RESALE PRICE MAINTENANCE*  
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I. HISTORY OF THE FAIR-TRADE STATUTES UNTIL THE MCGUIRE ACT OF 1952

THE LEGAL SYSTEM of vertical private price controls, by which a manufacturer seeks to control the price of his product after he has sold it, is embodied in the so-called Fair-Trade Laws which were enacted in the nineteen-thirties by forty-five states. As everyone knows, these statutes apply to commodities sold under a trade-mark, trade-name or brand which are in fair and open competition with commodities of the same general class; the statutes authorize contracts for sale or resale of such commodities, pursuant to which the purchaser undertakes that he will not resell except at the price stipulated by the vendor and that the purchaser, in turn, will require any dealer to whom he may resell to agree that such dealer will not resell except at the price stipulated by the original vendor. Manufacturers of the commodities described are thus enabled to determine not only their own selling prices, but the wholesale and retail prices as well. All of the statutes contain the famous “non-signer clause” which creates a cause of action for unfair competition against anyone who willfully and knowingly sells the commodity below the prices established by such a contract, whether or not a party thereto. Thus, one contract would be sufficient to bind all distributors of the commodity, provided the terms of that one contract have been made known to them. Finally, all the statutes explicitly state that they do not apply to horizontal agreements between manufacturers, or between wholesalers, or between retailers.¹

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It is, of course, obvious that the "non-signer clause" is the heart of this statutory scheme. Without that clause, "fair-trade contracts in any state would be meaningless, because the firms who precipitate price wars are the very ones who would not sign the fair-trade contract."

It is equally clear that these state statutes would be largely ineffective without congressional blessing, because resale price maintenance agreements in interstate commerce have been held violative of the Sherman Act in the celebrated Dr. Miles case. Hence, in the absence of a Federal "enabling" statute applicable to interstate trade, "it would ... be necessary for a manufacturer to be incorporated in each state in which he wished to issue fair-trade contracts." Such an "enabling" statute, known as the Miller-Tydings Amendment to the Sherman Act, was passed by Congress in 1937 as a rider to an appropriation bill for the District of Columbia, after attempts at enacting it as a separate statute had failed.

This amendment was generally held to have removed all obstacles to the enforcement of the state fair-trade acts, until, on May 21, 1951, the U.S. Supreme Court upset the fair-trade edifice in Schwegmann Bros. v. Calvert Distillers Corp. In that case, Maryland and Delaware distributors of gin and whiskey sought to enjoin a Louisiana retailer who had refused to sign a resale price maintenance agreement covering complainants' products from selling below the prices established by such agreements. The Court, Justices Frankfurter, Black and Burton dissenting, held that complainants' "marketing arrangements" were illegal under the Sherman Act and not covered by the Miller-Tydings Amendment. Since that amendment referred only to "contracts or agreements prescribing minimum prices for ... resale ..." and did not mention any obligation on the part of persons not parties to such "contracts or agreements," enforcement against a non-signer was outside the scope of the Amendment. Mr. Schwegmann was thus permitted to continue selling fair-traded commodities at any price he wished to set, provided he could obtain them from his suppliers.

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3 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (Mr. Justice Holmes dissented).
4 Views of the Department of Commerce, op. cit. supra note 2; Sunbeam Corp. v. Wentling, 185 F. 2d 903 (C.A. 3d, 1950).
6 Ibid.
7 341 U.S. 384 (1951).
It should be emphasized that the Court's opinion in the *Schwegmann* case rests on construction of the Miller-Tydings Amendment. It is true that Mr. Justice Douglas in the majority opinion referred to the non-signer clause as an example of "price-fixing by compulsion" and "resort to coercion"; in addition he mentioned the "devastating effect on Sherman Act policies" of interstate enforcement of the non-signer clause. Nevertheless, these expressions of hostility should not obscure the technical reason of the decision: the plain language used by Congress in the Miller-Tydings Amendment limited the application of that Amendment to parties to a contract.

Another blow had been struck at the fair-trade laws by the Third Circuit in *Sunbeam Corp. v. Wentling*; in that case a manufacturer of electric shavers sought an injunction against a Pennsylvania mail-order house which had refused to sign plaintiff's fair-trade contracts. The court held that the Pennsylvania fair-trade act authorized an injunction only against price-cutting by defendant in Pennsylvania. The court refused to enjoin price-cutting outside Pennsylvania on the ground that the Pennsylvania statute had no effect outside of that Commonwealth and that interstate commerce would be unlawfully burdened if it were given such effect. On rehearing, which occurred after the *Schwegmann* decision, the court reaffirmed its earlier conclusion.

Within one week after the *Schwegmann* decision had been handed down, R. H. Macy Co. of New York announced the cutting of prices on selected merchandise below the resale prices established by manufacturers in agreements which Macy had not signed. Other New York department stores followed suit, and the resulting price war was widely publicized in the press. Although the "war" spread to other cities, New York was the principal battlefield because of a "temporary buying hysteria" among its bargain hungry shoppers.

Nation-wide interest was aroused by these events; and there was much concern about possibly lethal effect on small independent retailers of price cutting by giant retailers. Consequently, the Joint Committee on the Economic Report and the Select Committee on Small Business of the U. S. Senate asked the firm of Dun & Bradstreet to report on these price wars. That report indicates that in the period from May 28 to June 16, 1951 price cutting of "fair-traded" goods occurred in 43 of the 123 leading

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8 *185 F. 2d 903, 192 F. 2d 7 (C.A. 3d, 1951).*

9 *Prevalence of Price Cutting of Merchandise Marketed under Price-Maintenance Agreements, prepared for the Joint Committee on the Economic Report and Select Committee on Small Business, United States Senate, 82d Cong. 1st Sess. 1 (1951).*
trading centers covered in the survey, and that 70% of all price cutting stores were found in New York City, Denver and Detroit. There were 77,000 stores in the 123 cities which handled one or more of the "fair-traded" lines, but only 825 stores were found to have cut prices below those set in resale price maintenance agreements. In 20 of the 43 cities where price cutting took place, less than 4 stores reduced their prices. There were only 6 cities with more than 10 price cutting stores. The goods involved were electric household appliances, cosmetics and drug specialties, men's wear and alcoholic beverages. After June 17, 1951 "a waning of activity and interest in price cutting of fair-traded merchandise" was observed.10

In spite of the ephemeral nature and relatively small area of these price wars, agitation for federal legislation restoring fair-trade did not cease. In February 1952 the House Committee on Small Business issued a report on "Fair Trade: the Problem and the Issues,"11 which examined in some detail the opposing views for and against fair-trade. The Committee concluded that it was impressed by the complexity of the problem and 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 enterprises in particular need protection against loss-leader and similar unfair business practices.

The Committee recommended that Congress should make it possible to enforce fair-trade contracts in interstate commerce.12

Also in February 1952 hearings were held by a subcommittee of the House Committee on Interstate and Foreign Commerce13 and by the Antitrust Subcommittee of the House Committee on the Judiciary14 on several bills designed to overturn the Schwegmann and Wentling decisions. The bill considered by the Interstate Commerce Committee, known as

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10 Ibid., at 1, 2, 7. The facts described in the text were reported in the Journal of the National Association of Retail Druggists on August 6, 1951 under the heading, "Price Wars—All But Gone." Celler Comm. Hearings 706.
12 Ibid., at 1.
the McGuire Bill, became law on July 14, 1952. It amends Section 5(a) of the Federal Trade Commission Act by adding thereto provisions to the effect that the enforcement of resale price maintenance agreements against both signers and non-signers shall not be deemed unlawful under any federal antitrust act or constitute an unlawful burden on interstate commerce when authorized by the law of the state in which the resale is to be made or to which the commodity is to be transported for resale.

The McGuire Act was thus the result of an extensive re-examination of the fair-trade problem by three committees of the House of Representatives. It would, therefore, seem to be appropriate to consider the evidence and the arguments which were presented to the Congress by the advocates and the opponents of fair-trade at a time when Congress was faced with the problem whether or not fair-trade should be resurrected after it had been killed by Schwegmann. Since Congress favored resurrection, the only method of attack remaining was on the basis of constitutionality. However, one such attack failed because of the Supreme Court's recent refusal to review a lower court's decision upholding constitutionality, discussed below. But the question is left open for future consideration.

II. THE CASE FOR AND AGAINST FAIR-TRADE, AS PRESENTED TO CONGRESS IN 1952

Resale price maintenance under the fair-trade statutes is most prevalent in drugs, pharmaceutical and cosmetic products, alcoholic beverages, electrical appliances, books, jewelry, sporting goods and cameras. The American Fair Trade Council, an organization of manufacturers supporting fair-trade, estimates that 5% of the retail trade in the United States, or approximately five billion dollars of annual sales volume, is in fair-traded merchandise. The importance of resale price maintenance varies from industry to industry. There seems to be general agreement that it is most widespread in the drug and cosmetics field, while its use is negligible in food and grocery products.


17 Small Business Report 4-5.

18 Celler Comm. Hearings 578.

19 In 1947, 85% of all items sold by this industry in New York were fair-traded. Ibid., at 579.

19 See Fulda, Food Distribution in the United States, the Struggle between Chains and Independents, 99 U. of Pa. L. Rev. 1051, 1117-18 (1951). As to extent of fair trading in other industries, see Celler Committee Hearings 758.
1. The case for fair-trade. Distributors as the driving force.

Who are the advocates of this fair-trade system? The legislative history of the McGuire Act is replete with statements that its main source of support has come from "organized groups of distributors" and that manufacturers have taken a less active part in the controversy. Indeed, a representative of a manufacturer of fair-traded small household appliances stated that his company considered the fair-trade program "as the small shop-keeper's minimum wage law," and counsel for the Illinois Pharmaceutical Association was quoted as saying that "The fair trade movement is a retailers' show with a manufacturers' sign or label over it."

The latter statement is particularly significant because of the preeminent position of the druggists in this movement. The National Association of Retail Druggists claims credit for the passage of the state fair-trade acts and the Miller-Tydings Amendment, and its efforts to secure passage of the McGuire Act are apparent from a special bulletin sent "to the Presidents, and Secretaries of State, Local, and Metropolitan City Pharmaceutical Associations and Members of the National Legislation and Auxiliary to National Legislation Committees." These gentlemen were advised that the McGuire Bill had just been reported favorably by the House Interstate Commerce Committee, and they were urged to "get not only other druggists but the members of their families, all other independent merchants, and everyone else you possibly can to write and wire their Congressman to call for support... We have made one big hurdle, thanks to the splendid cooperation you people have provided. I am confident we will be successful if you continue your efforts... So please get busy immediately—right away—to start the flow of letters and telegrams to the members of the... House." A few days earlier the Oklahoma Pharmaceutical Association had adopted a "push-button" plan according to which 150 druggists from the state were appointed as a committee to alert druggists in every town "within a few hours when the time comes to

20 Small Business Report 22, 23, enumerating seventeen such organizations outside the drug field. See also p. 38.
21 Ibid., at 41. Celler Comm. Hearings 548.
22 Commerce Comm. Hearings 143.
26 Celler Comm. Hearings 605. Mr. Dargavel refused to testify before the Celler Committee and expressed opposition to the Hearing planned by that committee. Ibid., at 891.
give Congressmen an extra nudge in order to get the fair-trade bill through.'\textsuperscript{27}

The National Association of Retail Druggists organized the Bureau of Education on Fair Trade, which maintains close contact with trade associations of wholesalers and retailers both in and outside the drug industry. A summary of its views, which were presented to the House Interstate Commerce Committee, follows:

"The continued survival of small business in our economy is at stake in fair trade.'\textsuperscript{28} Some parts of the economy, like agriculture, are deemed so important that special legislative protection is needed. Hence it is only logical to have legislation protecting small retailers against unfair competition of giant retailers. "Competition by means of loss leaders is unfair and antisocial because it is based on the ganging up of dollar power, on the huge resources needed to sell goods at a loss and stay solvent.'\textsuperscript{29} In price wars between giant retailers, "the little fellows are trampled." For instance, "price footballing Sunbeam Mixmasters by the big department stores caused 5000 small retailers to lose their Mixmaster business indefinitely.'\textsuperscript{30}

Under fair-trade there is brisk competition in price and quality. The Bureau submitted as proof of this statement a list of fair-traded articles showing wide variations in prices of many competing brands of silverware, soap, face powder, fountain pens, electric toasters, mixers, shavers, irons, and others. For instance, the list indicates that there are 14 brands of automatic electric toasters with fair-trade prices ranging from $9.75 to $24.50, and 56 brands of face powder with prices from 9 cents to $1.20 per ounce.\textsuperscript{31} This competitive situation is said to be due to two vital features of the fair-trade laws: They require that the trade-marked or branded article must be in free and open competition with articles of a similar class produced by others, and they do not sanction horizontal agreements among competitors.\textsuperscript{32} The requirement of competition with similar articles is often stressed as a powerful safeguard for the consumer and as an effective answer to the objection that the fair-trade laws do not permit any review by impartial public bodies of the reasonableness or fairness of the resale prices established by the producer. Such review is provided by competition, which will force a manufacturer to revise downward a non-

\textsuperscript{27}Ibid., at 599.

\textsuperscript{28}Commerce Comm. Hearings 27.

\textsuperscript{29}Ibid.

\textsuperscript{30}Ibid., at 28.

\textsuperscript{31}Ibid., at 22–23.

\textsuperscript{32}Ibid., at 17.
competitive resale price structure.\textsuperscript{33} By the same token, the non-signer clause is not a coercive measure at all, since the distributor who refuses to sign a fair-trade contract may always secure competitive articles.

The effect of fair-trade on the consumer naturally is a matter of vital importance. Hence, the Bureau submitted evidence in support of its claim that fair-trade prices have shown much greater resistance to inflationary pressures than all other prices. For instance, a study by McKesson and Robbins, Inc. indicates that from January 1, 1947 to December 1, 1950 a representative group of fair-traded toiletries, sundries, proprietaries and pharmaceuticals showed a total price increase at the wholesale level of 7.4\% contrasted with a 13.3\% rise in similar non-fair-traded products. During the same period, the over-all Consumers' Price Index of the Bureau of Labor Statistics, using 1935–39 as base period of 100, rose from 159.2 to 175.6.\textsuperscript{34} Reference is also made to an analysis made by the National Association of Chain Drug Stores of the retail prices of 7,334 drug store products of 250 manufacturers from 1939 to 1947. 4,377, or almost 60\%, of the products covered in this survey showed no change in price; 697 or 9.5\% showed a price decrease. The remaining 2,260 products showed price increases, but the rise amounted to only 3.1\%, compared with a 93\% increase in food prices and an over-all cost of living increase of 59.3\%.\textsuperscript{35} Finally, the Bureau presented data secured from an unidentified "independent research organization" purporting to show that consumers in non-fair-trade areas (Missouri, Texas, Vermont, and the District of Columbia) paid, during 1949, higher prices for specified drug store articles than in the fair-trade territory.\textsuperscript{36} This study was based on "770 carefully selected drug stores—700 in the fair-trade area and 70 in the non-fair-trade area."\textsuperscript{37}

It would seem, then, that the aim of the fair-trade laws is to make competition fair and "free" rather than "unbridled"\textsuperscript{38} and unfair, and that this is to be accomplished by suppressing loss-leaders. Says the Bureau:

The opponent of fair trade has sought to develop emotional bias against fair trade by asserting that it prevents consumers from getting bargains. . . . Let us examine the

\textsuperscript{33} Cellar Comm. Hearings 355, 712. Only the Wisconsin Act permits review of resale prices by the Department of Agriculture and Markets, which, after a hearing, may hold the price to be unfair and declare the contract invalid as in restraint of trade. Wis. Stat. (1951) § 133.25(7). This provision has never been used. Communication to the writer from the State Dept. of Agriculture, Jan. 26, 1953.

\textsuperscript{34} Commerce Comm. Hearings 19.

\textsuperscript{35} Ibid., at 20–21. To same effect see Cellar Comm. Hearings 153, 155–57.

\textsuperscript{36} Commerce Comm. Hearings 22.

\textsuperscript{37} Ibid., at 21.

\textsuperscript{38} Ibid., at 27.
"bargains" in the nonfair trade states before May 21, 1951, and in a number of cities across the country during the price wars immediately following the Schwegmann decision. These bargains, so-called, were nothing more nor less than loss leaders designed to lure customers into a store. The retailer who uses loss leader tactics builds his bait around national brand products whose value is as familiar to the consumer as the worth of a dollar bill. In fact, he selects precisely those national brands which have been most successful in achieving wide consumer popularity. The retailer advertises these selected and well-known products at a cut price. Dazzled by the bargain, the customers flock in.

In many, many cases, the loss leader is nothing more than a decoy. It is very frequently not meant to be sold at all. Many merchants will go to unusual lengths to deprive customers of the very advertised "bargain" that brought them into the store. They will hide it. They will run out of it early in the morning. They will switch the customer to something "just as good."

Now, then, has the retailer really cut prices? The answer is "no." What he has done is to juggle prices. . . . He knows from experience that most customers, once lured into the store, will not be able to resist the urge to buy other things on which the retailer realizes a substantial profit. The pay-off to this retailer comes from the customer's purchase of nonbargain merchandise—the ties and slips and dresses and fishing rods which the bargain-bent customer also bought.39

Here the Bureau's statement referred to the manufacturer's valuable trade-mark as being "exploited and cheapened" in the process, and to the fact that most small retailers cannot retaliate against the "juggling" described above because "A druggist cannot take higher mark-ups on dresses or yard goods when he is forced to sell national brands of drug products below cost in a price war," and "Most book shops do not sell millinery."40

This description of "lurist" practices makes it clear that articles identified by nationally advertised trade-marks or brands are ideally suited for use as loss-leaders. The effect of this practice on small retailers is well illustrated by the testimony of counsel for the American Booksellers Association who described events following the Schwegmann decision:

Within a month numerous best-selling books were being sold as loss-leaders at prices . . . frequently below the amounts actually paid for the books to the publishers involved. For example: "From Here to Eternity," on which the discount offered by its publisher, Scribner, was 44% (so that no retailer could buy the book for less than $2.47, even with a 2% cash discount), was reduced by Macy, Gimbel, and Abraham & Strauss from its list price of $4.50 to $1.64 . . . A neighborhood book seller . . . complained: "I haven't sold a copy since this thing started. I can't afford to take a dollar loss on every book I sell. I can't afford not to sell books. I'll be ruined if this keeps up."41

39 Ibid., at 26.
40 Ibid., at 27.
41 Celler Comm. Hearings 575.
Of course, one is tempted to add that it did not keep up.

Similarly, a New York retail jeweler described an apparel establishment which, after the *Schwegmann* decision, began to pack its store with jewelry for sale at or below cost in the expectation that "the public will stampede the joint. We'll sell plenty of our own stuff." Significantly, this witness emphasized his fear of losing his reputation as a result of such practices. Said he:

Every customer of mine who paid a legitimate fair price for an article in my shop was logically under the impression that I was a robber. Some came in and said to me: "Sam, these people must make a profit, too; otherwise they wouldn't do it. You have some nerve. I'll never come into your store again."

2. Manufacturers in favor of fair-trade.

The idea that the effect of loss-leader selling of nationally advertised brands is particularly ruinous because the defamatory nature of the practice has been repeatedly expressed in the hearings.

At this point, the arguments of retailers and manufacturers seem to coincide. This is apparent from the statements of the American Fair Trade Council, which was incorporated in 1939 as a non-profit organization supporting fair-trade. Its membership is composed of trade-mark and trade-name owners outside the drug and liquor industries. Significantly, the Council's advocacy of legislation restoring fair-trade was authorized not only by its members, and by four manufacturers' associations representing 1,603 members in the motor equipment, photographic, clothing and aluminum industries, but also by 93 resellers' associations from all parts of the country with a combined membership of 152,969 persons.

The president of the American Fair Trade Council, Mr. John W. Anderson, himself a manufacturer of automotive equipment, pointed out that "the value of a product is determined by what the consumer gets for what he pays. It is never determined by price alone." National advertising of products sold under identifying trade-marks thus provided the answer to the consumers' "groping for . . . guidance" in search of high

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4Ibid., at 257.  
4Ibid., at 257-58.  
4Ibid., at 171, 231, 253, 260-62, 494, 564, 570, 786.  
4Ibid., at 336, 722. Industries represented by members of the American Fair Trade Council include, among others: kitchen utensils, photographic equipment, fishing tackle, automotive heaters, tires and chains, vision and ignition products, glassware and pottery, household electric appliances, hosiery, silverware, books, paints and varnishes, luggage, etc.  
46 Celler Comm. Hearings 336, 722-25. (On 336, the total associations are represented as 93; on 722-25 they total 96. On 336 total membership is represented as 152,969; on 724-25 it totals 142,969.)  
47 Ibid., at 344.
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quality products. Yet, without fair-trade laws “the manufacturer’s advertised price for the product, no matter how reasonably competitive, with relation to its quality, had not enough stability in the market place to maintain, in the mind of the consumer, confidence in the competitive value offered by the brand, because the manufacturer who earned soonest . . . the greatest confidence of the greatest number of consumers, found himself . . . the earliest victim of a deceptive price-lure formula for retailing.”\footnote{Ibid., at 345.} Consequently,

The formula for cutting prices attractively on popular, trade-marked products, to lure customers for competitive stores, brings the popular product into disrepute with the public. Those many times more numerous merchants who offer the product reasonably at its established price are made to look like robbers to their customers—who desert them and divert their cash to the lurist retailer. \textit{The injured retailers naturally withdraw their patronage from the victimised product, and the manufacturer and his workers suffer accordingly.}\footnote{Ibid., at 345–46. (Emphasis added.)}

Thus, according to the principal spokesman of manufacturers favoring fair-trade, it is not only the small retailer who is victimized by loss-leader selling, but the manufacturer is similarly injured because his retailer may no longer be willing and able to continue distributing the product. This view was vigorously presented by other manufacturers. For instance, a member of the executive committee of Johnson and Johnson referred to reports from sales representatives about price cutting of Johnson’s baby powder down to nine cents per can. The cost to the retailer was sixteen cents. The witness added that “This creates a strong feeling of resentment against us on the part of the retailer and, to quote this representative: It kills the sale of the cut-priced item in all local neighborhoods.”\footnote{Commerce Comm. Hearings 138.}

Similarly, the general counsel of Sunbeam Corporation described the keen competition offered by private-brand merchandise of Sears, Roebuck in these terms:

\textit{If they can give a better product at lower price, that is fine, and they can legitimately crowd them out of the market that way. But if they are going to crowd them out of the market by taking Sunbeam’s Mixmasters and cutting the price to the point where nobody else can afford to handle it, in the hope of selling their own mixer, or in order to sell them other goods, that I say is unfair competition.}\footnote{Ibid., at 148–149.}

These stories seem to illustrate the real meaning of the familiar argument that fair-trade laws protect the manufacturer’s good-will embodied...
in his trade-mark,\textsuperscript{62} which persuaded the U. S. Supreme Court in the \textit{Old Dearborn} case to sustain the constitutionality of the fair-trade laws.\textsuperscript{63} In other words, manufacturers' advocacy of fair-trade seems to be motivated by the feeling that fair-trade creates favorable conditions for the distribution of their products.\textsuperscript{64} Indeed, both manufacturers and retailers seem to agree that suppression of loss-leader selling is the most important benefit to be derived from this legislation. Two additional case histories may illustrate. In November, 1945, the sales manager of the Simmons Company told the Annual Conference on Fair Trade, held under the auspices of the American Fair Trade Council, that his company was "one of the first to jump on the Fair Trade band wagon" because it assured the dealer a fair return on his investment; "... if the price was 'footballled,' reputable retail dealers would not push 'Beautyrest' nor do the educational job required."\textsuperscript{52} Similarly, Corning Glass Works adopted fair-trade because it "assured a fair profit to everyone handling the Pyrex line. Since the retailer and the wholesaler know the profit they'll make on the line, they advertise and promote it actively without fear of being undersold in the process."\textsuperscript{56}

3. \textit{The case against fair-trade}.

Vigorous opposition to fair-trade has been presented by labor, farmer and consumer organizations,\textsuperscript{67} the Department of Justice and the Federal Trade Commission,\textsuperscript{68} many department stores and mail order houses, independent retailers and supermarket operators like John Schwegmann himself, and manufacturers, who find fair-trade impracticable. In addition, many newspapers and magazines throughout the country hailed the \textit{Schwegmann} decision as a victory for the consumer and the free enterprise

\textsuperscript{62}Mr. Anderson, president of the American Fair Trade Council, spoke of "the willful prostitution of the good will of the manufacturer, by the retail lustir seeking store traffic normally moving to his competitors. ..." Celler Comm. Hearings 346; and of unwillingness to permit degrading of the trade-mark. Ibid., at 342.

\textsuperscript{63}Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936).

\textsuperscript{64}"Fair trade encourages retailers to price consistently at minimums, a practice not generally observed before fair trade. Fair trade eliminates the necessity for retailers to substitute other brands or to hide the specified item. Fair trade permits the neighborhood store to be competitive." Testimony of Paige D. L'Hommedieu, member of Executive Committee of Johnson & Johnson, New Brunswick, N.J., Commerce Comm. Hearings 137.

\textsuperscript{65}"Fair Trade, A Sound Basis for an Incentive Economy, published by Am. Fair Trade Council 8-9 (1945).

\textsuperscript{66}James C. Cummings, Shall We Place Our Products under Fair Trade Contracts? 57 Sales Management No. 6, pp. 116, 119 (Sept. 15, 1946).

\textsuperscript{67}Small Business Report 23.

\textsuperscript{68}Celler Comm. Hearings 18, 75.
system; among these were Business Week and the Wall Street Journal.\(^5^9\) Fortune magazine repeatedly attacked the fair-trade laws as economically unsound and harmful to the best interests of consumers;\(^6^0\) it opposed the McGuire Bill on the ground that none of the arguments in its favor have ever been substantiated.\(^6^1\)

Distributors hostile to fair-trade claim that fair-trade prices carry unreasonably high margins for the retailer ranging from 33 to 50% and that satisfactory profits can be obtained by much lower margins which would permit increasing the volume of sales.\(^6^2\) Although many fair-trade contracts permit the manufacturer to change the resale price from time to time, the system, nevertheless, is based on complete uniformity of retail prices at any given period.\(^6^3\) It is precisely this uniformity which is said to prevent retailers from passing on to the public economies in the cost of distribution.

For instance, an independent drug retailer in Omaha wrote to the House Judiciary Committee that he could make money at mark-ups ranging from 20 to 25% and that "lazy, stupid, and indolent drug operators can't even make money at 50% mark-up..." He asked why he should be forced to rob his customers "to prop up these parasites and line the pockets of greedy manufacturers?"\(^6^4\) His arguments against price uniformity deserve quotation:

The average workingman is paid his wages weekly and he shops from store to store with his wife and children in search of bargains, attempting to make ends meet out of his limited pay envelope. He pays spot cash, waits on himself, and then commandeers his wife and kids to help lug the merchandise to a distant parking lot or to the family home on the bus or street car. The family finds bargains and specials in the best brands of nationally known merchandise when there is free and open competition.... Fair-trade price-fixing kills all of this opportunity of the average family to exercise thrift and raise their standard of living, and in every store they are hit in the face with the same fixed price, regardless of the services rendered in selling the merchandise.

On the other hand, people in the higher-income brackets have adequate credit ratings

\(^{59}\) Ibid., at 312–13.

\(^{60}\) The Not-So-Fair-Trade Laws. The Druggist Started Something for All Business To Worry About, 39 Fortune p. 70 (Jan., 1949); The "Fair" Trade Controversy, We Urge a Re-examination of the Issue—and Offer Our Cooperation, 39 Fortune p. 75 (Apr., 1949).


\(^{63}\) In Burroughs Wellcome & Co. v. Weissbard, 129 N.J. Eq. 563, 20 A. 2d 445 (Ch., 1941), aff'd 130 N.J. Eq. 605, 23 A. 2d 396 (Err. & App., 1942), it was held that a manufacturer of pharmaceuticals could establish a price schedule with uniform discounts for doctors, dentists and hospitals.

\(^{64}\) Celler Comm. Hearings 594–95.
to warrant charge accounts and it is not uncommon for them to have free-charging
privileges ranging from 30 days to 6 months when purchasing branded high mark-up
fair-traded merchandise. They can get their orders filled over the telephone and have
free delivery made to the suburbs daily or three times a week. These people pay the
same identical price as the lower-income family, which means that the lower-income
family is actually paying the credit carrying charges and the expensive delivery
services extended to the families in the higher-income brackets.44

Mr. John Schwegmann, who said that he was not appointed his customers' first fighter to preside over the liquidation of the free enterprise system,45 described the economies of the supermarket operations which permit warehousing and retailing under one roof and buying of many supplies directly from manufacturers. Since the customer serves himself on a cash and carry basis, there is no need for sales clerks. These are not, however, the only savings which are passed on to the consumer.46 Mr. Schwegmann's two stores are not air-conditioned, and one of them is "a big shed," almost like a Quonset hut.47 They are eight miles from the center of New Orleans.48 Consequently, Mr. Schwegmann fights against fair-trade since "it prevents economical variations in types of retail establishments because the manufacturers are compelled to fix the retail price to fit retail operations with high overheads and costly services. Overhead and service then become automatically a part of the commodity's cost to the consumer, whether she can afford it or wishes to pay for extra services."49 Indeed, the customer who buys a fair-traded item in Mr. Schwegmann's store at the same price that she would have to pay in an air-conditioned store downtown with delivery service to her house on credit finds herself in a somewhat similar situation to a buyer who pays "phantom freight" under a basing-point system of pricing. Phantom freight was condemned under the Robinson-Patman Act as an unlawful price discrimination;50 but that act, at least, permits variations in prices "which make only due allowance for differences in the cost of manufacture, sale or delivery..."51

The fair-trade laws, on the other hand, do not permit any such allowance.52 In fact, counsel for a regional retail druggists' association, testifying

44 Ibid., at 595.
45 Ibid., at 327.
46 Ibid., at 306.
47 Ibid., at 282.
48 Ibid., at 314.
51 This argument was stressed by representatives of the Federal Trade Commission. Celler Comm. Hearings 90.
in favor of fair-trade legislation, explained that "the margin of profit on fair-traded merchandise takes into consideration, in part at least, the additional service that the customer receives from the neighborhood druggist, which he does not receive from the cut-rater, such as credit, 24 hours service, and delivery." This witness added that, in view of these advantages offered by the neighborhood druggist, "the customer will be reluctant to come into the store if he knows that he can get a nationally advertised product for less than a fair price at some other store."

This statement is based on the assumption that anything below the fair-trade price is necessarily unfair per se. Thus, every cut of the price established in the fair-trade contract automatically takes on a sinister character and qualifies for such epithets as "lurist," "juggling," "bait," etc. The possibility that customers may prefer or need a cheaper system of distribution without any additional service is not even mentioned, nor is there any recognition of the fact that lower margins may benefit both the retailer through an increased volume of sales and the public through lower prices. In short, fair-trade seems to ignore the distinction between competitive and predatory price cutting by condemning all price cutting except in specified emergency situations like closing out of the business or sales under court orders. It thus becomes apparent that, to quote a New Jersey court, "The plan established by the Fair Trade Act . . . is the elimination of price competition among retailers." It is, at least, questionable whether such a plan is an unmixed blessing for small retailers, since the quality of much branded merchandise "is now standardized and of such uniform quality that about the only inducement that can be offered is the one of lower price."

A possible answer to this criticism could be found in the fact that fair-trade prices are minimum prices and that higher costs of distribution and services could be added to the minimum prices.


Under one possible view, expansion of service occupations is necessary to prevent labor-saving machinery "from narrowing total-job opportunities." Therefore, "somewhat expensive distribution" is necessary. Celler Comm. Hearings 589.

Bristol-Myers Co. v. L. Bamberger & Co., 122 N.J. Eq. 559, 560, 195 A. 625, 626 (Ch., 1937), aff'd 124 N.J. Eq. 235, 1 A. 2d 332 (1938), holding department store's policy to grant discounts to its own employees violated fair-trade act. See also, statement by W. Lee Smith, president of Lewis & Smith Drug Co., Omaha, Nebr., in opposition to fair trade: "An industrious and aggressive small retailer can operate much more efficiently under free and open competition than a large bureaucratic organization such as a chain store or large independent store. . . ." Celler Comm. Hearings 595.

Ibid.
There is some evidence to the effect that some fair-traded items are being sold by independent stores at prices above the fair-trade price, although this could not generally be expected because of the publicity given to fair-trade prices by advertising. Moreover, the testimony quoted above indicates that fair-trade prices generally are calculated to include services to the customer. In this connection it should be noted that sixteen states, among them California, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania, authorize contracts which provide that the buyer will not resell "except at the price stipulated by the vendor." The statutes of all other states approve contractual undertakings not to resell "at less than the minimum prices stipulated." While the Miller-Tydings Amendment applied only to the latter type of contracts, the McGuire Act sanctions explicitly "contracts or agreements prescribing minimum or stipulated prices," thus giving congressional approval to price rigidity.

Another answer to the charge that many fair-trade prices are unreasonably high prices may be found in the uncontroverted fact that fair-trade retail prices have shown greater resistance to inflation than many other prices. However, opponents of fair-trade point out that this may be due to the initial excess of fair-trade margins, which started out with "a certain amount of water." In other words, prices would be lower without fair-trade. In any event, some drug manufacturers during the first half of 1951 advertised in trade papers the profits which could be obtained by retailers from fair-trade distribution of their products. For instance, one

70 Ibid., at 140 (a chart showing that one out of two independent stores charged a price higher than the fair-trade prices on two personal care items). On the other hand the president of the American Fair Trade Council stated that fair-trade prices, which are widely advertised, "are seldom exceeded by any retailer." Ibid., at 347.

80 See text to note 74 supra. The witness quoted in the text was a Maryland attorney. The fair-trade act of that state provides for minimum resale prices. 3 Ann. Code Md. (Flack, 1951) Art. 83, § 103.


82 The non-signer clause of all fair-trade acts creates a cause of action against those who, though not a party to the contract, knowingly and willfully sell "at less than the price stipulated in any contract." See, for instance, N.J. Rev. Stat. 56: 4–6 (1937). Even in the 16 states which authorize stipulated resale prices, contracts setting only minimum prices have been held to comply with the statute. See Pepsodent Co. v. Krauss Co., 200 La. 959, 9 So. 2d 303 (1942).

83 Celler Comm. Hearings 143. The statement quoted in the text was made by Mr. Ernest Goldstein, Counsel to the Anti-Trust Subcommittee. Mr. Goldstein referred also to the index of wholesale prices of the Bureau of Labor Statistics as indicating that wholesale drug prices rose 103% from 1939 to 1947 as compared with a 75% rise in the wholesale prices of all other commodities. Ibid., at 142.
such advertisement stated: "Now look at this deal. You buy 11, your profit is 43.1 per cent. You buy 30, it is 48.3 per cent. You buy 58, it is 50%." Another advertisement by the makers of Argyrol read as follows: "Profits up to 57½% on selling price, protected by fair trade." This may explain the statement of a congressional witness that "[i]n promoting membership in State retail druggist associations and in the National Association of Retail Druggists, one of the most potent appeals was profit protection. . . ." He added that this was "short-sighted" and "an utterly unsupportable approach." The witness who said that was none other than Mr. John W. Anderson, president of the American Fair Trade Council.

The thesis that fair-trade harms the consumer by keeping retail margins artificially and excessively high finds support in three factual observations: (1) The invasion of some fair-trade fields by outsiders, particularly the growing custom of food stores to sell drugs. (2) Repeated attempts by distributors in some industries to coerce manufacturers with threats of boycotts into adoption of fair-trade, and (3) the experience in the non-fair-trade states and during the period following the Schwegmann decision.

Each of these observations requires brief comment:

First, the invasion of fair-trade fields by outsiders is particularly apparent in the distribution of drugs and toiletries. According to The Progressive Grocer, the national magazine of the food trade, 70% of all food and grocery stores sold drug items in 1950, compared with 64% in 1949, 51% in 1946, and 37% in 1941. "[T]he percent of drug sales to total store sales is steadily rising. . . . Customers are becoming more and more accustomed to drug departments in food stores. . . . In all likelihood food stores will become the No. 1 outlet for a number of popular, frequently used drug products. . . ." The cause of this development is "the low margin on many food items." Indeed, The Progressive Grocer reported in January 1952 that food stores "depended more and more on the sidelines and supplementary items to balance out their margins and profits. Whether a grocer made a satisfactory profit frequently depended upon how well he merchandised the supplementary lines like drugs and toiletries. . . . Because of their favorable margin an increasing number of grocers added these lines." This year, "nearly 50% of the total U.S. volume in popular health and beauty aids" are being sold in chain and independent retail

84 Advertisements read by Mr. Goldstein from the standard bedside size of the American Druggist (Jan.–June, 1951). Ibid.
86 Facts in Food and Grocery Distribution as of January 1951, p. 12.
87 Facts in Food and Grocery Distribution as of January 1952, p. 6. (Emphasis supplied.)
More than half of Colgate's dentifrice sales are in food stores, and in Springfield, Massachusetts, three supermarkets sell more Pepsodent than the top fifteen drug stores. All this seems to be due to the fact that the average margin on drug proprietaries is about 33% and on food products 16 or 17%. Thus the success of the druggists in obtaining enactment of fair-trade laws created a new and presumably unexpected competitive peril by inducing an industry, accustomed to get along on much lower margins without a legislative umbrella, to invade their domain. Similar developments, though on a smaller scale, have been reported in the retail jewelry industry, with the apparent distinction, however, that hardware stores and automobile accessory stores have sold watches as "loss-leaders" with offers of 60% price reductions while grocers generally seem to adhere to fair-trade prices of drugs because they want the high retail margins. In such a situation the retailer jeweler, with his special skill in handling and repairing watches, may have a cause for complaint against unfair competition. The druggists, on the other hand, reap only the fruits of what they have sown.

Second, opponents of fair-trade emphasize that, in spite of the provisions against horizontal agreements, fair-trade is frequently used as camouflage for price fixing among manufacturers, wholesalers and retailers, and that many distributors have tried to induce unwilling manufacturers to adopt fair-trade by threats of boycott. As an example, a speech made in September 1935 by the executive secretary of the Northern California Retail Druggists Association was quoted as follows:

... the Pepsodent Co. was operating in ... California under the California Fair Trade Act. In all the time that they were operating under the Fair Trade Act they made no attempt to enforce their contract and like a bolt of lightning from the blue sky, they informed us that the California fair-trade contract was cancelled. ... I told them they would have the toughest time any salesmen had had in any territory. We...


89 Statement by Dr. Joseph M. Klamon, Professor of Marketing, School of Business and Public Administration, Washington University, Celler Comm. Hearings 396.

90 Mr. S. R. Lazrus, Chairman of the Board, Benrus Watch Co., testified that dry goods stores, hardware stores, automobile accessory stores and others have sold watches as "loss-leaders" with disastrous effect on retail jewelers. Celler Comm. Hearings 220.


passed a resolution at our meeting . . . and we sent that resolution to every member in California in which we urged and advised them to discontinue the sale of any product that had cancelled their fair-trade contract. Brothers, it was a slap in the face of our Fair Trade Act. It makes no difference what firm it was. It was unwarranted. . . . And to my great delight . . . all the druggists in California refused to sell Pepsodent tooth paste or Pepsodent products. They put them in the basement. Some were enthusiastic enough to throw them into the ashcan. 93

Subsequently the Pepsodent Co. reinstated its contract and donated $25,000 to be used on behalf of fair-trade legislation, and other manufacturers contributed for the same purpose. 94 More recently, retailers were urged not to patronize wholesalers or other suppliers who are not in sympathy with the fair-trade laws and reprisals against Life, Time, and Fortune magazines were advocated because of their articles hostile to fair-trade. 95

In the nineteen-forties indictments charging horizontal price fixing and conspiracies with intent to compel producers or distributors to enter into fair-trade contracts were returned against associations of wholesale liquor dealers, record dealers, and wholesale and retail druggists, and against producers and distributors of watches. 96 The Federal Trade Commission now takes the position that an agreement between a manufacturer and a retailer is a forbidden horizontal agreement where the manufacturer maintains its own retail outlets. 97

Perhaps the most significant event relevant to this aspect of the problem is the adoption of an "Anticoercion Resolution" by the board of directors of the American Fair Trade Council in July 1951. That resolution opposes "erroneous claims that under fair-trade laws there has been, in all fair-trading industries, widespread collusive action of resellers to coerce manufacturers to fair-trade products they might not voluntarily fair-trade and to fair-trade them at prices they might not choose voluntarily. . . ." Acknowledging the illegality of such practices, affirming belief in the power of fair-trade "for retarding the growth of retail monopoly through unfair extermination of smaller retailers" and "for inducing manufacturers


94 Celler Comm. Hearings 98.

96 Ibid., at 47, 48, 867.

to strive competitively to give the public greatest product value with relation to retail price" the resolution proclaimed that the American Fair Trade Council shall not aid, encourage, or tolerate, and does not condone, unlawful collusive action by any of its officers and/or members, or by any others, to coerce or force, directly or indirectly, any manufacturer, producer, or reseller, to fair-trade or agree to fair-trade any product, or to establish, at any particular figure or within any particular range, any resale price of any product, fair-traded or non-fair-traded, or to refrain from selling any product to any particular reseller or class of resellers.

And to give effect hereto, this organization hereby pledges to the Attorney General of the United States, and to all duly empowered investigative and enforcement agencies of Federal or State government, including congressional committees, that it will not suppress, or aid or encourage others to suppress, significant truth sought by any such agency with relation to any such coercive activities. . . .

In a statement transmitting this resolution to the members of the American Fair Trade Council, Mr. Anderson pointed out that the Council represents manufacturers in widely diversified industries "exclusive of the mammoth beverage and pharmaceutical industries," who "serve the public annually, as to value of retail sales, with a much greater volume of products under voluntary fair trade than are provided by the beverage or pharmaceutical industries." Mr. Anderson declared that "no single industry has . . . any dominant or decisive influence in the field of fair trade. It seems high time, in the public interest, that straightforward and sincere manufacturers and resellers practicing voluntary fair trade be relieved of all unfair onus of erroneous official and public notions about fair trade. . . ." If fair-trade were generally practiced on that basis, and if the consumer could be guaranteed at all times a choice between fair-traded and non-fair-traded products of the same industry, the system might become more compatible with a competitive economy. However, even this would not eliminate the non-signer clause, which is the major and most objectionable restrictive feature.

Subsequent correspondence between the president of the American Fair Trade Council and the executive secretary of the National Association of Retail Druggists revealed disagreement as to the appropriateness and timing of the Council's anticoercion resolution. On August 18, 1951, Mr. Anderson wrote to Mr. Dargavel expressing disappointment as to the latter's "unwillingness to accept and support the clear objectives of the AFTC anticoercion resolution." In his answer Mr. Dargavel said: "I will admit that when 'fair trade' first became effective perhaps a few

99 Ibid., at 888.
100 Ibid., at 800.
things were done unintentionally through lack of knowledge, but I believe
that those have been pretty well cleared up. On the other hand, for you to
send out something that simply condemns is not a good thing, in my
opinion. In other words you are admitting that those things did exist
where I do not, and you are proving a point that you have harped on for
a long period of time in the propaganda that has been sent out by the
American Fair Trade Council, casting aspersions on the people who
really were responsible for the passage of the law in the first place.”

Third, the evidence that fair-trade prices are below those charged for
the same articles in the non-fair-trade territory of Missouri, Texas, Ver-
mont, and the District of Columbia seems to be refuted by very strong
evidence to the contrary. Consider, for instance, the testimony of a
graduate of the Medical College of Virginia who now serves as an officer in
several corporations operating retail and wholesale drug businesses in
Virginia and the District of Columbia. He said that all fair-trade prices of
insulin guarantee 50% gross profit to the retailer and 25% to the whole-
saler, but that his company sells insulin in Washington, D.C. at retail at
20% gross profit. He submitted a long list of 208 items (consisting of
drugs, cosmetics, toiletries, small electrical household appliances) showing
considerably lower prices in the non-fair-trade areas than in the 45 fair-
trade states. According to this list the retailer’s profit in the fair-trade
states amounts to 38.5% as compared with 21.5% in the non-fair-trade
states, a saving of 17% for the consumer. Two examples of popular
articles will illustrate: Vick’s Drops is sold at 37 cents in fair-trade states
and at 29 cents in the free areas; Milk of Magnesia, fair-traded at 39 cents,
can be had for 33 cents where fair-trade does not exist. Similarly, the
existence of considerably lower prices in non-fair-trade Missouri is dem-
onstrated by surveys made by St. Louis newspapers. For instance, in
April 1951 the St. Louis Star-Times examined retail prices of 50 drug items
in St. Louis and in Illinois. The price of seven items was the same. Only
one item sold at a higher price in St. Louis. The Illinois fair-trade prices of
the remaining 42 items were higher than the St. Louis retail prices, the in-
creases ranging from 2.3% to 47.4%. The same newspaper found that
retail liquor prices in Illinois are “nearly 16% higher than in free enter-
prise, non-fair-trade St. Louis.” Similar comparative statistics are avail-
able for the District of Columbia and surrounding territory. These price

101 Ibid., at 799.
102 Ibid., at 419–20, 432.
103 Ibid., at 433–35.
104 Ibid., at 839.
105 H.R. Rep. No. 1516, 82d Cong. 2d Sess. 42 (1952) (Amending the Sherman Act with
Respect to Resale Price Maintenance).
comparisons might conceivably be interpreted as proving the sorry plight of retailers in the areas which have refused to enact fair-trade laws. The facts, however, do not support such interpretation. On the contrary, the 1948 U. S. Census of Distribution shows that the average drug store sales in the District of Columbia were higher than the average of any state, and that Texas had the largest number of proprietary stores. All free-price areas had 45 drug stores per million people, as compared with 37 drug stores in the fair-trade states. Missouri and Texas were among the ten states with the greatest number of drug stores and the highest volume of drug store sales. Likewise in 1948 Texas and Missouri ranked sixth and eleventh, respectively, in number of retail jewelry stores, which corresponds exactly to their rank in population in 1950. As to 1948 annual dollar sales volume of retail jewelry stores Texas ranked fifth and Missouri again eleventh.

There is even some evidence tending to show that, apart from the price wars which raged in a limited area for a short period, and which have been attributed to the desire to liquidate "swollen inventories," the Schwegmann decision did not have the disastrous effect claimed by the advocates of fair-trade. The magazine Drug Topics reported in January 1952 that drug store sales in 1951 had "climbed to the record-shattering total of $3,905,000,000," and that there had been a steady increase in sales from June through December, the period following the Schwegmann decision. Hence, historians may find hyperbole in allegations that without fair trade laws "insatiable greed ... threatens ... to eliminate the small entrepreneur."

All these facts would seem to support the charge that fair-trade is not consistent with free competition and that the areas which, in spite of enormous pressure, have not adopted fair-trade are enjoying the benefits of a healthy competitive economy. Perhaps it is no accident to find Mis-

106 Celler Comm. Hearings 445. 107 Ibid., at 508. 108 Ibid., at 238-39. See also, 236. 109 See also, 236. 110 Adams, The Schwegmann Case: An Economic Comment, 15 U. of Detroit L.J. 13, 15 (1951). 111 Celler Comm. Hearings 143-144. See also 250 for evidence of increased sales to retail jewelers in Baltimore in November 1951 compared to November 1950. 112 Statement by Nat. Assn. of Tobacco Distributors, ibid., at 111-112. See also, statement by Bulova Watch Co., ibid., at 113, about the threat to "the very existence of the small jeweler." 113 Ibid., at 399-414, 823-31, 835-42, as to unsuccessful attempts to enact fair-trade legislation in Missouri. The most recent bill (H.B. No. 135) was introduced on February 2,
RESALE PRICE MAINTENANCE

souri and Texas in the anti-fair-trade minority: Both have vigorously enforced "little" Sherman Acts.\textsuperscript{114}

The advocates of fair-trade urge, nevertheless, that their system enhances rather than restricts competition because it applies only to commodities which are "in free and open competition with commodities of the same general class produced or distributed by others." The meaning of this clause, which appears in all the state acts, the Miller-Tydings Amendment, and the McGuire Act, is best illustrated by the \textit{Eastman Kodak} case,\textsuperscript{118} where the Court held invalid the company's resale price maintenance agreements with respect to its unique color film on the ground that such film was not in the same general class with black and white film. The uniqueness of color film at that time would have permitted the company to establish a monopolistic resale price; hence it is clear that the power to set resale prices could safely be granted only where the manufacturer "would lose his trade by the competition of other similar articles" if his resale price were too high.

Unquestionably, the provision construed in the \textit{Eastman Kodak} case was intended as a safeguard for consumers against abuse of the price fixing power. But its effectiveness depends on what articles courts will consider sufficiently unique to be ineligible for resale price maintenance. The few cases which have dealt with this problem show much greater liberality in favor of fair-trade than the \textit{Eastman Kodak} case. Of par-

\footnotesize
1953, but was not enacted. A fair-trade act was passed by the Texas Legislature on June 19, 1939; on July 5, 1939 Governor O'Daniel vetoed the bill, having been advised by the Attorney General that the bill was void. On July 7, 1939, the Dallas Morning News, p. 2, section 2, hailed the veto on the ground that a fair-trade law would have been a "price fixing and price increasing law." Subsequent attempts to pass the bill were unsuccessful. In Vermont, a fair-trade bill was introduced in 1953 but defeated in the state senate by a vote of 21 to 8. N.Y. Times, § 3, p. 1F, col. 2 (Apr. 19, 1953). See also, H.R. Rep. No. 1516, 82d Cong. 2d Sess. 46 (1952) (amending the Sherman Act with Respect to Resale Price Maintenance) for a comparative table of failures of retail drug stores in states without fair-trade laws and adjacent states with such laws, showing a greater number of failures in the latter states.

\footnotesize\begin{itemize}
  \item \textsuperscript{118} Eastman Kodak Co. v. F.T.C., 158 F. 2d 592 (C.A. 2d, 1946).
  \item \textsuperscript{116} See generally, 1 Callmann, Unfair Competition and Trade Marks 456-60 (2d ed., 1950). Although a patentee may not control the resale price of the patented article after he has sold it [Motion Picture Co. v. Universal Film Co., 243 U.S. 502 (1917); Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908); Straus v. Victor Talking Machine Co., 243 U.S. 490 (1917); U.S. v. General Electric Co., 272 U.S. 476, 489 (1926)], the patented article may be subject to a fair-trade contract. Eli Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E. 2d 528 (1939), manufacturer of patented pharmaceutical products entitled to enjoin retail druggist from selling products below fair-trade price; Weco Products Co. v. Mid-City Cut Rate Drug Stores, 3 CCH Trade Reg. Serv. ¶25,523 (8th ed., 1941) (Cal. Super. Ct., 1940), "A patent does not ipso facto preclude the manufacturer from fixing prices and maintaining the same pursuant to the Fair Trade
ticular interest, perhaps, are the decisions that copyrighted books must be treated like other commodities for purposes of fair-trade in spite of the fact that a reader who wishes to buy *The Grapes of Wrath* will not likely be content with *Ferdinand the Bull*.117

More important, the provision involved in these cases does not answer the question as to what will happen if all other commodities of the same general class are also fair-traded. A wide variety of fair-trade prices seems to prevail in many lines;118 in others, uniformity or near-uniformity of price appears to be the rule. For instance, the fair-trade prices of the three leading manufacturers of insulin, a vitally important drug, seem to be identical.119 Of the ten leading brands of toothpaste, the six most popular sell at the same price.120 In any event, even the existence of price variety does not meet the objection that, as demonstrated by the experience in the free states, without fair-trade fair profits can be obtained at a generally lower level of prices. Courts have generally refused to consider attacks against the reasonableness of fair-trade prices so long as the statutory requirements were met.121 Apparently the only exception from this position was made by an Oklahoma court which dismissed a complaint for selling below a fair-trade price allowing a profit of 375%.122

As noted above, the major premise of the fair-trade movement is the alleged need for protection of small distributors against loss-leader practices by the giants. Professor Rahl has called attention to the parallel situation of independent grocers who have been able to survive the compe-
tion of the chains without fair-trade\textsuperscript{122} and the president of the American Fair Trade Council himself emphatically rejected the suggestion that little retailers are not as efficient as big ones and therefore need special protection.\textsuperscript{124} In fact, chain store organizations have benefited rather than suffered from fair-trade legislation which enabled them to promote their private label merchandise in competition with nationally advertised brands.\textsuperscript{125} Hence, suppression of unfair competition remains as the sole purpose of this legislation. Yet it is clear from the record that the fair-trade laws are being used in many instances to suppress competition which is not unfair at all, such as giving discounts to one's own employees\textsuperscript{126} or issuing cash register receipts redeemable in merchandise\textsuperscript{127} or charging a lower price for a smaller quantity than the one to which the fair-trade price relates\textsuperscript{128} or just cutting prices to pass on to consumers cost savings in distribution.\textsuperscript{129}

The loss-leader practice is not necessarily a predatory device under any and all circumstances. Indeed, most of the thirty-one state statutes designed to outlaw loss-leader selling require that the sale must have been made with the intent to drive competitors out of business, and those which omit this requirement have been held unconstitutional because of that omission.\textsuperscript{130} Accordingly, it has been argued that selling an item at 5 cents which costs the merchant 10 cents may be a legitimate form of ad-

\textsuperscript{122} Celler Comm. Hearings 191.

\textsuperscript{124} Ibid., at 369. Mr. Anderson has accused retail drug associations of advocating fair-trade on the "erroneous presumption" that small retailers cannot survive without "an indefensible indirect subsidy through protection of his profits under Fair Trade Laws." Interview on Voluntary Fair Trade at Tenth Annual Forum Meeting of the American Fair Trade Council, Waldorf-Astoria Hotel, New York, p. 16 (November 16, 1949).

\textsuperscript{125} Celler Comm. Hearings 25, 178-80, 438.

\textsuperscript{126} Bristol-Myers Co. v. L. Bamberger & Co., 122 N.J. Eq. 559, 195 A. 625 (Ch., 1937). See also, Sunbeam Corp. v. Civil Service Employees' Co-operative, 187 F. 2d 768 (C.A. 3d, 1951).

\textsuperscript{127} Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E. 2d 177 (1950). Judges Fuld and Loughran dissented on the ground that the decision "stigmatizes as unfair competition a long-established business practice... untainted by deceit, oppression or unfair dealing and involving no assault upon the good will of the manufacturer." Contra as to trading stamps: Bristol-Myers Co. v. Lit Bros., 336 Pa. 81, 6 A. 2d 843 (1939); Weco Products Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P. 2d 856 (1942).


\textsuperscript{130} Lovell, Sales Below Cost Prohibitions: Private Price Fixing under State Law, 57 Yale L.J. 391, 411 (1948). The persistent demand for fair-trade legislation presumably indicates the ineffectiveness of these statutes.
vertising to attract customers in the hope that they may like what they see in the store, and that this may be particularly appropriate at times for smaller retailers who do not have the advertising appropriations available to large retailers; such sales may be and often are made without any thought of deceiving the customer by raising prices on non-fair-traded goods or by hiding the advertised bargain under the table.\textsuperscript{13} It is only when the loss-leader is used for such fraudulent purpose or as part of a plan to force distributors out of business and their products out of the market that it comes into conflict with public policy against restraint of trade.

Moreover, the evidence presented to the Congress does not support the thesis that loss-leaders are widely used and an ever-present threat to fair competition on the distribution level everywhere. On the contrary, the Dun and Bradstreet report on the price-wars of June, 1951 and the situation in the areas without fair-trade laws seem to disprove that thesis. There are additional reasons for the inference that the over-all effect of loss-leader selling has been exaggerated. For instance, a witness representing a famous watch manufacturer stated that legislation restoring fair-trade was needed in order to avoid "the return to the jungle for American business, where only the powerful and predatory will exist." Yet, almost in the same breath, he explained that "The greater part of business done in this country, whether by department stores, specialty shops, and even bargain stores, must be 'normal' business—and not sales. By normal business I mean that the overheads that apply to the merchandise offered at every level must be covered by the individual sales—or bankruptcy will surely ensue."\textsuperscript{12} The same witness, when asked to name the people who are most likely to offer his company's watches as a loss-leader, replied:

Our experience has been that we have found our merchandise in gasoline stations, automobile-accessory stores, drug stores that are so small and inconsequential in their size that I do not think they have more than one clerk in the store—fortunately we have not had it in the big cities, but we have had drug stores carrying it. Also these bargain stores, we have one in Baltimore and one in New York...\textsuperscript{13}

He thought that his company "can maintain good business under any circumstances" because "no matter who sells my watches to the consumer, I am getting my price for my watches and nobody is breaking my price. They are only breaking the price of the fellow who is selling it."\textsuperscript{14} This

\begin{footnotes}
\item[12] Ibid., at 223.
\item[13] Ibid., at 225, 226.
\item[14] Ibid., at 243. See also, 376, 471. A pro-fair-trade witness representing the National Retail Hardware Association told a story about a loss-leader case: a hardware store in Muncie, Indiana, could not sell five dozen General Electric Irons because a chain drug store advertised
\end{footnotes}
last statement, incidentally, confirms the correctness of our earlier ob-
servations that the interest of manufacturers in fair-trade is, at most, in-
direct and derivative.

It is hardly necessary to add that predatory price cutting should not be
approved or condoned. The question is whether the fair-trade laws provide
appropriate machinery for curbing predatory price cutting since they
stigmatize all price cutting as unfair, thus throwing out the baby with the
bath water. Significantly, a representative of the National Federation of
Independent Business, which favored legislation to overturn the Schweg-
mann decision, suggested that fair-trade laws would not be necessary if the
Sherman and Federal Trade Commission Acts had been enforced more
effectively. This correctly implies that predatory price cutting can be
successfully attacked under those statutes as, indeed, it has been in the
recent A. & P. case.

It is, therefore, doubtful whether state legislation is needed to combat
predatory price cutting; but if so, one may wonder whether the experience
of Texas and Missouri does not indicate that effective enforcement of
“little” Sherman Acts would provide a better tool than the fair-trade
laws.

the same irons at the hardware store’s cost. But he did not say that this happens every day, nor
did he satisfactorily explain why hardware stores cannot afford selling G.E. appliances at less
than 331/3% margins. He objected to loss-leaders which would destroy the business of dealers,
although only 10 to 15% of his members’ sales are in fair-traded articles. Ibid., at 541, 542, 547.

134 Ibid., at 63.

Co. v. F.T.C., 142 F. 2d 511, 517 (C.A. 6th, 1944); in that case a sales representative of re-
spondent reported with respect to respondent’s only competitor, “I certainly hope that we can,
as you expect, eliminate him entirely, by making prices that he cannot meet without losing
money.” As to the unfair competition aspects of the Sherman Act and its concern with preda-
tory price cutting see Levi, A Two-Level Anti-Monopoly Law, 47 Northwestern L. Rev. 567,
576–80 (1952). As to the applicability of the Sherman Act to local transactions see Mandeville
well conclude that the complainants could profitably sell their swim suits of a value ‘Up to
$5.00’ at wholesale prices that permitted their retail sale for $2.74, and it cannot fairly be said
that such a conclusion, apparently well founded, would not generate in the opinion of the con-
suming public a depreciated valuation of the merchandise of the complainants as a result of
such changed views of the value of their merchandise.”

136 As to the availability of tort remedies see Prosser, Torts 1022 n. 12 (1941); Dunshee v.
Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1911).

137 The American Fair Trade Council contends that the federal antitrust laws would not
apply to predatory price cutting between local retailers. Celler Comm. Hearings 766. However
this does not necessarily prove the necessity for the fair-trade laws in their present form.
4. Enforcement problems.

Enforcement of the state fair-trade laws is almost everywhere a matter of private litigation: the statutory action for unfair competition against signers and non-signers who "willfully and knowingly" offer for sale or sell below the fair-trade price may be maintained by "any person damaged thereby." This includes owners of the trade-mark, brand or name, distributors who issue fair-trade contracts with the consent of such owner, and retailers, who may maintain the action against competing retailers. In addition, some states seem to permit distributors to establish fair-trade contracts without a showing of specific authorization from the owner of the trade-mark, brand or name. In those states it is held that the legislature did not intend to limit the advantages of the statute to manufacturers or trade-mark owners.

In the absence of administrative regulations governing enforcement of the fair-trade laws, the courts have insisted on one basic requirement. There must be "a fair-trade price structure which has a real and not merely a 'paper' or 'illusory existence,'" and this can be accomplished only by "reasonable and diligent enforcement of the existing Fair-Trade prices." In other words, a price cutter will have a valid defense if he can show that price-cutting "is general and long-continued" and that no effective measures to prevent it have been taken; failure to take such measures "is to be regarded as a waiver or abandonment of such rights as the contracts and the statute have conferred. Otherwise, unjust and unfair enforcement of the state fair-trade laws is almost everywhere a matter of private litigation: the statutory action for unfair competition against signers and non-signers who "willfully and knowingly" offer for sale or sell below the fair-trade price may be maintained by "any person damaged thereby." This includes owners of the trade-mark, brand or name, distributors who issue fair-trade contracts with the consent of such owner, and retailers, who may maintain the action against competing retailers. In addition, some states seem to permit distributors to establish fair-trade contracts without a showing of specific authorization from the owner of the trade-mark, brand or name. In those states it is held that the legislature did not intend to limit the advantages of the statute to manufacturers or trade-mark owners.

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The language quoted in the text is used in all the state fair-trade acts, 2 CCH Trade Reg. Rep. (9th ed., 1952) ¶¶ 8004, 8024, 8044, 8064, 8084, 8104, 8124, 8164, 8184, 8204, 8224, 8244, 8264, 8284, 8304, 8324, 8344, 8364, 8384, 8404, 8424, 8444, 8484, 8504, 8524 8544, 8584, 8604, 8624, 8644, 8664, 8684, 8704, 8744, 8764, 8784, 8804, 8844, 8884, 8904, 8924, 8944, 8964.


Schenley Products Co. v. Franklin Stores, 124 N.J. Eq. 100, 199 A. 402 (Err. & App., 1938); Parrott & Co. v. Somerset House Inc., 2 CCH Trade Reg. Rep. ¶ 8064.65 (9th ed., 1952) (Cal. Super. Ct., 1937). Apparently the authority to establish fair-trade prices without specific consent of the trade-mark owner has been rarely used, since exercise of such authority would lead to conflicting prices.

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discrimination, instead of fair trade, would be the product of the statute. 144

The fair-trade system thus makes it necessary for those who adopt it to spend time and money for lawsuits against price cutters, and it is precisely this policing obligation which deters many manufacturers outside the drug field from adopting fair-trade. 145 The problem is particularly important because of the emergence of the "discount house" in many large cities, which, according to a representative of R. H. Macy & Co., began to flourish only after "that iron clad ceiling that shut out all other competition" had been clamped down by the fair-trade laws. 146 Macy's described its experience with fair-traded General Electric appliances as follows:

Macy adhered to the prices prescribed by GE up to the spring of 1950. By that time, Macy's regular volume in the sale of appliances ... had declined 45 to 50% from 1947 ... other New York department stores and retailers—small and large—observing fixed prices were just priced out of the market by discount houses. ... 

Macy's shops in March 1950 showed that of 10 concerns against whom GE had obtained injunctions in 1948, every one was continuing to sell at cut prices. After repeated complaints to the manufacturer, Macy's, in March 1950, reduced the price on two GE small electrical appliances to test the matter....

GE then got busy ... they began about 50 lawsuits, obtaining an injunction in nearly every case. But customers continued to buy from the discount houses at cut prices.

Despite widespread publicity given to the GE injunction campaign, shops made by Macy in March, April and May 1950 revealed that of 436 retail stores carrying GE appliances shopped in Manhattan, 76% were selling GE appliances under the fixed price. ...

Trial of GE's suit against Macy ... began on September 11, 1950. ... Even during the period of the trial, GE's own shops showed that, despite the issuance of over 150 injunctions, the percentage of violations in Manhattan was 44 %, and 47 % in other parts of New York. Shops made by Macy's during the trial period of 77 of the largest dealers ... in Manhattan showed that 81% were selling GE appliances below fixed prices.

144 Automotive Electric Service Corp. v. Times Square Stores Corp., 175 Misc., 865, 24 N.Y.S. 2d 733, 741 (S. Ct., 1940), and cases cited; Ray Kline Inc. v. Davega-City Radio, Inc., 168 Misc. 185, 4 N.Y.S. 2d 541, 544 (S. Ct., 1938), "... the collapse of the retail radio price structure and the general disregard of all list prices since the promulgation of the contracts ... have made selling at competitive levels an economic necessity." For an extreme case of the application of the doctrine of abandonment see Bathasweet Corp. v. Weissbard, 128 N.J. Eq. 135, 15 A. 2d 337 (Ch., 1940), producer offering combination package for resale at a price less than the aggregate price of the articles if sold separately and independent of the combination held to have abandoned his price structure as to the combined items.

145 Keagy, Fair Trade Withstands Repeated Attacks, 164 Hardware Age No. 5, 114 at 118 (Sept. 8, 1949). Of the 131 firms which sell fair-traded goods through hardware stores, 95% reported "excellent" or "good" compliance. Most of these have never engaged in litigation. Only 17% of all hardware manufacturers use fair-trade. The same magazine contains statements by manufacturers explaining why they approve fair-trade, and by others why they find fair-trade impracticable.

Most significant...70% of 90 stores previously enjoined by GE continued to violate after the injunction order.147

The law suit referred to in this statement resulted in an injunction against Macy "conditioned on the continuation by...[G.E.] of its present vigorous enforcement activities."148 The court found that the price-cutting by others to which Macy objected was "widespread" among those favored groups having access to discount houses and not widespread as to the average retail purchaser. The court also found that a wholly-owned subsidiary of General Electric, the General Electric Supply Corporation, had occasionally sold below the fair-trade prices established by the parent corporation.149 Nevertheless, it held, prior to the Schwegmann decision, that G. E. was entitled to a conditional injunction.150

The discount houses, according to a survey made by Consumers Union in 1949 and 1950, operate in New York, Baltimore, Boston, Chicago, Detroit, Fort Worth, Los Angeles, Milwaukee, Philadelphia, Pittsburgh, Portland, Ore., Salt Lake City, San Francisco and Seattle.151 Significantly, their activities appear to be entirely outside the drug field. The survey showed that "it is very nearly impossible in most cities" to buy a tube of Pepsodent toothpaste or a box of Kotex for less than the fair-trade price. "But on items like refrigerators, automatic washing machines, or television receivers, the situation is very different. Here a 20% discount may mean a saving of $50 or more, which makes it worth the consumer's while to hunt up a discount house and perhaps undergo some inconvenience; and the retailer's margin, even after the discount, still is high enough to make the sale worth while to him."152

147 Ibid., at 474, 475. See also, Sunbeam Corp. v. Baumgarten, 93 F. Supp. 532 (E.D. N.Y., 1950), fictitious trade-in allowance enjoined.

148 G. E. v. R. H. Macy & Co., 199 Misc. 87, 103 N.Y.S. 2d 440, 451, 452 (S. Ct., 1951). This condition required G. E. to "(1) Keep itself informed as to price cutting activities. (2) Close scrutiny should be kept over prior violators and appropriate action taken where indicated. (3) Investigate and follow up complaints vigorously. (4) Enforce fair trade prices by repeated legal action if necessary. (5) The enforcement program must be a continuing and sustained one." The court observed that Macy maintained fair-trade prices "scrupulously for a long period of time, even when the discount houses were cutting prices. What Macy did object to was the ineffective enforcement which allowed the discount houses to cut prices and thus put Macy at a competitive disadvantage..."

149 Ibid., at 443, 444, 447. See, also, Celler Comm. Hearings 481.

150 While Macy's appeal was pending, the Schwegmann decision was handed down. The complaint was then dismissed on plaintiff's motion, 105 N.Y.S. 2d 1003 (App. Div., 1st Dept. 1951).


The "inconvenience" which the discount-hunting consumer may have to face is well described in reports which appeared in 1948 in the magazine *Retailing Daily*. According to this source, discount houses concentrate on home furnishings and electrical appliances and, although their activities are known to a substantial number of the buying public, they insist on precautions when accepting a new client which are reminiscent of pledges to a secret fraternity. The flavor of the situation appears in the following episode:

This reporter went in with a "friend" who was enrolled in the store, and asked if he "could get his picture taken." This cryptic conversation . . . was an open request for discount privileges.

In the basement of the store, a photographer takes passport type pictures of the customer for attachment to a confidential introduction card. Upon receipt of the card, you are eligible for discount privileges. If lines other than those carried by the store are requested, the customer is given the names of other sources and an introductory card to distributors . . . who will sell the desired lines at discount, with expected kickback.153

The above described activities of the discount houses would seem to indicate the impracticability of a system which attempts to enforce uniform retail prices, at least in those industries which, unlike the drug industry, adhere to fair-trade in part only. One may also wonder about the soundness of the court's rejection of the defense urged by Macy that forced compliance with fair-trade laws would be inequitable in view of the price cutting carried on by the discount houses. Perhaps the only effective answer to these difficulties, from the point of view of fair-trade advocates, is enforcement by the state, as adopted and practiced in three states. In Minnesota, the Commissioner of Business Research and Development is charged with the duty to investigate violations, to "assist in the enforcement" and to sue for injunctive relief "on behalf of the state."154 The "Trade Commission of Utah" has the same statutory responsibilities.155 Moreover, the Utah Commission has made use of its authority to issue cease and desist orders, which are subject to judicial review. The Commis-


154 Minn. Stat. (1949) § 362.14. These duties are carried out by the "Trade Promotion Division." About a hundred complaints were received by the Division in the nine months period following enactment of the McGuire Act. About 50% of the complaints came from manufacturers; the others originated with retailers. The Division sends a wire to the offender, stating that a complaint has been received and citing specific items allegedly sold below the fair-trade price. A follow-up letter invites comments and insists on compliance. No suits for injunctions have been filed since the accused dealers agreed to discontinue violations. The largest number of complaints involved hardware and sporting goods. Communications to the writer from D. M. Sandland, Director, Trade Promotion Division, dated April 6 and 16, 1953.

sion requires registration of all fair-trade contracts with Utah retailers which it publishes from time to time. Copies are available to anyone upon request. In Wyoming, the attorney-general and county prosecutors are directed to bring quo warranto proceedings to forfeit the charter of any domestic corporation and to withdraw the permit to do business of any foreign corporation violating the fair-trade act.

III. CONSTITUTIONALITY OF THE FAIR-TRADE LAWS

The foregoing analysis of the arguments for and against fair-trade demonstrates, I submit, a preponderance of reasons against, which have induced our Canadian neighbors in December 1951 to outlaw resale price maintenance. Since our Congress took the opposite view, the only method of attack left for the opponents of fair-trade was, as noted above, a challenge of its constitutionality which recently proved unsuccessful.

At the present time the constitutionality of the fair-trade laws rests on Old Dearborn Distributing Co. v. Seagram-Distillers Corp. In that case the U. S. Supreme Court conceded that generally an owner of property cannot be denied the right to fix the price at which he will sell it, and that this "is an inherent attribute of the property itself, and as such within the protection of the Fifth and Fourteenth Amendments." However, the Court held that the fair-trade law was merely permissive in respect of "identified" goods "under legislative leave by contract between the parties." As to the non-signer clause, the Court said:

The essence of the statutory violation ... consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely the good will—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.


156 Report of Department of State to Subcommittee on Monopoly of Select Committee on Small Business, U.S. Senate, 82nd Cong., 2d Sess., Subcommittee Print No. 5, 112-14, 233, 234 (July 9, 1952) (Foreign Legislation Concerning Monopoly and Cartel Practices); Resale Price Maintenance, Interim Report of the Committee to Study Combined Legislation, Ottawa, 1951. To the same effect is the French statute of July 19, 1952, Journal Officiel de la République Française, 19 juillet 1952, page 7227. Article II of the Swedish Bill to Counteract Restraint of Competition in Business in Certain Cases, Government Bill 103 of March 13, 1953, prohibits Resale Price Maintenance without permission of the Freedom of Commerce Board; this bill was enacted into law on May 20, 1953. The Danish government has recently announced that it will introduce a similar bill.

157 299 U.S. 183 (1936).

158 Ibid., at 192.

159 Ibid.

160 Ibid., at 193.
It should be noted that the plaintiff in the *Old Dearborn* case was a wholesaler who purchased from the producer and trade-mark owner. In addition, the non-signer clause was involved only in an indirect way: an officer of the defendant corporation had signed one of plaintiff's fair-trade contracts, but it was contended that he had done so without authority. Hence, the Court considered the defendant as a non-signer for the purposes of the case.\(^{163}\) However, the Court stated that defendant's "voluntary acquisition of the property with knowledge [of the fair-trade contract] carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under . . . the law by which such acquisition was conditioned."\(^{164}\)

Future attacks against the validity of the fair-trade laws can succeed only if the Supreme Court can be persuaded to reconsider and reverse the *Old Dearborn* case. Obviously, such a reversal could be expected only if it could be demonstrated that the major premises of the decision are erroneous, namely that "the primary aim" is not the protection of the producer's good will, and that the price restrictions are not an appropriate means to that end or to any other end within the police power of the states. Mr. Schwegmann tried to make precisely this demonstration. In January 1953, Eli Lilly & Co., manufacturer of pharmaceuticals, obtained an injunction against Mr. Schwegmann to restrain him from selling their products below the fair-trade price. Mr. Schwegmann had not signed a fair-trade contract, and it was conceded that he had not used plaintiff's products as "loss-leaders"; in fact, plaintiff did not deny that Mr. Schwegmann had obtained a 15% profit on such sales and that, if he had sold at the fair-trade price, his profit margin would have been 40%. Plaintiff submitted affidavits from retail druggists that they would stop selling plaintiff's products unless the fair-trade price was protected. Under these circumstances the District Court held that there was a showing of threatened and even of irreparable injury to plaintiff's business in Louisiana, and that, "as long as state fair trade laws are safe from constitutional attack, the manufacturer is not safe from the wrath of the retailer."\(^{165}\)

Mr. Schwegmann's sole defense in this case was based on constitutional grounds. He asserted that the Louisiana Fair Trade Law and the McGuire Act give plaintiff the arbitrary and unappealable right to fix the resale

\(^{163}\) Ibid., at 187; Seagram-Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N.E. 2d 940, 942 (1936).


price of its products in spite of the fact that he has parted with ownership and even though the purchaser of the goods has refused to sign a fair-trade contract. He urged that the statutes thus constitute an unlawful delegation of legislative power to private persons and deny him due process of law by placing on his right to dispose of his property a restriction created by private interests. The District Judge held that his decision on the constitutional issue was controlled by the "good will property right protection basis" of the Old Dearborn case; at the same time, he practically urged the Supreme Court to re-examine critically that decision and the whole subject of fair-trade. Said he:

Perhaps after twenty years of experience under the fair trade acts, the Supreme Court may conclude that the real purpose of these acts is not to protect the good will of the manufacturer, and that price fixing under these acts is not an appropriate means to that perfectly legitimate end, but is in fact an end in itself. In other words, it may well be found that the real purpose of fair trade legislation is to protect the retailer from competition with another retailer who, because of his efficient merchandising methods, is able to reduce his distributive costs and consequently his retail prices. That is a matter, however, which addresses itself to the Supreme Court.6

The Fifth Circuit, Holmes, J., dissenting, affirmed the judgment against Schwegmann on the ground that the latter's constitutional arguments were rejected in the Old Dearborn case. The Court added that the economic arguments for and against fair-trade are "addressed to legislative discretion and not subject to review by courts."157

It would seem that the facts of this second Schwegmann case undermine the basis of the Old Dearborn case. The District Judge in the second Schwegmann case pointed out that, as we have previously observed, "retail dealer associations rather than manufacturers have been the outstanding protagonists of fair trade legislation" and that plaintiff's affidavits "suggest the possibility that the manufacturers may be the unwilling proponents of such measures."16 In fact, the plaintiff filed his suit against Schwegmann in order to protect himself against what the District Judge called "the wrath of the retailer" who wished to hold on to his 40% profit margin. Are we then forced to conclude that the "good will" of the manufacturer which is to be protected is his relationship with his distributors who threaten not to buy the product for resale to the public un-

156 Ibid., at 271, 272.
157 Schwegmann Bros. v. Eli Lilly Co., 205 F.2d 788 (C.A. 5th, 1953) cert. den. 74 S. Ct. 71 (1953). The court also rejected the argument that the McGuire Act was an unconstitutional delegation of power over interstate commerce to the states.
less a uniform resale price structure satisfactory to the distributors demanding such price structure is established and enforced by legal action against dissenters? Certainly, this is not the concept of "good will" embodied in the law of trade-marks, which prevents one person from passing off his products as those of another and gives to the owner of the mark the right to prohibit its use for the purpose of deceiving the public with respect to the origin of the goods. Hence, a manufacturer has no cause of action for trade-mark infringement against retailers who sell his products at low prices in order to attract customers. Moreover, it is generally recognized that "the law of trade-marks is but a part of the broader law of unfair competition," and the fair-trade statutes denominate selling below the fair-trade price as unfair competition. Yet, we are still waiting for a plausible answer to the question as to why it is unfair for Mr. Schwegmann and others similarly situated to be content with 15% instead of 40% profit margins. Certainly this is not unfair to the manufacturer except in so far as it exposes him to reprisals from other retailers.

The "good will" theory of the Old Dearborn decision thus seems to be at odds with both the realities of the market place and the theories of the law of unfair competition. Nevertheless, it may be argued, predatory loss-leader sales actually damage the good will of the manufacturer by engendering the belief among consumers that the quality represented by the trade-mark has deteriorated. Although there is no evidence that this has actually happened in any appreciable extent, this argument might carry weight if the fair-trade acts were limited in their application to predatory loss-leader sales. However, the second Schwegmann case is Exhibit A for the proposition, advanced earlier in this article, that the fair-trade laws make no distinction between competitive and predatory price cutting.

On the basis of these considerations the Supreme Court of Florida held recently that the fair-trade law of that state is "arbitrary and unreasonable and violates the right to own and enjoy property" guaranteed by the Florida Constitution, and that it "serves a private rather than a public


170 He may, however, have a cause of action for "tortious interference with plaintiff's contractual relationships" by inducing purchasers from plaintiff to breach their fair-trade contracts with plaintiff. Sunbeam Corp. v. Payless Drug Stores, 113 F. Supp. 31, 36 (D.C. N.D. Calif., 1953).

171 Ibid., at 44.
Similarly, the Supreme Court of Michigan, in *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, held the non-signer clause unconstitutional as violative of the due process clause of the state constitution. Rejecting the argument that the non-signer clause was a valid exercise of the state's police power because it is directed against "destructive price cutting," that court said:

Can it be said that by the process of reducing prices either war, destruction or evil are visited upon the public health, safety, morals or the general welfare? (That is the controlling question.) Such is not the concept upon which America's competitive economy was developed.

The court also rejected the good will protection theory by asking:

Against what action may the state protect it? Against theft, slander, simulation and the like, no doubt. The relationship between state action in that field and public health, safety, morals and the general welfare is obvious.... The attribute of good will which constitutes the property right which the state may, in certain respects, protect, is... its propensity for producing business or sales. May every injury thereto or adverse effect be prevented by statute?... The sales and business accruing to plaintiff by reason of its good will would undoubtedly be affected adversely by the manufacture and sale of a competitive product. Can it be contended successfully that a state statute prohibiting such competition and thus protecting plaintiff's sales accruing from its good will would bear a reasonable relation to public health, safety, morals, and the general welfare. Obviously the answer must be no.

173 *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371, 375 (S. Ct. Fla., 1949). A concurring opinion pointed out that such legislation could be constitutional "only in extreme situations wherein our economic structure is seriously endangered" and "such drastic measures for blood transfusions... were essential to the preservation of a healthy body politic." Ibid., at 388. Subsequently, the Florida Legislature amended the statute by adding thereto "findings of fact" that the fair-trade law is in the public interest to prevent monopoly in times of prosperity as well as depression. 1 Laws of Fla. (1949) c. 25204. In *Seagram-Distillers Corp. v. Ben Greene, Inc.*, 54 So. 2d 235 (1951), the Supreme Court of Florida dismissed an action against a price-cutting non-signer on the authority of the Schwegmann case. Thus, the court has not yet passed upon the validity of the legislative "findings of fact."


175 Ibid., at 115-17 and 271-72. In *Doubleday, Doran & Co. v. R. H. Macy & Co.*, 269 N.Y. 272, 199 N.E. 409 (1936), the New York Fair-Trade Law was held unconstitutional as a delegation of legislative authority to private persons relating to a business not affected by the public interest. The decision was reversed on the authority of the Old Dearborn case, in *Bourjois Sales Corp. v. Dorfman*, 273 N.Y. 167, 7 N.E. 2d 30 (1937). However, in *Levine v. O'Connell*, 275 App. Div. 217, 88 N.Y.S. 2d 672 (1st Dep't, 1949), aff'd 300 N.Y. 658, 91 N.E. 2d 322 (1950), a statute authorizing the State Liquor Authority to prohibit the sale of liquor except pursuant to fair-trade contracts was held unconstitutional as an unlawful delegation of legislative power to an administrative agency. On that basis, the decision in *Doubleday* should be revived. See, also, *Serrer v. Cigarette Service Co.*, 148 Ohio 519, 76 N.E. 2d 91 (1947) (Ohio Unfair Cigarette Sales Act held unconstitutional because of failure to make allowances for difference in operating costs). A lower court in New Jersey recently refused to enjoin "a non-contracting, non-assenting retailer" to sell at fair-trade prices fixed by a New York manufacturer on the ground that equity would not decree "compulsory subjection to price adherence." The court said that the McGuire Act was "ineffective." *Lionel Corp. v.*
The same result was reached in February, 1953 by the Supreme Court of Georgia.\textsuperscript{175}

The District Judge in the second Schwegmann case referred to these recent state court decisions as indicating the need for taking a new look at the Old Dearborn case. The Supreme Court, in denying certiorari, refused to take such a look. In the meantime, other cases challenging the constitutionality of fair-trade as an unlawful delegation of legislative power to private persons are on their way to the higher courts in New York.\textsuperscript{176} Like Mr. Schwegmann, the defendants in those cases seek a final determination of the question as to whether the arguments against the wisdom of the fair-trade laws suggest their federal constitutional infirmity. It is to be hoped that when the next opportunity for review of this question arises, so important and controversial an issue will not be disposed of by the inconclusive method of denying certiorari.\textsuperscript{177}


\textsuperscript{174} Grayson-Robinson Stores, Inc. v. Oneida, Limited, 209 Ga. 613, 75 S.E. 2d 161 (1953), cert. den. 74 S. Ct. 39 (1953): Georgia Fair-Trade Act held unconstitutional on two grounds: (1) it was enacted prior to the Miller-Tydings Amendment and at that time inconsistent with the Sherman Act; thus, it offended the supremacy and commerce clauses of the Federal Constitution and this could be cured only by re-enactment; (2) it is “null and void” because it offends the due process clause of the Georgia Constitution. A concurring Judge pointed out that the defendant non-signer had not deceived or confused the public and had not capitalized on plaintiff’s reputation and good will.

\textsuperscript{177} After this article went to press, Mr. Schwegmann filed a petition for rehearing of the order denying certiorari.