LEGISLATION

Resale Price Maintenance and the McGuire Act

Introduction

The McGuire Act, recently enacted into law, was designed to clear the fog surrounding resale price maintenance in America. This latter refers to a contract, or system of contracts, whereby the producer or distributor of a trade-marked article attempts to fix the ultimate price to the consumer. Fair trade, or resale price maintenance, is believed to be economically desirable since its benefits, such as an assured margin of profits to the dealers, affect a large segment of our business. Fair trade poses a legal problem because of the existence of the Sherman Anti-Trust Act, which prohibits contracts in restraint of interstate commerce. A twofold problem is presented, economic and legal, and each will be separately discussed herein.

Economic Analysis of Fair Trade

The Argument for Fair Trade

Competitive pricing breeds competitive abuses, which have widespread effects within the distributive process. The principal evil under attack is "loss leader" selling, viz., pricing branded goods at cost or less to lure customers into the store. This type of price-cutting, a practice of the larger stores, allegedly causes economic loss in the form of reduced profits for those retailers who lose sales thereby. By precipitating downward spirals of price levels, unre-
stricted competition leads to a more tragic result—the widespread failure of small independent retailers whose survival is a vital economic factor in the welfare of the community. The manufacturer likewise needs the protective floor of the fair trade price to protect the good will of his product from dilution in the consumer’s mind. When the price of trade-marked goods is cut, their reputation for quality is bound to suffer.

A more tangible evil is disclosed by the argument that the manufacturer needs fair trade to keep his product from being driven off the market by retailers who refuse to sell it as a defense to “price-jugglers.” These unscrupulous retailers reduce prices of branded articles, thereby forcing competitors to take the price-cut commodity off their shelves rather than lose their margin of profit in the maelstrom of sacrifice selling.

The consumer, it is argued, is harmed by “loss leader” selling, because the cost of this type of “advertising” reflects itself in a higher general price level. Since he rarely leaves the store without purchasing an article on which the price has been increased to balance the loss on the “leader,” the consumer realizes no benefit by these practices.

Fair trade is advanced as an anti-monopoly measure. The hope of the fair trader is to eliminate all “price-juggling” on branded goods, and thus equalize the competitive strength of the independent retailer with that of the giant chain stores thereby safeguarding the continuance of a healthy small business community.

Probably the argument most relied on by the advocates of price maintenance, though often unexpressed or disguised, is that the livelihoods of some ten million retailers, wholesalers and their employees are affected by what happens to fair trade. Their economic well-being should be as much a consideration of the legislature as that of the farmer and the laborer. Fair trade is nevertheless urged as a measure consistent with our competitive system, since it places control of prices in the hands of those who regulate the distributive process, acting under contracts designed to protect the manufacturer’s

7 Select Committee Report, supra note 5, at 7.
8 Hearings before the Committee on Interstate and Foreign Commerce on H. R. 5767, 82d Cong., 2d Sess. 5 (1952) (hereinafter referred to as Interstate Commerce Committee Hearings).
9 Interstate Commerce Committee Hearings, supra note 8, at 62, 74.
10 Ibid.
11 Select Committee Report, supra note 5, at 44, 45 (Reconciliation of Fair Trade and Principles of Free Competition).
brand, good will, the retailer's competitive position, and the consumer's standards of quality.

Arguments Against Fair Trade

Those who oppose resale price maintenance maintain that the traditional American system of price regulation by the operation of the economic laws of supply and demand is sufficient, though they concede that a perfectly free competitive pricing system, unfettered by policing regulations, breeds abuses. They maintain, however, that the present price structure is not entirely governed by the forces of free competition, and that present regulatory measures are sufficient to prevent the abuses of free competition. As examples, they cite state "loss leader" statutes,\(^\text{12}\) prohibiting sales below cost, and the Robinson-Patman Act, prohibiting discriminatory pricing.\(^\text{13}\) Fair trade legislation, unlike these policing measures, is not designed to protect the public from the evils of unrestrained price-cutting, but to eliminate all forms of price competition, legitimate or reprehensible, by providing a contractually maintained price floor below which no retailer may lawfully sell. Price reductions made possible by low-cost store management, inventory control, or low-rent store location—all are condemned on fair-traded items.\(^\text{14}\) Efficient sellers are denied the opportunity afforded them under a relatively freer pricing system to increase their volume by price reductions based on economies.\(^\text{15}\) Thus, price minimums are said to lead to inefficiency and the stifling of initiative. The cushioned margin of profit of a fair trade price will invariably be geared to keep all distributors in the field, including the most inefficient, since the contracting manufacturer is subject not only to the desire to achieve the greatest spread of distribution,\(^\text{16}\) but to the insistent pressures of retail groups to provide a higher margin.\(^\text{17}\)

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\(^\text{12}\) A table of the various state statutes prohibiting sales below cost is found in Oppenheim, Unfair Trade Practices 951, 952 (1950). The primary obstacle to proper enforcement of these statutes is the difficulty of determining a workable definition of "cost." See also Select Committee Report, supra note 5, at 11.

\(^\text{13}\) Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 3767, 82d Cong., 2d Sess. 314, 323 (1952) (hereinafter referred to as Interstate Commerce Subcommittee Hearings) (statement of Dr. James M. Blair, Assistant Director and Chief, Division of Economics, Federal Trade Commission).

\(^\text{14}\) See Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance 69 (Canada 1952); Interstate Commerce Subcommittee Hearings, supra note 13, at 314, 318.

\(^\text{15}\) Ibid.

\(^\text{16}\) Interstate Commerce Subcommittee Hearings, supra note 13, at 314, 318.  

\(^\text{17}\) "The Department of Justice has brought criminal cases against several trade associations for activities going beyond those contemplated by the Miller-Tydings Act. Indictments were returned against the National Association of
The extent of the economic havoc wrought by "loss leader" practices and unfettered competition in pricing is minimized by those who oppose fair trade. Concrete evidence of business failures directly caused by these competitive abuses is said to be lacking.\(^1\) The extent of "loss leader" practice itself is questioned, since often what appears to be price-cutting by mass distributors is legitimate price reduction based on economies of operation.\(^2\)

"Fair trade prices tend to be high prices"\(^3\) represents another indictment of the price-maintained system. The manufacturer, when induced by the demands of organized distributors for a higher margin, will naturally pass the burden on to the consumer in the form of a higher price. Since under fair trade, pricing is not the result of competition, but of the interplay of horizontal and vertical forces arising from contractual agreements, and retailer group pressure on the manufacturer, prices will tend to be cast in a rigid mold. Since the price-making forces bear no relation to production and marketing costs, prices will be relatively inflexible and will not react properly to economic change.\(^4\)

Fair trade, as a corrective of competitive abuses, is held to be unenforceable. Discount houses flout the laws by "speakeasy" sales to card-introduced customers.\(^5\) A permanent policing system, costly to manufacturer and consumer alike, is necessary to prevent this practice. Chain stores, and supermarkets, the "... mastodons of retail merchandising ... in the jungle of the marketplace ..."\(^6\) will inevitably find new ways to combat measures designed to equalize the relative competitive strengths of the independent. Fair trade

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\(^1\) See Note, 64 HARV. L. REV. 1327, 1333 (1951).
\(^2\) Interstate Commerce Committee Hearings, supra note 8, at 74 (statement of Maurice Mermey, Director, Bureau of Education of Fair Trade, New York).
\(^3\) Inter Brooke, the National Wholesale Druggists Association, the New York State Pharmaceutical Association, and the Colorado Wholesale Wine and Liquor Dealers Association. . . .

"In all these cases, the defendants were charged with a conspiracy to raise, fix, and maintain prices and with persuading producers to enter into agreements to fix prices at a level to give retailers a desired margin of profit. Methods of persuasion included boycotting noncooperating producers. In each case nolo contendere pleas were entered and fines were assessed against the defendants." Hearings before the Antitrust Subcommittee of the Committee on the Judiciary on Resale Price Maintenance, 82d Cong., 2d Sess. 18, 29 (1952) (hereinafter referred to as Antitrust Subcommittee Hearings) (statement of H. G. Morison, Assistant Attorney General of the United States). See also Interstate Commerce Subcommittee Hearings, supra note 13, at 367 (statement of Q. Forrest Walker, Economist, R. H. Macy and Co.).

\(^18\) Interstate Commerce Subcommittee Hearings, supra note 13, at 361, 365 (statement of Q. Forrest Walker, Economist, R. H. Macy and Co.).
\(^20\) Select Committee Report, supra note 5, at 51.
\(^21\) Id. at 53.
\(^22\) See Note, 64 HARV. L. REV. 1327, 1333 (1951).
\(^23\) Interstate Commerce Committee Hearings, supra note 8, at 74 (statement of Maurice Mermey, Director, Bureau of Education of Fair Trade, New York).
enables the giant to obtain contract-guaranteed margins on branded items, while attracting customers with its own price-cut “house brand” goods.\textsuperscript{24}

\textit{Evaluation}

The factual basis for both disputants’ contentions will not be completely examined. Instead it is proposed to obtain a general picture of their validity by a brief glimpse at the effects of fair trade legislation, so far as they can be ascertained, on: (1) those in the productive and distributive processes, (2) the prices of consumer goods.

\textit{Ramifications in the Productive and Distributive Processes}

It is recognized that indiscriminate price-cutting and “loss leader” selling was prevalent in the early thirties when fair trade was introduced. During the same period the number of retail business failures was at an all-time high. Fair traders have read these facts together and sought to capitalize on the result.\textsuperscript{25} This emphasis on price-cutting, as a cause of business failures, would appear to be misplaced for a number of reasons.

There has always been a dearth of information on the actual retailer consequences of “loss leader” selling.\textsuperscript{26} It has been recognized by the Federal Trade Commission as a problem more surrounded by emotionalism than by factual information.\textsuperscript{27} Price-cutting as a cause of retailer failures is undoubtedly matched or exceeded by other factors.\textsuperscript{28} The mass distributor often bests the independent in obtaining expert management and adequate capital to function and expand. Difficult to measure, these factors nevertheless play an important part in the struggle for retailer existence. Large scale buying and selling, enabling the mass distributor to undersell the independent and still make a profit, often manifests itself in practices loosely called “loss leader” selling.\textsuperscript{29}

The relationship of price-cutting to the inroads of the chains into retailing during the early thirties is another premise easy of statement but difficult of proof. Chain monopoly, resulting in failures of independents, was often obtained through the employment of various discriminatory practices.\textsuperscript{30} Special discounts to chain pur-
chasers, advertising allowances, and geographical price discrimination all contributed to the growth of the chain, but these practices were at least inhibited, if not obliterated, by other legislation.\textsuperscript{81} It would be economically unrealistic, in the face of the variables contributing to retailer failures, to force a correlation between "loss leader" practices and the number of business failures. The economic chaos of the era would color any statistical evidence of price-cutting's relation to business failures, if such evidence were available.

In any event, fair trade may not be of long run aid to the independent in his fight to prevent underselling by the chain. There is evidence that the chain has in certain instances benefited from resale price maintenance by obtaining the fair trade margin on nationally branded products, while pushing its private lines at prices which the independent cannot meet.\textsuperscript{82} High profit margins on fair-traded drug items are so inviting that the chain has taken to stocking them.\textsuperscript{83} Thus, the independent druggist has seen the grocery chain benefit by a law advocated partly to equalize the competitive strength of the independent.

Protection of the manufacturer's good will in the brand name and product was recognized by the Supreme Court in the \textit{Old Dearborn}\textsuperscript{84} case, as the basis for resale price maintenance legislation. The reasoning, that the buying public would associate cut prices with low quality, and that the manufacturer's good will would be impaired by this consumer opinion of his wares, has been attacked by legal writers.\textsuperscript{85}

They argue that the public is not that easily duped. Their position is strengthened by the finding of the Federal Trade Commission\textsuperscript{86}.

\textsuperscript{81}See \textit{e.g.}, 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1946) (Robinson-Patman Act).

\textsuperscript{82}See note 24 \textit{supra}. This is recognized by the proponents of fair trade. \textit{Interstate Commerce Committee Hearings, supra} note 8, at 69.

\textsuperscript{83}"... [S]tudies reveal that 85% of the large grocery outlets now dispense dentifrices, certain pharmaceuticals, and health and beauty aids formerly sold primarily in drug stores. The magnitude of profits guaranteed... [has] converted some of the large supermarkets into ardent advocates of fair trade." \textit{Judiciary Committee Report, supra} note 6, at 19 (minority views). See also Legis., 36 \textit{CORNELL L. Q.} 781, 795 (1951).

\textsuperscript{84}\textit{Old Dearborn Distributing Co. v. Seagram-Distillers Corp.}, 299 U. S. 183 (1936).

\textsuperscript{85}See Legis., 36 \textit{CORNELL L. Q.} 781, 791 (1951); Note, 64 \textit{HARV. L. REV.} 1327 (1951). "The fear of loss of consumer confidence in low-priced goods is based largely upon an assumption of consumer irrationality." \textit{Id.} at 1329; see \textit{GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION} 268, 384 (1939).

\textsuperscript{86}"The Commission has been at some pains to discover instances of such price cutting which were sufficiently severe to result in a permanent and ma-
that producer volume is not in fact materially decreased by "loss leader" practices, and by the fact that few manufacturers appear on behalf of fair trade legislation.\textsuperscript{37} Often it requires coercion by a retailer group, bent on obtaining for its members an assured profit, to influence a manufacturer to enter a contract which the Supreme Court deemed a necessary method of manufacturer protection. Pepsi-\textsuperscript{3}dent Company soon found its product being concealed under druggists' shelves when it temporarily abdicated the fair trade fold.\textsuperscript{38} It is not surprising that a leading authority\textsuperscript{39} considered the judiciary's position unrealistic.

Does leader selling drive branded goods off distributor's shelves to the producer's detriment? A dealer, caught in a spiral of downward prices caused by indiscriminate price-cutting may adopt this method of self-preservation. But he has other alternatives. He may risk volume decline temporarily by not meeting the competitor's price. He may approach those warring nearest him and bid for measures of truce.\textsuperscript{40} The early subsidence, and restricted geographical consequences\textsuperscript{41} of price wars indicate that dealers soon reach tacit understandings to level and even reverse the downward trend. The Federal Trade Commission, in 1931, a year of widespread business failures, failed to uncover one instance where a manufacturer's article of merit was driven off the market by price-cutting alone.\textsuperscript{42}

**Influence on the Price of Consumer Goods**

It is recognized that resale price maintenance engenders "understandings" among distributors, often verging on the horizontality\textsuperscript{43}

\textsuperscript{37} Select Committee Report, supra note 5, at 23.

\textsuperscript{38} Judiciary Committee Report, supra note 6, at 20 (minority views).

\textsuperscript{39} See GRETER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 268, 384 (1939).

\textsuperscript{40} The dealer would, of course, be risking a prosecution under the anti-trust laws.

\textsuperscript{41} PREVALENCE OF PRICE CUTTING OF MERCHANDISE MARKETED UNDER PRICE MAINTENANCE AGREEMENTS, committee print, 82d Cong., 1st Sess. v (1951), cited in Judiciary Committee Report, supra note 6, at 47.

\textsuperscript{42} "No instance . . . has yet been brought to the commission's attention in which there was conclusive evidence that an article of real merit has been driven off the market by price cutting alone." Federal Trade Commission, Report on Resale Price Maintenance II, 162 (1931).

\textsuperscript{43} "Vertical price fixing is accomplished through agreements between manufacturers and wholesalers, wholesalers and retailers, or manufacturers and retailers. Horizontal price fixing, by contrast, is achieved through agreements among manufacturers, among wholesalers, or among retailers." Antitrust Subcommittee Hearings, supra note 17, at 273 n. 4 (comment by Walter Adams, Economic Consultant, U. S. Senate, 82d Cong., 1st Sess.). Within this defi-
condemned by the anti-trust laws, to put pressure on manufacturers to grant more generous margins. The drug trade has aimed at a 50% markup, which has been realized in a number of instances. A leading producer of pharmaceuticals featured this attraction in its advertisement to distributors. Increasing the spread of dealer margins can only be accomplished by one of two methods: lowering the cost to the distributor, or raising the fair trade list price at which the commodity is sold to consumers. The almost compelling inference is that in most cases the producer will risk volume decline by raising the list price rather than cut into his own profit margin.

The hidden costs of fair trade have tended to increase distribution costs, and thus to affect commodity prices. Fair trade committees and bureaus, financed out of the coffers of retailers, represent one of the costlier items. The expenses of litigation, paid for by those seeking to enforce price maintenance laws, and those charged with violating them, all contribute to the enhancement of prices. Statistical proof of price rises due to any given factor is, however, difficult to obtain. The mentioned factors have some effect on prices; the exact extent of that effect is almost impossible to ascertain. Surveys, offered in opposition to fair trade legislation, though taken in isolated industries, show a number of instances of price increases. A Federal Trade Commission survey reveals that prices of mass distributors rose, while those of the independent showed a slight decline. The greatest rise was in centers of population.

A graphic illustration of the spread between fair trade drug prices and non-fair-trade drug prices is found in the Judiciary Committee Report, supra note 6, at 42 (minority views). The table, comparing prices of important drugstore products sold in forty-five fair trade states, with the prices in non-fair-trade District of Columbia, shows higher prices on all of over sixty fair trade items compared. Another survey disclosed that prices for thirty-five different fifths of nationally advertised liquors cost only $139.67 in St. Louis (non-fair-trade area), while consumers paid $22.25 more, or $161.92 in Illinois (fair trade area), a difference of 15.9 per cent. The author interprets the Federal Trade Commission's statistics: "[Resale price maintenance] forced chain stores to increase their prices, while individual drug stores, on the average, showed price reductions which, however, varied considerably with the size of stores, and, for all independent store groups, the percentage decreases shown were much less than the per-
made on behalf of fair trade proponents showed slightly higher average prices on drug items in non-fair-trade areas. One point emphasized by the fair trade advocates is that maintained prices tend to be more stable in their resistance to inflation. In the final analysis, both sides realize the difficulty of measuring the manifold influences on price; neither maintains that its statistics are more than persuasive. Among those who saw an increase was Grether, a leading authority, who made extensive studies in the drug and grocery industries in California when the original fair trade act was passed in that state. The Canadian Committee to Study Combines Legislation arrived at the same conclusion.

The vice inherent in almost all surveys on controversial subjects is that each analyst has a different statistical axe to grind. Sampling procedures, correlation, trend recognition, and the inferences which are drawn from the study—all are tainted with the same virus—the possibility of the preconceived result. A truly objective survey, made by an institution having no particular proprietary interest in resale price maintenance would do all concerned a service.

Despite the ring of universal economic altruism in many of the arguments on behalf of fair trade, its most ardent advocates are organized retailers, groups confessedly battling for their special in-

52 OXENFELDT, INDUSTRIAL PRICING AND MARKETING PRACTICES, supra note 51, at 427.
53 The I. A. C. Neilson & Co. Study, made on behalf of the Bureau of Education on Fair Trade, showed the following: "Consumers in the fair-trade states paid less on the whole than consumers in the non-fair-trade area for the 24 products [compared] taken as a group. The weighted composite of all the prices for the entire period shows that consumers in the fair-trade area paid 1.4 cents less than did consumers in the non-fair-trade area." Interstate Commerce Committee Hearings, supra note 8, at 75.
54 A study made by McKesson & Robbins purported to show that prices in drug items (largely fair-traded) had risen only slightly between January 1, 1947, and December 1, 1950, compared with the rise in the cost of living reflected by the prices of other articles. Interstate Commerce Committee Hearings, supra note 8, at 77, 78. It might well be argued, consistently with a finding that fair trade prices did not respond quickly to inflationary pressures, that fair trade prices were higher than average at the beginning of the study, and that inflationary pressures only served to reduce slightly the dealer margins, not compelling a rise in prices. The minority of the House Committee on the Judiciary noted the following objections to the McKesson & Robbins survey: (1) It compared wholesale price levels in fair-traded drug products with the general retail price index reflecting the over-all cost of living. (2) The starting point for the survey was January 1947 when the wholesale drug index had reached its highest point in 20 years. Judiciary Committee Report, supra note 6, at 39.
56 REPORT OF THE COMMITTEE TO STUDY COMBINES LEGISLATION AND INTERIM REPORT ON RESALE PRICE MAINTENANCE 69 (Canada 1952).
57 In the foreground is the National Association of Retail Druggists. Lesser
terests. Resale price maintenance is opposed by large scale distributors, who fear a threat to their "low price" marketing methods. But in the fore of the opponents, one finds also consumer groups, labor groups, farm groups and various government agencies who have studied the problem. It is evident that fair trade is, in purpose if not in consequence, social legislation; a law functioning to insure profitable operation to a designated group within the economy. It is submitted that herein lies fair trade's strongest argument. When the economic policy evinced by Congress is the guaranteeing of fair opportunity to specified groups, then economics becomes in effect a weighing of the equities. In such a situation the voice of the small independent retailer is entitled to as much consideration as that of any other group. But the issue simmers down to this: Is this the type of social legislation needed today? The answer to this can only be determined by a complete study of the problem; and this entails an analysis of the legal aspects of fair trade as well as economic considerations.

Legislative Analysis of Fair Trade

History

At common law, restraints upon trade were not illegal unless they failed to meet certain conditions as to scope and necessity. In 1890, these rules became statutory with the passage of the Sherman Act, which provided that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states . . . " was prohibited.

Lights include associations representing jewelers, stationers, meat dealers, liquor distributors, automobile dealers, book sellers, tire dealers, hardware dealers, tobacconists, and grocers. Select Committee Report, supra note 5, at 22, 23.

58 R. H. Macy and Co. is one of the better known. Select Committee Report, supra note 5, at 23.


60 The American Federation of Labor, the Congress of Industrial Organizations. Select Committee Report, supra note 5, at 23.

61 The American Farm Bureau Federation, National Grange, National Dairy Union. Select Committee Report, supra note 5, at 24.

62 The Antitrust Division of the Department of Justice, the Federal Trade Commission, the Department of Agriculture. Select Committee Report, supra note 5, at 24. The Department of Commerce is in favor of fair trade. Interstate Commerce Committee Hearings, supra note 8, at 79-81.


65 Cf. Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 (1942); Ethyl Gasoline Corp. v. United States, 309 U. S. 436 (1940); Dr. Miles Medi-
Many people, especially the small retailers, felt that the Sherman Act should not have banned agreements maintaining a minimum price on trade-marked products. The Act, however, did not prevent stores from engaging in such practices as "loss leader" selling. Necessarily, these sales-methods were limited to large department stores, because small shop-owners with limited resources could not compete in this manner. Consequently, dealer organizations agitated for a change in the law.

The first state fair trade law was the California act, which, in 1931, permitted the execution and enforcement of resale price maintenance contracts. Two years later, this statute was modified so as to extend the binding force, including injunctive relief, of price maintenance contracts to include non-signers—those who were not parties to the agreements. Several other states passed similar laws; and in 1936 the Supreme Court held such statutes valid, even as to the non-signers. Most of the remaining states then passed fair trade laws.

In 1937 the Miller-Tydings Act was passed by Congress. By its terms, resale price maintenance contracts were exempted from the ambit of the Sherman Act though horizontal combinations remained illegal. Thus, though agreements between manufacturers, or between wholesalers, or other competing groups were void as horizontal arrangements, contracts between manufacturer and wholesaler or between wholesaler and retailer—vertical agreements—were now permissible. The Miller-Tydings Act further qualified the type of contracts that would be allowed as those "prescribing minimum prices" for the resale of a trade-marked commodity, when such contracts are permissible as to intrastate transactions within the state in which the resale is to be made.

When the federal courts applied the Miller-Tydings Act in specific cases, it became apparent that this law did not meet with whole-

66 See Select Committee Report, supra note 5, at 18.
67 See Note, 6 Southwestern L. J. 117, 118 (1952).
72 See Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 334, 389 (1951). "The most feasible interpretation that the courts can attach to the Miller-Tydings Amendment... is that it removes the penalties of the Sherman Act from parties making contracts... to fix and control resale prices under certain stated conditions and nothing more." Comment, 3 Ala. L. Rev. 352, 367 (1951).
hearted judicial approval.  In fact, the statute was restricted to its literal provisions.  As a result, this act soon lost most of its efficacy, and it became evident that a new law was necessary if resale price maintenance was to continue effectively in this country.

The Non-Signer Clause

Trade-marks are entitled to protection inasmuch as their primary function is "... to prevent confusion of the public regarding the origin of goods of competing vendors."  It has been asserted that they are likewise entitled to protection because they represent an interest—i.e., the good will attached to the label—which is retained by the manufacturer or wholesaler when he sells his trade-marked product.  Resale price maintenance has been advanced as a means of affording this protection. The non-signer who sells at below the price established by these fair trade agreements is said to exploit unfairly the trade-mark owner's good will, and to take undue advantage of dealers who abide by their contracts.

This view is disputed with the argument that:

... [O]nce the product is sold, with the ... trademark ... on the commodity, then the purchaser becomes the owner of the commodity with the trademark ... attached and a part of it, and the producer ... no longer retains what he has sold, and the purchaser is entitled to what he has bought, to be dealt with by him ... subject only to the proper exercise of the State and Federal police power.  This view is disputed with the argument that:

In reply, advocates of fair trade assert that the non-signer clause is lawful, since the non-signer may be said to have impliedly agreed to be bound by the terms of the price maintenance agreements.  Their argument runs thus: the non-signer was under no duty or compulsion to buy from the trade-mark owner; however, since he did

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76 See Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, 194 (1936); see Note, 125 A. L. R. 1335, 1345 (1940); see note 80 infra.  But see 1 CALLMANN, LAW OF UNFAIR COMPETITION AND TRADE-MARKS 449 (2d ed. 1950).
78 Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 381 (Fla. 1949) (concurring opinion) (emphasis omitted).
80 See Note, 125 A. L. R. 1335, 1346 (1940).  "This reasoning, of course,
buy, and since he knew of the price restrictions at the time he bought,\textsuperscript{81} he may be said to have tacitly agreed to abide by these limitations.\textsuperscript{82} Needless to say, this argument loses its force in cases where the non-signer was in fact ignorant of any price restrictions.\textsuperscript{83}

In a recent decision, the Supreme Court held that the non-signer provisions of price maintenance laws were invalid under the Sherman Act.\textsuperscript{84} The Miller-Tydings Act was limited to its terms, and since it did not mention non-signers, the Court refused to extend the force of the fair trade agreements to other than the contracting parties.\textsuperscript{85} Indicative of its sentiments, the Court went on to state that:

When they [i.e., the advocates of fair trade] seek . . . to impose price fixing on persons who have not contracted or agreed to the scheme . . . [t]hat is not price fixing by contract . . . that is price fixing by compulsion. . . .

. . . [W]hen retailers are [thus] forced to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids "horizontal" price fixing.\textsuperscript{86}

Though it did not so state on this occasion, it may well be that the Supreme Court will refuse to uphold the non-signer clause if this question of illegality arises in a future case. The mere statement in the McGuire Act that non-signers are bound \textsuperscript{87} does not appear sufficient to do more than pose the exact question: Has Congress power to bind a non-signer to an agreement made by other private persons, without benefit of public hearing to determine the reasonableness of the terms as to resale price?\textsuperscript{88}

The Sherman Act forbade, and the Miller-Tydings Act continued the prohibition against, agreements between competitors regulating
the resale price of their goods. If a manufacturer agrees with a wholesaler on the resale price of an article bearing the manufacturer's trademark, the Miller-Tydings Act validates the arrangement. This contract may be brought about by the instigation of either the manufacturer or the wholesaler. Similarly, contracts may be executed between wholesalers and retailers. Except for the decision mentioned above, it would seem that where retailers induce their wholesalers to sign resale price maintenance contracts, the arrangement closely approximates a horizontal agreement. Under the McGuire Act, which validates the non-signer clause, the resemblance to the forbidden horizontal arrangement becomes even greater; for the retailer, perhaps one of a number who feel that a stated price should be the sum for which a branded article should be sold, may by his action determine a price which will be binding upon all other retailers. The one retailer can thus effectuate the same result by his unilateral action that he could not achieve by direct agreements with his fellow-retailers. Similarly, a single retailer could arbitrarily impose his price upon all other retailers within the effective bounds of the price maintenance contract. It would seem, therefore, that either much or all of the sting has been drawn from the prohibition against horizontal agreements—at least insofar as these affect trade-marked goods.

Effect on Interstate Commerce

The Sherman Act prohibited any form of agreement which imposed burdens upon interstate commerce. The Miller-Tydings Act supposedly amended the Sherman Act to the extent of validating what would otherwise be illegally restrictive agreements governing the price of branded goods. In a recent case involving a Pennsylvania fair trade statute, the court held that, since the Miller-Tydings Act did not expressly state that price maintenance contracts might apply to interstate commerce, these agreements were valid only as to intrastate business. This is further indication of apparent judicial disapproval of fair trade by limitation of the statute to its exact terms.

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90 See Legis., 36 Cornell L. Q. 781, 793 (1951); Fink, supra note 80, at 559.
91 See Comment, 61 Yale L. J. 381, 401 (1952).
92 Ibid.; Fink, supra note 80, at 562.
95 See 81 Cong. Rec. 7495-7 (1937).
The new McGuire Act reverses the effect of the last-mentioned decision, and states that no contract allowed by the state fair trade laws "... shall constitute an unlawful burden or restraint upon, or interference with commerce." The Committee Report accompanying the House version of the Act states that:

[The purpose of this provision is to remove any obstacle, as far as the Federal law is concerned, which might stand in the way of a broader interpretation of State fair-trade laws so as to make them applicable to retail transactions and retail advertising which cross State lines.]

The effect of this provision in the new law is not clear. The applicability of the Federal statute depends upon whether or not the subject matter of the contractual restrictions is in interstate commerce. This was a problem before the McGuire Act, and it remains one today. Decisional law is not settled as to whether goods made, distributed and sold within a state may nevertheless be so enmeshed in interstate commerce that price restrictions on them will exert an influence upon the price of goods sold outside the state. The case limiting the Pennsylvania statute never decided the question of what the effect of a contract made in that state would be in a sister state. The McGuire Act, as did its predecessor, states that the legality of a contract in a given case is determined by the law of the state in which the resale is made. At first blush this might appear a simple solution; but a second glance at the various state fair trade laws will dispel that illusion. Some states, for example, permit contracts which restrain sales at below a stated minimum price, while in other states the contracts allowed are those which refer to stipulated prices.

What is the difference? In a not-too-ancient
case decided in Louisiana, the court held that since the state law referred to resale prices "stipulated by the vendor," the fair trade contract was illegal, although its phraseology followed the language of the Miller-Tydings Act and referred to minimum prices. On appeal, it is true, the lower court's decision was reversed on the ground that the Louisiana statute, considered in its entirety, really meant minimum, and not stipulated prices. But the question might not be settled too easily in another state where the statute specifically refers to stipulated prices, and where the rest of the law is ineffective to equate that term with "minimum." Apparently desirous of solving such a problem, the McGuire Act states that contracts may be made "prescribing minimum or stipulated prices." Although the contract may now be legal under the federal law, though it specify either "stipulated" or "minimum" prices, care must still be taken due to the continuing difference in the local state laws, which are made the ultimate criteria for the legality of any given contract. It would therefore seem that if the manufacturer desired to sell his trade-marked product at one price all over the country, he would have to execute two forms of price maintenance contracts, one prescribing stipulated prices, and the other listing the minimum prices.

The McGuire Act has not succeeded in its attempt to clarify fair trade laws in the United States. The question of the validity of the non-signer clause still exists, and awaits a final, clean-cut determination by the Supreme Court. At present, non-signer clauses are permissible in contracts regulating prices of trade-marked goods in interstate commerce. Just what will be construed to be interstate commerce is another unsettled problem in resale price maintenance, apparently dependent for its solution upon the desire of the particular court to either restrict or enlarge fair trade. A further difficulty arising under the McGuire Act is how much force is left in the old prohibition against horizontal combinations. The decisive problem yet unsolved is whether this new law can successfully withstand constitutional attack.

111 The McGuire Act "... is designed to restore the effectiveness of ... [the state fair trade] acts by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality. ... "... [T]his provision [regarding interstate commerce] is to remove any obstacle, as far as Federal law is concerned, which might stand in the way of a broader interpretation of State fair-trade laws ... ." H. R. Rep. No. 1437, 82d Cong., 2d Sess. 2 (1952).
112 See Eli Lilly & Co. v. Schwegmann Bros., 109 F. Supp. 269 (E. D. La. 1953). At this writing, appeal is pending before the Fifth Circuit Court of Appeals.
Constitutional Aspects

The constitutional questions raised by the federal fair trade legislation are primarily concerned with the due process clause of the Fifth Amendment, and with legislative delegation of power to regulate interstate commerce. The due process issue may be resolved by reference to parallel decisions of the Supreme Court with respect to non-signer provisions in state statutes under the Fourteenth Amendment. The validity of these provisions was declared by the Court in 1936, on the ground that the good will of a trade-mark is entitled to reasonable protection.¹¹³ Some state courts, have nevertheless found that state fair trade laws violate state constitutional provisions regarding due process.¹¹⁴

Since, however, the McGuire Act permits non-signers to be bound by the state laws, even where interstate transactions are concerned, a constitutional question has been raised—that the new statute effects an improper delegation of the powers granted to the Federal Government.

Congress has power under the Constitution to regulate interstate commerce.¹¹⁵ A problem soon arose as to whether the states had totally divested themselves of their power to regulate goods passing over their borders, or whether the delegation to the Federal Government was only partial. One view, strongly supported by Chief Justice Marshall, was that the power to regulate this trade was vested completely and exclusively in Congress.¹¹⁶ Opposed to this was the opinion that, in the absence of federal regulation on the subject, the states themselves could regulate interstate commerce.¹¹⁷ The generally accepted rule was enunciated in Cooley v. Board of Wardens.¹¹⁸

¹¹⁵ U. S. Const. Art. I, § 8, cl. 3.
¹¹⁷ See The License Cases, 5 How. 504, 579 (U. S. 1846) (per Taney, C.J.). “... [T]he object and motive of the State are of no importance.... It is a question of power.... [T]he grant of power to the federal government is not an absolute and entire prohibition to the States, but merely confers upon congress the superior and controlling power.” Id. at 583.
¹¹⁸ 12 How. 299, 319 (U. S. 1851). “Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some... as imperatively demanding that diversity, which alone can meet the local necessities. ...

“Whatever subjects of this power are in their nature national, or admit
The Court there declared that there were two areas of regulation: an exclusive area in which only Congress may legislate, and a concurrent area in which the states might exercise some control. Where commerce is national in scope, or where uniformity of regulation is required, the power to regulate is vested exclusively in Congress; but where local policies and necessity make diversity of regulation essential, the states may indirectly regulate interstate commerce, subject, however, to federal regulation of that commerce by subsequent enactments.

The line of demarcation separating the "exclusive" area from the "concurrent" area is, at best, tenuous; and the courts have been hesitant to define their exact limitations. To do so would be virtually impossible, since the court must decide in each case whether the public interest will be best served by state regulation.

only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress.” See also Gilman v. Philadelphia, 3 Wall. 713, 726, 727 (U. S. 1865).

119 Cf. Leisy v. Hardin, 135 U. S. 100 (1890); see Bowman v. Chicago & N. W. Ry., 125 U. S. 465 (1888); Welton v. Missouri, 91 U. S. 275 (1875); see The Minnesota Rate Cases, 230 U. S. 352, 401 (1913). Compare In re State Freight Tax, 15 Wall. 232 (U. S. 1872) (state tax on freight entering, leaving, or passing through states prohibited by commerce clause), and Morgan v. Virginia, 328 U. S. 373 (1946) (state regulation providing for segregation of passengers on interstate motor carriers while in state violative of commerce clause), with Crandall v. Nevada, 6 Wall. 35 (U. S. 1867) (state tax on persons leaving state not controlled by commerce clause). In this area, the silence of Congress implies that such commerce is to be free from all regulation. Cf. Robbins v. Taxing Dist., 120 U. S. 489 (1887); Walling v. Michigan, 116 U. S. 446 (1886); see Sanitary Dist. v. United States, 266 U. S. 405, 426 (1925).


123 Compare South Carolina State Highway Dep’t v. Barnwell Bros., 303 U. S. 177 (1938) (sustaining state regulation of size of interstate motor vehicle carriers on roads within state), with Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945) (rejecting state regulation of length of trains engaged in interstate commerce within state); Pennsylvania Gas Co. v. Public Service Comm’n, 252 U. S. 23 (1920) (state regulation of interstate sales of natural
If the area of commerce regulated by the McGuire Act comes within the concurrent jurisdiction of both the state and Federal Governments, there can be no question of the validity of the Act under the commerce clause. Since the states have the inherent ability to regulate such commerce indirectly, through the exercise of their police power, they need not be delegated such power by Congress. But if the commerce affected by the McGuire Act falls into that area where regulation is vested exclusively in Congress, then the Act would appear to be invalid, since the power to regulate, having been given to Congress, cannot be restored to the states.

If local laws were permitted to operate in this "exclusive" area, the states' power to alter or repeal such legislation, without any consultation with or deliberation by the Congress, would cause disunity where uniformity and harmony are required. Courts, however, have generally sustained enabling acts by finding that no delegation of power is involved. In upholding these acts, the courts declared that Congress was merely supplementing the state law. Thus it was competent for Congress to divest goods of their interstate character upon arrival in the state, despite the

gas directly to consumers in interstate commerce upheld), and Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n, 341 U. S. 329 (1951) (state regulation of sale in interstate commerce by producer to a consumer upheld), with Missouri v. Kansas Natural Gas Co., 265 U. S. 298 (1924) (state regulation of sales in interstate commerce to distributors invalid). See Cooley v. Board of Wardens, 12 How. 299, 319 (U. S. 1851) ("... the mere grant of such a power to congress did not imply a prohibition on the States to exercise the same power... ").


See Cooley v. Board of Wardens, supra note 124, at 318; see Willoughby, CONSTITUTIONAL LAW OF THE UNITED STATES § 74 (2d ed. 1929).

See Knickerbocker Ice Co. v. Stewart, supra note 125, at 164.


See In re Rahrer, supra note 128, at 561.

See, e.g., Kentucky Whip & Collar Co. v. Illinois Cent. R. R., supra note 128, at 350; Whitfield v. Ohio, supra note 128, at 439; In re Rahrer, supra note 128, at 562. There is no delegation of power since it is Congress, and not the states, which determines when the articles leave interstate commerce. See In re Spickler, 43 Fed. 653, 658 (C. C. S. D. Iowa 1890). Congress would
fact that the original package in which they entered was unbroken, or that the goods had not yet commingled with the general merchandise in the state.\textsuperscript{131} The state laws purporting to regulate such commerce, therefore, were not invalid, but merely \textit{inoperative} until congressional assent to the local policy implemented them.\textsuperscript{132} For the federal enabling law to be valid in such instances, however, the state law must be one which the national government itself could have enacted.\textsuperscript{133} If it relates to a sphere of activity within the exclusive control of the state, the federal law is invalid.\textsuperscript{134}

This theory, however, cannot be used to justify the McGuire Act, since that statute does not purport to modify the original package doctrine.\textsuperscript{135} To the extent, however, that the McGuire Act contains a legislative declaration that resale price maintenance contracts shall not be deemed undue burdens on interstate commerce, it resembles the McCarran Act,\textsuperscript{136} which declared that state taxation of insurance companies was not an undue burden on interstate commerce.

\begin{itemize}
\item \textsuperscript{131} See Brown v. Maryland, 12 Wheat. 419 (U. S. 1827) (where imported goods remain in original form or package in which they were imported, state tax prohibited until the goods are commingled with the merchandise of the state); Leisy v. Hardin, 135 U. S. 100 (1890) (application of original package doctrine to interstate commerce).
\item \textsuperscript{132} See, e.g., \textit{In re Rahrer}, supra note 128; Safe Harbor Water Power Co. v. Federal Power Comm'n, supra note 128; \textit{In re Spickler}, supra note 130; West Virginia v. Adams Express Co., 219 Fed. 794 (4th Cir. 1915). The decisions concerning federal enabling laws in regard to state liquor prohibition, \textit{In re Rahrer} and \textit{Clark Distilling Co. v. Western Md. Ry.}, seem to imply that the police power of the state is concurrent in all respects with Congress' power to regulate interstate commerce. The act of Congress merely removes an impediment to their operation. See Sholley, \textit{The Negative Implications of the Commerce Clause}, 3 U. of CHI. L. REV. 556, 587-588 (1936).
\item \textsuperscript{133} See \textit{In re Rahrer}, 140 U. S. 545, 560 (1891). Yet the Supreme Court sustained federal enabling legislation to exclude convict-made goods from their markets. See Kentucky Whip & Collar Co. v. Illinois Cent. R. R., 299 U. S. 334 (1937); Whitfield v. Ohio, 297 U. S. 431 (1936). A federal statute prohibiting the interstate commerce of such goods would have been stricken since, in Hammer v. Dagenhart, 247 U. S. 251 (1918), the Federal Government was prevented from controlling the means of production by regulating interstate commerce. \textit{Cf.} Carter v. Carter Coal Co., 298 U. S. 238 (1936). The Court was, therefore, bound by these decisions which would prevent federal prohibition of convict-made goods in interstate commerce. It was not until 1941 that the Supreme Court expressly overruled the \textit{Hammer} case and limited the \textit{Carter} case. United States v. Darby, 312 U. S. 100 (1941).
\item \textsuperscript{134} \textit{Cf.} United States v. DeWitt, 9 Wall. 41 (U. S. 1869).
\item \textsuperscript{135} The original package doctrine has been rejected as regards goods in interstate commerce. See Live Poultry Dealers' Protective Ass'n v. United States, 4 F. 2d 840, 848 (2d Cir. 1924); see Minnesota v. Blasius, 290 U. S. 1 (1933) (state regulation permitted where goods come to rest in state).
\end{itemize}
To justify the McCarran Act, the "balance of interest" concept was applied. Under this theory, Congress may redefine the areas of national and local interest, since its power under the commerce clause is plenary. Congress, therefore, may not only detract from the state's powers, but also may add to them. Congress, in essence, balances the national interest against local policy, and decides which is to prevail.

This "balance of interest" concept gives Congress the power to determine which areas of regulation it will share concurrently with the states, and which areas it will retain for its exclusive jurisdiction. The act of Congress permitting states to place burdens on interstate commerce is, in effect, a legislative declaration that no uniformity of regulation is required, and that the area of regulation is concurrent. By reasoning thus, the Court has solved the question of delegation of congressional regulatory power over interstate commerce. But in validating this method of determining the issue, the Court, it would appear, has virtually divested itself of judicial veto over federal legislation under the commerce clause. It would seem, therefore, that the Supreme Court would, as it has in the past, approve this new enabling legislation.

On the basis of this "balance of interest" concept, the McGuire Act declares that it is in the national interest to permit full effectiveness of state fair trade legislation. While there is no technical delegation of power, the result is the same as if Congress had in fact delegated such regulatory power to the states. However, as

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142 In cases in which the Court struck down state regulation, the Court intimated that if Congress gave express approval to such regulation, it would be permissible. See Schwengmann Bros. v. Calvert Distillers Corp., 341 U. S. 384, 386, 390, 395 (1951); Leisy v. Hardin, 135 U. S. 100, 119 (1890).
143 This concept is similar to the Cooley test. However, the Court in that case did not declare that Congress may determine where the national interest lies. Of course, in the absence of any congressional legislation on the matter, the Supreme Court remains the final arbiter as to whether state regulation is permissible. See Southern Pacific Co. v. Arizona, 325 U. S. 761, 769 (1945).
144 See note 137 supra.
146 See Corwin, The Constitution and What It Means Today 48 (10th
in permissible delegation to administrative bodies, the standards are adequately set forth, and Congress retains control. Should any amendment of state resale price maintenance prove inimical to the national interest, Congress is always free to contract the power of the states as may be required.

Conclusion

Many of the problems of fair trade, both legal and economic, are still extant. The present inability to obtain a true statistical picture of the economic effect of resale price maintenance creates an almost insurmountable hurdle—at least for the present—to a determination of the wisdom of such legislation.

Apart from fair trade's supposed economic desirability, and the probability that it can successfully withstand constitutional attack, immediate problems of law loom large. Perhaps the greatest of these arises from the uncertain effects of the extension of the non-signer provision into interstate commerce. In addition, it would seem that the Sherman Act has lost one of its teeth—because its prohibition of horizontal price maintenance agreements is apparently abolished,147 at least where trade-marked goods are concerned.

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147 "Thenceforward, any group of distributors desiring to fix prices horizontally would be foolish to take the direct road to that end. Instead some one of their number would make a vertical contract with a supplier and then place the other members of the group on notice of the existence of the contract. Through this means, the group could not only negate the objections of the Government, but could actually use the courts as devices to enforce the arrangement." Letter from Fed. Trade Comm'n, ¶ 9 (Feb. 2, 1952), H. R. Rep. No. 1437, 82d Cong., 2d Sess. 11 (1952).