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CONSTITUTIONALITY OF STATE FAIR TRADE ACTS

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I.

Fair Trade, the persistent child of protective legislation and the subject of only faint judicial remonstrances for two decades, has, in a few short years, discovered itself in troubled adulthood. Its once tranquil existence has been transformed into one of stormy attack.

As is well known, so-called "Fair Trade" laws authorize contracts for sale or resale of a given commodity under which the purchaser agrees that he will not resell except at the exact or minimum price stipulated by the vendor. They apply only to commodities identified by trade-mark, trade-name or brand and in fair and open competition with commodities of the same general class. The heart of every such act is the famous "nonsigner" provision which creates a cause of action for unfair competition against anyone who, willfully and knowingly, sells the commodity at a price below that established by a written contract, whether or not the seller is a party thereto.

At common law, there appears to have been no violation in the nature of restraint of trade if a manufacturer desired to exact from a reseller of his product a written promise to sell only at the price stipulated.¹ A manufacturer's covenant fixing retail prices as incidental to some main contract was sustained provided it involved less than a controlling part of a given commodity in a given market, did not tend to create a monopoly, was reasonable in reference to the interests of the parties and of the public, and the price fixed was necessary to the protection of the covenantee and fair to the public in that it furnished only a reasonable profit to the parties.²

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1. *Garst v. Harris*, 177 Mass. 72, 58 N.E. 174 (1900).

2. *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144 (1913); *accord*, *Grogan v. Chafee*, 156 Cal. 611, 105 Pac. 745 (1909); *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S.W. 427 (1901); *Quinlivan v. Brown Oil Co.*, 96 Mont. 147, 29 P.2d 374 (1934).

However, the impact of the Sherman Anti-Trust Act, announced in the famous *Dr. Miles* case,³ left little doubt with regard to the validity of vertical resale price agreements. The United States Supreme Court, with only Justice Holmes dissenting, held that such an agreement between a manufacturer of patent medicines and his retailers actually restrained competition on the latter level as effectively as any horizontal price-fixing agreement. Thus, vertical price fixing was condemned as expressly offensive to antitrust policy.

The birth of Fair Trade, the legislative sanction to vertical price setting, came in the early years of the depression of the nineteen thirties. The first Fair Trade Act was passed by California in 1931,⁴ and has served as a model for all others with few variations. By 1941, all but three states had enacted similar acts.⁵

The constitutionality of these state statutes was sustained in 1936 over objections grounded upon the fifth amendment and the due process and equal protection clauses of the fourteenth amendment in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*⁶ One year later Congress passed the Miller-Tydings amendment,⁷ and thus effected a statutory exemption from the Sherman Act for all state Fair Trade laws.

The nearly unanimous adoption of price-fixing laws should not be misleading. Misgivings and outright condemnations were published and

3. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

4. CAL. BUS. & PROF. CODE ANN. §§ 16900-05 (Deering 1951). The pertinent sections are quoted below in part: "16902. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract: (1) That the buyer will not resell such commodity except at the price stipulated by the vendor. (2) That the vendee or producer require the person to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor.

"16904. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

5. The only states which have never enacted Fair Trade legislation are Missouri, Texas and Vermont. 1 CCH TRADE REG. REP. (10th ed.) ¶ 3075.

6. *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N.E.2d 940 (1936), *aff'd*, 299 U.S. 183 (1936). The Supreme Court there said the Illinois Fair Trade Act was designed solely "to afford a legitimate remedy for an injury to the good will which results from the use of trade-marks, brands or names." It held the act effective against signatories and informed dealers alike as a valid exercise of the state's police power for the purpose of safeguarding a supplier's proprietary interests from impairment through price cutting and "loss-leader" selling. The court in effect held that there was no federal constitutional question involved in these state Fair Trade statutes, but rather that their constitutionality was a matter for determination by the state through its legislature and its courts. *Id.* at 196.

7. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

heard even before the California act became effective.⁸ The lines were drawn in Professor Shulman's excellent and concise analysis of the issues in 1940.⁹ Despite the vigorous and continued criticism of Fair Trade, the momentum of the movement has caused the acts to become deeply imbedded in the state statutes. And, as in most instances of state legislation, once imbedded, it becomes almost impervious to change. The consumer, purportedly the center of the controversy with regard to his "protection," but most often neglected, could not conceivably organize and maintain lobby and pressure groups so well as retail merchants and other sellers who are solid entities. A depression of the market for goods, followed on its heels by a period of wartime scarcities and shortages, kept the picture of Fair Trade out of focus. The retailers' organized pressure combined with the depression and war was enough to keep the balance among the relevant group interests far in favor of Fair Trade.

This balance has apparently been shaken. The era of continued economic expansion, and the corresponding increase in the manufacturing of all types of consumer goods, has wiped out any possible justifications for Fair Trade based upon depression-wartime arguments, i.e., creation of monopoly due to either shortage of buying power or scarcity of commodities. The first evidence of this new situation was made apparent in the case of *Schwegmann Bros. v. Calvert Distillers Corp.*,¹⁰ in which the Supreme Court overturned effective Fair Trade by announcing that since the Miller-Tydings amendment exempted only "contracts or agreements" from its anti-monopoly provisions and did not include a sanction of Louisiana's nonsigner provision, it would incorrectly "perform a distinct legislative function by reading into the [Federal] Act a

8. SELIGMAN & LOVE, PRICE CUTTING AND PRICE MAINTENANCE 99 (1932).

9. Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L.J. 607 (1940). "The change of policy with reference to resale price maintenance," said Professor Shulman, "was not due to the pressure of analogies from the law of real property or to the discovery or better understanding of any doctrine of equitable servitudes or of any general principles of equity jurisprudence, fundamental or otherwise. It was rather the response to a cry of distress from groups of people who have found their voices and who have learned, particularly during the days of the NRA, how to use them in unison and effectively." *Id.* at 623.

It is undeniably true today, if not in 1940, that "the Fair Trade Acts are concerned not with the protection of the producer or the owner of the trade-mark, but with the protection of certain types of wholesale and retail distributors. Their function and object is not to protect the good-will symbolized by the trade-mark, but to alleviate the rigors of price competition between distributors. . . . [T]he concern of the Acts with trademarked goods is accidental and incidental. . . .

"It is common knowledge that the pressure for the passage of these Acts, insofar as it was publicly disclosed, came not from manufacturers or other trade-mark owners but from distributors—first and foremost the retail druggists associations and then other retail and wholesale distributors." *Id.* at 615.

10. 341 U.S. 384 (1951), referred to as the "first Schwegmann decision."

provision that was meticulously omitted from it."¹¹ At the same time, an inroad upon Fair Trade was accomplished in the lower federal courts when the Third Circuit Court of Appeals held that a manufacturer of electric shavers was not entitled to enforce the Pennsylvania Fair Trade law against a Pennsylvania mail-order business in its shipments to points outside Pennsylvania.¹²

Immediately after the *Schwegmann* decision, a wave of price-cutting and loss-leader selling was followed within a year by an apparent loss of interest in price-cutting on fair-traded commodities. In spite of the relatively small area of these price wars, and the obvious fact that even in those places normality was returning, Congress, after bitter debate, enacted the highly controversial McGuire Act.¹³ As is obvious, Fair Trade laws without nonsigner provisions to govern interstate sales are worthless. The effect of the McGuire Act was to clearly negate the first *Schwegmann* decision. However, the loss of prestige which Fair Trade suffered as a result of that decision was never fully regained. Instead, large discount houses and chain groceries have come forward as individual champions of the fight against price-fixing laws. Increased production in consumer goods during and following the Korean War foretold a precarious future for state Fair Trade laws. An expanding economy in its wealthiest period strains at every restraint upon a free market, whether the particular restraint be considered good or bad. Some manufacturers have entirely dropped Fair Trade practices, due to increased costs of enforcement and pressure of mounting sales, and others are fast losing interest.¹⁴ As a result, some states have developed equitable limitations upon Fair Trade, denying injunctive relief to a trade-mark owner who has not vigorously enforced his rights in the area prior to his instant action.¹⁵ Although the Supreme Court refused to rule upon the constitutionality of the McGuire Act by denying certiorari to a Fifth Circuit Court of Appeals decision,¹⁶ serious questions concerning these statutes and their validity under state constitutions and state public policy have begun to be raised in the state courts. The latter, once generally content to rest upon the *Old Dearborn* case as the last word on the validity of Fair Trade and its nonsigner provision, have begun to examine its reasons for existence and the validity of those reasons. It should also be

11. *Id.* at 388.

12. *Sunbeam v. Wentling*, 185 F.2d 903 (3d Cir. 1950), *vacated*, 341 U.S. 944 (1951), *opinion on remand*, 192 F.2d 7 (1951).

13. 66 STAT. 631, 15 U.S.C. § 45 (1952).

14. *Wall Street Journal*, Sept. 7, 1956, p. 1, col. 2.

15. Comment, 10 N.Y.U. INTRA. L. REV. 1 (1954).

16. *Eli Lilly & Co. v. Schwegmann Bros.*, 205 F.2d 288 (5th Cir. 1953), *cert. denied*, 346 U.S. 856 (1953), herein referred to as the "second Schwegmann decision."

noted that since the Supreme Court has often held that a denial of certiorari implies neither approval nor disapproval,¹⁷ the Court is in no manner bound by its second *Schwegmann* decision.

The oldest contention advanced by the exponents of Fair Trade laws is that the latter rightfully protect the trade-mark and good will of a manufacturer's commodity. It is asserted that when a manufacturer produces a quality product, protects it with a trade-mark or brand name, and by nation-wide advertising brings it to public attention, for the ultimate benefit of his retailers as well as himself, the resulting good will should not be allowed to become the means for attracting buyers to the purchase of inferior products, i.e., to be used as a loss-leader.

A second contention favoring Fair Trade is advanced by owners of "small stable retail businesses." Led by the influential National Association of Retail Druggists, it is submitted by this group that small businesses cannot, lacking large-volume sales ability, compete with prices set by large competitors for loss-leader purposes. The result of allowing these low-margin, high-volume sellers to run stable, quality items at prices below cost for customer attraction purposes in effect allows them the power to establish a monopoly over the resale of that product. This, it is said, is just as much unfair competition as allowing direct monopoly control of a commodity. What these proponents of Fair Trade would seem to argue, therefore, is that the commodity, to be fair-traded, must be in open competition with other commodities of the same general class, and that competition is not eliminated by Fair Trade laws, which only eliminate "unbridled" competition occasioned by the use of loss-leaders.

Fair Trade laws have long been most vigorously opposed by the Department of Justice and the Federal Trade Commission.¹⁸ It has been the position of the two federal government agencies most concerned with the enforcement of the Sherman Anti-Trust Act that the state Fair Trade laws, and the federal permissive acts relating thereto, are in absolute derogation of the seventy-year-old antitrust policies of the federal government. In both theory and principle, the FTC contends, any law which allows a private person to fix prices upon goods in the competitive free market without any governmental review is in direct contravention of the free enterprise system of government. Less organized but not less vociferous opposition has come from labor, commerce, and consumer organizations who advance the thesis that Fair Trade laws harm the consumer by keeping retail margins artificially and excessively high.

17. *Agoston v. Pennsylvania*, 340 U.S. 844 (1950); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1949); *United States v. Carver*, 260 U.S. 482 (1923).

18. H.R. REP. No. 1292, 82nd Cong., 2d Sess. (1952).

It is contended that rather than to protect the small retailer from damage from negligible instances of loss-leader selling on the part of high-volume sellers, the main purpose of the Fair Trade laws is to guarantee a profit insured by a lack of real and actual competition. The fact is continually pointed up by these Fair Trade opponents that the real advocates of price-fixing laws are the retail merchants associations who want a profit guaranteed and who are unwilling to face competition, and not the manufacturers, protection of whose trade-marks, trade-names and brands is said to be the purpose behind Fair Trade statutes.¹⁹

Statistics and surveys on both sides have proved fairly inconclusive by their extreme variance. While one survey has shown prices on specific fair-traded commodities in Maryland to be consistently higher than on those same commodities in the non-Fair Trade District of Columbia,²⁰ another has resulted in a finding that in non-Fair Trade states the average prices paid for otherwise fair-traded products were generally no more or no less than in states which regularly enforced injunctive Fair Trade provisions.²¹

While the majority of the highest state courts have found their Fair Trade laws compatible with their states' constitutional guarantees, a growing minority of state courts, mostly in recent decisions, have, for divergent reasons, held identical Fair Trade laws unconstitutional under state constitutions. It appears to be generally felt that the Supreme Court will not, having indirectly but yet effectively sustained the McGuire Act, overturn its attitude toward the constitutionality of this permissive federal legislation in the near future. It appears more certain that the Court is content with its guide-line drawn in the *Old Dearborn* case, i.e., that although no federal question of constitutionality exists as to state Fair Trade acts, there nevertheless may be valid grounds for their being held unconstitutional on state constitutional grounds. In an area such as this, where policy is so closely connected with politics, it is notably the disposition of the Supreme Court often to leave the matter to the individual state courts unless it appears quite out of hand. The extreme variance of statistics on the question indicates in one way the almost certain impossibility of presenting to the Court an "ungovernable situation" necessary to obtain a reconsideration of its position.

19. For an excellent presentation of the opposing arguments regarding Fair Trade laws, including an analysis of the Commerce Committee Hearings on Minimum Resale Prices, conducted prior to the passage of the McGuire Act, see Fulda, *Resale Price Maintenance*, 21 CHICAGO L. REV. 175, 186 (1954).

20. *Id.* at 195.

21. Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L.J. 967, 973 (1955).

It is also to be noted that no serious or concerted efforts by organized groups opposing Fair Trade have been made toward repeal of the state or federal acts since the passage of the McGuire Act. Thus, an unusual situation has now developed where the state courts are taking the initiative away from the federal courts, Congress, and the state legislatures by examining and even re-examining the real purposes, practices, and effects of Fair Trade laws. With this situation becoming increasingly apparent, the focal point for Fair Trade opponents is the state courts, whose decisions upon grounds other than federal law will, it is believed, decide the future of Fair Trade. It will therefore be the purpose of this study to examine those state court decisions with particular reference to the various grounds upon which they have invalidated Fair Trade laws and vertical private price controls.

The highest state courts in fifteen states have, since the passage of the first Fair Trade laws, upheld the constitutionality of the nonsigner provisions contained therein.²² Lower court decisions in Ohio and New Mexico upholding the nonsigner clauses of those acts,²³ and a 1939 Attorney General's opinion describing a fifty-dollar penalty provision in the Massachusetts Fair Trade Act as constitutional and enforceable against both signers and nonsigners,²⁴ raise the total of states judicially committed to enforcement of their Fair Trade laws to eighteen. In

22. *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177 (1936); *Scovill Manufacturing Co. v. Skaggs Pay Less Drug Stores*, 291 P.2d 936 (Cal. 1955); *Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co.*, 128 Conn. 596, 24 A.2d 841 (1942); *Revere Copper and Brass, Inc. v. Economy Sales Co.*, 127 F.Supp. 739 (D.C. Conn. 1954); *Klein v. National Pressure Cooker Co.*, 31 Del. Ch. 459, 64 A.2d 529 (1949); *Seagram Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N.E.2d 940 (1936); *Barron Motors, Inc. v. May's Drug Stores, Inc.*, 227 Iowa 1344, 291 N.W. 152 (1940); *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682, 7 A.2d 176 (1939); *Hutzler Bros. Co. v. Remington-Putnam Book Co.*, 186 Md. 210, 46 A.2d 101 (1946); *W.A. Sheaffer Pen Co. v. Barrett*, 209 Miss. 1, 45 So.2d 838 (1950); *General Electric Co. v. Packard-Bamberger & Co., Inc.*, 14 N.J. 209, 102 A.2d 18 (1953); *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 15 N.J. 191, 104 A.2d 304 (1954); *Bourjois Sales Corp. v. Dorfman*, 273 N.Y. 167, 7 N.E.2d 30 (1937); *General Electric Co. v. Masters, Inc.*, 121 N.Y.S.2d 37 (1953); *Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939); *Burch Co. v. General Electric Co.*, 382 Pa. 370, 115 A.2d 361 (1955); *Miles Laboratories, Inc. v. Owl Drug Co.*, 67 S.D. 523, 295 N.W. 292 (1940); *Frankfort Distillers Corp. v. Liberto*, 190 Tenn. 478, 230 S.W.2d 971 (1950); *Seagram Distillers Corp. v. Goronswet*, 281 S.W.2d 657 (Tenn. 1955); *Sears v. Western Thrift Stores of Olympia, Inc.*, 10 Wash.2d 372, 116 P.2d 756 (1940); *Elgin National Watch Co. v. Drukman*, CCH TRADE REG. REP. (1953 Trade Cas.) ¶ 67,498 (Wash. Super. Ct. 1953); *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N.W. 426 (1937); *Bulova Watch Co. v. Anderson*, 270 Wis. 21, 70 N.W.2d 243 (1955).

23. *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 68,165 (Ohio Ct. of Common Pleas 1955); *Skaggs Drug Center v. General Electric Co.*, 4 CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68,471 (N.M. Dist. Ct., Sept., 1956).

24. 1 CCH TRADE REG. REP. (10th ed.) ¶ 3085.23.

thirteen states,²⁵ Hawaii, and Puerto Rico, no decisions regarding the validity of Fair Trade laws have been reported.²⁶ Missouri, Texas, Vermont, and the District of Columbia have never enacted Fair Trade legislation. Ten state supreme courts have found, for reasons later to be fully presented, that their respective Fair Trade acts are unconstitutional, at least as regards nonsigners. In five states, lower courts have rendered decisions denying constitutionality to such nonsigner provisions. It should be noted especially that, although the first of these state decisions was rendered as long ago as 1939, six of these decisions were handed down in 1956, and three in 1955. A comparison of the more recent dates of these decisions denying constitutionality as compared to the generally early dates of those decisions upholding their respective statutes indicates both the misleading quality of the "weight of authority" and the obvious trend in the state courts today. The conclusion is inescapable that the future of Fair Trade laws in the United States is at stake.

II.

At the present time there seem no longer to be any federal constitutional or statutory barriers to Fair Trade legislation. However, the state Fair Trade acts have continued to suffer vicissitudes in the state courts, and in none have they fared worse than in Florida. On two occasions the Florida Supreme Court managed to invalidate the act on technical grounds without actually declaring the substance of the act unconstitutional.²⁷

The real issue was decided in 1949, however, in the leading case of *Liquor Store, Inc. v. Continental Distilling Corp.*²⁸ A 1939 amendment

25. Alabama, Arizona, Idaho, Kansas, Maine, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Rhode Island, West Virginia, Wyoming.

26. 1 CCH TRADE REG. REP. (10th ed.) ¶ 3003.

27. In *Bristol-Myers Co. v. Webb's Cut-Rate Drug Co.*, 137 Fla. 508, 188 So. 91 (1939), the non-signer provision of the first Florida Fair Trade Act (Fla. Laws 1937, c. 18395, § 6) was held unconstitutional as not within the scope of the act's title. The supreme court concurred in the lower court holding that the inclusion in the title of the expression "through the use of voluntary contracts" restricts the subject of the act and implies that its provisions will apply only to retailers who voluntarily enter into such contracts. Enforcement of the statutory injunction against defendant for price cutting was denied because he was not a party to any contract with the plaintiff. The nonsigner provision of the statute was thus rendered ineffective. In *Scarborough v. Webb's Cut-Rate Drug Co.*, 150 Fla. 754, 8 So.2d 913 (1942), the director of the State Beverage Department was restrained from enforcing a penalty provision of the Florida Beverage Act (Fla. Laws 1941, c. 21001) against a price-cutting, nonsigner retailer. The court said: "The only power in any State Agency is that conferred upon the Beverage Department to see that those prices fixed by the distributors are enforced. This provision alone is enough to condemn the Act as being unconstitutional and void." *Id.* at 775.

28. 40 So.2d 371 (Fla. 1949).

to the act²⁹ had cured the technical defects, leaving nothing but the constitutional issue squarely before the court. It was then decisively held that the Florida Fair Trade Act exceeded the bounds of the legislature's police power because it served the private interest of one economic group to the detriment of the general public by allowing an interested person the power to fix a price without any review of his act. As a price-fixing statute, the Florida court found it arbitrary, unreasonable, and violative of the constitutional right to own and enjoy property. It established its present-day position in regard to the *Old Dearborn* case in holding: "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."³⁰ The court did not limit its decision to the nonsigner provision, but held the entire act unconstitutional.

Immediately following the *Liquor Store* decision, the persistent Florida legislature passed a third Fair Trade Act,³¹ in all respects similar to the act of 1939 except that a lengthy preamble entitled "Findings of Fact" was annexed, which in effect declared that the statute would serve the public interest and was a lawful exercise of the police power.³² A new provision, presumably inserted to calm critics of the monopolistic tendencies of the act, empowered the attorney general to "bring an action . . . to restrain the performance or enforcement of" any contract which he deemed to prevent competition.³³ This was not enough. The nonsigner clause in this act was held in valid in *Seagram-Distillers Corp. v. Ben Green, Inc.*,³⁴ solely on the authority of the first *Schwegmann* case, and without the court finding it necessary to rule on the effectiveness of the legislature's amendments. With the passage of the federal McGuire Act, which cured the defects of the Miller-Tydings Act and overthrew the legal effect of the first *Schwegmann* decision, Florida law again became somewhat unsettled, although the position of its supreme court could, by this time, hardly have been more obvious.

Generously, the court agreed to settle the doubt, and in 1955 the invalidity of Fair Trade in Florida was presumably settled. In *Miles Laboratories, Inc. v. Eckerd*,³⁵ the question whether the McGuire Act had caused its decision in the *Seagram-Distillers* case to be superseded was placed squarely before the court. The effect of the McGuire Act

29. FLA. LAWS 1939, c. 19201.

30. 40 So.2d at 375.

31. FLA. LAWS 1949, c. 25204.

32. FLA. LAWS 1949, c. 25204, § 1.

33. FLA. LAWS 1949, c. 25204, § 10.

34. 54 So.2d 235 (Fla. 1951).

35. 73 So.2d 680 (Fla. 1955).

was disposed of by holding that "the decisions of this 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."³⁶ The court, in sounding the death knell in Florida for Fair Trade, said: "This Court has expressed its views on fair trade and similar acts and has consistently and unequivocally rejected, on constitutional grounds, both the underlying theory and the economic facts on which they are sought to be predicated . . . [A]s we have stated before, the real effect of the nonsigner clause is anti-competitive price-fixing, not the protecting of the good will of the trade-marked products as other courts have held . . . [T]he nonsigner clause must fall as an invalid use of the police power for a private, not a public purpose."³⁷

An indication of the finality of the *Miles Laboratories* decision is to be noted in the recent holding of the Fifth Circuit Court of Appeals in *Sunbeam Corp. v. Masters of Miami, Inc.*³⁸ In that case, a manufacturer of fair-traded electrical appliances brought a bill for injunction and damages on the ground that defendant had interfered with Fair Trade contracts between that manufacturer and distributors and retailers of its products by inducing them to sell such products to defendant in violation of those contracts. The district court dismissed and the court of appeals affirmed on the ground that the complaint failed to allege a cause of action.³⁹

Assuming that the federal court's position on the Florida law is correct, the refusal to allow an action for inducement to breach a Fair Trade contract leaves the fair-trader only his "inter partes" action, regarding which there is even some doubt as to future enforceability. But as to the nonsigner of a Fair Trade contract, the law in Florida is clear that he is under no responsibility to maintain a manufacturer's minimum resale price. In sum, the nonsigner provision of the Florida law is void and

36. *Id.* at 681. The court cited *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), and *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

37. *Id.* at 681-82.

38. 225 F.2d 191 (5th Cir. 1955).

39. The contention was made before the federal court that the Florida Supreme Court had retreated from its position in the *Miles Laboratories* case by denying certiorari to a lower court decision holding a Fair Trade resale-price maintenance contract enforceable as between the parties thereto. *Chase & Sherman v. Sunbeam Corp.*, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,524 (Cir. Ct., Dade County 1954), *cert. denied without opinion*, 73 So.2d 714 (Fla. 1954). The federal court said: "Since we conclude that, whether or not Fair Trade contracts are enforceable between the parties thereto, the public policy established by the Florida Supreme Court is opposed to actions such as the present one, there is no conceivable way in which plaintiff could prove a right to recover on the allegations of this complaint. . . . It is settled law that no foreign tort action contrary to a strong public policy of the forum state can be maintained." 225 F.2d 191, 198.

unconstitutional in that it (1) violates public policy, (2) bears no relation to the public health, morals, peace, safety, or general welfare, and, as such, is an abuse of the police power, and (3) it attempts to delegate the sovereign power of the state for a private purpose.

The second nonsigner provision of a state act to fall was that of the Minnesota Fair Trade Act⁴⁰ in the case of *Calvert Distillers Corp. v. Sachs*.⁴¹ However, the scope of the Minnesota decision was limited. The court decided the issue of the validity of the nonsigner provision solely on the basis of the United States Supreme Court's decision in the first *Schwegmann* case, and prior to the enactment of the McGuire Act. The court gave no indication of its view as to the validity or invalidity of the act under the state's own constitution, laws, or public policy, and no cases have arisen in Minnesota since that decision which would test the court's position regarding the effect of the McGuire Act. The Minnesota Attorney General has stated in an opinion that the McGuire Act does change the rule of the first *Schwegmann* case, and that the nonsigner provision of the Minnesota act is now effective.⁴²

The lack of any direct authority renders it impossible to draw a satisfactory conclusion. Whether the Minnesota Supreme Court will, at the next opportunity, hold that the McGuire Act did settle the controversy, or whether it will re-examine the statute on state grounds, remains to be seen.

In 1952, prior to the passage of the McGuire Act, Michigan became the third state whose supreme court was to rule against the constitutionality of Fair Trade. However, unlike the Minnesota court, the Michigan court based its decision almost solely upon the ground that the act was violative of state constitutional guarantees. In *Shakespeare Co. v. Lippman Tool Shop Sporting Goods*,⁴³ it was held that the Michigan Fair Trade Act⁴⁴ was unconstitutional as applied to persons who had not signed an agreement to maintain Fair Trade prices, since it deprived such persons of property without due process of law within the meaning of the Michigan constitution.⁴⁵ Since plaintiff was a Michigan corporation and defendant a sporting-goods retailer doing business only in Michigan, the trial court elected to treat the transaction involved as being exclusively in intrastate as distinguished from interstate commerce. It then

40. MINN. STAT. ANN. § 325.12 (1947).

41. 234 Minn. 303, 48 N.W.2d 531 (1951).

42. CCH TRADE REG. REP. (1952 Trade Cas.) ¶ 67,391 (Opinion of Attorney General of Minnesota, December 10, 1952).

43. 334 Mich. 109, 54 N.W.2d 268 (1952).

44. MICH. COMP. LAWS § 445.151 (1948).

45. MICH. CONST. art. 2, § 16 (1908).

proceeded to dismiss the bill for injunction on the sole ground that the act, as applied to a non-contracting person, was violative of the due process clause of the state constitution. In affirming the dismissal, the supreme court held that the better reasoned view was that of the Florida court in *Liquor Store, Inc. v. Continental Distilling Corp.*, and that such was the only view consistent with its holding in *People v. Victor*.⁴⁶ An attempt by plaintiff to distinguish the *Shakespeare* case on the ground that the Fair Trade Act involved protection of a person's property, i.e., good will represented by a trade-mark, was turned away by the majority of the court, which reasoned that trade-marks are protected in certain respects by Congress, notably in the elimination of duplication and confusion between products, but were entitled to no further protection under state laws. The court rejected the theory that the statute prevented "destructive price-cutting" and "the evils of a price war," which in turn vitally affect the public health, safety, morals and general welfare, by merely stating in effect that such a concept is not that upon which America's free competitive economy was developed.

As an addendum, the Michigan court found the act, as applied to nonsigners, within the prohibition of the Sherman Act, basing its conclusion upon the first *Schwegmann* decision. Thus, both the intrastate and interstate price maintenance activities of Michigan manufacturers were rendered ineffective as to nonsigners in the *Shakespeare* decision.

Three years later, in *Argus Cameras, Inc. v. Hall of Distributors, Inc.*,⁴⁷ the Michigan Supreme Court rendered the state's Fair Trade Act almost totally ineffective by denying a temporary injunction to restrain a nonsigner defendant from tortiously interfering with plaintiff's written contracts with wholesalers and retailers. The court affirmed its position in the *Shakespeare* case, and further added that the public policy of Michigan was stated therein to be against enforcement of Fair Trade laws as applied to nonsigners. The significance of the decision for present purposes is that the court found justification for the defendant's acts in section 774 of the *Restatement of Torts*,⁴⁸ which provides that a defendant is privileged to induce the non-performance of a contract "the purpose or effect of which is to restrict his business opportunities in violation of a defined public policy," and is so privileged even though such

46. 287 Mich. 506, 283 N.W. 666 (1939). In the case it was held that a statute forbidding the giving of a premium with the retail sale of gasoline was unconstitutional as constituting a deprivation of property without due process of law, for the reason that such legislation is outside the scope of the police power inasmuch as it bears no reasonable relationship to the public morals, health, safety or general welfare.

47. 343 Mich. 54, 72 N.W.2d 152 (1955).

48. RESTATEMENT, TORTS, § 766 (1939).

a contract may be enforceable inter partes.⁴⁹ Although the decision creates a somewhat anomalous situation in Michigan law,⁵⁰ it is nevertheless quite clear that it virtually nullifies Fair Trade in Michigan.

It is to be noted that the Michigan Supreme Court based its decision entirely on the proposition that the Fair Trade Act violates the due process clause of the state constitution, with support from admittedly rather questionable precedent. Significantly, it barely touched on the background and economic history of Fair Trade. Though its decisions may not be so well reasoned as those of Florida and several other states, they are just as decisive in their result.

Perhaps the most thorough consideration given to a state Fair Trade act by any court is that of the Supreme Court of Georgia, which has twice held such an act unconstitutional. In the first case, *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*,⁵¹ decided in 1953, the court struck down the entire Georgia Fair Trade Act⁵² on the ground that, when enacted on March 4, 1937, it was contrary to the express provisions of the federal Sherman Anti-Trust Act and therefore void ab initio. Subsequent enabling legislation in the form of the Miller-Tydings and McGuire Acts could not operate to validate the Georgia act since it was void from its inception. "A void statute can be made effective only by reenactment."⁵³ By referring to its reasoning in a former decision,⁵⁴ the court also held that the Georgia act "offends article 1, section 1, paragraph 3 of our Constitution of 1945, which provides that 'No person shall be deprived of life, liberty or property except by the due process of law.' . . . [A]nd for that reason the act is null and void."⁵⁵

In 1955, however, the Georgia court was met with the contention that its second ruling in the *Grayson-Robinson* case was obiter dictum for the reason that the case had already been disposed of on the grounds

49. *Id.* at comment *a.*

50. Note, 54 MICH. L. REV. 711, 712 (1956).

51. 209 Ga. 613, 75 S.E.2d 161 (1953).

52. GA. SESS. LAWS 1937, p. 800.

53. *Jones v. McCaskill*, 112 Ga. 453, 37 S.E. 724 (1900); *State v. Miller*, 66 W.Va. 436, 66 S.E. 522 (1909).

54. *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951). In this case the question was presented as to the constitutionality of a provision in the Georgia Milk Control Law which attempted to set the retail price of milk by authorizing such action by an appointed board. In adopting a previous dissenting opinion, the court said "that as a health measure reasonable regulations may be enacted by the legislature, applying to sale and distribution of milk under the police power of the state," but by its provision to fix the price of milk "it thus takes from the seller and purchaser the right to agree upon the price of their choice. . . . The right to contract is a property right which is protected by the due process clauses of our State and Federal Constitutions, which cannot be abridged by mere legislative act." *Id.* at 562.

55. *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 619, 75 S.E.2d 161, 164 (1953).

that the statute was void ab initio.⁵⁶ The gap was sealed and Fair Trade was ended in Georgia by the holding that the reenacted Georgia Fair Trade Act⁵⁷ "clearly violates the provisions of the due-process clause of the Constitution of the State of Georgia."⁵⁸

This appears to be one of the strongest state court positions on the subject of legislative or private price fixing. The court refused to consider the subtle, perpetual arguments for Fair Trade based upon protection of trade-marks and public welfare, and recognized the act to be merely a price-fixing measure for which there was no conceivable public need. If the milk industry is not within the scope of public interest as regards price fixing,⁵⁹ said the court, "electrical appliances are not."⁶⁰ Although the nonsigner provision was at issue in both cases, the court in its opinion makes no distinction between signatories and nonsigners, and thus, presumably, has invalidated the entire act.⁶¹

Less than a year passed before the validity of another state Fair Trade law was tested, this time before the Arkansas Supreme Court in the well-known *Union Carbide & Carbon Corp. v. White River Distributors, Inc.* case.⁶² In an action for an injunction against a price-cutting defendant under the act's nonsigner provision, the trial court denied relief on the ground that the act violated sections 2, 8, 18, 19, and 29 of article 2 of the Arkansas constitution. On appeal to the state supreme court, the facts were fully stipulated and it was agreed that no federal constitutional question was involved. Only the nonsigner provision⁶³ of the act was under attack, and the court stated that it would limit its discussion to section 8, article 2 of the state constitution which provided that no person shall be deprived of his property without due process of law. The pivotal issue was therefore whether the act, including its nonsigner provision, constituted an abuse of the police power of the legislature. In holding that there were "several considered matters which impel us to conclude that the Act is not to protect the public welfare and

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

57. GA. SESS. LAWS 1953, p. 549.

58. *Cox v. General Electric Co.*, 211 Ga. 286, 292, 85 S.E.2d 514, 518 (1955).

59. See note 54 *supra*.

60. *Cox v. General Electric Co.*, 211 Ga. 286, 289, 85 S.E.2d 514, 516 (1955).

61. In its most recent opinion on the subject of legislative price-fixing, a unanimous Georgia Court cited the three cases above as binding precedents for the rule that any price-fixing is void in Georgia. *Williams v. Hirsch*, 211 Ga. 534, 87 S.E.2d 70 (1955).

62. 224 Ark. 558, 275 S.W.2d 455 (1954). The case was first brought in the Federal District Court of Arkansas, but the court refused to decide the case because the Arkansas courts had not passed on the question of Fair Trade, which involved a state constitutional question. Plaintiff was allowed twenty days in which to bring its case in the Arkansas courts. *Union Carbide & Carbon Corp. v. White River Distributors, Inc.*, 118 F. Supp. 541 (E.D. Ark. 1954).

63. ARK. STAT. ANN. § 70-201 (1947).

therefore violates our constitution,"⁶⁴ the court considered the following four points: (1) The act can be sustained only if it enhances the general welfare and not if it restricts it. A trade-mark is entitled to protection, which, being ample under the federal laws, entitles the plaintiff to no additional protection by state law if it is at the expense of the general welfare. Since competition is, to a degree, restricted by the act, the interest of the public is not served thereby. (2) "The history of the promulgation of Fair Trade Acts justifies the inference they were thought to benefit a few manufacturers and not the general public." Also, ". . . by far the most enthusiastic advocate of fair trade legislation is the retail druggist."⁶⁵ The court concerned itself with the realities of Fair Trade while developing this second point, and concluded that the real purpose of Fair Trade laws today is to eliminate price competition between retailers. (3) A statute which fixes prices for goods or services must have an obvious and real connection with the public health, safety and welfare. In *Noble v. Davis*,⁶⁶ the Arkansas court denied constitutionality to a statute fixing charges to be made by barbers for their services. The connection of this statute to the public welfare was called "visionary and not real" and a "nonexisting fact." This decision, said the court, controlled the present one on the point that a statement by the legislature that a statute is in the public interest will have no effect on the court's decision if it be the fact that the statute is not a proper matter for legislative concern. (4) The Arkansas court cited with approval the "well-reasoned" decisions of the Florida, Michigan and Georgia courts, with particular emphasis upon the latter's rulings on the due process objection.

It is to be noted that the Arkansas court did not hesitate to investigate the political-economic aspects of Fair Trade legislation in reaching its decision. It had the benefit of prior concurring decisions, but reached an independent conclusion based upon its own due process clause. The basic grounds for the unconstitutionality of Fair Trade in Arkansas appear to be (1) prior Arkansas precedent against price-fixing statutes, whether the price be set by the legislature or the power to set the price be delegated thereby, and (2) an invalid exercise of the police power, with the result that the act violates the due process clause of the Arkansas constitution.

In a well-considered opinion, the Nebraska Supreme Court invali-

64. *Union Carbide & Carbon Corp. v. White River Distributors, Inc.*, 224 Ark. 558, 562, 27 S.W.2d 455, 457 (1954).

65. *Id.* at 563.

66. 204 Ark. 156, 161 S.W.2d 189 (1941).

dated its entire Fair Trade Act.⁶⁷ In *McGraw Electric Co. v. Lewis & Smith Drug Co.*,⁶⁸ decided in early 1955, injunctive relief was denied against a price-cutting retailer by the lower court. On appeal, eight specifications of challenge to the act were designated,⁶⁹ two of which were the basis for the supreme court's decision. (1) "The Fair Trade Act constitutes an unconstitutional delegation of legislative power in violation of Article III, section 1, of the Constitution of the State of Nebraska, to fix prices of goods without conforming to any standards prescribed by the legislature." (2) "The Fair Trade Act has the effect of depriving of liberty and property without due process of law, and constitutes legislation beyond the scope of the police power and contrary to Article I, section 3, of the Constitution of the State of Nebraska. . . ."

Regarding specification (1) above, the court held the question of legislative delegation of power to be of incidental concern but not of controlling importance. For the real question, said the court, was not the validity of an inter partes contract, but the validity of the provision which extended obligations between contracting persons to persons who were not parties to such contracts.

Specification (2), however, was held to be the crux of the objection to the act. In this respect the court said, "The conclusion is inescapable that trade-mark owners, producers, and wholesalers may, by the simple device of attaching to their commodities a distinguishing brand or mark and entering into a contract with a single retailer, establish and maintain on a horizontal level for all retailers a minimum retail price."⁷⁰ The effects of such legislation are therefore to permit one producer and one retailer to do that which legally the members of each class are forbidden to do, to compel retailers to observe agreements to which they have never assented, to permit impairment and destruction of the right of the retailer to freely sell commodities which he has bought and of which he has become owner in good faith, and to immunize sellers of a commodity against competition. In view of such effects, the court held the non-signer provision of the act unconstitutional as a grant of special privilege and immunity. The objection grounded upon due process was also considered to be well taken. "Liberty," said the court, "within the constitutional meaning includes absence of arbitrary and unreasonable restraint upon a person in the conduct of his business and the handling of his property."

67. NEB. LAWS 1937, c. 136, p. 478.

68. 159 Neb. 703, 68 N.W.2d 608 (1955).

69. *Id.* at 710.

70. *Id.* at 716.

Since the nonsigner provision of the act was void and unconstitutional from the date of its passage, the court found the entire act to be void for the reason that it was induced by the nonsigner provision. Its decision was affirmed during the same term in *General Electric Co. v. J. L. Brandeis & Sons*.⁷¹

Thus, the Nebraska Supreme Court, without a detailed investigation of any present need or lack of need for retail price-fixing laws, struck down the entire act on purely constitutional grounds. It appears to be significant that each state court which has addressed itself to the validity of Fair Trade has increasingly come to face the economic realities and consequences of price maintenance systems and to determine their constitutionality on the basis of economic fact. The result, once the courts have detached the vague emotional appeal of Fair Trade from its real purposes and effects, is apparent in the later holdings of unconstitutionality.

A surprising but heartening decision to Fair Trade opponents was handed down in April, 1956, by the Supreme Court of Oregon. Since 1947, it had been assumed that Oregon was clearly with the majority of state courts upholding the validity of Fair Trade.⁷² Nevertheless, in the very recent case of *General Electric Co. v. Wahle*,⁷³ the Oregon court was faced with the square issue of the constitutionality of the nonsigner provision in the Oregon act, and held it repugnant to the state's constitutional guarantees. Two preceding decisions were distinguished as involving different fact situations. The court's decision was based almost entirely upon the relevant provisions of the Oregon constitution. At the outset the substance of the act was recognized to be price-fixing. "Protection of the 'good will' of the trade-mark owner is simply an excuse and not a reason for the law."⁷⁴ Whatever past justification, if any, there had been for permitting retail price fixing had disappeared with the depression of the thirties. The court developed the grounds for holding the statute unconstitutional in stating: "The right to pursue any legitimate trade, occupation or business is a natural, essential, and inalienable right, and is protected by our constitution. Constitution of

71. 159 Neb. 736, 68 N.W.2d 620 (1955).

72. In the case of *Borden v. Schreder*, 182 Ore. 34, 185 P.2d 581 (1947), the court said: "Ever since the decision of the Supreme Court of the United States in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* . . . sustaining the constitutionality of the Fair Trade Act of Illinois . . . the validity of such legislation has not been considered open to question." This assumption in favor of constitutionality was further bolstered in *Federal Cartridge Corp. v. Helstrom*, 202 Ore. 557, 276 P.2d 720 (1954), reaffirming *Borden v. Schreder* to the effect that it "held the Fair Trade Law of this state to be constitutional."

73. 296 P.2d 635 (Ore. 1956).

74. *Id.* at 643.

Oregon, Art. 1, § 20. . . . The right of an owner of property to fix the price at which he will sell it is an inherent attribute of the property itself and is within the protection of the state and federal constitutions."⁷⁵ Also: ". . . The Fair Trade Act as it applies to nonsigners constitutes an unnecessary and unreasonable interference with an individual's constitutional right of contract and of property in violation of Art. 1, § 20, of the Oregon Constitution, and of the due process clause of the federal constitution."⁷⁶

The second ground was stated: ". . . We are of the opinion that the Act also contains an attempted unconstitutional delegation of legislative power in violation of Art. 1, § 21, Oregon Constitution. . . ."⁷⁷

The decision also quoted extensively from the language of Mr. Justice Douglas in the first *Schwegmann* decision.⁷⁸

Whatever the basis for its initial impression of the nonsigner provision, it is clear that the Oregon court has settled the matter to the detriment of Fair Trade, and has done so solely on state constitutional grounds including the right to pursue any legitimate business, the right to own property and all the rights concurrent therewith, including the right to sell, and the right to freely contract for the sale of property. The court did make the finding that there was no hidden legitimate public policy behind the act, but it could hardly be said to have seriously weighed the historical economic arguments in reaching its decision.

In April, 1956, Virginia became the eighth state thus far to invalidate its Fair Trade Act⁷⁹ by supreme court decision.⁸⁰ Like Minnesota, its decision cannot be considered decisive of the matter, for it was based upon a holding that the Fair Trade Act had been repealed by implication by the 1950 reenactment of the Virginia Anti-monopoly Laws.⁸¹ In reaching its decision on the latter ground, the court found it unnecessary to consider "the very serious questions raised as to the constitutionality of the Fair Trade Act when measured by the provisions of the Virginia Constitution and the doctrine of *Young v. Commonwealth*, 101 Va. 853, 45 S.E. 327, . . . (1903)."⁸² The *Young* case declared unconstitutional an Act outlawing trading stamps, used in much the same fashion as those popular in modern times.

75. *Ibid.*

76. *Id.* at 647.

77. *Ibid.*

78. *Id.* at 651.

79. VA. CODE ANN. § 59-1 (1950).

80. 92 S.E.2d 384 (Va. April, 1956).

81. VA. CODE ANN. § 59-20 (1950).

82. 92 S.E.2d at 388.

It is apparent, of course, that the decision could be negated by legislative action alone. The decision in the *Young* case, typical of the decisions on the subject of redeemable trading stamps and the legality thereof, is no more than speculatively indicative of what the Virginia Supreme Court might hold when faced squarely with the issue of constitutionality of Fair Trade. One thing appears certain; the court will seriously consider the legislative right under the police power to enact price-fixing legislation if the *Young* case is any criterion. The balance does appear to be in favor of the opponents of Fair Trade.

The Louisiana Fair Trade Act,⁸³ specifically its nonsigner provision, was rendered unconstitutional in recent months as constituting an unlawful delegation of legislative power to private persons in violation of article three, section one of the Louisiana constitution. In *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*,⁸⁴ the Louisiana Supreme Court said in effect that the right of an individual to engage in a lawful business and to fix the price at which he disposes of his own property is guaranteed by the due process clause of the state's constitution. Despite apparent federal court sanction of the McGuire Act, this does not foreclose a state determination on state constitutional grounds because the United States Supreme Court "is powerless to resolve conflicts between state laws and state constitutions."

After *Pepsodent Co. v. Krause Co.*,⁸⁵ decided in 1942 and followed in several lower court decisions, Fair Trade was believed solidly entrenched in Louisiana. The court had said plainly: "The Louisiana Supreme Court has sustained the validity of the Louisiana Fair Trade Law, and its decision is conclusive, insofar as the State Constitution is concerned." In the present case, however, the court distinguished its prior decision on the ground that in the *Pepsodent* case the only issue before it had been the contention that the Fair Trade Act violated article 19, section 14 of the state constitution, which prohibited combinations in restraint of trade. The nonsigner provision of the Louisiana Fair Trade Act was then held to be beyond the legislature's police powers and therefore void under the state's due process guarantee.⁸⁶

83. LA. REV. STAT. § 51:391 (1950).

84. 4 CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68,400 (La. Sup. Ct. June, 1956).

85. 200 La. 959, 9 So.2d 303 (1942).

86. An interesting sidelight to the main holding developed when plaintiff contended that, were it not for the federal antitrust laws, he would have the right to impose some sort of lien or servitude upon his commodities which could bear upon third parties not in privity of contract (and therefore since the antitrust laws grant exception to Fair Trade legislation, the latter is presumably a statement of the seller's rights). The court answered simply that "such a lien or servitude or covenant running-with-the-article is not known to our law," which results in there being some question, although not mentioned, as to the validity of written price maintenance agreements in Louisiana.

Thus the Louisiana court, exercising its prerogative to alter its views in the matter of the constitutionality of state laws, took the common ground developed in the recent cases and decided the case on the ground that the state constitution's due process clause was violated by an unauthorized exercise of the police power. Again, economic issues were mentioned only in passing. Shorn of its emotional aspects, the question of the invalidity of the nonsigner provision was relatively a simple matter.

The most recent decision rendering the nonsigner provision of a Fair Trade act unconstitutional and inoperative is a decision by the Colorado Supreme Court.⁸⁷ The holding was based simply upon the delegation-of-power principle: "The General Assembly itself has no power to fix the prices of merchandise sold on the open market. It follows that it cannot lawfully delegate such authority to another."

In two states, the lower courts have denied constitutionality to their respective Fair Trade acts as they apply to non-contracting persons. The first was in Utah, where a district court in 1954 held the entire act void and in direct contravention of the Utah constitution.⁸⁸ The second was Indiana, where a superior court in 1955 declared the Indiana Fair Trade Act unconstitutional on similar grounds.⁸⁹ It should be noted, however, that in 1954 a federal district court in Indiana held the same act valid and the nonsigner provision enforceable.⁹⁰

In South Carolina, a motion to temporarily restrain alleged violations of the state's Fair Trade laws was dismissed in federal district court.⁹¹ Although the South Carolina Supreme Court had never passed upon the validity of Fair Trade or its nonsigner provision, District Judge Timmerman felt bound to follow, for the time at least, a county court decision which held the entire act void and in direct contravention of the state's constitution.⁹²

A recent circuit court decision in Kentucky held the Kentucky Fair Trade Act in general, and its nonsigner provision specifically, unconstitutional as violative of section 13 of the Kentucky constitution, which

87. *Olin Mathieson Chemical Corp. v. Francis*, 4 CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68,463 (Colo. Sup. Ct. 1956).

88. *General Electric Co. v. Thrifty Sales, Inc.*, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,861 (Utah Dist. Ct. 1954).

89. *Bargain Barn, Inc. v. Arvin Industries, Inc.*, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 68,074 (Ind. Sup. Ct. 1955).

90. *Sherwin Williams Co. v. Bargain Barn, Inc.*, CCH TRADE REG. REP. (1954 Trade Cas.) ¶ 67,697 (D.C. Ind. 1954).

91. *Olin Mathieson Chemical Corp. v. Rogers-Kent, Inc.*, 4 CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68,389 (D.C. S. C. 1956).

92. *Rogers-Kent, Inc. v. Westinghouse Electric Corp.*, CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 68,084 (S.C. Co. Ct. 1955).

forbids an unlawful taking of property.⁹³ Admittedly the points for unconstitutionality were not so well taken as in prior decisions. Nevertheless, the issue of the validity of Fair Trade will probably soon be before another state supreme court, and with the additional advantage of a federal district court opinion in support of the lower court's decision.⁹⁴

III.

Although opponents of Fair Trade no longer face the uphill battle they previously encountered, much remains to be done if the illegality of retail price fixing is to be permanently established. The problem is two-fold. States which have given apparent legal sanction to Fair Trade must and can be convinced otherwise. States which have enacted Fair Trade legislation which has not yet been tested in the courts must, when the situation arises, be convinced of the invalidity of their laws. The contemporary precedents above analyzed are of value not only for purposes of establishing grounds for invalidation but also, through their very number, heightening the force of the legal argument.

In states where Fair Trade has received supreme court sanction, only the initial approach to the problem of constitutionality differs from the state where the issue is one of the first impression. In the former situation, courts seem more than willing to distinguish prior decisions on the ground that the arguments for a decision of unconstitutionality had not theretofore been presented to the court. A hesitant court might be reminded that in matters of such social and economic importance, courts have freely exercised the prerogative to alter their views as to the constitutionality of state laws. A point of importance to consider is the present condition of the American economy, and the argument that whatever the need for protective price-setting may have been, it can no longer be justified. Once a court is determined to reconsider its prior decision on any one or more of these grounds, the issues are the same as in a case of first impression.

93. *General Electric Co. v. American Buyers Cooperative, Inc.*, 4 CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68,341 (Ky. Cir. Ct. 1956). The basis for the court's reasoning was that the act bound persons who were not aware of any restriction when they purchased the commodity but who later acquired knowledge of such restriction before sale thereof to another. A somewhat better-reasoned ground for unconstitutionality was the proposition that § 198 of the Kentucky Constitution, requiring the General Assembly to "enact such laws as may be necessary to prevent trusts, pools, and combinations from combining to depreciate any article below its real value," even though it was not violated in this instance by plaintiff, was nevertheless "an expression of the public policy of Kentucky against price fixing." This public policy was contravened by the Fair Trade Act, which permitted price fixing.

94. *Sunbeam Corp. v. Richardson*, 4 CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68,407 (D.C. Ky. 1956).

The common ground for a finding of unconstitutionality rests within the due process clauses of the respective state constitutions. It is most effectively argued that the acts violate the right of a person to lawfully acquire and thereafter sell property which belongs to him, at the price which he determines. Even if a written price-fixing contract constitutes no violation of a state's common law regarding restrictive covenants, or anti-monopoly laws pertaining to agreements in restraint of competition, this objection, directed against the nonsigner provision, appears to be the most persuasive. The basic premise is, of course, the abuse of legislative police powers. This is consistently proved by a showing that the legislation is arbitrary, unreasonable and discriminatory in that it allows only a relatively few producers of trademarked commodities the right to fix prices. The often quoted metaphor is, that by adopting Fair Trade, states have thrown the baby (free competition) out with the bathwater (loss-leader selling and other minor "evils" sought to be cured by permitting price-fixing). In present times, at least, it is plausibly argued that such legislation cannot meet the test of a valid exercise of the police power, namely, that the act bears no reasonable and provable relationship to the public morals, health, safety, or general welfare.

Perhaps next in order of persuasiveness as to invalidity is case authority against permissive price-fixing statutes affecting other areas of business or agriculture. Whether the latter decisions were predicated upon the lack of legislative power to fix prices, or the power to delegate that right, is immaterial, for if the legislature had not the power to fix such prices, then clearly it could not delegate that power to a private party.

An excellent policy argument, which some decisions fail to mention, is a two-point attack on Fair Trade at its very source. The stated purpose of the acts is to protect trade-marks or brand names and the good will established by the use thereof. Yet the federal trade-mark legislation as well as the doctrine of unfair competition provides extensive protection for those items of good will. Such protection should be sufficient. But the true purpose of Fair Trade acts is really not to render such protection at all. Among the most vigilant supporters of price-fixing are the retail druggists associations.

Effective attacks on Fair Trade statutes can also be made on technical grounds. Significantly, no court which has initially so acted has failed to find its act unconstitutional when later faced with the defective statute corrected. Notable also is the fact that once rendered ineffective, Fair Trade statutes have not regained their former force and prestige by corrective reenactment.

It is thus within the framework of the individual state court systems that Fair Trade is finally meeting defeat.⁹⁵ With its tenuous justification for existence hanging by the thread of denial of Federal certiorari, the current of authority appears to be fast moving in favor of the opponents of Fair Trade.

95. It is to be remembered that such major business states as New York, Illinois, Pennsylvania and New Jersey still remain citadels of fair trade.