

PRICE CONTROL BY LAW IN THE UNITED STATES: A SURVEY

BRECK P. McALLISTER*

The ways in which the activities of government may influence prices are so many and diverse that only an arbitrary line will serve to set apart methods of more or less direct control for separate treatment. A tariff may have objectives of protection, or revenue, or both, but it is undeniable that it has important and recognized effects on a given price structure. Policies of government in the realm of currency and public finance may be undertaken with or without thought to prices. Here too the market place may prove to be an all too sensitive barometer. Tax measures may have their repercussions on what the consumer must pay for goods and often they are shaped with full awareness of this. Subsidies and bounties and other measures to encourage and facilitate trade and industry may seem to have little to do with prices but they do reflect the public interest in bearing a share of the cost of rendering a given service. When we come to the regulatory measures of recent decades the effect on prices seems plain enough. The Supreme Court saw this clearly enough in a case involving a workman's compensation act when it declared that the act requires that "the losses shall be reckoned as a part of the cost of the industry just like the pay roll, the repair account or any other item of cost."¹ The same may be said with varying force of laws regulating the quality and standards of goods, hours of labor, minimum wages, social security and the like. It is not to be supposed that government is unaware of the economic cost of its measures. The insistence of government must be taken to be a choice between competing social and economic values.

There are many instances in which government acts with its eye directly fixed on the forces that play on the market place and attempts to influence price by putting the weight of its power on one or more of them, if not on price itself. Economic man—he whose acts for his own good bestow good on all, so the story runs—is out of hand. His conduct must be conditioned by new forces. Government steps in to attempt to supply them. He may be so unruly that it is feared he will not perform

* A.B., 1923, University of California; LL.B., 1926, Harvard University; Ph.D., 1929, Robert Brookings Graduate School. Member of the New York and District of Columbia Bars. Associate Professor of Law, University of Washington. Special Assistant to the Attorney General, Anti-Trust Division, Department of Justice, Washington, D. C., 1927-1929; practice in the field of anti-trust law with the firm of William J. Donovan, New York City, 1929-1933. Contributor to legal periodicals on subjects relating to trade regulation.

¹Mountain Timber Co. v. Washington, 243 U. S. 219, 243 (1917).

according to the story and so government deals directly with price. There are various other measures, too, that may be employed and, in the United States, government generally has been content to stay its hand from direct control, important as are the instances of its exercise, and to attempt rather to deal with other forces. It is proposed here to review the story of the efforts of government along these lines in the history of the United States. The primary concern will be with the measures that have been employed as instruments of control and the economic, social and political forces that have brought them about.

I. THE REVOLUTIONARY YEARS

Price fixing laws of the revolutionary years may seem to belong to the remote past but the fact is that for a time during those years prices of nearly every article in general use, as well as the wages of labor, were fixed by most of the state legislatures.² This fact is a part of our heritage of governmental action and as such warrants mention. The outbreak of the armed conflict and the activities of the makeshift Continental Congress sent prices up. Without either a national treasury or national credit and without power to levy taxes the Continental Congress undertook to furnish the sinews of a successful revolution by the issuance of paper money and the states did likewise. The states were supposed to redeem it by the use of their taxing powers but taxation was a delicate matter at that time. The result during this period was chaos in commercial transactions and in the market place. The paper money fell in value until the expression "not worth a Continental" came to be the epithet of the day. Unable or unwilling to deal with the disease the states attempted to deal with the most apparent symptoms. Prices were out of hand and so they sought to control them.

For some five years, from 1776 to 1781, this effort was made. As an organized movement it dates from a meeting of delegates from Massachusetts, New Hampshire, Rhode Island and Connecticut held at Providence in December, 1776. This meeting adopted an elaborate schedule of prices covering substantially everything in use at the time and recommended its adoption by the states. The Continental Congress gave its full approval and added its recommendation. The states were not slow to act. By January of 1777 the four states represented at Providence had written the schedule into their laws³ and before the year was out Maine,⁴ Maryland,⁵

² BOLLES, *FINANCIAL HISTORY OF THE UNITED STATES, FROM 1774 TO 1789* (2d ed. 1884) cc. IX, XII; DAVIS, *The Limitation of Prices in Massachusetts, 1776-1779*, in 10 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (1907) 119; HARLOW, *Economic Conditions in Massachusetts during the American Revolution* in 20 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (1920) 163; JONES, *Historical Development of the Law of Business Competition* (1926) 36 YALE L. J. 42, 52; U. S. DEP'T AGRIC., BUR. AGRIC. ECON., BIBLIOGRAPHY No. 18, *Price Fixing by Governments, 424 B.C.—1926 A.D.* (1926) 18 *et seq.*

³ Price control statutes passed by the states during the revolutionary war are collected in CLARK, *EMERGENCY LEGISLATION TO DECEMBER, 1917* (U. S. Dep't Just. 1918) 228-990. Massachusetts, Act of Jan. 25, 1777, *id.* at 420 and amending act of the same year, *id.* at 429. Both were repealed later in the year, *id.* at 439. The Massachusetts laws are discussed in Davis, *supra* note 2. New Hampshire, Act of Jan. 18, 1777, CLARK, *op. cit. supra* at 466, as amended by Act of April 10, 1777, *id.* at 471. Both acts were repealed by the Act of Nov. 27, 1777, *id.* at 476. Rhode Island, Act of Dec., 1776, *id.* at 823,

Pennsylvania,⁶ and New Jersey⁷ had done likewise. New York followed in 1778.⁸ During the ensuing years there were other meetings, other resolves and other schedules of prices. In some states the laws were short lived, in others they were more lasting, but in all there was deep concern about the matter.⁹ As late as November of 1779 the Continental Congress again urged the states to establish by law general limitations of prices. A troublesome matter had been the difficulty of securing uniform action by all the states. Town was pitted against farm and everywhere the patriotic utterances of the revolutionary years were mingled with denunciations of monopoly, greed and avarice. A variety of legislation was passed. Laws against forestalling and engrossing, so well known in England, found their way to the statute books in nearly every state.¹⁰ Appeals to patriotism were joined with laws making it a criminal offense to refuse to accept the Continental bills. In many states barter was resorted to by the people.

Both the Congress and the states were caught in the web of the prevailing paper money policy. Every effort was being made to give it currency in the markets in payment for goods and as legal tender in payment of debts and taxes. The price-fixing laws were but a part of this effort but like the other measures they failed in their objective. They were generally disregarded and as soon as the credit and currency of the new nation were established and there was an end to the chaos that had prevailed during the Revolution there was an end to the price-fixing laws as well.

and amending Acts of Feb., March and May, 1777, *id.* at 831, 833, 835. These acts were repealed in Aug., 1777, *id.* at 851. Connecticut, Act of 1777, effective Nov. 12, 1777, *id.* at 228. In 1778, following the New Haven meeting of representatives of the states, Connecticut passed a general price fixing statute, *id.* at 232. This was suspended later in the year and finally repealed, *id.* at 240, 242. Other Connecticut laws are summarized in U. S. DEP'T AGRIC., *op. cit.*, *supra* note 2, at 19; see especially the price fixing Acts of Nov. 19 and Dec. 18, 1776, passed before the date of the Providence meeting.

⁴ Act of May, 1777, see U. S. DEP'T AGRIC., *op. cit.* *supra* note 2, at 25.

⁵ Act of June, 1777 to punish forestalling and engrossing and to limit the profit of retailers, see CLARK, *op. cit.* *supra* note 3, at 293.

⁶ Act of Oct. 13, 1777 appointing a Council of Safety with power to regulate prices, see U. S. DEP'T AGRIC., *op. cit.* *supra* note 2, at 34.

⁷ Act of Dec. 11, 1777, see CLARK, *op. cit.* *supra* note 3, at 513. This act was suspended in June, 1778 and again in October and December, 1778, *id.* at 529, 530, 531.

⁸ Act of April 3, 1778, see *id.* at 595. This was suspended by Act of June 29, 1778 and repealed by Act of Oct. 28, 1778, *id.* at 601, 603. New York again embarked on a policy of general price fixing by Act of Feb. 26, 1780, *id.* at 636.

⁹ See U. S. DEP'T AGRIC., *op. cit.* *supra* note 2, at 18, 25-27, 30-39, for references to changes in state laws during this period; the statutes there referred to and many others will be found in CLARK, *op. cit.* *supra* note 3, at 228-990.

¹⁰ Between 1777 and 1780 eleven states passed laws prohibiting engrossing and forestalling. Some of these were passed as part of the price fixing laws while others were separate laws. Some were repealed soon after their enactment while others were in force during the entire period and remained on the statute books for some time thereafter. These laws are collected in CLARK, *op. cit.*, *supra* note 3, and are as follows: *Connecticut*, 1777 and 1778, at 228, 241; *Delaware*, 1779, at 257; *Maryland*, 1777, 1778, and 1779, at 293, 300, 317, 344, 370; *Massachusetts*, 1777, 1779, at 420, 441; *New Hampshire*, 1777, 1778, at 471, 477; *New Jersey*, 1777, 1779, at 513, 532; *New York*, 1780, at 636; *North Carolina*, 1780, at 680, 689; *Pennsylvania*, 1778, 1779, 1780, at 708, 761, 784; *Rhode Island*, 1776, 1777, at 823, 835; *Virginia*, 1777, 1778, 1779, 1781, at 942, 952, 961, 983.

It is not surprising to find the states resorting to this method of control. Colonial history abounds with similar measures.¹¹ Assizes of bread had existed in nearly all of the colonies.¹² These, like their counterparts in England, involved price fixing. The charges of grist mills were generally subject to public control.¹³ Laws against forestalling go back to colonial beginnings at Jamestown soon after 1607 and at Massachusetts Bay a little later.¹⁴ There is some evidence that the assize of bread persisted in at least a few states after the close of the war and even for a few years after the establishment of the new government in 1789.¹⁵ On the whole, however, the new nation shook off its colonial heritage of restrictive price control laws and gratefully gave up the unhappy experiences of the revolutionary years, for the problems of independence were quite different. It was at this time, too, that the *laissez faire* doctrines of Adam Smith, developed so systematically and rationally in his *Wealth of Nations*, published in 1776, were taking hold of men's minds on both sides of the Atlantic. It was in this state of affairs and of men's minds that the United States set out to develop its untapped resources, supply the wants of its people and take its place as a member of the family of nations. On every hand the effort was to protect the struggling young manufacturers at home, to encourage new ones, to foster the American carrying trade by water, to settle new lands and, in short, to build a self-sufficient economic unit.

II. CONTROL OF TRANSPORTATION

It remained for transportation to cement the bonds of the original union, and, coincidentally, to afford a new occasion for the exercise of governmental control over price. The waterways were, of course, the normal highways of an undeveloped country but these were not enough and from 1794 to about 1820 there was a mania

¹¹ Many of these colonial laws are summarized in U. S. DEP'T AGRIC., *op. cit. supra* note 2. We find that in 1640 Connecticut fixed the price of corn for use in payment of debts, *id.* at 19; in 1758 Georgia fixed the price of the work of tradesmen and in 1768 established the assize of bread, *id.* at 23; Maryland had a series of acts fixing the prices of a large number of commodities for use in the payment of debts beginning in 1692 and ending in 1730 and in 1671 it fixed the prices of wines, liquors and other commodities, *id.* at 25; Massachusetts in 1659 fixed the price of strong liquor and in 1720 established the assize of bread, *id.* at 27; Rhode Island in 1721 fixed the price of hemp and flax, *id.* at 35; South Carolina in 1687 fixed the price of corn, beef, pork, tobacco and tar for use in payment of debts, in 1695 it fixed the price of liquor sold in public houses and in 1740 Charlestown fixed the price of building materials as well as the wages of builders, *id.* at 37; Virginia fixed the price of tobacco as early as 1631 and continued this in 1633, 1639-40, 1755 and 1758; in 1647 and again in 1755 it fixed the price of corn; in 1661 it fixed the price of hides and shoes; in 1657 it gave bounties for the production of silk, flax, hops, etc., and fixed the prices for those products as well as wheat and in 1665 and again in 1682 it fixed the price of wheat, tobacco, flax and other commodities for use in the payment of debts, *id.* at 38.

Instances of general price fixing in Massachusetts going back to 1631 and 1634 are given in Jones, *supra* note 2, at 45-46.

¹² CLARK, HISTORY OF MANUFACTURES IN THE UNITED STATES, 1607-1860 (1916) 64.

¹³ *Id.* at 63. A Rhode Island law of 1779 appears in CLARK, *op. cit. supra* note 3, at 860.

¹⁴ See Jones, *supra* note 2, at 43-46.

¹⁵ In U. S. DEP'T AGRIC., *op. cit. supra* note 2, we find reference to the assize of bread in Maryland in 1785, 1789 and in Baltimore in 1794 and 1796, at p. 26; in Richmond, Virginia, in 1790 and Alexandria in 1798, at p. 40; in New Hampshire in 1786, at p. 30; in Georgia in 1790, 1796 and 1797, at p. 21.

of road building. This was the era of the turnpike.¹⁶ Hundreds of turnpike companies were chartered by the states and thousands of miles of road were built. Government, both state and federal, played an important part in this era, but in addition a large amount of private capital went into roads. That meant that the owners charged tolls. It is difficult to learn to what extent tolls were actually fixed in the many charters granted at this time but it is clear that they were fixed in some and it would seem to be beyond dispute that there was ample power to fix them in all.¹⁷

The turnpikes did not satisfy the growing nation. Even when well maintained, and that was seldom true, they were costly, slow, and ill suited to the transportation of bulky freight. Those who looked across the Atlantic found that England had been in a great era of canal building from about 1760 to the close of the century. Canal building was given a great impetus in the United States in 1807 when Albert Gallatin, Secretary of the Treasury, submitted a report advocating an extensive system of canals and turnpike roads to be constructed by the federal government.¹⁸ These recommendations came to grief in the play of local forces and it was not until the completion of the Erie Canal by New York State in 1825 that we enter the era of canal building. The panic of 1837 put an end to it but in the meantime over 906 miles of canals had been built in New York State alone. Other states, especially Pennsylvania and Ohio, rivalled its achievements. The federal government contributed some money for this purpose but the great bulk of it came from state and private sources.¹⁹ Here again there was the problem of tolls and this time we can state more positively that when charters were granted to private companies provisions were included fixing the tolls that might be charged, nor does there ever appear to have been any serious debate as to the power to do this²⁰

In the same way that the turnpikes gave way to the canals in many sections so, too, the canals were destined to meet their match when the network of railroads was finally developed, but the process was slow. From 1840 until the close of the Civil War the canals fully justified their existence and they prospered²¹ but by the beginning of the war some 30,000 miles of railroad had been constructed. This was a phenomenal growth from the small beginnings in 1830 but it was dwarfed by the boom days of railroad construction that followed. By 1890 the railroad network was 166,000 miles in extent and the continent had been spanned many times.²² The effect of all this on economic life became apparent soon after the war. Before the war the Mississippi River enjoyed a large traffic in the produce of the middle west

¹⁶ MEYER, HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860, (1917) cc. I, II; FAULKNER, AMERICAN ECONOMIC HISTORY (1924) 311-316; LARRABEE, THE RAILROAD QUESTION (4th ed. 1893) 37.

¹⁷ MEYER, *op. cit. supra* note 16, at 68-70.

¹⁸ FAULKNER, *op. cit. supra* note 16, at 313; LARRABEE, *op. cit. supra* note 16, at 33, 37-45; MEYER, *op. cit. supra* note 16, at 135.

¹⁹ MOULTON, WATERWAYS VERSUS RAILWAYS (1912) c. V; MEYER, *op. cit. supra* note 16, cc. V-IX; FAULKNER, *op. cit. supra* note 16, at 317-324.

²⁰ MEYER, *op. cit. supra* note 16, at 72.

²¹ MOULTON, *op. cit. supra* note 19, at 69.

²² LARRABEE, *op. cit. supra* note 16, c. III; RIPLEY, RAILROADS: RATES AND REGULATION (1923) c. I.

destined for export by way of New Orleans or for the eastern seaboard but by 1872 it was estimated that eighty-three per cent of this traffic went east by rail and by 1879 seven-eighths of the produce of the trans-Mississippi states did likewise. In the west Chicago had become the grain center of the country,²³ and by the middle of the '70's five great railroads had direct lines to the eastern seaboard.²⁴

These were the essential economic facts which gave direction to the forces that are summed up in the Granger movement of the late '60s and early '70s, in which are found the beginnings that contributed in no small measure to the final outcome, the subjection of the vast railroad properties of the country to public control, both state and federal. First we must retrace our steps briefly. We have already noted that it was the panic of 1837 that put a stop to the mania of canal building but by that time the public debt of the states was over \$170,000,000 and when this is compared with the figure of some \$12,000,000 in 1820 it is evident that internal improvements, since most of this money went for roads and canals, were undertaken with an easy hand in those years. When the bubble burst in 1837 many states repudiated their debts and on every hand there was a desire to get out, and stay out, of expensive public improvements.²⁵ It was this circumstance, probably more than any other, that resulted in railroad construction being carried on by private corporations and individuals and not by the states or other public bodies. The initial impulse came from private sources but the railroad fever caught quickly and it was not long before the lessons of '37 were forgotten and public aid was extended with a lavish hand, even before the Civil War, to this new form of transportation.²⁶ In this period of construction the dominant impulse was the desire to get railroads built and this, coupled with the growing power of the builders, overshadowed all else. The gospel of *laissez faire* economics was never more potent and while there was a gesture of public control of rates in the form of a variety of charter and franchise provisions and in some early general laws, these were never more than a gesture.²⁷ There was another gesture in the form of advisory commissions established for the most part in the New England states but these are best described as permanent legislative fact-finding bodies.²⁸

We come now to the Granger movement²⁹ for it represents the first crystallization of any effective body of opinion that something should be done about railroad rates and practices and, more concretely, that something should be done about them for the benefit of the farmers of the great middle and trans-Mississippi west. These farmers grew articulate for the first time through the order of Patrons of Husbandry, organized in 1867. While the order attempted to hold itself aloof from the partisan

²³ MOULTON, *op. cit. supra* note 19, at 85-86.

²⁴ FAULKNER, *op. cit. supra* note 16, at 452.

²⁵ *Id.* at 324.

²⁶ *Id.* at 332. After the war public aid was given on an even more lavish scale. *Id.* at 456.

²⁷ MOSHER AND CRAWFORD, PUBLIC UTILITY REGULATION (1933) 14; MEYER, RAILWAY LEGISLATION IN THE UNITED STATES (1903) Pt. II, cc. I and II, discuss the rate provisions of early railway charters and general laws.

²⁸ MOSHER AND CRAWFORD, *op. cit. supra* note 27, at 16.

²⁹ BUCK, THE GRANGER MOVEMENT (1913), is indispensable to any study of this movement.

political arena it was an important rallying point for the forces that demanded public control of railroads and as such it partook of the broader political movement. There was something of repentance and frustration, stored-up anger and exasperation in all this. Princely domains had been bestowed upon the railroad companies and princely treasures too, and the farmer himself had made his contribution. In return he expected speedy and cheap transportation of his great staple crops, wheat and corn, to the eastern seaboard but speed and cheapness are relative terms. He made no complaint on the score of speed but the new cheapness seemed unduly high. There were rate wars that promised cheapness but these always seemed to end in treaties of peace that took the form of pools and agreements; moreover, the rate wars seemed to occur only at the competitive points where the contending forces joined issue, and the sinews for the battle seemed to come from unduly high rates at other points. To this discrimination there was added the rebate accorded none too willingly to the big favored shipper and the farmer was not apt to be in this class nor was he the beneficiary of the free passes distributed freely where they would do the most good. The stock market battles, the jobbery and frauds in connection with construction contracts, the watering of stock, all these were foreign to him and so he fastened his eye on what he could see closer to home and the principal things he saw were rankly discriminatory rates and unduly high rates.

The Patrons of Husbandry, or Grange, reached its greatest strength in 1875 when it had over 750,000 members from nearly every state of the union and as such was a new and potent force in American politics. The so-called "Granger Laws" to control railroad rates are directly traceable to its influence. The most important of these were passed in Illinois (1869, 1871, 1873),³⁰ Minnesota (1871, 1874, 1875),³¹ Iowa (1873, 1874),³² Wisconsin (1874, 1875)³³ and Missouri (1875)³⁴ but there was agitation for control in nearly every state. In Illinois the grain warehousemen of Chicago were also the object of a regulatory measure and in 1871 maximum charges for the storage of grain were fixed by statute.³⁵ It must not be supposed that effective public control sprang into existence with the passage of these laws. Many of them were drastic, like the Potter law of 1874 in Wisconsin. Many were largely ineffective for efforts at enforcement were resisted and often thwarted. Almost everywhere the railroad builders were powerful forces and in many states the laws were repealed or sharply modified. But out of this period two important precedents were fixed. The first was the acceptance by the Supreme Court of the United States of the principle that there is power in the states to regulate the charges of railroads and public grain warehouses together with the solemn statement, later repudiated, that "For protection against abuses by legislatures the people must resort to the polls, not to the courts."³⁶ The second was the emergence of the mandatory commission

³⁰ *Id.*, c. IV.

³¹ *Id.* at 159 *et seq.*

³² *Id.* at 166 *et seq.*

³³ *Id.* at 179 *et seq.*

³⁴ *Id.* at 194 *et seq.*

³⁵ *Id.* at 134.

³⁶ *Munn v. Illinois*, 94 U. S. 113, 134 (1876). Other Granger cases are *Chicago, B. & Q. Ry. v. Iowa*, 94 U. S. 155 (1876); *Peik v. Chicago & N. W. R. R.*, 94 U. S. 164 (1876).

vested with power to fix rates and control certain practices as the most effective device for exercising public control.

Both precedents were important when the scene shifted to the Congress with the passage of the Interstate Commerce Act of 1887. The political force of the Granger movement had long since died down but other agrarian groups, notably the Farmers Alliance and the Northwestern Alliance,³⁷ had carried on the work with equal determination. The Knights of Labor, the first national labor organization and a real power in the late '70s and '80s, went all the way and demanded government ownership of railroads.³⁸ New forces were making themselves heard in politics. Independent parties were the order of the day as the leadership of the old parties was challenged.

These forces found expression in the halls of Congress. There was agitation for cheap transportation by government competition through public waterways and a national freight railroad.³⁹ In 1874 the House passed the McCrary bill creating a commission with power to fix maximum rates, but it failed in the Senate.⁴⁰ In the years that followed other bills were introduced and in 1878 one passed in the House but the final impulses that led to the Act of 1887 came from the startling revelations of the Cullom Report of 1886⁴¹ and the decision of the Supreme Court declaring state regulation of interstate rates to be violative of the commerce clause.⁴² The Cullom Report disclosed a sorry picture of unreasonably high local rates as compared with through rates, unreasonably high rates at non-competing points, rank discriminations between persons, places and classes of freight, secret rebates, pooling agreements, and the whole catalogue of prevailing abuses of railroad management. The Supreme Court decision made it clear that if there was to be effective regulation the federal government must do its part, and it would be a leading one, for by this time the purely intrastate haul was but a minor part of railroad transportation. The result was the Interstate Commerce Act of 1887. We must stop here, for the story of experience under the original act, its frustrations, its amendments, and the work of the Interstate Commerce Commission, is a long one.⁴³ What concerns us is that we find here price control exercised over the basic transportation system of the United States and important among the objectives of the original act were the requirements that rates be reasonable, public and non-discriminatory. The last one, a characteristic of all public utility measures, will make its reappearance in a new form in more recent measures dealing with price policies in industry and trade generally.

³⁷ Drew, *The Present Farmers Movement* (1891) 6 POL. SCI. Q. 282, gives an account of the organization and aims of these groups; BUCK, *THE AGRARIAN CRUSADE* (1920), is invaluable to an understanding of this period, see especially cc. VI-X.

³⁸ See BEARD, *THE RISE OF AMERICAN CIVILIZATION* (1930) c. XXI.

³⁹ HANEY, *A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES, 1850-1887* (1910) c. XIX.

⁴⁰ *Id.* at 283.

⁴¹ SEN. REP. NO. 46, 49th Cong., 1st Sess. (1886).

⁴² *Wabash, St. L. & P. R. R. v. Ill.*, 118 U. S. 557 (1886).

⁴³ Professor I. L. Sharfman has to date published four volumes of a projected five on the history and work of the Interstate Commerce Commission.

III. THE ANTI-TRUST MOVEMENT

The story of the almost fantastic growth of industry and trade from the close of the Civil War to the end of the century has been told many times.⁴⁴ The United States was the greatest free trade area in the world. With a constant development of transportation facilities by water and by rail, regional and national markets for the products of the factory were developed on a growing scale. It was the age of the corporation for by the end of the century three-fourths of the manufactured products came from factories owned by corporations, great and small. Expressed in statistics of iron, steel, coal, sugar, oil, copper, beef, pork, lead and other sinews of modern industrialism, the results are indeed impressive. Expressed in terms of human and social values, there is not so much to be said. There were many new millionaires, lords of great financial and industrial domains, but there were multitudes who knew only the long hours of labor, the all too scant pay, and the squalor of the new urban and industrial order.

We have already referred to the agrarian movement of the '70s and its results in the railroad legislation of the middle west. In 1876 it entered the national political scene and, as the Greenback party, polled some 80,000 votes for its candidate for President. In 1880 it polled 308,578 votes and in 1884, 175,370 votes but that was the end of the party.⁴⁵ The Greenback party was a movement of agrarian discontent and protest but its specific for the farmer's troubles was inflation of the currency though there was always a strong flavor of anti-railroad and anti-monopoly in its platforms.⁴⁶ In the late '80s there was a ferment of organization of agrarian groups. The most powerful of these was The National Farmers Alliance and Industrial Union which claimed a membership of 3,000,000 in 1890.⁴⁷ At the elections of that year it secured one Senator and forty-four Representatives pledged to support its demands.⁴⁸ In the field of labor, too, the workingman was making the beginnings of organization on a national scale. In 1875 the Knights of Labor was organized and by 1885 it was strong enough to cripple the Gould railroads with a strike. The following year the American Federation of Labor was organized.⁴⁹ All of these groups were important forces by 1890 and at the election of 1892 they rallied under the banner of the People's party and polled over a million votes.⁵⁰

The leadership of the old parties was put on the defensive as these portents came from the west. The old parties were engaged in a contest over what principle should govern tariff legislation and the national election of 1888 was fought on the

⁴⁴ This story is well told in BEARD, *op. cit. supra* note 38, c. XX.

⁴⁵ BRUCE, *AMERICAN PARTIES AND POLITICS* (3d ed. 1936) 118, 137.

⁴⁶ MCKEE, *THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES, 1789-1901* (1901) 191, 215.

⁴⁷ DREW, *op. cit. supra* note 37; BUCK, *op. cit. supra* note 37.

⁴⁸ BUCK, *id.* at 133.

⁴⁹ See BEARD, *op. cit. supra* note 38, c. XXI; 2 COMMONS, *HISTORY OF LABOUR IN THE UNITED STATES* (1926) 362.

⁵⁰ BRUCE, *op. cit. supra* note 45, at 137.

issue of a tariff for revenue as against a tariff for protection. This was the basic issue and while both major parties, as well as the independent parties, had anti-trust planks in their platforms for the first time,⁵¹ they did not figure as issues in the campaign except perhaps as the Democrats charged that the protection principles of the Republicans tended to foster and protect trusts and combinations.⁵²

That there were trusts, pools and combinations in the new industrial order was evident by this time. The Standard Oil Trust (1882), the Cotton-Seed Oil Trust (1884), the Linseed Oil Trust (1885), the National Lead Trust (1887), the Whiskey Trust (1887), the Sugar Trust (1887) and the Diamond Match Company (1889) were the most important.⁵³ Apart from the trust proper it was charged that industry was honeycombed with pools, gentlemen's agreements to fix prices and limit production, and exclusive selling agencies to market the products of competitors, all designed to limit competition and control prices.⁵⁴ The reports of investigating committees had brought most of this before the public.⁵⁵ The Cullom Report of 1886 had exposed the part played by discriminatory railroad rates and rebates in the building of the new economic empires.⁵⁶

These revelations had had some effect in the states and before July 2, 1890, the date of the Sherman Act, twenty-one states, mostly in the south and middle and far west, had written into their constitutions, or statutes, or both, prohibitions against "monopoly" and "restraint of trade" in one form or another.⁵⁷ But the trusts at this time were national in their scope and state laws could do little about them and little was attempted.

When we turn to the passage of the Sherman Act by the Congress it is difficult to find that that body was responding to an aggressive public demand that something be done about "the trust problem." The national campaign of 1888 had been fought on the tariff issue, as we have noted, and the Congress of 1890 devoted most of its time and attention to the passage of the McKinley Tariff Act of 1890, an act that for the first time was based largely on the principle of protection.⁵⁸ The agrarian forces marshalled their strength in opposition to it but the best they could get was protection for farm products that was neither wanted nor needed and the passage

⁵¹ MCKEE, *op. cit. supra* note 46, at 235, 241, 247, 251. The Democratic party in 1884 had a mild and equivocal anti-trust plank in its platform. *Id.* at 206.

⁵² *Id.* at 235.

⁵³ SEAGER AND GULICK, *TRUST AND CORPORATION PROBLEMS* (1929) 49-60; JONES, *THE TRUST PROBLEM IN THE UNITED STATES* (1928) c. III.

⁵⁴ *Id.* c. II.

⁵⁵ In 1888 a committee of the New York Senate brought to light facts about the sugar trust and other combinations, N. Y. SEN. DOC. No. 50 (1888); two reports were submitted in 1888 by a House committee which had investigated the oil, sugar, whiskey and cotton-bagging combinations but the report was poorly presented and contained no recommendations for legislation. H. R. REP. No. 3112, 50th Cong., 1st Sess. (1888); H. R. REP. No. 4165, 50th Cong., 2d Sess. (1889).

⁵⁶ *Supra* note 41; the earlier Windom Committee report of 1874 had contained similar facts. SEN. REP. No. 307, 43d Cong., 1st Sess. (1874).

⁵⁷ SEAGER AND GULICK, *op. cit. supra* note 53, c. XVII.

⁵⁸ TAUSKIG, *THE TARIFF HISTORY OF THE UNITED STATES* (1923) c. V.

of the Silver Purchase Act, an act that was but a halting step in the direction of the currency measures that they were advocating.

It is difficult, too, to escape the conclusion that the Sherman Act fits in the same category.⁵⁹ In the Senate the vote was 52 to 1. In the House it was unanimous. There was little debate in either body. In the Senate it took up only five days at different times while in the House it is hard to find more than one day devoted to this subject.⁶⁰ There was public knowledge of the existence of trusts and their practices but it had not been translated into any aggressive demand for legislation. There was another issue that was in the forefront and it was the tariff. The Sherman Act would be a simple answer to those who denounced the tariff as a measure that would enrich the trusts and foster higher prices. The unanimity with which it became law makes the Act seem to be little more than a measure to appease the growing unrest in the farming and industrial regions. Senator Platt of Connecticut took that view of the matter when he characterized the proceedings in the Senate as not "in the line of the honest preparation of a bill to prohibit and punish trusts. It has been in the line of getting some bill with that title that we might go to the country with."⁶¹

The debates are of little help in shedding light on the precise meaning of the law. It was Mr. Justice Peckham who summed the matter up when he declared that "all that can be determined from the debates and reports is that various members had various views."⁶² The general language of the law was an invitation to debate and controversy as to its meaning and effects and, in the hands of lawyers and judges, that controversy still persists. The economics of the Sherman Act may be simply stated. Monopolies and attempts to monopolize are proscribed and so are contracts and combinations in "restraint of trade." There is here a legislative attempt to protect a system of competition against the operation of forces that would tend to destroy it. This involves a conception of a norm of competition which when operative would insure fair prices to the consumer and fair profits to the producer. The preservation of the automatism of free competition, enforced by government, was the great objective. It is noteworthy that with the precedent of the railroad law so fresh in its mind the Congress entrusted its broad mandate to the judges rather than to an administrative body charged with responsibility for endowing it with meaning in the first instance.

Until after the turn of the century the story of the Sherman Act is not that of a law passed in response to an insistent public demand. It fairly languished on the statute books. President Harrison was in office for close to three years after he approved the Sherman Act on July 2, 1890 yet these years are barren of any effective

⁵⁹ BUCK, *op. cit. supra* note 37, at 132.

⁶⁰ KNAUTH, *THE POLICY OF THE UNITED STATES TOWARDS INDUSTRIAL MONOPOLY* (1914) c. II; CLARK, *THE FEDERAL TRUST POLICY* (1931) c. III; SEAGER AND GULICK, *op. cit. supra* note 53, at 372-373.

⁶¹ As quoted in BEARD, *CONTEMPORARY AMERICAN HISTORY, 1877-1913* (1914) 136. See also 21 CONG. REC. 2729 (1891).

⁶² *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318 (1897).

steps against the well known trusts.⁶³ An indictment against the Whiskey Trust was found to be faulty and was quashed and at the close of the administration a bill in equity was filed against the Sugar Trust. A suit against the Trans-Missouri Freight Association, involving an agreement as to rates among a group of railroads, was unsuccessful in the lower courts though the United States won in the Supreme Court during the administration of President Cleveland. The record of the second Cleveland administration is little better.⁶⁴ The suit against the Sugar Trust was decided by the Supreme Court in 1895 and it was a complete victory for the trust.⁶⁵ There was a little comfort in the success of the suit against the Trans-Missouri Freight Association,⁶⁶ and this was confirmed in a later decision in a similar suit against the Joint Traffic Association.⁶⁷ But these successes were gained by a 5 to 4 vote in the *Trans-Missouri* case and a 5 to 3 vote in the *Joint Traffic* case while the defeat in the *Knight* case had provoked only one dissent. There is little more to be said about the McKinley administration. There was a unanimous victory in the suit instituted under Cleveland against the Cast Iron Pipe combination, and that is all.⁶⁸

A law passed in response to an insistent popular demand does not lie idle on the statute books for ten years, as this one had, while the objects against which it is directed gain in number and size and power, yet that is precisely what had happened. The *Knight* case of 1895 seemed to remove any obstacle to combination that the Sherman Act might have presented and this, together with the defeat of Bryan in 1896, the Dingley tariff of 1897 and an era of business prosperity that followed, were all factors favorable to the further development of the trust movement. In these years combinations generally made use of the holding company device. The new combinations were organized on a gigantic scale, the biggest of all being the billion dollar Steel Trust of 1901.⁶⁹

During the administrations of Theodore Roosevelt and Taft there was far greater activity in the enforcement of the Sherman Act than there had ever been before.⁷⁰ The victory of the United States in the *Northern Securities* case in 1904,⁷¹ even though the Court was almost as badly divided in its reasons as it was in its votes, was enough to shake the faith of the trust organizers in the immunity of the

⁶³ The record of the Harrison administration is reviewed in WALKER, HISTORY OF THE SHERMAN LAW (1910) c. IV.

⁶⁴ *Id.* c. V.

⁶⁵ U. S. v. E. C. Knight Co., 156 U. S. 1 (1895).

⁶⁶ U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897).

⁶⁷ U. S. v. Joint Traffic Ass'n, 171 U. S. 505 (1898).

⁶⁸ U. S. v. Addyston Pipe and Steel Co., 175 U. S. 211 (1899); WALKER, *op. cit. supra* note 63, c. VI.

⁶⁹ SEAGER AND GULICK, *op. cit. supra* note 53, c. V, describes the movement during this period; see also BEARD, *op. cit. supra* note 61, c. IX.

⁷⁰ During the Roosevelt administrations there were brought 18 bills in equity, 25 indictments and one forfeiture proceeding. President Taft outdid this, his administration bringing 46 bills in equity, 43 indictments and one contempt proceeding. A list of cases instituted by the United States under the anti-trust laws during the different administrations will be found in THE FEDERAL ANTITRUST LAWS (U. S. Gov't Printing Office, 1928).

⁷¹ Northern Securities Co. v. U. S., 193 U. S. 197 (1904). The court split five to four, and four opinions were delivered.

holding company device and there was a definite halt in the movement. The sweeping victories seven years later in the *Standard Oil*⁷² and *American Tobacco*⁷³ cases brought with them the labored enunciation of the "rule of reason" by Chief Justice White. With all its vagaries it still stands as the accepted reading of the Sherman Act. The rule did not, however, gain ready acceptance for a Senate committee in 1913 reported that this rule made it "imperative to enact additional legislation." The committee found itself "unwilling to repose in the Supreme Court, or any other court, the vast and undefined power which it must exercise in the administration of the statute under the rule which it has promulgated."⁷⁴

In spite of this attitude the "rule of reason" survived the attempt to change it and the final legislative products, the Clayton Act⁷⁵ and the Federal Trade Commission Act,⁷⁶ represented a reaffirmance of the basic faith of the Sherman Act. They differed not at all from the Sherman Act in their purposes but only in the methods to be pursued to achieve the common objective.⁷⁷ Both were designed to implement the earlier law. It was believed that certain practices were so generally the tools of incipient monopoly that the proscription of those practices would halt the fruition of monopoly and restraint of trade. It was believed that government would act more effectively if it could step in and check certain practices than if it must wait until its only recourse was to seek to dissolve the trust at the height of its power. It is in this connection that the prohibition against the discriminatory price first made its appearance in federal anti-trust law in Section 2 of the Clayton Act. It was designed to check the elimination of a competitor by local price cutting. The objective here is quite different from that of the typical public utility law. The latter, with its requirements that rates be non-discriminatory and be published and adhered to, imposes a substantially uncompromising one-price policy on the utility whereas the anti-trust flavor injected into the Clayton Act marks a definite compromise with that idea.

To sum up, the basic faith in all this anti-trust legislation was a faith in the automatism of free competition. If this could be preserved by government, the merits of the system, so convincingly set out in 1776 by Adam Smith in his *Wealth*

⁷² *Standard Oil Co. of N. J. v. U. S.*, 221 U. S. 1 (1911).

⁷³ *U. S. v. American Tobacco Co.*, 221 U. S. 106 (1911).

⁷⁴ SEN. REP. NO. 1326, 62d Cong., 3d Sess. (1913).

⁷⁵ 38 STAT. 730 (1914), 15 U. S. C. §13.

⁷⁶ 38 STAT. 717 (1914), 15 U. S. C. §41.

⁷⁷ The statement in the text must be confined to the legislative purpose behind these laws. See HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924) c. 1; CLARK, *THE FEDERAL TRUST POLICY* (1931) c. VIII; Montague, *The Federal Trade Commission and the Clayton Act in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION* (1917); Handler, *The Jurisdiction of the Federal Trade Commission over False Advertising* (1931) 31 COL. L. REV. 527. The judicial view as to the purpose of the Federal Trade Commission Act is clearly expressed by Mr. Justice Sutherland in *F. T. C. v. Faladam*, 283 U. S. 643, 650 (1931), and by Mr. Justice Brandeis (dissenting) in *F. T. C. v. Gratz*, 253 U. S. 421, 434 (1920). It must be recognized that many of the practices challenged by proceedings under this legislation have had little, if anything, to do with the practices that motivated the legislation; as to the Federal Trade Commission, see Handler, *supra*, and as to §2 of the Clayton Act, see McAllister, *Sales Policies and Price Discrimination under the Clayton Act* (1932) 41 YALE L. J. 518, but this does not invalidate the statement as to legislative purpose.

of Nations, would work. It is in this sense only that anti-trust laws involve control of price. There is here no direct control by government. It is only by indirection, by seeking to maintain conditions of competition, that government makes itself felt in the market place.

IV. EXTENSION AND RESTRICTION OF DIRECT PRICE CONTROL: 1907-1929

It is to the expanding field of public utilities that one must turn for direct control of price. The early Granger decisions of the Supreme Court in 1876, particularly *Munn v. Illinois*,⁷⁸ contained in them the recognition of state power to regulate the charges of public utilities but it was not until 1907 that the movement began for further state regulation. At that time gas and electricity were coming to be the household necessities that they are today. With the monopoly that was necessarily enjoyed by the owners of the pipes and wires there came direct control of price, and in 1907 New York under Governor Hughes and Wisconsin under Governor La Follette enacted laws creating state public service commissions with broad powers to regulate the charges of public utilities. In the selection of the commission method of control there is a further reminder of the pioneer Granger railroad laws. The movement spread rapidly and within six years twenty-two states had created commissions with varying powers over different kinds of utilities. It was at this time, too, that state control of insurance first made its appearance.⁸⁰ Today only Delaware is without such a commission. The list of utilities subject to public control has grown from the railroads, warehouses, and grain elevators of the Granger days to include electric light and power, gas, street and interurban railways, telephone and telegraph, motor vehicle carriers, water works, pipe lines and heating plants.⁸¹ In all of this legislative price control there is the necessary corollary that prices be non-discriminatory.

During the World War the United States undertook a broad policy of price fixing. Prices were fixed for basic raw materials such as iron ore, copper, lumber, coal, zinc, sulphuric acid and many consumption necessities such as sugar, flour and raisins. The necessities of the war brought this about and price fixing ended with the Armistice.⁸² The rent law of New York and similar Congressional action for the District of Columbia were a part of the war movement.⁸³ In 1919, as an aftermath of war conditions, Montana undertook to vest in a state commission power to fix the price of all commodities but this effort ran afoul of constitutional arguments and was short lived.⁸⁴

⁷⁸ *Supra* note 36.

⁷⁹ This movement is reviewed in MOSHER AND CRAWFORD, *op. cit. supra* note 27, c. II.

⁸⁰ *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1914) (sustained the constitutionality of the Kansas law).

⁸¹ MOSHER AND CRAWFORD, *op. cit. supra* note 27, c. III.

⁸² See Haney, *Price Fixing in the United States during the War* (1919) 34 POL. SCI. Q. 104, 262, 434.

⁸³ *Block v. Hirsch*, 256 U. S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921).

⁸⁴ *Holter Hardware Co. v. Boyle*, 263 Fed. 134 (D. Mont. 1920), *appeal dismissed on stipulation* 257 U. S. 666 (1920), 33 HARV. L. REV. 838.

The Packers and Stockyards Act of 1921⁸⁵ was the result of years of fruitless agitation, investigation and efforts to enforce the anti-trust laws. From 1918 to 1920 the Federal Trade Commission released a series of reports of its turbulent investigation of the meat packers and thereafter the demand for special legislation would not down.⁸⁶ The law itself was little more than a codification of anti-trust matters with special reference to the practices prevailing in the meat packing and stockyards businesses. The only departure from orthodox anti-trust policy was in the power vested in the Secretary of Agriculture to fix the maximum charges for the services of stockyards.⁸⁷ This was direct price fixing and to that extent represented a departure from the tenets of the Sherman Act. It was evident to the investigators and the Congress that competition played no part in the fixing of these charges.

Before considering the recent price control legislation of the depression years it remains but to record the price fixing attempts of the 1920s that make up the Index Expurgatorius of the Supreme Court. They include the charges of theatre ticket agents,⁸⁸ employment agents,⁸⁹ gasoline,⁹⁰ and ice.⁹¹ How these matters came to be on this Index has been discussed elsewhere.⁹² Its existence lends point to other and indirect methods of price control and, of these, competition by government is apt to be important. The Index will thus merely deflect the course of governmental action.

V. PRICE CONTROL DURING THE DEPRESSION

The economic dislocations caused by the depression brought forth new sorts of price control. Heretofore we have been concerned solely with efforts of government to circumscribe economic power of one kind or another in such a way as to check real or fancied exploitation of the public. The measures may have taken the form of direct price control or the indirect methods of the anti-trust laws but in all the legislative purposes were the same. The objectives of the depression legislation to be considered now were quite different.

New York State led the way with a statute of 1933 to fix the price of milk. An investigation lasting nearly a year preceded legislative action. The importance of the dairy industry in the agricultural economy of the state, the dependence of the people on the continuance of an essential food supply and the serious threat to the industry caused by the alarming price declines of 1931 and 1932, were all factors that led the state to seek to rescue the industry by direct price fixing. The prices received by the farmer for his milk had fallen below the cost of production and it was this that the legislature sought to correct. The statute received the constitutional

⁸⁵ 42 STAT. 159 (1921), 7 U. S. C. §201. See *Stafford v. Wallace*, 258 U. S. 495 (1922).

⁸⁶ FED. TRADE COMM'N, REPORT ON THE MEAT PACKING INDUSTRY (1918-1920).

⁸⁷ The constitutionality of this section of the act was sustained in *Tagg Bros. & Moorhead v. U. S.*, 280 U. S. 420 (1930).

⁸⁸ *Tyson v. Banton*, 273 U. S. 418 (1927).

⁸⁹ *Ribnik v. McBride*, 277 U. S. 350 (1928).

⁹⁰ *Williams v. Standard Oil Co.* 278 U. S. 235 (1929).

⁹¹ *Cf. New State Ice Co. v. Liebmann*, 285 U. S. 262 (1932).

⁹² *McAllister, Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759.

blessing of the Supreme Court but only by a close margin.⁹³ The movement spread rapidly into about a dozen other states⁹⁴ but the New York law expired by limitation in April, 1937 and has not been renewed. This will probably mark the end of similar measures in the neighboring states.

The National Industrial Recovery Act⁹⁵ was a similar rescue expedition but on a much broader scale. It sought to deal with the ravages of a nationwide business depression. In this broad objective it played its part along with other measures for relief and recovery. There was price fixing and price control in a variety of forms in the N.R.A. codes of fair competition but the dominant purposes of the entire effort were to put people back to work by shortening hours of labor, to increase general purchasing power by fixing minimum wages and to encourage collective bargaining as to wages above the minimum.⁹⁶ If industry was to pay the increased cost growing out of this program it demanded, and in a large measure received, various forms of price control in the codes. These have been reviewed in detail elsewhere⁹⁷ and there is no need to run through the list again. It is noteworthy, however, that the process of code making was predominantly one of higgling and bargaining between government and the interested parties with only a phantom mandate from the Congress. It was in this haphazard fashion that the government found itself embarked upon the most extensive effort at price control ever undertaken in this country when the Supreme Court put an end to the whole enterprise.⁹⁸ There is a wealth of experience in the short history of the codes and much to be learned in the field of economics and, of equal importance, in the determination of the limits of effective public administration. As far as public law is concerned, the reproving words of the Supreme Court addressed to the unbounded delegation of power by the Congress should have a salutary effect. Hereafter we may look for Congressional mandates that articulate a policy. It is a vain exercise to attempt to reconcile the economics of the N.R.A. with the tenets of the anti-trust laws. In spite of the deferential gesture of the Congress towards the earlier dogma we have it now on high authority that in the codes as finally written there was a denial of the older

⁹³ *Nebbia v. New York*, 291 U. S. 502 (1934). The conditions in the industry as revealed in the investigation that gave rise to this statute are fully set forth in the majority opinion in this case. The original statute expired by limitation on March 31, 1934 but was extended for additional periods until April, 1937. It was allowed to lapse on that date. Goldsmith and Winks, *Price Fixing: From Nebbia to Guffey* (1936) 31 ILL. L. REV. 179.

⁹⁴ Laws of New York, Virginia, New Jersey and Pennsylvania are discussed in Note (1936) 21 CORN. L. Q. 366. Price fixing laws were also found in the following states: *Connecticut*, GEN. STAT. (Cum. Supp. 1933, 1935) c. 107a, §§796c-811c, 1933, 1935; *Florida*, Laws 1935, Vol. 1, p. 772; *Massachusetts*, Acts 1934, c. 376; *Ohio*, OHIO GEN. CODE (Page, Supp. 1926-1935) §1080; *Oregon*, CODE (Supp. 1935), §41-2001; *Rhode Island*, Pub. Laws 1934, p. 64; *Vermont*, Pub. Laws 1933, c. 197, §4618; *Wisconsin*, Laws 1933, c. 65.

⁹⁵ 48 STAT. 195 (1933), 15 U. S. C. §703.

⁹⁶ For what must now be taken to be an authoritative statement of the background, objectives and economic policies of this effort, see REPORT OF THE PRESIDENT'S COMMITTEE OF INDUSTRIAL ANALYSIS ON THE NATIONAL RECOVERY ADMINISTRATION, (Feb. 17, 1937) c. I; see also LYON *et al.*, THE NATIONAL RECOVERY ADMINISTRATION (1935) c. III.

⁹⁷ TERBORGH, PRICE CONTROL DEVICES IN N.R.A. CODES (1934); LYON *et al.*, *op. cit. supra* note 96, c. XXIII.

⁹⁸ *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495 (1935).

laws in many and important particulars and of these price control stands at the head of the list.⁹⁹

The Bituminous Coal Conservation Act of 1935¹⁰⁰ was, of course, directly traceable to the N.R.A. It was but a special code for a particular industry and as such it provided for control of hours of labor, wages and prices. In the bituminous coal industry labor cost amounts to about two thirds of the cost of producing a ton of coal.¹⁰¹ In this circumstance any force that determines the wage level will make itself felt in the price level. The interdependence of the two is so great that any control of the one will produce effects on the other. If the wage contract is to be controlled then it is necessary to control prices in order that operators may be able to pay the wages. If prices are controlled, the level at which they are fixed will largely determine the kind of a wage contract that may be made. Government sought to deal with both factors in the original act. Six Justices of the Supreme Court were explicit in declaring that the Congress was without power to deal with the factor of labor costs and four Justices were equally explicit in sustaining the power to deal with the factor of prices.¹⁰² Judicial utterances as to the separability or inseparability of the provisions of the act dealing with these matters will have no effect on the economics of the industry. However disappointed organized labor may be in the outcome of the initial constitutional tilt the demand for price control still has its support for the bearing of prices on wages is all important in the still depressed coal industry. The new Bituminous Coal Act of 1937¹⁰³ is the fruit of the demand for price stabilization. It is an attempt to salvage what may turn out to be valid in the second encounter with constitutional arguments. The debate as to the validity of price control will not be cast in terms of the bearing of prices on wages but any consideration of the legislative purpose must give an important place to the desire to exert control over this vital factor in the process of writing a wage contract.

VI. PRICE DISCRIMINATION: THE ROBINSON-PATMAN ACT

The Robinson-Patman Act¹⁰⁴ is not an anti-trust law for, though it bears a superficial resemblance to Section 2 of the Clayton Act¹⁰⁵ which it undertakes to

⁹⁹ See REPORT OF THE PRESIDENT'S COMMITTEE, *supra* note 96, at 216 *et seq.*

¹⁰⁰ 49 STAT. 991 (1935), 15 U. S. C. §801.

¹⁰¹ "The interdependences of wages and prices is manifest. Approximately two thirds of the cost of producing a ton of coal is represented by wages," *per* Mr. Justice Sutherland in *Carter v. Carter Coal Co.*, 298 U. S. 238, 315 (1936).

¹⁰² *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

¹⁰³ The text of the act appears in C. C. H., TRADE REGULATION SERVICE, *Coal Regulation*. It was signed by the President in April, 1937. To the effect that organized labor supports the price control provisions, see the statement of counsel for the United Mine Workers of America who had cooperated in the drafting of the Act, as quoted in the dissenting opinion of Mr. Justice Cardozo in the *Carter Case*, 298 U. S. at 336.

¹⁰⁴ 49 STAT. 1526 (1936), 15 U. S. C. §§13, 13a. Excellent discussions of the Act appear in Notes (1936) 50 HARV. L. REV. 106; (1937) 46 YALE L. J. 447; (1936) 36 COL. L. REV. 1285. See also valuable discussions by Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store*, (1936) 15 HARV. BUS. REV. 62, and by the speakers at the symposium held by the Trade Association Executives in New York City and published as CONFERENCE PROCEEDINGS ON THE ROBINSON-PATMAN ANTI-DISCRIMINATION ACT (1936).

¹⁰⁵ 38 STAT. 730 (1914), 15 U. S. C. §13. This section is discussed by the writer in *Sales Policies and Price Discrimination under the Clayton Act* (1932) 41 YALE L. J. 518.

amend, both the forces that brought it about and its objectives are quite different. Nor is it a legislative rescue expedition traceable to the depression. And, of course, it is not a price-fixing measure though its general requirement that prices be non-discriminatory is characteristic of measures designed to control the charges of public utilities. Its concern is with the marketing structure by which goods pass from the producer to the ultimate consumer, and this sets it apart from earlier laws. Nationwide and regional markets have introduced great variety and complexity into marketing structures and in many instances the familiar lines separating manufacturer, wholesaler and retailer have been broken. Chain organizations of many forms, department stores, mail order houses and cooperative buying pools are all evidence of basic change. The necessary functions are performed in different ways and are often combined in one hand but wherever goods must pass from person to person in this process the price paid for goods may be vital to the prosperity or even survival of a given class of persons in the hierarchy of distribution. It is for this reason that the Robinson-Patman Act takes a proper place in any discussion of price control by law for it seeks to outlaw a price practice that is thought to constitute an unfair advantage secured by the mass distributor, this relatively new colossus in marketing, in the contest with the independent. It is an anti-chain store law and must take its place in its legislative purpose with other measures of like import.¹⁰⁶

In spite of this particular objective the Act is drawn in universals and these, when examined in the particulars of a great variety of marketing problems, prompted one able commentator to declare that there is "a lawsuit in literally every word of it."¹⁰⁷ From this there is no dissent. Moreover, this fact has posed a difficult problem for the writer of this "survey" article which has been met only by a rigorous selection of matter for discussion. In this process, a consideration of Section 3 of the Act has been eliminated. That section was the fruit of a legislative compromise. The Robinson-Patman Bill encountered a rival in the Borah-Van Nuys Bill which subjected to criminal penalties certain discriminatory practices which were comprehended by the provisions of the Robinson-Patman Bill. The contest between the two measures was resolved by the inclusion of the Borah-Van Nuys provisions in the Robinson-Patman Act as Section 3, a procedure which has bred a host of interpretive problems. No prosecutions are known to have been instituted under Section 3, and it seems clear that Section 1, amending Section 2 of the Clayton Act, will prove the significant provision of the new Act. Attention has therefore been confined to it.^{107a}

The Act declares that "it shall be unlawful for any person engaged in [interstate]

¹⁰⁶ For the political and commercial background and legislative history of the Act, see Ellison in CONFERENCE PROCEEDINGS, *supra* note 104, Evans, *Anti-Price Discrimination Act of 1936* (1936) 23 VA. L. REV. 140-146. The original act was drafted by counsel for the United States Wholesale Grocers Association and was actively promoted as an anti-chain store measure by that association.

¹⁰⁷ Gordon in CONFERENCE PROCEEDINGS, *supra* note 104, at 21.

^{107a} There will, however, be no reference to problems arising under subsections (c) (d) and (e) of that section dealing with payment of brokerage and advertising allowances.

commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce [up to this point the Act is substantially identical with old Section 2 of the Clayton Act but what follows is new] or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them. . . ." It is at once apparent that, like old Section 2, it is not every discrimination in price that is outlawed but only those that produce the specified effects on competition. There are, then, two questions to be asked and each must be answered in the affirmative in order to find a violation of the Act. Has there been a price discrimination? Has it produced at least one of the effects specified in the Act? These questions will be taken up in order.

Strictly speaking there is a discrimination *in price* when there is *any* difference in price to *any* buyer for the dictionary tells us¹⁰⁸ that to discriminate is to mark a distinction, a difference, and when that is applied to price, any difference would seem to be enough. The Act, however, mollifies somewhat the rigors of the dictionary in its other provisions. Thus, there is no discrimination in price within the meaning of the Act unless the difference be as to "commodities of like grade and quality." We merely learn from this that a seller may make a different price for his shaving soap than for his bath soap and there is room for many interpretations in the twilight zone of meaning of these words.

Also, there is no discrimination in price if the discrimination makes "only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." This provision is of great importance and is pregnant with lawsuits. The straight quantity discount was an effective escape from the perplexities of old Section 2¹⁰⁹ but now it may be justified only if it makes "only due allowance" for differences in cost of manufacture, sale or delivery. The cost accountant will be called upon to develop a technique to make some showing of a cost difference on which to base a price difference and the battle will be over the items that may be included in the accountant's tables. The outcome will depend on how exacting the courts turn out to be.¹¹⁰ The words of the Act do not foreshadow the result but the common sense of the judges is apt to call a halt to disputation when some fairly approximate result has been reached for otherwise litigation might well lose sight of the broad objective in a welter of the accountant's tables. The objective would seem to call for no more than some reasonable or approximate relation between the schedule of quantity discounts and the savings in cost that the quantity

¹⁰⁸ The writer consulted WEBSTER'S NEW INTERNATIONAL DICTIONARY (1928).

¹⁰⁹ This point has been discussed by the writer, *op. cit. supra* note 105.

¹¹⁰ The type of controversy that must inevitably arise is foreshadowed in the proceedings of the Federal Trade Commission against the Goodyear Tire and Rubber Co. See GEORGE, THE FEDERAL TRADE COMMISSION DECISION IN THE GOODYEAR CASE (Dun & Bradstreet, Inc., 1936).

sold or the method of sale may make possible. The quantity discount is thus preserved to the mass distributor, and others too, but its preservation carries with it the burden of relating it to some saving in cost. By calling a discount a quantity discount the seller does not foreclose further inquiry for the assumption of the Act is that a so-called quantity discount is not a quantity discount at all but is rather a discriminatory price unless the seller is able to show that it reflects some saving in cost.¹¹¹ Cost is thus the exclusive touchstone of the validity of this discount. A host of practical problems will follow in the wake of this principle.¹¹²

The functional discount is of long standing in marketing practice. It involves a classification of the seller's customers according to the functions performed by members of the class and the granting of a different discount to the different classes. If a customer is classified as a wholesaler he ordinarily gets a more favorable discount than if he is classified as a retailer. There is, then, even in this simple case, an obvious price differential and *prima facie*, at least, this is a price discrimination within the meaning of the Act. The difficulties grow out of the fact that there are no closed categories of wholesalers or of retailers. Wholesalers may be general or short line; they may maintain warehouses and perform other services or they may not; they may be large or small. Retailers may operate as local, regional or national chains, or as mail-order houses or department stores and the method of operation may involve the performance of functions otherwise performed by a wholesaler. Retailers, too, may be large or small independents and as such they may be loosely or closely organized into cooperative buying and service groups. In this way the symmetry of a simple marketing structure is broken at many points. Functions become blurred and the lines of competition are broken. In this situation there may be many instances in which purchasers of a like quantity are sold at different prices or even in which a purchaser of a greater quantity is sold at a higher price than others for the functional discount, as such, takes no account of the quantity purchased. The classification to be accorded a given purchaser or class of purchasers will often bring to the forefront the struggle between the mass distributors and the so-called legitimate outlets and on a shifting market scarcely any sales policy can be worked out that will not involve some discrimination in the ordinary dictionary meaning of the word. This, as we shall see, does not necessarily stamp it as unlawful but does suggest that it will be difficult to answer the first question, as to whether there has been a discrimination in price, in anything but the affirmative.¹¹³

¹¹¹ This was in substance the position taken by the Federal Trade Commission in its proceedings against the Goodyear Tire and Rubber Co. under old §2 of the Clayton Act. See George, *supra* note 110.

¹¹² Many of these are discussed in Notes (1936) 36 COL. L. REV. 1285, 1304; (1937) 46 YALE L. J. 447, 455. There is also the provision empowering the Federal Trade Commission to fix and establish quantity limits which may not be exceeded but this depends on a finding that "available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce," Robinson-Patman Act, §1(a).

¹¹³ This analysis is based on the language of the Act and on a study of the comparable language of old §2 and has been discussed with reference to available court decisions by the writer, *op. cit. supra* note 105. Most commentators prefer to state that there is no "discrimination" within the meaning of the Act

There are three other provisions that deserve brief mention. One deserves mention only that it may be dismissed. That is the provision that recognizes the right of the seller to select his customers. One court¹¹⁴ thought that this might justify a discrimination between customers selected but that seems wrong. It imports no such thing. Another provision justifies price differentials as applied to sales of perishables and seasonal goods, distress sales and sales of discontinued lines. The last provision permits a seller to rebut a *prima facie* case of price discrimination by showing that the different price was made "in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor." There is dispute as to whether this merely establishes a rule of procedure or whether it constitutes an absolute defense to a charge of discrimination.¹¹⁵ Whatever the outcome may be there is nothing in the language to suggest that it makes any difference whether the price being met is itself discriminatory or whether a discriminatory price must be made to meet the other price. Without more specific language it is hard to see how the courts can do more than apply it as it stands, no matter at what sacrifice to the effectiveness of the Act, and the sacrifice would be great.¹¹⁶

Assuming that a discrimination in price has been made out we come now to the second question, has it produced at least one of the effects specified in the Act? One of the proscribed effects is taken verbatim from old Section 2 of the Clayton Act and that is where the effect "may be substantially to lessen competition or tend to create a monopoly" so that this comes into the new Act loaded with such meaning as has already been given to it by the courts.¹¹⁷ The other proscribed effects are new and they are "to injure, destroy, or prevent competition with any person who either grants or knowingly¹¹⁸ receives the benefit of such discrimination or with customers of either of them." There is here no requirement that there be a showing of substantiality.¹¹⁹ It is enough if competition is injured, destroyed or prevented

unless it has produced one of the prohibited effects. See Thurlow M. Gordon in CONFERENCE PROCEEDINGS, *supra* note 104, at 23, 29; Note (1936) 50 HARV. L. REV. 106; Smith, *The Patman Act in Practice* (1937) 35 MICH. L. REV. 705, 708. These commentators generally quote the statement of Representative Utterback in 80 CONG. REC. 9559 (June 15, 1936) to the effect that a "discrimination" is more than a mere difference and implies some relationship between parties that entitles them to equal treatment. It seems to the writer that Representative Utterback's idea is taken care of by the requirement that, in order to constitute a violation of the Act, the "discrimination" must produce certain effects on competition. It is the disturbance of a relationship of competition that is important. It probably does not matter very much which view is taken. The writer simply prefers to give the word "discrimination" its ordinary meaning and direct attention to the effect of the "discrimination" on competition.

¹¹⁴ *Mennen Co. v. F. T. C.*, 288 Fed. 774 (C. C. A. 2d. 1923), *cert. denied*, 262 U. S. 759 (1923).

¹¹⁵ See Notes (1936) 36 COL. L. R. 1285, 1311; (1936) 50 HARV. L. REV. 106, 117; Thurlow M. Gordon in CONFERENCE PROCEEDINGS, *supra* note 104, at p. 33.

¹¹⁶ One must not be too dogmatic on this point, however, and commentators foresee the possibility that the contrary view may be taken. See note 115, *supra*.

¹¹⁷ This has been discussed by the writer, *op. cit. supra* note 105.

¹¹⁸ The presence of this word is puzzling. It is thought to be inadvertent in Note (1937) 46 YALE L. J. 447, 450. In Note (1936) 50 HARV. L. REV. 106, 108, it is thought that it will have to be disregarded completely in order to avoid unintended consequences.

¹¹⁹ It may be said that under old §2 of the Clayton Act the requirement of substantiality was met by a showing, without more, of injury to a particular competitor and *Sidney-Morris & Co. v. National Ass'n*

and, of these, injury is the most susceptible of proof and therefore the most drastic from the point of view of the seller.¹²⁰ The courts will have to fashion some specification of the kind and degree of proof required to show injury to competition and the task will not be easy for if the injury is caused in any field of competition, whether of the vendor, the vendee or even of the sub-vendee, that is enough. If this provision is given a literal application it will require the seller so to fashion his price policy that it will not produce injury to competition at any step in the process of getting his product to the consumer. When the seller is charged with responsibility for the consequences of his own price policy in the field of competition in which he and his vendees are engaged, there can be no complaint but when to this is added responsibility for the policies of his vendee it would seem that this could not stand without some showing of complicity of the vendor with his vendee. Without this there is a bare attempt to fasten responsibility on one for the acts of another whom he cannot control or direct but with it there is a division of responsibility among those who caused and made possible the forbidden discrimination. The rigors of even such a temperate construction of the Act may well cause the courts to be exacting in requiring proof of a causal relation between the price discrimination and the fact of "injury" to competition.

In all cases the effect must be on "competition" and here the courts will be required to draw in some way the lines that mark the fields of competition. This will be particularly troublesome where functions often performed by different persons are absorbed into one hand. For example, is a retail chain store that buys direct from a manufacturer in competition with an independent wholesaler? Is a cooperative buying pool of retailers in competition with an independent wholesaler when it buys direct from the manufacturer? Many more such questions will arise in the administration of this act and space does not permit of their discussion.¹²¹

This much, however, may be said. The salvation of functional discounts and of other practices of long standing in trade will depend upon the conclusions reached by judges on the many and important questions that will arise under the Act. This result is foreshadowed by the provisions for its enforcement. The Robinson-Patman Act is an amendment to Section 2 of the Clayton Act and, as such, it is enforceable by the same diverse methods. Two agencies of the government are expressly charged

of Stationers, 40 F. (2d) 620 (C. C. A. 7th, 1930), points to that result. That case, however, involved the threatened elimination of the competitor. Query whether the "injury" contemplated under the new law will have to go that far. Cf. Evans, *supra* note 106, at 151.

¹²⁰ There is analogy in §4 of the Clayton Act permitting a suit for treble damages to be brought by any person "who shall be *injured* in his business . . ." by reason of any violation of the anti-trust laws. In treble damage suits the Supreme Court has insisted on a definite showing of a causal connection between the wrong and what the court called "the fact of damage" but when this has been shown proof addressed to the quantum of damage need not be strict. See *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555 (1931); *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th 1930), *cert. denied*, 282 U. S. 899.

¹²¹ Many possibilities are discussed in Note (1936) 36 COL. L. REV. 1285, 1294-1297, and it is predicted that a requirement of substantiality will be read into the Act. With this the writer concurs. This is a familiar device of the courts in dealing with anti-trust laws.

with its enforcement. The Attorney General may proceed by bill in equity in the District Court to prevent and restrain violations.¹²² The Federal Trade Commission may proceed by the issuance of a complaint followed by the steps that govern other proceedings by the Commission.¹²³ In addition, private parties may bring suits to recover statutory treble damages or may seek injunctive relief against threatened loss or damage.¹²⁴ It is plain that in proceedings initiated by the Attorney General or by private parties the judges alone will be called upon to develop the meaning of the Act. The part played by the Commission in proceedings initiated by it will be no greater under this amendment to Section 2 than it was under the original section. The meaning of the original section was always a question of law for the judges.¹²⁵ The result is that the rules of trade will be judge-made and it is apparent that the general words of the Act point only in a general direction and not to a particular result in a concrete case. Under the Act there is transferred to the judges a broad discretion in influencing important marketing policies and, if it should turn out that the judges are not expert in these matters, the blame must rest on the law-makers who made such a law as this.

In view of its relatively limited objective the Act is hard to understand. It applies to all sellers and is drawn in language that will give but little assistance to the judges in resolving important conflicts over marketing policies and practices. It draws within its ambit matters that lie outside the particular objective of the Act. It is another example of legislation in universals in a field in which, as the Act only too abundantly shows, universals are difficult to formulate and if applied indiscriminately may produce unsought consequences. It will be years before the products of the judicial process will be susceptible of formulation into any usable pattern of sales policies. The habits of mind that prevail in the courtroom are ill adapted to the difficult task of giving meaning to the vagaries of this legislative product. Flexibility in the formulation and application of rules as to price policies would seem to be a more workmanlike procedure.¹²⁶ Policies and practices vary from in-

¹²² Clayton Act, *supra* note 105, §15.

¹²³ *Id.* §11. Under this section the Commission is required to hold a hearing on the complaint and if a violation of the Act is found, it must make a report in writing stating its findings of fact and shall then issue a cease and desist order. If the order is violated the Commission may apply to the Circuit Court of Appeals for the enforcement of its order or the person against whom it is directed may obtain a review on a similar application. In either event there must be filed in court a transcript of the entire record before the Commission and the Act recites that "The findings of the Commission . . . as to the facts, if supported by testimony, shall be conclusive," but the courts have always reached their own conclusions on the record as to the construction of the Clayton Act. See *Mennen Co. v. F. T. C.*, 388 Fed. 774 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 759 (1923); *National Biscuit Co. v. F. T. C.*; 299 Fed. 733 (C. C. A. 2d, 1924), *cert. denied*, 266 U. S. 613 (1924), for the only two cases to reach the courts involving Commission proceedings under §2.

¹²⁴ Clayton Act, *supra* note 105, §§4, 16.

¹²⁵ It is notable that a large number of the cases under the original Section 2 were private suits for treble damages or injunctive relief. See especially the important cases of *Van Camp & Sons v. American Can Co.*, 278 U. S. 245 (1929), and *American Can Co. v. Ladoga Canning Co.*, *supra* note 120.

¹²⁶ There is one provision for flexibility in the power granted to the Federal Trade Commission to fix quantity limits for quantity discounts under certain conditions (see note 112, *supra*) but this deals with only a small part of the field covered by the Act.

dustry to industry and without understanding and study of the conditions under which a given rule must operate and its probable consequences, rule-making is apt to be crude and clumsy. Judicial inaptitude is, then, but the penalty for legislative inaptitude. "Common sense," to use the expression of the Supreme Court in a notable opinion,¹²⁷ requires that if this power of control is to be exercised at all it be vested in an administrative body empowered to legislate for the particulars of a given trade or industry.

VII. THE "FAIR TRADE" MOVEMENT

The Fair Trade Acts¹²⁸ partake of the economic motivation of the Robinson-Patman Act. They are simply different legislative manifestations of similar forces. We have noted that the impulse for the Robinson-Patman Act came from the effort of the independents in the marketing structure to deprive the mass distributor of a competitive advantage attributed to special prices that the independents were unable to secure. The Fair Trade Act is concerned primarily with retail trade.¹²⁹ It casts the protecting mantle of the state around one class of retailer, he who will sell goods for not less than the price stipulated by the producer of the goods. All other retailers, be they mass distributors or fellow independents, are branded as unfair competitors. In the language of the trade, they are "price cutters."

In the typical statute¹³⁰ the legislative mantle does not cover all goods but only those that bear the "trade-mark, brand, or name of the producer" and that are "in fair and open competition with commodities of the same general class produced by others." With these limitations the statutory scheme permits, and it is only permissive, the producer to fix the price at which his goods shall be sold at each step in the process of getting them into the hands of the consumer. When the producer has set up this contractual marketing structure all others who have notice of it must conform even though they are strangers to the contractual arrangement.¹³¹

It must be left to the economist and business man to debate the economic merits and demerits of resale price maintenance. That there is much to be said on both sides is evidenced by the vast literature that this subject has called forth.¹³² The courts, both state and federal and under both state and federal anti-trust laws, have generally, though not universally, tagged agreements such as may be made under

¹²⁷ *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394 (1928).

¹²⁸ The laws of the thirty-one states now having Fair Trade Acts are conveniently collected in C. C. H., *TRADE REGULATION SERVICE*, Vol. I, State Fair Trade Acts.

¹²⁹ This is not to say that these acts do not apply equally to sales at wholesale and otherwise. The statement in the text is made to direct attention to the primary legislative objective.

¹³⁰ The California Act which has been so widely copied is used in the analysis that follows. See Cal. Stat. 1931, c. 278, p. 583; CAL. GEN. LAWS (Deering, 1931) no. 8782, as amended by Cal. Stat. 1933, c. 260, p. 793.

¹³¹ The constitutionality of the Illinois and California Fair Trade Acts has been sustained. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 57 Sup. Ct. 139 (1936); *The Pep Boys, Manny, Moe and Jack v. Pyroil Sales Co.*, 57 Sup. Ct. 147 (1936). Discussions of the problems that will arise under these acts will be found in Notes (1936) 36 COL. L. REV. 293; (1936) 45 YALE L. J. 672; Elliott, *Fair Trade and Resale Price Maintenance* (1936) 10 SO. CAL. L. REV. 1.

¹³² Most of it is cited in Note (1936) 36 COL. L. REV. 293.

the Fair Trade Acts as in "restraint of trade" and under the guise of the compulsion of these and other non-compelling words the judges have taken sides in the debate.¹³³ In 1933 the California legislature started a movement in the opposite direction when it put teeth into its 1931 Fair Trade Act and set up a statutory scheme which, at this writing, has been copied in thirty-one states and the end is not yet.¹³⁴

Things like this do not just happen and we must go back to trace the forces that brought about this epidemic of laws. If the distributors of Dr. Miles' medicines in 1911¹³⁵ sought the protective mantle of his contracts it was only to protect themselves against their fellow independents who cut prices. In the years that followed the mass distributor became an even greater threat to the position of the "legitimate" distributor. The Federal Trade Commission made this clear in 1929 and in later reports.¹³⁶ The producer too, the Commission found, would be glad to have this contractual arrangement made available to him. It looked for a time during the 1920s as though there might be a Congressional reversal of the position taken by the court under the Sherman Act¹³⁷ but it remained for the ubiquitous N.R.A. to codify the demand of organized retailers into a provision outlawing price cutting "below cost."¹³⁸ The code served to crystallize the demand of retailers for protection against the ever present "price cutter" and the ever growing mass distributor whose disturbances were all the greater in the disorderly markets during the depression. But experience under the cost protection principle of the code was unsatisfactory and the goal of a stable retail market seemed more likely to be reached if resale prices could be fixed and maintained. Attention was shifted to this device and it has been under this new sponsorship of organized retailers that the movement for Fair Trade Acts has spread so rapidly and so successfully.¹³⁹ As such it bears but a superficial likeness to the struggle over Dr. Miles' contracts in 1911. And it is under the same sponsorship that the movement in the present Congress to remove resale price agreements from the prohibitions of the Sherman Act has a vitality that was lacking in earlier efforts to the same end.¹⁴⁰

There has also been an epidemic, though a less virulent one, of Unfair Practices

¹³³ Authorities will be found collected in Note (1936) 45 YALE L. J. 672.

¹³⁴ *Supra* note 128.

¹³⁵ *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 (1911), is the leading case in which the Supreme Court declared a contractual resale price arrangement to be in violation of the Sherman Act.

¹³⁶ FED. TRADE COMM'N, REPORT ON RESALE PRICE MAINTENANCE (1929), Pt. I, p. XII, c. VI. In response to a Senate Resolution of 1931 the Commission submitted 33 factual reports on various phases of chain store operations and practices. The story of the growth of chain stores is told in Fed. Trade Comm'n, *Growth and Development of Chain Stores*, SEN. DOC. NO. 100, 72d Cong., 1st Sess. (1932).

¹³⁷ The course of these measures is reviewed in SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932).

¹³⁸ See General Code of Fair Competition For the Retail Trade, Art. IX, 1(c), Art. VIII. These prohibited price cutting below cost and the use of "loss leaders."

¹³⁹ An outstanding discussion of the forces that brought about the California Fair Trade Act and experience under it is presented in Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting* (1936) 24 CALIF. L. REV. 640.

See also Grether, *Solidarity in the Distributive Trades in Relation to the Control of Price Competition*, *infra*, p. 375. Ed.

¹⁴⁰ The Miller-Tydings bill, H.R. 1611, is now pending in the Congress.

Acts and they are part and parcel of the same movement. At this writing ten states have such laws.¹⁴¹ For the typical act we again turn to California for in 1935 that state refashioned its earlier laws¹⁴² and produced the act that has been substantially copied in the other states. The Fair Trade Acts, as we have seen, permit vertical control of the price of trade-marked goods but, while horizontal control is expressly denied in those acts, it is evident that effects will be felt in the horizontal price level. The great objective is, after all, a stable retail market and that means one in which neither the mass distributor nor the "price cutter" shall, by his practices, gain what is deemed an unfair advantage. The Unfair Practices Act is directed at the horizontal level of prices and, unlike the Fair Trade Act, it applies to all goods. Its most novel and important provision prohibits sales below "cost," and that term is defined, "for the purpose of injuring competitors and destroying competition." Another provision outlaws price discrimination "with the intent to destroy . . . or to prevent the competition of any person" but this precursor of the Clayton and Robinson-Patman Acts has long been familiar in state anti-trust laws.¹⁴³ Secret rebates, refunds, unearned discounts, and the like, are prohibited in another section.

The cost protection principle of this act is but the provision of the N.R.A. Retail Trade Code¹⁴⁴ in a new dress and it is directly traceable to it. The new dress is the provision that the sale below "cost" must have been made "for the purpose of injuring competitors and destroying competition." There will be troubles enough in determining "cost"¹⁴⁵ and when to this is added the showing of purpose it is evident that there is more of hope than of realization in this act. Only the most liberal judicial notions as to the requisite showing of the condemned purpose will make of this act an effective and usable instrument. If the judges can be persuaded to accept, without more, the fact of sales below "cost" as sufficient evidence of the wrongful purpose then the act may serve to put a floor under retail markets¹⁴⁶ and to this extent it will contribute to the maintenance of a vertical price established under the Fair Trade Act. But if the judges are insistent upon a definite showing

¹⁴¹ These Acts are collected in C. C. H., *TRADE REGULATION SERVICE*, Vol. I, *State Anti-Trust Laws*, for the following states: Arkansas (1937), California (1935), Connecticut (1935: limited to the retail drug trade), Kentucky (1936), Louisiana (1936: limited to the retail drug trade), Montana (1937), Oregon (1937), South Carolina (1932), Tennessee (1937) and Wyoming (1937). The Arkansas, Kentucky, Montana, and Wyoming laws are copied from the California law. Oregon and Tennessee have introduced variations in the statement of the unlawful purpose or effect while Connecticut and Louisiana have gone the whole way and prohibited sales below cost, as defined, without any requirement of a wrongful purpose or effect.

¹⁴² In 1933 California adopted a Sales Below Cost Act, Cal. Stat. 1933, p. 1280-1281, which was strengthened and incorporated in the Unfair Practices Act of 1935, Cal. Stat. 1935, c. 477, p. 1546. An excellent discussion of experience in the drug and grocery trades under the California Act appears in Grether, *supra* note 139, at 656-659, 685; see also Cupp, *The Unfair Practices Act*, (1936) 10 *So. CALIF. L. REV.* 18.

¹⁴³ Provisions prohibiting price discrimination will be found in the anti-trust laws of a great many states. See C. C. H., *supra* note 141.

¹⁴⁴ *Supra* note 138.

¹⁴⁵ Many of these troubles are discussed by Grether, *supra*, note 139, at 686-690, with particular reference to the problem as to whether "cost" is to be an average or an individual figure and the pitfalls of each alternative.

¹⁴⁶ In the hands of an aggressive trade association this may be accomplished. See *id.* at 656, and 685.

of the wrongful purpose it is likely that the act will be a disappointment to its proponents. The troublesome phrase may have grown out of doubts as to the constitutionality of a flat prohibition of sales below "cost"¹⁴⁷ but experience may show that the constitutional hurdle will have to be met directly if the objective is to be gained.

Our survey of price control by law has taken us through a great variety of measures undertaken at different times and with various particular objectives. If any one thread runs through these measures it is that the price at which goods are sold and services furnished to the public is a matter of public concern and, if need be, of governmental action. The particular objective is quickly merged in a continuing policy of control and as precedent grows on precedent it becomes more evident that there is nothing sacrosanct about price. It affects so many interests, those of producer, wage earner, distributor and consumer alike, that the power of control carries with it a vast power over the economic and social destinies of the nation. Price itself may be said to be "affected with a public interest," to resurrect a now outmoded phrase. This has been the great objective of the measures we have reviewed.

Price is not an abstraction. It is a very real force in economic and social life and it makes itself felt in a variety of ways. It may be a weapon of oppression of the weak by the strong; or it may be a competitive weapon that has grown too strong for those who wield it and, uncontrolled, may threaten the security of the industry or trade on which weak and strong alike depend. And price is unruly, not easily subjected to control by either government or private interests.

These considerations, and many others, are reflected in the measures that have been adopted by government. In the great transportation and public utility fields government has attempted to deal with price directly. In the great fields of industrial enterprise, trade, and agriculture government has sought to condition forces that are thought to play an important part in its determination. In the first type government has acted generally through an administrative body vested with broad powers of control but in the second the typical instrument is the penal or civil statute. The important statutes in this last field are but little more than broad mandates to the judges that leave to them the difficult task of giving direction to important forces in our economic life as concrete cases come before them for decision. In this process important questions of economic policy, unanswered by the broad mandates of the statute, must await the contingencies and limitations of the litigated case and years may pass before any answer is forthcoming. This must not be taken as a pat plea for certainty and definiteness for that plea is apt to be vain and illusory. It is a plea that government, if it is to act at all in these matters, fashion its instruments of control with more sureness. There is no quarrel with the broad mandates of the statutes for in them there is strength and adaptability to new conditions. A bill of particulars has little place in a statute in this field. It may be a source of

¹⁴⁷ See *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1 (1926). Connecticut and Louisiana are the only states that have taken this constitutional chance. See note 141, *supra*.

weakness and merely deflect the course of trade practices into other, and equally undesired, channels. The quarrel is, rather, with the legislature that is content to entrust its mandates to the judges alone who must deal with them only in terms of the issues presented in the course of particular cases involving particular parties. In this process there is little opportunity for broad study of the consequences that may follow from a choice that must be made among competing alternatives and when the choice has been made the result may be a satisfactory solution of the particular problem before the court but it may produce wholly different and unsought consequences in other industries and trades. There is instruction in the methods of government when direct control of price is attempted. It is recognized that the legislative process is unsuited to ordain the details of control and must limit itself to a broad mandate to an administrative body. The important details of legislation may then be written in orderly fashion by those whose sole responsibility is to give meaning to the legislative mandate in the light of the varying conditions that may be revealed after careful study, and there is opportunity to refashion and adapt as experience points the way. There are equally cogent reasons why a similar instrument should be fashioned when other and equally difficult controls are attempted in the complicated and ever changing fields of industry and trade. Possibilities along these lines are virtually untried and unexplored.