THE DEVELOPMENT OF FAIR TRADE

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CHAPTER I

INTRODUCTION

Definition

Fair trade is a form of resale price maintenance achieved through contracts. The extent and applicability of such contracts is authorized through state and federal legislation.¹ Resale price maintenance² has to do with vertical relationships formed between producers and their distributors, particularly the retail dealers. Usually, fair trade practices are used in connection with the sale of highly advertised products.

In practice, fair trade deals through the separate levels of the production function in its price control effort. The system does not unite retailers who are in competition with each other, but the method originates with the manufacturer or the wholesaler. Fair trade is often defined as "vertical" as distinct from "horizontal" price fixing.


²For the author's purpose, the term "resale price maintenance" will refer to fair trade in the body of this paper.
Vertical price fixing controls are agreements between producers and wholesalers, between producers and retailers, or between wholesalers and retailers. Horizontal price fixing agreements are contracts between producers themselves, between wholesalers themselves.  

The distinction between vertical and horizontal price fixing determines the constitutionality of fair trade practices. All federal and state statutes include specific provisions prohibiting horizontal price agreements. Fair trade's base is that of vertical price fixing. This seemingly prevents rather than causes monopolization of trade by eliminating certain predatory trade practices at the retail level.

In addition to a signed agreement between a manufacturer and a retailer, the fair trade system contains a nonsigner provision. This nonsigner clause has become the basis for the whole fair trade plan. It is an indirect manner through which resale prices are established by the manufacturer or wholesaler. The nonsigner provision operates through a notification by the manufacturer or distributor that certain terms, including stipulated or minimum prices, have been settled upon with one retailer. Through such notification, state fair trade laws recognize that the manufacturer or distributor may enforce prices on retailers. The manufacturer may enforce the law even if a

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retailer has refused to agree to his contract with another retailer or not. It is obvious that, without this nonsigner provision, fair trade legislation would be worthless. Without this provision, retailers who want to cut prices would never sign a price maintenance contract and resale price maintenance would not be possible.4

Background

Resale price maintenance has been used in some countries and in certain trades for about a hundred years. The adoption of the system grew with the increase of industrialization and the branding of goods.

Fair trade laws have been enacted in forty-six states of the United States at various times. The laws are rooted in a long controversial history that began in the 1880's. This confusion has continued down to the present day. The system of fair trade laws became a widespread practice in the United States after the California Fair Trade Law was passed in 1931. The fair trade system had its greatest following in 1937. Since the birth of the system, fair trade laws have met with problems throughout their troubled history.

The Sherman Antitrust Act of 1890 placed early resale price maintenance in an unclear position. With the growth of chain stores in the 1920's, local retail merchants encouraged state laws to prevent price cutting of nationally advertised branded merchandise. Many states have declared all or part of the fair trade laws as unconstitutional. The Federal Courts have reversed opinion on the matter at different times. For example, the Miller-Tydings Act of 1937 exempted from the Sherman Act state-sanctioned contracts fixing resale prices. However, in 1951, the U. S. Supreme Court held that the Miller-Tydings Act could not bind merchants who had not signed such contracts. The McGuire Act of 1952 closed the loophole, and Congress re-established the nonsigners clause. Recently, some states have declared all or part of the fair trade law unconstitutional. Federal and state antitrust statutes have crossed opinion after opinion. Further, there is an atmosphere of confusion surrounding the present and future status of resale price maintenance.

In addition to the fair trade system in the United States, similar systems are found in the more highly industrialized countries. Such countries have been found mainly in Western Europe since World War II--Sweden,
Denmark, United Kingdom, Ireland—with the exception of Canada. However, by 1957 most of the countries enforced a general ban on resale price maintenance of all kinds and on suggested collective resale prices.

Controversy Around Fair Trade

The motive for adopting resale price maintenance in the United States was a declared desire to protect the small retailers from predatory competitors. The legal framework of resale price maintenance has been in the protection of


6In Sweden, 1948, it was found that an average of twenty-five to twenty-eight percent of consumer goods were under resale price maintenance agreements. The system was banned by 1956. The United Kingdom in 1938 had about thirty percent of consumer goods in resale price maintenance agreements. The Board of Trade said that by 1951 this estimate had gone up rather than down. Twelve per cent of the consumer goods in Germany were articles under resale price maintenance contracts. Because of the occupation by American and British forces, the resale price system was closely related to the American method. The German government declared the system to be illegal in 1953. In 1952 about ten per cent of the consumer goods were resale price maintenance goods in France. However, France banned the practice in 1953. In Canada, resale price maintenance contracts were very significant but no statistics were made available. Canada made resale price maintenance contracts illegal. Soren Gammelgaard, Resale Price Maintenance (Paris: The European Productivity Agency of the Organization for European Economic Co-operation, 1958), pp. 19-34. However, since the publication of this source, the Resale Price Act was passed in England in 1964. The passage of this act was due to the efforts of Edward Heath, President of the Board of Trade in England. It ended resale price maintenance in England.

the manufacturers' products which are resold. Similar reasons for protecting the manufacturer's interests caused resale price maintenance to be established in countries throughout the world.

Even with the widespread uses of resale price maintenance, the world has criticized the system greatly. While the critics of fair trade have been loud and clear, there have also been defenders of the system. Some examples of this division of thought will be given. The different statements to be given are indicative of the complexity of the issues. Saul Stone, an attorney for the nationally known opponent of fair trade, Mr. J. T. Schwegmann of Schwegmann Brothers, said, "Fair trade protects the inefficient retailer . . . it will die under its own weight." Lewis Berstrin, legal representative for the fair-trade-minded jewel industry, believed that "every manufacturer has the right to set his own prices at the level he chooses." George Chapman of the Sunbeam Corporation said, "Fair trade embodies the Ten Commandments and the Sermon on the Mount." William Somon of the American Bar Association stated, "There's nothing fair about fair trade, it's like a Russian peace proposal."

9Ibid.
10Ibid.
11Ibid.
The subject of resale price maintenance raised a great controversy within the business community and the general public.

Many hold the principle of resale price maintenance to be un-American, a denial of due process, and a profit by the elimination of price competition. Conversely, a large body of opinion holds that fair trade confers on certain manufacturers a basic form of property protection and in so doing shields thousands upon thousands of small retailers and wholesalers from predatory price cutting, this contributing significantly to the preservation of our free enterprise economy.\(^\text{12}\)

Basically, the proponents of fair trade believe that fair trade is consistent with competitive principles. They argue that fair trade prices are fair prices, and the system does not lead to excessive mark-ups. Proponents feel that the producer of branded merchandise must be protected under fair trade practices. Fair traders feel strongly that the practice provides a curb on monopoly; the provisions are fair and democratic. Proponents believe that there is a necessity for the nonsigner provisions of fair trade laws to make fair trade effective and applicable to all retailers. Fair traders believe that fair trade promotes efficiency in retail sales and reduces the cost of distribution.\(^\text{13}\)


However, the Director of the Bureau of Education on Fair Trade stated in 1956 that he knew of very few professional economists in the United States who had emerged as champions of fair trade. The opponents of fair trade feel that it is basically monopolistic in character. Critics say that not the suppression of predatory price cutting but the elimination of price competition on the retail level is the real objective of fair trade. Opponents say that fair trade laws are not a remedy for discriminatory pricing. Essentially, the opponents believe that fair trade means higher prices for the consumers. They say the real purpose of fair trade is to obtain higher retail margins. Critics of fair trade believe that few manufacturers or retailers are seriously injured by predatory price cutting. Opponents of fair trade theorize that the nonsigner provisions are undemocratic, oppressive, unfair, and coercive.

Since resale price maintenance bears directly on retail prices, the use of the system brings criticism in

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periods of inflation. Criticism is significant particularly when government attempts to introduce and implement general price and income policies.16

This mass network of arguments concerning fair trade has caused much discussion, theorizing, and many statistical studies as to the effects of fair trade. The acceptance and rejection of fair trade seems to have come in cyclical movements throughout its confused history.

Statement of Objectives and Limitations

This study does not take into consideration Unfair Trade Laws. Unfair trade practices related to sales-below-cost. Unfair trade is often confused with fair trade. However, problems inherent in Unfair Trade legislation and practices is quite different from those in fair trade.

It is the primary concern of this study to examine the development of Fair Trade and the different interpretations which fair trade laws have had. Also, this study will attempt to estimate future action in the area of fair trade. The economic effects of the system will be examined. There is a close connection between economic effects of resale price maintenance and the legal interpretations of

16Yamey, Resale Price Maintenance, p. 3.
the laws. For example, the courts have failed to extend the power needed for an effective system in some fair trade states. The courts have declared the fair trade law legal but not the nonsigner provision. This study, therefore, closely examines the legal framework upholding the system. Although the writer's understanding of the legal aspects is somewhat limited, an attempt to deal with the legality has been undertaken. It is virtually impossible to interpret the effects of fair trade without viewing court decisions on the subject.

Sources
Sources which have been used range from business periodicals dating back seven years and State Law Journals dating back as far as 1933. Articles from economic journals have also been used. Statistical studies were taken from private and government sources from as far back as thirty-five years ago. General information was obtained from Business Periodicals Index and the Reader's Guide to Periodical Literature. An examination of Senate and House Hearings dating from 1951 to the present also provided a means for several references. Publications of various Fair Trade organizations were read for an understanding of the advocate position. Major sources which best give the nature of the problem lie in the legal framework.
CHAPTER II

DEVELOPMENT OF THE RESALE PRICE MAINTENANCE PLAN

Early Price Policy

Price policy in its early development was closely connected with changes in economic life. The earliest period in which price policy can be found is in feudal society. Business activity in this period was characterized by the principle of *caveat emptor*—let the buyer beware. In this system every individual attempted to gain advantage of his neighbor. Therefore, discriminating multiple prices were used at an early period in history.

Under the *caveat emptor* system many difficulties and abuses arose. As a result of this, there emerged a pricing system known as *justum pretium* or fair price. This system was first applied to the consumer. With the growth of industry and commerce, *justum pretium* led to the policy that the producer was also entitled to charge a price ample to cover his living expense.¹

The theory of pricing developed to the point that a producer was entitled to charge a price sufficient to repay costs and yield a reasonable profit margin. With the economic growth of the world, middle men and merchants also demanded a profit. Prices were then adjusted to yield these profits. Therefore, fair price has had many connotations.\(^2\) Competition has complicated the modern pricing system in many areas. Resale price maintenance is only one of the many complications that has occurred in the pricing system.

The period during the 1890's was receptive to resale price maintenance. During this time the forces of the industrial revolution were coming into being. The years 1880-1890 saw unrest in the retail trades due to the problem of price cutting. As advertising developed and the theories of large selling grew, property merchandise increased to great importance. Several trades began to develop the chain store system which added to the demand for resale price maintenance. Also there was a growing movement of consumer's cooperatives in England. A need, seemingly, was molded for resale price maintenance.\(^3\)


\(^3\)Edward T. Grether, *Resale Price Maintenance in Great Britain* (Berkeley, California, 1939), p. 266.
Rise of Resale Price Maintenance

Perhaps the first price maintenance movement was found in England in 1775. The industry probably first affected was publishing. Book publishers could be considered the first to develop a distinctive product comparable to the trade-marked goods of today. During this period, English retailers were instructed to sell books at a set price. They were directed to destroy the remaining books which did not sell at the established price. James Lackington, an English bookseller, refused to sell at the stipulated prices and thereby defied his associates. Because of one or two booksellers such as Lackington, the industry soon set up an organization whereby fixed prices were recognized and upheld. The organization formed was the Booksellers Association.⁴ This was the first recorded practice of resale price maintenance.

The Booksellers Association in 1852 attempted to control retail book prices. It gained support of the trade regulations of publishers. However, certain prominent members of the trade arose to the defense of the price cutters. Charles Dickens presided over a meeting called to discuss the authority of the Association to control.

retail book prices. Among those present were Professors A. Owen, E. Newman, and Mr. Crabb Robinson. At this meeting letters were read from Thomas Carlyle, John Stuart Mill, W. E. Gladstone and others. The opinions of those present and of the letters read were almost wholly opposed to the activities of the Bookseller's Association. The criticism of the Association rested as being contrary to the principles of free trade.5

A decision on the Bookseller's Association authority was handed down by the Lord Chief Justice Campbell stating that

. . .such regulations seem prima facie to be indefensible, and contrary to the freedom which ought to prevail in commercial transactions. Although the owner of property may put what price he pleases upon it when selling it, the condition that the purchaser, after the property has been transferred to him and he has paid the purchase money, shall not sell it under a certain price, derogates from the rights of ownership, which as a purchaser he has acquired. . .we are reminded of the peculiarity that the publisher names the price at which the book is to be sold to the customer (which may be considered the maximum price), when as the manufacturer in other trades entirely leaves the price to be paid by the customer to be fixed by the retail dealer.6


As a result of Lord Campbell's decision, the Booksellers Association was dissolved. As the years passed, the price cutting problem gained momentum. Since new books were sold at a discount off the published prices, bookdealers were forced to add side lines to their businesses. If they did not add side lines, they often lost their businesses.

Greatly dissatisfied with the situation, Sir Frederick Macmillan of the Macmillan Publishing Company began a campaign to remedy the situation. To depart from the discount system, Macmillan wanted to make a preliminary test of a fixed price for a book. The book which Macmillan decided to use in his experiment was Alfred Marshall's *Principles of Economics*. This book at the time was in preparation for publication by the Macmillan company.\(^7\)

Macmillan explained to Marshall that, because of the present discount system in retail prices, the publishers had to ridiculously raise them. This was done in order to leave plenty of margin after taking off the discount. Macmillan pointed out to Marshall that the present discount system was encouraging a spirit of competition so alive

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that the business was not realizing enough profit for bookdealers to remain in business.\textsuperscript{8}

Macmillan proposed to Marshall that the Macmillan Company allow a discount. This would enable the dealer to make a fair profit only if he sold at the published price. Professor Marshall at Cambridge University agreed to Macmillan's offer. \textit{Principles of Economics} was published in July 1890 on the \textit{net term} basis. After a cool reception by the discount houses, the system began to develop. The Macmillan Company protected the net terms system. It allowed the trade terms only to those bookdealers who signed an agreement not to break prices.\textsuperscript{9}

Soon other publishing companies adopted the net system. By 1895 the Associated Booksellers of Great Britain and Ireland was formed. This association was organized to support the net system of publishing books. The \textit{Principles of Economics}, under this system, sold 37,000 copies in the first thirty years of its existence.\textsuperscript{10}

\begin{flushright}
\textsuperscript{8}Ibid.
\textsuperscript{9}Grether, \textit{Resale Price Maintenance in Great Britain}, p. 267.
\end{flushright}
This history and Alfred Marshall's part in it are particularly significant when one notes that the Proprietary Articles Trade Association in the drug and chemical business became the pattern of other price associations in England and elsewhere. This organization was established on January 29, 1896, five and a half years after the Marshallian experiment.\textsuperscript{11}

The Introduction of Resale Price Maintenance in America

The earliest American cases where resale price maintenance was permitted were the patent cases.\textsuperscript{12} The first Supreme Court decision involving the establishment of minimum resale prices was the Fowle \textit{v.} Park case in 1889. Park and Fowle sold a product labeled "Wistor's Balsam of Wild Cherry". Park and Fowle had entered into a contract to sell at prescribed prices in separate markets. However, Mr. Park sold at lower-than-agreed-on prices. Soon he extended his market into Fowle's area. Fowle brought suit against Park. Park maintained that their agreement of a division of the


market and the prescription of minimum prices was actually an illegal restraint of trade. 13

The Supreme Court decision held that the arrangements made between Park and Fowle were not unreasonable and said:

Public welfare is first considered, and if it be not involved and the restraint upon the one party is not greater than the protection the other requires, the contract may be sustained. The question is whether the contract is unreasonable.

Relating as these contracts did to a compound involving a secret in its preparation; based as they were upon a valuable consideration; and limited as to the space within which, though unlimited as to time for which, the restraint was to operate, we are able to perceive how they could be regarded as so unreasonable as to justify the court in declining to enforce them.

The vendors were entitled to sell to the best advantages and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers; and the purchasers were entitled to such protection as was reasonably necessary for their benefit.

...The policy of the law is to encourage useful discoveries by securing the fruits to those who made them. 14

The first legislation under which resale price maintenance could come under jurisdiction of the United States government was the Sherman Anti-Trust Act. This was passed July 2, 1890. Section One of this Act as originally enacted provided:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared illegal. Every person who shall make such contract shall be deemed guilty of a misdemeanor. shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments.

This was the only legal basis upon which to test the legality of resale price maintenance for a number of years. The next chapter will trace the legal history of resale price maintenance in the United States.

CHAPTER III

LEGAL HISTORY OF RESALE PRICE MAINTENANCE

Period 1892-1929

As mentioned in the preceding chapter, the Sherman Anti-Trust Act was the first legal weapon the United States Government had to control resale price maintenance. Two years after the passage of the Sherman Anti-Trust Act in 1892, the Supreme Court reaffirmed the position taken on resale price maintenance in the Fowle v. Park Case of 1889. In this 1892 case, In re Green, there was a similar set of facts and contracts. This decision was adjudicated following, and in light of, the Sherman Act.

It was not until nine years later that the Supreme Court focused upon other resale price maintenance cases. The new series of cases in the courts involved patented articles.

The cases that came up regarding price maintenance of patented articles were found legal at common law. Because they were licensed situations, they were also unaffected by the newly enacted Sherman Act.

1 52 Fed., 104 (1892).

2 Seligman and Love, Price Cutting and Price Maintenance, p. 44.
One such case involving patented articles was Bement v. National Harrow Company in 1902. The Supreme Court said in regard to the patent laws:

The very objective of these laws is monopoly, and the rule is with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

The Supreme Court said in regard to the holder of a patent:

An owner of a patent has the right to sell it or keep it; to manufacturer the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it. The owner of a patent can change such price as he may choose and may assign it or sell the right to manufacture and sell the article patented under the condition that the assignee shall charge a certain amount for the article.

Therefore, the Supreme Court accepted resale price maintenance as constitutional. However the Court clarified the judgment to licensors in contracts with licensees in producing and distributing patent articles.

However in 1912, complications around the earlier patent decision brought the Standard Sanitary Manufacturing

3 186, U.S. 70 (1902).
4 Ibid.
5 186 U.S. 88 (1902).
Company v. U.S. case to the Supreme Court. The situation was complicated by the license agreements. The manufacturers of enamelled ware agreed to sell at prices settled upon by six members of their committee. A jobber or manufacturer who did not agree or adhere to the set prices would, by the rules set out in the contract, forfeit some rebates which he would otherwise receive. The Court ruled this too much of an attempt to fix prices.

In 1926 the Supreme Court reiterated its ruling of Bement v. Harrow concerning patent arrangements. This was the U.S. v. General Electric case. The Court ruled that the patent holder (General Electric) could stipulate licensee's sales at fixed prices in accord with the licensor's system of distribution. Therefore, the Supreme Court ruled that licensing contracts involving patented articles might legally establish resale prices.

The next area in which resale price maintenance was confronted was the practice of copyrights. The Supreme Court in 1903 rendered two decisions. In these decisions the Court found that the sale of a copyrighted article at less than prices stipulated in notices within the article
was not an infringement of the copyright. These are the only unanimous Supreme Court decisions in which the maintenance of prices has been curtailed. In the other cases where there had been a limitation on the maintenance of prices, there were numerous and loud dissents.

The Supreme Court ruled in one of the copyright cases:

The precise question... is, does the right to vend... secure to the owner of the copyright the right, after the sale of the book to a purchaser, to restrict future sales at retail, to the right to sell it at a certain price per copy, because of a notice in the books that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum.

At about the same time as the copyright cases were being decided upon, ten cases pertaining to merchandise made under secret processes came up for consideration. One of these cases, the J. D. Park v. Hartman case in 1907, is particularly significant to the development of fair trade. This was the first case in which the Supreme Court went on record as declaring resale price maintenance illegal. The analogy between secret processed goods and patented articles was

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8 Seligman and Love, Price Cutting and Price Maintenance, pp. 48-49.
10 153 Fed. 24 (1907).
thrown out. Also the patentee's claim to special privileges was attacked. The Court held that the system of contracts to regulate the sale of Peruna, a product produced under a secret process, was unenforceable. The Court said the sole objectives were the restriction of commerce and the suppression of competition.

The next important case involving a secret process article was Dr. Miles Medical Company v. Park & Sons Company (1911). Dr. Miles Medical Company manufactured medicines under secret formulas. The company attempted to maintain minimum prices on all sales of medicines, both wholesale and retail. This case differed from the earlier Hartman case in that the Miles Medical Company purported to make the wholesale and retail distributors its agents.

In this case Park and Sons Company, a wholesale drug concern, refused to enter into the required sales contract with the plaintiff, Dr. Miles Medical Company. Miles Company charged Park and Sons with obtaining Miles products through persuasion of legitimate dealers to violate their contracts. The Court found the contracts to be a system of interlocking restrictions to control prices. The Court said that the retail agents were not agents but vendors who

\[11\] 220 U.S. 373 (1911).
purchased in order to resell as retail dealers. Justice Hughes, referring to Park v. Hartman, refused to find an analogy between the rights of the owner of a patent and those of an inventor of a secret-process article. The Court said in regard to the right of a manufacturer to regulate prices of products manufactured by him:

... a manufacturer cannot, by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales; ... Even copyright owners, protected by statutory grant, have no such privilege; whatever control a manufacturer might have over his product after his own sales depends not upon an inherent power incident to production and original ownership, but upon agreement; and while the earlier doctrine ... with respect to contracts in restraint of trade has been substantially modified in adoption to modern conditions, public interest remains the first consideration, and restraints are sustained only if found reasonable, both with respect to the public and to the parties, and only if limited to what is fairly necessary for the protection of the covenantee. The Court held that the complainant’s agreements and plan were injurious to public interest. The Court said the main purposes of these agreements were the destruction of competition and the fixing of prices. Thus, the Court voided such agreements. The Court said:

12 220 U.S. (1911).
13 220 U.S. 405-406, (1911).
...where commodities have passed into channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. 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.\textsuperscript{14}

After the Miles decision, the other courses by which a manufacturer could control the price of his product at the various distribution levels were: (1) the establishment of recognized agencies or branches; (2) refusal to sell to price violators; (3) or distribution through only select dealers.\textsuperscript{15}

In 1908 as already stated, the United States Supreme Court ruled that the Copyright Act did not give the copyright owner the right to fix the resale price of the copyrighted article. This was decided in the Bobbs-Merrill Company v. Straus case. A similar question with respect to rights conveyed by patent law was involved in the case of Bauer v. O'Donnell in 1913. In a five to four decision the court extended to patents the rule in Bobbs-Merrill v. Straus on copyrights.\textsuperscript{16}

\textsuperscript{14}220 U.S. 406 (1911).
\textsuperscript{16}229 U.S. 1 (1913).
Because of the Bauer v. O'Donnell decision, resale price agreements regarding patent articles were to be sustained only when in conjunction with a licensing contract. This case also asserted that the patentee was entitled to no privileges regarding resale price maintenance which were not held by the vendor of other merchandise.

The Victor Talking Machine Company in 1917 attempted to fix resale prices in such a way as to by-pass the earlier Court decisions. In the Bauer case the court differentiated between the earlier cases of Bement v. National Harrow and Henry v. Dick. The Court implied that resale price maintenance could still be attained by devised legal means. However, Victor's system was challenged by the Courts in the Straus v. Victor Talking Machine Company case. Victor's plan included a licensing of dealers. The Court said in regard to the licensing system:

There remains for this "License Notice" so far as we can discover, the function only of fixing and maintaining the price of plaintiff's machines to its agents and to the public, and this we cannot doubt is the purpose for which it really was designed. 17

In 1918 the Supreme Court in the Boston Store v. American Gramaphone Company case used the precedents set in

17243 U.S. 500 (1917).
the earlier case. The Court decided that alleged price fixing contracts were contrary to the general law and void. The Court said that the power to make such a contract was incongruent with the common law. The Court also said the contract was not within the monopoly held by the patent law arrangement.

The Supreme Court in 1919 upheld a lower court's decision that a refusal to sell was legal. Because U.S. v. Colgate Company was a writ of error, the Supreme Court was bound by law to follow the lower court's interpretation of the indictment. This indictment made no reference to monopoly. Only Section I of the Sherman Act was charged. The refusal-to-sell element had to be ruled upon as possibly being an unlawful restraint of trade.

The indictment set forth in the case said:

Distribution among dealers of letters, telegrams, circulars, and lists showing uniform prices to be charged; urging them to adhere to such prices and notices stating that no sales would be made to those who did not.


19 250 U.S. 301 (1919).

Requests, often complied with for information concerning dealers who had departed from specified prices.

Investigation and discovery of those not adhering thereto and placing their names upon "suspended lists".

Requests to offending dealers for assurance and promises of future adherence to prices, which were often given.

Uniform refusals to sell to any who failed to file the same; sales to those to did.

Similar assurances and promises required of, given by, other dealers followed by sales to them.
Unrestricted sales to dealers with established accounts to had observed specified prices, etc. \(^{21}\)

The court found no presence of any price maintenance agreements. Therefore, there was no violation of them. The Court found the practice of selling to whom one chooses rooted deep in common law. The Court said that a refusal to sell was legal in the absence of agreements expressed or implied. The Court said that the Sherman Act "...does not restrict the long recognized right of the trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." \(^{22}\)

The fact that a dealer might be refused a new shipment of supplies was found legal in the U.S. v. Colgate case. The Court said:

\(^{21}\) Ibid. p. 32.

\(^{22}\) 250 U.S. 307 (1919).
The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstances that the manufacturer...refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition whereas inferentially others declined to do so...The retailer, after buying, could if he chose, give away his purchase, or sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually.23

However, by 1922, the Supreme Court found the refusal to sell illegal when combined with implied resale price agreements. This decision was handed down in Federal Trade Commission v. Beech-Nut Packing Company. The Commission, empowered with Section 5 of its new eight-year-old Federal Trade Commission Act, sought to force the Beech-Nut Company to discontinue the maintenance of resale prices. Section 5 of the Act provided for "...unfair methods of competition are hereby declared unlawful."24

Beech-Nut Company openly admitted to selling only to wholesalers who confined sales to retailers who, in turn,

23 250 U.S. 305 (1919).
24 38 Stat., 717 (September 26, 1914).
adhered to the resale price maintenance agreement. The policy through which the Beech-Nut Company made wholesale transactions consisted of (1) price lists and forms giving agreed resale prices; (2) asking jobbers and wholesalers to sell only to retailers who in turn would maintain prices; (3) employing salesmen and agents to report those dealers not observing suggested prices; (4) publishing and distributing the names of price violators to the trade; (5) utilizing card lists on which names of price cutters appeared were marked "Do Not Sell."25

As a result of the above practices, the Federal Trade Commission issued a cease and desist order. The Supreme Court declared the practices of the Beech-Nut Company unfair methods of competition. The Court states, however, that it fully recognized the decision in the Colgate case that a manufacturer need not sell to one of his choice. A manufacturer might refuse to sell to price cutters, but could take only limited steps to determine their identity.

The Beech-Nut case is important to the development of resale price maintenance in three ways. First, this case marked the entry of a new agency, the Federal Trade Commission, to enforce law concerning resale price maintenance.

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Second, the Beech-Nut case was one of the first important decisions dealing with the refusal to sell. This practice itself was not outlawed, as were the means to make the system effective. And third, the Beech-Nut case set the precedent that the Federal Trade Commission Act had not declared resale price maintenance illegal as an "unfair method of competition" as stated in Section 5 of the Sherman Anti-Trust Act.  

After the enactment of the Beech-Nut decision, the later twenties had a restricted use of resale price maintenance agreements. The manufacturer could maintain resale price maintenance only if he used an agency system of distribution. This proved to be a difficult and costly method. It was not used widely. The manufacturer could maintain resale prices through his refusal to sell, but the Beech-Nut case had placed severe restrictions on the effective application of the refusal-to-sell technique. Resale price maintenance could also be applied through contracts where special licensing was used. The licensing technique was used only by a small number of American industries. Therefore it can be seen that throughout its early history, resale price maintenance was held to be incongruent with the main ideas of the Sherman Anti-Trust Act.

\[\textit{Ibid.}, \text{pp. 73-74.}\]
In the early period of resale price maintenance, the Sherman Anti-Trust Act was the only source through which a decision on the matter could be reached. Demand for federal legislation legalizing resale price maintenance took form in 1912. This action took place shortly after the decision in the Miles case.

During this period the American Fair Trade League was organized. This organization was made up of manufacturers of trade-marked or branded articles. The purpose of the League was to secure federal legislation in favor of resale price maintenance. An effective organization was needed to combat a bill placed before Congress. This bill attempted to prohibit patented articles from resale price maintenance. This was the "Oldfield Bill" of 1912.

The most active proponent organization for resale price maintenance was the National Association of Retail Druggists. The N.A.R.D. was formed in 1898. In the 1930's this group dominated the resale price maintenance movement.

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Organized opposition to resale maintenance arose in 1915 with the establishment of the National Trade Association. During the period from 1914 to 1917, the N.A.R.D. and the N.T.A. worked feverishly to obtain the favor of congressmen and the general public. In fact, according to the League's statement, the League had secured the support of two-thirds of the sixty-third Congress to favor resale price maintenance.  

The proponents demanded legislation in favor of resale price maintenance. Raymond B. Stevens in 1914 introduced to Congress the first national resale price maintenance bill. The stated purpose of the bill was, "To prevent discrimination in prices and to provide for publicity of prices to dealers and to the public."  

About twenty-five witnesses testified in favor of the bill. Most of the witnesses were made up of N.A.R.D. members. There were no witnesses in opposition. The sixty-third Congress failed to pass the bill. However, this did not discourage the proponents. The Stevens Bill for resale price maintenance was introduced to the sixty-fourth Congress.  


31 Hearing before the House Committee on Interstate and Foreign Commerce on H. R. 13305, 63rd Congress, 2d and 3rd Session (Washington, D. C. 1956), p. 3.
For the next fourteen years, similar bills were introduced every year under the name Kelly or Capper-Kelly bill. A bill was never passed.\textsuperscript{32}

The first state to establish a fair trade law was New Jersey. New Jersey legalized resale price maintenance in 1913. New Jersey's fair trade law was called the Notice Act.\textsuperscript{33}

The law was amended in 1915 and again in 1916.\textsuperscript{34}

The Notice Law statute provided that

\begin{quote}
It shall be unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or goodwill of any maker in whose product said merchant, firm, or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale or a sale by a concern going out of business.\textsuperscript{35}
\end{quote}

The New Jersey Court of Chancery ruled this act constitutional in the \textit{Ingersoll v. Hahne & Company} case in


\textsuperscript{33}\textit{Ibid.}, p. 50.

\textsuperscript{34}\textit{Laws of New Jersey, 1913, Ch. 210}, as amended by Ch. 376, \textit{Laws of 1915} and Ch. 107, \textit{Laws of 1916}.

\textsuperscript{35}\textit{Laws of New Jersey, 1913, Ch. 210}.
1918. Ingersoll brought an injunction against Hahne & Company. Ingersoll tried to prevent the defendant from selling and advertising their $1.35 Ingersoll watches at a $1.00 each. The Court of Chancery recognized that this decision was contrary to the rulings of the federal courts. The Court of Chancery said firmly that the matter involved was one of intrastate commerce, while the federal decisions deal with interstate commerce of public policy of the nation.

Therefore, resale price maintenance by the end of the 1920's had come from obscurity to a position demanding attention. The manufacture dominated the lead in the development of resale price maintenance up to this period. The action for resale price maintenance was beginning to jell into active participation. Bills were introduced annually to favor the system, and a state had declared the process legal in intrastate commerce.

Period 1930-1952

Leadership of fair trade in the early thirties shifted from manufactured-dominated league to various associations.


37 88 New Jersey Eq. 222, 101 Alt, 1030 (1918)
of wholesale and retail merchants. The National Association of Retail Druggists became the most important.\textsuperscript{38}

Fair trade was legalized under the National Recovery Act.\textsuperscript{39} The economic situation consisted of a depression, loss leader selling, and widespread price cutting. These conditions resulted in demands from the business community for legislation to deal with the problem.

Section One of Title One of the National Recovery Act declared it "...to be the policy of Congress...to eliminate unfair competition practices..." Section 4(b) gave the President power to require licenses to conduct business whenever he found "...that destructive wage or price cutting or other activities contrary to the policy of this title...were threatening to hamper the effectiveness of the recovery program." This, in essence, legalized price fixing and resale price maintenance.

The legality of resale price maintenance ended with the death of the National Industrial Recovery Act on May 27, 1935. The codes had produced an elimination of price competition in many industries. The court declared


that the whole philosophy of the codes was against previous antitrust legislation. 40

In the area of state legislation in the early thirties, California passed a fair trade law in 1931. However, California had already been practicing resale price maintenance. This law was to do little more than place into effect and statutory form what the Supreme Court of California had already found in common law and prior legislation. 41 The California Act permitted producers and owners of trademarked goods to establish prices by contract. This was applicable only if the products were in free and open competition with similar products. The California law provided only for vertical not horizontal price fixing.

In 1933 an amendment was added to the California Fair Trade Act. Because some California retailers did not sign the price maintenance contracts, they were able to sell at prices below those who signed the contract. As a result those who agreed to resale price maintenance agreements were faced with a loss of business. The new amendment needed to remedy this situation became known as the

41 Grogan v. Chaffee, 156, Col. 611, 105 Pac. 745 (1909); Chi rodell v. Hunsicker, 164 Ca. 355, 128 Pac. 1041 (1912).
nonsigner clause. The maintenance of a contract price
due to this amendment was enforceable not only by signers of
the contracts, but also for the nonsigner who willfully sold
at prices below that which another retailer had been stipu-
lated. This amendment is the soul of state fair trade laws.
Without this amendment, "...fair trade contracts in any
state would be meaningless, because the firms who precip-
itate price wars are the very ones who would not sign the
fair trade contract."\(^{42}\)

In the period from 1933 to 1936, thirteen more states
in addition to California passed fair trade laws. One was
enacted in 1933; eight were adopted in 1935, and four were
passed in 1936.

Many more states followed with fair trade laws. This
came after the Supreme Court decision in the Dearborn case
in 1936.\(^{43}\) In Old Dearborn Distributing Company v. Seagram
Distillers Corporation the Court upheld the nonsigner clause.
The chief points covered by the Supreme Court's decision
in the Old Dearborn case may be summarized as follows:

\(^{42}\)Opinion of the Department of Commerce in the U.S.
Congress, House Hearings on Resale Price Maintenance,
before the Antitrust Subcommittee of the Committee on the

\(^{43}\)U.S. Federal Trade Commission, Report on Resale
Price Maintenance, p. 69.
The provision of the Act declaring as not in violation of the laws of Illinois certain contracts for maintenance of resale prices on identified articles (2) does not infringe the rule of law whereby an owner of property may fix the price at which he will sell the property; (b) does not attempt to fix prices; (c) does not delegate to private persons the power to fix prices in violation of the due process clause of the constitution.

The nonsigner clause of the Act (a) does not result in a denial of due process; (b) does not result in a denial of equal protection of the laws. The phrase "fair and open competition" as used in the Act is not so vague and indefinite as to deny due process.\(^4\)

Justice Sutherland in delivering the opinion of the Court related the case to Dr. Miles Medical Company v. John D. Park & Sons. In the Miles case it was stated "...nor can the manufacturer by rule or notice, in absence of contract or statutory right even though the restriction be known to purchasers, fix prices for future sales."\(^5\)

The Court affirmed the constitutionality of the nonsigner provision. It based its approval on the trademark theory. The Court's justification of the nonsigner clause was stated thus:

\(^{44}\)Ibid., p. 92.

\(^{45}\)221 U.S. 405.
...the nonsigner provision does not deal with the restriction upon the sale of the commodity qua commodity but with that restriction because the commodity is identified by the trademark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the base disposition of the commodity, but in the forbidden use of trademark, brand or name in accomplishing such disposition.46

The Court also considered the property right involved in goodwill. The decision in the Miles case was rejected. Therefore, when a change of title occurred, no control over the resale price could be assumed. The Court said the sale of an article did include an exchange of ownership, but not the proprietary element of goodwill. The basic purpose of fair trade was stated by the Court:

The primary aim of the law is to protect the property, namely the goodwill, of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself. Goodwill is property in a very real sense, injury to which is a proper subject for legislation.47

The Court also found that:

Price cutting by retail dealers is not only injurious to the goodwill and business of the producer and the distributor of identified goods, but injurious to the general public as well.48

47 229 U. S., 194.
48 Ibid., 195.
The Supreme Court's 1936 *Dearborn* decision held that the purpose of fair trade legislation was the protection of the value of goodwill as symbolized by trademarks. This decision greatly increased the demand for fair trade in the various states. In 1937, twenty-eight states adopted fair trade laws, one more in 1938, and one more state in early 1939.49 By 1939 there were forty-four states that held fair trade laws.

With the increased practice of fair trade laws in more states, the fair trade groups decided to take advantage of this popularity to expand the movement. The advocates thought they could expand the practice by playing on the states' rights aspect of fair trade. The states' rights sentiment was intensified from 1936-7 because of the centralizing tendencies of F. D. Roosevelt's New Deal economic program.50 The fight for federal legislation was headed by the National Association of Retail Druggists and the American Fair Trade Association.

A new bill was introduced to extend fair trade. The bill was a rider to an appropriation bill for the District of Columbia. The efforts to secure the bill separately


50 Yamey, *Resale Price Maintenance*, p. 68.
had failed. The President was vigorously opposed to the bill. He believed that it would increase consumer prices.51

The Miller-Tydings Amendment to the Sherman Anti-Trust Act was introduced to the Senate by Senator Tydings of Maryland and to the House by Representative Miller. This amendment was designed as a federal enabling statute. The bill did not establish resale price maintenance in the various states. It held legal resale price maintenance in interstate commerce between fair trade states. The amendment also included the enforcement of the nonsigner clause in interstate commerce.

One of the arguments for the amendment was given by Representative Wright Patman of Texas. Patman said in favor of the Miller-Tydings enabling act:

We could believe that their agreements are wrong. We can believe that the wrong viewpoint. We could believe it against the public interest and still vote for this bill as Members of Congress, because if the people of Arkansas want to pass a law that will permit their citizens to deal in this way, that is the Arkansas people's privilege, and we should not pass any law to prevent that; we should only permit them to make any contract that they want to make; and this only permits them to make vertical contracts in regard to the sale of goods, wares, or merchandise.52


This bill as mentioned was tied to a states' rights stand. This can be seen most vividly in Senator Tydings' statement:

But most important, from the standpoint of Congress, the proposed bill merely permits the individual States to function without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject of the State Laws.

In other words the bill does no more than to remove the Federal obstacles to the enforcement of contracts which the States themselves have declared lawful.\(^{53}\)

The Miller-Tydings Act was passed in 1937 as an amendment to the Sherman Anti-Trust Act. It limited the Federal Trade Commission Act of 1914 and validated resale price maintenance in interstate commerce.

The Miller-Tydings Amendment to Section One of the Sherman Anti-Trust Act stated:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or the distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to enter state transactions, under any statute, law or public policy now or here

\(^{53}\text{Ibid., p. 62.}\)
after in effect in any State, Territory, or District of Columbia in which such resale is to be made, or to which commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section Five, as amended and supplemented, of the Act entitled "an Act to create a Federal Trade Commission to define its powers and duties, and for other purposes" approved September 26, 1914. (The Amendment provided further) That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between producers, or between wholesalers, or between brokers, of between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

With the passage of the Miller-Tydings Act more states adopted state fair trade laws. The California fair trade law was copied verbatim by twenty states. The California provision of the nonsigner clause was adopted by all the states which passed fair trade laws.

The number of states validating fair trade laws later increased to forty-five of the forty-eight states. With the admission to statehood of Hawaii, the number has

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increased to forty-six. The states which have not passed fair trade laws are Missouri, Texas, Alaska, and Vermont. The District of Columbia has also rejected fair trade.

The state fair trade laws have a uniformity about them. This stems from their relation to the first fair trade law enacted in California. Sales made at less than contract price are declared illegal. This also applies to retailers who were not members to the contract. Most state fair trade laws contain the following elements:

(1) the requirement that products subject to price maintenance must be in free and open competition with other commodities of the same general class;

(2) prohibitions against horizontal price agreements between manufacturers and wholesalers or retailers;

(3) provisions permitting sales at less than established prices in (a) closing out sales, (b) sales of damaged or deteriorated goods publicly advertised as such, and (c) sales under court order; and

(4) provisions banning evasions through (a) the giving of anything of value in connection with the sale of a fair-traded article, (b) the offering of concessions by the giving of coupons redeemable in cash or merchandise in
connection with such sales or (c) the sale of fair traded article in combination with another commodity.55

In most of the states that passed fair trade laws, the regulation of the laws was left up to interested parties rather than to the regular law enforcement officials. Any violation of the fair trade laws was dealt with as a criminal act in the states practicing them. The right of plaintiff was given to dealers who might have been injured in the violation rather than to the manufacturer whose price was cut.56

The next two legal steps which had a marked effect on the existence of resale price maintenance were the Schwegmann and Wentling decisions. These two decisions later led to the McGuire Act. This Act was passed slightly over a year after the Schwegmann decision was given.

The first case which struck a blow at modern fair trade laws was the Schwegmann Brothers v. Calvert Distillers Corporation. The decision was handed down in May of 1951. The case involved Schwegmann Brothers, a New Orleans liquor dealer. This company refused to sell Calvert products at

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56 Ibid.
a price system organized by Calvert. Schwegmann cut the prices which Calvert wanted maintained. The Louisiana fair trade law characteristically contained the nonsigner clause. This meant that if other retailers agreed to the Calvert pricing system then Schwegmann Brothers should also. The Calvert Company brought suit against Schwegmann. However, Schwegmann, in its defense, said that the nonsigner provision was not approved in the Miller-Tydings Act. Therefore, the price system set up by the distillers was in direct violation of the Sherman Anti-Trust Act.

Calvert's point of view was upheld by the Court of Appeals in the state of Louisiana. Yet the Supreme Court in a five to three vote decided in favor of Schwegmann. Justice Douglas gave the court's opinion while Justices Frankfurter, Black, and Burton contributed the dissenting opinions.

Justice Douglas said that fair trade was legal in intrastate commerce and was authorized by state law. The Court further said that in interstate commerce the practice of fair trade was not generally allowed except by the exemptions in the Miller-Tydings Amendment.

The Court decided that the law had not extended exemptions to coerce non-contractual forms of price maintenance. The Court interpreted the Miller-Tydings
Amendment is not meaning the nonsigner clause system as one of the exemptions. The Court said:

What is granted is a limited immunity—a limitation that is further emphasized by the inclusion in the inclusion in the state law of the nonsigner provision. The omission of the nonsigner provision from the federal law is fatal to the respondents position unless we are to preform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it.\(^5\)

The Court believed that, if the government had wanted an effective nonsigner provision, then Congress would have enacted different legislation. It was strange that the one clear provision that could have accomplished that result was omitted. The Court observed this.

The Court stated that it had reviewed the legislative history of the Miller-Tydings Act. The study revealed no evidence in congressional debates or committee reports that the government meant for the nonsigner provision to be included or understood. The Court was disturbed over the coercive feature of the nonsigner provision. Also it was interested in the effects on competition. The Court said that the Miller-Tydings amendment prohibited horizontal

\(^{57}\)Schwegmann Brothers v. Calvert Distillers Corporation, 341 U.S. 388 (1915).
price fixing. The Court said that "when retailers are forced to abandon price competition they are driven into a compact in violation of the spirit of the proviso."\textsuperscript{58}

The dissenting opinion of the Court was written by Justice Frankfurter. He based his opinion primarily on the fact that, when the Miller-Tydings Amendment was enacted, every state law passed to that time contained the nonsigner provision. Justice Frankfurter believed that the Congress should support the state laws as they were, not as they should have been. The dissenting opinion believed that to exclude the nonsigner clause was "contrary to the work of the statute and the legislative history."\textsuperscript{59}

The decision in the Schwegmann case did not invalidate state fair trade laws as such. Local and intrastate sales were unaffected. The decision nullified the nonsigner clause in interstate commerce. It thereby diminished the applicability of state fair trade laws.

The Schwegmann decision was handed down on May 21, 1951. A little over a week later, on May 29, 1951, R. H. Macy & Company ran a two page advertisement in the New York papers.

\textsuperscript{58}Ibid.

\textsuperscript{59}House Report 1292, p. 37.
The ad announced a six percent price reduction on 5,978 items which were formerly price fixed under fair trade legislation.60

Other New York stores followed the price cutting of Macy's. A price war ensued in New York and throughout the United States. Some observers feel that Macy's decision to cut prices and the resulting price war contributed to the victory of fair trade legislation in Congress which was being considered at that time.61

Because of the furor of the price war, Congress asked the firm of Dun & Bradstreet to furnish a report on the situation.62 This report was prepared for the Joint Committee on the Economic Report and the Select Committee of the U.S. Senate. The report discounted the extent of the Schwegmann decision's effect on the price war. There were 77,000 stores included in the survey. Of these only 825 stores cut prices below those set in resale price maintenance agreements. The report stated that the price cutting on fair trade products lasted only a month. The report said


that price war was restricted to those stores which had refused to sign a fair trade contract for the merchandise involved.

Even before the Schwegmann decision was given, an unfavorable decision regarding fair trade was made. This was the Sunbeam v. Wentling case in 1950. The Supreme Court in 1950 reversed a District Court decision. The District decision had issued an injunction against a non-signer. This forbade him to sell in intrastate and interstate commerce below fair trade prices. The situation involved a main-order operator, Wentling, who was selling Sunbeam electric shavers by mail. He was selling from his state of Pennsylvania at prices below those stipulated by Sunbeam. Pennsylvania was a fair trade state.

The Court recognized that all states did not have fair trade laws. The Court said this complicated price regulation in interstate commerce. The Court put forth the question:

...if a state may regulate the price at which an article must be sold if it is to be shipped out of state, may it not equally well regulate the price for which the article must have been sold before it is allowed to come into the state.  


64 Ibid., 908.
The Court could see no reason for the restricting aspect of fair trade on interstate commerce. The Court said:
"Tariff barriers are but feeble obstacles compared with such a blockade on the interstate movement of goods."\textsuperscript{65}

The Court did not recognize the nonsigner provision in the Wentling decision. The Court applied the state's fair trade law only to its intrastate commerce. The Court would not prosecute retailers, such as Wentling, who sold at below agreed prices in interstate commerce. This assault on fair trade was the first after World War II. It preceded the Schwegmann decision by a year.

With the passage of the Schwegmann and Wentling decisions, many feared a complete breakdown of all fair trade systems. The price war after the Schwegmann decision was a good tool for fair trade advocates to show what would happen under a no-fair-trade system. Pressure on federal legislation was so great that the House Committee on Small Business engaged in a study. The study was conducted in 1952 and was titled "Fair Trade: The Problems and Issues." The committee was definitely influenced by the few extreme price reductions which had occurred after the Schwegmann case. The committee summed up its opinion:

\textsuperscript{65}Ibid.
The Select Committee on Small Business has studied carefully the arguments presented both by the advocates of fair trade and the opponents. It is impressed by the complexity of the problem and by the weight of evidence on both sides of the issue. The committee is convinced that deceitful and misleading price cutting is not in the public interest and that small business enterprise in particular need protection against loss-leader selling and similar unfair business practices. It believes the states should retain jurisdiction over retail practices and that Congress should make it possible to enforce fair trade contracts.  

The Committee's decision was that Congress should legalize fair trade contracts in interstate commerce.

Pressure was placed on government officials to pass further fair trade legislation as a result of this study. An example of this pressure was the "push-button" plan to pass the new fair trade bill, the McGuire Act. A group was organized in Oklahoma by Albert R. Weaver, Secretary of the Oklahoma Pharmaceutical Association. In Weaver's plan a hundred-and-fifty druggists from over the state were set up as a contract committee. The function of this committee was to serve as an organized front. It would give Congressmen an extra nudge to pass the McGuire Act.  

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The most important advocate of the McGuire Act was the National Association of Retail Druggists. N.A.R.D. was joined by others who wanted favorable new fair trade legislation.68

The group of opponents of legalized price maintenance represented a greater diversity of interests than those of the supporters.69 The most opposed was the National Retail Dry Goods Association. This group is composed of large department stores.

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69 Opponents to new fair trade legislation were the American Home Economics Association, American Farm Bureau Federation, Congress of Industrial Organizations, American Federation of Labor, Cooperative League of the United States of America, Consumers Research, Inc., National Housewives League, General Federation of Women's Clubs, National Grange, National Dairy Union, American Association of University Women, Federation of Citizens Associations. As being listed against fair trade should also be included the Antitrust division of the Department of Justice and the Federal Trade Commission. The Department of Agriculture expressed disapproval as well the Temporary National Economic Committee. House Report 1292, pp. 23-24.
The main objection to fair trade was the threat to retailers' marketing methods.

In addition to these associations, many newspapers and magazines were opposed to fair trade legislation. For example Business Week on June 9, 1951 stated:

The Supreme Court has fired a shot heard round the merchandising world. . . The sound economic logic of the Court's decision leaves many a small retailer in a dilemma. He admits the fair trade legislation is a breach in antitrust laws. . . He realizes that the antitrust laws are more vital to him than to virtually any other group. . . We have confidence in the vitality and ingenuity of the small independent to stand the gaff.

Another example of press opposition was the Wall Street Journal, Chicago, on May 23, 1951, which stated:

The fair trade laws were an attempt to allocate a share of restricted market, not to expand the market. That is an Old World idea, and we can see what it has done in such places as Great Britain and Italy. The mass market necessary to the American system produced at progressively lower prices. In the long run, everyone suffers from a device which blocks the creation of wealth.

With the help of the organized pressure groups, the McGuire Amendment to the Federal Trade Commission Act was enacted on July 14, 1952. It became Public Law 542. The main function of the McGuire Amendment was to bring non-signers within control of state fair trade laws. Therefore, the McGuire Amendment upheld the nonsigner provision. It declared the provision not burdensome on interstate commerce.
The McGuire Act was held constitutional in the second Schwegmann case in 1953.  

There are great differences between the McGuire Act of 1952 and the Miller-Tydings Act of 1937. The McGuire Act is more general. It extends the exemptions from the restrictions of earlier antitrust statutes. The McGuire Act upholds the nonsigner provision for state fair trade laws. The McGuire Act also exempts fair trade compacts. It exempts enforcement from all antitrust laws, not merely from the Sherman Act and the Federal Trade Commission Act, as does the Miller-Tydings Act.

The Miller Tydings Act applies only to minimum resale prices and not to so-called "stipulated" prices. The McGuire Act applies to both. The Miller-Tydings Act required a vendee to enter into a fair trade agreement. The McGuire Act does not. The McGuire Act specifically notes that making fair trade contracts does not constitute "an unlawful burden or restraint upon, or interference with, [interstate] commerce."\(^7\)

Thus with the passage of the McGuire Act, Congress reversed the earlier decisions in the Schwegmann and Wentling cases.\(^2\)


\(^7\)C. C. H. Trade Regulation Reporter, p. 4305.
CHAPTER IV

THE DECLINE OF FAIR TRADE

IN THE VARIOUS STATES

For a number of years resale price maintenance legislation has been debated on economic as well as constitutional grounds. One reason for the decline of fair trade practice has been the expensive litigation, notably the enforcement costs. The expense to a manufacturer of a fully contested lawsuit often times stops the manufacturer from trying to uphold the system.\(^1\)

However, the greatest decline of fair trade has been due to constitutional attack. In the states of Alaska, Missouri, Texas, and Vermont there have been no fair trade laws enacted. But in the states where these laws have been passed serious debates and litigation has occurred. Seventeen states have upheld the constitutionality of the fair trade laws.\(^2\) Twenty-four states have declared it unconstitutional. The four states\(^3\) which declared resale price maintenance


\(^3\)Montana, Nebraska, Utah, and Hawaii.
unconstitutional in toto did so mainly on account of constitutional provisions prohibiting price fixing combinations or monopolies.

Some courts declared the Act unconstitutional on grounds of the nonsigner provision. These courts did so for the following reasons: (1) it illegally restricts the right of contract and disposition of one's property; (2) it stigmatizes by deceit or unfair dealing and involves no assault upon the good will of the manufacturer; (3) it ignores the motivating force of the retailer; (4) it unlawfully delegates the legislative power of the state to private individuals since it confers upon them the power to fix the prices without standards, hearing, and review; (5) it tends to establish a monopoly, and (6) it offends constitutional guarantees of a right of personal liberty and private property without due process of law.\(^4\)

The State Courts have refused to look at the real purpose and economic consequences as the basis of determining the constitutionality of resale price maintenance. However, economic reasoning is noticeable in the legal decisions of many of the Courts.

Michael Conant said in his article on the nonsigner provision in state unconstitutionality: "Violation of

\[^4\text{316 S.W. 2d (1958) 360.}\]
constitutional due process as the basis of an attack on the nonsigner clauses of state resale price statutes has a fundamental weakness. Conant, however, did believe that there was a more logical attack on the nonsigner provision. Conant says the better attack is unconstitutional delegation of legislative power. The state court's which believe as Conant does are those in Indiana, Kansas, Louisiana, and Minnesota.

In the review of the following cases it is interesting to note that the judiciary, rather than the legislative, branch of government represents the general public's interest in the fair trade argument. The Supreme Court contends that the manufacturers of trade-marked goods and their "independent" retailers do not have the public's interest at heart in their efforts.

The next section is a review in detail of various state court decisions as to the unconstitutionality of fair trade.

Florida

The first clear defeat of fair trade legislation occurred in Florida in 1949. The State Fair Trade Law was

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held repugnant to the state constitution in *Liquor Store Inc. v. Continental Distilling Corporation.*\(^6\) The general welfare of the state could not be served by using police power to uphold the system. The Florida Supreme Court declared the State Fair Trade Act of 1939 unconstitutional. But the State Legislature with a few insertions reenacted the law.\(^7\)

The Florida Supreme Court did not approve of the philosophy of fair trade. It condemned fair trade as an unreasonable price fixing measure. The Court decided, however, that the legislature alone "...is the judge of the wisdom of regulation."\(^8\) The Court felt its duty was to study the purposes of the act in order to find any violation of the state constitution.

The State Supreme Court argued that fair trade could only be valid if it promoted the welfare of the general public. The court, however, interpreted the resale price maintenance system as favoring particular groups at the expense of others.\(^9\) The Court held that the legislature had delegated sovereign power to private parties for

\(^6\) 40 So. 2d 371 (Fla 1949).


\(^8\) 40 S. 2d 371, 374 (Fla 1949).

private purposes. The Court determined that there was no true exercise of police power involved. The Court said:

When a statute is brought into question resting upon the police power the courts have . . . the duty to inquire whether it is within constitutional limits. . . . It is particularly a judicial question whether the legislative act is for a private or a public purpose. 10

The Florida Supreme Court did not single out the nonsigner provision as unconstitutional. It held unconstitutional the whole social and economic philosophy on which fair trade is based.

As a result of the Liquor Stores decision, the Florida legislature passed a substantially identical act. 11 The new statute of 1949 asserted the public policy and "findings of fact" behind the law. Provision No. 10 of the new law gave the Attorney General power "...to bring an action... to restrain the performance or enforcement" of any resale price maintenance contract if the Attorney General finds that the contract "prevents competition among commodities of the same general class or that the commodity covered by the contract is not in free and open competition with... commodities of the same general class..." 12 This provision

10 40 So. 2d 371, 374 (Fla 1941).
12 Fla. Laws 1941, c. 25, 204.
was added to calm the critics who found monopolistic tendencies in the fair trade act.\textsuperscript{13}

The first adverse decision on the state court level was given in 1939 by the Florida Supreme Court. The Court struck down the nonsigner provisions of the Act. The Court did so because of a technical defect in the title.\textsuperscript{14} The title defect in regard to the nonsigners provision was the expression "...through the use of voluntary contracts."\textsuperscript{15} The Florida Supreme Court said that this phrase restricted the subject of the act. The Court said it presented the nonsigner provision as applying only to retailers who voluntarily entered into fair trade contracts. This correction was made by the Florida legislature. This correction was upheld by the Court in 1943 in the Scarborough case.

Not since the United States Supreme Court upheld a state fair trade act in \textit{Old Dearborn Distributing Co. v. Seagram Distillers Corporation} in 1936 and the Miller-Tydings Act of 1937 had the highest court of any state questioned the constitutionality of fair trade laws. A


\textsuperscript{14}Bristol-Myers Co. v. Webb's Cut Rate Drug Co., Inc., 137 Fla. 508, 188 So. 19 (1939), after correction of this defect, the law had been upheld in \textit{Scarborough v. Webb's Cut Rate Drug Co.}, 150 Fla. 845, 8 So. 2d 913 (1942).

\textsuperscript{15}Florida Laws 1937, ch 18395.6, p. 107.
revolutionary attitude was sparked by the Florida Supreme Court. It curtailed the state court's automatic adoption of the highest court's legal reasoning. The Florida Supreme Court said:

The Court of last resort of each sovereign state is the final arbiter as to whether the act conforms to its own constitution whereas the federal courts are concerned only with whether the act offends the federal constitution.\footnote{16So. 2d 371, 373 (Fla. 1941).}

After the passage of the McGuire Amendment in 1952, the Florida State legislature reenacted the Fair Trade Act of 1949 to 1953.

In 1954 the Florida Supreme Court gave its opinion of the new fair trade act in the Miles Laboratories, Inc. v. Eckard case. The Court gave this decision in light of the McGuire Amendment. The question whether the Seagram Corporation v. Ben Greene, Inc. decision had been superceded by the McGuire Act was answered thus:

The purpose of the McGuire Act was to supply the nonsigner defect and left the way open for states to permit or refuse price fixing statutes to affect nonsigners of fair trade agreements. It is hardly necessary to point out that the decisions of the Court interpreting the Constitution of Florida are supreme and will not be overthrown by act of Congress or the Federal Courts unless some Federal constitutional question is involved.\footnote{1773 Southern Reporter 2d, 631 (Fla, 1954).}
The Court also declared the nonsigner provision illegal. Justice Terrel said of the nonsigner clause:

As we have stated before, the real effect of the nonsigner clause is anti-competitive price fixing; not the protecting of the good will of trade marked products as other courts have held. The real vice of the nonsigner clause is the absence of that standard. Justice Terrel said that the nonsigner clause was an invalid use of the police power for a private, but not public, use.

By 1956, the question of fair trade for Florida was assumed completely dead. The courts had agreed with lower courts on the unconstitutionality of resale price maintenance. Therefore, the reasons that the nonsigner clause was declared illegal in Florida was that it (1) was anti-competitive price fixing; (2) was not in the general welfare; and (3) attempted to use the police power of the state for a private and not public use.

Michigan

In 1952 the constitutionality of the Michigan Fair Trade Law was tested. The decision in the Shakespeare Company v. Lippman's Tool Shop Sporting Goods Company was handed down just prior to the passage of the McGuire Amendment.

1873 Southern Reporter 2d 682 (Fla. 1954).

The Shakespeare Company brought action against Lippman's Tool Shop Sporting Goods Company for selling fair trade articles at below the minimum fixed price. The State Circuit Court for the county of Wayne entered a decree adverse to the plaintiff. The plaintiff appealed. However, the Supreme Court of Michigan held the plaintiff's side. The Court under Justice Dethmers said that the Fair Trade Act provision prohibiting the sale by nonsigners for fair traded articles at less than fixed price was a violation of the due process clause. The Court also said it was not sustainable under the police power. The Court said that the nonsigner clause constituted legislation beyond the scope of the police power. The Court said the clause bore no reasonable relation to public health, morals, safety or welfare.\(^{20}\)

The Supreme Court did not give warrant to the plaintiff's argument of trademarked justification. The Court said that the function of a trademark was simply to designate a particular manufacturer. The Court implied that the trademark theory was used to protect one's goodwill against the sale of an identical product. The court at this point negated the Old Dearborn case.\(^{21}\) Justice Dethmers said that

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\(^{21}\) *Old Dearborn Distributing Company v. Seagram Distillers Corporation* 299 U.S. 183 (1936).
the decision reached by the Florida Supreme Court in 1949\textsuperscript{22} was better than the United States Supreme Court's decision of trademark justification in the \textit{Old Dearborn} case. The Court reasoned that the trademark did not protect the owner from sales by nonsigners of fair trade agreements at less than fixed price.\textsuperscript{23}

In a dissenting opinion Justice Butzel viewed the fair trade act as a valid exercise of the state's police power. Justice Butzel believed that fair trade was the prevention of "destructive price cutting" and "the evils of \ldots price war".\textsuperscript{24} Justice Dethmers said that it was unreasonable to assume by the process of reducing prices that either war, destruction, or evil would place the public welfare in jeopardy. Dethmers said this was the concept upon which the American economy was built.\textsuperscript{25}

Justice Butzel also defended fair trade on the grounds that it protected the small retailer from the larger one. Butzel suggested that fair trade placed an artificial weight on the smaller. It equalized the uneven race between the

\textsuperscript{22}\textit{Liquor Stores, Inc. v. Continental Distilling Corporation} 40 So. 2d 371 (Fla. 1949).


\textsuperscript{24}54 N.W. 2d 271 (1952).

\textsuperscript{25}\textit{Ibid.}
small retailer and the large one. However, the consenting opinion questioned:

Is not the survival of the small retailer made as difficult by the large retailers cut-rate sales of bulk, unbranded and non trade marked staples as by the like sale of branded and trade marked goods? The difference, if any, is scarcely such as to render the restriction on price cutting valid in the one instance and invalid in the other.  

In 1955 the Michigan State Supreme Court denied a temporary injunction. It restrained a nonsigner from interfering with the manufacturer's written contracts with wholesalers and retailers.  

Justice Ried said in regard to the injunction:

To be sure some five states, Michigan included, have held the nonsigner provision invalid. However, we have never held that the law is not valid as to signers. It is not within our province to declare that plaintiff's contracts violate public policy, and especially not a preliminary hearing.  

The Michigan Supreme Court decisions are important because they attack fair trade at its source. The trademark justification is excused as a valid reason for fair trade. The Court pointed out the federal trademark legislation for branded goods protection. The Court saw no public interest attained from this system. The Court said it was basically

26 54 N.W. 2d 271 (1952).


28 Ibid., 158-159.
against the fiber of the American economy.

**Georgia**

Georgia declared the Fair Trade Act null and void on February 24, 1953. Georgia was the first state to declare fair trade unconstitutional after the passage of the McGuire Amendment. Oneida, Ltd. brought action against Grayson-Robinson Stores Inc. for selling its "Community" silverware at prices below which were fixed in fair trade contracts. The defendant operated a store in Atlanta and purchased the silverware from sources other than the manufacturer.\(^9\)

The Georgia Supreme Court declared that the Georgia Fair Trade Act was null and void. The Court found it contrary to and inconsistent with terms of the Sherman Act before its amendment by the Miller-Tydings Act and the McGuire Act. The Fair Trade Act offended the supremacy clause as well as the commerce clause of the Federal Constitution, the Court said. The Georgia Fair Trade Act was passed on March 4, 1937 by the legislature. This was prior to the Miller-Tydings Amendment and the McGuire Amendment. Therefore, it was illegal by the Sherman Act.\(^{30}\)

\(^{29}\)Grayson-Robinson Stores, Inc. v. Oneida Ltd.,
209 Ga. 613, 75 S.E. 2d 161 (1953).

\(^{30}\)Ibid., 162-163.
As a result of the Oneida decision, the Georgia Legislature again passed a Georgia Fair Trade Act in 1953. Section F of Part I of the Act provided that trademarks, brands, or names of commodities would be protected by the Act. This is an indication of the thorough study the fair trade advocates had made. They knew of the previous decision in Michigan overlooking trademark justification.31

Interesting to this study is the fair traders' notion of competition. This is given in the 1953 Fair Trade Act:

...to declare the public policy of Georgia with respect to property rights, trademarks, goodwill, and the right and freedom to contract, and to exercise the police power of the State of Georgia so as to forbid the conduct of business in such a manner as to infringe the equal rights of others, and to protect the general public against practices which may have the effect or be intended to have the effect, of deflating or lessening competition or encouraging monopoly, by authorizing contracts stipulating minimum resale prices on commodities bearing trade marks, brands or names and defining as unfair competition and making actionable knowingly and willfully to advertise for sale, offer for sale, or sell such commodities at less than the minimum prices established or stipulated in or under the contracts authorized by this Act, whether the person so advertising for sale, offering for sale or selling is or not a party to such contracts.32

This section of the Fair Trade Act said that it was good public policy to restrict price competition for one group of categories. This was done so that other commodities would not be harmed.

31 85 S.E. 2d 520 (1955).
32 85 S.E. 2d 519-520 (1955).
The new Act contained this statement of public policy mainly for a defense mechanism. The earlier Act of 1937 did not contain a declaration of public policy.

The legality of this new Fair Trade Law was questioned in *Cox v. General Electric Company*, 1955. General Electric sought judgment against the retailer, Cox, for selling at less than minimum prices stipulated by plaintiff. The Supreme Court under Justice Wyatt said that the Act of 1953 created a property right to the manufacturer or distributor of a commodity. He wrote that when the owner of the commodity makes a contract as to the minimum price at which the commodity is to be sold "...it is a breach of such property right for any person to sell or offer to sell such a commodity at less than the price stipulated in the contract,"\(^{33}\) whether or not he signed the contract. Justice Wyatt could find no reason in the constitution for making the contract valid by the General Assembly of the state. Therefore, the nonsigner provision was declared unconstitutional. The reason given was a violation of the due process clause of the Constitution of Georgia.\(^{34}\)

The Court was so convinced with its decision that the following statement was made in regard to the General

\(^{33}\)Ibid., 530.

\(^{34}\)Ibid., 515.
Assembly: "We are convinced that any findings of fact with what has been held in this opinion...would be to find...a fact that does not exist. . ."35

This case was one of the most clear-cut adverse decisions to fair trade up to this time.

Arkansas

One month after the Supreme Court of Georgia issued its opinion on Fair Trade Laws, the State Court of Arkansas did likewise. The Court found the nonsigner provision to be unconstitutional.36

Union Carbide sold an anti-freeze product under the name of "Prestone." Union Carbide signed an agreement with a retailer to sell the product at $3.75 per gallon. However, a retail store owned by White River, Inc. sold the product at $2.97 per gallon. This broke the nonsigner provision of the State Fair Trade Act.37

The Court stated that it could not determine if welfare was looked after in the Act. It also felt that the interest

35Ibid., 518.


37Ibid., 456.
of the public was best served by its opportunity to buy commodities in a freely competitive market. The Court felt that the nonsigner clause hampered the freedom of competition.38

The nonsigner clause was declared illegal because of the due process clause of the State Constitution. The Court said that the retailer purchased the product to sell. Therefore, he had property in the product. The State Constitution, Section 8, said that no one shall be deprived of his property without due process of law. However, the Court added to this negation of the nonsigner clause, "... and in doing so we do not intend to intimate that the other sections [of the State Constitution] are not relevant to the issue here [the unconstitutionality of the fair trade law].39

Nebraska

In 1955 Nebraska declared the fair trade law unconstitutional on grounds of legal principles. McGraw Electric brought action against Lewis and Smith Drug Company for selling at below minimum prices. The basic defense on the trial was not as a conflict on questions of fact but on the question of validity and constitutionality of the Fair Trade Act.

38Ibid., 459.
39Ibid., 456.
The Supreme Court of Nebraska challenged the invalidity and unconstitutionality on eight points. The Court found the Fair Trade Act broader than the title reasoned. The Court found the Act unconstitutional. The Court said it violated the provision that no law shall be amended unless the new Act contains the section as amended, and a repeal of the old section. The Act, the Court said, was in violation of the state's antitrust statute. The Court found the Act depriving liberty and property without due process of law. The Court said the Act constituted legislation beyond the scope of the police power. The Court held the Act unconstitutional for it was contrary to the Sherman Anti-Trust Act. The Court said the Act also granted special privileges and immunities to private persons.40

The Court also found the Fair Trade system to be horizontal price maintenance and, therefore, unconstitutional. The Court said of the nonsigner provision, "It compels retailers to...terms to which they have never given assent...it permits the impairment and destruction of the right of any retailer...it immunizes against competition between and among retail competitions handling such commodities in trade."41

40 68 N.W. 2d 616 (1955).
41 68 N.W. 2d 616 (1955).
The Court found the entire Fair Trade Act to be unconstitutional. The Court has not changed this 1955 decision.

Oregon

In 1951 the Oregon Supreme Court found the Fair Trade Law of the state unconstitutional on grounds of the Sherman Anti-Trust Act. Unconstitutionality was based on the nonsigner provision. This is the heart of the fair trade system. The Court relied heavily on the decision in the Schwemmarn case.42

One year later the McGuire Amendment was upheld by the Federal Supreme Court. The Oregon Supreme Court was bound to reconsider its decision on the nonsigner provision of the Fair Trade Law. In 1956 the Court faced the decision again.

The Oregon Supreme Court said that, by virtue of the federal statutes, no question could be raised as to the validity of the Oregon Fair Trade Act.43 The state law was legal because of the Miller-Tydings Amendment to the Sherman Anti-Trust Act and the McGuire Act which amended the Federal Trade Commission Act. The Oregon Court had to base its

adverse decision to fair trade on the state constitution. In regard to the nonsigner provision, the Court said: "Could there possibly be a more flagrant violation of the constitutional provision respecting the delegation of legislative power than is attempted by the Fair Trade Act?" The Court found the defense of protecting trademark or branded goods by fair trade invalid. The Court said it was hard to find "...any justification for the fair trade act..." The Court said that the nonsigner provision was designed principally to destroy competition at the retail level.

_Dr. G. H. Tichenor Antiseptic Company v. Schwegmann Brothers Giant Super Markets, 231 La. 51, 90 So. 2d 343 (1956)._
The 1956 case was only a small segment of the importance which the Louisiana cases have given to the system of resale price maintenance. The fair trade cases of 1951 and 1953 were far more important to the life of fair trade. It is significant that Schwegmann's name should appear on the 1956 last decision of the State Court. His name appeared on two of the most important cases in resale price maintenance history. He is known as one of the chief opponents to fair trade.

Mr. Schwegmann is head of a New Orleans supermarket. The supermarket sells a great variety of goods. He is strongly convinced that he can sell at prices as low as he chooses. As a result, he has had to fight a hoard of law suits by manufacturers who want their retailers to sell at prices which they have agreed upon. Schwegmann was not dismayed by the McGuire Amendment. He fought on for what he believed. In the 1956 case before the State Court he sponsored a bus motorcade to Baton Rouge to argue against fair trade. Schwegmann said in the 1956 case, "It is D-Day for all consumers in Louisiana." Certainly Schwegmann's

name will go down in history as one of the most vocal opponents to fair trade laws.\textsuperscript{49}

\textbf{Colorado}

The Colorado Supreme Court declared the state's Fair Trade Law unconstitutional in 1956. The Court held the nonsigner clause unconstitutional because it lacked due process. The Court said it was confiscatory and it tended to establish a monopoly.\textsuperscript{50}

Justice Knauss quoted the Florida case of \textit{Liquor Store Inc. v. Continental Distilling Corporation} which stated that "... the essence of resale price maintenance is the control of price competition." Justice Knauss stated that he failed to see how a consumer of merchandise manufactured under a fair trade agreement benefited if he was made to pay a higher price for the commodity than he might otherwise be able to get.\textsuperscript{51}

Justice Krauss said further fo the Act:

\begin{quote}
This statute is in fact a price fixing statute. The power to fix the price is vested in an interested person who is not an official. There is no review of this act. He is required to consult with no one and in no sense is required to take into consideration the cost
\end{quote}

\textsuperscript{49}\textit{Taste of Conquest," Newsweek, 23 (New York, July 23, 1956), p. 56.}

\textsuperscript{50}\textit{Oliln Mathieson Chemical Corporation v. Phil I. Francis, 134, CoI. 160, 301 P. 2d 139 (1955).}

\textsuperscript{51}\textit{Ibid., 144-145.}
of the article or the reasonableness thereof. We need look no further than our own justification for precedents to turn the decision.52

Utah

This state struck down the Fair Trade Law in its entirety. The Court declared in 1956 the Utah Fair Trade Act unconstitutional for "price fixing" in violation of the constitution.53

In the Court's opinion, Justice Crockett referred to the Attorney General's National Committee to Study Anti-Trust Laws 1955. Justice Crockett agreed that fair trade goes beyond the necessity of loss leader controls. He said it tended to pass on to the consumer the savings derived from competitive distribution. The Court believed that fair trade might be used as a device to protect distributors from price competition and to maintain the price on such products.54

Justice Crockett pointed out that since 1952, of the State Courts considering the issue for the first time, only four had upheld fair trade laws. Eight had found them unconstitutional.55 Justice Crockett said that the more

52 Ibid., 145.
54 Ibid., 148.
55 Massachusetts, New Jersey, Ohio, and Pennsylvania.
recent decisions declared the acts invalid because there had been a few years of experience with the situation. Also he pointed out that there had been numerous comprehensive studies covering the economic effects.56

Therefore, the Court found the Fair Trade Act unconstitutional on the grounds of price fixing. The Court said that the price fixing was in violation of the constitutional provision. Any combination by individuals or corporations having for its object or effect, the controlling of the price of any product was against the State Constitution. Justice Crockett referred to the price fixing of fair trade as such:

It is like a sin: a little sin, if properly so classified, is just as definitely sin as a great quantity of it, and hardly to be approved under the pretext that it is so small in amount that it can really regarded as a virtue.57

Indiana

The Supreme Court of Indiana declared the State Fair Trade Law illegal purely on legal grounds. No consideration was given to business or economic conditions.58 The Court said it was not at liberty to substitute its own judgment for that of the General Assembly as to whether price fixing

56 301 P 2d 730 (1956).
57 Ibid., 751.
was good or bad for the economic life of the state. The Court recognized the future possibility that the benefits of price fixing might outweigh the disadvantages in time of a depression, or the converse be true in a time of prosperity or inflation. The Court held that the Indiana Constitution had the same meaning regarding separation of powers and the vesting of the right to enact laws in the General Assembly no matter what the economic situation of the State may be. 59

However, Justice Emmert tended to believe the opinion delivered by Justice Hughes in the Dr. Miles case. 60 This was that fair trade was a system of interlocking restrictions. It seeks control of the prices of all sales and fixes the amount which the consumer shall pay, thus eliminating all competition. 61

The Court compared the nonsigner provision of the fair trade law to the National Industrial Recovery Act of 1933. The Court said a retailer would be bound to a manufacturer's contract and "... not because a statute said he should be bound when he did not consent." 62 The Court rejected the

59 Ibid., 420.
60 Dr. Miles Medical Co. v. John D. Park & Sons Co., 1911, 220 U.S. 373.
61 231 Ind., 188, 143 N.E. 2d 417 (1957).
62 Ibid., 417.
fair trade law mainly on the grounds of unconstitutional delegation of legislative power to private persons. 63

South Carolina

The Rogers-Kent v. General Electric Company case declared the fair trade law of South Carolina unconstitutional. The Court said that the nonsigner provision constituted a deprivation of property without due process of law. 64

The Court rejected the trademark justification of fair trade. Justice Oxner said that if a manufacturer or producer sells his trademarked article for full value, completely parting with possession and title, he does not retain property interest. Therefore this would not enable him to control the selling price in perpetuity. 65

New Mexico

By the time the New Mexico Supreme Court reached a decision on fair trade, twenty-seven state appellate courts had reviewed the situation. Sixteen of the Courts sustained the constitutionality of fair trade, but eleven had declared

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63 Ibid., 415
65 Ibid., 670.
The New Mexico Supreme Court declared fair trade unconstitutional on grounds that the nonsigner provision was an arbitrary exercise of police power. It acted without any regard to the general welfare of the public. 67

The New Mexico Court relied heavily on the decision given by the Colorado Court. The Court believed that the State Court of Colorado's decision "...which to our view states the modern trend...and contains language the reasoning of which we feel should be adopted in New Mexico." 68

Ohio

The Ohio Court wrote a short decision making fair trade unconstitutional. 69 The Court recognized the previous decisions of state courts for 70 and against fair trade.

The Ohio decision was the first to dedicate the economic consequences of the decline in the legal states of fair trade. The Court said:

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67 Ibid., 974.

68 Ibid., 973.


70 The State Courts Cases which upheld Fair Trade are Joseph Triner Corporation v. McNeil, 1935, 363 Ill. 2 N.E. 2d 929; Sears v. Western Thrift Stores of Olympia Inc., 1941, 10
Many manufacturers have abandoned reliance on the fair trade acts to stipulate the prices at which their trademarked products may be sold, realizing the difficulty of enforcement and the further facts that arbitrary price fixing is monopolistic in character, has an anti-competitive effect on the economy and works to the disadvantage of the consuming public.71

The latter part of this statement implies a social rather than a private motivating interest on the part of manufacturers. This is alien to the competitive free enterprise system. The first part of the statement sounds like a logical reason for manufacturers abandoning fair trade.

Kansas

"Zerex" antifreeze was the product in question when the Kansas State Supreme Court declared the Fair Trade Law unconstitutional. The Quality Oil Company sold "Zerex" at $2.25 per gallon. But the fair trade price of du Pont was $3.25 per gallon.72

The Court under Justice Fatzer said that the purpose of resale price maintenance was the control of price competition. Justice Fatzer said it was solely the nonsigner


71 Supra 483.

clause which hampered the endorsement of the system.\textsuperscript{73} The Court held the system unconstitutional and void on improper delegation of legislative power.

**West Virginia**

The 1937 Fair Trade Law of West Virginia was declared illegal in 1958.\textsuperscript{74} The Court relied heavily on the Georgia and New Mexico decisions.\textsuperscript{75} The nonsigner clause was declared unconstitutional due to an improper exercise of police power. This effected a violation of the due process provision as required by the Constitution of West Virginia.\textsuperscript{76}

**Kentucky**

The General Electric Company, one of the stalwart defenders of fair trade, was again defeated in Kentucky. The State Court reviewed the reasons other state Courts had declared the law invalid--act is arbitrary, monopolistic, invades the right of property, and constitutes an unlawful delegation of governmental power. The Court said it was not concerned with the economic philosophy of fair trade. It was concerned only with the power of the

\textsuperscript{73}Ibid., 736.

\textsuperscript{74}General Electric Company v. A. Dandy Appliance Company, 103 S.E. 2d 310 (1958).

\textsuperscript{75}Cox v. G. E. op. cit.; and Skaggs v. G.E. op. cit.

\textsuperscript{76}103 S.E. 2d, 318 (1958).
Legislature under the Kentucky Constitution to enact a fair trade law. 77

The Court posed the question: "What is wrong with a man selling his own property for what he pleases?" 78 The Court answered this by saying, "We think the statute is the anti-theses of fair trade." 79

Commissioner Stanley concluded the Court's opinion by declaring the fair trade law unconstitutional due to due process. 80

Washington

This State Court decision is unique in that it is the only State Supreme Court which at first upheld fair trade and eighteen years later reversed its decision. The Court in 1941 declared that the fair trade law was constitutional. The Court said the act was a valid exercise of police power of the state. The Court found that parties who sold below the fair trade price committed an act of unfair competition. 81 In this earlier decision the Court

78 Ibid., 361.
79 Ibid.
80 Ibid., 362.
ruled that the nonsigner provision was a vehicle for vertical price fixing. The Court said the provision did not contravene with the state constitution prohibiting monopolies. 82

However, in 1959, the Court ruled the Sears v. Western Thrift decision reversed. 83 The Court recognized that the Sears decision was given at the time of the Old Dearborn decision. The Court did not reject the trademark theory found in the Old Dearborn decision. The Court modified the extent to which it could be used to justify the nonsigner provision. The Court said:

If the manufacturer does have an interest in the portion of goodwill which goes with the trademarked product, then he is entitled to sue and recover that portion of the resale price which is attributable to such goodwill, and we do not think it can be seriously contended that he has such a right. In selling the product to the retailer, the manufacturer exact a price for the use of his trademark and the benefit of the goodwill associated with it, as well as for the physical components of the product, and unless he also exact an agreement that the retailer will not resell the product at less than stipulated price we can see no equity which should entitle him to special protection of the law. 84

82 Ibid., 759.
84 Ibid., 1090.
Justice Rosellini reversed the decision of the earlier case. He found it unconstitutional on grounds that the nonsigner provision was an improper exercise of police power.

**Minnesota**

The Minnesota Supreme Court in 1951 declared that fair trade resale prices were invalid and inoperative. The Court found this "...established with respect to commodities in interstate commerce." The Court gave the decision in light of the first Schwegmann decision. The Court did not apply the theory of the nonsigner provision to intrastate commerce. The Court left this wide open in the 1960 decision.

In *Remington Arms Co. v. G.E.M. of St. Louis* the Court compared the economic aspects of fair trade with the State Constitution. The Court declared that the Fair Trade Act was detrimental to the economy and to the consumer. The Court said that the one who usually invokes the Act is a member of a monopoly or oligopoly. The Court pointed

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86 *Calvert Distillers Corporation v. Sachs* 243 Minn. 303, 48 N.W. 2d 531 (1951).
87 257 Minn. 562, 102 N.W. 2d 528 (1960).
cut that the appellant and another company controlled eighty-five percent of the production of the product. The Court believed that it was apparent than fair trade created an atmosphere where monopolies could flourish. The Court ruled the provision unconstitutional on grounds that it was an unlawful delegation of legislative power.

The Court made an interesting distinction between the State unfair Trade Act and the Fair Trade Act. The Court said that the unfair Trade Act "sales below cost is clearly aimed at supressing predatory practices" and declared that sales below cost is "for the purpose or with the effect of injuring competition or destroying competition."

The Court said that fair trade contract tends to make legal contracts which are unlawful prior to its passage. The Court held that the nonsigner provision eliminated competition which should be encouraged for the public interest rather than supressed.

88 Ibid., 536.
89 Ibid., 537.
90 Ibid., 531.
91 Ibid., 532.
Montana

The Montana Supreme Court found the fair trade system unconstitutional in 1961. The Montana Constitution was the basis used to make its decision. The Constitution states:

No incorporation, stock company, person or association of persons...shall, directly, or indirectly...make any contract...or in any manner whatever, for the purpose of fixing the price...any article of commerce.

The Court argued that fair trade was a price fixing implement. The Court pointed out that the appellant fair traded his product at a higher price than any competitor. The Court said the appellant could set the exact price of the commodity.

Iowa

The Supreme Court of Iowa declared that fair trade was an unconstitutional delegation of authority. The

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93 Ibid., 651.
94 Ibid., 652.
Court said that the system went beyond all common law development in the state.

The Court gave the interesting comparison:

When we hold it is an unconstitutional delegation of legislative authority to permit the highway commission to establish rules governing the stopping of vehicles upon a highway, to permit the Conservation commission to determine how many fish a fisherman may catch and for a Court to fix the boundaries for a city, it is an obvious non sequitur to permit a manufacturer to regulate the sales policy of a retailer not privy to any contract or agreement with the manufacturer. 96

Oklahoma

The execution of the Oklahoma fair trade system was a two-fold arrangement. 97 The Court found the system unlawful because of its delegation of legislative power and due process violation. Both of these pertained to the nonsigner provision. The Court said there was no relation between "price fixing provisions as applied to nonsigners and prevention of injury to the economic, social, and moral well being of the State." 98

The Court justified the forces of competition at the retail level of the production column as being as beneficial to have "free and open competition" among manufacturers. 99

96 Ibid., 370.
98 Ibid., 299.
99 Ibid., 302.
Pennsylvania

The Pennsylvania Supreme Court made it clear that the day is past when a manufacturer and one retailer could set a price on a trademarked goods which binds all other retailers throughout the state. The Court declared illegal the nonsigner provision of the Fair Trade Act. The plaintiff, Olin Mathieson Corporation, was a manufacturer of pharmaceuticals using the trademark "Squibb." White Cross sold "Squibb" at less than the fair trade price.

Olin Mathieson must be regarded as another judicial defeat for fair trade. An administrative agency could afford protection for the manufacturers trademarked goods.

Hawaii and Nevada

Hawaii declared the nonsigner clause of the Fair Trade Act unconstitutional in 1963. In 1967 the state held the law by its nature unconstitutional. Hawaii's new statehood sister, Alaska, has never enacted a fair trade law.

Nevada repealed the Fair Trade Act in 1965.

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101 Dickinson Law Review "What's In Store for Fair Trade in Pennsylvania" (Fall 1964), 203.
103 Ibid.
CHAPTER V

FAIR TRADE AND ECONOMIC EFFECTS

Over the past fifteen or twenty years fair trade has been the subject of extensive empirical inquiry. There are several reasons for this interest. First, resale price maintenance has been an important public issue. And secondly, fair trade by its nature can be examined through statistical methods.

The statistical surveys can be classed into five main groups. These are 1) the statistical quantification as to the extent of fair trade; 2) studies which compare price changes of fair traded products over some given period; 3) studies which compare product prices in fair trade and free trade areas; and 4) studies of operating ratios of various kinds of outlets. The usual purpose of these studies is to determine the effects of fair trade on retailing efficiency. But there have also been studies of miscellaneous nature. They have used data comparing bankruptcy rates of retail stores in fair trade and free trade areas, business failures in the areas, and so forth.

There have been surveys to determine the extent of fair trade products. One such study was conducted by the Temporary National Economic Committee in 1941. It was
estimated that only fifteen per cent of retail sales came within the scope of fair trade laws.\textsuperscript{1} A more recent study completed in 1954 placed retail sales under fair trade control at $11.7 billion, or 6.9 percent of total retail sales.\textsuperscript{2}

In 1956 it was estimated that about 61.5 per cent of the nation's manufacturers were practicing fair trade agreements in some of their products.\textsuperscript{3} An earlier study in 1951 by the Standard Advertising Register showed 8.7 percent of the nation's nationally advertised producers fair trading one or more products. The complete results of this report appear in Table I.

Herman in 1954 conducted a survey showing the industrial distribution of fair traded merchandise. The results of this study are given in Table II:

From these surveys it can be seen that the percentage of goods sold under fair trade contracts in the United States


### TABLE I

**DISTRIBUTION OF THE FAIR TRADING MANUFACTURERS OF NATIONALLY ADVERTISED PRODUCTS BY INDUSTRIAL CLASSIFICATION, 1951***

<table>
<thead>
<tr>
<th>Industrial Classification</th>
<th>Manufacturers Listed by Standard 1951 Advertising Register</th>
<th>Fair Trading Manufacturers</th>
<th>Fair Trading Manufacturers Given in Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airplanes and accessories</td>
<td>72</td>
<td>4</td>
<td>5.6</td>
</tr>
<tr>
<td>Automobile accessories</td>
<td>324</td>
<td>78</td>
<td>22.0</td>
</tr>
<tr>
<td>Automobiles and trucks</td>
<td>59</td>
<td>2</td>
<td>3.4</td>
</tr>
<tr>
<td>Beer, ale and soft drinks</td>
<td>251</td>
<td>7</td>
<td>2.8</td>
</tr>
<tr>
<td>Building construction and material</td>
<td>601</td>
<td>12</td>
<td>2.1</td>
</tr>
<tr>
<td>Cleansers</td>
<td>213</td>
<td>53</td>
<td>24.9</td>
</tr>
<tr>
<td>Farm equipment</td>
<td>333</td>
<td>3</td>
<td>0.9</td>
</tr>
<tr>
<td>Fancy goods, notions, etc.</td>
<td>335</td>
<td>16</td>
<td>4.8</td>
</tr>
<tr>
<td>Flour and cereal</td>
<td>76</td>
<td>6</td>
<td>7.9</td>
</tr>
<tr>
<td>Food products</td>
<td>861</td>
<td>44</td>
<td>5.1</td>
</tr>
<tr>
<td>Furniture, floor covering and upholstering</td>
<td>330</td>
<td>16</td>
<td>4.6</td>
</tr>
<tr>
<td>Household appliances</td>
<td>109</td>
<td>13</td>
<td>11.9</td>
</tr>
<tr>
<td>Hardware</td>
<td>337</td>
<td>33</td>
<td>9.8</td>
</tr>
<tr>
<td>Heating</td>
<td>244</td>
<td>11</td>
<td>4.5</td>
</tr>
<tr>
<td>House furnishings</td>
<td>553</td>
<td>82</td>
<td>14.8</td>
</tr>
<tr>
<td>Household appliances</td>
<td>142</td>
<td>18</td>
<td>12.7</td>
</tr>
<tr>
<td>Jewelry, silverware, etc.</td>
<td>248</td>
<td>37</td>
<td>14.9</td>
</tr>
<tr>
<td>Knit goods and underwear</td>
<td>230</td>
<td>13</td>
<td>5.6</td>
</tr>
<tr>
<td>Livestock and poultry</td>
<td>204</td>
<td>10</td>
<td>4.9</td>
</tr>
<tr>
<td>Lighting</td>
<td>150</td>
<td>7</td>
<td>4.3</td>
</tr>
<tr>
<td>Machinery and supplies</td>
<td>694</td>
<td>19</td>
<td>2.3</td>
</tr>
<tr>
<td>Mail order houses</td>
<td>36</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Industrial Classification</td>
<td>Manufacturers Listed by Standard 1951 Advertising Register</td>
<td>Fair Trading Manufacturers</td>
<td>Fair Trading Manufacturers Given in Per Cent</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-------------------------------------------------------------</td>
<td>----------------------------</td>
<td>---------------------------------------------</td>
</tr>
<tr>
<td>Men's clothing</td>
<td>295</td>
<td>9</td>
<td>3.1</td>
</tr>
<tr>
<td>Musical instruments</td>
<td>104</td>
<td>6</td>
<td>5.8</td>
</tr>
<tr>
<td>Office equipment</td>
<td>225</td>
<td>51</td>
<td>22.7</td>
</tr>
<tr>
<td>Paints and varnishes</td>
<td>175</td>
<td>17</td>
<td>9.7</td>
</tr>
<tr>
<td>Proprietary medicines and drugs</td>
<td>620</td>
<td>17.4</td>
<td>28.1</td>
</tr>
<tr>
<td>Publishers and engravers</td>
<td>493</td>
<td>48</td>
<td>9.7</td>
</tr>
<tr>
<td>Radio and television</td>
<td>158</td>
<td>8</td>
<td>5.1</td>
</tr>
<tr>
<td>Seeds, plants and supplies</td>
<td>287</td>
<td>9</td>
<td>3.1</td>
</tr>
<tr>
<td>Shoes</td>
<td>250</td>
<td>5</td>
<td>2.0</td>
</tr>
<tr>
<td>Smokers' requisites</td>
<td>110</td>
<td>46</td>
<td>4.1</td>
</tr>
<tr>
<td>Sporting goods</td>
<td>345</td>
<td>65</td>
<td>18.8</td>
</tr>
<tr>
<td>Sweets</td>
<td>137</td>
<td>3</td>
<td>2.1</td>
</tr>
<tr>
<td>Tires and tubes</td>
<td>25</td>
<td>5</td>
<td>20.0</td>
</tr>
<tr>
<td>Toilet and requisites</td>
<td>402</td>
<td>61</td>
<td>15.2</td>
</tr>
<tr>
<td>Trailers, pleasure</td>
<td>29</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Watercraft, bicycles and</td>
<td>86</td>
<td>2</td>
<td>2.3</td>
</tr>
<tr>
<td>motorcycles</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wines and liquors</td>
<td>165</td>
<td>13</td>
<td>7.9</td>
</tr>
<tr>
<td>Women's clothing</td>
<td>741</td>
<td>5</td>
<td>0.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>11,115</strong></td>
<td><strong>1,011</strong></td>
<td><strong>9.1</strong></td>
</tr>
</tbody>
</table>

*Source: Data compiled in testimony of John W. Anderson, President of the American Fair Trade Council, before the Antitrust Subcommittee of the House Committee on the Judiciary, Resale Price Maintenance, Hearings on H. R. 4365, 1952, p. 713, Reference I.*
### Table II

**Industrial Distribution of Fair Traded Merchandise for 175 Firms: 1954**

<table>
<thead>
<tr>
<th>Industrial Classification</th>
<th>Number of Firms</th>
<th>Per Cent of Firms</th>
<th>Volume of Sales $\text{\textdollar} \text{Mil.}$</th>
<th>Per Cent of Sales</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcoholic beverages</td>
<td>7</td>
<td>4.0</td>
<td>131.4</td>
<td>9.5</td>
</tr>
<tr>
<td>Automotive supplies</td>
<td>7</td>
<td>4.0</td>
<td>33.0</td>
<td>2.8</td>
</tr>
<tr>
<td>Boats and outboard motors</td>
<td>2</td>
<td>1.1</td>
<td>49.8</td>
<td>3.6</td>
</tr>
<tr>
<td>Books</td>
<td>7</td>
<td>4.0</td>
<td>16.2</td>
<td>1.2</td>
</tr>
<tr>
<td>Cameras and photo supplies</td>
<td>4</td>
<td>2.3</td>
<td>65.5</td>
<td>4.8</td>
</tr>
<tr>
<td>Clocks and watches</td>
<td>4</td>
<td>2.3</td>
<td>36.2</td>
<td>2.6</td>
</tr>
<tr>
<td>Cosmetics and perfumes</td>
<td>31</td>
<td>17.7</td>
<td>100.8</td>
<td>7.4</td>
</tr>
<tr>
<td>Tobacco products and accessories</td>
<td>8</td>
<td>4.6</td>
<td>90.0</td>
<td>6.6</td>
</tr>
<tr>
<td>Drugs and medicines</td>
<td>26</td>
<td>14.9</td>
<td>271.2</td>
<td>20.0</td>
</tr>
<tr>
<td>Druggists' sundries</td>
<td>23</td>
<td>13.4</td>
<td>200.1</td>
<td>14.6</td>
</tr>
<tr>
<td>Electric appliances and housewares</td>
<td>6</td>
<td>3.4</td>
<td>136.0</td>
<td>13.6</td>
</tr>
<tr>
<td>Food products</td>
<td>2</td>
<td>1.1</td>
<td>5.2</td>
<td>0.4</td>
</tr>
<tr>
<td>Firearms and ammunition</td>
<td>2</td>
<td>1.1</td>
<td>48.9</td>
<td>3.6</td>
</tr>
<tr>
<td>Hardware</td>
<td>11</td>
<td>6.3</td>
<td>19.5</td>
<td>1.4</td>
</tr>
<tr>
<td>Hosiery</td>
<td>3</td>
<td>1.7</td>
<td>16.0</td>
<td>1.2</td>
</tr>
<tr>
<td>Other</td>
<td>21</td>
<td>12.0</td>
<td>25.9</td>
<td>1.9</td>
</tr>
<tr>
<td>Shoes and other footwear</td>
<td>2</td>
<td>1.1</td>
<td>29.9</td>
<td>2.2</td>
</tr>
<tr>
<td>Sporting goods</td>
<td>4</td>
<td>2.3</td>
<td>2.7</td>
<td>0.2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>175</strong></td>
<td><strong>100.0</strong></td>
<td><strong>$1368.5$</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

has been small. There has been a strong concentration of fair trade pricing in a few industrial classifications. A few large manufacturers have handled a relatively large percentage of total fair traded retail sales.

A look at fair trade and the effects on prices will be undertaken next. The first detailed study of the economic effects of resale price maintenance laws was carried out for the Druggist's Research Bureau. It was conducted by H. J. Ostlund and C. R. Vicklund in 1939.\(^4\) This survey attempted to reach every drug distributor in the forty-two Fair Trade States. The study used fifty leading trademarked goods which were fair-traded in several states. Goods used were toiletries, drugs, and cosmetics. This study attempted to measure the price changes of items most extensively affected by fair trade.

Data were collected by type of store, store size, and the city's size. The survey distributed forms to each retailer asking him to give the prevailing price before passage of a fair trade law and the price at which the current majority of sales were made.

The survey found that there was a general decline in price levels after the introduction of fair trade. The weighted average price of the fifty leading trademarked goods was 35.56 cents before fair trade. However, it was 35.20 cents in 1939, a decline of one per cent from the average before fair trade. These fifty items had a weighted average list price of 40.45 cents. The average price before fair trade, given as a percentage of the weighted average list price was 87.9 per cent. The average price of these items in 1939 was 87.0 per cent. Therefore before fair trade these items were selling on the average 12.1 percent below their list prices. After fair trade they were selling 13.0 percent below. The average reduction amounted to 0.9 per cent.

The weighted average contract minimum price of the fifty items was 33.74 cents, 83.3 per cent of list. The average price before Fair Trade legislation was 87.9 percent or list or 4.6 points above this level. Yet the average price in 1939, 87.0 percent of list, was 3.7 points above this level.

Although the survey shows a general decline in price levels after the introduction of fair trade legislation,

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5 Ibid., p. 9.
6 Ibid.
exceptions can be found. One difficulty associated with the report was the technique of weighing price changes by volume or sales. This procedure can lead to misleading conclusions. For example, the survey showed a general decline in prices; however, chain stores had to raise their prices by an average of five per cent to bring them up to the prescribed minimum prices.

This study has received much criticism. Criticism as to the accuracy of the data involves questions of whether the returns were representative of the prices of nonrespondents as well as those of respondents. The level of non-response to the questionnaires was about 65 per cent. Of the independent stores in the forty-two states 20.4 per cent were represented. Of the chain drug stores 66.6 per cent were represented in the tabulations used in the study.7

The driving force of fair trade has come from organizations within or closely allied to the drug trade. Therefore, it is likely that those chains having "favorable" results to fair trade would tend to report them while those with "unfavorable" results might not report them at all. The Federal Trade Commission related to this idea that

7Ibid., p. 7.
perhaps the druggists had difficulty recalling prices of products which had prevailed in some cases several years previous.\(^3\)

The validity of respondents is also criticized because the leading druggist trade journal at that time, *Drug Topics*, published facsimiles of the survey forms together with the admonition to druggists to "Cast your vote for fair trade." Of the total returns received by Ostlund and Vicklund, five percent consisted of these facsimiles instead of the original forms sent out by the surveyors.\(^10\)

The time element also played a great part in the accuracy of the data. Prices must have fluctuated to some extent before the passage of fair trade. When dealing with fifty items and fluctuating prices, some mistakes must have been made by the druggists.

An examination of the survey was conducted in 1955 by Marvin Frankel. Frankel offered several points of criticism. Frankel said that accurate conclusions were difficult to obtain from the survey because the study was conducted by an institution which was favored by ninety percent of the universe being tested.


\(^9\)Ibid., p. 583.

\(^10\)Ostlund and Vicklund, *Fair Trade and the Retail Drug Store*, p. 146.
Since only one state, Hawaii, has adopted resale price maintenance since 1940, it is difficult to find effects of the introduction of fair trade legislation on prevailing price levels.11

The National Association of Chain Drug Stores in 1949 undertook a survey of price changes in order to "show the performance of fair traded items in the drug industry as against price performance generally..."12 This survey consisted to two-hundred-and-fifty manufacturers who produced the great bulk of fair traded drug merchandise. The questionnaires asked the drug manufacturers to report their fair trade prices for the years 1939 and 1947. More than 7,300 items were included in the survey. The survey showed that in 1939 customers buying one of each of these items paid $6,222.18. In 1947 they paid $6,555.77. The survey compared the actual increase of $333.59 or 5.36 percent against the total cost-of-living increase of 59.3 percent in this period.13 Therefore, the study showed that prices of fair traded drug items had remained stable relative to general prices elsewhere in the economy.


This study does not indicate the price changes of non-fair traded drug items in this period. The study assumed that the rise in the general price index was a representation of the non-fair traded items. Frankel criticized the study on several grounds. Frankel pointed out that prices reported were not necessarily the prevailing prices since in many areas minimum prices are not enforced. In different areas the degree of competition and the general market conditions vary so that using the minimum contract price as a base could be very misleading. Perhaps his thought is best summarized by:

> It appears legitimate to draw but one conclusion from the study; that minimum contract prices rose but little from 1939 to 1947. This bit of information tells us nothing about the increase in actual prices and the role played by fair trade in that increase.\(^\text{14}\)

The most extensive study given to resale price maintenance by the government was conducted by the Federal Trade Commission in 1945.\(^\text{15}\) Data were collected from twenty cities. Twelve of the cities were in price maintenance areas and eight were not. The Commission selected the size of the package which was most frequently purchased out of about 155 items. Prices of forty-four brands of

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grocery store commodities and ninety-five brands of men's clothing were used to construct the survey base. The time period for the study was six to eighteen months after that date. Retailers and wholesalers were interviewed in personal meetings. Manufacturers were sent forms inquiring about price fluctuation and sales volumes. The proprietors of the various independent stores had to work on the statistics from memory since only the chair stores kept records on prices, volumes, or dates of price changes. In the larger metropolitan areas, sample representatives of the whole mass of stores were taken.

The results of the study showed that some chain supermarket stores had slight price increases on fair-traded items after the passage of resale price maintenance. The study found that prices of competing non-fair-traded goods did not change. Analysis on the price effect in the commodities sold by grocery stores yielded no impressive conclusions. There appeared only a slight decrease in the volume of sales of a few articles after being placed under the fair trade act. First, this could possibly have been because the price increases were very small and, second, the retailers were encouraged to push sales of fair-traded items by the National Retail Grocers Association and other trade groups.16

16 Ibid., pp. 636-37.
In the drug industry the commission worked with twenty-five types of drug related commodities in nineteen cities. The study concluded that in large market areas chain and department stores raised the price of products placed under contract by ten per cent. These stores experienced a loss of volume, even though some of the stores had a thirty per cent increase in average gross margin.

The commission found that the short run effect of fair trade caused an economically unjustified rise in the prices of drug and cosmetic items from chain stores and supermarkets.17

In summary, the effects of fair trade on manufacturer's prices, costs, volumes, and rate of return were inconclusive. The study suffered from having to depend on memories rather than collected data. The period covered years prior to 1940 and this was short period since some of the examined states had only passed fair trade in 1937. Poor organization and lack of clarity of purpose were also problems with the report.

The only other government survey conducted was done in relation to a study on discount houses.18 This study

17 Ibid., p 708.
was conducted by the Department of Justice in 1956. In this study, price comparisons were made of identical products in fair trade and nonfair trade areas. The study showed that eight nonfair trade areas were paying on the average twenty-seven percent less than fair trade areas on seventy-eight brands. In 119 brands of the 132 surveyed the nonfair trade areas were paying 19 per cent less than those in the fair trade group.\textsuperscript{19} Therefore this survey tended to show that prices of similar products in free trade areas seemed to be lower than in fair trade states.

A more recent study was performed by McKesson and Robbins which spanned the years 1952 to 1959.\textsuperscript{20} This study was done in connection with quality stabilization. The survey examined wholesale price changes of 201 drug products. This figure was divided into subgroups. However, in the various subgroups difficulties were encountered when an attempt was made to compare price changes. In some subgroups the study failed to include fair and free traded items. No division was given between the goods.

In general the study indicated that wholesale prices in the items surveyed rose less than other wholesale price indices.

\textsuperscript{19}Ibid., p. 278.

The A. C. Nielsen Company conducted a potentially more useful study in 1953. Neilson compared prices reported for twenty-four packaged remedies and grooming aids in 1949 and 1951 in fair-trade and non-fair-trade states. It was concluded that consumers in fair trade areas were on the average charged somewhat less than those in nonfair trade states. The same firm prepared a similar report in 1958, but for some reason limited the comparison to fifteen items. However, the new study was declared inadequate for comparison in response to Department of Justice inquiries.

The survey conducted by Nielson did not indicate how the data was collected. Only druggists were used in the 1949 and 1951 surveys. This survey dealt only with drug products. This persistence in drug surveys prevents the understanding of efficient administered price maintenance on general price levels.

The advocates of fair trade have recently pointed out that while the price index of all goods and services in the United States during the period from 1947 to 1958 rose from 95.5 to 123.5 that the heaviest fair traded item, drugs, increased from 96.1 to 120.7 in the same period. 21

21 Ibid. p. 164.
Congressional hearings through 1964 failed to show that prices were lower in fair trade areas. Perhaps the most extensive of these studies was conducted in 1952. This study examined prevalent prices in top four national aspirins, top ten tooth paste brands, top nine shaving creams, top six hair tonics, top thirteen liquid shampoos, top eighteen deodorants, and top seven hand lotions. The survey compared prices of these items in Baltimore, a fair trade city, and Washington, a free trade city. In every case the prevalent price was cheaper in Washington, D. C. area. The prices were lower by an average of seventeen per cent. 22

It can be concluded that the statistical evidence appears to indicate that prices under fair trade will be higher than would be expected in the absence of fair trade legislation.

Studies as to the extent of protection afforded the small retailer or druggist from bankruptcy have been conducted. Traditionally it has been the primary aim of fair trade to protect the small independent firms. It has been the central argument in the defense of fair trade that the large volume distributor through misleading price cutting would unfairly drive all small retailers out of business.

However, the statistical findings of this study indicate that the absence of effective fair trade was only a small factor in determining business failures if it was a factor at all. The main sources for data on business failures in the United States are published by Dun and Bradstreet. Unfortunately most of information given is strictly on bankruptcies. The Department of Commerce publishes estimates of total business failures. This data is based on data given by Dun and Bradstreet.

An examination of bankruptcy in free and fair trade states is given in Table III. This table indicates that failure rates have been lower in free trade states than in fair trade states. The table represents the years 1939 and 1940 which were the peak years for fair trade's popularity.

Business failures in 1962 given in Table IV show that the average failure rate was 71 bankruptcies per 10,000 firms in states which upheld the nonsigner clause and only 29 bankruptcies per 10,000 firms in free trade states.

Advocates of fair trade point out that in seventeen states since fair trade was disabled, bankruptcy rates have

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### TABLE III

**DISTRIBUTION OF BUSINESS BANKRUPTCY RATES FOR SELECTED STATES: 1939 AND 1940**

<table>
<thead>
<tr>
<th>State, Free Trade</th>
<th>1939 Number</th>
<th>1939 Rate Per 1000 Firms</th>
<th>1949 Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vermont</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Washington D.C.</td>
<td>1</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Texas</td>
<td>16</td>
<td>5</td>
<td>19</td>
</tr>
<tr>
<td>Missouri</td>
<td>19</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>Maine</td>
<td>4</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>Maryland</td>
<td>3</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>17</td>
<td>15</td>
<td>11</td>
</tr>
<tr>
<td>Illinois</td>
<td>52</td>
<td>14</td>
<td>45</td>
</tr>
<tr>
<td>Kansas</td>
<td>8</td>
<td>7</td>
<td>7</td>
</tr>
</tbody>
</table>

*Source: House Subcommittee on Antitrust of the Committee on the Judiciary, Hearings on Resale Price Maintenance, 1932, pp. 95-96.*
# Business Failure Rates per 10,000 Firms for Free Trade and Fair Trade States*

<table>
<thead>
<tr>
<th>State</th>
<th>Rate</th>
<th>State</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mo.</td>
<td>27</td>
<td>Ala.</td>
<td>29</td>
</tr>
<tr>
<td>D. C.</td>
<td>16</td>
<td>Ariz.</td>
<td>110</td>
</tr>
<tr>
<td>Mont.</td>
<td>15</td>
<td>Cal.</td>
<td>120</td>
</tr>
<tr>
<td>Neb.</td>
<td>13</td>
<td>Conn.</td>
<td>64</td>
</tr>
<tr>
<td>Tex.</td>
<td>35</td>
<td>Del.</td>
<td>32</td>
</tr>
<tr>
<td>Utah</td>
<td>34</td>
<td>Idaho</td>
<td>39</td>
</tr>
<tr>
<td>Ver.</td>
<td>17</td>
<td>Ill.</td>
<td>69</td>
</tr>
<tr>
<td>Average</td>
<td>29</td>
<td>Me.</td>
<td>26</td>
</tr>
<tr>
<td>Ky.</td>
<td>45</td>
<td>Mass.</td>
<td>42</td>
</tr>
<tr>
<td>Mass.</td>
<td>42</td>
<td>Miss.</td>
<td>17</td>
</tr>
<tr>
<td>Nev.</td>
<td>72</td>
<td>N. H.</td>
<td>32</td>
</tr>
<tr>
<td>N. J.</td>
<td>60</td>
<td>N. Y.</td>
<td>116</td>
</tr>
<tr>
<td>N. C.</td>
<td>21</td>
<td>Tenn.</td>
<td>42</td>
</tr>
<tr>
<td>Tenn.</td>
<td>42</td>
<td>N. D.</td>
<td>6</td>
</tr>
<tr>
<td>Va.</td>
<td>32</td>
<td>Wis.</td>
<td>58</td>
</tr>
<tr>
<td>Wis.</td>
<td>58</td>
<td>Average</td>
<td>71</td>
</tr>
</tbody>
</table>

*Source: Dun and Bradstreet Reference Book, July, 1963, as reproduced in Hearings before the House Committee on Interstate and Foreign Commerce, 1963, p. 82.
In most cases the data used were for the years 1960 and 1961. But this study indicates that the absence or presence of fair trade is critical.

The tables indicate that business failures were higher in states which legalized price fixing. But this study indicates that there is little merit to small business claims that the presence of fair trade is critical to the success of small business. However, it is true that in the 1930's economic conditions might have warranted the small business statements regarding fair trade.

Recently there has been some change of mind by small businessmen regarding fair trade. A survey conducted in 1960 indicated that 52 per cent of those surveyed opposed a national resale price maintenance bill. A similar survey conducted in 1962 showed that 51 per cent of the 179,000 small businessmen contacted were against fair trade laws. A survey in 1955 of 5,000 marketing executives indicated that 50 per cent were not in favor of fair trade legislation.

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Also the National Small Business Association conducted a survey in 1962. The study revealed that 60 percent of its membership was opposed to fair trade legislation.\textsuperscript{27}

\textsuperscript{27}U.S. Congress, House, Committee on Interstate and Foreign Commerce, \textit{Hearings on the Quality Stabilization Act}, p. 17.
CHAPTER VI

CONCLUSION

Fair trade has experienced a long and confused history. Throughout much of its life the participants were not aware of the legal position of resale price maintenance. Today, even the ideas of its main supporters, the small businessmen, have changed. Over half of the present day small retailers have expressed a negative attitude toward the system. This leads to a questioning of fair trade. The growth of fair trade was not due to the general desire of small retailers, but to the loud specific factions of the independent retailers, such as druggists.

Fair trade experienced its greatest strength during the depressed economic conditions of the 1930's. The legal reasoning of the period found justification in the trademark theory. More basically, perhaps, the courts wanted the inflationary tendencies of fair trade present. However, with the prosperity of the 1950's, the courts condemned fair trade with limiting federal and state acts. In the last two decades of prosperous economic conditions, twenty-four state courts have found the provision contrary to the American economic, legal, and political philosophy. The
growth and significance of fair trade has not depended as much on economic application as on the decisions of state and federal courts.

Federal and state legislation has set out to restrict excessive competition and thus halt the formation of monopolies through the elimination of competition. However, fair trade legislation has not fully succeeded in either of these goals. Fair trade stifles competition and aids in the fixing of retail prices.

The opposition to fair trade has been inspired by particular economic interests. Probably the most active are the large chain retailers which use loss leader selling. The opposition has the support of the price conscious consumer. The general opposition had developed more actively for it does not conflict with the philosophy of the competitive free enterprise system.

The advocates of fair trade who have directed their efforts towards the survival of the small independent retailer have taken an inappropriate plan of attack. The advocates might achieve more results seeking stronger enforcement or amendments to the Robinson Patman Act of 1936, instead of the fair trade route. This law could protect the independent retailer from any economically unjustified competition with chain department and discount stores.
Section 2(a) of the Patman Act makes it illegal for a chain store to permit a price discrimination to exist in different markets where the effect of such discrimination will tend to lessen competition or create a monopoly. Manufacturers can also control resale prices by using bona-fide consignment selling. In this system the supplier retains ownership of the goods. The retailer than operates only as an agent to the transaction. But this system has costly draw backs to the supplier and generally is not used unless there are basic marketing problems.

Resale prices could be maintained by the supplier's distributing his goods only to those retailers who he knows will not sell below a suggest price. However, this system is costly to the supplier in keeping posted on the actions of his retailers.

The findings of this study indicate that the extent of goods sold under fair trade has generally been less than ten percent. However, there has been a high concentration of fair trade products in certain industries including drugs, electric appliances, and alcoholic beverages. The number of goods sold under fair trade has decreased greatly in the past twenty years.
In areas where fair trade has been practiced, slight price inflation can be found. Whether this inflation is a direct result of fair trade or not is difficult to determine. If fair trade were practiced more extensively today, one could possibly examine the results of fair trade on inflation.

The primary purpose of fair trade in protecting the small business from economic failure has not proved successful. The findings of this study indicate doubt that fair trade legislation reduces small business failures. States which have no fair trade measures generally have lower bankruptcy rates than states which have fair trade provisions.

Twenty-four states have declared fair trade illegal in the past two decades. Four states never passed a fair trade act. A majority of the states at present do not have fair trade laws. More states in the future will probably discard the system. Although the state courts have not used economic conditions as a basis for determining the constitutionality of fair trade, economic reasoning is noticeable in the legal decisions of almost all the courts. It is interesting to note that the judiciary rather than the legislative branch of the government has had the general public's interest closest at hand.
From the findings in this study, it appears that manufacturers' interest in maintaining stipulated prices has decreased. This general lack of interest in enforcement tends to dampen the future of fair trade.
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