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# Fair Trade: The Ideal and the Reality

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# COMMENT

## FAIR TRADE: THE IDEAL AND REALITY

As a matter of national antitrust policy, a vigorous battle has been waged against persons who, by their agreements, attempt to restrain trade and destroy competition. To the general rule prohibiting concerted efforts to affect price a narrow exception is made for the sector of the economy which is involved in the distribution of consumer goods to their ultimate users. Unsurprisingly, the legislation which accords favored treatment to this economic enclave has been the subject of considerable controversy.[1]

That the controversy is not dead is evidenced by the recent interest shown by courts, state and federal, and the Congress of the United States. Since 1949 a string of state high court decisions has nibbled away at the list of forty-six states whose legislatures had adopted fair trade.[2] In 1964 the United States Supreme Court noted probable jurisdiction in a consolidation of two appeals[3] involving the eligibility of the Ohio Fair Trade Act[4] for antitrust exemption under the McGuire Act.[5] A recently proposed federal fair trade statute known as the Quality Stabilization Act[6] has been reported on favorably by the House Committee on Interstate and Foreign Commerce in 1963.[7]

This recent concern about fair trade, especially on the part of Congress, indicates the appropriateness of a re-appraisal of the social

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1 Which, as Senator Humphrey accurately quipped in the Report of the Select Committee on Small Business on a Study of Fair Trade Based on a Survey of Manufacturers and Retailers, "give[s] off more heat than light." S. Rep. No. 2819, 84th Cong., 2d Sess. 3 (1956).

2 Only Alaska, Missouri, Texas, Vermont, and the District of Columbia have never had fair trade. The legislation is now considered unconstitutional in the following states: Alabama, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Washington, West Virginia, and Wyoming. In all but Idaho, the unconstitutionality was determined by the highest court of the state. The non-signer clause of the Hawaii statute has been repealed, Hawaii Sess. Law 1963, Ch. 88, 51.

3 Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964).

4 Ohio Rev. Code Ann. §§ 1333.27-.34 (Page 1962).

5 66 Stat. 631 (1952), 15 U.S.C. §§ 45(2)-(5) (1964).

6 H.R. 3669, 88th Cong., 1st Sess. (1963).

7 H.R. Rep. No. 566, 88th Cong., 1st Sess. (1963). "Quality Stabilization" is a less than accurate characterization of the import of the bill if we are to believe the report of the House Committee which mentioned this purpose neither in the statement of the purposes nor in the description of the needs giving rise to the proposed legislation.



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and economic ramifications of the permissive legislation.[8] This comment will discuss these socio-economic ramifications in terms of the arguments, for and against fair trade, which they underlie.

## I. The Nature, History, and Importance of Fair Trade

Fair trade statutes authorize owners of trademarks to enter into contracts with the distributors of their products wherein the latter promise to comply with minimum or stipulated prices in reselling the trademarked products.[9] The immediate effect of the legislation is to permit a trademark owner to withdraw his product from intrabrand price competition whenever it is in free and open competition with other commodities of the same general class.[10] A standard feature of these permissive statutes is a provision for compelling retailers to comply with the price maintenance predilections of the manufacturer[11] whether there has been a contractual agreement to do so or not. Three statutory techniques have been developed to achieve this end.

The original and still most common means of obtaining retailer cooperation is the "non-signer" clause. Such a clause, inserted in the fair trade statute, simply forbids any retailer from knowingly or willfully selling or advertising branded commodities below the minimum prices stipulated in a contract between the manufacturer and any other retailer. In effect, it extends the obligation of the resale price maintenance contract to non-signers thereof.[12] Any retailer violating the terms of a contract is guilty of an "unfair trade practice" for which a remedy at law or equity is provided to persons injured by the violation.

A recently developed technique for universalizing the effectiveness of the fixed minimum prices is to imply a price maintenance contract between the manufacturer and the retailer by legislative fiat. The "implied contract" statutes[13] provide that an acceptance of goods for resale

8 Theoretically the doctrine of judicial self-restraint and the corollary liberal standard of substantive due process in economic matters foreclose judicial inquiry into the "wisdom" of legislative acts.

9 In doing so the acts amount to a legislative abrogation of the ancient common law prohibition of restraints on the alienation of personalty. See Coke on Littleton § 233(a).

10 This *interbrand* competition prerequisite (sometimes described as "fair and open competition") is virtually the only limitation on the use of the statutes.

11 Although wholesalers, importers, for instance, may be and often are trademark proprietors, for convenience the word "manufacturer" will be used to designate anyone with whom branded merchandise originates.

12 Examples of non-signer clauses are: Cal. Bus. & Prof. Code § 16904; Ill. Ann. Stat. ch. 121 ½, § 189 (Smith-Hurd 1960); Ohio Rev. Code Ann. § 1333.07 (Page 1962).

13 Which have so far been adopted in only two states: Ohio Rev. Code Ann. § 1333.28(I); Va. Code Ann. § 59.8.2(10) (Supp. 1964).

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with notice of an established minimum resale price constitutes acceptance of the price. By merely notifying retailers of his intentions, a manufacturer becomes eligible for damages or injunctive relief against any retailer who frustrates his price maintenance objectives.

The most radical device for accomplishing manufacturer control over retail price is a legislative declaration that the trademark owner retains an untransferable interest in his products so long as they bear his mark. Such a statute would permit the manufacturer to establish retail price minimums and enforce them as a matter of property right. Thus far, only the Ohio legislature has invested trademark owners with continuing and inalienable interests in their products.[14] Even the Ohio provision is probably inadequate to reserve to the manufacturer continuing rights in the transferred commodity such as would allow enforcement of the broad price maintenance goals intended by fair trade.[15] The proposed federal fair trade law contains a similar provision. It too is probably too narrow to reproduce the legal effects of other fair trade statutes.[16] There is no reason, however, why such provisions could not be drafted more broadly to make them satisfactory substitutes for or supplements to other statutory varieties of fair trade.

Although the first legislative sanction[17] of contracts to maintain retail price was an early depression California statute,[18] efforts at obtaining producer control of retail prices had begun long before.[19] In 1911, the Supreme Court decided *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[20] in which it was held that a series of vertical[21] price

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[14] Ohio Rev. Code Ann. § 1333.31 (Page 1962).

[15] Arguably, it does nothing more than supply an additional theory for recovery for trademark violations: by characterizing them as violations of his continuing "proprietary interest" in the commodity, recovery can be predicated on this *property* right.

[16] H.R. 3669, 88th Cong., 1st Sess. § 7 (1963) (as amended by committee). The proposed federal statute in its entirety goes much farther than does existing state fair trade legislation.

[17] Attempts at wholesale price maintenance date back to 1876 when the predecessor of the National Wholesale Druggist's Association was formed to curb excessive competition. Bowman, "The Prerequisites and Effects of Resale Price Maintenance," 22 U. Chi. L. Rev. 825, 826 (1955).

[18] Cal. Stat. 1931, ch. 278, §§ 1-5.

[19] A 1913 New Jersey statute, N.J. Stat. Ann. §§ 56.4-1, -2 (1964), forbids retailers from discriminating against or appropriating brand names by depreciating the value of the goods in the public mind, from using price inducements and making misrepresentations as to value or quality, and from engaging in unfair discrimination against buyers where notice prohibiting these practices appears on the goods. The remedies of injunction and damages were provided the injured trademark owner.

[20] 220 U.S. 373 (1911).

[21] A vertical price fixing agreement is one between parties standing at different levels of production or distribution, *e.g.*, between a wholesaler and a retailer. These are

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agreements between a manufacturer and his several retail distributors tended to stifle competition among retailers and therefore was no more permissible under the Sherman Act[22] than the similar horizontal price-fixing agreements. Following this decision, a number of manufacturers of national brands combined to form the American Fair Trade League. The purpose of this organization was to secure protection for the good-will of its members from the "disparaging" effects of loss-leader selling, a device sometimes used by retailers to stimulate business. The manufacturers felt that they possessed a legitimate property interest in the brand names and product images which they had tediously built up with expensive national advertising and intensive merchandising. This interest, they argued, deserved protection from those retailers who would attempt to build their own reputations by selling trademarked items at cut-rate prices, lending an aura of cheapness to the "bait" product in the process. The League was to accomplish its aim of trade-mark protection by promoting fair trade laws which would legalize vertical minimum price agreements and permit their use in fighting the evils of loss-leader merchandizing.[23]

In the early thirties, retailers displaced manufacturers as the chief proponents of fair trade after two decades of efforts on the part of the latter group had virtually failed to produce any legislation. The retailers' interest sprang, no doubt, from the increasingly adverse circumstances in which they found themselves. The general decline in economic activity which characterized that period combined with the wider use of new and more efficient distribution methods to put serious pressures on persons engaged in traditional "small-time" retailing. While no one could do anything about the depression, the small retailer saw the emerging chain stores with their discount prices as an ill with an easy cure. The challenge of the more efficient chain store and its unbeatably low prices was met with restrictive legislation. Fair trade was but one of several legislative remedies pushed through by retail merchants.[24] The attack was first focused at the state level and in 1931,

to be distinguished from horizontal agreements, the parties to which are on the same level and therefore are competitors.

22 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).

23 Fair trade is not the only way of achieving resale price maintenance. Vertical integration with retailer outlets, consignment selling, franchised selling, selective refusals to deal with price cutters, and direct selling by the manufacturer to consumers other than in retail outlets are all devices which might be used to place control of retail prices on the manufacturer.

24 Tax legislation which discriminated against high volume retailers (so-called "anti-chain store acts") were enacted. See, *e.g.*, Cal. Stat. 1935, ch. 849; N.M. Laws Spec. Sess. 1934, ch. 33. Such acts have been held unconstitutional as violations of

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California became the first state to authorize,[25] at least for intrastate transactions, the sort of resale price maintenance contract which was declared invalid by *Dr. Miles*.[26] It was soon realized that the statute, as enacted, was almost as ineffective to maintain price as none at all, for it bound no one who was unwilling to consent to the stipulated price minimum anyway. In 1933, the crucial non-signer clause was added permitting parties to fair trade contracts to bind persons who had not consented.[27] Vigorous efforts to induce passage of fair trade statutes in other states followed the success in California. The National Association of Retail Druggists emerged to assume a position of particular prominence in the leadership of the campaign. Apparently apprehensive that theirs was a cause unlikely to draw support from those aware of its anticompetitive aims, the Association spared no effort in hiding the bill's true effects from the legislators who were to approve them.[28] Legislative consideration of the Association's proposed bill was so superficial that a gross stenographic error slipped through eleven state legislatures, and another lesser one was neglected by seventeen.[29] At the same time, retail druggists were literally regimented under neighborhood "captains" into a militant lobbying force.[30]

Despite the pressures brought on state legislatures to enact fair trade laws, the actual results were spotty. With the ghost of *Dr. Miles* lurking in the background, the states probably quite rightly feared that most contracts entered pursuant to a fair trade statute would be violative of the Sherman Act; thus it would be pointless to enact legislation purporting to authorize them. These doubts were dispelled by Congress in its approval of a rider to a District of Columbia revenue and appro-

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equal protection guarantees. See, *e.g.*, Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). Also enacted were "Unfair Sales Acts" or "Unfair Trade Practices Act," forbidding sales at less than cost to divert trade from or injure competitors. See, *e.g.*, Minn. Stat. Ann. § 325.04 (Supp. 1964); Tenn. Code Ann. §§ 69-301, -306 (1955); Va. Code Ann. §§ 59-9 to -19.1 (Supp. 1964). The manifest purpose of both types of legislation was to provide the small retailer legal shelter against powerful competitors.

25 Cal. Stat. 1931, ch. 278, §§ 1-5.

26 *Supra* note 20.

27 Cal. Bus. & Prof. Code § 16904.

28 A more detailed account of the efforts to conceal the nature of fair trade appears in Edwards, Memorandum for the Assistant Attorney General, Re Grounds for the Repeal of Miller-Tydings Which Authorizes Resale Contracts (1941), reprinted in *Hearings on H.R. 4365 Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 82d Cong., 2d Sess. 436 (1952).

29 *Ibid.* Edwards reported that the absence of an active opposition to the bills was due in part to threats of economic reprisals. *Ibid.*

30 *Ibid.*

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priations bill.[31] Known as the Miller-Tydings Act, the rider withdrew the prohibitions of the Sherman Act from fair trade contracts entered in accordance with local law.[32] Federal control was thus abdicated to what proponents of the Act styled as the sovereign will of the states.[33] The Supreme Court had, in the meantime, sustained the constitutionality of the non-signer clauses in *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*[34] There, the non-signer clause of the Illinois Fair Trade Act[35] was held to be a valid exercise of the police power free from due process and equal protection objection, in that it protected the goodwill of a manufacturer as symbolized by his trademark. With both constitutional and Sherman Act objections to fair trade thus eliminated, state legislatures apparently felt free to adopt it; within a year, twenty-eight states became fair trade jurisdictions.[36]

Thus fair trade entered its greatest period of popularity and acceptability. Soon the legislatures of forty-six jurisdictions had adopted it.

Then, in 1951, the Supreme Court perpetrated a brief crisis by limiting the applicability of the Miller-Tydings amendment to "consentual contracts and agreements," leaving the coercive non-signer clauses invalid as violative of the Sherman Act.[37] Fair trade laws were reduced to impotency. Lacking the means to force compliance on the part of unwilling retailers, a program of resale price maintenance would be almost impossible. Response to this decision was immediate. The next year Congress passed the McGuire Act[38] which exempted non-signer clauses from Sherman Act coverage.[39] Quick judicial approval of McGuire Act provisions came in 1953 when it was upheld by the Fifth Circuit.[40] The recent Supreme Court decision in *Hudson Distribs., Inc.*

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31 50 Stat. 673, 693 (1937), 15 U.S.C. § 1 (1964), (Title VIII—Amendment to the Antitrust Laws).

32 *Ibid.*

33 See the testimony of Edward S. Rogers for the National Association of Retail Druggists in *Hearings on S. 3822 Before the Subcommittee of the Senate Committee on the Judiciary*, 74th Cong., 2d Sess. 5 (1936).

34 299 U.S. 183 (1936).

35 Ill. Ann. Stat. ch. 121 ½, § 189 (Smith-Hurd 1960).

36 In addition to the thirteen already having it on the books.

37 Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

38 66 Stat. 631 (1952), 15 U.S.C. §§ 45(a)(2)-(5) (1964).

39 The McGuire Act also cleared up several problems arising under Miller-Tydings such as whether stipulated, as opposed to minimum, price agreements were permissible, and whether fair trade agreements could be construed as an unreasonable burden on commerce.

40 Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 205 F.2d 788 (5th Cir.), *cert. denied*, 346 U.S. 856 (1953).

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*v. Eli Lilly & Co.*[41] provides reassurance that, absent congressional action, the competition-fostering Sherman Act will not return to haunt future fair trade agreements.

Fair trade has done less well in avoiding conflict with the various provisions of state constitutions. The recent trend has been to find non-signer clauses invalid[42] either as unlawful delegations of legislative power to private interests[43] or as unnecessary to the public welfare and therefore beyond the scope of the police power.[44] Laws permitting fair trade agreements are still operative in at least twenty-one jurisdictions, however.[45]

Despite the much touted potential benefit which fair trade provides them, manufacturer interests have taken little advantage of the legislation. It was estimated in 1959 that fewer than one percent of all manufacturers engage in the resale price maintenance programs which affect between four and ten percent of all retail sales.[46] For more than seventy percent of retailers selling fair traded items, such sales amounted to less than ten percent of their total.[47] Often, even when a manufacturer does pursue an official policy of fair trading his products,

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41 377 U.S. 386 (1964).

42 For a complete list of states wherein fair trade has been found violative of local constitutional guarantees, see note 2 *supra*.

43 *E.g.*, *Florida*: Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949); *Louisiana*: Dr. G.H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 231 La. 51, 90 So. 2d 343 (1956); *Minnesota*: Remington Arms Co. v. G.E.M. of St. Louis, Inc., 257 Minn. 562, 102 N.W.2d 528 (1960); *Pennsylvania*: Olin Mathieson Chem. Corp. v. White Cross Stores, Inc., No. 6, 414 Pa. 95, 199 A.2d 266 (1964). The argument has also been unsuccessful. See, *e.g.*, *Illinois*: Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N.E.2d 929 (1936), *aff'd*, 299 U.S. 183 (1936); *Maryland*: Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A.2d 176 (1939).

44 See, *e.g.*, *Arkansas*: Union Carbide & Carbon Corp. v. White River Distribs., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); *Michigan*: Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952). The argument has also been unsuccessful. See, *e.g.*, *California*: Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P.2d 177 (1936); and *Illinois*: Joseph Triner Corp. v. McNeil, *supra* note 43. The contention that fair trade violates state equal protection provisions was accepted by a majority of the Florida Supreme Court in Liquor Store, Inc. v. Continental Distilling Corp., *supra* note 43, at 385 (concurring opinion). That it violates state constitutional anti-monopoly provisions was accepted by other supreme courts. See, *e.g.*, *Montana*: Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc., 139 Mont. 15, 359 P.2d 644 (1961); *Utah*: General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956). These contentions have not been relied on elsewhere in invalidating fair trade.

45 An ambiguous situation exists in Idaho where an appellate court has ruled fair trade unconstitutional but no case has yet reached the supreme court.

46 Herman, "A Statistical Note on Fair Trade," 4 Antitrust Bull. 583, 584, 586 (1959). (1954-56 estimate 6.9%, 1959 "substantially less.")

47 S. Rep. No. 2819, 84th Cong., 2d Sess. 15 (1956).

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lax enforcement results in a return to the intrabrand competitive situation. A mere one-third of the manufacturers engaged in fair trade were able to report in a congressional survey that they had not encountered major enforcement difficulties.[48] Cost of enforcement seems to be the greatest problem; however, adversity on the part of the courts, discount houses, and retailers desiring nationally advertised loss-leaders have also been cited as posing substantial difficulties.[49]

Despite the common argument that fair trade legislation is intended to protect the small manufacturer, large manufacturers are very much involved in fair trade. In 1954 approximately twenty percent of fair trading manufacturers accounted for about eighty-two percent of all sales of fair traded merchandise.[50] Significantly, the resources needed to carry on a costly program of resale price maintenance successfully would most likely be at the disposal of larger concerns.[51]

Fair trade legislation is actively utilized in only a rather small group of industries. There seems to be a disproportionate interest among manufacturers of articles which are distributed principally through retail drug outlets. In 1954 this group comprised nearly forty-six percent of all manufacturers using fair trade and accounted for forty-two percent of all sales of fair-trade merchandise.[52]

## II. The Socio-Economic Rationale

This being the approximate status of fair trade, what has motivated its proponents to support its development this far, and what reasons exist supporting a policy of encouraging or discouraging future development? Fair trade results inevitably in a drain on the resources of the economy. Like any social program it has its social costs. Some argue that this cost is in the form of increased prices which the con-

48 S. Rep. No. 2819, *supra* note 47, at 7.

49 S. Rep. No. 2819, *supra* note 47, at 8. In spite of this relative unimportance on the marketplace, many retailers see repeal as having disastrous results. It has been suggested that fair trade acts be strengthened by making incorrigible competitors guilty of a crime and subject to fines or imprisonment. S. Rep. No. 2819, *supra* note 47, at 21-22.

50 Herman, *supra* note 46, at 588.

51 Resale price maintenance does not come cheaply; expenditures up to $900,000 have been reported. S. Rep. No. 2819, *supra* note 47, at 7. While the Senate Report did not specify that this was an *annual*, rather than the aggregate, expenditure, the form of the question posed to manufacturers implies that the figures given are annual ones. S. Rep. No. 2819, *supra* note 46, at 23. Besides, annual figures would be the only meaningful ones in this regard, adding justification to the assumption.

52 Herman, *supra* note 46, at 585. In addition, smoking articles and photographic supplies accounted for 6.6% and 4.8% of sales, respectively. Other major classifications are electrical appliances (13.6%) and alcoholic beverages (9.5%). *Ibid.*

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sumer must pay for the objects of his consumption.[53] It may also take the form of decreased profits to the proprietors of manufacturing concerns which must draw substantially on the resources of their sales and legal departments in enforcing fair trade.[54] The firm which was named in a survey of retailers as being the most successful in eliminating cut-rate sales of its products reported spending about 750,000 dollars annually in the enforcement of its more than 250,000 fair trade contracts with retailers and wholesalers.[55] Whether he be stockholder or consumer, someone must bear this cost; is this burden justifiable?

### A. *Advantages Provided the Manufacturer*

At first glance it seems odd that a manufacturer would want fair trade at all. His best interest would normally be expected to be served by a competitive distribution of his product at the least mark-up over his factory price, since this maximizes his sales.[56] Before a manufacturer *can* engage in fair trade, as a matter of economic practicality, he must have some degree of monopoly power. With it, he may share with the market control over the prices of his products.[57]

The original impetus for resale price maintenance contracts was to provide the trademark owner with a defense against assaults on his goodwill effected by discount selling. Though the term "goodwill" is ambiguous, it clearly does not here refer to the favorable customer relations produced by supplying the greatest quantities at the least cost. By engaging in resale price maintenance, the trademark owner

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53 The Federal Trade Commission, reporting on its extensive empirical study of resale price maintenance, concluded that the administrative costs of fair trade (including the extra burden placed on crowded dockets) resulted in "the enhancement and maintenance of high living costs." FTC, Report on Resale Price Maintenance, Summary and Conclusions LXI (1945).

54 S. Rep. No. 2819, *supra* note 47, at 5. Some firms have even set up special departments devoted to handling their fair trade programs.

55 S. Rep. No. 2819, *supra* note 47, at 18. That this is an annual, not the aggregate, amount is to be inferred from the form of the question asked manufacturers. See *supra* note 51.

56 See generally Telser, "Why Should Manufacturers Want Fair Trade," 3 J.L. & Econ. 86 (1960).

57 *Id.* at 87-88. Monopoly power sufficient for this purpose may be had by virtue of a trademark or other means of product differentiation. The economic necessity of some monopoly power to control price seems at odds with the legal requirement that the commodity be in "free and open competition with other commodities of the same general class." See text accompanying *supra* note 9. The legal prerequisite of competition has been a weak limitation on the use of fair trade where the court has considered it at all. Apparently no amount of market control short of absolute monopoly will disqualify a manufacturer from engaging in fair trade. See text accompanying notes 67 & 68 *infra*.

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may hope to (1) protect that demand for his product which is attributable to consumer preference for higher priced lines, or (2) create goodwill among the retailers on whom he must rely to help conduct his non-price competitive campaign against other producers. The two will be considered individually.

### 1. Consumer Goodwill

Producers who find that their selling volume actually increases with increased price are prime candidates for fair trade. That the public should respond to a higher price by greater consumption is, of course, the uncommon situation; such products are said to be negatively price elastic. Negative price elasticity exists where a higher price, usually tending to deter purchase, acts as a positive inducement to the purchase of the goods in question. That is, the desirability of the goods, and hence the amount which will be paid for them, is actually *enhanced* in the eye of the consumer by virtue of their higher price. This enhanced subjective value is more than enough to overcome any decrease in relative desirability[58] incident to higher price. Typical of goods which are affected in this manner are many luxury items and status symbols. Much of the satisfaction derived from such goods is the ego-nurturement provided by the atmosphere of exclusiveness which surrounds their consumption. This feeling that one is part of an exclusive group is a pleasurable one that people will pay for. The idea that consumption of particular goods evidences a cultivated taste or elevated status may have been inculcated by advertising or simply by exposure to the general reputation of the product. However, the effectiveness of many products' snob-appeal depends on their being available only at an exclusive price. A price-cutting retailer can ruin the image.

The reputation of exclusive products will generally lead to considerable interest among members of the "excluded" consumer class when the price is brought nearer that of less expensive substitutes. The prospect of this interest tempts retailers to sell the product at a loss in order to lure customers into the store hoping to make up the loss with profits on other sales. When products are sold at such abnormally low prices, their exclusiveness vanishes. Their manufacturer may find that after a temporary burst of activity, his long run sales volume will decrease. With vanishing exclusiveness goes all value as a loss-leader. Also gone may be former customers who have abandoned the product

[58] In this situation, "desirability" refers both to the extent to which the good is *wanted* as well as whether its acquisition is economically feasible. That is, for these purposes, even a commodity which is wanted or needed very much would be considered "undesired" if the wherewithal to purchase it is lacking.

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to the masses. The manufacturer is left with two choices: rebuild the reputation of his product by another costly advertising campaign (only to risk another round of disparagement), or lower his wholesale price to permit retailers to appeal to a wider market. The latter choice would probably net him less profit than did his former policy of snob-appeal. Otherwise, he would not have been pursuing the former policy in the first place. In fair trade, such manufacturers have a potent weapon against the demeaning trait of mass consumption.

Negative price elasticity may also result where the consumer takes price as an indicium of quality. Since most consumers are inexpert about much of what they buy, they must rely rather heavily on such factors as price in determining which of several competing items is best in materials, construction, engineering, etc.[59] Manufacturers naturally want to foster confidence in their products and are therefore perturbed by retailers who advance their own causes by selling products at unnaturally low, loss-leader prices.

The consumer who might at first find it advantageous to purchase well known products at the economical loss-leader prices would, it is argued, also come out the loser in the long run. As the "orderly marketing" of merchandise broke down, price would come to reflect not quality but simply the whim of the retailer. With nothing to guide their choice, many consumers would find themselves purchasing shoddy merchandise. Since consumers could not respond to a superior product by buying it (because there is no way to recognize its superiority) the impetus to produce better merchandise would die.

Precisely how far this hypothetical diseased condition would go if unchecked (*e.g.*, by fair trade) is impossible to predict, but it may be helpful to recall that the markets in which our modern industrial economy was built were subject to the undiluted brunt of such objectionable merchandising techniques. Fair trade also postdated the period when some of the most famous brand names were popularized. Quality is a stable attribute of a product. Eventually the better reputation of those products which perform better ought to lead to more sales. Even if price were to become an entirely unreliable indicator of quality, performance would soon replace it as the criterion. But, in sum, though quality is not as fleeting a trait as snob-appeal, a manufacturer can find fair trade useful in protecting his products from the clouds on their reputation which loss-leader selling may precipitate.

It is not difficult to agree that where higher price does affect favor-

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59 Tausig, in 1916, was perhaps the first to note this "irrational" association of price and quality by consumers, Tausig, "Price Maintenance," 4 Am. Econ. Rev. 170-84 (Supp. 1916).

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ably the quantity of a product which is demanded, and therefore is a positive attribute of the manufacturer's product just as are usefulness and aesthetic value, it is a proper legislative function to afford protection to that higher price just as it would be given to other valuable traits. Fair trade seems to serve this valid and commendable purpose.[60] On the other hand, however desirable may be the protection of the property right of trademark owners, fair trade might be an inappropriate way of going about it.[61] To remedy the evils of loss-leader merchandising by investing private persons with broad discretion to set the prices at which others must sell is not necessarily warranted by the exigencies of the situation. Resale price maintenance can throttle not only loss-leader selling but the benefits of competitive marketing as well.[62] Enactment of statutes aimed at loss-leaders or bait-merchandising specifically[63] perhaps represent a more sophisticated attack on the problem in that they lack the undesirable side effect of destroying price competition.

### 2. Retailer Goodwill

It is the goodwill of retailers that fair trading manufacturers are probably most interested in preserving.[64] While prices are important in determining how much of his product a manufacturer will be able to sell, other considerations often play heavily upon and indeed may dominate the consumer's final choice. The services which the retailer offers in conjunction with an item can cause the purchaser to choose it over competing lines irrespective of price. These services, such as special repairs, may be beneficial to the consumer, but more generally they take the form of efforts by the retailer to "push" one manufacturer's line over that of another. Recommending the favored line and placing it where it is more likely to catch the eye of the prospective purchaser are among methods which are useful in inducing a greater sales volume of a particular brand.[65]

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60 It is by no means certain that fair trade is worth the expense to the manufacturer, though. If it really worked, one would expect that after three decades more manufacturers would be taking advantage of it.

61 *Accord,* Att'y Gen. Nat'l Comm. Antitrust Rep. 149, 153-55 (1955) which, though recognizing that fair trade was calculated to serve certain valid commercial purposes, declared its operation too broad. The majority recommended outright repeal of federal permissive legislation. A minority thought that repeal should be accompanied by an anti-loss leader provision. A few favored maintenance of the status quo.

62 *Id.* at 153-54.

63 *E.g.,* Cal. Bus. & Prof. Code § 17044; Idaho Code Ann. § 48-404 (1948); Wash. Rev. Code Ann. § 19.90.040 (1961).

64 *Cf.* Telser, *supra* note 56, at 89-96.

65 The services referred to in this connection must be carefully distinguished from

Manufacturers are naturally interested in obtaining these special services for their products, and by using fair trade to guarantee retailers a higher mark-up on their products, they hope to receive such services. The actual effectiveness of resale price maintenance in procuring the desired treatment is, of course, not accurately measurable. However, in a survey of retailers, fifty-six percent admitted to "pushing" fair traded lines.[66] The extent to which other merchants may tend unconsciously to emphasize more profitable items would not be reflected in the survey. The same survey also revealed that over one-half of the retailers who quit stocking fair traded items did so because of poor enforcement. This certainly suggests the value of a well-policed price maintenance program in creating interest in one's product at the retail level.[67] Moreover, absent fair trade, the incentive to offer these special services would be diminished because many consumers, after being sold by one retailer, would make their actual purchase from another who offers the lowest price. Thus, a manufacturer cannot really succeed in obtaining the special services by merely granting wholesale price advantages to retailers who render them.

Of course there is some question as to whether the special services of the retailer will be sufficiently influential to overcome the downward pressure on volume attending the higher price. This is especially significant where a substantial portion of a manufacturer's output is sold through stores not rendering services, and therefore in interbrand competition where price reigns supreme. On the other hand, product differentiation and the public's acceptance of price as at least a partial index to quality give the manufacturer some monopoly control over price. Where demand for his product is relatively inelastic, the manufacturer enjoys considerable freedom in setting price without serious consequences for his sales volume. Also, while the extent of the retailer's control over the customer's choice among competing brands is conjectural, it would be unrealistic to assume that his influence, wielded at the time of purchase, is not considerable.[68]

*general* services (such as air-conditioning the premises, a storewide policy of backing what is sold, or smiling clerks) which affect all brands in the same way. Retail prices will tend to vary from store to store in accordance with the general services offered. General services would be expected to be of visible benefit to the consumer since they are weapons which the retailer uses in his competition with other retailers. The services sought by manufacturers relate *specifically* to the favored product, tending to single it out for intensified consumer interest.

66 S. Rep. No. 2819, *supra* note 47, at 19-20.

67 S. Rep. No. 2819, *supra* note 47, at 14.

68 A result of these promotional tactics is that the consumer probably pays more for a product than he would if it were distributed in a competitive retail market. The extra charge is exacted to compensate the retailer for services rendered the manufacturer, which services may be useless to or may tend to mislead the consumer.

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The use of fair trade to obtain special services from retailers is a substitute for advertising. Each dealer becomes, in effect, a small advertising agent for the trademark owner, remuneration taking the form of higher profits on his sales. Small manufacturers who cannot afford expensive advertising outlays may especially benefit from the existence of this type of promotion device. What may make fair trade more objectionable in this role than is advertising (apart from the fact that it offers none of the indirect benefits that advertising provides in the form of television entertainment and magazines, for instance), is that its nonpublic nature impedes control. In a situation where the temptation to mislead the consumer is very great, machinery for control is almost nonexistent. The public nature of advertising at least makes it more amenable to the surveillance of such policing agencies as the Federal Trade Commission. The trust, which is commonly placed in, for example, the retail druggist, attenuates the need for control and certainly militates against creating a situation where persons may profit by inducing its abuse.

### 3. Other Motivations

Another motive manufacturers have offered in support of fair trade is that it is necessary to preserve the small retailer on whom they depend to provide the desired wide distribution of their products. It is apparently feared by some that unless small retailers are guaranteed a fair profit on the sale of a manufacturer's products, they will lose interest in handling the line or, even worse, will be forced to close. Both results will tend to restrict distribution.[69] Arguably distribution would be just as wide, if less diffuse, in a somewhat more concentrated retail market; but whatever the validity of the notion that more outlets produce greater sales volume, the fairness of burdening the consumer with the extra cost is questionable. If the demise of the small businessman is the result of the deceptive loss-leader tactics of an unscrupulous few, then it is in the public interest to stop it. If, however, manufacturing interests prefer a style of retailing that the public has opted to reject, it hardly seems equitable to charge the many with support of the self-interested predilections of the few. If a manufacturer wants the economic extravagance of a store on every corner carrying his product, *he* should be willing to pay the price rather than shifting to the consumer the burden of subsidizing otherwise unprofitable operations.

Of minor importance is the use that cartel participants can make of fair trade to police the market division and prices, which have been calculated to maximize cartel profits.[70] Using resale price maintenance,

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69 S. Rep. No. 2819, *supra* note 47, at 11-14.

70 Telser, *supra* note 56, at 96.

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an individual manufacturer can be prevented from spoiling the market for the whole group by attempting to increase his share through price competition. The enthusiasm with which marketing conspiracies are pursued under modern antitrust laws makes apprehensions of this sort of abuse a bit unrealistic; however, in view of the ease with which "conscious parallelism" deteriorates into tacit conspiracy[71] we should beware of legalizing any scheme which may tend to facilitate horizontal price fixing at any level.[72]

B. *Protection Provided the Retailer*

The interest of retailer trade associations in the promotion of fair trade can hardly be explained in terms of the traditionally announced goals of protecting the goodwill of trademark owners.[73] Yet, retailer organizations have taken a great interest in the vitality of fair trade, and they probably are now behind nearly all promotional activities in its behalf.[74] Their concern is the threat to the present structure of retail marketing posed by the giant discounters who are taking smaller markups on products which are sold in competition with small business. The resulting lower prices are a considerable attraction to shoppers who patronize the discounters in ever greater numbers. This trend puts a pinch on retailers whose small scale of operations often makes it impossible to meet the challenge of price competition. Fair trade shelters these smaller retailers from competitive pressures and it may possibly mean the difference between survival or failure for marginal establish-

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71 Department of Justice, Report to the Subcommittee on Monopoly of the Senate Select Committee on Small Business, 82d Cong., 2d Sess., on a Study of the Development of the Antitrust Laws and Current Problems of Antitrust Enforcement 21 (Subcomm. Print No. 3, 1952).

72 For a rather thorough discussion of the usefulness of fair trade in policing illegal price-fixing agreements among competitors, see FTC, Resale Price Maintenance 522-37 (1945). It is also noted that the initiative for fixing prices tends to shift from manufacturers to powerful retailer associations, hence the effectiveness of retail price maintenance programs where strong trade associations adopt the guild spirit. *Id.* at 547.

73 Equally inexplicable in traditional terms is the interest of wholesalers who have no trademark rights of their own. The fair trade legislation of a number of jurisdictions is designed to allow wholesalers to enter resale price maintenance contracts with their retailer customers even where they have no brand-associated goodwill to protect. Indeed, the right of the trademark owner to exclusive control of the use of his mark may be impaired by officious wholesalers who may place price conditions on its use.

74 *E.g.*, such groups as the Ohio Hardware Association, Ohio Retail Food Dealers, Ohio Association of Tobacco Distributors, Ohio Retail Jewelers Association, and the Ohio State Pharmaceutical Association joined with others in arguing as amici curiae before the Supreme Court in Hudson Distribs., Inc., v. Eli Lilly & Co., 377 U.S. 386 (1964). See Fulda, "Resale Price Maintenance," 21 U. Chi. L. Rev. 175, 180-84 (1954).

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ments. The new giants are, of course, in business to succeed and in pursuit of that end they must attempt to draw customers away from long established trading relationships. Lower prices made possible in various ways, some related to size, are their chief weapon in this struggle. Many feel that fair trade is necessary to protect small retailers from destruction by falling prey to the competitive advantages accruing to mere largeness.[75]

That the survival of small business is important to the small businessman goes without saying. A number of reasons why the survival of small retailing is important to the public welfare, and therefore a proper subject of legislative action, have been advanced as well. Of course, small scale retailing provides countless persons with a means of earning a respectable livelihood. Moreover, small businessmen, striking out on their own, represent and help preserve the healthy spirit of independence that many feel is disappearing in this age of anonymity. It has less sentimentally been suggested that the small businessman is "a very vital element of American democracy" who is a "principal source of leadership and support" of community undertakings.[76] Thus, there may be valid social reasons for arresting a trend which is destroying valuable social assets and at the same time working the serious economic hardship of unemployment upon many. Even though it may mean a higher price on consumer goods, perhaps the added cost is justified by noneconomic, social benefits which result. On the other hand, this could be characterized as the unnatural preservation of institutions which have outlived their economic usefulness by eliminating the competition whose function it is to weed out the inefficient. In this connection it should be emphasized that destroying small business does not mean destruction of the small businessman; the impact of competitive forces is merely to divert his labors to more useful enterprise.

### 1. Preservation of Competition

Despite its rather clear anticompetitive effects, fair trade has been seriously argued to be a necessary measure to preserve competitive retailing and to ward off the retailing monopolies which would grow in its absence. To evaluate this contention, a brief analysis of retail competition will be undertaken with attention to the effects on its operation of artificial price rigidities such as result under fair trade. Secondly, the utility and value of fair trade in averting loss-leader induced monopoly will be discussed. Finally, contentions that fair trade has no harmful side effects on competition will be considered.

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[75] S. Rep. No. 2819, *supra* note 47, at 11-12.

[76] H.R. Rep. No. 566, 88th Cong., 1st Sess. (1963).

Competitive selling is the state of affairs brought about when two or more entrepreneurs vie with one another to attract the limited purchasing resources of the public by offering goods and services in exchange. The greater the price, the greater is the average profit[77] per sale; the greater the volume, the greater is the total profit.[78] It is elementary that changes in price nearly always affect volume. The absence of perfect competition gives retailers some freedom with regard to their prices. The fact that one's prices for the same or readily substitutable items are higher than those of another will not lead to a forfeiture of all sales to the latter. The potential customer's lack of knowledge of the difference, his immediate convenience, or plain inertia will frequently result in a willingness to pay the higher price. Yet these factors tend to be transient in effect and will not forever stave off the high-price seller's demise.

There can be but one rational reason for the price differential if what the consumer receives is exactly the same at the high and the low priced outlets and all merchandise lines are priced "rationally."[79] That basis exists where one retailer faces higher costs selling at his most profitable volume level than does the other selling at the same level. The less efficient one seeks to maximize his profit by charging more per sale even though this may result in a decrease in volume and probably lower total revenue.[80] The loss of total revenue occasioned by the

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77 Meaning return to invested capital, and, in the case of the proprietor actively engaging in the prosecution of the business, return to his labor as well.

78 This assumes that the scale of operations is fixed and that volume is not so great that the cost of effecting each *additional* sale is not greater than the average cost for all sales. If the cost of making the marginal sale were greater than the average cost of all previous sales, the expenditure would bring the average costs up. The assumption of a fixed "scale of plant" is realistic for the short-run, which in the case of retailers might mean a fairly long time. Their scale is not so flexible. Moreover, it is probably reasonable to assume that the variable costs of the typical retail firm (chiefly cost of goods sold) increase almost linearly within the range of normally encountered short-run volume variations. Proportionately high fixed costs (overhead) *average* less and less per sale as volume increases. Combined with the nearly linear increase in variable cost, the result is a lower (total) average cost per sale meaning more of the price is left for the retailer. In sum, it is assumed that most outlets are operating at slightly less than optimum volume, *i.e.*, volume at which the average cost of making a sale is minimal and greater volume would be at the expense of business profits. Price is also presumed constant.

79 *I.e.*, to yield the maximum total profit from sales of each line.

80 The amount of decrease in revenue depends on the degree to which volume varies in response to changes in price, that is, the *price elasticity* of the product. Since it is usual for retailers to have some monopoly price control, limited price increases may not have the effect of reducing volume drastically, and perhaps not at all, in the short run at least.

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lesser output will be less percentage-wise than the total cost avoided, however.[81] There may be any number of reasons for the greater inefficiency which requires higher prices to yield an adequate return to the factors combining to provide the services of distribution. Poor management techniques, unsophisticated inventory handling, and uninformed buying practices would all obviously lead to costlier operation. That the mere fact of smallness deprives enterprise of the economies accruing to larger scale is also a factor.[82] Whatever the reasons for the higher costs, however, the competitive economy will tolerate neither the costs nor the waste which results. The extra expense of inefficiency will be reflected in extra price which must be paid for the comparable value received. When consumers finally refuse to pay that extra price, the wasteful operation will be terminated by bankruptcy. It is in this manner that the pressures of competition insure that the most will be provided at the lowest cost to society. By freezing prices and preventing any natural downward movement, fair trade neutralizes these pressures and hamstrings the operation of competition. Rather than succumbing as they would in a free market, inefficient firms may manage to survive on the artificially maintained prices which the fair trade manufacturer sets. In paying the artificially maintained price, the public is, in effect, taxed to subsidize the unproductive. Fair trade thus institutionalizes a drain on the vitality of the entire economy.

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81 This is true by definition assuming for the purpose of comparison that the smaller retailer is selling at approximately that volume calculated to maximize his profits. This assumption that profits are being maximized must be indulged in order that the comparison of the efficiencies of the larger and smaller scales of plant might be meaningful. If the profits of a given operational scale are being maximized at a given volume (and price) level, the implication is that they would be less at a higher volume (and lower price) level. A larger scaled seller would face the same costs per sale only at a higher volume because of the economies accruing to larger scale. Moreover, the low cost seller's greater scale causes his profit maximizing volume to be higher than that of the smaller outlet, which higher volume can be achieved by charging less for the merchandise. The reason for the larger seller's higher profit maximizing volume is that the costs for his *additional* sales increases with greater volume at a rate less than the marginal cost increase for the smaller seller (who is deprived of scalar economies). Because lower prices are required to effect volume increases, the revenue from the additional sales also declines; but so long as there is a price-cost differential (which there would be at relatively higher volume for the larger seller) there is profit in the sale. To maximize *total* profits, the larger seller must sell at greater volumes. Thus, because of their different cost pictures, smaller sellers maximize their profits at lower volumes and higher prices than do larger ones.

82 Among reasons for the greater economies resulting from merely being big are that a greater division of labor permits specialization in the various aspects of retailing leading to more efficiency. Greater capital resources provide flexibility which may be used to meet situations or to implement more efficient techniques.

A closely related vice of fair trade is its potential to promote slovenly practices on the part of even the efficient among protected retailers. The motivation to promote efficiency, to make capital investments, and to strive to perform the distributive function as economically as possible are all absent when such efforts will be unrewarded by greater patronage in response to lower prices.[83] While the retailer might advantage himself by streamlining his operations so as to leave a greater part of the revenues as profit, the easier and certainly less risky course would be simply to rely on his suppliers to maintain the level of prices. It is ironic, if not pathetic, that many American businessmen can become enthralled with a scheme which rejects profit as the criterion of economic usefulness or productivity. Without profit as a criterion, the incentive to do a better job is removed.

We have seen that competition performs a vital public service. Nearly everyone intuitively, at least, understands its mechanisms and realizes its value. It is therefore not surprising that retail proponents of fair trade are reluctant to admit that the ability of discount stores to sell goods at unmatchable prices is due to their greater efficiency. Rather the blame is placed on the discounter's use of "unfair" tactics. It is not competition which is sought to be irradicated but its abuse. Specifically, the unfairness towards which fair trade is directed is the use which "unscrupulous" retailers make of loss-leaders to stimulate their own business.[84] The theory of the unfairness is this: Customers are drawn into the store with offers of reputable, branded merchandise sold at bargain prices. Deceived into thinking that the store offers bargains generally, the customer buys other items as well. By then selling the customer less well known products (or their own inferior brands) at relatively greater markups, the store makes up for its loss. The unfairness inheres in luring customers away from other sellers by means of this deception. It has been suggested that the supposed necessity of selling "lemons" along with loss-leaders in order to recover a profit is illusory, however.[85] As has been pointed out,[86] increased volume may *lower* the average cost of making each sale. Therefore, the increased sales volume of the non-loss led items which the discounter sells could result in a greater total profit from the sales of those lines. This greater

83 The consumer suffers also in that he is insulated from the savings arising from greater distribution efficiency, which savings would, at least partly, accrue to him where competitive retailing prevailed.

84 For a discussion of the "disparaging" effects of loss leaders, see text accompanying notes 58-63 *supra*.

85 See Herman, "Fair Trade: Origins, Purposes, Effects," 27 Geo. Wash. L. Rev. 621, 642 (1959).

86 *Supra* note 78.

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profit on non-loss led lines may more than compensate for the loss incurred in selling the loss-leaders at below cost. In fact, the increased profitability arising from the greater volume in the non-loss led lines might be realized even though the prices on those lines are cut. The consumer, while taking advantage of bargains on some items sold, is thus not necessarily "stung" on others. Although this reasoning does not prove that loss-leader promotion is actually beneficial to the consumer, it, considered with the discounter's presumable hesitation to impair tomorrow's sales by gypping the customer today, increases the difficulty of accepting contrary averments.

Because the loss-leader is designed to divert business from competitors, a trend which may, if carried to the extreme, cut them out of the market entirely, its use in competition has been characterized as "unfair." The type of competition which results is not the gentlemanly variety of whose value all are aware, but it is destructive of useful enterprise. Unchecked, this destructive competition will bankrupt most small (and therefore weaker) businesses leaving only the powerful giants to monopolize the channels of distribution. At the same time, manufacturers, seeing their traditional distributive systems slipping into oblivion (why they cannot sell through the giants is uncertain), feel constrained to integrate vertically,[87] thereby increasing the monopoly. Thus, it is concluded, fair trade benefits the consumer who ultimately must suffer the evils of monopoly.

To appreciate the benefits of fair trade as monopoly-preventive legislation, the vice of concentrated market power must be understood. Monopoly power has many advantages, most notably the economies which accrue to its scale; it is therefore unrealistic to consider it to be a universally undesirable market structure.[88] Its greatest defect is probably its controllable, but inevitable, tendency towards restricted output and higher prices. These phenomena result from the monopolist's natural inclination to maximize his profits.[89] Having control of the entire supply of the commodity he sells, the monopolist can force the consumer to pay the extra price.

Regardless of how undesirable a highly centralized retailing system may be, undesirability alone indicates neither the necessity nor the usefulness of fair trade laws in combatting it. In the first place, it is extremely doubtful that there *is* a trend towards a declining avail-

87 That is, create a manufacturer-operated retailing system which is integrated into the manufacturing operations.

88 Consider, for example, the inconvenience of having two local telephone companies.

89 The monopolist's profits would be greater than the total that would accrue to competitors serving the same market.

ability of competing stores among which a consumer may choose or, if there were, that fair trade would be capable of arresting it. Statistics prepared from the Statistical Abstract of the United States and presented before the Antitrust Subcommittee of the House Judiciary Committee[90] indicate that the number of retail drug stores declined slightly in both fair trade and free trade jurisdictions[91] between the years 1935 and 1948. The percentage of decline in neither case exceeded one percent.[92] During the same period, the number of drug stores per million dollars of sales also fell in nearly identical proportions for each area. Similarly, the number of drug outlets per one million persons declined by approximately the same percentages in fair trade and non-fair-trade jurisdictions. The drop left a substantially greater number per million persons in *free* trade jurisdictions where their density was greater prior to 1935.[93] Such uncomplicated statistics raise, if not answer, the question of the usefulness of fair trade in protecting small business. From them it is difficult to conclude anything but that fair trade has failed to affect noticeably the viability of the drug stores which it protects.[94] Nor does it appear that the monopolization of retailing is proceeding any faster in non-fair-trade states than in states where fair trade is actively battling monopolization. Worthy of note is that the manufacturers of goods normally sold in drug stores are probably more actively engaged in fair trade than are the suppliers of any other major type of outlet.

Thus, it is particularly significant that thirteen years of resale price maintenance has failed discernibly to affect the vitality of drug retailers. Looked at another way, the effect of unencumbered competition in weeding out inefficient retailers was no greater in free trade states than where it was forbidden by law. Perhaps free price competition motivated small retailers to become more efficient and allowed the natural replacement of those which did not. Perhaps when a business is unhealthy and doomed, not even artificial stimulation can save it. Perhaps it is not a problem of survival at all which motivates small retailers to want fair trade.

Even if the absolute number of retail establishments is decreasing,

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[90] Statement by Q. Forrest Walker, *Hearings on H.R. 4365 Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 82d Cong., 2d Sess. 508 (1952).

[91] Missouri, Texas, Vermont, and the District of Columbia.

[92] From a total of 5,773 to 5,717 in free trade states as against 50,924 to 50,079 in fair trade states.

[93] Also presented to the subcommittee were statistics taken from the Survey of Current Business showing that the number of retail firms *in general* fluctuated correspondingly in fair and free trade states. *Hearings on H.R. 4365*, *supra* note 90, at 509.

[94] See Herman, *supra* note 85, at 637-40.

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mass mobility adds a new dimension to the modern situation as compared to that of the 1930's. Then, if there were only one merchant in the neighborhood, he had a virtual monopoly; now, it is neither uncommon nor inconvenient to drive relatively great distances in search of a bargain. The point is, simple mobility, by extending the shopper's range, has given him access to a greater number of establishments than ever before. With the effective market thus expanded, competition has actually *increased* since 1935, despite the decrease in absolute numbers of individual sellers. Since there is a limit on how gigantic the giants may become, legally[95] if not physically, it seems unlikely that any retailer will ever be able to take over any substantial market area.

But even if complete monopolization were a threat, fair trade hardly seems to be an appropriate countering device. Rather than preserving competition, it permits formerly competing firms to adopt a common price policy and to behave as a market dominating unit. Fair trade actually facilitates the creation of monopoly power by removing the legal obstacles to unified action by competitors.[96] It also eliminates the administrative and practical difficulties attending the giant mergers which otherwise would be necessary to concentrate market control. The power to extract an "excessive"[97] price from consumers is no less where the monopoly results from a unified price policy among small retailers than where it consists of a monolithic large retailer. The immediate effect on competition is the same. In the long run, however, the fair-trade-created monopoly is worse than the monolith. Whereas the handsome profits accruing to the latter will attract competitors who will bid price down, the law protects the fair trade monopoly from such spoilers.

95 Since presumably no "giant" could long avoid affecting interstate commerce, the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1964), or the Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964) should control any malignant growth. Similar statutes exist at the state level, *e.g.*, N.Y. Gen. Bus. § 340; Va. Code Ann. §§ 59-20 to -40 (1950), as amended, Va. Code Ann. 59-20, -40 (Supp. 1964); Wis. Stat. Ann. 133.01 (Supp. 1964).

96 Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964). To be exempted, the collusion must, of course, be vertical. However, the exempting legislation apparently allows the tacit horizontal conspiracy which might otherwise be imputed to an arrangement wherein competitors enter price fixing agreements with a third person knowing that their act is part of a common plan to affect price. *Cf.* United States v. United States Gypsum Co., 333 U.S. 364 (1948); United States v. Masonite Corp., 316 U.S. 265 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

97 That is, the price would be greater than the amount necessary to reimburse the seller for his actual sacrifice in distributing the goods, which amount would, under competition tend to determine price.

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It has been seriously contended that, although fair trade operates to fix price, it neither destroys competition nor deprives the public of its advantages. Two lines of reasoning have been offered in support of this contention. The first is premised on the proposition that *useful* competition is not affected by fair trade, only unfair or destructive competition. One would expect the phrase "unfair, destructive competition" to refer to the situation where, as a result of the ungamely tactics of some competitors, others are forced out of business for reasons other than their relative inability to perform efficiently. As was seen above, the unfairness inheres in expanding volume by deceiving customers into believing that they receive more for their money by trading with the unfair competitor than they do elsewhere.[98] All healthy competition is destructive in the sense that it forces unsound enterprises to discontinue. Unfortunately, however, "unfair destructive competition"[99] has come to suggest in many minds *any* competitive situation in which an over-ambitious retailer tries to increase his sales at the expense of his competitors. The typical sort of discount selling may have this destructive effect. But such selling need not be deceptive to be profitable; the lower prices can truthfully reflect lower costs and the curtailment of unnecessary services. If the consumer is getting what he thinks he is getting, *i.e.*, there is no deception, and the discounting retailer is profiting from the transaction, it is difficult to perceive the unfairness of the lower prices, even if their effect is to drive high-cost sellers from the marketplace. The non-price and presumably fair competition which survives the operation of fair trade (such as advertising[100] and promotional gimmickery) is of little or no benefit to the consumer. Any price competition remaining above the maintained minimum which may remain would be only of limited benefit.

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98 Loss-leader selling would, of course, typify this situation where the dealer made up for his losses by selling "lemons."

99 "Unfair competition," as used in the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964), includes the Sherman Act violations of conspiracy to restrain trade and monopolization in 50 Stat. 693 (1955), as amended, 15 U.S.C. §§ 1, 2 (1964). In combination with the Robinson-Patman sections, 49 Stat. 1526, 1528 (1936), as amended, 15 U.S.C. §§ 13, 13a (1964), prohibiting predatory pricing for the purpose of monopolization, an adequate remedy for malicious or destructive competitive tactics ought to be provided. However, fair trade is not merely redundant. Its interference with free competitive practices applies whether or not unsavory techniques are being employed against competitors.

100 The generally more laudable function of advertising, that of *informing* the consuming public of the available purchasing options becomes nugatory at the retail level if all sellers offer the same items at the same fair trade price. Because convenience would be the only rational reason for choosing one retail establishment over another, retail

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Secondly, it is claimed that because free and open competition among goods of the same general class is a statutory prerequisite to use of fair trade,[101] the continued operation of competitive pressures on price are assured. If the meaning of "free and open competition" were known, it would be easier to appraise this allegation. The scanty existing authority seems to indicate that the requirement is satisfied if the market is shared by more than one seller.[102] Even *direct* competition among goods is not required—only the existence of competing goods of the same general class.[103] This is a fairly weak requirement, especially in view of the dubious quality of competition where oligopoly or duopoly market structures exist at the manufacturer level. The Department of Justice has noted the considerable use of "follow the leader" pricing in such markets, and that although there is not a conspiracy in the ordinary sense, competition is likewise absent.[104] At any rate, it is missing the point to believe that competition prevails under fair trade because producer level competition is unaffected. The consumer is entitled to competition among dealers *as well as* manufacturers.[105] The price paid for the services of warehousing and distributing the commodity ought to be subject to competitive pressures just as is the price for producing it. The absence of competition in some links of the chain of supply cannot compensate for its weakness or absence in others.

A final reason to doubt the value of fair trade as society's salvation from creeping monopoly is to be found in the considerable, though unpublicized, support given it by chain store interests.[106] Testifying during Senate hearings on the Miller-Tydings enabling amendment, the Secretary of the National Association of Chain Drug Stores made

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advertising would more than ever be directed towards producing economically irrational reactions.

101 See examples cited *supra* notes 11 & 12.

102 Eastman Kodak Co. v. FTC, 158 F.2d 592, 594 (2d Cir. 1946), *cert. denied,* 330 U.S. 828 (1947). See also Eastman Kodak Co., 44 F.T.C. 14 (1947).

103 Eastman Kodak Co. v. FTC, *supra* note 102, at 594.

104 Department of Justice, Report to the Subcommittee on Monopoly of the Senate Select Committee on Small Business, 82d Cong., 2d Sess., on a Study of the Development of the Antitrust Laws and Current Problems of Antitrust Enforcement 21 (Subcomm. Print No. 3, 1952).

105 This was a conclusion drawn by the FTC after its study of resale price maintenance two decades ago. FTC, Resale Price Maintenance, Summary and Conclusions LXIV (1945).

106 See Edwards, Memorandum for the Assistant Attorney General, Re Grounds for the Repeal of Miller-Tydings Which Authorizes Resale Contracts (1941), reprinted in *Hearings Before the Antitrust Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary,* 82d Cong., 2d Sess., ser. 1, pt. 1, 436 (1952).

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the rather amazing statement that the chain drug stores of the country were "all for the bill."[107] Two possible explanations have been offered for the interest shown by these supposedly embryonic retailing monopolies against whose growth fair trade is presumably aimed.[108] Now that the chain drug stores are firmly rooted in the market structure, they are beginning to feel the competitive stings of newcomers to the field. The chain drug store, having outgrown its need for aggressive price competition, now finds that its best interest is served by eliminating it. Like the small druggist who preceded it, the chain store has reached a position of comfortable prominence and would prefer not to witness further economic evolution.[109]

Alternatively, for the chain store whose private brands[110] have become fairly well established, fair trade agreements can be very handy in a program of price competition. By cutting the prices of his non-fair-traded private brands, the chain store can raid its smaller competitors who, not being able to afford private labels of their own, are powerless to retaliate. Rather than protecting the small independent from the mammoth chains, fair trade can thus be demonstrated to be of invaluable assistance to the latter in achieving their ultimate takeover. Quite apart from depriving the public of the advantages of price competition, fair trade appears to be hopelessly inept both at fighting monopoly and at providing protection to the small retailer.

### 2. Preservation of Retailer Services

The proponents of fair trade claim that if the discounter is not taking a loss on the low-priced items which lure customers into the store, he necessarily is cutting corners in order to reap a profit from his enterprise.[111] Service minded retailers stock such unprofitable staple items as nails and bolts purely as a convenience to their customers. Although a loss may be taken on these items, the small retailer makes up for it by selling more profitable, national brand merchandise.

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107 *Hearings on S. 3822 Before the Subcommittee of the Senate Committee on the Judiciary*, 74th Cong., 2d Sess. 18 (1936).

108 Edwards, *supra* note 106, at 438.

109 Later, during House hearings the Secretary of the National Association of Chain Drug Stores echoed the wails of the small independent decrying bait merchandising and predatory pricing. *Hearings on H.R. 1611 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 75th Cong., 1st Sess., ser. 1, at 22 (1937).

110 Private brands are branded products made for and sold exclusively by the retailer featuring them.

111 The contention was argued in the brief of the amici curiae in Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964).

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Discounters who stock only lines showing high turn-over and profitability can ruin the retail price level on the "bread and butter" items by selling them at cut-rate prices. In doing so they skim the cream off the market, leaving the small retailer only the uninteresting and unprofitable service burden. The consumer will, for a time, enjoy "having his cake and eating it too" by patronizing the small merchant when he needs staple items and turning to the discounter for larger purchases. Ultimately, the argument goes, the end will come. The abused small retailer will have vanished leaving only the variety-shy discounter to serve the public.

Providing staple items at little profit is not the only service which the purchaser may forego in taking his business to the discount store. The small retailer may be in a position to offer special ordering services, easy credit arrangements, a liberal refund policy, and so forth, especially to his regular customers. Some purchasers may prefer simply to avoid the more austere premises on which the discounter typically does business. The personal service obtainable in small outlets has been contrasted with the sparse and often untrained sales personnel found in the discount store. Rather than being left to his own devices in making his selection, the patron of the small store can avail himself to the freely offered advice concerning the relative merits of the seller's wares.[112]

Unquestionably there is a trend among larger retailers to curtail those services which they feel the consumer is not so interested in having, while retaining worthwhile ones such as refunds, dealer warranties, repair departments, home delivery, and time payment plans.[113] One discount chain reported that such cutbacks produced substantial saving which may be passed on to the consumer.[114] If the small businessman is providing the consumer with invaluable services which cannot be obtained at the large discount store, it is also true that consumers are driving past him to take advantage of the better prices offered by the discounter. One must not forget that the small busi-

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112 Fair trade may defeat its own purpose in this regard by encouraging manufacturers to try to influence the tenor of this freely offered advice, though, as was seen in the text accompanying note 66 *supra*, 56% of retailers of fair traded products admitted responding to the manufacturer's call.

113 These latter two are sometimes provided, though at an additional cost to the actual beneficiaries, rather than distributing the cost among all customers in the form of higher prices.

114 The gross overhead reportedly dropped to 11.9% compared with 34% for the average department store, *Hearings on S. 3850 Before the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 191 (1958).

nessman who is robbed of high profit sales by the larger stores' competitive victory may still make a profit by simply raising the price of staples.[115]

If the services which the large outlet curtails in order to lower prices are considered worthwhile by the purchasing public, fair trade is not necessary to sustain the small businessman who provides them. If not, the artificial rigidity placed on the economy by resale price maintenance will perpetuate their rendition only at the expense of the consumer who would rather use his money on something he wants. So long as deceptive practices on the part of competitors are prevented by governmental agencies such as the Federal Trade Commission, the consumer will, by the pattern of his spending, indicate what his preferences are. Resale price maintenance will not breathe life back into dead tastes; it only thwarts the mechanism giving expression to public desires and sparking the structural economic changes required to serve the wants of society. Unless we are prepared to underwrite forever the production of services for which public demand has subsided, a governmental plan to do anything but soften the blow of obsolescence seems impractical. If the pinch on small business is caused by a shift in consumer preferences to discount retailing (and its lower prices, fewer services, and less variety), arguing the social value of the curtailed services will not indicate the desirability of fair trade. If consumers do not want the services, they *have* no social value.

### 3. Miscellaneous Considerations Contra

In opposition to fair trade it has been argued: (1) that permitting vertical agreements is contrary to the national antitrust policy against combinations in restraint of trade; (2) that the nature of fair trade encourages retailers who cannot themselves combine to fix prices, secretly to pressure manufacturers to join them in order to lend an aura of legality to their conspiracy; and (3) that it raises prices and interferes with the mechanism of competition.

Because of its rather limited public welfare justification and its extremely mischievous potential, fair trade was considered to be an "unwarranted compromise . . . of national antitrust policy" by the Attorney General's Committee to Study Antitrust Laws.[116] Of much concern is the usefulness of fair trade in circumventing the *horizontal* price fixing prohibitions of the Sherman Act. Ironically, for all the

115 By virtue of their being staples, they would presumably have a fairly inelastic demand, meaning that a price calculated to bring a fair return would not result in a serious volume decline.

116 Att'y Gen. Nat'l Comm. Antitrust Rep. 154 (1955).

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interest which retailers show in the promotion and enforcement of fair trade legislation, and for all the talk about such laws being necessary for the protection of the small retailer, there is nothing in the statutes which permits the retailer to initiate action in his own behalf. True to the original purpose of the law, it is structured to allow manufacturers voluntarily to enter resale price maintenance agreements with their distributors. The illogical result is that some beneficiaries of the legislation are protected at the discretion of others. This is a situation which *invites* conspiracy. The obvious advantages that a fair trade agreement offers naturally tempts retailers to seek them for the merchandise which they sell. When the manufacturer refuses to play along, retailers, especially those who can pool their forces, *e.g.*, a trade association, may attempt to coerce the manufacturer into entering the desired agreement.[117] This horizontal combination to compel resale price maintenance is a violation of the Sherman Act.[118] A number of instances of coercion have been litigated[119] or subjected to administrative action. Perhaps the classic case of abuse was the vicious and predatory campaign which the National Association of Retail Druggists waged against Pepsodent when the latter decided to drop its program of resale price maintenance. So successful were California druggists in cutting Pepsodent out of the toothpaste market that Pepsodent meekly returned offering a penance of 25,000 dollars to be used in the promotion of fair trade legislation.[120] A letter from the executive secretary of the National Association of Retail Druggists to a rebellious manufacturer of toiletries threatened a "campaign . . . to . . . cause you more trouble and take away more business than you had ever realized."[121] In fact, the executive secretary has conceded that the only way for druggists to benefit fully from the legislation is to "work together and *force* these manufacturers into line."[122] Not all proponents of fair trade approve of such abuses,[123] yet the executive secretary of NARD refused to admit that any genuine abuses have ever occurred.[124] The difficulty of preventing the numerous violations

117 See FTC, Resale Price Maintenance, 143, 166-218, 396-99 (1945).

118 United States v. Frankfort Distilleries, 324 U.S. 293 (1945).

119 See cases cited in H.R. Rep. No. 1516, 82d Cong., 2d Sess. 33 (1952).

120 For a more complete description of the events and tactics, see FTC, *op. cit. supra* note 117, at 145.

121 *Id.* at 166-67.

122 *Id.* at 168. (Emphasis added.)

123 Most notable of the disclaimers of coercive pressures is that of the American Fair Trade Council, *Hearings Before the Antitrust Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82d Cong., 2d Sess., ser. 1, pt. 1, 889-90 (1952).

124 *Id.* at 799.

of the anti-conspiracy provision of the Sherman Act, combined with the observation that most resale price maintenance agreements, if investigated, would be found to have such illegal origins[125] casts serious doubt on the desirability of fair trade. Since it is almost impossible to authorize vertical price fixing agreements without sabotaging the effectiveness of horizontal price fixing prohibitions, it would seem ill-advised to do so unless we are ready to change our policy towards price fixing altogether.

Empirical data regarding the effect of fair trade on prices are conflicting.[126] It is almost inconceivable that prices would not average at least a little higher because the added price rigidity occasioned by fair trade tends to keep prices from falling but is without impediment to their going up. The motives behind fair trade perhaps provide the answer: the very desire to place a floor under prices implies that they would otherwise be lower.

The factor contributing most to the dynamism of the fair trade movement is perhaps the effect of the legislation to increase the profitability of being in business. The apparent inability of the legislation to influence either the number or the competitive durability of retail outlets has been seen. Considering this fact with the unquestionable capacity of fair trade to produce greater retail profits makes claims that the very survival of small business is at stake seem a trifle insincere. Drug retailing, which accounts for the sale of more fair traded items than any other category,[127] provides a case in point. Disease and affliction have, to a great extent, been replaced in this country by a large and fabulously profitable drug industry. The distribution end, of course, does not want to be left out. Because one buys drugs largely out of impelling necessity, their volume is not likely to be much affected by price, so long as it is within the reach of the buyer.[128] The druggist is aware that fair trade can assure him of the high markup which is necessary to reap the profits he wants.[129] In fact, the announced pur-

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125 FTC, *op. cit. supra* note 117, Summary and Conclusions at LXI.

126 The report of a thorough survey of the effect of fair trade on toothpaste prices (comparing fair trade states with free trade states, and the price situation existing before and after passage of the McGuire Act) concludes that fair trade pushes prices up. Bowman, "The Prerequisites and Effects of Resale Price Maintenance," 22 U. Chi. L. Rev. 825, 849 (1955). Another article concluded that fair trade has no effect on prices. Adams, "Resale Price Maintenance: Fact and Fancy," 64 Yale L.J. 967, 973 (1955).

127 *Cf.* text accompanying note 52 *supra.*

128 Most non-pharmaceutical drugstore items probably have relatively inelastic demands. Some, such as perfumes and vitamin pills, may even be negatively price elastic.

129 "High markups" may mean 340% for aspirin, 450% for prophylactics, and 1000% (ten times) for phenobarbiturates. *Hearings on H.R. 10527 Before the House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 676 (1958).

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pose of NARD's supporting fair trade is not the elimination of deceptive or unfair competition but the establishment of a fifty percent markup on all items sold in the drug store.[130] That the profit motive is ultimately behind fair trade should come as a surprise to nobody. As with any cause, the reasons offered in support of the legislation are not necessarily the ones which induce the expenditures of time and money required to secure and successfully utilize it. Though the existence of these private motivations among fair trade's supporters do not automatically discredit it as a measure designed to protect the public welfare, they may not be ignored in assessing its desirability.

## III. Summary and Conclusion

Legislation permitting vertical agreements to fix retail prices, though once operational in nearly every state, has been held invalid in about one-half the jurisdictions in which it was originally enacted. Even where it has not been found to be inconsistent with state constitutional provisions, its prerogatives have been little exercised. The federal constitutionality of fair trade has been favorably determined, and special exemptory legislation bars federal antitrust statutes from frustrating its operation. The prices fixed in contracts entered pursuant to the legislation are made mandatory upon all sellers within the jurisdiction. Most commonly this is accomplished through a non-signer clause in the statute which declares sales below the contractual minimum to be unfair trade practices.

Fair trade inevitably results in some social cost. The protection provided for the goodwill of the manufacturer has been forwarded as a justification for this cost. Manufacturers of products for which price is taken as an indicium of quality, or whose reputation for exclusivity is tarnished by a smaller price tag, would seem to have a valid interest in maintaining retail price. Such a manufacturer's reputation, *i.e.*, his goodwill, may be seriously damaged by a price-cutting retailer who promotes his own ends by selling the manufacturer's products at a loss. The manufacturer's goodwill among his retailer-distributors can be important in securing special treatment for his products and such special treatment can lead to more sales. Retailer goodwill and favored treatment may be had by guaranteeing the dealer a higher markup through fair trade. The effect of the special services in creating customer interest in a manufacturer's line may more than outweigh the deterrent to purchase resulting from the higher price. Used in this way, the function of fair trade is somewhat analogous to that of advertising. Similarly, fair trade has been cited as useful in maintaining wide distribution

130 FTC, *op. cit. supra* note 117, at 131.

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for a manufacturer's products by sustaining the interest of the many retailers who are potential dealers in those products.

The cost of fair trade has also been justified on the grounds that it protects small retailers from extinction caused by their relative inability to compete with larger distribution units. There may be social reasons for protecting the smaller retailer quite apart from any economic considerations. Though some feel that fair trade is necessary to prevent the gradual consolidation of retail outlets by protecting existing fragmented markets, perhaps fair trade's deleterious effects on price competition are worse than the monopoly which it is feared will otherwise arise. If fair trade affords protected retailers a greater measure of security than they would have in its absence, it is not shown by the comparative decline in their numbers in fair and free trade states. The argument that fair trade is destructive only of "unfair destructive" competition and therefore is harmless to desirable forms fails to recognize that all competition may be destructive of unproductive enterprise. Moreover, the retail non-price competition which remains at the retail level when price is maintained is of little or no benefit to the consumer, and the price competition above the maintained minimum, if any, is of limited benefit. The contention that fair trade may operate only where there is free and open competition at the manufacturer level and therefore does not deprive the consumer of the benefits of price competition is misleading. The price paid for the distributive services ought to be subject to competition as well as the price paid for actual manufacture. The demonstrable competitive utility of fair trade to large retailers casts further doubt on its value in preserving a relatively atomized retail market.

Another reason offered for protecting the small retailer is to insure continued production of the customer services such as greater variety and trained sales personnel, which services are often lacking in discount houses. But even if there is a trend among larger outlets to curtail these services, fair trade should not be necessary to bring about their production. In a competitive market a seller with whom the public is satisfied does not need legislation to prop his prices and provide him a profit on his operations.

In opposition to fair trade it has been argued that it does nothing more than exempt a vocal interest group from the general national policy of discouraging the decline in numbers of economic initiative centers. Also, it has been alleged that the nature of fair trade facilitates horizontal price fixing agreements which evade antitrust restrictions. Finally, fair trade has been cited as artificially increasing the cost of living to consumers.

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In summary, fair trade is intended to serve certain valid social ends: the protection of trademark-associated goodwill, the preservation of competition, and perhaps the preservation of a style of retailing which, though more costly, results in desirable noneconomic benefits to society. If fair trade were worth its cost to the manufacturer, one would expect it to be more widely utilized than it presently is. Other means of trademark protection do not seem to be so ineffective as to permit nonusers to be readily deprived of the value of their trademarks. Nor is fair trade demonstrably of value in keeping up the number of retailers in the industry where it is most extensively used. For the preservation of competition, fair trade appears to be an inordinately drastic remedy. In their zeal to protect competitive marketing, its supporters seem to have adopted a measure which has exactly the opposite effect. Thus, fair trade is of uncertain value in solving the problems for which it was designed; worse, even where it succeeds in doing some good, its pernicious side effects may outweigh the good which results. Only the almost complete lack of interest in fair trade among manufacturers has allowed the survival of retail price competition in fair trade jurisdictions. But apart from the ill which it may spawn, in view of the wide scope of other federal economic and trademark legislation and the broad acceptance of similar state legislation, it is questionable that fair trade is necessary at all.

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