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NOTES

Fair Trade—Economics and Constitutionality

One of the basic postulates of the democratic system of the United States Government is that the governmental powers delegated by the people should be separated to the greatest practicable extent. Since the founding of this country great concentrations of governmental power have been regarded with suspicion, and, for the most part, avoided by the division of our government into administrative, legislative, and judicial branches. This division has raised problems of an overlapping of functions. The ultimate solution of these problems lies with the judiciaries of our state and federal governments.¹ For this reason it is desirable that courts exercise restraint in defining the area within which they can constitutionally act. If such restraint is not exercised the concept of a separation of powers will soon lose its significance. Recently some state courts have upset state legislation permitting resale price maintenance by manufacturers. This result has been reached by declaring their states' fair trade statutes unconstitutional. It would seem that the courts which have taken this action have not exercised the restraint prescribed by the doctrine of the separation of powers.

During the 1930's fair trade laws were enacted by forty-five states. These statutes, usually conforming to a general pattern,² affect trade-mark

¹ U.S. CONST. art. III.

² See 1 CALLMAN, UNFAIR COMPETITION AND TRADE MARKS § 22.2, and model statutes in 5 CALLMAN 2250 (2d ed. 1950).

or trade name goods which are in fair and open competition with goods of the same class. By the enactment of the Miller-Tydings Amendment to the Sherman Act, Congress permitted the states to legislate with respect to trade-mark or trade name goods in interstate commerce.³ Prior to this amendment the Supreme Court had held that minimum resale price maintenance in interstate commerce violated the Sherman Act.⁴ The passage of Miller-Tydings, however, enabled the states to enact legislation which authorized fair trade contracts in both interstate and intrastate commerce. By a fair trade contract the manufacturer establishes, as one of the conditions of the sale of his product, a minimum price below which the contracting wholesaler or retailer may not resell the trade-mark or trade name product. The statutes also contain what has come to be known as a "non-signer" clause. By the terms of this clause a manufacturer, once having established a minimum resale price schedule by means of one fair trade contract, binds all retailers within the state and can enjoin even non-signers from continuing sales at prices below those set by the fair trade contract. In *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*,⁵ decided by the Supreme Court in 1936, the constitutionality of the state fair trade legislation was upheld. In 1950, however, the Supreme Court ruled that since non-signers were not mentioned in the Miller-Tydings Act, state fair trade legislation could not affect non-signers engaged in interstate commerce.⁶ The McGuire Act, passed by Congress in 1952, made the state statutes valid as to non-signers, even if they engaged in interstate commerce.⁷

Large-volume, low-cost distributors, since their profits are made by underselling competition, are generally unwilling to sign fair trade contracts. Many of these large-volume retailers, moreover, are not willing to adhere to the minimum price schedules established by the manufacturers. On discovering that a retailer has been violating his price maintenance schedule, the manufacturer usually requests by letter that the retailer discontinue the violation. If the practice continues the manufacturer may institute an action seeking injunctive relief and often damages. After the court order has been obtained, if the retailer persists in his violations the manufacturer can institute civil or criminal contempt actions. Usually the retailer's only defense is an attack on the constitutionality of the state fair trade legislation.

Florida, in 1949, was the first state to declare its fair trade statute un-

³ Miller-Tydings Amendment to the Sherman Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

⁴ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁵ 299 U.S. 183 (1936).

⁶ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

⁷ 66 STAT. 632 (1952), 15 U.S.C. § 45 (1952).

constitutional.⁸ Michigan followed in 1952.⁹ The ground for these decisions was that fair trade statutes bore no substantial relation to public morals, safety or general welfare. The Supreme Court of Georgia held that the Georgia Fair Trade Act¹⁰ violated the due process clause of the state constitution,¹¹ in that the statute unreasonably deprived persons of the valuable property right to contract.¹² The Supreme Court of Arkansas has recently promulgated a similar decision.¹³ A lower court in Colorado has ruled that a non-signer of a fair trade contract is unconstitutionally denied his free use of property and freedom to dispose of his property as he wishes.¹⁴ The Supreme Court of Nebraska has held that fair trade legislation violates the Nebraska constitution because it grants special privileges and immunities to producers and wholesalers of trade-mark brands.¹⁵

The point which is most readily perceptible from these decisions is that they are not consistent. If a fundamental right is being invaded by fair trade legislation there is certainly anything but a unanimity of opinion as to just what that right is.¹⁶ The lack of agreement on which fundamental right is being unconstitutionally infringed is probably the most convincing argument for the proposition (enunciated by the majority of the states' decisions)¹⁷ that no fundamental right is violated by fair trade legislation.¹⁸ It is interesting to note that in law review articles, most of the contemporary writers ignore the constitutional questions involved in "fair trade" and concern themselves mainly with a discussion of economic ramifications.¹⁹

⁸ *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So.2d 371 (Fla. 1949).

⁹ *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952).

¹⁰ GA. LAWS Act 853, §§ 1-12 (1953).

¹¹ GA. CONST., Art. I, § 1, par. 3.

¹² *Cox v. General Electric Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955).

¹³ *Union Carbide and Carbon Corp. v. White River Distributors, Inc.*, 224 Ark. 558, 275 S.W.2d 455 (1955).

¹⁴ *Olin Mathieson Chemical Corp. v. Francis*, CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 67,984 (Colo. Dist. Ct. 1955).

¹⁵ *McGraw Electric Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 68 N.W.2d 608 (1955).

¹⁶ For a list of arguments advanced against the constitutionality of Fair Trade legislation see: 1 CCH TRADE REG. REP. ¶ 3085 (1955).

¹⁷ For a summary of those states which have upheld the constitutionality of their Fair Trade statutes see: 1 CCH TRADE REG. REP. ¶ 3085 (1955).

¹⁸ Recently Ohio upheld the constitutionality of its Fair Trade statute in a common pleas decision. *Union Carbide and Carbon Corp. v. Bargain Fair, Inc.*, 130 N.E.2d 255 (Ohio Com. Pl. 1955).

¹⁹ For recent discussions of the economic validity of the cases for and against Fair Trade see: Adams, *Fair Trade and the Art of Prestidigitation*, 65 YALE L. J. 196 (1955); Herman, *A Note on Fair Trade*, 65 YALE L. J. 23 (1955); Adams, *Resale Price Maintenance: Fact and Fancy*, 64 YALE L. J. 967 (1955); Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954).

The conclusion to be drawn from the apparent confusion as to why these statutes are not constitutional is that the courts are making a decision based on the economic wisdom of this legislation, but are then explaining their decisions in what purport to be compelling constitutional arguments.

The work of the courts in protecting fundamental liberties has been, in most instances, commendable. In the cases where fair trade statutes are involved, however, it is highly questionable that a fundamental right is in danger or that a real constitutional issue exists. Certainly the majority view is that these laws are legitimate, constitutional exercises of the police power of the state.²⁰ Furthermore, many of the leading cases setting forth the majority position hold that the question is strictly an economic one and that the legislature's findings in this area should not be disturbed by the courts.²¹ As mentioned above, the inconsistency in the minority's opinions lends support to the majority view. The fact that the question of the wisdom of fair trade laws is largely an economic one, coupled with the traditional view that economic questions are to be determined by the legislature,²² leads to the conclusion that these minority courts have usurped the function of their state legislatures.

There are cogent and valid reasons why courts should be more aware of their power to legislate by declaring statutes unconstitutional and why courts should use that power sparingly. First, the historical-political reasons for court interference with the legislature are no longer present. The courts no longer stand between the people and a Parliament controlled by a King.²³ Second, the legislature is a more efficient organ for the determination of economic policy than the courts. A legislative committee is in a better position to hear all sides of an economic debate than is a court which suffers from the limitations of the adversary system.²⁴ Third, the legislature is more directly responsible and consequently responsive to the economic

²⁰ *Max Factor v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177, *aff'd*, 299 U.S. 198 (1936); *Jos. Triner Corp. v. McNeil*, 363 Ill. 559, 2 N.E.2d 929, *aff'd*, 299 U.S. 183 (1936).

²¹ *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936); *Max Factor v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177 (1936); *General Electric Co. v. Masters*, 307 N.Y. 229, 120 N.E.2d 802 (1954); *Eli Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939); *Borden Co. v. Schreder*, 182 Ore. 34, 185 P.2d 581 (1947); *Sears v. Western Thrift Stores, Inc.*, 10 Wash.2d 372, 116 P.2d 756 (1941).

²² *Nebbia v. New York*, 291 U.S. 502, 537 (1934)

²³ Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

²⁴ "In many respects the legislative hearing provides a greater protection to the essential interests of society than does the trial. Self-limitation has made the judge a referee. The legislator understands that he must bear full responsibility for his decisions, and thus he is not content with evidence of interested parties. He must search out every source which adds to the understanding and the determination of the question before him." Horack, *The Common Law of Legislation*, 23 IOWA L. REV. 41, 52 (1937)

needs and desires of the people.²⁵ Fourth, it is important that courts be more aware of their power to legislate in order that they may be better able to follow the policy of the legislature and to resist the temptation to enact by decision their own preconceptions and notions of wise policy.²⁶ Finally, it is vital that courts heed the proscriptions of the state and federal constitutions and the traditional American ideas with respect to the separation of powers. This constitutional approach is advocated by two eminent jurists, Holmes,²⁷ and Frankfurter. In the words of Mr. Justice Frankfurter:

In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate and equipped to devise policy, as the courts are not.²⁸

The application of this approach by the courts seems necessary if we are to continue under present theories of constitutional government.

It may well be, as suggested by one court,²⁹ that the question of the wisdom of fair trade legislation needs reopening and reinvestigation. Certainly, the great amount of judicial activity in this area suggests that there is considerable opposition to such laws. For the courts to undertake the task, though, would be extremely unwise because of the reasons outlined above. Admittedly, it is difficult for the courts to draw a line beyond which they will not interfere with legislative activity. The Supreme Court of Delaware has rendered a decision which reaffirms the rule laid down by the United States Supreme Court in the *Old Dearborn* case.³⁰ In what might be a serviceable test for the determination of whether a question is economic in nature and consequently a legislative problem, the Delaware court has said that it will not upset legislation whose economic soundness is "fairly debatable." In the words of the court:

Not only are these questions "fairly debatable"; they have been warmly debated for years, and the debate, we gather, is still going on. The legislative judgment must therefore prevail.³¹

It is submitted, with respect to any test the courts might apply, that the de-

²⁵ *Ibid.*

²⁶ *Helvering v. Davis*, 301 U.S. 619 (1937); *Nicholls v. Lynn*, 297 Mass. 65, 7 N.E.2d 577 (1937); *Campbell v. New York*, 244 N.Y. 317, 155 N.E. 628 (1927); 14 AM. JUR., *Courts* § 203 (1938).

²⁷ See Holmes' decision in *Tyson v. Banton*, 273 U.S. 418 (1926).

²⁸ Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 528, 545 (1947).

²⁹ *Eli Lilly & Co. v. Schwegmann Bros.*, 109 F. Supp. 269, 271 (E.D. La. 1953), *aff'd*, 205 F.2d 788 (5th Cir. 1953), *cert. denied*, 346 U.S. 856 (1954).

³⁰ *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936).

³¹ *General Electric Co. v. Klein*, 106 A.2d 206, 211 (Del. 1954)