not in the codes prepared by the manufacturers, but in the retail codes. A new class is now pushing this legislation. It had been noticed in the 1926 hearings that the manufacturers were no longer interested very strongly in this movement, but no inferences were drawn from this observation.[123] The entry upon the scene of the retailers as the proponents of this legislation should have changed the nature of the arguments in support of the program. But it did not. As pointed out previously, Justice Sutherland upheld the Illinois Fair Trade Act in 1936 because it was a reasonable method of protecting the manufacturers' property rights in their trademarks.[124]

The loss-limitation provision in the Retail Drug Code [125] showed the haste in which it was written. The provision stated that the use of the "so-called 'loss leader' is hereby declared to be an unfair trade practice. These 'loss leaders' are articles often sold below cost to [*sic*] the merchant for the purpose of attracting trade." [126] It was expressly stated that this was not a prohibition against selling without profit to the seller, but the selling price must include labor costs. In his letter of transmittal of this code to the President, Gen. Hugh Johnson, the N. R. A. Administrator, mentioned the pressure for inclusion of this provision as a protection against predatory price cutting.[127]

120. So valuable was this good name "that we could well have afforded to let the factory burn down rather than have our name ruined." *Id.* at 70.
121. *Id.* at 73.
122. Congressman Kelly's statement on the bill opened the hearings. *Id.* at 3 *et seq.*
123. *Id.* at 51.
124. See note 78 *supra.*
125. 2 N. R. A. CODES OF FAIR COMPETITION 27 (1934).
126. *Id.* at 36.
127. *Id.* at 29. An identical provision was included in the *Code of the Retail Food and Grocery Trade,* 4 N. R. A. CODES OF FAIR COMPETITION 457 (1934). This gives

The N. R. A. experience only whetted the appetites of those who wanted this kind of price restriction and the drive in the Thirties for Fair Trade laws became irresistible. Thirteen states had such laws by 1936 and 28 others followed in 1937.[128] The carefully organized campaign to secure the passage of these laws was then directed against Congress and in August of 1937 the Miller-Tydings Act was signed by the President.[129] The Act declared that contracts fixing minimum resale prices made in accordance with the laws of the various states were not a violation of the Sherman Act nor were they an unfair trade practice under section 5(a) of the Federal Trade Commission Act. The Act had an unfortunate legislative history that aroused more objection than the provisions of the Act itself.[130] President Roosevelt was dissatisfied, first, with Congressional consideration of the bills, then, with the passage of the Act, and, finally, with the manner of its passage. In April, the President had written to Congress that he was requesting a recommendation on this legislation from the Federal Trade Commission, but at the time of his writing he felt that it was "untimely" to attempt "to legalize any competitive or marketing practice calculated to facilitate increases in the costs of numerous and important articles which American householders . . . buy." [131] He asked the Congress to forego consideration of the bill and to authorize the Federal Trade Commission to make further studies of the problem. Finally when the bill was passed, the President voiced his disapproval of the use of a rider to an appropriation bill in passing this type of law and he expressed the hope that this law "would not boost prices as much as some of his advisers feared it would." [132]

The debate in Congress on the Act was unproductive. The proponents of the bill denied that it was a price-fixing law and declared that the main purpose of the bill was to back up the states which had passed such laws.[133] But the reports on the bills show signs of the contradiction that was developing between practice and theory in the Fair Trade movement. Congressman Celler of New York wrote a separate report to say that while he would vote for the bill

a good idea of the intensity of the pressure since the policy recommendations of the N. R. A. had been opposed to resale price maintenance becoming a part of any code. The basis for the opposition was that the existing law, through permitting a refusal to sell to a price cutting retailer, gave adequate protection to the manufacturer. LYON ET AL., THE NATIONAL RECOVERY ADMINISTRATION 729-30 (1935).

128. FTC REPORT 69 (1945).

129. 50 STAT. 693 (1937), 15 U. S. C. A. § 1 (1941).

130. See the minority report of Senator King of Utah in SEN. REP. No. 879, 75th Cong., 1st Sess. (1937). The bill was attached as a rider to the District of Columbia appropriation bill. A veto of the bill thus became impossible without a veto of the appropriation and Congress had already adjourned.

131. 81 CONG. REC. 3838 (1937).

132. N. Y. Times, Aug. 19, 1937, p. 26, col. 1.

133. H. R. REP. No. 382, 75th Cong., 1st Sess. (1937); SEN. REP. No. 879, 75th Cong., 1st Sess. (1937). Trouble in semantics developed during the debate. Senator Tydings wound up a speech in support of the bill by declaring that he had never voted for a price-fixing bill in his life. The next speaker, Senator Austin of Vermont, then showed how full choice still remained in the states. For instance, he suggested, look at the people of Vermont who had said: "We do not want price fixing in this State." 81 CONG. REC. 7496 (1937).

there were a few unresolved questions in his mind. He wanted to know why there were no manufacturers at the hearings on this bill. He seemed fairly certain that this indicated the pressure-group nature of this legislation. He then queried whether this ganging up of retailers would not now be used to raise prices.[134] The Senate committee, apparently unaware of any such developments, reported that the state laws here being supported were directed against the "so-called loss-leader selling" which "operates as a fraud on the consumer, destroys the producer's goodwill in his trademark, and is used by the large merchant to eliminate his small independent competitor." [135] The views of Justice Sutherland in the *Old Dearborn* case are clearly reflected here with no intimation that such views were now obsolescent. The hearings preceding the passage of this law contributed little to the previously examined arguments in support of the general theory of resale price maintenance.[136]

This brings the legislative history of resale price maintenance to a momentary halt. The next effort will center upon repealing the Miller-Tydings Act.[137] The wisdom of such action, of course, should be the determinative factor. Having now reviewed the development of the Fair Trade movement and having considered in some detail the nature of the theoretical support for this legislation, this study will turn to an investigation of the materials at hand to serve in rebuttal of this support. A study of the forces used to put the Fair Trade movement into practice will then be used as a setting for an appraisal of the position of this movement in our competitive economy.

Rebuttal of the Formal Case for Resale Price Maintenance

The previous statement of the arguments of the advocates of maintaining retail prices was stated with perhaps some laboring of the premises. But if the statement in its fullness was fairly presented, an examination may be made with confidence that this was the whole case. If it is, then it seems obvious that the first question is: What is a "loss leader?" It is certainly some form of price cutting. This leads to the second question: To what extent is price cutting tortious? These are the basic issues in the formal debate and some clarity ought to be introduced with respect to them, if possible. Following a discussion of these two points, some more generalized objections to the Fair Trade program will be discussed.

Some precision in the definition of a loss leader would seem to be impor-

134. H. R. Rep. No. 382, 75th Cong. 1st Sess. 5 *et seq.* (1937).
135. Sen. Rep. No. 879, 75th Cong., 1st Sess. 5-6 (1937).
136. *Hearings on S. 100* (1937); *Hearings on H. R. 1611* (1937).
137. The O'Toole Bill (H. R. 4003, 81st Cong., 1st Sess.) was introduced April 4, 1949 as the latest effort to repeal the Miller-Tydings Act. This bill was referred to the Committee on the Judiciary of the House. A subcommittee of this Committee is currently conducting hearings under the chairmanship of Congressman Celler of New York on the need for further legislation to reinforce the antitrust laws.

tant,[138] because, it is said, all predatory price cutting is accomplished by means of loss leaders.[139] The Federal Trade Commission made an extensive study of chain stores and devoted special attention to the use of loss leaders by these chains. As a definition for the purposes of this study, the Commission adopted the following: "A loss leader apparently is variously considered as an article sold below net invoice cost, net purchase cost or net manufacturing cost as the case may be, or it may be applied to goods sold below the net purchase cost of the goods plus operating costs, or simply to goods sold below the usual markup."[140] A very early definition of an aggressive cutter was "a dealer who was so designated by 75% of the local trade at any given place." [141] Compiling variants of this same species will not be fruitful. A fine logical distinction is not being made when a responsible citizen, like Senator Tydings, will characterize R. H. Macy's as "great believers in predatory price-cutting to take the trade of these independents away, then when they get it away they can make it up on something else, or obviously they couldn't stay in business." [142] However unsatisfactory it may seem, the following definition appears to be the closest to reality. Speaking of a loss leader, one writer said: "In all probabilitv it is little more than a derogatory term used by business men to denote any deep price cuts of which they disapprove." [143]

What makes this latter conception of a loss leader appear to be accurate is the fact that the federal courts have never been persuaded to make price

138. "It is commonly alleged that the chief reason for the urgent necessity of resale price-fixing legislation is the use of 'loss leaders' in merchandising. No one has adequately defined the term. No one has determined the extent of loss-leader use, however defined. No one has measured its harmful effects or beneficial effects upon the distributor and the consuming public. Few distribution problems have been characterized by more befuddled thinking." *Hearings on H. R. 1611*, 151 (1937).

139. See GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION, c. 8 (1939) for an excellent analysis of leaders and loss leaders. Grether defines a leader "as a product offered for sale below the price at which it would otherwise have been sold for the purpose of attracting patronage to other articles in the vendor's general assembly." *Id.* at 200. A loss leader is a subclass under leader and is defined by Grether as "a product offered for sale at a price lower than its invoice or replacement cost, plus the average expense percentage of the vendor or the particular expense percentage allocable to it, on which the loss is expected to be recovered from the patronage attracted to other articles in the vendor's general assembly." *Id.* at 201. This is a reasonable distinction, essentially between good and bad price cutting, but it cannot be maintained that this distinction is very often made by the proponents of resale price maintenance. There has been no visible sign that any price cutting would ever be approved by them.

140. SEN. Doc. No. 51, 72d Cong., 1st Sess. 2 (1932). Grether claims that because of this loose definition, the results of the studies of the Commission are of "scant significance." Grether, *op. cit. supra* note 139, at 200.

141. Jayne v. Loder, 149 Fed. 21, 24 (3d Cir. 1906).

142. *Hearings before Subcommittee of the Committee on the District of Columbia of the Senate on H. R. 3838*, 76th Cong., 1st Sess. 29-30 (1939). The term "loss leader" includes a presumption of dishonesty on the part of the retailer using one and a further presumption of gullibility on the part of any customer going into a retail outlet because of an advertised low price. Neither of these presumptions seems capable of proof. See *Hearings on H. R. 1611*, 89 (1937).

143. Nelson, *Trade Practice Conference Rules and the Consumer*, 8 GEO. WASH. L. REV. 452, 460 (1940). The opponents of this legislation do not deny that they use loss leaders. They simply say that "a customer in the store is worth two in the home." *Hearings on H. R. 1611*, 151-52 (1937).

cutting an unfair competitive practice.[144] Price cutting is only unlawful when there is a showing that the practice was employed as an instrument of monopoly power.[145] A man in good faith may go into business in competition with another and cause loss to tbat other without being liable for the loss so caused, even though he knew such loss would probably occur.[146] It must follow that while in business he can, in good faith, take such measures as seem reasonably necessary to stay in business. The qualifying requirement of good faith does not beg the question. It simply denotes a lack of malice.[147] For, as the *Restatement* puts it: "One who engages in a business primarily for the purpose of causing loss of business to another and with the intention of terminating the business when that purpose is accomplished is liable to the other for the loss so caused." [148] It appears then that the federal courts have remained unmoved throughout this furore over the cutting of prices by "knaves," because this particular type of knavery seems never to have been unlawful.[149] What is more, they have declared that attempts at resale price maintenance, in the absence of statute, are unfair competitive practices.[150] This was first definitely established, as previously indicated, in the *Beech-Nut* decision.[151]

Besides failing to convince the courts, the proponents of these measures also failed to convert the larger retailers. In 1929 the Federal Trade Commission found that 78% of the department stores and 70% of the chain stores were opposed to resale price maintenance, as contrasted with a 91% favorable vote of the regular dealers.[152] A few larger department stores, such as Macy's

---

144. Remington-Rand, Inc., v. Mastercraft Corp., 67 F. 2d 218, 221 (6th Cir. 1933). The *Restatement* takes the position that drastic price-cutting, a "predatory trade practice," is not actionable *per se,* however harsh the price cuts may be. RESTATEMENT, TORTS § 709, comment *a* (1938).

145. Schine Chain Theatres, Inc., v. United States, 334 U. S. 110, 120-21, 68 Sup. Ct. 947, 92 L. Ed. 1245 (1948).

146. HOLMES, THE COMMON LAW 144-45 (1881); RESTATEMENT, TORTS § 708 (1938).

147. The test of predation is intent. OPPENHEIM, CASES ON FEDERAL ANTI-TRUST LAWS 75 (1948).

148. RESTATEMENT, TORTS § 709 (1938). This section states the principle derived from the leading case of Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946 (1909) (banker opening a rival barbershop to drive plaintiff out of business gave plaintiff a cause of action).

149. The reason seems to be that the federal courts have approached resale price maintenance solely as a problem of restraint of trade. Contrasted with this, the state courts have emphasized the unfair competition aspects of the problem. OPPENHEIM, CASES ON FEDERAL ANTI-TRUST LAWS 383-84 (1948). Doubts continue as to the existence of an independent federal law of unfair competition. Bunn, *The National Law of Unfair Competition,* 62 HARV. L. REV. 987 (1949). Because trademark infringement is the main type of unfair competition litigation handled by the federal courts, the federal law continues to emphasize misrepresentation and passing off, elements which admittedly are not present in price cutting. See Rogers, *supra* note 94.

150. Armand Co. v. Federal Trade Commission, 78 F. 2d 707 (2d Cir. 1935); Butterick Co. v. Federal Trade Commission, 4 F. 2d 910 (2d Cir. 1925).

151. Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441, 42 Sup. Ct. 150, 66 L. Ed. 307 (1922). See Stevens, *Resale Price Maintenance as Unfair Competition,* 19 COL. L. REV. 265 (1919).

152. REPORT OF THE FEDERAL TRADE COMMISSION ON RESALE PRICE MAINTENANCE, Part 1, 78 (1929) (Hereinafter cited as "FTC REPORT, Part 1 (1929)"). It may also be found as H. R. Doc. No. 546, 70th Cong., 2d Sess. (1929). A regular dealer is

of New York and Filene's of Boston, were among the oldest and most effective opponents of any legislation to maintain retail prices. They and others made the following general objections to the laws: (1) the establishment of uniform prices would deny to the consumer the benefit of operating economies; (2) the very rigidity of the prices so fixed seriously impaired the possibility of economical merchandising; (3) the prices would have to be fixed at a level that would insure higher prices to the consumer; (4) the higher prices would necessarily include a high cost of national advertising for which the consumer got nothing. These objections are sufficient to show the tenor of the opposition. The basic premise of these opposition forces was that at the retail level different prices may be produced by competition that is not dishonest. The layman is apt to feel that this is true, and it seems surprising that any discussion is necessary. When a witness testified that it was impossible to set a price that would fit both mail-order catalog service and store service, it seemed a reasonable claim.[153] An executive of R. H. Macy's explained that it had been calculated that giving credit added 6% to the cost of a product and that therefore his company had decided that Macy's would give no credit and would charge 6% less than the price set by any other store in the city which gave credit.[154] Another example was Namm's Store in Brooklyn, which was in reality two stores. Upstairs, salesgirls waited upon customers, and credit, delivery, aud other services were rendered; downstairs in the basement, cash payment and self-service were the basis of substantially lower prices.[155] Is one to believe that Major Namm was a predatory price cutter downstairs but not upstairs?

It cannot be denied that there are different costs of doing business. The Fair Traders argue that even if this be true these costs should not be translated into different retail prices. Besides, as previously pointed out, the Fair Trade advocate claims that it is the high cost retailer who cuts the most sharply.[156] This contention, however, seems unprovable. A much more sensible story would be that the most economical operator has the lowest prices. Wherever the argument may emerge, it is certain that one principle of the Fair Trade program is to eliminate competition among retailers. The nature of the program in action has yet to be indicated, but this is the true basis of the refusal to admit the desirability of such competition. As one witness said: "This bill might also be called . . . a bill to aid the inefficient—to aid the indigent." [157]

defined "as an independent retail unit purchasing merchandise from wholesalers or manufacturers and selling to the consumer." *Id.* at 73.

153. *Hearings on S. 100,* 18 (1937). "It is our policy to quote lower prices, wherever possible, than asked elsewhere for merchandise of comparable quality. This is made possible by the economies of our method of doing business." MONTGOMERY WARD CATALOG, FALL & WINTER (1949-50) 1109 (1949). How predatory price cutting can be effected by means of a mail order catalog is difficult to see. There are no loss leaders to entice the customer to read the catalog. *Hearings on H. R. 1611,* 115 (1937).

154. *Hearings on H. R. 11,* 283 (1926).

155. *Hearings on H. R. 1611,* 102 (1937).

156. *Supra* note 102.

157. *Hearings on H. R. 11,* 269 (1926).

The laws not only were based on a blindness to the possibilities of economies in retailing; they also made such economies harder to make. As previously mentioned, exemptions from the contract restrictions are almost universally confined to four situations.[158] A trademarked commodity can be sold below the contract price when the retailer is, in good faith, selling his stock preparatory to going out of business, when the goods are damaged or deteriorated, when the sale is by an officer acting under a court order, or when the trademark has been obliterated. In the Stevens bill of 1914 these were also the sole exceptions. As early as 1916 Edward Filene of Boston was already defending his famous bargain basement, where slow moving stock from the upstairs store sold at steadily reduced prices for thirty days at which time the unsold remainder was given to charity.[159] Clearance sales are essential to sound merchandising.[160] Slow moving and overstocked items must be moved. And yet such sales cannot be made subject to any uniformity. Items move at different rates under different selling techniques. Seasonal clearances have been assumed to be a standard practice to get ready for a new season.[161] The Fair Trade laws assume that any clearances of unsalable stock will now be confined to non-trademarked goods only. Furthermore, newcomers in a neighborhood have traditionally overcome customer inertia by loudly proclaiming the low and attractive prices of their new store.[162] Under these laws how can obsolescent models or fading styles be cleared out quickly so as to make way for new varieties? Suppose there is a declining market in which the proper merchandising technique is to slash prices to clear out the high-priced stock. It would, of course, be no answer to the objections to the entire Fair Trade program to widen this list of exemptions; but even if it were, it is unlikely that any such extension would take place, since the whole objective of the movement is uniformity of prices, and to this end exemptions must perforce be few. These objections are mentioned to demonstrate further that the problems of neither the merchandiser nor the manufacturer are being considered with any sympathy by those favoring these Fair Trade laws. A quantity of unsalable goods will not improve the goodwill value of the trademark they bear. In short, the effort is to put all of the retailers on one level which operates in favor of the less efficient.

If the whole direction of resale price maintenance must be to favor the less efficient retailer and to block the use of standard techniques in aggressive and economical merchandising, then the end result must be that Fair Trade laws raise prices on Fair Traded goods. Has this been the result in practice?

---

158. *Supra* note 19.
159. *Hearings before Committee on Interstate and Foreign Commerce on H. R. 13568*, 64th Cong., 1st Sess., Part I, 212 (1916).
160. *Hearings on H. R. 11*, 252 (1926).
161. *Hearings on H. R. 1611*, 109 (1937).
162. *Id.* at 111.

For a long time the answer to this question was unknown.[163] A few admittedly incomplete studies are now available that show the answer to be indisputably in the affirmative. In California, in 1934, the contract prices for drug items were 33% higher than the prices advertised on these same commodities in the newspapers during the first six months of 1933.[164] The 1945 investigation of the Federal Trade Commission gave the same general result. The manufacturers set their contract prices between the two extremes of the prevailing prices with the result that in the retail grocery trade, for instance, "price increases most often were shown by cash-and-carry stores while price decreases were shown most often by credit and delivery stores." [165] The Report then points out that price increases "fell most heavily upon those consumers who from necessity or personal choice patronize minimum-service stores." In the retail drug trade the same situation developed, and the chain stores and department stores are found raising their prices.[166] The two studies heretofore mentioned exhaust the reliable data on the subject at the present writing.

A thought that might not occur to the ordinary consumer is one contended for by the proponents of these laws. An authoritative spokesman for this group points out the danger of inferring that "the sole objective of public policy was to obtain the lowest possible price to the consumer on every commodity. This is both an economic fallacy and a misconception of law. The public is more interested in fair and reasonable prices which preserve the economic balance and advantages to those engaged in the trade, with due regard to the consuming public, than it is in securing the lowest obtainable prices, when the inevitable tendency is to degrade or drive from the market 'articles which it is assumed to be desirable that the public should be able to get.' " [167] This may explain the apparent subversion of the economic basis of our society by the advocates of these measures and should all the more stir the consumer to reassert his traditional belief that in a competitive society the objective is the best goods at the lowest prices.[168]

If trademarked goods which are subjected to resale price maintenance

163. "In the absence of definite experience" the Federal Trade Commission polled various business groups as to what they *expected* from legalized resale price maintenance. FTC REPORT, Part 2, c. 5 (1931). The conclusion reached at that time by the Commission was that "Neither injury is capable of exact measurement, but, in the opinion of the commission, the potential damage to consumers through price fixing would be much greater than any existing damage to producers through this form of price cutting." *Id.* at 165.

164. Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 CALIF. L. REV. 640 (1936). Additional material on increases in California and other Pacific states is in GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 298 (1939).

165. FTC REPORT xlvi (1945).

166. *Id.* at xlviii *et seq.*

167. Ely Lilly & Co. v. Saunders, 216 N. C. 163, 174, 4 S. E. 2d 528, 125 A. L. R. 1308 (1939). The quote within the quotation is from the dissent of Justice Holmes in the *Dr. Miles* case, 220 U. S. 373, 412, 31 Sup. Ct. 376, 55 L. Ed. 502 (1911).

168. One of our official economists described resale price maintenance as an "impediment to low-price policies." NOURSE, PRICE MAKING IN A DEMOCRACY 161 (1944).

contracts rise to a higher general level of selling price, they must also then rise to a higher price as compared with unbranded goods or with goods whose brand does not have to bear the cost of a national advertising campaign. A reputable recent study has borne this out by a demonstration that the prices of nationally advertised brands are materially higher than those of virtually identical merchandise which is unbranded or which bears a distributor's private label.[169] It was always Macy's contention that resale price maintenance would not injure it because the day any law was passed affecting prices, Macy's intended to use its own unfettered brands.[170] The witnesses who spoke for Macy's always made a great show of producing Macy's trademarked articles and comparing them with products bearing nationally advertised brands, demonstrating that the two were the same and that the article of Macy's was sold at a substantially lower price.[171] Another effect of advertising is to emphasize prices. If an item is nationally known as a nickel item, the producers are almost trapped into maintaining the five-cent price regardless of the vicissitudes of the business cycle. The way out, of course, is to maintain the price but vary the size and quality of the same article. And it has been a common complaint that these changes have been made without notice.[172]

This emphasis upon price serves to introduce an example of the inconclusiveness of some of the arguments that have raged over resale price maintenance. One of the founders of the American Fair Trade League and one of the oldest supporters of the movement was William Ingersoll, whose dollar watch is part of our cultural history. Ingersoll always claimed price cutting ruined his watch business.[173] At the 1926 hearings, the Macy witness rejected this claim and said that the changing price structure had simply made it impossible any longer to turn out profitably a dollar watch.[174] It is evident that it would not be possible to determine the relative merits of this particular controversy, but it does focus attention on one point: How many manufacturers have been hurt by predatory price cutting? A definitive reply to this question is the statement of the Federal Trade Commission that it had "been at some pains to find instances of such price cutting which were sufficiently severe to result in a permanent and material reduction of the manufacturers' volume of business, but without discovering any instances in which it could be satisfactorily shown that decreased volume was primarily due to dealer price cut

---

169. Nelson and Keim, Price Behavior and Business Policy 368 *et seq.* (TNEC Monograph 1, 1940).

170. *Hearings on H. R. 11,* 265 (1926). Macy's today has over 1400 of its own branded products. *The Not-So-Fair-Trade Laws,* Fortune 166 (Jan. 1949). See Nourse, *op. cit. supra* note 167, at 250.

171. *Hearings on H. R. 11,* 290 (1926).

172. *Id.* at 271; *Hearings on H. R. 1611,* 188 (1937) (Palmolive soap the same price but half the size).

173. *Hearings on H. R. 11,* 39 (1926).

174. *Id.* at 250.

ting." [175] In all the hearings examined only two manufacturers ever reported that they themselves had been hurt by price cutting.[176] All other testimony must be regarded as hearsay.

With this final statement on the rebuttal of the formal case for resale price maintenance, it is best to turn to more fruitful fields of investigation. It should be clear that these claims and counterclaims have not been entirely of a statistical character. Much work remains to be done, particularly in publicizing the facts. But even this would not be sufficient, because, as we shall now see, the character of the movement has so changed that the whole debate has been rendered theoretical.

Fair Trade and a Competitive Economy

Several articles have been written in recent years pointing out or deploring the withdrawal from a thoroughgoing conception of competition that is embodied in the Miller-Tydings Act. This exception to the Sherman Act represents a reversal of policy; it has been criticized as an unjustified reversal.[177] Prices are the primary regulating material in our economy, and one objective of the antitrust laws was to prevent man-made obstacles to their free formation.[178] Price fixing, reasonable or unreasonable, is unlawful *per se*.[179] If competition must be preserved by regulating laws, a paradox must be evident when a law is passed which allegedly assists in the preservation of competition by eliminating so much price competition at the retail level.[180] This is not the place to defend a competitive economy. We are officially committed to such a business philosophy.[181] But one of the most pernicious effects of the Fair Trade legislative program could be the creation of the belief that the gradual elimination of the harsh realities of the competitive business life was intended in the passage of laws such as these and that there has been an intent to soften the rigors of such a life by a modified form of competition.

The President's Council of Economic Advisers recently spoke of "the

175. FTC Report, Part 2, 4 (1931).

176. *Hearings on H. R. 13568*, 46th Cong., 2d Sess. 586 (1917); *Hearings on H. R. 11*, 39 (1926).

177. Letter of W. A. Ayres, Chairman of the FTC, dated April 14, 1937, to the President. 81 Cong. Rec. 7490 (1937); Loevinger, The Law of Free Enterprise 109, 283 (1949).

178. See Judge Rifkind's remarks in Stenographer's Minutes of United States v. National Lead Co. 3873 (S. D. N. Y. Oct. 2, 1945).

179. United States v. Bausch & Lomb Optical Co., 321 U. S. 707, 720, 64 Sup. Ct. 805, 88 L. Ed. 1024 (1944); United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 223, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940). See Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 Calif. L. Rev. 297, 667 (1940).

180. Note, *"Preservation of Competition" through Federal Antitrust Laws*, 51 Harv. L. Rev. 694, 700 (1938).

181. "It is not for us, however, to pick and choose between competing business and economic theories in applying this law [Sherman Act]. Congress has made that choice. It has declared that the rule of trade and commerce should be competition, not combination." Douglas, J., in United States v. Crescent Amusement Co., 323 U. S. 173, 187, 65 Sup. Ct. 254, 89 L. Ed. 160 (1944).

tendency toward soft competition" and gave as an example the Miller-Tydings Act. The Council then went on to say that "The philosophy of the Sherman Act appears to be yielding to a policy of 'ethical competition' which does not differentiate between the stability of the individual firm and the stability of the total economy." [182] This seems to mean that competition will now be tempered so that nobody need go out of business because of it. The technique used to secure the passage of the Miller-Tydings Act repudiates the thesis that we need not regard this Act as any intentional modification of our traditions. The Act is an aberration, fostered and propelled by a minority pressure group. It will die because of the weakness of its internal structure; but for the good of the body politic and economic, it should be killed, swiftly and definitely.

And now the narrative returns to the point at which it began, to that little band of wilful men—the National Association of Retail Druggists. This Association was founded in 1898. The guiding principle of the organization from that date has been that every retail druggist should get a 33 1/3% markup as a minimum on each item that he sells.[183] This principle was put into action in a program which consisted of agreements with manufacturers and wholesalers to fix prices, maintenance of blacklists of aggressive retail price cutters who refused to maintain the agreed upon prices, boycotts of unwilling manufacturers, and other methods desigued to reach the same results. In 1906 the United States petitioned for equitable relief against such activities in the Circuit Court in Indiana. Exactly one year later complete relief in a very broad and inclusive decree was granted.[184] This judgment has never been vacated.

As pointed out previously, the association supported every effort to get Congress to pass national legislation authorizing resale price maintenance contracts. Its first apparent success on the national level, however, was achieved in the retail codes of the N. R. A. The California acts of 1931 and 1933 were the work of the Northern California Retail Druggists Association, but in 1935 the N. A. R. D. undertook to push Fair Trade laws through the remaining states. The Association first drafted a model statute, which most of the states later adopted. The California statute, which was followed by the states enacting laws in 1935 and 1936, authorizes contracts which hold the line "at the price stipulated by the vendor." The N. A. R. D.'s statute avoids the charge of price-fixing by authorizing contracts which forbid resale "at less than the minimum price stipulated by the seller." [185] It is no mere coincidence that this

182. THIRD ANNUAL REPORT TO THE PRESIDENT BY THE COUNCIL OF ECONOMIC ADVISERS 15 (1948).

183. FTC REPORT 142 (1945).

184. United States v. National Association of Retail Druggists (C. C. Ind. May 9, 1907). The complaint in this case does not appear to be publicly available, but the decree is reprinted in DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, JULY 2, 1890-JANUARY 1, 1918, 115 (1918).

185. The variations in the two types of this statute are discussed in ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 297 (1937). The variations in the statutes of all the states are classified in FTC REPORT 70 *et seq.* (1945).

latter type of contract alone is exempted from the Sherman Act by the Miller-Tydings Act.

The Association adopted the technique that had been so successfully used in California—the "Captain Plan." [186] Under this plan a state would be divided up into districts, in each of which an active and aggressive druggist was elected as captain to keep alive the interest of the other druggists in the progress of the movement. This system, promoted with vigor, had an astounding legislative success. Bills were pushed through state legislatures so quickly that typographical errors in the California statute were embodied in the statutes of seven other states which copied that statute.[187] There were no hearings at all on the bills in Illinois, New Jersey and Pennsylvania. No hearings were held in New York until the bill had already passed the legislature.[188]

Once the state bills had been passed, the next task was to get the manufacturers to "fair trade" their products. The most famous incident in this campaign was the experience of the Pepsodent Company. In 1935 this company, upon advice of counsel, decided to discontinue its resale price maintenance in California.[189] Sales of the company's products thereupon practically ceased. The retail druggists of that state seemed to know what to do with the Pepsodent products. "They put them in the basement. Some were enthusiastic enough to throw them into the ash can." [190] The company quickly capitulated and renegotiated the contracts. It also donated $25,000 to the National Association of Retail Druggists to be used to further the campaign for resale price maintenance. The California druggists then put on a special drive for Pepsodent products, lost ground was recovered for the company, and everybody seems to have been made happy—without any polling of the consumers.[191]

The activities of the Association next were devoted to the passage of national legislation. The bills which eventually became the Miller-Tydings Act were then being considered in Congress. The Journal of the Association gave explicit instructions as to the proper procedure to be followed to ensure passage of these bills through Congress. It was advised that "At least one thousand communications should be placed in the hands of each of these Senators [on the Judiciary Committee] when the call comes from Washington. No threatening statements should be included, but the letter should be written in the strongest possible language. Stress the plight of the small man in business

186. Described in GRETHER, PRICE CONTROL UNDER THE FAIR TRADE LEGISLATION 97 (1939); FTC REPORT 144 (1945).
187. GRETHER, *op. cit. supra* note 186, at 19.
188. FTC REPORT 56 (1945). This fact was pointed out in the hearings on the Miller-Tydings Act. *Hearings on S. 100*, 12 (1937).
189. For the reason that shipments were being made from Chicago and therefore that the Fair Trade contracts were covering goods traveling in interstate commerce, which counsel advised was unlawful. GRETHER, *op. cit. supra* note 186, at 99.
190. FTC REPORT 143 (1945).
191. GRETHER, *op. cit. supra* note 186, at 99-100.

and the fact that he is numerically supreme at the polls."[192] As the campaign developed every loyal member of the Association was urged to write his Congressman every week.[193] And finally, when the bill had passed through Congress, another call came: "I earnestly urge you to deluge the President with telegrams, urging that he sign the bill at once and make it a law."[194]

The Congress had had warning that this was a pressure group movement, both in the hearings,[195] and in the report from the House committee. Congressman Celler had filed a separate report on the bill in which he had warned against the combination of the people who were supporting this bill in order to secure higher prices.[196] In fact, Congressman Celler at the hearings had told about the N. A. R. D.'s goal of a 33 1/3% markup, but Senator Tydings had rejected the notion of such a retailers' combination.[197]

But our latter-day Cassandra, Congressman Celler, was ignored, and the bill was passed. The Association then settled down to making it effective. Two years later an unsuccessful attempt was made to secure a Fair Trade law for the District of Columbia. But as *Fortune* recently said, Congressmen have no interest in higher prices for the District.[198] The hearings on that bill, however, told of boycotts against reluctant manufacturers and against newspapers that expressed disapproval of the Fair Trade movement.[199] These activities continued, and two years later an imaginative law review editor wrote of collective bargaining by retailers to secure their desired markups.[200] This writer pointed out that these combinations of retailers were horizontal agreements which had not been exempted from the operation of the Sherman Act by the Miller-Tydings Act. However, it was not until early in 1942 that the Justice Department moved against the N. A. R. D. to restrain its bludgeoning activities. In the space of one year three criminal actions were begun under similar indictments. The defendants in these actions included the National Association of Retail Druggists,[201] various state pharmaceutical associations,[202] and the National Wholesale Druggists Association.[203]

The indictment against the retail druggists charged a violation of Section

---

192. Cited in TNEC Hearings, Part 8, 3368, 3461 (1939).
193. *Id.* at 3368, 3462.
194. *Id.* at 3463.
195. *Hearings on H. R. 1611*, 118 (1937); *Hearings on S. 100*, 22 (1937).
196. H. R. Rep. No. 382, 75th Cong., 1st Sess., 5 *et seq.* (1937).
197. *Hearings on S. 100*, 5-6 (1937).
198. *The Not-So-Fair-Trade Laws*, Fortune 70 (Jan. 1949).
199. *Hearings before Subcommittee of the Committee on the District of Columbia of the Senate on H. R. 3838*, 76th Cong., 1st Sess. 7-8 (1939).
200. Note, *Collective Bargaining by Retailers Under the Fair Trade Acts*, 8 U. of Chi. L. Rev. 745 (1941).
201. United States v. National Association of Retail Druggists, No. 683c (Criminal) (N. J., indictment returned Mar. 26, 1942).
202. United States v. New York State Pharmaceutical Association, No. C-114-75 (S. D. N. Y., indictment returned Mar. 4, 1943).
203. United States v. National Wholesale Druggists Association, No. 618c (Criminal) (N. J., indictment returned Feb. 6, 1942).

1 of the Sherman Act by the formation of a combination and conspiracy to raise, fix and maintain the retailers' margin of profit on drugstore items by first fixing the price among themselves and then, according to the second count of the indictment, "persuading, inducing, and compelling producers to enter into and maintain agreements fixing prices." The means used upon these producers were the urging of specific wholesale prices, persuasively expressing disapproval of such sales devices as combination deals, boycotting noncomplying producers, disciplining retailers who although members of the Association did not actively promote these policies, and pressing producers to sue or threaten to sue retailers who violated the Fair Trade acts. The Captain Plan was mentioned as a method used to effectively organize the individual retailers to carry out these policies. These drug associations pleaded *nolo contendere* [204] and were punished by fines.[205]

This brief survey of the activities of one aggressive retail association was designed to show the pressure group character of the Fair Trade laws.[206] The evidence was clear by 1937 that retailers were pressuring these laws.[207] That is why, in retrospect, Justice Sutherland's opinion in the *Old Dearborn* case seems like "reminiscing about resale price maintenance when it was young, fresh, and fair." [208] Further, because this is a pressure group operation, because the hearings on these laws in the states have been so scanty, and because accurate information concerning the operation of these laws has been both meagre and difficult to get, it can hardly be claimed that this whole program represents a considered exemption to our basic philosophy of a competitive economy.

It is because no modification of our attitude towards competition has been contemplated that a powerful feeling is growing against resale price mainte-

---

204. Equivalent to a plea of guilty. See Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications,* 51 YALE L. J. 1255 (1942).

205. In the N. A. R. D. case, the charges against the individuals were dismissed, and the defendant associations were fined a total of $15,250 (Jan. 29, 1947). In the case against the New York Association, charges against the individuals were dismissed, and the corporate defendants were fined a total of $17,500 (Jan. 28, 1947).

206. Lest it be thought that the movement has slackened in its force, the story of *Fortune Magazine's* tiff should be told. In the January, 1949, issue, the editors undertook an examination of the Fair Trade movement and came to an unfavorable conclusion. The article declared that: "The United States is not yet committed to the idea that all members of a competitive economy must be legally safeguarded against all the hazards of competitions." *The Not-So-Fair-Trade Laws,* FORTUNE, 70, 166 (Jan. 1949). The flood of invective, personal abuse and general criticism that was directed at the editors following the publication of the article caused the editors to re-examine—and reaffirm—their position. *The "Fair" Trade Controversy,* FORTUNE 75 (April, 1949).

207. LYNCH, THE CONCENTRATION OF ECONOMIC POWER 149 (1946) seems to dispute this. See also Grether, *Solidarity in the Distributive Trades in Relation to the Control of Price Competition,* 4 LAW & CONTEMP. PROB. 375, 384 n. 14 (1937).

208. Schulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels,* 49 YALE L. J. 607, 615 (1940). The retailers enlisted "the support for this purpose of an irrelevant and even misleading, though nevertheless powerful and effective, theory." *Id.* at 616. Justice Sutherland's opinion "is to a considerable degree divorced from the economic realities." Note, *Compulsory Resale Price Maintenance in Liquor: A New York Experiment in Controlled Competition,* 57 YALE L. J. 459, 470 n. 45 (1948).

nance. When the T. N. E. C. asked Thurman Arnold, then Assistant Attorney General in charge of the Antitrust Division, for recommendations as to legislation required to make the antitrust laws more effective, the second item on his list was a recommendation for the repeal of the Miller-Tydings Act.[209] He claimed that the Act had become a cloak for conspiracies in restraint of trade that could not be considered within its scope. This appears to be the main basis for the Federal Trade Commission's disapproval of resale price maintenance.[210]

In addition to the horizontal combinations at the retail level so as to unite retailers against manufacturers to ensure adequate price margins,[211] the whole program conduces toward horizontal combinations at the manufacturer level to make uniform the prices of competing brands before they are fixed by Fair Trade contracts.[212]

Another approach to avoiding combinations in restraint of trade is to be on guard that no little oases exit within our price structure that are not subject to price competition.[213] When the T. N. E. C. recommended the repeal of the Miller-Tydings Act [214] it specifically objected to the effect of the Act in introducing rigidities into the pricing of certain goods. Singling out of trademarked goods for this doubtful blessing has been objected to [215] now that it is clear that the protection of the manufacturers' goodwill is "an elaborate fiction" [216] urged in defense of the Act. But the main objection is not to the piecemeal approach of the movement hut to the presence of any fixed element within our economy.[217] The recent experience of Great Britain presents an example of the strangling effect of politically fixed costs and the enormous difficulty to be encountered in changing them. If the resale price maintenance movement is to be regarded, at present, as a political problem, and we have rejected the idea that it represents a considered innovation to our economic

---

209. TNEC Final Report 121 (1941).

210. FTC Report lxiv (1945).

211. In United States v. Frankfort Distilleries, Inc., 324 U. S. 293, 65 Sup. Ct. 661, 89 L. Ed. 951 (1945), retailers and wholesalers combined to force producers into making fair trade contracts which established artificially high and non-competitive markups. A boycott was arranged in case of non-compliance. This was held an illegal arrangement.

212. See memorandum of Corwin Edwards, TNEC Final Report 248 (1941).

213. Among the effects of a non-competitive price structure are (1) the consumer is priced out of the market or is forced to pay higher prices, (2) there is a waste of resources represented by the encouragement of an excessive number of outlets, and (3) competition in advertising is stimulated, and this adds further to costs. Note, *Compulsory Resale Price Maintenance in Liquor: A New York Experiment in Controlled Competition*, 57 Yale L. J. 459, 471-72 (1948).

214. TNEC Final Report 33 (1941).

215. Loevinger, The Law of Free Enterprise 283 (1949). There is a strong position that the monopoly elements of a patent and a trademark are the same. Chamberlin, The Theory of Monopolistic Competition 56 *et seq.* (1938). Why then permit for a trademark what is denied to a patent? Another unreasonable classification is the protection of distributors from price competition and not the manufacturers. Edwards, Maintaining Competition 73 (1949).

216. Corwin Edwards in TNEC Final Report 244 (1941).

217. Price rigidities may, under special circumstances, be introduced to combat inflation. See Taft, *Basic Concepts of Price Control and the Sherman Antitrust Act*, 11 Geo. Wash. L. Rev. 191 (1943).

philosophy, then political courage must be fostered and this one problem, at least, removed.

As a conclusion, some wise remarks seem appropriate. They were written in 1916 by Professor Taussig of Harvard University:

> "The case in favor of resale price maintenance is not made out. There is no public gain from giving an article an outward appearance of special merit. There is still less a public gain from compelling retail dealings to be conducted in the good old way and at the good old expense. . . . Let the retailer sell as he sees fit, and continue to trust in the efficacy of competition for cheapening the methods of distribution, and in the good sense of the purchasing public for assuring to them goods of the kind they really want, and at the prices which are really advantageous." [218]

---

218. *Hearing on H. R. 13568,* Part 2, 266-74 (1916). This is believed to be the same as Taussig, *Price Maintenance,* 6 AMER. ECON. REV. 170 (1916), which was not available to the writer.