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Fair Trade and the State Constitutions -- A New Trend

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NOTES

FAIR TRADE AND THE STATE CONSTITUTIONS— A NEW TREND

The proponents of resale price maintenance will mark the years 1955 and 1956 as a period of major setbacks. The past two years have seen the highest courts of eight states[1] invalidate state Fair Trade laws. The rapid development of this trend is surprising in view of the fact that prior to 1949, the constitutionality of such legislation under the state constitutions had been upheld by every state court in which it was attacked, and was widely regarded as a settled proposition.[2]

Much has been written explaining,[3] defending,[4] and condemning[5] the concept of Fair Trade, and no attempt will be made here to reconstruct the numerous discussions concerning the economic wisdom[6] of the institution. However, constitutional decisions are not resolved in a vacuum, apart from social, political, and economic situations. Some notice must, therefore, be taken of the flood of criticism directed at Fair Trade from diverse sources, and of the possibility that the influence of such criticism upon judicial thinking has been even more profound than the recent opinions indicate.

Fair Trade statutes permit contracts between manufacturers of trademarked or branded commodities, and retailers, by which the latter bind themselves not to sell below a certain stipulated price;[7] no one may sell or offer to sell the item below this price, whether or not such person is a party to the contract.[8] The latter feature, the

1. Arkansas, Colorado, Georgia, Louisiana, Nebraska, Oregon, Virginia, Utah. The courts of Florida and Michigan had previously taken similar action.

2. "[I]f 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." Rose, *Resale Price Maintenance,* 3 VAND. L. REV. 24, 37 (1949).

3. See, *e.g.,* WEIGEL, THE FAIR TRADE ACTS (1938).

4. See, *e.g.,* Breighner, *Why Fair Trade Is Fair,* 34 MICH. ST. B.J. 40 (1955).

5. See, *e.g.,* Rose, *supra* note 2.

6. An example of one of the more common criticisms is the following statement: "An effective 'Fair Trade' system, moreover, strikes not only at promotional price cutting, but at all price reductions which pass to the consumer the economies of competitive distribution." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 53 (1955); U.S. CODE CONG. & AD. NEWS 2185-94 (1952).

7. For typical statutory provisions, see CAL. BUS. & PROF. CODE ANN. § 16902 (Deering 1951).

8. "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, 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. CAL. BUS. & PROF. CODE ANN. § 16904 (Deering 1951).

controversial nonsigner provision, is the backbone of resale price maintenance,[9] and is the provision which has occasioned most of the condemnation visited on Fair Trade.

FAILURE OF CONSTITUTIONAL ATTACKS

Early State and Federal Decisions

California passed a Fair Trade Act in 1931 and amended it in 1933 to include a nonsigner provision. By the end of 1936, 14 states had passed such laws. During that year, the Court of Appeals of New York struck down the Fair Trade law of that state in a case involving a nonsigner.[10] However, the New York court soon overruled this case[11] on the authority of the United States Supreme Court's decision in *Old Dearborn Distributors Co. v. Seagram Distillers Corp.*,[12] in which the court disposed of any "due process" and "equal protection" objections against Fair Trade laws arising under the Federal Constitution. The Supreme Courts of California and Illinois also had occasion to pass on the validity of the Fair Trade Acts in 1936. Both courts upheld the acts[13] as a reasonable exercise of the state police power, relying on the broad scope of this power authorized by the Supreme Court in *Nebbia v. New York*.[14] These cases illustrate a refusal to quarrel with economic policies of the legislature.

Acceptance of the Trademark Theory

Along with the Supreme Court in the *Old Dearborn* case, the high courts of Illinois and California placed their stamp of approval on the so-called "trademark" theory. This principle is an attempt to answer the fundamental constitutional objection to the Fair Trade scheme, which stems from the fact that an individual may acquire unconditional title to goods and still be restricted in disposing of them, by the terms of a contract to which he was not a party. No standards are set to govern the price set by the contract, and once made, it binds all others who may acquire goods bearing the trademark. Nor is there any right of appeal to any agency from the price set by the contract.

9. "This 'non-signer' clause is the heart of the statutory scheme. Without it, fair-trade contracts would be practically worthless, since distributors who want to cut prices would never sign a price maintenance contract." Fulda, *Resale Price Maintenance in the United States*, 3 BUS. L. REV. 66 (1956).

10. Doubleday, Doran & Co. v. R. H. Macy & Co., 269 N.Y. 272, 199 N.E. 409 (1936). The court held this measure to be for price fixing, a purpose which the legislature could not accomplish directly or indirectly.

11. Bourjois Sales Corp. v. Dorfman, 273 N.Y. 167, 7 N.E.2d 30 (1937).

12. 299 U.S. 183 (1936).

13. Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P.2d 177 (1936); Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N.E.2d 929 (1936).

14. 291 U.S. 502 (1934). This case torpedoed the theory that the state police power is limited to the protection of the public life, safety, health, and morals, and held that there is no closed class or category of businesses affected with a public interest.

What is it that justifies subjecting a party to the terms of an agreement he never made? It is argued that the goodwill attached to the manufacturer's trademark follows the trademarked goods into the hands of a purchaser. Consequently, even though having no title to the goods themselves, the manufacturer continues to possess a valuable property interest in the trademark, which the legislature, in the exercise of its police power, may reasonably protect from price cutting by appropriate restrictions.[15] Thus, it was said in the *Old Dearborn* case that the restriction "ran with the acquisition and conditioned it."[16] This is the professed purpose of the Fair Trade laws.

The Miller-Tydings Act of 1937[17] was designed to obviate the possibility that state fair trade acts would be invalidated for conflicting with the Sherman Act.[18] Following this permissive legislation by Congress, the number of Fair Trade states climbed to 45.[19]

Influence of the Old Dearborn Case

The *Old Dearborn* case having disposed of objections under the Federal Constitution, the state courts refused to find merit in similar objections under the state constitutions. In *Goldsmith v. Mead Johnson & Co.*[20] the high court of Maryland said, "In construing this article of the Declaration of Rights, the decisions of the Supreme Court on the Fourteenth Amendment are 'practically direct authorities.' "[21] The persistent refusal to re-examine legislative determinations in economic matters, which has characterized the decisions sustaining Fair Trade laws, was illustrated when the validity of the statute was again at issue before the Maryland court in 1956.[22] The contentions were made that economic conditions had changed, and furthermore experience had demonstrated that Fair Trade legislation had not accomplished the intended purpose. These suggestions were met with a refusal to overturn legislative policies in the absence of a showing that they were so clearly unsound economically as to have no reasonable basis to support them.

Maryland was joined by many states, including New Jersey,[23] Wis-

15. This theory has been criticized as a fiction utilized to disguise a policy of relieving retailers from the rigors of price competition. Shulman, *The Fair Trade Acts, and the Law of Restrictive Agreements Affecting Chattels,* 49 YALE L.J. 607 (1940).
16. 299 U.S. at 194.
17. 50 STAT. 693 (1937), 15 U.S.C.A. § 1 (1948).
18. In Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911), the Supreme Court had held that a contract by which a manufacturer fixed the resale price of items which he sold to retailers was in restraint of trade.
19. Missouri, Texas, and Vermont, have not enacted Fair Trade statutes.
20. 176 Md. 682, 7 A.2d 176 (1939).
21. 7 A.2d at 178.
22. Home Utilities Co. v. Revere Copper and Brass, Inc., 122 A.2d 109 (Md. 1956).
23. Lionel Corp. v. Grayson-Robinson Stores, Inc., 15 N.J. 191, 104 A.2d 304 (1954); Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 95 A.2d 391

consin,[24] Connecticut,[25] Delaware,[26] and Massachusetts,[27] in applying Supreme Court decisions interpreting the Federal Constitution to questions involving state constitutions. When the California court reaffirmed its position,[28] the previous independently made decision was bolstered by federal authorities.[29]

In sustaining the validity of the North Carolina act, the supreme court of that state pointed out that restrictions on the use which an individual makes of his property are not uncommon, and found no reason for placing resale price restrictions on a different footing from other types of regulation.[30]

The courts of South Dakota and Washington had occasion to consider the effect of constitutional anti-monopoly clauses upon resale price maintenance. Both courts held that Fair Trade acts did not produce a restraint on competition sufficient to constitute a violation of these provisions.[31]

Other courts[32] joined the ranks of those refusing to strike Fair Trade, with the Supreme Court of Tennessee, in effect, denying the existence of constitutional problems in this field.[33]

Criticism of Fair Trade

The unanimity of the courts during this period did not, of course, reflect the state of opinion elsewhere. Among legal writers, economists, businessmen, political figures, newspaper editors and the public at large, resale price maintenance had vigorous critics. The restriction of competition at the level of distribution, with the resultant higher prices to consumers, the difficulty of equitable enforcement, and the

(1953); Johnson & Johnson v. Weissbard, 121 N.J. Eq. 585, 191 Atl. 873 (Ct. Err. & App. 1937).

24. Bulova Watch Co. v. Anderson, 270 Wis. 21, 70 N.W.2d 243 (1955); Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N.W. 426 (1937).

25. Burroughs Wellcome & Co. v. Johnson W. Perfume Co., 128 Conn. 596, 24 A.2d 841 (1942).

26. General Electric Co. v. Klein, 106 A.2d 206 (Del. 1954).

27. General Electric Co. v. Kimball Jewelers, Inc., 132 N.E.2d 652 (Mass. 1956).

28. See note 13 *supra*.

29. Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores, 45 Cal. 2d 881, 291 P.2d 936 (1955).

30. Ely Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939).

31. Miles Laboratories, Inc., v. Owl Drug Co., 67 S.D. 523, 295 N.W. 292 (1940); Sears v. Western Thrift Stores, Inc., 10 Wash. 2d 372, 116 P.2d 756 (1941).

32. W.A. Schaeffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950); Burche Co. v. General Electric Co., 382 Pa. 370, 115 A.2d 361 (1955). The New York court has repeated its holding in Bourjois Sales Corp. v. Dorfman, 273 N.Y. 167, 7 N.E.2d 30 (1937) in: General Electric Co. v. Masters, Inc., 307 N.Y. 229, 120 N.E.2d 802 (1954); Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950); Calamia v. Goldsmith Bros., 299 N.Y. 636, 87 N.E.2d 50 (1949); Guerlin, Inc. v. F.W. Woolworth Co., 297 N.Y. 101, 22 N.E.2d 253 (1939); Port Chester Wine & Liquor Shop v. Miller Bros. Fruiterers, Inc., 281 N.Y. 101, 22 N.E.2d 253 (1939).

33. Frankfort Distillers Corp. v. Liberto, 190 Tenn. 478, 230 S.W.2d 971 (1950).

interference with the individual retailer's freedom of action were among the weaknesses cited by the opponents of the measure.[34]

A committee of economists, law professors, and attorneys, formed by the Attorney General in 1953 for the purpose of studying the anti-trust laws, advocated the repeal of "Fair Trade" legislation.[35] While admitting the necessity for protecting legitimate commercial aims, the committee did not consider "Fair Trade" a proper means of protecting these interests. It was criticized as restrictive of competition, unfavorable to the consumer, and at war with the basic philosophy of the anti-trust laws.

The influence of the Federal Trade Commission, the Justice Department, and various business, consumer, farm and labor organizations[36] could not indefinitely fail to be reflected in the attitudes of the courts. The United States Supreme Court, in the 1951 case of *Schwegmann Bros. v. Calvert Distillers Corp.*,[37] held that the Miller-Tidings Act did not exempt the nonsigner provisions of state laws from the operation of the Sherman Act.[38] The Court did not hold Fair Trade acts unconstitutional and, in fact, it declined to do so after Congress, by passing the McGuire Act,[39] authorized nonsigner clauses. However, the refusal to favor the "Fair Trade" concept by a broader construction of the Miller-Tydings Act seems indicative of some permeation of judicial consciousness by the repeated criticisms of the scheme which emanated from so many and such widely respected quarters.

Recent Success of Constitutional Attacks

The first clear defeat of Fair Trade legislation had occurred earlier in Florida, where in 1949 that state's Fair Trade law was held repugnant to the state constitution. In the case of *Liquor Store, Inc. v. Continental Distilling Corp.*,[40] the court found that the general wel-

34. Rose, *Resale Price Maintenance*, 3 VAND. L. REV. 24 (1949).
35. See note 6 *supra*.
36. For a list of some proponents and opponents of Fair Trade, see U.S. CODE CONG. & AD. NEWS 2184 (1952).
37. 341 U.S. 384 (1951). For a discussion of this case, see Rahl, *Resale Price Maintenance, State Action, and the Anti-trust Laws*, 46 ILL. L. REV. 349 (1951).
38. After the *Schwegmann* decision and before passage of the McGuire Act, the Supreme Court of Minnesota held the nonsigner provisions of the Minnesota law invalid as beyond the authority given the states by the Miller-Tydings Act. Calvert Distillers Corp. v. Sachs, 234 Minn. 303, 48 N.W.2d 531 (1951). After the passage of the McGuire Act, the state attorney general ruled that the nonsigner provisions of the state act were still in force. Opinion of the Attorney General of the State of Minnesota, December 10, 1952, 1952-53 Trade Cas. ¶ 67,391.
39. 66 STAT. 632 (1952), 15 U.S.C.A. § 45 (Supp. 1956). This act was held not to violate the Federal Constitution in Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 205 F.2d 788 (1953), *cert. denied*, 346 U.S. 856 (1953). The McGuire Act seems safe from attack in the United States Supreme Court. Note, 16 U. PITT. L. REV. 50 (1954).
40. 40 So. 2d 371 (Fla. 1949). Ten years earlier, the court had struck the nonsigner provisions of the act because of a technical defect in the title.

fare would not be served by upholding such an exercise of the state's police power. It was held that the legislature had delegated sovereign power to private parties for a private purpose. The Florida legislature, in the hope of convincing the judicial branch that a reasonable basis existed for this type of regulatory act, amended the statute so as to incorporate findings of fact to justify its passage. Subsequently, the court affirmed, in a brief opinion, the action of a trial court which had looked behind these findings of fact and found them wanting.[41]

Further condemnation was heaped upon the scheme in the 1954 case of *Miles Laboratories, Inc. v. Eckerd.*[42] Provision for some administrative supervision by the attorney general,[43] which had been written into the Act in 1953, was found to be a meager remedy for the absence of a yard stick standard to control an inherent limitation of property rights.

Instead of discussing the statute with a view to the requirement of particular portions of the state constitution, the court approached the problem in these cases by inquiring into the extent of the police power of the state. The absence of standards to control the operation of the system and the fact that the welfare being protected was limited rather than general, resulted in a declaration that the statute went beyond the limits of this police power. This approach seems to deal in very broad and somewhat vague constitutional principles, permitting more freedom for the application of judicial policy.

The Florida decisions started a trend which Michigan joined in 1952, and which recently has progressed so rapidly that the courts of ten states have now invalidated Fair Trade statutes.[44]

Use of the Due Process Concepts

"Due process" was the constitutional implement utilized by the high courts of Michigan,[45] Georgia,[46] Arkansas,[47] Nebraska,[48] and

Bristol-Myers Co. v. Webb's Cut Rate Drug Co., 137 Fla. 508, 188 So. 91 (1939). However, after the correction of this defect, the law had been upheld in Scarborough v. Webb's Cut Rate Drug Co., 150 Fla. 845, 8 So. 2d 913 (1942). This case could not be regarded as a clear approval of Fair Trade, although the holding was practically supported by reference to the *Old Dearborn* case, because it involved the liquor industry and emphasis was laid on special regulatory power over this type of business.

41. Seagram-Distillers Corp. v. Ben Greene, Inc., 54 So. 2d 235 (Fla. 1951).

42. 73 So. 2d 680 (Fla. 1954).

43. The attorney general was authorized to bring an action to restrain the performance or enforcement of any contract if it seemed to prevent competition between similar commodities. *Id.* at 682.

44. See note 1 *supra.*

45. Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952).

46. Cox v. General Electric Co., 211 Ga. 286, 85 S.E.2d 514 (1955).

47. Union Carbide & Carbon Corp. v. White River Distributors, Inc., 224 Ark. 558, 275 S.W.2d 455 (1955).

48. McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955).

Colorado[49] to invalidate their Fair Trade Legislation.

The controlling question, in the judgment of the Michigan court, was whether reducing prices brings evils on the public health, safety, morals, or general welfare. The court found no reasonable relation between the protection of these interests and the purpose of the statute. The proposition that the legislature may protect the manufacturer's trademark rights, which was accepted by the United States Supreme Court in the *Old Dearborn* case, and by numerous state courts, was not directly contradicted in the Michigan opinion. The court preferred to find that there had been no violation of the plaintiff's trademark rights by a sale below the Fair Trade price. Support for the holding was drawn from the *Liquor Store* decision of the Florida court, and from a previous Michigan case[50] holding that a statute forbidding the giving of premiums with the sale of gasoline accomplished a denial of due process of law.

In a 1953 case, which held the Georgia Fair Trade Act void *ab initio* because it had conflicted with the Sherman Act at the time of its passage (and had not been validated by repassage after Congress removed the conflict), the Georgia Supreme Court raised by way of dictum due process objections to the statute.[51] After repassage of the act, the dictum matured into a square holding in 1955 that the statute violated the due process clause of the Georgia Constitution.[52]

The court utilized a prior holding,[53] that a State Milk Control Board could not be given authority to fix the selling price of milk, as a springboard for its approach to the problem. The legislature was held to lack power to fix prices or to authorize others to do so except concerning certain property affected with a public interest. Apparently, the Georgia court was unready to accept the *Nebbia* doctrine of a broadened police power not confined to regulation of limited types of activities having a unique relation to the public welfare.[54]

A Fair Trade Act also fell before the due process clause of the Arkansas Constitution. In the case of *Union Carbide & Carbon Corp. v. White River Distributors, Inc.*[55] the act was found to have failed to meet due process requirements because it could not be characterized as benefitting the general welfare and therefore was not a reasonable exercise of the state police power.

The court described the "pivotal issue" as whether or not there had been an abuse of the police power, which seemed to broaden the

49. Olin Mathieson Chemical Corp. v. Francis, 301 P.2d 139 (Colo. 1950).
50. People v. Victor, 287 Mich. 506, 283 N.W. 666 (1939).
51. Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 209 Ga. 613, 75 S.E.2d 161 (1953).
52. See note 46 *supra*.
53. Harris v. Duncan, 208 Ga. 561, 67 S.E.2d 692 (1951).
54. See note 14 *supra*.
55. See note 47 *supra*.

inquiry into the due process question, rather than narrow its scope and reduce the controversy to more specific matters.

In addition to the due process grounds previously employed by other state courts, the Supreme Court of Nebraska declared Fair Trade Acts unconstitutional in that state because it was found to grant special privileges and immunities to certain persons and withhold these rights from others.[56]

The grant of power to individuals to fix and enforce the prices of merchandise, without the imposition of any standards (previously criticized by the Florida court), was found in this case to be particularly obnoxious to the concept of due process of law.

The Supreme Court of Colorado, in finding that Fair Trade Laws failed to meet due process requirements of the state constitution,[57] emphasized the importance of the property rights which were being compromised without due process of law. The right to deal with property to which an individual has received unconditional title, and to contract freely with respect to such goods, was held to be beyond the reach of the police power in such a situation as this. The court went further, and stated that "Fair Trade" tends to promote monopoly and stifle trade,[58] thus contradicting the obvious legislative factual determinations motivating the passage of the statute. This portion of the opinion seems to reveal a hostility to "Fair Trade" based on a feeling of its economic unsoundness, which may well reflect the influence of the general criticism previously noted.

Unlawful Delegation of Legislative Power

In the case of *General Electric Co. v. Wahle*,[59] the Oregon Fair Trade Statute was struck down as an unnecessary and unreasonable interference with contract and property rights, and a delegation of legislative power to private persons in specific violation of the Oregon Constitution.[60] The Oregon court showed its uneasiness in regard to the unrestrained power given to manufacturers of trademarked items in the following terms: "Under the Fair Trade Act authority is delegated to the owner of a trademarked commodity to determine whether the provisions of the law shall be put into effect and operation as to such commodity. . . . By his own act in entering into a contract with a single retailer, the trademark owner may fix the price for all retailers.

56. See note 48 *supra*.
57. See note 49 *supra*.
58. "The contract in the instant case . . . if enforced . . . inevitably will result in monopoly." Olin Mathieson Chemical Corp. v. Francis, 301 P.2d 139, 147 (Colo. 1950).
59. 296 P.2d 635 (Ore. 1956).
60. "[N]or shall any law be passed, the taking effect of which shall be made to depend on any authority, except as provided in this Constitution . . . ." ORE. CONST. art. 1, § 21 (1859).

Without regard to the interests or welfare of the nonsigners, and without their consent, he may change the price at will . . . ."[61] The Louisiana Supreme Court recently invalidated resale price maintenance on similar grounds.[62]

Repeal by Implication

Fair Trade received a setback in Virginia, but not because of a conflict with the state constitution. The legislature had re-enacted that state's Anti-monopoly Act in 1950, and it defined a monopoly as a combination of acts by two or more persons ". . . (5) to make . . . or carry out contracts . . . or agreements of any kind or description by which they: (a) bind . . . themselves not to sell . . . any commodity . . . below a . . . fixed value . . . ."[63] The re-enactment of this statute was held by the Virginia Supreme Court to have repealed the state Fair Trade Act,[64] because of the irreconcilable conflict between the two.[65]

Constitutional Anti-monopoly Clause

The Constitution of Utah, which forbids "any combination . . . having for its object or effect the controlling of the price . . . of any article or manufacture or commerce . . . ." provided the supreme court of that state with a firm basis for striking down resale price maintenance.[66]

Conclusion

Although some recent cases[67] have upheld Fair Trade Laws, the birth and growth of a trend in the opposite direction has been almost sensational. As late as 1949, the numerous state courts which had passed on the constitutionality of these statutes chose to stand in the long shadow of the Supreme Court's *Old Dearborn* decision. Now that the courts of nine states have invalidated Fair Trade Acts and one found a repeal by implication, it seems safe to predict that the constitutional issue will soon be brought before the courts of the seventeen odd states[68] who have not yet decided it.[69] Then too, a reversal by some of those seventeen courts which have sustained the scheme is not impossible.

61. 296 P.2d at 648.
62. Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 90 So. 2d 343 (La. 1956).
63. Va. Code Ann. § 59-20 (1950).
64. Benrus Watch Co. v. Kirsch, 198 Va. 94, 92 S.E.2d 384 (1956).
65. For a discussion of implied repeals, see Sutherland, Statutory Construction §§ 2011-12 (1943).
66. General Electric Co. v. Thrifty Sales, Inc., 5 Utah 326, 301 P.2d 741 (1956).
67. General Electric Co. v. Klein, 106 A.2d 206 (Del. 1954). See also note 22 *supra*.
68. Alabama, Arizona, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Montana, Nevada. New Hampshire, North Dakota, Oklahoma, Rhode Island, South Carolina, West Virginia, and Wyoming.
69. Trial court decisions in three of these states have recently held resale price maintenance laws violative of state constitutions. Bargain Barn, Inc. v. Arvin, 1955 Trade Cas. ¶ 68,074 (Ind. Super. Ct. 1955); General Electric Co. v. American Buyers Cooperative, Inc., CCH Trade Reg. Rep. (1956 Trade

The most basic difference between the cases which invalidate Fair Trade Acts and those which do not, arises from differing views as to the relative functions of court and legislature where economic matters are concerned. The "hands off" approach, followed by the United States Supreme Court since 1937,[70] resulted in the unanimous approval of Fair Trade Legislation by the state courts until 1949. This position was the culmination of a long history of judicial interference with legislative attempts to deal with pressing economic problems.[71]

A hasty retreat[72] from the practice of second guessing the legislative branch, soon led to the point where the Supreme Court was reluctant to question state and federal regulation of business affairs. A few state courts did refuse to follow this trend in regard to price fixing statutes.[73] However, the pre-1949 history of the Fair Trade acts demonstrated the safety of economic regulatory measures from constitutional attack at that time.

The New Willingness To Look Behind Economic Measures

The disappearance of the depression-born pressure on the courts to refrain from tampering with regulatory laws has occasioned a willingness to subject measures such as resale price maintenance to more thorough scrutiny. Unfortunately, in many cases, the standards used to decide constitutionality have been very indefinite. While constitutional standards are necessarily of a general nature, it is difficult to see how a discussion of the extent of the state "police power" would be helpful for any purpose other than to disguise a pure policy decision.

A realistic approach to the problem must recognize the existence of valid conflicting interests. Evaluating a regulatory statute by weighing the harm to be remedied against the harm incidental to the remedy itself[74] seems to be a practical way to deal with the problem. In the Fair Trade situation, this would preclude a holding that the evil accompanying the nonsigner provisions render them arbitrary and unreasonable in and of themselves. Such a finding could be made however, after a consideration of the evil to be remedied.

Cas.) ¶ 68,341 (Ky. Cir. Ct. 1956); Rogers-Kent, Inc. v. Westinghouse Electric Corp., 1955 Trade Cas. ¶ 68,084 (S.C. County Ct. 1955).

70. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

71. "By giving broad scope to these vague expressions of the Fourteenth Amendment, the judiciary seized the power to nullify legislative enactments because the judges found them vicious or silly." *Ibid.* See also CONSTITUTION ANNOTATED 974-80 (Corwin ed. 1952).

72. Paulsen, *supra* note 70, at 94.

73. *Id.* at 95.

74. "And the guaranty of due process . . . demands . . . that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid . . . in given circumstances, may be invalid . . . under other circumstances . . . ." Nebbia v. New York, 291 U.S. 502, 525 (1934).