

A NOTE ON FAIR TRADE

EDWARD S. HERMAN †

IN his provocative article "Resale Price Maintenance: Fact and Fancy,"¹ Professor Walter Adams brings an impressive arsenal of scholarship to bear on the legal status of the various alternatives to fair trade as instruments for maintaining resale prices. Unfortunately, however, an uncritical treatment of several basic issues seriously vitiates his argument and results in a set of conclusions substantially irrelevant to considerations of public policy.

Professor Adams' conclusions are based on the propositions (1) that "the case against fair trade rests on highly ambivalent evidence," and (2) that resale price maintenance "can frequently be achieved without recourse to fair trade."² From these premises he infers (1) that "a repeal of the Miller-Tydings and McGuire Acts is not an effective way of coping with the alleged vice of resale price maintenance,"³ and (2) that since the fair trade laws have "free and open competition" requirements for eligibility "it seems wiser—and politically more realistic—to demand extension of the 'free and open competition' proviso to other forms of resale price maintenance rather than to urge the repeal of the only laws of which it is now an explicit part."⁴ The purpose of the present note is to evaluate the basic contentions that underlie Professor Adams' conclusions, and to appraise the latter in the light of any adjustments found necessary in the premises.

THE CASE AGAINST FAIR TRADE

The first premise that Professor Adams attempts to establish is that the case against fair trade is inconclusive. He arrives at his result by the questionable method of listing unweighted and incompletely evaluated arguments for and against fair trade. He does not indicate which arguments he considers important and correct, nor does he reconcile their obvious inconsistencies. Presumably we are to conclude that the case is moot because arguments have been mustered on each side.

Professor Adams presents four arguments against fair trade, neatly balanced by four arguments in its defense. The first and "most telling argument against fair trade is that in practical effect it nullifies the antitrust prohibitions against

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1. 64 YALE L.J. 967 (1955).

2. *Id.* at 969.

3. *Ibid.*

4. *Id.* at 990.

horizontal price fixing."⁵ Although economists are in virtually unanimous agreement that this is a valid contention, and that the primary purpose and effect of fair trade is to reduce price competition,⁶ Professor Adams neglects to inform his readers of this fact, and fails to commit himself directly on the question of the validity and importance of this argument. He does come to grips with it in somewhat oblique fashion in his citation and defense of the contention made by fair trade advocates that the Miller-Tydings and McGuire Acts protect the consumer against any undue restraints by sanctioning fair trade pricing only where the goods in question are sold in "free and open competition" with other goods of the same general class. Professor Adams comments that "from the consumer's point of view this is a crucial safeguard against exploitation. So long as there is effective competition between manufacturers, the fact that each of them sees fit to set minimum resale prices is of secondary importance."⁷

The adequacy of this reply to the "most telling argument against fair trade" can be discussed in terms of the following questions: First, is it meaningful and accurate to say that "so long as there is effective competition between manufacturers" fair trade is not likely to prove injurious to consumers? Second, have the courts interpreted the "free and open competition" proviso in a manner that renders it readily available for the prevention of fair trade pricing by firms possessing substantial monopoly power? Third, given the nature and background of the fair trade laws, and the state of court interpretation of the "free and open competition" proviso, is it reasonable to expect effective enforcement of this proviso by the antitrust agencies?

5. *Id.* at 970. Not only does competition among distributors tend to be reduced by the contractual determination of dealer margins under fair trade, but distributors desiring to engage in horizontal price fixing are able to do so without violating the law if one of their number enters a vertical contract with a supplier and places the other dealers on notice of the existence of the contract. Manufacturers are still formally free to compete in factory price, but price competition among manufacturers is likely to be curbed with the extension of fair trade because of the diminution of dealer pressure for price concessions and the reduction of other unstabilizing (and competition promoting) effects of price competition at the distributive level. Furthermore, fair trade provides a convenient mechanism for facilitating manufacturer curbs on competition, since by establishing contracts with single distributors, with retail prices and discounts equivalent to those of other manufacturers, any manufacturer can obtain the effects of a horizontal price agreement. C. EDWARDS, *MAINTAINING COMPETITION* 72 (1949); STOCKING & WATKINS, *MONOPOLY AND FREE ENTERPRISE* 322-23 (1951); FTC, *REPORT ON RESALE PRICE MAINTENANCE* lxii (1945).

6. See, *e.g.*, J. M. CLARK, *SOCIAL CONTROL OF BUSINESS* 381 (2d ed. 1939); C. EDWARDS, *op. cit. supra* note 5, at 66-73; MACHLUP, *POLITICAL ECONOMY OF MONOPOLY* 214-15, 229 (1952); MUND, *GOVERNMENT AND BUSINESS* 474-75 (2d ed. 1955); OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 422-29 (1951); PURDY, LINDAHL & CARTER, *CORPORATE CONCENTRATION AND PUBLIC POLICY* 439 (1950); STOCKING & WATKINS, *op. cit. supra* note 5, at 322-24; WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 420-21 (1955).

7. Adams, *Resale Price Maintenance: Fact and Fancy*, 64 *YALE L.J.* 967, 972 (1955).

As regards the first question, it should be noted initially that fair traded goods are invariably differentiated products (being branded and trademarked commodities), and are frequently sold in markets of few sellers. This means that such goods are sold under conditions in which significant factors are already at work tending to reduce the effectiveness of competition. To say that fair trade is harmless so long as there is effective competition among manufacturers is to disregard and divert attention from the fact that fair trade is itself a factor tending to reduce the effectiveness of competition in markets in which competition is already limited.⁸ Even assuming effective competition among manufacturers, however, there is no rational foundation for the assertion that a sufficient degree of competition among manufacturers eliminates the possibility that significant adverse effects may result from fair trade. Insofar as fair trade is effective it tends to raise distribution costs by depriving low cost distributors and the public of the advantages of superior efficiency, by diverting competition into cost-increasing non-price channels, and, as a result of high profit margins, by inducing excessive entry and capacity (and inefficient output volume per unit) in the field of distribution. These higher distribution costs tend to be translated into higher prices to consumers irrespective of the degree of manufacturer competition.⁹

Court decisions interpreting the "free and open competition" proviso have been sparse but nonetheless revealing. In the only decision thus far rendered in which the "free and open competition" proviso of the federal fair trade laws has been interpreted, it was held that "if a purchaser wants a color film he must be able to buy it from *more than one* manufacturer if there is to be free and open competition with commodities of the same general class. . . ."¹⁰ Courts have found the almost identical "fair and open competition" provisos of several state laws insufficient to condemn fair trade pricing in the long

8. Professor Adams cites information supplied by the Bureau of Education on Fair Trade indicating the existence of a substantial number of brands of six classes of commodities—sterling silverware, face powder, toilet soap, washing machines, floor wax and dentifrices—from which he concludes that if such information is correct, then "the fact that the resale price of each brand is set by the manufacturer is of relatively minor significance." *Id.* at 972-73. However, not only is this evidence unverified and not shown to be representative of fair traded goods in general, but in addition the conclusion rests on the implicit and largely invalid assumptions (1) that all the cited brands are typically sold in the same markets, (2) that each of these brands is produced by a different firm, and (3) that the branding and advertising of these various products does not convey substantial monopoly power. The fact that the consumer can choose between an alleged 58 brands of sterling silverware and 76 brands of toilet soap should be considered in the light of the fact that the four largest producers of these commodities accounted for 61 and 79 per cent of the 1947 output of sterling silverware and soap respectively. FTC, REPORT ON CHANGES IN CONCENTRATION IN MANUFACTURING 142, 147 (1954).

9. See C. EDWARDS, *op. cit. supra* note 5, at 69-71; GREYER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 294-320 (1939); OXENFELDT, *op. cit. supra* note 6, at 429; STOCKING & WATKINS, *op. cit. supra* note 5, at 330.

10. *Eastman Kodak Co. v. FTC*, 158 F.2d 592, 594 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947). (Emphasis added.)

playing phonograph industry (in which four firms produced seventy-nine per cent of the 1947 output);¹¹ in the automatic lighter business (in which the court found that "Ronson had more than a majority of the lighter business in the country in 1951");¹² and in the whiskey industry (in which four firms produced seventy-five per cent of the 1947 output).¹³ The standards thus far developed in interpreting the protective proviso would appear to sanction the use of fair trade contracts where there are several independent sellers of a similar type of commodity, and where such sellers are not acting in a manner that would ordinarily constitute a violation of the Sherman Act.¹⁴ A proviso so interpreted, and written into statutes the essence of which is restriction of competition, cannot be taken seriously as a "crucial safeguard against exploitation."¹⁵

Professor Adams expresses disappointment at the failure of the antitrust agencies to enforce the proviso guaranteeing the consumer against exploitation, but he does not consider whether nonenforcement has resulted from mere obstinacy on the part of these agencies or from more deep-seated obstacles. Among the latter, the Department of Justice has noted the vagueness of the "free and open competition" proviso,¹⁶ and attention has already been called to the character of court interpretations of this proviso, which has hardly been such as to infuse the antitrust agencies with a fervor for enforcement. Furthermore, the fair trade laws have increased the enforcement responsibilities of the antitrust agencies by providing a mechanism "susceptible of use as a cloak to hide general price fixing activities,"¹⁷ although, as Professor Adams observes in another context, the resources of these agencies remain meager.¹⁸ As Corwin Edwards has pointed out,

11. *Columbia Records, Inc. v. Goody*, 278 App. Div. 401, 105 N.Y.S.2d 659 (1st Dep't 1951); FTC, REPORT ON CHANGES IN CONCENTRATION IN MANUFACTURING 146 (1954).

12. *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 1953 Trade Cas. ¶ 67562 (E.D. Mo. May 25, 1953).

13. *Carstairs Distiller Corp. v. H. C. Drescher Co.*, 106 N.Y.L.J. 110 col. 3 (N.Y. Sup. Ct. July 1, 1941); *Schenley Distributors, Inc. v. H. Hollander Co.*, CCH TRADE REG. REP. ¶ 3154.23 (Mass. Super. Ct. 1940); FTC, REPORT ON CHANGES IN CONCENTRATION IN MANUFACTURING 138 (1954).

14. See *Eastman Kodak Co. v. FTC*, 158 F.2d 592, 594 (2d Cir. 1946), *cert. denied*, 330 U.S. 828 (1947); *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 1953 Trade Cas. ¶ 67562 (E.D. Mo. May 25, 1953); *General Electric Co. v. S. Klein, Inc.*, 1953 Trade Cas. ¶ 67443 (N.Y. Sup. Ct. Feb. 20, 1953); *Sunbeam Corp. v. Central Housekeeping Mart, Inc.*, 1952 Trade Cas. ¶ 67379 (Ill. Super Ct. Dec. 9, 1952).

15. It is one of the remarkable features of Professor Adams' article that he indicates awareness of the unencouraging manner in which the courts have interpreted the protective proviso in a footnote, Adams, *supra* note 7, at 969 n.6, and yet proceeds to conclusions that require that his own footnote be disregarded.

16. See the statement of H. Graham Morison, Assistant Attorney General in charge of the Antitrust Division, *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Resale Price Maintenance*, 82d Cong., 2d Sess., ser. 12, at 42-43 (1952).

17. *Id.* at 43.

18. Adams, *supra* note 7, at 973.

"in practice it is nearly always impossible for one manufacturer to establish a system of vertical price fixing unless he can be sure that his competitors will do likewise; and a single price-fixing commodity is exposed to the inroads of competing commodities when these articles can be sold for less than the fixed price. Consequently, horizontal collusion in violation of the law has been an indispensable part of the movement for resale price maintenance. . . . If the Antitrust Division had the men and money to examine every resale price contract which has been written under the cloak of State and Federal legislation . . . there would be no resale price problem for there would be practically no resale price contracts. In the absence of such wholesale law enforcement, the system of resale price legislation has become a breeding ground for restraints of trade such as Congress never intended to sanction and did not sanction."¹⁹

The second argument against fair trade mentioned by Professor Adams is "the prejudicial effect of fair trade on the consuming public."²⁰ He notes that a number of surveys have been "repeatedly cited" to demonstrate the adverse effects of fair trade on the consumer, but he does not attempt a direct appraisal of this body of evidence. Instead he again falls back on the allegations of "fair trade advocates," who provide him with the following counter-arguments. First, the usual surveys of the effects of fair trade on prices are alleged to lack statistical significance because they are unrepresentative: "In the absence of fair trade, a department store or chain selling a diversified product line can cut prices on nationally advertised, trade-marked articles to build up store traffic, and hope to make up for its low margins or losses on these items by the sale of other, less attractively priced goods. . . . [The challenged surveys] do not show to what extent the 'bargains' purchased by some consumers are subsidized by the 'lemons' purchased by other consumers."²¹ Secondly, the Bureau of Education on Fair Trade claims that studies made for it by A. C. Nielsen & Co. "indicate that on the average the public paid less for a list of leading drug and toilet articles in the fair trade areas than in the non-fair trade areas of the country."²² Finally, its supporters urge that insofar as fair trade curbs loss-leader selling the consumer is protected against eventual monopolization of the channels of distribution.²³

It is quite true that statistical measurement of the effects of fair trade is extremely difficult, and that the results thus far obtained are not entirely conclusive. Nevertheless, in virtually every instance of a survey carried out by reasonably disinterested parties, the spotty individual studies point to the price increasing or stabilizing effects that we would expect on theoretical

19. Statement by Corwin Edwards, *Hearings Before the Antitrust Subcommittee of The House Committee on the Judiciary on Resale Price Maintenance*, 82d Cong., 2d Sess., ser. 12, at 440 (1952); see also the remarks of Assistant Attorney General Morison, *id.* at 41.

20. Adams, *supra* note 7, at 971.

21. *Id.* at 973.

22. *Ibid.*

23. *Ibid.*

grounds.²⁴ Thus, although the aggregate evidence is not conclusive, it establishes a presumption that is not seriously disturbed by the counter-arguments uncritically cited by Professor Adams. The argument that the unfavorable surveys do not show the extent to which "bargain" prices are compensated for by the sale of high priced "lemons," states a formal possibility which is not supported by any evidence. The *fact* of bargain prices on a considerable range of commodities cannot be dismissed by the mere *assertion* that bargains may be offset by lemons. Such an assertion rests on an assumption of consumer irrationality which is least appropriate for precisely those persons to whom a unit of money has the most significance. Furthermore, no reason is given for supposing that the exploitation of consumer irrationality is confined to the large distributor. This assertion is also grounded on the assumption that every store of a particular type has an almost identical over-all margin on sales, so that sales of items at low margin must be offset by high margin sales. When it is recognized that in many fields large volume distributors compensate for systematically low margins by large sales volume, this assumption ceases to be compelling.²⁵

When a group such as the Bureau of Education on Fair Trade releases a set of conclusions that run counter to theoretical expectations and the results of the bulk of other studies on the subject, it would hardly seem reasonable to cite its results without question and then imply that the argument is a draw because there are statistics on both sides. Professor Adams not only falls into this error but, despite an alertness to the paradoxes in the arguments against fair trade, he neglects calling attention to the dilemma raised by the Nielsen study, namely that "loss leader selling" is apparently more prevalent in the fair trade than in the non-fair trade states!

The contention that fair trade, by protecting the independent dealer against loss leaders, protects the long run interest of the consumer in the maintenance of competitive distribution, suffers from the fact that the consumer is asked to undergo potentially severe current restraints on competition in distribution

24. FTC, REPORT ON RESELL PRICE MAINTENANCE pts. I, II (1945); GREYER, *op. cit. supra* note 9, *passim*; Hession, *The Economics of Mandatory Fair Trade*, 14 J. MARKETING 707-20 (1950); Lewis, *Economic Effects of Price Maintenance in Knoxville, Tennessee*, 4 J. MARKETING 139-46 (1939); Stewart, *Mandatory Resale Price Maintenance of Distilled Spirits in California*, 18 J. MARKETING 370-79 (1954); Wolff & Holt-hausen, *The Control of Retail Prices Under the Fair Trade Laws*, *Dun's Review*, July 1938, pp. 15-22, 44-47; *The Not-So-Fair Trade Laws*, *Fortune*, Jan. 1949, p. 70; *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Resale Price Maintenance*, 82d Cong., 2d Sess., ser. 12, at 429-35 (1952); H.R. REP. No. 1516, 82d Cong., 2d Sess. 39-45 (1952).

25. HOFFMAN, *LARGE-SCALE ORGANIZATION IN THE FOOD INDUSTRIES*, 3-4, 61-68 (TNEC Monograph No. 35, 1940); C. PHILLIPS, *MARKETING BY MANUFACTURERS 199-200* (2d ed. 1951); Gilchrist, *The Discount House*, 17 J. MARKETING 267, 270-71 (1953); Zimmerman, *The Supermarket and the Changing Retail Structure*, 5 J. MARKET-ING 402, 405 (1941); FTC, *Final Report on the Chain Store Investigation*, S. DOC. No. 4, 74th Cong., 1st Sess. 67 (1935).

in order to prevent future developments that are highly uncertain.²⁶ Not only are other methods available for preventing monopolization of the distributive mechanism which do not require the throwing out of the baby (current competition in distribution) with the bath water (loss leaders),²⁷ but serious question can be raised concerning the efficacy of fair trade as a means for stabilizing the market structure of the distributive trades.

This brings us to the third argument against fair trade: that it actually contributes to the weakening of the competitive position of the independent retailer by encouraging the development of private brands sold at prices substantially below those of the fair traded items to which the independent dealer is largely confined. Professor Adams finds a curious paradox in this argument. "Fair trade is condemned for *destroying* price competition and thus harming the consumer. At the same time, it is attacked for *stimulating* price competition and weakening the independent retailer. Thus, fair trade opponents find themselves contending that resale price maintenance is too effective, on the one hand, and not effective enough, on the other."²⁸ This paradox is unduly strained. The emphasis on the words "destroying" and "stimulating" implies that it may be difficult to conceive of the possibility that both might happen to price competition as a result of fair trade. But the paradox falls to the ground when we consider that the destruction may be now and the stimulus occur only gradually over an extended period; and that the destruction may be great and the stimulus relatively modest. A price fixing arrangement will destroy competition and injure consumers now; in time, if the price fixers are unable to prevent entry, defections from the conspiracy, or encroachments by competitors outside of the arrangement, then there will be a tendency for outsiders to expand business gradually at the expense of the combination by quoting prices below the high levels fixed by that group. The competitive position of the combination is worsened as the monopoly prices induce entry and diminish the market shares of the price fixers. But the adverse competitive effects are likely to be immediate and substantial; the induced increase in competition is likely to lag and, at best, to return eventually only to approximately the original degree of competition.

The fourth argument against fair trade is that it "inevitably produces a non-competitive atmosphere which fosters violations of the antitrust laws."²⁹ After citing several cases in which the fair trade laws appear to have served as a cloak for price fixing conspiracies and other restraints of trade, Professor

26. A necessary corollary of the argument that fair trade protects the consumer's *long run* interest in competitive distribution is that manufacturer competition is inadequate to provide such protection; and yet fair trade spokesmen typically justify the *short run* restraints on competition in distribution that fair trade entails, by contending that manufacturer competition sufficiently protects the consumer. This constitutes an admirable effort to have one's cake and eat it too, but the tears for long run competitive distribution are too obviously of the crocodile variety.

27. *E.g.*, laws preventing sales below cost, predatory price cutting, and other abuses.

28. Adams, *supra* note 7, at 971.

29. *Ibid.*

Adams presents (with implicit approval) the reply of the advocates of fair trade, who urge that "the very cases cited by opponents of fair trade demonstrate that the antitrust laws can still be enforced where the practitioners of fair trade exceed or abuse their carefully defined statutory rights."³⁰ However, it would hardly appear to be an effective reply to a charge that certain legislation encourages the violation of other laws, to say that such violations are themselves not exempt from the law!

In sum, the case against fair trade is not effectively challenged by the counter-arguments cited by Professor Adams. The criticisms of fair trade are adequate to sustain the conclusion that, from the standpoint of economic effects, the fair trade laws run counter to the public interest.

THE ADEQUACY OF THE ALTERNATIVES TO FAIR TRADE

Professor Adams' policy recommendations rest not only on the alleged inconclusiveness of the case against fair trade, but also on the proposition that resale price maintenance can be achieved without recourse to fair trade. If other devices are readily available alternatives to fair trade as techniques for the maintenance of resale prices, the repeal of the fair trade laws would not effectively eliminate any evils inhering in resale price maintenance. Professor Adams assumes that this is the case, but he does not justify the assumption. That there is at least an issue to be raised as to the substitutability of the various price maintaining devices should be indicated by the magnitude of the campaign waged on behalf of fair trade with these alleged alternatives already in hand!

The resale price maintenance devices that may be considered as possible alternatives to fair trade are forward integration,³¹ consignment selling, use of the agency device, and the simple refusal to deal with those who fail to maintain prices. Are these alternatives readily available and effective substitutes for fair trade as means of maintaining resale prices? Not only is forward integration limited by the fact that it requires large additions to capital investment and a considerable expansion of managerial responsibilities, but it is also quite impractical for the typical producer of fair traded goods who markets his product through thousands of "general" drug, hardware and variety stores. Consignment selling likewise increases capital costs (by requiring a larger inventory investment), and enhances the risks connected with price change and obsolescence. It involves "not only the nuisance of making reports but . . . also the frequent disagreement between the consignor's accounts and the consignee's";³² and "neither wholesalers nor retailers take the same interest in a consigned product that they do in one they purchase out-

30. *Id.* at 972.

31. Professor Adams' article does not specifically examine the alternative of forward integration.

32. Klaus, *Sale, Agency and Price Maintenance: II*, 28 COLUM. L. REV. 441, 461 (1928).

right."³³ The agency device also tends to increase the costs and risks of doing business;³⁴ it restricts the number of distributive outlets that may be maintained;³⁵ and it can probably be utilized effectively for purposes of price maintenance only where the manufacturer has sufficient monopoly power to enable him to induce virtually all desired dealers to enter such contracts.³⁶ Refusing to deal with those persistently cutting prices below the levels suggested by the manufacturer does not enhance the costs and risks of doing business to the extent of the previously mentioned devices, but it is a relatively clumsy and ineffective substitute for fair trade. Refusal to deal provides neither the strategic focal point for the co-operative efforts of organized dealers to pressure manufacturers into price maintenance at satisfactory margins, nor the convenient mechanism for manufacturer cooperation, that are afforded by the enforceable fair trade contract (with the attached non-signer clause). There are no legal penalties available as a supplement to refusals to deal to restrain price cutters, so that manufacturer policing of retail prices and the flow of goods through distributive channels must be persistent and comprehensive for effective price maintenance. Some manufacturers are likely to be unable to use this method, and others may feel that the kind of price maintenance obtainable with this device is not worth the additional effort and expense it entails.

In sum, there are disadvantages attaching to each of the alternative devices for maintaining resale prices, which make them less than perfect substitutes for fair trade. None of these devices possesses the combination of advantages characteristic of fair trade: simplicity, low cost and risk, legal sanction, and ready adaptability to the facilitation of horizontal collusion. The demise of fair trade would not result in a simple shift from fair trade to some other means of maintaining resale prices; in many instances the alternative methods would be unavailable or simply not feasible.

CONCLUSIONS

If, as has been argued above, the case against fair trade is reasonably convincing, and if for the typical fair-trading manufacturer the alternative price maintaining devices are not readily available or effective substitutes for fair trade, then, contrary to Professor Adams, the repeal of the Miller-Tydings and McGuire Acts would be a sensible beginning in an effort to cope with

33. C. PHILLIPS, *op. cit. supra* note 25, at 328.

34. See *United States v. General Elec. Co.*, 32 F. Supp. 753, 818-24 (D.N.J. 1949).

35. See C. PHILLIPS, *op. cit. supra* note 25, at 186.

36. "First, in the typical fields to which the General Electric pattern is indigenous, the problem of price maintenance is practically irrelevant. Second, in the fields where price maintenance is desired, those manufacturers who are already least affected by competition will be able to adopt the General Electric pattern with little difficulty, while those to whom price maintenance would be most welcome are financially too weak to use that pattern with success. Klaus, *Sale, Agency and Price Maintenance: I*, 28 COLUM. L. REV. 312, 315 (1928).

“the alleged vice of resale price maintenance.” And if the “free and open competition” provisos of the fair trade laws have shown themselves to be hopelessly inadequate protection against abuses resulting directly from the anti-competitive legislation to which they are attached, it would appear rather pointless as well as highly impractical “to demand extension of the ‘free and open competition’ proviso to other forms of resale price maintenance rather than to urge the repeal of the only laws to which it is now an explicit part.”³⁷

37. Adams, *supra* note 7, at 990.

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