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CONSTITUTIONAL LAW-DUE PROCESS-FAIR TRADE ACTS

CONSTITUTIONAL LAW—DUE PROCESS—FAIR TRADE ACTS—The recent decision of the New York Court of Appeals in *Doubleday, Doran & Co. v. R. H. Macy & Co.*,[1] holding unconstitutional section two of the New York Fair Trade Act,[2] presents another interesting aspect of the long struggle by manufacturers of widely known trade-marked articles to secure some adequate protection for themselves and the public against the destructive practice of retail price cutting.[3]

It will be recalled that this practice, which began its phenomenal growth shortly before the beginning of the present century, created what many believed to be two serious evils.[4] Because it made the price of nationally advertised products vary from store to store and city to city, it forced the producer of such goods into virtual competition with himself, allowed others to capitalize on his extensive advertising campaigns, and eventually lowered his article in the eyes of the consumer. But worse than this, it drove to the wall many small retail merchants who, because of large overheads and small turnovers, could not compete. This latter not only seriously affected the public but deprived the trade-mark owner of available markets and tended to fetter competition in the retail trade.

It will also be recalled that attempts were early made by the pro-

[1] 269 N. Y. 272, 199 N. E. 409 (1936).

[2] N. Y. Laws (1935), c. 976, p. 1902.

[3] The term "retail price cutting" is used in reference to the practice of large retail firms which sell nationally known and advertised trade-marked articles below their standard price as "bait" not only to attract the public to the store but to create the inference that all other products, regardless of their source or price, are the same clear "bargains." Inasmuch as the retail stores are not usually eleemosynary institutions, that inference is probably incorrect. For an exhaustive discussion of the whole situation here presented, see SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932).

[4] See BRANDEIS, BUSINESS AS A PROFESSION (1933), the chapter entitled "Competition that Kills"; MONTAGUE, BUSINESS COMPETITION AND THE LAW (1916). See also the dissenting opinion of Justice Holmes in Dr. Miles Medical Company v. John D. Park & Sons, 220 U. S. 373 at 409, 31 S. Ct. 376 (1911).

ducers to combat this practice by methods calculated to maintain the price at a constant figure throughout the country. But the federal courts, followed by most of the state courts,[5] proceeding upon the theory that the public interest was best served through the maintenance and protection of free competition,[6] and ignoring the social and economic interests at stake, successively declared every effort illegal.[7] Express and implied [8] contracts between manufacturer and wholesaler or retailer by which the producer sought agreements from those to whom he sold his goods to resell only at a named price or to those only whom the producer named, all forms of licensing by which the producer sought to sell his article subject to a restriction or a condition that it be resold only at a certain figure,[9] and the use of agents, blacklists and identification marks to ferret out those who refused to resell at the prices suggested by the owner [10] were prohibited. Patented goods,[11] secretly made goods,[12] copyrighted articles [13] and trade-marked articles [14] received the same treatment at the hands of the judges, who rested their decisions both on the common law precedent that no man may restrain the use of personalty after transferring title,[15] and on the various anti-trust laws.[16] By the early twenties the trade-mark

[5] For a review of the state court decisions, see SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE, Appendix III, pp. 460-470 (1932).

[6] United States v. Trenton Potteries Co., 273 U. S. 392, 47 S. Ct. 377 (1927); United States v. A. Schrader's Sons, Inc., 252 U. S. 85, 40 S. Ct. 251 (1920).

[7] For a review of the various decisions, see Dunn, "Resale Price Maintenance," 32 YALE L. J. 676 (1923); 27 COL. L. REV. 183 (1927); 43 YALE L. J. 1332 (1934); and for collections of cases, see 7 A. L. R. 449 (1920), 19 A. L. R. 926 (1922), and 32 A. L. R. 1087 (1924).

[8] Boston Store of Chicago v. American Gramophone Co., 246 U. S. 8, 38 S. Ct. 257 (1918); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1911); United States v. A. Schrader's Sons, Inc., 252 U. S. 85, 40 S. Ct. 251 (1920).

[9] Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 S. Ct. 412 (1917); Bauer & Cie. v. O'Donnell, 229 U. S. 1, 33 S. Ct. 616 (1913).

[10] Federal Trade Comm. v. Beech-Nut Packing Co., 257 U. S. 441, 42 S. Ct. 150 (1922).

[11] Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 S. Ct. 412 (1917).

[12] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1911).

[13] Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 S. Ct. 722 (1908); Straus v. American Pub. Assn., 231 U. S. 222, 34 S. Ct. 84 (1913).

[14] Federal Trade Comm. v. Beech-Nut Packing Co., 257 U. S. 441, 42 S. Ct. 150 (1922).

[15] See Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376 (1911).

[16] Sherman Act, 26 Stat. L. 209, 15 U. S. C. 1-7, 15 (1890); Federal Trade Commission Act, 38 Stat. L. 717, 15 U. S. C. 41 (1914); Clayton Act, 38 Stat. L. 730, 15 U. S. C. 12-27, 44 (1914).

proprietor had only the alternative of suggesting the prices at which his articles should be resold and exercising the doubtful privilege of refusing to deal with those whom he, by chance, found selling below those figures,[17] or attempting to do what was financially prohibitive to all but the largest businesses—establish exclusive selling agencies.[18]

Ruled out by the courts, the manufacturers and producers turned to the various legislatures for help; but it was not until the business depression arrived to accentuate the evils of the existing situation and stir men into activity that aid was given. Finally, between the years 1931 and 1935, ten states [19] passed identical statutes [20] under the name

[17] United States v. Colgate Co., 250 U. S. 300, 39 S. Ct. 465, 7 A. L. R. 443 (1919).

[18] United States v. General Electric Co., 272 U. S. 476, 47 S. Ct. 192 (1926). For a discussion of the agency feature, see Klaus, "Sale, Agency and Price Maintenance," 28 COL. L. REV. 441 (1928).

[19] *California:* Cal. Gen. Laws (Deering 1931), § 8782, p. 4910, amended, Cal. Gen. Laws (Deering 1933 Supp.), § 8782, p. 2396; *Illinois:* Ill. Laws (1935), p. 1436 (approved July 8, 1935); *Iowa:* Iowa Pub. Acts (1935), c. 106, p. 151 (approved May 16, 1935); *Maryland:* Md. Laws (1935), c. 212, p. 453 (approved May 17, 1935); *New Jersey:* N. J. Laws (1935), c. 58, p. 140 (approved March 12, 1935); *New York:* N. Y. Laws (1935), c. 976, p. 1902; *Oregon:* Ore. Ann. Code (1935 Supp.), § 70-401 (approved March 13, 1935); *Pennsylvania:* 73 Pa. Stat. (Purdon 1935 Supp.), § 7 et seq. (approved June 5, 1935); *Washington:* Wash. Laws (1935), c. 177, p. 657 (approved March 25, 1935); *Wisconsin:* Wis. Laws (1935), c. 52, p. 80 (approved May 1, 1935).

Of these, it should be noted that New Jersey formerly had a statute designed to accomplish the same purpose as the "Fair Trade Act." N. J. Comp. Stat. (1911-1924 Cum. Supp.), § 225-1, p. 3777. This statute seems never to have been repealed. It is commented on by SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE, Appendix III, pp. 465-6 (1932), and was upheld in Ingersoll & Bro. v. Hahne & Co., 88 N. J. Eq. 222, 101 A. 1030 (1917), 89 N. J. Eq. 332, 108 A. 128 (1918).

[20] The New York law provides as follows [N. Y. Laws (1935), c. 976, p. 1902]:

"Section 1. Subdivision 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

"2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

of the "Fair Trade Act," [21] designed as "an act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name." [22]

In order to understand the ruling of the New York Court of Appeals,[23] already mentioned, it is important to consider two of the provisions of this act. The first section is believed to be entirely innocuous,[24] merely legalizing all resale price agreements concerning any trade-marked article in fair and open competition with commodities of the same general class, legalizing, also, provisions in such agreements by which the transferee or vendee promises that he, in turn, will exact similar contracts from his vendees, and stipulating for certain definite exceptions where the agreed price will not control. The second section,

"(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(c) By any officer acting under the orders of any court.

"Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section one of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract is unfair competition and is actionable at the suit of any person damaged thereby.

"Section 3. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale price.

"Section 4. The following terms as used in this act, are hereby defined as follows: 'Producer' means grower, baker, maker, manufacturer or publisher. 'Commodity' means any subject of commerce.

"Section 5. If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"Section 6. This act shall take effect immediately."

[21] A few states added sections of their own. Washington [Wash. Laws (1935), c. 177, p. 657] provided that the act was only a relief measure, and would expire July 1, 1937. It was also the only state to devote one section to a declaration of the purposes of the law. Wisconsin [Wis. Laws (1935), c. 52, p. 80] established a system for review of prices by an administrative tribunal at the protest of anyone who believed them to be unfair or unreasonable. It is not conceived that this would save the statute from the due process objection found in the Doubleday case. Assuming the statute otherwise constitutional and the administrative review necessary, a question might come as to whether reasonableness of price was a sufficiently definite standard by which the tribunal could go. Compare the statements of the United States Supreme Court in Cline v. Frink Dairy Co., 274 U. S. 445, 47 S. Ct. 681 (1927), and United States v. Trenton Potteries Co., 273 U. S. 392, 47 S. Ct. 377 (1927); and see Montague, "Price Fixing, Lawful and Unlawful," 62 AMER. L. REV. 505 (1928).

[22] This is the headnote to the New York Fair Trade Act, N. Y. Laws (1935), c. 976, p. 1902, but all the acts contain essentially the same wording.

[23] 269 N. Y. 272, 199 N. E. 409 (1936).

[24] Cf. Marisch v. Eastman Kodak Co., 244 App. Div. 295, 279 N. Y. S. 140 (1935). The court in the principal case expressly found nothing objectionable in this section.

however, presents what the New York court felt was a marked innovation. It provides that any person, whether or not he is a party to any agreement made legal by section one, who knowingly offers for sale or sells any commodity at less than the contract price will be guilty of unfair competition and liable to any party damaged thereby. By its terms, once a price for a trade-marked article has been established by the contracting parties, that price is binding upon all who take the same or identical goods from the producer, passing along with the article very much like an equitable restriction.[25] In its actual effect, it enables the producer, who can readily find one party to contract with him, to stipulate the price at which he wishes his products thereafter to sell, no matter into whose hands they may fall, and gives the force of law to those prices.[26]

This, at least, was the interpretation which the parties in *Doubleday, Doran & Co. v. R. H. Macy & Co.*[27] put upon section two. Here plaintiff book company made an agreement with plaintiff seller and distributor concerning the price at which certain books were to be resold. Defendant company, knowing of this agreement, purchased such volumes directly from the plaintiff book company but made no contract as to the resale price. Subsequently, defendant advertised the sale of the books at less than the stipulated figure and plaintiffs sought an injunction. The lower court ruled [28] that section two was unconstitutional since it took, without due process of law, the defendant's prop-

[25] See Chaffee, "Equitable Servitudes on Chattels," 41 HARV. L. REV. 944 (1928). While the effect of the "Fair Trade Act" may be to create something similar to an equitable servitude, it is really something rather different. Equitable servitudes die out as soon as they have served their purpose, but this act, in terms, at least, extends control far beyond the seeming necessities of the case to include the ultimate consumer. On the other hand, inability to prove any damages in a suit against the consumer would appear effectively to eliminate any actual danger to the public. The exact purpose in framing the statute in the manner here found is not known. Perhaps, by creating the tort of unfair competition the draftsmen hoped to escape the price fixing objection raised in the Doubleday case. Cf. the old New Jersey fair competition law, which seems more clearly to provide that the price should be in the nature of an equitable restriction. N. J. Comp. Stat. (1911-1924 Cum. Supp.), § 225-1, p. 3777.

[26] It is not difficult to understand the purpose of this provision or to recognize its reasonableness. It is believed the drafters of the act were convinced that merely legalizing the price fixing contracts would not aid the trade-mark proprietor since the goods must, in the modern marketing process, pass through several hands beyond those with whom he made the agreement, and that even if his promisees made new contracts as to prices with those to whom the goods were in turn transferred—a thing which in itself might be difficult to achieve—the proprietor would in most instances derive no benefit. The method here devised covers, by a sort of backhand stroke, all those who could not be reached by the method of express price fixing contracts. See SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932).

[27] 269 N. Y. 272, 199 N. E. 409 (1936).

[28] (Sup. Ct. 1935) 284 N. Y. S. 533.

erty right to sell the volumes at whatever price it decided to name.[29] On appeal, the judgment was unanimously affirmed, the court ruling that the states were powerless to establish the selling price of any and all commodities, that prices could not be fixed unless the business was one "affected with a public interest," and that what the legislature could not do directly it was powerless to do indirectly by the means here attempted.[30]

Eliminating for the moment the price fixing feature and looking at price merely as one of the many conditions or qualities annexed to a commodity, nothing objectionable can be found in section two, unless it be assumed that the provision is arbitrary or unreasonable. The court in the instant case, to be sure, seemed to express surprise that the act attempted to create a servitude upon trade-marked articles; but certainly it has never been held that the legislature, in the interests of the public at large, could not attach restrictions upon the use of property. Nor is it necessary to go as far afield as the zoning ordinances for analogy.[31] Equitable servitudes on chattels are not an unheard of thing.[32] While it may be agreed as a postulate that the right to carry on a legitimate business is protected by the due process clauses of the state and federal constitutions,[33] and further that inherent in this right is the power to use and dispose of property, there are few who would attempt to maintain that rights of property are absolute or that all these rights which the individual has are of a vested or inviolable nature.[34] Time and again it has been pointed out that in the name of advancement of the community, every person at some time or other is called upon to sacrifice some few of his former rights, or the rights which formerly he would have been free to exercise,[35] and that the law,

[29] The corresponding section of the California act [Cal. Gen. Laws (Deering 1933 Supp.), § 8782, p. 2396] is said also to have been held unconstitutional, 22 CAL. L. REV. 86 at 96, note 73 (1933); but no record of any case could be found.

[30] Aside from the constitutional law problem which this case raised, a question also arises as to the effectiveness of the restrictions when the goods are put in interstate commerce. In this connection, see the article in 34 COL. L. REV. 1336 (1934), where the question was discussed in relation to the interstate shipments of milk. And see Baldwin v. Seelig, 294 U. S. 511, 55 S. Ct. 497 (1935).

[31] Village of Euclid, Ohio v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926).

[32] See Chafee, "Equitable Servitudes on Chattels," 41 HARV. L. REV. 948 (1928).

[33] Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 S. Ct. 652 (1884); Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992 (1888); Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662 (1917).

[34] Wight v. Baltimore & Ohio Ry., 146 Md. 66, 125 A. 881 (1924); Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217 (1917).

[35] Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18 (1904); Pierce Oil Corp. v. Hope, 248 U. S. 498, 39 S. Ct. 172 (1919).

through the judicial tribunal, in such cases only sees to it that the sacrifice is proportionate to the public need, that the legislation which calls for the surrender is neither arbitrary nor unreasonable nor irrelevant to the policy the legislature is free to adopt.[36] When, therefore, the legislature deems it necessary in the public interest to declare that anyone taking property from the producer holds it subject to certain restrictions, there is little to sustain the approach of the New York Court of Appeals unless, further, emphasis is to be placed not upon the reasonableness of the restriction as such, but upon the special pricing feature of the legislation.

It may fairly be admitted, turning to this latter feature, that the Fair Trade Act fixes price, for at least it gives legal protection to the figure set by the producer as fair to him. The New York court thus has reasonable ground for emphasizing the price fixing element. It may be admitted also, that the court has much precedent to support its stand that legislative price fixing is unconstitutional unless the business sought to be regulated is "affected with a public interest." [37] This whole approach, however, treating, as it does, price as something in a category by itself, as something more or less sacrosanct, has openly been criticized by bench and bar [38] as a view based on economic fears and beliefs [39] rather than upon law. Moreover, insofar as the United States Supreme Court is concerned, it seems no longer to be the guiding principle. Certain it is that the now famous case of *Nebbia v. New*

[36] Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124 (1921); Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539 (1905); Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934).

[37] Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630 (1923); Tyson v. Banton, 273 U. S. 418, 47 S. Ct. 426 (1927); and see annotation in 58 A. L. R. 1255 (1929); Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545 (1928); Williams v. Standard Oil Co., 278 U. S. 235, 49 S. Ct. 115 (1929).

[38] Hamilton, "Affectation with a Public Interest," 39 YALE L. J. 1089 (1930); Finkelstein, "From Munn v. Illinois to Tyson v. Banton," 27 COL. L. REV. 769 (1927); 32 MICH. L. REV. 832 (1934); 39 YALE L. J. 256 (1929). See also the dissenting opinion of Justice Holmes in Tyson v. Banton, 273 U. S. 418 at 445, 47 S. Ct. 426 (1927); the dissenting opinion of Justice Stone in Ribnik v. McBride, 277 U. S. 350 at 359, 48 S. Ct. 545 (1928); and the dissenting opinion of Justice Brandeis in New State Ice Co. v. Liebmann, 285 U. S. 262 at 280, 52 S. Ct. 371 (1932).

[39] Cf. the dissenting opinion of Justice Brewer in Budd v. New York, 143 U. S. 517 at 551, 12 S. Ct. 468 (1892):

> "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may not it with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so 'Looking Backward' is nearer than a dream."

York [40] has cast considerable doubt upon all those decisions which established for price legislation a different standard than for other forms of business regulation; for the court, in that opinion, appears definitely to have gone out of its way to remove the "affected with a public interest" test as a basis of permissible price fixing.[41] While this opinion is not controlling upon the state courts interpreting the due process clauses of the respective state constitutions, it certainly is entitled to great weight.[42]

And, in truth, the approach of those decisions which make the distinction concerning price adhered to in the *Doubleday* case does not appear to be entirely logical. Moreover, few situations suggest that more clearly than the one now under consideration. It is held that the police power enables the legislature to prohibit, in the public interest in free competition, the use of property in the formation of monopolies [43] and the adoption of various forms of unfair competitive practices.[44] But under the theory of the instant decision, the selfsame power exerted in the selfsame interest cannot lawfully be exercised when the legislature attempts to prohibit the use of property in pricing policies which fetter that same competition and damage those business interests

[40] 291 U. S. 502, 54 S. Ct. 505 (1934).

[41] "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest' and 'clothed with a public use' have been brought forward as the criteria of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." 291 U. S. 502 at 536-7, 54 S. Ct. 505 (1934).

[42] Except in the field of taxation, the Fifth and the Fourteenth Amendments of the Federal Constitution are usually considered as applying to the same acts and having the same meaning. Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358 (1932). It is difficult to understand why the New York Constitution should be differently interpreted.

[43] United States v. Joint Traffic Assn., 171 U. S. 505, 19 S. Ct. 25 (1898); United Shoe Machinery Corp. v. United States, 258 U. S. 451, 42 S. Ct. 363 (1922).

[44] It is said that the reason for the establishment of the Federal Trade Commission was that Congress deemed it impractical to define the many forms of unfair competition and desired an administrative body to formulate constructive regulation that would keep in step with the new methods of competition which changing economic conditions steadily developed. Jones, "Historical Development of the Law of Business Competition," 36 YALE L. J. 351 at 378 (1927). For a discussion of recent trends in the interpretation of the Federal Trade Commission Act, see 32 MICH. L. REV. 1142 (1934).

which the legislature and the courts have heretofore in other ways considered worthy of protection,[45] and this even though the price legislation is conceived to be the only measure which may be adopted to correct the evils discovered.[46] Such an approach forces one to the peculiar conclusion that while the public is and always has been considered as concerned with the prevention of destructively high prices, it is now to have no legitimate concern in preventing correspondingly low ones. In other words, price itself must be allowed to run rampant unless the business which measures it is "affected with a public interest," despite that the nation's whole economic history displays that the first interest of the people is price.[47] Such certainly should not be the law. Applying a statement often found in the reports, it is an approach that ignores the substance of the legislation while placing emphasis on the mere form.[48]

It is not supposed, of course, that the decision in *Nebbia v. New York* [49] is decisive of the instant case, or that the same economic set-up is presented here as there. It is a similar situation, but not analogous; for it certainly is a far cry from the regulation of the price of milk to that of books. On the other hand, it hardly needs mentioning that the regulation in each situation is also decidedly different so that the variance in economic importance should not necessarily be fatal to the Fair Trade Act. What the *Nebbia* case is believed to stand for, however, is the principle that price fixing should be treated as other forms of legislative regulation,[50] and should not be given a special and arti-

[45] The business interests here referred to are the rights of the manufacturer and owner to the good will which his trade-marked article bears and creates. While the law has not in the past definitely recognized a man's interest in good will and protected his interest in possible customers as such, there is movement in that direction by the courts. See Grismore, "Are Unfair Methods of Competition Actionable at the Suit of the Competitor?," 33 MICH. L. REV. 321 (1935). And of course, the trade-mark proprietor has long been protected against trade-mark infringement and the tort of "passing off," both of which torts constituted one of the most frequent means of making raids upon a manufacturer's good will at common law. It is believed that the practice of retail price cutting is but another form of that attempt by persons to capitalize upon the good will of others.

[46] It is difficult to see how any other measures could be adopted to remedy the marketing defects and give the protection desired. Chain store taxation has been employed and upheld, State Board of Tax Comrs. v. Jackson, 283 U. S. 527, 51 S. Ct. 540 (1931), but it may be questioned whether such a scheme will effectively remedy the evils against which the Fair Trade Act is directed.

[47] See Jones, "Historical Development of the Law of Business Competition," 35 YALE L. J. 905 (1926), 36 YALE L. J. 42 (1926) and 36 YALE L. J. 351 (1927).

[48] For the best discussion of this point see the opinion of the majority of the Court in Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934).

[49] 291 U. S. 502, 54 S. Ct. 505 (1934).

[50] "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is

ficial test which begs the question to be decided in every case; [51] and that is all that need be asked for the Fair Trade Act's price scheme. If that act is thought to be discriminatory [52] or arbitrary and unreasonable and irrelevant to the policy which the legislature is free to adopt,[53] then one need hold no brief for it; but it is believed that an investigation of the situation is convincing that there were definite evils which the legislature had sought to destroy and that the measures, reasonable in themselves, bore a real and substantial relation to the end desired. Excluding other possible defects in the act,[54] it is not understood that the legislature need show more in other cases of regulation [55] and it is not understood why more need be shown in this instance.

J. B. B.

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free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." Nebbia v. New York, 291 U. S. 502 at 539, 56 S. Ct. 505 (1934).

[51] Cf. the dissenting opinion of Justice Stone in Tyson v. Banton, 273 U. S. 418 at 451, 47 S. Ct. 426 (1927).

[52] It is clear that there is some discrimination here, but, of course, some discrimination is justified, if there is a reasonable basis for the classification. See Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Assn., 276 U. S. 71, 48 S. Ct. 291 (1928).

[53] As to the certainty of this test, see Brown, "Due Process, Police Power and the Supreme Court," 40 HARV. L. REV. 943 (1927). The advantage of this approach over that found in the Doubleday case lies, not so much in the fact that such a standard has a truer ring in the judicial ear or that it furnishes a more understandable test by which both the legislative and the judicial branches of the government may go, although it is believed that this is essentially true, but in the fact that it wipes away an arbitrary distinction which made for hard and fast categories and prevents a crystallization of the law in the face of rapid changing social needs with which the legislature has, in the nature of things, a closer contact.

[54] The only other possible major defect that it is believed might be found appears in the question of the certainty of the terms of the Fair Trade Act. It is not considered an easy question to know just when an article is in "fair and open competition" or when there are commodities "of the general class." Cf. Cline v. Frink Dairy Co., 274 U. S. 445, 47 S. Ct. 681 (1927); Small Co. v. American Sugar Refining Co., 267 U. S. 233, 45 S. Ct. 295 (1925).

[55] Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 49 S. Ct. 57 (1928); Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186 (1911).