

## RESALE PRICE MAINTENANCE: CONSTITUTIONALITY OF NONSIGNER CLAUSES

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### INTRODUCTION

For a number of years, the Congress of the United States has debated federal resale price maintenance bills.<sup>1</sup> Proposed legislation before the 86th Congress and expected to be reintroduced in the 87th would allow enforcement of resale price maintenance against any seller in the chain of distribution who has notice of the established price, even though the seller is not a party to the resale price contract. The key sections of these bills provide that:

(6) In the case of merchandise with respect to which a person is a proprietor, it shall be lawful for such a person to establish and control, by notice to his distributors, stipulated or minimum resale prices for such merchandise, if such merchandise is in commerce or is held for sale after shipment in commerce and is in free and open competition with merchandise of the same general class produced by others. He may so establish schedules of resale prices differentiated with reference to any criteria not otherwise unlawful. Such schedules may be changed from time to time by notice to distributors having acquired such merchandise with notice of any established resale price . . . .

(7) Except as provided in paragraph (9), it shall be unlawful (i) for any distributor with notice of an applicable stipulated resale price established under paragraph (6) by a proprietor with respect to merchandise to sell, offer to sell, or advertise such merchandise in commerce, or such merchandise held for sale after shipment in commerce, at a different price, or (ii) for any distributor with notice of an applicable minimum resale price so

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<sup>1</sup> *Hearings on H.R. 10527, 10770, 10847, 11048, 11216, 11264 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958); Hearings on S. 3850 Before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958); Hearings on H.R. 768, 1253, 2463, 2729, 3187, 5252, 5602 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959).* For economic analyses of resale price maintenance, see generally GREYER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939); HARMS, OUR FLOUNDERING FAIR TRADE (1956); YAMEY, ECONOMICS OF RESALE PRICE MAINTENANCE (1954); Note, 69 HARV. L. REV. 316, 322-35 (1955); statements of economists in the congressional hearings, *supra*.

established with respect to merchandise to sell, offer to sell, or advertise such merchandise in commerce, or such merchandise held for sale after shipment in commerce, at a lower price.<sup>2</sup>

Paragraph (7) will be crucial to the success of the proposed statute. Experience in the operation of resale price maintenance since 1933, under state statutes with exemption from the federal antitrust laws,<sup>3</sup> has shown that enforcement solely through contract is unfeasible.<sup>4</sup> The nonsigner clauses<sup>5</sup> have been the only realistic avenue of enforcement against recalcitrant wholesalers and retailers who are determined to engage in price competition.

The enforcement of resale price maintenance through contracts presents no problems of constitutionality. Such enforcement is based on voluntary assent of the parties and is sanctioned by statutes making this type of price-fixing contract legally enforceable and exempt from the antitrust laws.<sup>6</sup> Hence, this Comment will deal only with the constitutionality of enforcement against nonsigners.

The highest courts of seventeen states have upheld the nonsigner clauses of their state resale price maintenance statutes<sup>7</sup> while those of

<sup>2</sup> S. 1083, H.R. 1253, 86th Cong., 1st Sess. (1959) (to amend § 5(a) of the Federal Trade Commission Act, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45 (1958)). See generally MacLachlan, *A New Approach to Resale Price Maintenance*, 11 VAND. L. REV. 145 (1957).

<sup>3</sup> For legislative history, see Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 205 F.2d 788, 790 n.3, 791 n.4 (5th Cir.), cert. denied, 346 U.S. 856 (1953); Pepsodent Co. v. Krauss Co., 56 F. Supp. 922, 924-27 (E.D. La. 1944).

<sup>4</sup> See statement of Herman S. Waller, General Counsel of the National Association of Retail Druggists, in *Hearings on H.R. 768, 1253, 2463, 2729, 3187, 5252, 5602 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 92-94 (1959); Bowman, *Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955); Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175, 176 (1954).

<sup>5</sup> The California nonsigner clause, the first to be passed, is typical: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." CAL. BUS. & PROF. CODE § 16904. Mr. Justice Douglas has described the nonsigner clauses of resale price maintenance statutes as follows: "That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388 (1951). He also described nonsigner enforcement as "a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing." *Id.* at 390.

<sup>6</sup> Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 192 (1936); General Elec. Co. v. American Buyers Co-op., Inc., 316 S.W.2d 354, 359 (Ky. 1958) (dictum).

<sup>7</sup> General Elec. Co. v. Telco Supply, Inc., 84 Ariz. 132, 325 P.2d 394 (1958); Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P.2d 177, *aff'd sub nom.* Pep Boys v. Pyroil Sales Co., 299 U.S. 198 (1936); Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A.2d 841 (1942); General Elec. Co. v. Klein, 34 Del. Ch. 491, 106 A.2d 206 (Sup. Ct. 1954); Johnson & Johnson, Inc. v. G.E.M. Sundries Co., 43 Hawaii 103 (1959), *aff'd*, 283 F.2d 86 (9th Cir. 1960); Seagram-Distillers Corp. v. Old Dearborn Distrib. Co., 363 Ill. 610, 2 N.E.2d 940, *aff'd*, 299 U.S. 183 (1936); Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A.2d 176 (1939);

another eighteen states have found nonsigner clauses to violate the state constitutions.<sup>8</sup> Since the structure and language of most state constitutions, being patterned after the federal constitution, are very similar, this divergence of decision calls for explanation. Nonsigner clauses in state resale price maintenance laws have been challenged mainly on two constitutional grounds: first, that they take property without due process of law, and second, that they constitute an unconstitutional delegation of legislative power to private persons. The conflicting opinions of the state courts on the definition and scope of these two constitutional doctrines, as they have been applied in the review of nonsigner statutes, will be analyzed in an attempt to reconcile the decisions by reference to the established meaning of these constitutional concepts in federal law.

### SUBSTANTIVE DUE PROCESS

The due process clause of the federal constitution today puts no limit on state economic regulation except that it may not be wholly arbitrary.<sup>9</sup> Recent opinions of the Supreme Court have clearly vindi-

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General Elec. Co. v. Kimball Jewelers, 333 Mass. 665, 132 N.E.2d 652 (1956); W. A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950); Corning Glass Works v. Max Dichter Co., 161 A.2d 569 (N.H. 1960); Lionel Corp. v. Grayson-Robinson Stores, Inc., 15 N.J. 191, 104 A.2d 304, *appeal dismissed for want of a substantial federal question*, 348 U.S. 859 (1954); General Elec. Co. v. Masters, Inc., 307 N.Y. 229, 120 N.E.2d 802, *appeal dismissed for want of a substantial federal question*, 348 U.S. 892 (1954); Ely Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939); Burche Co. v. General Elec. Co., 382 Pa. 370, 115 A.2d 361 (1955); Miles Labs. v. Owl Drug Co., 67 S.D. 523, 295 N.W. 292 (1940); Standard Drug Co. v. General Elec. Co., 117 S.E.2d 289 (Va. 1960); Bulova Watch Co. v. Anderson, 270 Wis. 21, 70 N.W.2d 243 (1955).

<sup>8</sup> Union Carbide & Carbon Corp. v. White River Distribs., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949); Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957); Quality Oil Co. v. E. I. du Pont de Nemours & Co., 182 Kan. 488, 322 P.2d 731 (1958); General Elec. Co. v. American Buyers Co-op., Inc., 316 S.W.2d 354 (Ky. 1958); Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 231 La. 51, 90 So. 2d 343, 348 (1956); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); Remington Arms Co. v. G.E.M., Inc., 102 N.W.2d 528 (Minn. 1960); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608, *modified*, 160 Neb. 319 (1955); Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957); Union Carbide & Carbon Co. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956); Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957); General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956); Remington Arms Co. v. Skaggs, 345 P.2d 1085 (Wash. 1959); General Elec. Co. v. A. Dandy Appliance Co., 143 W. Va. 491, 103 S.E.2d 310 (1958).

<sup>9</sup> "A violation of the Fourteenth Amendment . . . would depend upon whether there is any rational basis for the action of the legislature." *Sage Stores Co. v. Kansas ex rel. Mitchell*, 323 U.S. 32, 35 (1944). Since "due process" originally meant full and fair procedure, the creation of substantive due process by the courts has been termed an usurpation of legislative power. If this be true, then the demise of substantive due process in the federal courts is merely a return to the original limited meaning of the power given the courts by the Constitution. CORWIN, COURT OVER

cated Mr. Justice Holmes.<sup>10</sup> The legislature in the exercise of the police power is free to decide what types and methods of regulation are reasonable, and the Court will not superimpose its views on the reasonableness of statutes.<sup>11</sup> Only in the rare case in which the Court should find the statute to be wholly arbitrary and without reason would it hold the statute unconstitutional.

Consonant with the minimization of substantive due process in the area of economic controls, price regulation by state and federal governments has been upheld by the Supreme Court since *Nebbia v. New York*.<sup>12</sup> The concept that governmental control is limited to public utilities—or to businesses affected with a public interest—has been discarded, and state and federal governments may regulate any

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CONSTITUTION 107-08 (1938); Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561, 567 (1954). Logically consistent constitutional interpretation would then seem to require, if any of the substantive freedoms of the first eight amendments are to be protected against state infringement, that the privileges and immunities clause of the fourteenth amendment, not the due process clause, incorporates the bill of rights. But this the Court has explicitly held not to be the case. *Adamson v. California*, 332 U.S. 46, 53 (1947). See 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1083-102 (1953); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 55-97 (1908).

<sup>10</sup> "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (dissenting opinion). "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain . . . . The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (dissenting opinion).

<sup>11</sup> In *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955), Mr. Justice Douglas, speaking for a unanimous Court, reversed the holding of a three-judge district court that three sections of an Oklahoma statute regulating opticians deprived them of property without due process of law in violation of the fourteenth amendment: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Id.* at 488. "The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts to balance the advantages and disadvantages of the new requirement . . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Id.* at 487-88. See *Daniel v. Family Ins. Co.*, 336 U.S. 220, 224 (1949).

<sup>12</sup> 291 U.S. 502 (1934). "It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory . . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." *Id.* at 536. See *Olsen v. Nebraska*, 313 U.S. 236, 246-47 (1941), and cases there cited. For decisions approving price regulation by the federal government, see *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939). See HALE, FREEDOM THROUGH LAW 400-29 (1952); Gray, *The Passing of the Public Utility Concept*, 16 J. LAND & P.U. ECON. 8 (1940).

price for any purpose which is not explicitly prohibited in the federal constitution. Given this background, it is clear that the nonsigner clauses of state resale price maintenance statutes, being but one method of price regulation, do not violate the due process clause of the fourteenth amendment. The legislative purpose of the Illinois statute held constitutional in *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*<sup>13</sup> was the protection of business goodwill.<sup>14</sup> While reasonable men may debate whether resale price maintenance does promote goodwill, the Court could not possibly find the statute to be wholly arbitrary—that is, without any reason. Because there is no antimonopoly clause in the federal constitution, the legislative purpose of the state statute could just as well have been promotion of local monopolies (those which do not affect interstate commerce). The statute still would be based on reason and would therefore not violate the due process clause of the fourteenth amendment.

Although the United States Supreme Court has come to realize that it does not have the investigative machinery to determine whether particular regulations are reasonable, few state supreme courts have had the humility to abnegate such power. In the majority of state courts, substantive due process in the review of economic regulation still persists.<sup>15</sup> In construing the due process clauses of their state constitutions, most state courts continue to review the reasonableness of statutes, deciding whether the means adopted are reasonably related to a proper legislative purpose.

In upholding the nonsigner clauses of their state statutes in the face of challenges under their state constitutional due process clauses, a few high courts follow the *Nebbia* rule.<sup>16</sup> The Massachusetts court, in

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<sup>13</sup> 299 U.S. 183 (1936). The classification was also held not to be arbitrary and therefore not to violate the equal protection clause of the fourteenth amendment.

<sup>14</sup> In a substantive due process justification of this purpose, Mr. Justice Sutherland, perhaps unwittingly, treats the protection of goodwill as the same thing as protection of trademarks, and thus cites trademark infringement cases to support a ruling designed to protect through price fixing the general goodwill enjoyed by the producer. 299 U.S. at 195. There is no direct relation between the trademark (one instrument to promote goodwill), and price fixing (which was approved here as another instrument to promote goodwill). See *Sunbeam Corp. v. Wentling*, 192 F.2d 7 (3d Cir. 1951); Bates, *Constitutionality of State Fair Trade Acts*, 32 IND. L. REV. 127, 148 (1957); Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L.J. 607 (1940); Note, 6 GEO. WASH. L. REV. 110, 120 (1937); Note, 49 YALE L.J. 145 (1939). Having joined in the dissent in *Nebbia*, Justice Sutherland would not rely on that case to sustain private price regulation via the nonsigner clause. See Note, 50 HARV. L. REV. 667, 670 (1937). The lower court in the companion case to *Old Dearborn* did rely on *Nebbia*. *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N.E.2d 929, *aff'd*, 299 U.S. 183 (1936).

<sup>15</sup> Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 226 (1958); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); Note, 53 COLUM. L. REV. 827 (1953); Comment, 18 OHIO ST. L.J. 384 (1957).

<sup>16</sup> *General Elec. Co. v. Telco Supply, Inc.*, 84 Ariz. 132, 325 P.2d 394 (1958), 1 ARIZ. L. REV. 331 (1959); *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 55 P.2d

rejecting a constitutional attack on the state statute, said: "On this issue the defendant assumes the burden of showing the absence of any conceivable ground upon which these enactments may be supported."<sup>17</sup> Most other courts sustaining nonsigner clauses have made a substantive due process inquiry. Following Mr. Justice Sutherland's opinion<sup>18</sup> in the *Old Dearborn* case,<sup>19</sup> they find price restriction a legitimate means to protect goodwill and therefore a reasonable exercise of the police power. They find the limiting of so-called "harmful competition" to be an exercise of the police power in the interest of public health, morals, comfort, or safety, or in the promotion of public welfare.

Those state courts holding the nonsigner clauses of their state statutes to violate the due process clause of the state constitution have, of course, utilized substantive due process concepts. Some of these courts emphasize that the right to set a price on goods in which the seller has title is a valuable property right,<sup>20</sup> and hold that this property right may not be impaired by an exercise of state police power, reasoning that price regulation is permissible only after a judicial finding that the industry is "affected with a public interest." Other courts find that the legislated price fixing of the nonsigner clause is not reasonably related to public safety, health, morals, or welfare.<sup>21</sup> Here again,

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177, *aff'd*, 299 U.S. 198 (1936); Seagram-Distillers Corp. v. Old Dearborn Distrib. Co., 363 Ill. 610, 2 N.E.2d 940, *aff'd*, 299 U.S. 183 (1936); Ely Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939); Burch Co. v. General Elec. Co., 382 Pa. 370, 115 A.2d 361 (1955).

<sup>17</sup> General Elec. Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 675, 132 N.E.2d 652, 657 (1956).

<sup>18</sup> Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A.2d 841 (1942); General Elec. Co. v. Klein, 34 Del. Ch. 491, 106 A.2d 206 (Sup. Ct. 1954); Johnson & Johnson, Inc. v. G.E.M. Sundries Co., 43 Hawaii 103 (1959), *aff'd*, 283 F.2d 86 (9th Cir. 1960); Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A.2d 176 (1939); W. A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So. 2d 838 (1950); Corning Glass Works v. Max Dichter Co., 161 A.2d 569 (N.H. 1960); Lionel Corp. v. Grayson-Robinson Stores, Inc., 15 N.J. 191, 104 A.2d 304, *appeal dismissed for want of a substantial federal question*, 348 U.S. 859 (1954); General Elec. Co. v. Masters, Inc., 307 N.Y. 229, 120 N.E.2d 802, *appeal dismissed for want of a substantial federal question*, 348 U.S. 892 (1954); Miles Labs. v. Owl Drug Co., 67 S.D. 523, 295 N.W. 292 (1940); Standard Drug Co. v. General Elec. Co., 117 S.E.2d 289 (Va. 1960).

<sup>19</sup> See note 14 *supra*.

<sup>20</sup> Union Carbide & Carbon Corp. v. White River Distribs., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); General Elec. Co. v. American Buyers Co-op., Inc., 316 S.W.2d 354 (Ky. 1958); General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956); Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957).

<sup>21</sup> Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954); Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608, *modified*, 160 Neb. 319 (1955); Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957); Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); Remington Arms Co. v. Skaggs, 345 P.2d 1085 (Wash. 1959); General Elec. Co. v. A. Dandy Appliance Co., 143 W. Va. 491, 103 S.E.2d 310 (1958). See 35 WASH. L. REV. 181 (1960).

unconstitutionality is based on a judicial finding of fact that the means adopted by the legislature to protect goodwill are unreasonable.

In clinging to the public utility concept, the courts sustaining the due process objection to nonsigner clauses ignore the federal view as seen in *Nebbia* and *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*.<sup>22</sup> Some of them even cite earlier federal cases, which though not explicitly overruled by the *Nebbia* case, were clearly repudiated by its rule.<sup>23</sup> They thus conclude that the state has no power to regulate price for most products and, consequently, has no power to authorize private control over such prices other than by contract.<sup>24</sup>

Legislative approval of anticompetitive price fixing for some products as beneficial to public welfare has been overruled in these cases by a judicial disposition to promote competition. In the absence of express state constitutional prohibition of anticompetitive statutes, the courts rationalize the interposition of their own views by holding that the due process clauses of their state constitutions require that "liberty" or "property" be given substantial substantive protection.<sup>25</sup> Such Benthamite concepts of absolute liberty have, however, been examined and proved wanting.<sup>26</sup>

#### DELEGATION OF LEGISLATIVE POWER TO PRIVATE PERSONS

Delegation of legislative power is defined as the authorization to issue rules having legal effect—that is, enforceable through compulsion by the state.<sup>27</sup> Once the basic structure of a law has been established by statute, the legislature may delegate to the chief executive or other governmental body the power to make detailed rules for the

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<sup>22</sup> 313 U.S. 236 (1941); see note 12 *supra*.

<sup>23</sup> See *Union Carbide & Carbon Corp. v. White River Distribs., Inc.*, 224 Ark. 558, 561, 275 S.W.2d 455, 457 (1955), citing *Coppage v. Kansas*, 236 U.S. 1 (1915); *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 185-86, 301 P.2d 139, 152 (1956), citing *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418 (1927), and *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 116, 54 N.W.2d 268, 271 (1952), citing *Ribnik v. McBride*, 277 U.S. 350 (1928), *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, *supra*, and *Charles Wolff Packing Co. v. Court of Industrial Relations*, *supra*; *General Elec. Co. v. Wahle*, 207 Ore. 302, 319, 296 P.2d 635, 643 (1956), citing *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), and *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, *supra*.

<sup>24</sup> *Olin Mathieson Chem. Corp. v. Francis*, *supra* note 23; *Cox v. General Elec. Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955).

<sup>25</sup> *General Elec. Co. v. American Buyers Co-op., Inc.*, 316 S.W.2d 354 (Ky. 1958); *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956).

<sup>26</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-93 (1937); COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 75-83 (1933); Pound, *Liberty of Contract*, 18 *YALE L.J.* 454 (1909); Note, 8 *W. RES. L. REV.* 57 (1956).

<sup>27</sup> Ross, *Delegation of Power*, 7 *AM. J. COMP. L.* 1, 17 (1958).

statute's operation.<sup>28</sup> These rules must conform to the statutory standard,<sup>29</sup> be adopted after hearing,<sup>30</sup> and be subject to judicial review.<sup>31</sup> It is these safeguards which satisfy the procedural requirements of due process of law.<sup>32</sup> In the matter of price regulation, state legislatures have delegated to public service commissions the authority to fix rates or prices in conformance with the constitutional procedures.<sup>33</sup> The action of a public utility commission in regulating rates is legislative in character and is subject to the same tests and commands as a legislative enactment.<sup>34</sup> Both the legislature and the commission exercise a sovereign power of government.

The delegation of legislative power to private persons is another matter. When the power of government to use compulsion in enforcing rules is delegated to private persons, there is created a new, private government, and private government violates the essential concept of a democratic society. It is not subject to the requirements of hearing and judicial review as is elected government, and it may oppress an unwilling minority to the full extent of the delegated power. For these reasons, legislative power in a democratic society is vested solely in the elected legislature. Although it may be delegated in limited ways to other responsible governmental bodies, a discretionary regulatory power over prices, rates, or wages may not be delegated to private persons.<sup>35</sup> In *A. L. A. Schechter Poultry Corp. v. United*

<sup>28</sup> *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 305 (1933); *United States v. Shreveport Grain & Elev. Co.*, 287 U.S. 77, 85 (1932); *Field v. Clark*, 143 U.S. 649, 692-93 (1892). See 1 COOLEY, *CONSTITUTIONAL LIMITATIONS* 228-30 (8th ed. 1927); Jaffe, *An Essay on the Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947).

<sup>29</sup> "[T]o uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 434 (1935) (Cardozo, J., dissenting). See 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.03 (1958).

<sup>30</sup> *Morgan v. United States*, 304 U.S. 1, 14-15 (1938).

<sup>31</sup> The action of a regulatory commission may not be arbitrary or confiscatory and this is a question for the courts. See *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287, 304-05 (1933); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933); *Northern Pac. Ry. v. Department of Pub. Works*, 268 U.S. 39, 41-42 (1925).

<sup>32</sup> Compare *Administrative Procedure Act* §§ 1-11, 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1958), as amended, 50 U.S.C. APP. § 1900 (1958), as amended, 5 U.S.C. § 1105 (Supp. 1959), where the constitutional safeguards with respect to the operation of federal administrative agencies are embodied and elaborated.

<sup>33</sup> *Pennsylvania R.R. v. Towers*, 245 U.S. 6 (1917). Compare *Wichita R.R. & Light Co. v. Public Util. Comm'n*, 260 U.S. 48, 58-59 (1922).

<sup>34</sup> Price regulation is legislative in that it "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) (Holmes, J.).

<sup>35</sup> 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.14 (1958), points out that the constitutional law on delegation of legislative power to private persons "has not crystallized any consistent principles," *id.* at 138, and is "unsteady and conflicting,"



States,<sup>36</sup> one of the two main grounds for holding the National Industrial Recovery Act unconstitutional was that it delegated the power to fix wages and hours in the poultry slaughtering industry to an industry trade group.<sup>37</sup> And in *Carter v. Carter Coal Co.*,<sup>38</sup> the sections of the Bituminous Coal Conservation Act giving to the producers of two-thirds of the tonnage and to a majority of the miners the power to fix wages and hours in their districts was held to constitute an unconstitutional delegation of legislative power.<sup>39</sup>

Following this reasoning, the high courts of four states have invalidated the nonsigner clauses of resale price maintenance statutes solely on the ground of unconstitutional delegation of the states' legislative power.<sup>40</sup> Five other states regarded unconstitutional delegation as one ground, though not the sole basis, for holding their nonsigner

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*id.* at 141. Most of the conflicting cases concern the constitutionality of laws allowing a given percentage of the parties who are to be affected by a statutory rule to vote whether it will become effective. Except for the resale price maintenance laws, none upholds a discretionary regulatory power of private persons over others' prices. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 217 (1937), notes the resale price maintenance exception as an unprecedented legislative extension of the law of property and contract which the courts at that time permitted to override conflicting constitutional principles. See Note, 37 COLUM. L. REV. 447 (1937). Unconstitutional delegation of legislative power to private groups, inasmuch as it lacks the procedural safeguards of constitutional government, probably violates procedural due process also. From this point of view, the decision in *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), discussed in notes 13-14 *supra* and accompanying text, is in error.

<sup>36</sup> 295 U.S. 495 (1935).

<sup>37</sup> "But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." 295 U.S. at 537. The question of delegation of legislative power to private persons was reached in *Schechter* after the section of the act providing for presidential approval of private codes had been held unconstitutional for lack of intelligible standards.

<sup>38</sup> 298 U.S. 238 (1936).

<sup>39</sup> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . [A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." 298 U.S. at 311.

<sup>40</sup> *Bissell Carpet Sweeper Co. v. Shane Co.*, 237 Ind. 188, 194-95, 143 N.E.2d 415, 419 (1957); *Quality Oil Co. v. E. I. du Pont de Nemours & Co.*, 182 Kan. 488, 322 P.2d 731 (1958); *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*, 231 La. 51, 66, 74, 90 So. 2d 343, 348, 351 (1956); *Remington Arms Co. v. G.E.M., Inc.*, 102 N.W.2d 528, 534 (Minn. 1960). Citing with approval the Minnesota decision, a lower court in Iowa held that state's nonsigner clause unconstitutional. *Bulova Watch Co. v. Robinson Wholesale Co.*, TRADE REG. REP. (1960 Trade Cas.) ¶ 69752 (Iowa Dist. Ct. May 27, 1960). See 27 FORDHAM L. REV. 68, 72 (1958); 18 LA. L. REV. 178 (1957).

clauses to violate their state constitutions.<sup>41</sup> Coercive regulation of resale prices is no different from other price regulation—therefore, it is solely a legislative function. And since the quality, quantity, and packaging of a trademarked article are all determined by the manufacturer, the one significant factor—other than the choice of marketing procedures—which can be controlled by wholesalers and retailers is price. Regulation of price, whether maximum, minimum, or fixed, thus deprives the wholesaler or retailer of the key area of discretion in his marketing plan.

The regulatory power over price in the typical nonsigner statute is enforceable by injunction and contempt proceedings. The manufacturer (or wholesaler) who establishes a resale price may thus control the price policy of those not in contract with him by compelling unwilling middlemen not to resell at a lower price. After retailers have stocked their shelves with his product in reliance on the existence of one established resale price, the manufacturer may use his regulatory power to raise the established resale price to a level where sales are much slower and retailers' inventories excessive. Thus the producer has uncontrolled sovereignty over the price at which retailers not in contract with him will sell so long as he establishes price pursuant to the state statute. The retailer has no right to hearing or judicial review of arbitrary action in the setting of the price. Nor is the producer bound by any intelligible standard in the price he sets. It is for these reasons that nonsigner clauses have been held unconstitutional delegations of legislative power to private persons.

Not all courts accept this approach. In the *Old Dearborn* case,<sup>42</sup> the Supreme Court held that the nonsigner clause of the Illinois statute was not a delegation of state legislative power which would violate the due process clause of the fourteenth amendment to the federal constitution. Since no delegation of federal legislative power was involved, only the due process aspects could be subject to binding federal decision.<sup>43</sup> The Court reasoned that appellant nonsigner knew of the re-

<sup>41</sup> *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (1956); *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949); *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 68 N.W.2d 608, *modified*, 106 Neb. 319 (1955); *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958), 27 U. CINC. L. REV. 329, 9 W. RES. L. REV. 509; *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956). For a lower court decision in Oklahoma which relies upon unconstitutional delegation of legislative power as one ground for voiding a nonsigner statute, see *Revlon, Inc. v. American Mut. Co.*, 1959 Trade Cas. 75894 (Okla. Dist. Ct. Oct. 16, 1959). See also Note, 25 U. CINC. L. REV. 466 (1956).

<sup>42</sup> *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 194 (1936); see Note, 63 YALE L.J. 538, 543 (1954); 36 CORNELL L.Q. 781, 783-84 (1951).

<sup>43</sup> See *Douglas v. Noble*, 261 U.S. 165, 168 (1923); *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 720, 68 N.W.2d 608, 617, *modified*, 160 Neb. 319 (1955).

striction before he bought the goods, and, therefore, the restriction ran with the acquisition and conditioned it. The Court in effect held that the Illinois statute and Illinois Supreme Court approval of what amounted to an equitable servitude on chattels<sup>44</sup>—here trademarked goods—met all the federal procedural requirements necessary for the adoption of such a rule and thus did not violate the due process clause of the federal constitution.

*Old Dearborn* is not precedent for deciding whether the nonsigner clause of any state resale price statute delegates state legislative power to private individuals in violation of the state constitution.<sup>45</sup> Nevertheless, high courts of such populous commercial states as New York,<sup>46</sup> Massachusetts,<sup>47</sup> Pennsylvania,<sup>48</sup> New Jersey,<sup>49</sup> and California<sup>50</sup> have erroneously cited *Old Dearborn* as sufficient authority that their state constitutions are not violated by their nonsigner statutes. An equitable servitude on chattels in the form of price control was held not to violate the state constitutions even though it was necessary to delegate the sovereign power of state government to private persons in order to effect such a servitude. The high courts of Illinois<sup>51</sup> and Maryland<sup>52</sup>

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<sup>44</sup> See Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250, 1254-55 (1956); Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 987-95 (1928). See also GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* §§ 27, 28 (2d ed. 1895).

<sup>45</sup> 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.14 (1958); Note, *Fair Trade and the State Constitutions—A New Trend*, 10 VAND. L. REV. 415, 417 (1957).

<sup>46</sup> *Bourjois Sales Corp. v. Dorfman*, 273 N.Y. 167, 171, 7 N.E.2d 30, 31 (1937). The *Bourjois* case was followed in *General Elec. Co. v. Masters, Inc.*, 307 N.Y. 229, 237-38, 120 N.E.2d 802, 804 (1954). Compare *Levine v. O'Connell*, 275 App. Div. 217, 88 N.Y.S.2d 672 (1949), *aff'd*, 300 N.Y. 658, 91 N.E.2d 322 (1950), where it was held that the state Alcoholic Beverage Control Law authorizing the State Liquor Authority, at its discretion, to prohibit the sale of alcoholic beverages except pursuant to fair trade contracts was an unconstitutional delegation of legislative power.

<sup>47</sup> *General Elec. Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 676-77, 132 N.E.2d 652, 659 (1956). Compare *In re Opinion of the Justices to the Senate*, 337 Mass. 796, 151 N.E.2d 631 (1958).

<sup>48</sup> *Burche Co. v. General Elec. Co.*, 382 Pa. 370, 373-74, 115 A.2d 361, 362-63 (1955).

<sup>49</sup> *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 15 N.J. 191, 197-98, 104 A.2d 304, 306-07 (1954).

<sup>50</sup> *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores*, 45 Cal. 2d 881, 888, 291 P.2d 936, 940 (1955). Three years earlier, the same court held a delegation of power to fix minimum prices to an administrative board of interested members of an industry to be an unconstitutional delegation to private persons. *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d 436, 448, 254 P.2d 29, 36 (1953); see *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 157-59, 346 P.2d 737, 746-47 (1959) (Peters, J., dissenting).

<sup>51</sup> *Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.*, 15 Ill. 2d 182, 189, 154 N.E.2d 290, 294 (1958). The Illinois Supreme Court in other cases has professed strong adherence to the principle that the sovereign power to legislate may not be delegated to private persons. See *People ex rel. Chicago Dryer Co. v. Chicago*, 413 Ill. 315, 109 N.E.2d 201 (1952), and cases cited therein.

<sup>52</sup> *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682, 688, 7 A.2d 176, 179 (1939). See the similarly erroneous contract emphasis in *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores*, 45 Cal. 2d 881, 291 P.2d 936 (1955).

committed an additional error in relying on *Old Dearborn* as precedent for the state constitutionality of nonsigner clauses by quoting those sections of the case that approve fair trade *contracts* as not violative of federal due process.<sup>53</sup> The *nonsigner clause* as not violative of federal due process is discussed in *Old Dearborn* two pages later.<sup>54</sup>

Those decisions which follow *Old Dearborn* hold that the retailer's knowledge of the established resale price before he purchases the particular goods is sufficient reason to find that there is no unconstitutional delegation of legislative power.<sup>55</sup> This, however, is a *non sequitur*: notice to the nonsigner of established resale prices may warn him not to buy those goods or that his purchase of them is conditioned; but if he does buy them, he still comes under the coercive price control of a party not in contract with him. These cases uniformly ignore the body of law holding that compulsory price regulation is a legislative function. They conclude that the legislation is complete upon passage and that manufacturers' price regulation pursuant to it is not legislative. Other decisions seem to treat the delegation as the same thing as delegation to a government commission and emphasize a finding that the statute has intelligible standards.<sup>56</sup> Moreover, these cases ignore the fact that the requirement of intelligible standards is only one of three basic elements of due process in administrative law. Fair hearing and judicial review are not available when a seller establishes resale prices which his buyer believes to be too high. Still other courts, following *Old Dearborn*, hold that the state delegation of price control power to private producers or sellers is not unconstitutional because it is adopted in support of the primary purpose of protecting a property interest in goodwill or trademarks.<sup>57</sup> This argument says, in effect, if the purpose of the statute is constitutional, a traditionally unconstitutional means may be adopted by the legislature to achieve that purpose—a view contrary to the basic principles of constitutional government.<sup>58</sup>

<sup>53</sup> 299 U.S. at 192.

<sup>54</sup> 299 U.S. at 194.

<sup>55</sup> *Ely Lilly & Co. v. Saunders*, 216 N.C. 163, 177, 4 S.E.2d 528, 537 (1939); *Weco Prods. Co. v. Reed Drug Co.*, 225 Wis. 474, 484, 274 N.W. 426, 429 (1937); see *Esterbrook Pen Co. v. San Juan F. Vilarino* 5 y 10, 144 F. Supp. 309, 313 (D.P.R. 1956). See also *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 564, 2 N.E.2d 929, 932, *aff'd sub nom. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

<sup>56</sup> *Corning Glass Works v. Max Dichter Co.*, 161 A.2d 569, 574 (N.H. 1960). The effectiveness of one of these standards is questioned in Herman, *Free and Open Competition*, 9 STAN. L. REV. 323 (1957).

<sup>57</sup> *E.g.*, *Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.*, 15 Ill. 2d 182, 188, 154 N.E.2d 290, 293 (1958); see Note, 50 HARV. L. REV. 667, 670 (1937); Comment, 1959 U. ILL. L.F. 664.

<sup>58</sup> This rule is seen most clearly where a governmental body has been granted the power to punish persons for criminal activity but adopts a procedure which is unconstitutional. See *Reid v. Covert*, 354 U.S. 1 (1957), *reversing on rehearing* 351 U.S. 487 (1956).

## OTHER BASES OF UNCONSTITUTIONALITY

Utah has held the nonsigner clause of its state resale price statute to violate the state constitutional prohibition on "any combination . . . having for its object or effect the controlling of the price of any products of the soil, or of any article of manufacture or commerce."<sup>59</sup> But in other states with constitutional proscriptions of monopolies, nonsigner clauses have been held not violative of such provisions.<sup>60</sup> The usual reasoning of the courts in these cases is that their constitutions prohibit only complete monopolies of a trade or product and do not bar vertical price-fixing agreements for individual products. This reasoning is applied even though a large majority of the producers of a type of product establish the same relatively high resale price for their comparable products.

The Florida nonsigner statute was held arbitrary and violative of due process in part because it served a private rather than a public purpose.<sup>61</sup> The Nebraska clause was held to create unconstitutional special privileges and immunities.<sup>62</sup> And the Oregon nonsigner statute was held to violate the state constitutional rights of contract and property.<sup>63</sup>

## CONCLUSION

Violation of constitutional due process, as the basis of an attack on the nonsigner clauses of state resale price statutes, has a fundamental weakness. The original meaning of due process was limited to procedure, and the decisions of the United States Supreme Court over the last twenty-five years have repudiated the substantive due process attack on economic regulation by state or federal governments. Although the high courts of twelve states have held that state non-

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<sup>59</sup> *General Elec. Co. v. Thrifty Sales, Inc.*, 5 Utah 2d 326, 301 P.2d 741 (1956), 42 CORNELL L.Q. 407 (1957), 5 UTAH L. REV. 279 (1956).

<sup>60</sup> *Pepsodent Co. v. Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942); *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682, 7 A.2d 176 (1939); *W. A. Sheaffer Pen Co. v. Barrett*, 209 Miss. 1, 45 So. 2d 838 (1950); *Ely Lilly Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939); *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*, 231 La. 51, 90 So. 2d 343 (1956) (dictum); *Skaggs Drug Center v. General Elec. Co.*, 63 N.M. 215, 315 P.2d 967 (1957) (dictum). In Tennessee, the contracts section of the resale price statute was held not to violate the state monopoly prohibition. *Frankfort Distillers Corp. v. Liberto*, 190 Tenn. 478, 230 S.W.2d 971 (1950).

<sup>61</sup> *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949).

<sup>62</sup> *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 68 N.W.2d 608, *modified*, 160 Neb. 319 (1955).

<sup>63</sup> *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635, 647 (1956) (alternative holding).

signer statutes violate the due process clauses of their state constitutions, these decisions may not have the stability and permanence that constitutional protections should afford in a democratic society. These courts which, during a period of general prosperity and few bankruptcies, have found nonsigner statutes not reasonably related to public welfare may change their minds and reverse themselves if the next constitutional test of such statutes is brought during a recession. They have the views of sixteen other state high courts on which to rely for the proposition that nonsigner statutes do not violate constitutional due process. And this is also the view of the United States Supreme Court.

Ambiguous constitutional concepts, such as substantive due process, vest great power in courts. Under a system of judicial supremacy, a power in courts to interpose their views on the reasonableness of statutes allows judicial usurpation of legislative power. And judicial conservatism can block experimentation by the legislature in new methods of social control and impede the adaptation of law to a changing society.<sup>64</sup>

Unconstitutional delegation of legislative power is a more soundly reasoned attack on nonsigner clauses. Counsel for nonsigner defendants who have cut prices in violation of established resale price schedules would be well advised to center a constitutional defense entirely on this ground and bypass the questionable due process defense. The key to success is to demonstrate to the court that nonsigner statutes are compulsory price regulation laws and that price regulation is a legislative function. The conclusion of unconstitutionality follows directly from these premises and from the principle of law that sovereign legislative power is vested only in elected government.

The proposed federal resale price maintenance law, set forth in the introduction to this Comment, is a clear delegation of federal legislative power to private persons. The language of the statute indicates its purpose of price regulation and of giving power for such regulation to private manufacturers and distributors. A statute with similar language was adopted in Ohio in 1959<sup>65</sup> after that state's former

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<sup>64</sup> Llewellyn, *Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665 (1925).

<sup>65</sup> OHIO REV. CODE ANN. § 1333.29 (Page Supp. 1960): "It shall be lawful . . . for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price."

resale price maintenance statute had been held unconstitutional. Two lower courts have already held the new Ohio act unconstitutional on the ground that it delegates legislative power to private persons.<sup>66</sup> It is reasonable to predict that if the federal resale price statute is passed, it will suffer the same fate in the federal courts.

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<sup>66</sup> Hudson Distributions, Inc. v. Upjohn Co., TRADE REG. REP. (1960 Trade Cas.) ¶ 69778 (Ohio C.P. July 28, 1960); Helena Rubinstein, Inc. v. Cincinnati Vitamin & Cosmetic Distributions Co., TRADE REG. REP. (1960 Trade Cas.) ¶ 69720 (Ohio C.P. May 23, 1960).