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PRICE CONTROL BY GOVERNMENT COMPETITION IN ANGLO-AMERICAN FEDERATIONS

ALBERT SALISBURY ABEL†

The stress of circumstance in the last few years has been making us constitution-conscious. In considering remedies for the evils with which we have been afflicted, we have not been able to end our inquiry with a determination as to their desirability or practicality but have been forced to proceed to an independent examination of constitutionality. Despite this stimulus, we have in our constitutional thinking retained a curious quality of placid insularity. Some small part of the profession and the public is probably aware of the fact that there exist in the world other nations, continental in their size and common law in their traditions and thought processes, which operate as federal systems under rigid constitutions. Almost no one has deigned to glance at those nations for information or suggestions as to how the modern state can continue to live and thrive in a federal form.

Australia and Canada have been perplexed, even as we have, with the difficulties and distress of the war and post-war years. Their problems have been much the same as ours;¹ the temperament, the ideals, and the political prejudices of their people are much the same. Their constitutions differ from ours, it is true, to some extent in expression and to a slighter extent in sub-

† Assistant Professor of Law, Washington University.

1. See the remarks of Lord Tweedsmuir, Governor General of Canada, before the United States Senate, April 1, 1937: "I am especially interested in Canada to discover that nearly all our problems are paralleled by yours. We have the same economic problems. We have the same problems in the drought areas in the West. We have very similar constitutional problems and the task of harmonizing local interests and rights with national interests and duties." *New York Herald-Tribune*, April 2, 1937, p. 23:1.

stance. The likeness and the differences are both of considerable potential utility to all three countries. Through studying the legislation of the others and its judicial fate in running the constitutional gauntlet, the profession and the courts in each may well discover possibilities and limitations of their own constitution more clearly and comprehendingly than by a non-comparative method.

In this connection the words of Justice Barton of the High Court of Australia will bear repeating:

I have endeavoured to come to my conclusions upon principle, and I acknowledge that in the process I also am much strengthened by the American authorities. When I hear that too much attention is being paid to such decisions I cannot help remembering that some of the most important conclusions of this Court, defining and safeguarding the Australian Constitution, were given upon citation of them, and in memorable instances founded upon them. When I travel in a railway carriage I often find a fellow occupant who insists upon excluding the fresh air. Future instances of such a dislike of ventilation will remind me strongly of the warning against the breath of American reason.²

One familiar with the sometimes stuffy atmosphere of American constitutional lore and—if it may be ventured of a neighbor—its Canadian equivalent might wish this open window policy to be extended.

In their general framework, American and Australian federalism proceed on the same plan. In both, the federal government has only such powers as are delegated to it by the Constitution together with the incidental powers necessary and proper to the exercise of the granted powers,³ while the state governments

2. *Duncan v. Queensland* (1916) 22 C. L. R. 556 at 602.

3. Constitution of the United States, Art. I, sec. 8: "The Congress shall have power * * * 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Commonwealth of Australia Constitution Act, 1900, sec. 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to * * * matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or office of the Commonwealth." Leading cases on the interpretation and application of these provisions are *McCulloch v. Maryland* (1819) 17 U. S. 316, 420, 4 L. ed. 579 and *Jumbunna Coal Mine v. Victorian Miners' Association* (1908) 6 C. L. R. 309, 14 Argus L. R. 701 at 713.

have reserved powers extending to all fields of governmental action possessed by them before federation and not surrendered at that time.⁴ Among the specific powers conferred on the federal government in both nations are those which have loosely been labelled the "war power"⁵ and the "commerce power," *i.e.*, the power over interstate commerce.⁶ The Canadian constitution is quite different in structure.⁷ Under it, certain powers are specifically bestowed upon the Dominion government and others upon the provincial governments. The latter possess only the powers thus expressly conferred, while the Dominion possesses whatever residual powers may exist, the specification not being as to it the limit of its powers but merely a partial enumeration.⁸

4. Constitution of United States, Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Commonwealth of Australia Constitution Act, 1900, sec. 107: "Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

5. Constitution of the United States, Art. I, sec. 8: "The Congress shall have power: * * * 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years. 13. To provide and maintain a navy. 14. To make rules for the government and regulation of the land and naval forces."

Commonwealth of Australia Constitution Act, 1900, sec. 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:— (VI) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."

6. Constitution of the United States, Art. I, sec. 8: "The Congress shall have the power: * * * 3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Commonwealth of Australia Constitution Act, 1900, sec. 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:— (1) Trade and commerce with other countries, and among the States."

7. Cf. the remarks of Lord Haldane, in Attorney-General for the Commonwealth v. Colonial Sugar Refining Co., Ltd. [1914] A. C. 237 at 252 et seq., contrasting the Canadian Constitution with those of the United States and of Australia.

8. British North America Act, 1867, 30-31 Victoria ch. 3, sec. 91: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that" the Dominion legislature shall have exclusive cognizance of named classes of subjects.

The actual grant to the Dominion is of the power to legislate for the peace, order, and good government of Canada; but this broad expression has been given such a confined construction that it means greatly less than the language standing by itself would indicate and, in operation, the Dominion, with its residual powers, has little if any greater leeway for action than the Union and the Commonwealth with their granted powers.⁹ To the Dominion is given power over defense¹⁰ and over "trade and commerce,"¹¹ to the provinces power over "property and civil rights" in the province.¹² The line of cleavage between these grants represents their respective regulatory realms.

One further important difference remains to be noted between the Canadian constitutional scheme and that of the United States and Australia. Under the former, the powers given are not subject to extraneous limitations imposed by other parts of the instrument. If once action is found to be within the powers allotted to province or Dominion, as the case may be, province or Dominion may undertake it without further ado.¹³ Not so in either the United States or Australia. In both of these the question of constitutionality is only half-answered when the allocation of action between state and federal authority has been effected. That is the first and in some respects the lesser of the difficulties. In Australia it is required further that the regulation attempted shall not so operate as to interfere with the absolute freedom of interstate trade.¹⁴ In the United States it must observe many taboos, the most potent of which is that it

9. See, on the general question of the respective power of the Dominion and the Provinces, *Montreal v. Montreal Street R. Co.* [1912] A. C. 333, 1 D. L. R. 681; *Attorney-General for Canada v. Attorneys-General for Alberta and British Columbia* (1916) 26 D. L. R. 288.

10. *British North America Act, 1867*, 30 & 31 Victoria ch. 3, sec. 91 (7).

11. *British North America Act, 1867*, 30-31 Victoria ch. 3, sec. 91 (2). The process of paring down the operative effect of this expression, so that it now means little more than the "interstate commerce" spoken of by the American Constitution was commenced by *Citizens' Ins. Co. v. Parsons* (1881) App. Cas. 96, where the suggestion was made that the Dominion power is to be confined to "general trade and commerce."

12. *British North America Act, 1867*, 30-31 Victoria ch. 3, sec. 92 (13).

13. See *Nelson v. Pacific Great Eastern R. Co.* (1918) 25 B. C. R. 259; *The King v. Royal Bank* (1912) 4 Alta. L. R. 249; *Sandwich E. v. Union Nat. Gas Co.* (1925) 57 Q. L. R. 656, 56 Q. L. R. 399.

14. "On the imposition of uniform duties of customs of trade commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free." *Commonwealth of Australia Constitution Act, 1900*, 63-64 Vic. ch. 12, sec. 92.

shall not infringe rights of life, liberty, or property, without due process of law.¹⁵ The Australian limitation is necessarily peculiar to a federal state and so presents a problem of federalism; the American one could exist equally in a unitary government, and an exploration of its intricacies and involutions has no place in an inquiry focusing on the phenomena of federalism. Accordingly, the subtle prohibitions imposed by the need for "absolutely free" trade must be fully explored wherever they arise while those arising from the need for "due process of law" will call for no more than a casual glance.

Price control as it is ordinarily thought of and has commonly been practised consists of a regime of governmental "thou shalt not's."¹⁶ Prices, for instance, are too high. The seller, through one circumstance or another, enjoys a position more favorable than the pure theory of a competitive economy contemplates. Thereupon government steps in with a command that he shall not profit by his position to the full extent of his fortuitously enhanced bargaining power but shall instead sell at a figure not in excess of a stated price or a stated profit, assumed to be reasonable.¹⁷ Or, conversely, prices are so low as to threaten to

15. Constitution of the United States, Amendment V: "No person shall * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation"; Amendment XIV, 1. * * * "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." The classic statement of the assumptions by which due process has been made a vehicle for invalidating price regulation is that of *Allgeyer v. Louisiana* (1887) 165 U. S. 578, 589, 17 S. Ct. 427, 41 L. ed. 832: "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

16. The article by Bonn on Price Regulation in 12 *Encyclopedia of Social Sciences* (1934) 355-362, constitutes a useful brief survey of the history and general techniques of price control.

17. This type of price regulation appeared very early in the history of England, the American colonies, and Canada; see, e. g. the Statute of Laborers (25 Edw. III) Stat. I (1350) (future prices of finished goods fixed by reference to past prices); Acts Gen. Ass. Va. 1630, No. IV, 1 Henry's Stat. at L. 150 (resale of imported goods at any advance in price prohibited); Acts of Nova Scotia, 1758 (32 Geo. II) ch. 21 (as size of

throw the machinery of production out of order. Buyers, pressing to extremes their bargaining advantage over sellers (typically seller-producers), are only restrained by the government's intervention, either to decree that minimum unit prices must be paid for the commodity¹⁸ or to establish marketing machinery for draining off the surplus to a non-competitive market and so restoring the bargaining equality between seller and buyer, usually accompanied by some method of equalization between sellers to make sure that all bear the loss and share the gain in an approximately proportional degree.¹⁹ These typical price control devices may be aptly characterized as control by command.

But there is another form of direct price control to which the government may also resort which, by way of distinguishing it, might be styled control by competition. Where control by command sets out to counteract competition, control by competition sets out to revive and intensify it. Thus where the former, finding a group of sellers in a semi-monopolistic position which enables them to domineer over buyers and exact prices according to their will, requires them under pains and penalties not to demand as much as they please but to limit themselves to as much as the government pleases, the latter sees the government itself become a seller putting goods on the market in competition with private dealers, who must then make terms as favorable as this new competitor or resign themselves to keeping their stocks on their hands. So, when the situation is reversed and the distressed seller is at the mythical mercy of the buyer, control by command, prescribing the quantity of mercy which the latter must show, compels him to refrain from taking advantage of his opportunity beyond a certain point; while control by competition finds the government itself becoming a buyer, ac-

bread). Its most notable use was during the World War when all three of the federations here under consideration employed it extensively; see, e. g. the War Precautions Act (Aust.) 1914-1916; the War Measures Act (Canada) 1914; the Lever Act (1918) 40 Stat. 276.

18. As by the state milk control legislation, of which the New York statute, Laws N. Y. 1933, ch. 158, Agriculture & Markets Law, Cons. Laws, ch. 69, sustained in the *Nebbia* Case (1934) 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940 is representative.

19. See the plans elaborated in the Dried Fruits Act 1928 (Aust.) No. 11 of 1928 in conjunction with such state legislation as the Dried Fruits Acts 1924 and 1925 (S. A.) Nos. 1657, 1702; and in the Natural Products Marketing Act, 1934 (Can.) c. 51 and the Natural Products Marketing Act Amendment Act 1935 (Can.) c. 64.

quiring stocks of the commodity at a price greater than that which the competing private buyer has been offering, and so compelling the latter either to offer equally favorable bids or do without the commodity in question.

In both cases control by competition may be highly effective, at least in certain situations and as to certain classes of goods. The government with its enormous "capital" can practically dominate the market if it chooses to bestir itself vigorously, outstaying the private dealer on a purely business basis. Its informational and investigating services enable it to keep abreast of market tidings. The large scale institutions and establishments which it maintains in its governmental capacity afford outlets which enable it, when the parity between buyer and seller has been restored, to lay aside its role of businessman and resume its wonted duties as pure government, without having tremendous stocks left over from its trading days to rot on its hands. Opposed to all this there are certain political considerations to be weighed. There is always the fear, for instance, that the government may sustain a loss in its operations. More potent perhaps, because more mystical, is the swelling cry that the government is giving itself over to a regime of socialism.²⁰ It is not these political limitations, however, but constitutional restrictions on the government in the market place that here concern us.

The federal form of government has seriously hamstrung price control by command.²¹ It is potentially effective, although probably in a somewhat less degree, to hamper and halt price control by competition. Here, as there, the requisite grant of power to the federal government must be found or it may not venture to

20. This paper does not contemplate a discussion of the constitutionality *vel non* of socialism as such, i. e. of a settled governmental regime of control of the instrumentalities of production and distribution, but is limited to the issues arising from occasional governmental interventions in the marketing process for the purpose of price adjustment. On the other problem, see Black, *Socialism and the Constitution* (1928) 28 Ill. L. Rev. 313.

21. The writer, who has traced the constitutional impaling on the federal-state dilemma of legislation aimed at price control by command, in a paper prepared under Professor Thomas Reed Powell at the Harvard Law School last year, of which paper this article forms a part, knows of no published discussion on the subject. For the last judicial pronouncements to date involving the difficulties confronting that form of control, see Attorney General for British Columbia v. Attorney General for Canada [1937] A. C. 377; James v. Commonwealth of Australia [1936] A. C. 578; Baldwin v. G. A. F. Seelig, Inc. (1935) 294 U. S. 511, 55 S. Ct. 497, 79 L. ed. 1032.

buy and sell for purposes of market manipulation. Here as there the threat of interference with interstate dealers looms grimly above the state or province when it undertakes to act, while the privileges and immunities clause provides another obstacle to be cleared.

The extent to which the federal-state type of governmental organization affects the constitutionality of efforts at price control by government competition is the problem which it is here proposed to examine. The paucity of cases bearing upon that problem is at first blush astonishing. That astonishment vanishes however with an examination of the record. The plain fact is that constitutional objections to such governmental action have very seldom been urged because there has very seldom been occasion to urge them.

The government has been more frequently and conspicuously a buyer and/or seller in the United States than in either Canada or Australia. Accordingly, the American experience will first be examined, and then the more meagre materials from the two younger federations.

When the states, or their creatures, the municipalities, have gone into the business of selling in this country, they have almost always done so for other motives than to control the market price of the ordinary goods of existence. While in general such activity has been sustained, it has been undertaken under circumstances so special that it is almost rash to use the decisions as a predicate for any general conclusions. At least that is so of all of the decisions up until ten or fifteen years ago. Government selling really has a bifurcated history in the United States. One branch traces up through the sales of intoxicating liquors and must be regarded with all the caution required in discussing cases rooted in that interesting subject matter. The other has a genealogy in municipal operation of "public utility" and public-utility-like enterprises, which again makes it at once more and less than it purports to be. Latterly there does seem to be something faintly glimpsable in the cases which indicates that the law is shedding these peculiar marks of its origin, and the parts are fusing into a true law of government as seller, although so tentatively and hesitantly as to defy positive statement. The most profitable approach would seem to be to study each of the two branches in turn, and then the current state of affairs. Be-

fore setting out on the quest, the caution is again given that the cases will be found largely ignoring the federal-state issues latent in them. Their silences are more significant than their statements.

The middle of the nineteenth century witnessed a rash of statutes vesting a monopoly of the sale of liquor in states or, to speak more accurately, in local agents or subdivisions of the states. In three states, Vermont, Connecticut, and Indiana, the legislation was challenged on constitutional grounds. In the first two it was declared valid,²² in the third the contrary result was reached.²³ It is only collaterally and because they are the first of their breed that these early cases possess significance, for by construction or express provision, each statute exempted from its operation the liquor introduced from other states, and, at the same time, it was intimated,²⁴ the domestic production of beverages for extrastate tipplers was not prohibited. Furthermore, the preoccupation of the courts was almost wholly with the prohibitory features. In the cases from Vermont and Connecticut, the merchandising sections, novel as they were, were well-nigh neglected, receiving mention so elliptical as hardly to be worth the name of discussion.²⁵ The Indiana case did, indeed, denounce feelingly the general impropriety of state operation of business, but without categorizing the iniquity as violating any specific constitutional provision.²⁶ It was not on this ground, however,

22. *Lincoln v. Smith* (1855) 27 Vt. 328; *State v. Brennan's Liquors* (1856) 25 Conn. 278.

23. *Beebe v. State* (1855) 6 Ind. 501.

24. *Id.* at 505.

25. The Vermont decision was concerned in large measure with the question of the legality of the warrant under which liquor improperly possessed was seized, and was wholly devoid of discussion on the validity of the dispensary system. The Connecticut case dismissed it with the following statement: "It is finally said that the public have no right to monopolize the sale of ardent spirits; the object of the legislature in authorizing a sale by a public agent for certain purposes, was not to raise a revenue for the town, but to accommodate certain persons with spirits for particular uses, and at the same time to guard against the evils resulting from an indiscriminate sale by all persons and for all purposes." *State v. Brennan's Liquors* (1856) 25 Conn. 278, 288.

26. "And we may as well remark, here as anywhere, that if the manufacture and sale of these articles are proper to be carried on in the state for any purpose, it is not competent for the government to take the business from the people and monopolize it. The government can not turn druggist and become the sole dealer in medicines in the state; and why? Because the business was, at and before the organization of the government, and is properly, at all times, a private pursuit of the people, as much so as the manufacture and sale of brooms, tobacco, clothes, and the dealing in

that the statute was held to be beyond the legislature's power but because the prohibitory features were deemed to contravene provisions of the state constitution construed as forbidding the taking of liberty or property without due process. Whatever of present interest the decision possesses is as a curious herald of the injunctions of the Fourteenth Amendment thirteen years before its enactment.

For over thirty years, the felicitous combination of purity and profits embodied in the liquor dispensary system seems to have sunk from public consciousness. Then it reappeared in South Carolina, where in its different aspects it provoked a series of decisions in various courts state and federal. The statutory scheme was in all substantial respects the same as those which had resulted three decades before in the conflicting decisions already discussed. The supreme court of the state at first²⁷ held the statute bad in *McCullough v. Brown*,²⁸ but less than a year afterwards it had a change of heart and in *State ex rel. George v. Aiken*²⁹ overruled its former decision and bestowed the constitutional accolade upon the dispensary system.

The core of the dispute lay in the answer to the question, Was the state liquor monopoly a police regulation? No, said the court in the *McCullough* case, it was not a regulatory measure nor a prohibitory law but simply a revenue act. Yes, it said in the *Aiken* case, it was a true police regulation, dealing with a commodity quite different from the ordinary goods of commerce.

tea, coffee and rice, and the raising of potatoes; and the government was organized to protect the people in such pursuits from the depredations of powerful and lawless individuals, the barons of the middle ages, whom they were too weak to resist, single-handed, by force; and for the government now to seize upon those pursuits is subversive of the very object for which it was created and is inconsistent with the right of private property in, and pursuits by the citizen. 'A government is guilty of an invasion upon the faculties of industry possessed by individuals, when it appropriates to itself a particular branch of industry, the business of exchange and brokerage for example; or when it sells the exclusive privilege of conducting it.' Say's Political Economy, note to p. 134." *Beebe v. State* (1855) 6 Ind. 501.

27. *State ex rel. Hoover v. Chester* (1893) 39 S. C. 307, 17 S. E. 752 was actually the first case to discuss the validity of the statute, and it was sustained. The entire attack, however, was with reference to formalities in enactment and expression, the court expressly refusing to rule on substantive constitutional issues under either the state or federal constitution, on the ground that they were beyond the scope of the issues involved in the appeal.

28. (1893) 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410.

29. (1894) 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; followed in *Melchers v. Bates* (1894) 42 S. C. 271, 20 S. E. 240.

There was substantial agreement that upon the police character of the legislation and the extraordinariness of liquor as a subject the validity of the act must necessarily hinge. Because of the denial of its police character, the statute was viewed by the majority in the *McCullough* case as repugnant to the provisions of the state constitution as being a deprivation of liberty and property outside the realm of permitted governmental action. This solution relieved the court of any need for passing on supposed conflicts between the legislation and the Federal Constitution, or of determining whether anything in the state's position as a member of a federal union interfered with its engaging in the business of slaking the thirst of its citizens. It was no impediment, however, to its speaking out a bold warning that such action violated the fundamental tenets of free government on which South Carolina's institutions were based (*i. e.*, offended the judicial motion of what the legislature ought to do).³⁰ Be-

30. "Finally the constitutionality of the Dispensary Act is assailed, upon the ground that the legislature have undertaken thereby to embark the state in a trading enterprise, which they have no constitutional authority to do, not because there is any express prohibition to that effect in the Constitution, but because it is utterly at variance with the very idea of civil government, the establishment of which was the expressly declared purpose for which the people adopted their Constitution; and, therefore, all the powers conferred by that instrument upon the various departments of the government must necessarily be regarded as limited by that declared purpose. Hence, when, by the first section of the second article of the Constitution the legislative power was conferred upon the General Assembly, the language there used cannot be construed as conferring upon the General Assembly the unlimited power of legislating upon any subject, or for any purpose according to its unrestricted will, but must be construed as limited to such legislation as may be necessary or appropriate to the real and only purpose for which the Constitution was adopted, to wit: the formation of a civil government—upon the same principle it seems to us clear that any act of the legislature which is designed to or has the effect of embarking the state in any trade which involves the purchase and sale of any article of commerce for profit, is outside and altogether beyond the legislative power conferred upon the General Assembly by the Constitution, even though there may be no express provision in the Constitution forbidding such an exercise of legislative power. Trade is not and cannot properly be regarded as one of the functions of government. On the contrary, its function is to protect the citizen in the exercise of any lawful employment, the right to which is guaranteed to the citizen by the terms of the Constitution, and certainly has never been delegated to any department of the government. We do not deem it necessary to go into any extended consideration of the fearful consequences of recognizing the power of the legislature to embark the state in any trade arising from the hazards of all business of that character, or, to comment upon the danger to the people of the monopoly of any trade by the state; for if it can monopolize one, it may monopolize all other trades or employments, although it is permissible for a court when called upon to construe an act, to consider its effect and consequences." *McCullough v. Brown* (1893) 41 S. C. 220, 248-250, 19 S. E. 458, 23 L. R. A. 410.

cause—and *solely* because—of the affirmance of its police character, the dispensary system was viewed in the *Aiken* case as conformable with the mandates of the state constitution. It was frankly conceded that, except for that fact, indeed except for the unusual nature of the commodity, the legislation could not be sustained; as a derivative and incidental power corollary to the police power, the state had ample authority to sell, but there was no separate independent head of state power under which it might do so.³¹ This analysis took the statute over the due process and taxation hurdles but by that very fact imposed on the court the need to inquire into its conformity with the requirements of the Federal Constitution, which it had avoided in the prior decision by finding the dispensary system to be obnoxious to the Constitution of South Carolina. Aside from the federal due process clause (which was disposed of by the same reasoning as the analogous provision in the state constitution), it was urged in opposition to the validity of the fact that two of the restraints on state action embodied in the United States Constitution stood in the way of the legislation, namely, the prohibition against abridging the privileges of immunities of citizens of the United States and the erratic but compelling veto of the commerce clause. The first of these contentions was brushed lightly aside with the reiteration that here was an exercise of the police power and consequently a matter not within the range of that particular constitutional prohibition. As to

31. "It is because liquor is not regarded as one of the ordinary commodities that the act of 1892, prohibiting its sale, was, as to that matter, construed to be constitutional. We cannot for a moment believe that the court would have declared an act constitutional that prohibited entirely the sale of corn, cotton, and other ordinary commodities. It is fallacious to argue, in the light of this distinction, so thoroughly sustained by the authorities, that if the government can take the exclusive control of the liquor traffic, it can do so as to any other avocations in life * * *. If the act is not a police measure, it is unconstitutional. It is quite a different thing, however, when trade is simply an incident to a police regulation. Buying and selling on the part of the federal, state, and municipal governments take place every day and so long as the buying and selling are in pursuance of police regulations, they are entirely free from legal objection. The federal government sells liquor and other articles that have been seized as contraband. Articles are purchased by the state to keep up the penitentiary and asylums and other public institutions and enterprises. We see it buying a farm to utilize the convict labor of the state, and selling the produce made on the farm. Municipal governments have the right to buy and dispose of property in administering their governmental affairs." State ex rel. George v. Aiken (1894) 42 S. C. 222, 234, 247, 20 S. E. 221, 26 L. R. A. 345.

the second, the court avoided any discussion in general terms of the standing under the commerce clause of a state sales system, whether monopolistic or competitive. Instead it found ready to hand the Wilson Act,³² bestowing upon the states a large measure of autonomy in dealing with intoxicating liquors moving from state to state and contented itself with the proposition that, under that act, control by the state of the liquor traffic within its borders was not complicated by commerce clause considerations, a principle as applicable, it was held, to a dispensary system as to outright prohibition.

This later decision was in complete accord with the position which the federal court had already taken on the South Carolina legislation in *Cantini v. Tillman*.³³ In that case the police power had been invoked as furnishing the foundation of the legislation and as getting it past objections grounded on the state constitution and the federal due process clause; and the Wilson Act had been cited as a sufficient answer to the claim of interference with interstate commerce. The charge that the legislation abridged the privileges or immunities of citizens of the United States was more fully rebutted than in the state decisions, on the reasoning that the selling of liquor at retail did not rank as a privilege or immunity of American citizenship. Furthermore certain other contentions on federal constitutional grounds not urged before the South Carolina court were disposed of favorably to the dispensary act. Thus, the Wilson Act was found to furnish a sufficient answer not only to the commerce clause contention but also to the proposition that the South Carolina statute provided for levying imposts or duties on imports or exports, contrary to the provisions of Article 1, Section 10, of the Constitution. And the fact that plaintiffs suing to enjoin enforcement of the statute were Italian subjects was held not to disable the state from establishing a liquor monopoly, despite the existence of a treaty between the United States and Italy guaranteeing to citizens of the latter the right "to carry on trade, wholesale and retail," "to do anything incident to or necessary for trade upon the same terms as the natives," and "to enjoy the same rights and privileges as are or shall be granted to the natives."

The decisions, placed as they were on the very narrow ground

32. (1890) 26 Stat. 313.

33. (C. C. S. C. 1893) 54 Fed. 969.

of the application of the Wilson Act, were barren of information on the point of the states' power to undertake the sale of commodities generally without crossing the path of the commerce clause. The question, then, was whether the Supreme Court in its turn would confine its discussion to the effect of the Wilson Act or whether it would enter into the broader aspects of the propriety or the status of state selling and state monopoly under the Constitution. The result was ambiguous.

In two cases, *Scott v. Donald*³⁴ and *Vance v. W. A. Vandercook Co. No. 1*,³⁵ the Court condemned two successive and somewhat different dispensary acts. The latter of these cases held that the Wilson Act was available to states electing to regulate liquor by state monopoly, and so made that the law. Going further it held that the preceding case had also held that; but the language of the earlier opinion³⁶ and the division of the court on the two cases³⁷ make it seem extremely doubtful whether

34. (1897) 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632.

35. (1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100.

36. It appears rather that what the earlier opinion had decided was that the Wilson Act might be resorted to in aid of state prohibitory and probably state licensing systems, but not in aid of a state dispensary system. See, e. g., the following statements: "So long, however, as state legislation continues to recognize whiskies, beers and spiritous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the constitution and laws of the United States, as is given to other articles * * *. It [the South Carolina Act] is not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors, as articles detrimental to the welfare of the state and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890." *Scott v. Donald* (1897) 165 U. S. 58, 91, 100, 17 S. Ct. 265, 41 L. ed. 632.

37. It is to be observed that Shiras, J., who wrote the majority opinion in *Scott v. Donald*, wrote the dissent in *Vance v. W. A. Vandercook Co.* and affirmed emphatically in the latter that the former had held state dispensary laws to be outside the protection of the Wilson Act, as against the contention of the new majority that he meant no such thing. On the other hand, Brown, J., who had dissented in *Scott v. Donald* because he understood that it placed state liquor monopolies beyond the Wilson Act pale, voted with the majority in *Vance v. Vandercook*. The majority in the former case consisted of Fuller, C. J., and Field, Harlan, Gray, Shiras, White, and Peckham, JJ.; Brown, J., dissented and Brewer, J., took no part in the decision. In the latter case, the majority consisted of Harlan, Gray, Brewer, Brown, White, and Peckham, JJ.; the dissent of Fuller, C. J., and Shiras and McKenna, JJ. Field, J., had been replaced by McKenna, J. Of the six members who adopted the thesis that the cases were consistent on the application of the Wilson Act, four had concurred in the former opinion, one had dissented from it, and one had not participated; two of the other justices constituting the original majority, including Shiras who wrote the opinion, dissented in the second case, and one was dead. The proposed reconciliation of the two is thus not very convincingly sustained on a count of noses.

the explanation of the earlier decision by the later one is much more than a reconciliation *a posteriori*. That is largely immaterial, however, not only because, case law being ambulatory in character, a later holding consigns to oblivion prior inconsistent decisions, but also because only insofar as the statutes were considered outside the narrow and special limits of the Wilson Act could their fate have any bearing on the general problem of the state's right to deal in commodities. Whatever significance the cases possessed on this broader problem lay in, first, their development of commerce clause law independent of the Wilson Act, and, secondly, the manifestations therein of judicial receptivity or hostility toward the state's entrance into the field of selling goods.

It was agreed by all the justices in both cases that the only selling which might be monopolized by a state in any event was selling within the state; hence, that attempts to strike at interstate sales by punishing residents who bought elsewhere, or by seizing or preventing delivery of goods so purchased, constituted conduct prohibited by the commerce clause. Upon that ground the invalidity of the statute involved in the *Vance* case³⁸ was rested. Again, should the state in setting up the monopoly expressly discriminate against producers in other states in favor of those within its borders, that, it was felt, would render the whole scheme obnoxious to the commerce clause. Preferential clauses of this kind had characterized the dispensary act first passed upon, in *Scott v. Donald*.³⁹ Under that act the state was directed to procure its supply from local brewers and distillers, provided that the home-made product was as good and as cheap as that available elsewhere, and to sell wine from South Carolina grapes at not over ten per cent profit, with a view to encouraging viniculture within the state. These provisions were eliminated by the later legislation; but the fact that they had existed was eagerly resorted to in *Vance v. Vandercook* as a ground for distinguishing *Scott v. Donald*.

The intrusion of government into a traditional domain of business went almost unnoticed. There was an express refusal to enter into that phase of the question in *Scott v. Donald*.⁴⁰ In

38. (1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100.

39. (1897) 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632.

40. "It was pressed on us, in the argument, that it is not competent for a state, in the exercise of its police power, to monopolize the traffic in 'intoxicating liquors', and thus put itself in competition with the citizens

Vance v. Vandercook, it drew forth a perfunctory grumble in the dissenting opinion of Mr. Justice Shiras⁴¹ and a rather summary dismissal by the majority of the ingenious contention that all state trading inevitably involved discrimination, since officials in obtaining supplies must needs purchase from citizens of some of the states and in doing so necessarily preferred them to citizens of other states. The explanation apparently is that the court had swallowed the police regulation theory of the dispensary system hook, line, and sinker. So completely was their attention focused on that aspect of the legislation that they had none left for the issues involved in state merchandising.

The *Vance* case voided a dispensary act and validated the dispensary system. Thenceforth the constitutionality of the scheme was never seriously assailed.⁴² When, in cases subsequently coming before the United States Supreme Court, state

of other states. This phase of the subject is novel and interesting, but we do not think it necessary for us now to consider it." 165 U. S. at p. 101.

41. "We did not find it necessary in *Scott v. Donald* to pass upon the validity of the scheme whereby a state should seek to establish itself as a trader in articles of commerce, and to punish, as criminals, all persons who should attempt to deal in such articles. Nor has the court seen fit to discuss that question in the present case. It may be that, if confined to articles of state production, such a scheme might not be open to objections on federal grounds. But, where a state proposes to create a monopoly in articles which its own legislation recognizes as proper subjects of manufacture, sale and use, and where those articles are a part of international and interstate commerce, it is, I submit, too plain to call for argument that such an attempt does not comport with that freedom of trade and commerce, to preserve which is one of the most important purposes of our Federal System." (1898) 170 U. S. 438, 467, 468, 18 S. Ct. 674, 42 L. ed. 1100.

42. The Georgia Dispensary Statute, Ga. Acts of 1897, 562, was sustained on reasoning practically identical to that of the South Carolina court. *Plumb v. Christie* (1898) 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181. The court sounded a refreshing note of judicial self-restraint in dealing with legislation, saying at pp. 692, 693: "It is idle, in a court of law created for the purposes of declaring legal principles or passing upon legal rights of litigants at issue, to discuss 'inherent and inalienable rights,' supposed to exist in the enlightened conscience or consciousness of mankind, yet undefined by any rule known to the organic or statute laws of a state. In discussing the validity of an act passed by the legislative branch of the government, no light can be gathered by an attempt to show that it contravenes the general purposes for which a free government is established. * * * It is worse than useless then for the courts to undertake to pass upon the validity of a statute, by an inquiry as to whether or not it is just or oppressive. To enter into such a field of investigation would be like embarking upon the sea without rudder or compass. A law is not necessarily unconstitutional or otherwise invalid because it is unjust. We live under a constitution and written laws, and the court can enforce only such rights as they protect, and remedy such wrongs as they redress." The constitutionality of the act was reaffirmed in *Dispensary Commissioners v. Thornton* (1898) 106 Ga. 106, 31 S. E. 733.

liquor monopolies were involved, the court tacitly assumed the constitutionality of the acts establishing them. But while those cases thus added no increment of strength to the dispensary system itself, they broadened the basis upon which it rested and strengthened materially the implication that the states might engage in selling other more prosaic commodities, less steeped in emotion and politics than intoxicating liquors. Something must be allowed for the fact that the cases in question thereafter were tax cases, in which the federal government claimed to impose a tax on the conduct of state liquor dispensaries and the states sought to escape on the doctrine of the immunity of governmental instrumentalities as established by *Collector v. Day*⁴³ and the authorities following it. The disallowance of the claimed immunity is therefore not conclusively convincing that the assumptions of the decisions will be transferred to controversies unrelated to the governmental hunger for revenue which has left its mark on taxation law. On the other hand, there is a fairly even chance that the change in language represents a real change in attitude, however vague.

It will have been observed that the cases thus far discussed all placed heavy stress upon the notion that the state dispensary plan was an exercise of the police power. Whatever else there might be in it was largely ignored. It was because it was an appropriate measure of police regulation that it slid by the multitude of constitutional bans and bars. That characteristic was regarded as the key to its constitutionality. As long as that element dominated the thinking of the courts in the field, the dispensary cases were comparatively sterile of consequences in other connections. The almost immemorial exertion of governmental effort to regulate the liquor traffic has given it a peculiar position as a head of the police power. Until the connection between the dispensary cases and the police power was broken down, therefore, it was highly questionable how far, if at all, those cases authorized government marketing of anything except intoxicating liquors. It was the accomplishment of the tax cases, about to be noticed, that they divorced the dispensary laws from the police power and so made the constitutional discussions and suggestions relating to such laws available throughout the wider field of state selling generally—perhaps.

43. (1871) 11 Wall. 113, 20 L. ed. 122.

In *South Carolina v. United States*,⁴⁴ the court conceded that there was an element of police regulation in the statute; but it refused to be blind to the other purposes which the act served and notably to its efficiency as a revenue measure.⁴⁵ To permit the regulatory element to give color and character to the whole system would be to falsify the facts. Whatever the conceptual ancestry of the legislation, the actual going enterprise was action of the state in a proprietary and not a governmental capacity. It was running a business just as any private concern might do; and the business, rather than the regulatory, feature was predominant. Mr. Justice Brewer, who prepared the opinion, even ventured a quick and cautious glance at the possibility that the states might extend their range of operations and undertake to deal in a great variety of commodities, in which case, he suggested, the character of their conduct would be precisely analogous to that involved in operating the dispensary system.⁴⁶

After the rise and fall of national prohibition, several of the states⁴⁷ turned to the dispensary system and the stage was set for a re-litigation of the issues decided by *South Carolina v. United States*. In *Ohio v. Helvering*,⁴⁸ the Supreme Court of the United States re-affirmed its decision in the earlier case in clear and positive terms. Nor was that all. Advancing one mighty step beyond, the court declared that as to the operations of its liquor business, the state was not exercising its police power but was performing some other function no different than that which would be involved in selling any other and ordinary commodity. No constitutional objection was voiced to the fact of its doing so; nor was there any indication of any such objection in case any state should decide to deal in other classes of goods.⁴⁹ Thus there was accomplished, so far as judicial rhetoric

44. (1905) 199 U. S. 438, 26 S. Ct. 110, 50 L. ed. 261.

45. In 1901, profits from sales amounting to \$545,248.12 were divided between the municipal and county and the state governments.

46. (1905) 199 U. S. 438, 454, 455, 26 S. Ct. 110, 50 L. ed. 261.

47. E. g., Pennsylvania, Ohio, and Iowa.

48. (1934) 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307.

49. "The argument seems to be that the police power is elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power and applied to business activities is the power to regulate those activities, not to engage in carrying them on. If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some

could do so, the stripping of the dispensary system of its early dependence on the police power. As a result, the liquor monopoly decisions of the last century may well be generalized to apply to the constitutionality of state sales without regard to subject matter. They are distinguishable if the court feels that way; but they are squarely in point, if it feels *that* way.

Concurrently in a widely separated field the practise of state operation of economic enterprises and sale of commodities to its citizens was growing. Many forms of activity had been captured by the government so early in the history of the republic that the entrepreneurs did not yet understand that the rights which the union had been formed to secure, in which formation they had themselves in many instances participated, were being undermined. Thus we today are disposed to accept without hesitation that education and the maintenance of highways are governmental functions which must always and everywhere have been so; yet the private schoolmaster and the tollroad proprietor of late colonial and early federal days very probably thought theirs were ordinary lawful callings and property interests not greatly unlike those of the shopkeeper or the shipowner. The free public school and the public highway were so early added to the public services, however, that no protest was uttered against the intrusion of the government into the competition for scholars and travellers as subversive of the Constitution.⁵⁰ As time passed and the adoption of the Constitution receded further and further into history, however, people became more and more aware of what rights it was they had sought to protect by that instrument. The shareholders in the Charles River Bridge seem to have had a vague sense, as little as fifty years after the convention, that the fundamental law was intended to guarantee in perpetuity the rights of toll bridge proprietors.⁵¹

Still the field of governmental activity in business kept advancing and the varieties of service afforded by it to its constituents multiplying, until at the end of the nineteenth century

authority apart from the police power. When a state enters the market place seeking customers, it divests itself of its quasi sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." 292 U. S. at 389.

50. See 2 Taussig, *Principles of Economics* (2d ed. 1913) 484, 485; *Albritton v. Winona* (Miss. 1938) 178 So. 799, 805.

51. See *Charles River Bridge v. Warren Bridge* (1837) 11 Pet. 420, 9 L. ed. 773.

there was a rather considerable list of enterprises as to which there was a well-established tradition of governmental operation or subvention. Those of the categories which had been soonest and most completely brought within the purview of government action were by now regarded as governmental functions and their one time status as competitive businesses was forgotten. Those more recently and more sporadically undertaken by government were thought of as public service enterprises which merged on the one side into matters purely governmental, on the other into matters purely private.

How the state of Georgia became a railroad owner and the city of New York a proprietor of ferry boats, how municipalities throughout the land undertook to supply their citizens with electricity and gas and water are not matters with which we need presently concern ourselves in this inquiry into governmental control of commodity prices. At the same time it must be borne in mind that there is an ancestral link between governmental supplying of services and governmental dealing in goods. The classes of commodities which the government first undertook to furnish its citizens were those which, to a degree, were substitutional for, or whose production was normally incidental to, the output of the public service enterprises. Indeed that still continues to be the case. The government in the sales field is much more the public utilitarian than the general merchant. This close connection between public service enterprises and the merchandising enterprises which have been undertaken has assisted the courts tremendously in sustaining the validity of legislation setting the government up in business, and they have recurred again and again to their similarities to bolster up decisions favorable to the constitutionality of such legislation.

Typically the business of selling goods has not been undertaken by the states on a state wide basis but by agencies and subdivisions of the state—counties, cities, and the like. It is, accordingly, around the acts of these municipal bodies that the constitutional law in the field has accreted. That accidental circumstance is probably of little importance, however, no distinction being maintainable on federal constitutional grounds between what the state does by itself and what it does through these subordinates.

The pioneer effort in the direction of giving municipal bodies

power to enter into the field of selling commodities seems to have been the Massachusetts proposal in 1892 to confer upon the cities and towns of the state the right to maintain fuel yards to sell coal and wood to the inhabitants. Although the grain vending activities of the city of Boston throughout the eighteenth century furnished a historic analogy for the legislation,⁵² the prevailing cast of legal and economic thought in the late nineteenth century was not congenial to such attempts. The Supreme Judicial Court advised against the constitutionality of the projected legislation,⁵³ reiterating the rebuke a few years later when the question was again raised.⁵⁴ Shortly Michigan announced its concurrence.⁵⁵ The early record of state merchandising, as embodied in the municipal fuel yard acts, was thus through the first decade of the present century an unbroken succession of judicial defeats.

52. "In the fall of 1713 there was a scarcity of grain, and the General Court prohibited the exportation of it. 1 Prov. Laws (state ed.) 724. The town of Boston in March, 1713-14, voted to lay in a stock of grain to the amount of five thousand bushels of corn and to store it in some convenient place and it was left to the selectmen to dispose of it as they saw fit. Record Commissioner's Reports, 101, 104. After that, as shown by the records, the town regularly bought and stored grain and sold it to the inhabitants as late as 1775, and perhaps later, and it established two granaries, one of which, in the common, remained in use probably as long as the town bought and sold grain. Whether after the Revolution the town continued to buy grain, we are not informed, as the records have not been printed. The amount which could be sold to any one person was often limited to a few bushels at a time. The report of a committee in 1774 shows that from March, 1769, to March, 1774, the quantity of corn and rye purchased was five thousand eight hundred and thirty-six bushels and that the stock on hand was three hundred seventy-six bushels. It is apparent that the original purpose was to provide against a famine, and that it was not the intention of the town to assume the business of buying and selling all the grain which the inhabitants needed, but of keeping such an amount in store as was necessary in order that small quantities might be obtained, particularly by the poorer inhabitants, at what the selectmen, or a committee of the town, or the town itself deemed reasonable prices. On May 25, 1795, the town voted to sell the granary." Opinion of the Justices (1892) 155 Mass. 598, 602, 603, 30 N. E. 1142.

53. Opinion of the Justices, *supra*, note 52. Holmes, J., dissented, and Barker, J., entered a qualified dissent.

54. Opinion of the Justices (1903) 182 Mass. 605, 66 N. E. 25.

55. *Baker v. Grand Rapids* (1906) 142 Mich. 687, 106 N. W. 208. The court only adhered to the Massachusetts doctrine to the extent of declaring that the town could not embark on sales of coal as a commercial enterprise, although it might do so to tide over emergencies. The case is of doubtful weight, as, first, the municipality did not deny but indeed expressly admitted its inability to sell coal on a general commercial basis and, second, the plaintiff's application for injunction was dismissed on the clean hands doctrine and for failure to show injury.

In the next ten years, judicial sentiment on the constitutionality of state selling was evenly divided.⁵⁶ While Louisiana in 1914⁵⁷ and Missouri in 1919⁵⁸ held that municipalities might not constitutionally engage in the manufacture and sale of ice, a contrary result was reached in Georgia;⁵⁹ and the municipal fuel yards of Portland were given a clean bill of constitutional health by the Supreme Court of Maine⁶⁰ and, on appeal, of the United States.⁶¹ Furthermore in the war and post-war years toward the end of the decade, the scarcity, actual or potential, of many essential commodities and unsettled market conditions led to the adoption of statutes in a number of states⁶² and of a constitutional amendment in Massachusetts⁶³ looking to the distribution of large classes of consumers' goods by the government, typically by municipal action.

From 1920 to the present date, case after case has sustained the constitutionality of such or similar municipal undertakings and in not a single jurisdiction not already committed to the opposite rule⁶⁴ has it been adopted. Municipal ice plants were

56. For a summary of doctrines and prospects as they appeared toward the end of this period, see Maxey, *Is Government Merchandising Constitutional?* (1918) 52 Am. L. Rev. 215.

57. *Union Ice & Coal Co. v. Ruston* (1914) 135 La. 898, 66 So. 262.

58. *State ex rel. Kansas City v. Orear* (1919) 277 Mo. 303, 210 S. W. 392.

59. *Holton v. Camilla* (1910) 134 Ga. 560, 68 S. E. 472; *Saunders v. Arlington* (1918) 147 Ga. 581, 94 S. E. 1022. The latter case relied, for the constitutional point, on the earlier one, without further discussion.

60. *Laughlin v. Portland* (1914) 111 Me. 486, 90 Atl. 318; *Jones v. Portland* (1915) 113 Me. 123, 93 Atl. 41.

61. *Jones v. Portland* (1917) 245 U. S. 217, 38 S. Ct. 112, 62 L. ed. 252.

62. Conn. Pub. Acts 1917, ch. 386, sec. 2, p. 2554 (municipal sales of food or fuel supplies); N. J. Laws 1917, ch. 80, and N. J. Laws 1918, ch. 53 (municipal sales of food or fuel, statutes of limited duration); N. Y. Laws 1917, ch. 813, sec. 14 (municipal sales of food and fuel on assent of state officials); Vt. Pub. Acts 1919, no. 105, p. 110 (municipal sales of fuel and ice); Wis. Laws 1917, ch. 561 (state expropriation and sale of fuel, food, seeds, or other personal property necessary for common defense).

63. Const. Mass., Art. XLVII: "The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress of a sufficient supply of food and other common necessities of life and the providing of shelter are public functions and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court may provide." Rati-field Nov. 6, 1917. Mass. Gen. Acts 1918, ch. 204, carried into operation the terms of the provision.

64. Solely upon the authority of *Baker v. Grand Rapids*, supra, note 55, the Michigan court held, in *Toebe v. Munising* (1937) 282 Mich. 1, 275 N. W. 744, that municipalities had no authority to engage in the fuel business, two justices dissenting.

approved in Arizona in 1926⁶⁵ and in Texas in 1930.⁶⁶ In Minnesota⁶⁷ and Nebraska⁶⁸ the operation of city fuel yards was held constitutional. The principle of government selling was extended in the last named state to retail sales of gasoline, with the cities authorized to operate filling stations; and neither state⁶⁹ nor federal⁷⁰ courts found any meritorious ground of constitutional objection to the system.

The completeness with which the courts have reversed their attitude toward municipal operation of retail sales establishments would seem to be, for one of even mildly prophetic gifts, pregnant with the materials of prediction. Be that as it may, the mere fact that up to 1910 such enterprises were held unconstitutional in a hundred per cent of the cases, that from 1910 to 1920 there was an exactly even division among the jurisdictions passing on the question, and that since 1920 the authorities have unanimously sustained such undertakings, except for one decision attributable to the compulsion of *stare decisis*,⁷¹ makes the present trend and direction of judicial sentiment on the subject amply transparent.

In all this array of cases one seeks in vain for any reasoned discussion of the effect of the federal system upon the limitations and capacities of the several states. It simply is not there. Yet the cases are not without their value in that connection. For one thing, the practice of conducting retail sales establishments has grown from a status of general outlawry to one of general acceptance, so that as, if, and when the constitutionality of the practice shall in the future be contested on strictly federal grounds, the attack will be on a familiar form of governmental action which will have in its favor all the psychological reluctance of judicial bodies to uproot the established. There will be full scope for the technique of rationalizing inertia which has on occasion played such a signal part in the disposition of constitutional issues. Moreover, the very fact that there has

65. *Tombstone v. Macia* (1926) 30 Ariz. 218, 245 Pac. 677.

66. *Denton v. Denton Home Ice Co.* (1930) 119 Tex. 193, 27 S. W. (2d) 119.

67. *Central Lumber Co. v. Waseca* (1922) 152 Minn. 201, 188 N. W. 275.

68. *Consumers Coal Co. v. Lincoln* (1922) 109 Neb. 51, 189 N. W. 643.

69. *Standard Oil Co. v. Lincoln* (1926) 114 Neb. 243, 207 N. W. 172.

70. *Mutual Oil Co. v. Zehrunge* (D. C. D. Neb., Lincoln Div., 1925) 11 F. (2d) 887.

71. *Supra*, note 64.

been, and still is, so little consideration of the state-federal problem possesses its own significance as an indication that the profession has felt that the frame of government presents no very serious obstacle to the adoption of state merchandising schemes.

The great bulk of the discussion has stressed the feature of the expense involved in inaugurating such schemes, to the almost complete neglect of consideration of the effect and legality of competitive selling as such. Thus the turning point in practically all the cases reviewed has been the issue of whether the taxes involved in setting up the sales enterprises in question were for a public purpose.⁷²

The courts which have sustained the validity of municipal merchandising have made frequent reference to the special conditions prevailing at the time and place to aid them in finding a public purpose to be served by the operation of the business.⁷³ Again, emergency has been mentioned on several occasions as a factor of great weight in support of municipal action. How much actual importance it has may well be questioned, however. Upon that point the Portland Fuel Yard Cases, in the first of which⁷⁴ the emergency element was much stressed while in the second⁷⁵ a permanent fuel yard ordinance was sustained without discussion, solely upon the authority of the prior case, are suggestive. Reference to such factors has in any event proved a convenient formula with which to solve the problem of public purpose and the broader problem of which it is a specialized form, that of due process. By its use the courts have found themselves able to reconcile such municipal undertakings with

72. See Note (1928) 41 Harv. L. Rev. 775 for a discussion of doctrinal evolution regarding state and municipal excursions into business enterprise as public purposes under the taxing power.

73. See *Tombstone v. Macia* (1926) 30 Ariz. 218, 235, 245 Pac. 667; *Standard Oil Co. v. Lincoln* (1926) 114 Neb. 243, 251, 207 N. W. 172; *Holton v. Camilla* (1910) 134 Ga. 560, 567, 68 S. E. 472. The contrary view has been supported by the holding that the tables of public purpose were closed at a date now past and cannot be reopened; see, e. g., the statement in *State ex rel. Kansas City v. Orear* (1919) 277 Mo. 303, 320, 210 S. W. 392: "The rule to be invoked in determining whether the business in question, when it is proposed by the municipality to engage in the sale of the enumerated necessities of life, is public or private, is whether such business is sanctioned by time and the acquiescence of the people as being public or private."

74. *Laughlin v. Portland* (1914) 111 Me. 486, 90 Atl. 318.

75. *Jones v. Portland* (1915) 113 Me. 123, 93 Atl. 41; *aff'd* (1917) 245 U. S. 217, 38 S. Ct. 112, 62 L. ed. 252.

the imperatives of the state constitutions and also to find them compatible with the Fourteenth Amendment.⁷⁶

It is probably the due process provision of the Fourteenth Amendment that a few courts have had in mind in making the blanket statement that governmental operation of such businesses as those under consideration does not violate any principle of the Federal Constitution.⁷⁷ In general no attempt has been made to spell out any other ground of repugnance to that instrument. There seems to be no instance in which the commerce clause has been urged against the carrying on of retail businesses by municipalities. On one occasion the claim was advanced that such action was an impairment of privileges or immunities of citizens of the United States; but it was made with seemingly faint conviction and disallowed with scant discussion.⁷⁸ By and large any limitations on such matters which may inhere in the federal structure of the republic have been permitted to lie unasserted, except for the summarily rejected claim of infringement of privileges and immunities.

Only rarely have the businesses been frankly and avowedly competitive in character. In the special circumstances of the fuel and ice businesses, judicial caution found convenient escapes from an indorsement of competitive government selling. Public health and safety, connection with existing municipal services, analogy to public service enterprises—in these were found the justification and the limits of municipal merchandising. While the decisions which refused to sustain such municipal

76. "The due process provision of the Fourteenth Amendment of the Federal Constitution, although the amendment does not mention taxes, inhibits their imposition for private purposes. The principle is fundamental in government that the power of taxation, though unrestrained in terms, cannot be exercised for other than a public purpose.* * * Economic and industrial conditions are not stable, times change. Many municipal activities, the propriety of which is not now questioned, were at one time thought, and rightly enough so, of a private character. The constitutional provision that taxes can be levied only for public purposes remains; but conditions which go to make a purpose public change." *Central Lumber Co. v. Waseca* (1922) 152 Minn. 201, 202, 188 N. W. 275. See *Mutual Oil Co. v. Zehrunge* (D. C. D. Neb., Lincoln Div., 1925) 11 F. (2d) 887. In *Jones v. Portland*, supra, note 75, the discussion of constitutionality under the Federal Constitution was confined in both the Maine and the United States Supreme Courts to the due process issue.

77. See *Denton v. Denton Home Ice Co.* (1930) 119 Tex. 193, 203, 27 S. W. (2d) 119; *Standard Oil Co. v. Lincoln* (1926) 114 Neb. 243, 253, 207 N. W. 172.

78. See *Holton v. Camilla* (1910) 134 Ga. 560, 68 S. E. 472.

activity went out of their way to condemn governmental selling and to assimilate the selling of ice and fuel with other retail enterprises,⁷⁹ those which upheld the legislation were for the most part active in distinguishing them and ready to cry confusion to the general policy, without condemning the particular instance.⁸⁰

The use as a whipping boy of general competitive selling by government was not possible in the Lincoln Filling Station Cases. The Standard Oil Company alleged the absence of emergency or combination in restraint of trade and the purpose of the city to maintain one station only, with the object of con-

79. The police power "is a power to regulate the business of others, and not a power to go into business. Of course, if the business cannot be regulated otherwise than by the government going into it, or perhaps even if, in the opinion of the Legislature, that mode of regulation is the most practical and best, such mode can be adopted; but nothing of that kind could be pretended in the case of the grain or the ice business.* * * For the support of its paupers and indigent sick the municipality may go as deeply as the necessity of the case may require into the pockets of its large taxpayers; but it cannot do so for the purpose of selling ice, or bread, or meat, or drugs, etc., more cheaply to the inhabitants in general than the regular merchants are doing. This would be paternalism pure and simple, a thing foreign to our system of government." *Union Ice & Coal Co. v. Ruston* (1914) 135 La. 898, 919, 926, 66 So. 262. "A municipality, however, cannot enter into a commercial enterprise, such as buying and selling coal to its citizens as a business, thereby entering into competition with dealers in coal." *Baker v. Grand Rapids* (1906) 142 Mich. 687, 106 N. W. 208. "We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling of such articles as wood and coal for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in the Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the Constitution was adopted was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the Constitution was to protect individuals in their right to carry on the customary business of life, rather than to authorize the Commonwealth or the 'towns, parishes, precincts, and other bodies politic' to undertake what had usually been left to the private enterprise of individuals." *Opinion of the Justices* (1892) 155 Mass. 598, 602, 603, 30 N. E. 1142.

80. "That it is beyond the power of a municipal corporation to engage in the sale of commodities which are and can be easily conducted by private business concerns in competition with one another, and which can be sufficiently regulated thereby.* * * In this we most heartily concur." *Laughlin v. Portland* (1917) 245 U. S. 217, 499, 38 S. Ct. 112, 62 L. ed. 252. In *Holton v. Camilla* (1910) 134 Ga. 560, 563, 68 S. E. 472 the city expressly disclaimed any intention of embarking on an independent ice business and urged only its right to use facilities in connection with existing waterworks and electric light plant for the production of ice.

trolling the market price at which gasoline was to be sold locally. The city demurred. The court was thus squarely confronted with the propriety of municipal operation designed to establish a retail selling price for a commodity. Over the bitter protests of two justices, it was held that notwithstanding the admittedly competitive character of the undertaking, it was still within the sphere of the permissible.⁸¹ On a closely similar state of pleadings, the Federal District Court for Nebraska had already sustained the activities of the municipality,⁸² noting the fact that, while there had been much talk in the opinions about a supposed inability of government to enter business in competition with private dealers, the Supreme Court of the United States in *Jones v. Portland*⁸³ had not indicated its assent to any such distinction. Both the state and the federal court did indeed stress the great and growing importance of gasoline as an article of commerce and consumption; but the very fact that they did so, while rejecting the proposed test on the ground of competitive purpose, seems to justify an inference that whatever limit there may be on the government's power is to be found in the importance of the commodity and not in any element of competition with private business. The United States Supreme Court affirmed the state decision without opinion,⁸⁴ on the authority of *Jones v. Portland*.

The relative infrequency with which the states have undertaken the direct operation of retail sales enterprises is the obvious explanation of the fragmentary character of the law in that connection as compared with the materials on municipal merchandising. The two Dakotas seem to have provided the only instances where such a policy has been submitted to the scrutiny of the courts. In South Dakota, the state embarked on a program of gasoline distribution similar in general character to that which had been put into effect in the city of Lincoln, Nebraska, and sustained in the cases already noticed.⁸⁵ Such activity was distasteful to the supreme court of the state which

81. *Standard Oil Co. v. Lincoln* (1926) 114 Neb. 243, 207 N. W. 172.

82. *Mutual Oil Co. v. Zehrung* (D. C. D. Neb., Lincoln Div., 1925) 11 F. (2d) 887.

83. (1917) 245 U. S. 217, 38 S. Ct. 112, 62 L. ed. 252.

84. (1927) 275 U. S. 504, 48 S. Ct. 155, 72 L. ed. 395.

85. *Standard Oil Co. v. Lincoln* (1926) 114 Neb. 243, 207 N. W. 172; (1927) 275 U. S. 504, 48 S. Ct. 155, 72 L. ed. 395; *Mutual Oil Co. v. Zehrung* (D. C. D. Neb., Lincoln Div., 1925) 11 F. (2d) 887.

held the scheme bad, not because of substantive unconstitutionality but by reason of a defect in the title of the act under which the governor assumed to act in setting aside the requisite funds to start the system going.⁸⁶ The circumspection of the court with respect to the ground of decision was not matched by a parallel restraint in the language employed. Noting, without determining, the contention that the section was authorized as an exercise of the police power, the court strongly reprobated the state's entry into the field of private business, declaring the retail selling of any commodity, however important to the consuming public, not to be among the public purposes for which taxation was authorized.⁸⁷ In thus aligning itself in sentiment, though not technically in decision, with a school of thought already obsolescent in the nearly related field of municipal merchandising,⁸⁸ the court disregarded utterly the judicial approval bestowed upon the commercial grain operations of the state's northern twin.

While, it was as a buying, more than a selling, threat that wheat-raising North Dakota wished to throw its weight into the market, under the program formulated and carried to enactment by the Non-Partisan League in 1919, and in that aspect its action must be considered more at length later, yet it should be noted that the endorsement given to the program by the decision in the case of *Green v. Frazier*, in both the state⁸⁹ and

86. *White Eagle Oil & Refining Co. v. Gunderson* (1925) 48 S. D. 608, 205 N. W. 614; Comment (1926) 21 Ill. L. Rev. 178.

87. "There is nothing essentially different in the business of retailing gasoline from that of any other commodity, and while it may be conceded that gasoline under present economic conditions is a necessity, there is no reason why it may not be retailed by private enterprise. There is no need of the exercise of the right of eminent domain; it is not contraband as is intoxicating liquor, and no governmental restrictions are placed upon trade in gasoline, as such. Private persons have as much right to engage in the sale of this commodity as in the sale of any other useful or necessary article. We are satisfied the state may not enter into business of selling gasoline and levy and collect taxes to conduct such business, unless, as suggested by the defendants, article 13 of our Constitution, and especially section 1 of said article, empowers the state to enter into such business. Recent amendments to our Constitution evidence a tendency to depart from the earlier fundamentals of our government, and experiment in socialism and paternalism. * * * There is nothing in any of these amendments to the Constitution which can be construed to apply to the sale of gasoline by the state. * * * If we were to so hold it would lead to a practical removal of all restrictions upon the state to engage in business, since there is nothing which is not useful and used in activities developing the resources of the state." 48 S. D. at 621, 622.

88. See the discussion, *supra* p. 481.

89. (1920) 44 N. D. 395, 176 N. W. 11.

the federal⁹⁰ supreme courts, extended without qualification to both phases of the state's undertaking. In spirit, the *White Eagle Oil* case,⁹¹ with its mutterings against the constitutionality of the state conduct of business enterprises, however closely linked to the economic welfare of the state, is antagonistic to the approval given to comparable activities in North Dakota, by the United States Supreme Court.

Can anything be safely ventured in the light of the situations and cases which have been reviewed as to the constitutionality of price control by competition in selling, as a function of the states in the United States? Not very confidently, perhaps, yet they do, it is submitted, give something with which to work. Probably the circumstantial difference between direct state selling and municipal selling can be regarded as of no importance; at any rate no point is made of that factual distinction either in the dispensary cases, in the *White Eagle Oil* case, or in *Green v. Frazier*, all of which freely accept the municipal merchandising cases as at least persuasive authority without suggesting any corresponding distinction in result. The challenge of the due process requirement and of the public purpose test in taxation both seem to have been met though the courts have been inclined to timidity in formulating the rationale for that result, clinging closely to the familiar formulae and concepts, such as the police power, and thundering against the constitutionality of government competition in the abstract while sustaining its various concrete manifestations. But the decisions of the United States Supreme Court in *South Carolina v. United States*⁹² and in *Ohio v. Helvering*,⁹³ looking through the spurious regulatory purpose of the dispensary acts to their revenue features and withdrawing the police power scaffolding of the system without questioning its proper validity, and in *Standard Oil Co. v. Lincoln*,⁹⁴ affirming a frankly competitive municipal enterprise undertaken for the acknowledged purpose of controlling prices, make it, if not certain, at any rate more than probable, that there is nothing in the due process concept which interdicts the control of prices by competition. With the due process issue out

90. (1920) 253 U. S. 233, 40 S. Ct. 499, 64 L. ed. 878.

91. *Supra*, note 86.

92. (1905) 199 U. S. 438, 26 S. Ct. 110, 50 L. ed. 261.

93. (1934) 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307.

94. (1927) 275 U. S. 504, 48 S. Ct. 155, 72 L. ed. 395.

of the way, the constitutional problem is stripped down to the naked question of the effect on state power of the federal tie. One or two cases holding that state sales systems do not impair the privileges and immunities of citizens of the United States,⁹⁵ a handful of decisions disposing of commerce clause objections to the dispensary system under the Wilson Act, random holdings that state monopolies must not discriminate against extrastate dealers or concerns by a grant of preferential treatment to the home team—such is the meagre sum total of available material to answer that question. On the privileges and immunities point there is indeed something that looks like ossified law. On the commerce clause phase, we have only cases dealing with a system of monopoly control, and treating even that largely on the basis of a special statute. The embryo of doctrine in that field is not yet viable. On the other hand, the more ominous perils of due process, so often fatal to judicially unloved economic and social legislation, has become more of a past threat than a present danger.

The United States Supreme Court has approved the practise of retail selling with the undisguised object of price manipulation, and has stressed the remoteness of its connection with the police power without imputing to it any the less validity on that account. Most important—probably *the* important thing—is the fact that the system has been increasing and multiplying, spreading over such diverse fields as whisky, ice, coal, gasoline, and wheat. The public and the courts are getting used to seeing it around. Most victims on the altar of constitutionality are sacrificed in their tender infancy, not after they have reached their tough and hardened adulthood. When the attack on such a program comes, as in all probability it will, there will be very little in the existing judicial materials to fend it off. What it will have to do is to overthrow a cumulation of instances of actually existing exercises of such power by the state and by municipalities. The tremendous inertia of institutions makes it better than an even bet that, whatever the sanctioning formula, the states' control of sellers' prices by competition will be found entirely compatible with their position as members of the union.

95. *Holton v. Camilla* (1910) 134 Ga. 560, 68 S. E. 472; *Cantini v. Tillman* (C. C. S. C. 1893) 54 Fed. 969; *State v. Aiken* (1894) 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345.

In Canada the provincial governments have engaged in the retail selling of goods to any considerable extent in only one field, that of intoxicating liquors. While the dispensary system has been adopted by the legislatures of several of the provinces, either on a monopolistic basis⁹⁶ or supplemented to a certain extent by private licensed dealers,⁹⁷ there has been very little litigation contesting the authority of the provinces so to act. The absence from the British North America Act of a due process clause would seem to be the major factor which has produced this paucity of precedent. In only one⁹⁸ case, indeed, has provincial authority in this regard been called in question; but that one is particularly enlightening for our purposes since it was fought out on the issue of the distribution of power between the provinces and the Dominion.

British Columbia had adopted a policy of provincial monopoly in the selling of intoxicating liquors in 1921⁹⁹ in lieu of its prior prohibition act; and, a prosecution having been instituted against a private person for making sales in violation of the act, its validity was sustained by the supreme court of the province in *Re Army and Navy Veterans of Canada*.¹⁰⁰ The settled technique of construction applied to the British North America Act required the finding, first, that there was an established head of provincial power in section 92 on which the legislation might be rested and, secondly, that there was no power given the Dominion by section 91 to which it might more appropriately be assigned.¹⁰¹ The court, while not unaware of the regulatory features incident to the bill, as was shown by its discussion of

96. See, e. g., the Liquor Control Act (Ont.), Ont. Rev. St. (1927) ch. 257.

97. As under the Alcoholic Liquor Act (Que.), Que. Stat. 1921 (11 Geo. V.) ch. 24.

98. In *Quebec Liquor Commission v. Lessard* (1922) 63 D. L. R. 177, 37 Can. C. C. 112, the Quebec statute, supra, note 97 was sustained as a proper exercise of provincial power; but the opinion, which is brief, does not indicate that the dispensary feature of the act was involved and, indeed, the facts on which the prosecution was based tend to negative any such supposition and to suggest that the attack on the act proceeded on a wholly different basis.

99. By the Government Liquor Act, 1921 (B. C.), B. C. Stat. ch. 30.

100. (1921) 61 D. L. R. 416. Also see *Rex. v. Ferguson* (1922) 69 D. L. R. 153, reaffirming the constitutionality of the act and holding that due proclamation thereof, under sec. 117 of the statute had been made, so as to bring it into effect.

101. This technique for the determination of the validity of provincial legislation is most explicitly stated, and most fully developed, in Lord Haldane's opinion in *Toronto Electric Commissioners v. Snider* [1925] A. C. 396, [1925] 2 D. L. R. 5.

the prior British Columbia liquor legislation and of cases concerning the liquor systems in the other provinces, did not torture the law into a mere regulatory measure or rule of police, but treated it without equivocation as a provincial incursion into the domain of business. Against such an enterprise it was urged that the legislation was a dealing with "trade and commerce," a subject entrusted to the Dominion by section 91 (2); in its favor, that it concerned either a local work or undertaking, or "property and civil rights within the province," or a matter "of a merely local or private nature in the province," which were subjects of provincial cognizance under subsections 10, 13, and 16 respectively of section 92. The suggestion that the liquor stores of British Columbia were a local work or undertaking was rejected by the court, which confined the application of the clause to structures and plants of a physical and tangible character, such as electric plants. But the other two heads of provincial power considered, and more especially subsection 16, were felt to be sufficiently comprehensive for the liquor business to be *intra vires* the province. The opposing claim that the power related to trade and commerce was grounded on the contention that liquor was a commodity of commerce, so recognized by British Columbia, and consequently any attempt by it to take into its hands the supplying of that commodity was an invasion of Dominion powers; but the court found no difficulty in dismissing the contention as an attempt to assign to provincial action a limit inconsistent with its recognized extent.¹⁰²

Thus, in Canada as in the United States, the present case authority, what there is of it, recognizes the right of the constituent members of the federation to embark on sales enterprises. True, the sales in question were not made pursuant to a policy of price control by competition, but the scheme had regulatory aspects. However, the discussion was on the plane of the transaction of business by the province rather than of police regulation, and a restriction of the decision to the latter would seem to be contrary to its tone and spirit. True also there is a much slighter substratum of experience and familiar-

102. A further argument that sec. 92(5) giving to the province "the management and sale of the public lands belonging to the Province and of the timber and wood thereon" by implication withdrew from the provinces the power to make any other commodity sales was noticed and rejected.

ity underlying provincial merchandising in Canada than supports municipal and state selling in the United States; but as against this, the Dominion-provincial issue was clearly articulated and definitely passed on in the Dominion, whereas with us the analogous federal-state issue has been pretty much neglected or avoided in the opinions.

Control by competition has by no means been an unused device in the polity of the Australian states. Indeed so commonly has it been resorted to at times past that an eminently qualified authority could say in 1917 that "there are probably more examples of State industrial enterprise and competition in Australia than elsewhere in the world."¹⁰³ The New South Wales government has been a fishmonger in Sydney and a baker in the same city; Queensland has entered the butcher business in Rockhampton and Brisbane, and Western Australia at various urban centers within its borders; fish stalls have been operated by the last-mentioned state at Perth and Fremantle; and with such other miscellaneous ventures as the New South Wales and Western Australian brickworks, sawmills in a number of states, and machine and implement manufacturing, the states have entered the field as competitors to correct price conditions which were felt to be detrimental to the public welfare. Curiously enough, however, in not a single instance does any constitutional objection to such activity appear to have been urged. Partly, no doubt, this traces to the absence of a due process clause in the Australian Constitution; partly perhaps to the residual powers of the Australian states¹⁰⁴ which dispense with the need of finding for them that grant of authority in more or less express terms which is essential to the validity of Canadian provincial legislation. Still, section 92 with its sweeping declaration of absolute freedom of trade and commerce¹⁰⁵ remains; and one is left to wonder why it has never been invoked against this form of price control.

While there has been no adjudication on the states' power to

103. Wilkinson, *State Regulation of Prices in Australia* (1917) 155. The materials with reference to state competition in Australia for this entire paragraph are drawn from Chapter XI of Wilkinson, pp. 154-197, in which he treats of "Regulating Prices by State Competition." See also Chapter XIV, "State Purchase and Distribution of Supply in the Interest of Consumers," pp. 213-224.

104. *Supra*, note 4.

105. *Supra*, note 14.

sell commodities to the public in Australia, however, it is there one must turn for the most direct pronouncements on the power of the federal government in that regard. The Commonwealth did not enter into the merchandising business (except in the Northern Territory where it had some trading ventures) until after the states had had considerable experience in the field and as late as 1917 took no part in the competitive distribution of commodities; but it did at that time have munitions, clothing, and arms factories established which, while producing solely for the government departments, were, of course, capable of producing for general sales purposes should the Commonwealth choose to embark on such a course.¹⁰⁶

It does not appear that the Commonwealth, in bidding on six turbo-alternator sets for the Sydney municipal electric light plant at Botany Bay and obtaining the contract for their supply and installation, was consciously engaging in any such aggressive policy of turning its existing facilities to competition with private dealers in electrical supplies and equipment. Rather, it seems, the extensive shops and plant of the Commonwealth Shipping Board at Cockatoo and Schnapper Islands could not be kept decently busy by the rather slight requirements of the Australian naval and military defense services in a period of deep peace. It was even asserted that they could not be kept in a proper state of efficiency unless permitted to remain continuously operating, which would require that to some extent the Shipping Board seek outside business from private persons. Nevertheless, the High Court held, there was no power in the federal government to enter on such a course of conduct, and the city of Sydney must seek its turbo-alternators in some other quarter.¹⁰⁷ The trade and commerce power, it was held, gave the Commonwealth no authority to engage in, but merely to regulate, trade and commerce.

The real reliance of the Shipping Board, however, was on the naval and defense power; for, it was urged, the dockyards and workshops could not be maintained efficiently as a practical matter without permitting their use in private enterprise when naval construction was slack. To reject this plea, the High

106. Wilkinson, *op. cit.* supra, note 103, at pp. 194, 195.

107. Commonwealth v. Australian Commonwealth Shipping Board (1926) 39 C. L. R. 1.

Court intimated, hurt it more than it did the Shipping Board, yet rejected it must be.¹⁰⁸ "There is no power," it was said, "which enables the Parliament or the Executive Government to set up manufacturing or engineering business for general commercial purposes,"¹⁰⁹ and this negation of authority was felt to dispose of the Shipping Board's power to furnish and install electrical materials although the case involved no attempt to set up any business for any purpose but merely an effort to utilize the surplus capacity of an existing plant established for a purpose admittedly within the control of the Commonwealth.

This distinction thus casually brushed aside in the Shipping Board Case came into its own nine years later in *Attorney General for Victoria ex rel. Victorian Chamber of Manufactures v. The Commonwealth*.¹¹⁰ The Commonwealth, acting again under the defense power, had maintained a clothing factory at Melbourne for the purpose of making uniforms for the naval and military forces and other services of the Commonwealth, having found at the time of the war a disturbing discrepancy between the amount for which it could make uniforms and the amount at which it could buy them.¹¹¹ Finding that its skilled employees could not be constantly occupied in satisfying its own limited needs, it entered into the business of buying and selling a great variety of clothing, mostly uniforms, to outside persons and organizations in many different categories.¹¹² To stop such

108. "Despite the practical difficulties facing the Commonwealth in the maintenance of its dockyards and works, the power of naval and military defence does not warrant these activities in the ordinary conditions of peace, whatever be the position in time of war or in conditions arising out of or connected with war." *Id.*, per Knox, C. J. and Gavan Duffy, Starke, and Rich, JJ.

109. *Id.* per Knox, C. J. and Gavan Duffy, Starke, and Rich, JJ.

110. (1935) 52 C. L. R. 533.

111. In the statement of agreed facts submitted to the court appears the following at p. 538: "At the outbreak of war the contract prices for soldiers' jackets purchased from the trade ranged up to 25s. each. As the result of information and experience gained from the operations at the clothing factory, the price was fixed at 19s. per garment for all such jackets purchased from the trade. Actually the price paid by the Defence department to the clothing factory for such jackets was 18s. and 3d. per jacket, and this price included an allowance of a per cent. for profit. A similar position existed in relation to all other military garments during the time of the war."

112. Something of the range and extent of the clothing factory's trading activities is disclosed by the following classes of customers (additional to Commonwealth forces and services) listed in the statement of facts: "(c) Government departments and services of the state of Victoria to which

dealings, the Victorian Chamber of Manufactures instituted proceedings against the Commonwealth, "no doubt," as Mr. Justice Rich surmised, "out of a desire to suppress the competition of the factory, such as it is."¹¹³ In this understandable aim the Chamber was unsuccessful; Australia was authorized to go right ahead continuing the competition such as it was.

The trading operations of the clothing factory were characterized as mere incidents to its main business, that of supplying uniforms for the Commonwealth forces and services; and, held the court, the supplying of merchandise by the Commonwealth in competition with private dealers insofar as it was merely incidental to the conduct of an enterprise which it was duly authorized to run was constitutionally unobjectionable.¹¹⁴ As for the Shipping Board Case, the court cautiously avoided a too extensive probe of its doctrines. There was no explicit

clothing has been supplied:—Victorian railways, penal establishments, Victorian police, hospitals for insane, children's welfare department, aborigines department, agricultural department, state dental centre, Victorian health department, veterinary research department. (d) Other public and semi-public bodies of the state of Victoria and other institutions and bodies to which clothing has been supplied:—Melbourne and Metropolitan Tramways Board, Melbourne City Council, Ballard and Bendigo Tramways Board, Metropolitan Fire Brigade, state electricity commission. (e) Other institutions and bodies and persons including the following:—Melbourne Aquarium, Zoological Gardens, Boy Scouts Association, Sea Cadets Corps, Victorian Civil Ambulance, St. John Ambulance Association, Lost Dogs' Home, Royal Automobile Club of Victoria, Commonwealth Oil Refineries. In addition there have been a very few purchases by individual persons." Cf. with this the sale of six turbo-alternators to the Sydney electric plant which, so far as appears from the opinion, is the only transaction which had been entered into by the Shipping Board, in *Commonwealth v. Commonwealth Shipping Board* (1926) 39 C. L. R. 1.

113. (1935) 52 C. L. R. 533.

114. "This brings us to the question whether the legislative power in respect of defence is a sufficient warrant for the legislation. . . . It is obvious that the maintenance of a factory to make naval and military equipment is within the field of legislative power. The method of its internal organization in time of peace is largely a matter for determination by those to whom is entrusted the sole responsibility for the conduct of naval and military defence. In particular, the retention of all members of a specially trained and specially efficient staff might well be considered necessary, and it might well be thought that the policy involved in such retention could not be effectively carried out unless that staff was fully engaged. Consequently, the sales of clothing, to bodies outside the regular naval and military forces, are not to be regarded as the main or essential purpose of this part of the business, but as incidents in the maintenance for war purposes of an essential part of the munitions branch of the defence arm. In such a matter much must be left to the direction of the Governor General and the responsible ministers." 52 C. L. R. 533, 559, per Gavan Duffy, C. J., and Evatt and McTiernan, JJ.

overruling; instead minute differences in the basic legislation and petty variations in the facts were eagerly seized on to support small-scale distinctions. In effect the earlier case was dishonored though not disowned.

The retail sale of goods by the federal government seems to be a form of activity which has never been undertaken as a matter of regular governmental policy in either Canada or the United States. It may, however, be worth while at this point to call attention to the T.V.A. Case,¹¹⁵ for, while it was concerned with the sale of electric current and so did not involve such a transfer of commodities as concerns us here, the marked similarity of its conclusions to those of the Australian Uniforms Case should not be overlooked. The commerce power, with its included control over navigable waters, and the defense power were the heads of authority under which the establishment of the plant was found to be within the constitutional competence of the United States. With such authority to set it up, power existed to run it in the manner usual and appropriate for the efficient maintenance and operation of such establishments, and, by virtue of Article IV, Section 3 of the Constitution,¹¹⁶ to sell whatever surplus was created in doing so. The result is a recognition that the federal government may produce and dispose of articles of commerce in competition with private industry in so far as its action is incidental to the efficient effectuation of some one or more of its granted powers, such as the power of defense—the very proposition which was sustained in *Attorney General for Victoria v. The Commonwealth*.¹¹⁷

In many respects this all seems remote from price control by competition. Certainly if the federal government can only put on the market such occasional supplies as result incidentally from the exercise of some specifically granted power, it cannot proceed upon any very thoroughgoing trading scheme nor figure in the capacity of seller except in random accidental cases. It should be remembered, however, that "incidental" is a catch-

115. *Ashwander v. Tennessee Valley Authority* (1935) 297 U. S. 288, 56 S. Ct. 466, 80 L. ed. 688.

116. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States or of any particular State."

117. (1935) 52 C. L. R. 523.

all concept under which almost anything can be included. If the legislature or the executive does not use it as a subterfuge and if the courts require a reasonably direct and demonstrable relation between the selling involved in any given case and the direct granted power to which it is referred, then it does seem that the concept is not capable of supporting a policy of federal price control by competition. Mr. Justice McReynolds, with uncompromising legal realism, adverted in the T.V.A. Case to the common rumor that the project was designed as a "yardstick" of prevailing prices¹¹⁸—a stick which in this connection was quite as useable for beating down as for mensuration; and the heterogeneous character of the purchasers of Commonwealth-made clothing, ranging from poundkeepers to filling-station attendants,¹¹⁹ suggests that perhaps Mr. Justice Rich's guess that the Australian merchants objected to government competition "such as it is," and that their apprehension was not without factual basis, were equally well-grounded. Quite likely the form of words employed in both the Australian and the American decisions could be found by a sympathetic court sufficiently broad to authorize an almost indefinite extension of federal selling as a means of influencing prices. How far the elastic term "incidental" will be stretched as a matter of grubby fact is an unanswered question. If it does not open, it certainly unlocks, the door to federal action of the character indicated.

In guessing what the situation is in Canada, this Australian and American history is of no help. It centered not upon federalism *per se* as a limiting force but upon the particular form of federalism prevailing in the Commonwealth and the United States, in which the general government is one of limited and enumerated powers, with the residue of action reserved to the states.¹²⁰ The need was to find an express grant of authority which would permit of federal action, not to escape from pos-

118. "The record leaves no room for reasonable doubt that the primary purpose was to put the Federal Government into the business of distributing and selling electric power throughout certain large districts, to expel the power companies which had long serviced them, and to control the market therein. A government instrumentality had entered upon a pretentious scheme to provide a 'yardstick' of the fairness of rates charged by private owners and to attain 'no less a goal than the electrification of America.'" *Ashwander v. Tennessee Valley Authority* (1935) 297 U. S. 288, 361, 56 S. Ct. 466, 489, 80 L. ed. 688.

119. See *supra*, note 112.

120. *Supra*, notes 3, 4.

sible qualifications of power which might prevent it. In a system such as that of Canada, which proceeds on a different theory, of substantially complete allocation of all possible realms of action, with federal control over matters inadvertently unprovided for,¹²¹ the stress is quite different.

The authority of the Dominion to act as merchant has been adverted to in but one decision, that of *Attorney General for Canada v. Alexander Brown Milling and Elevator Company*,¹²² involving the validity of the establishment and operations of the Canadian Wheat Board. Strictly speaking the matter was not at issue in that case, which went off upon grounds of estoppel precluding one who had dealt with the board from thereafter contesting its authority in certain respects. However, the discussion supporting the decision subsumed the capacity of the Dominion government, acting through instrumentalities established by it for that purpose, to buy and sell commodities. No specific language in the British North America Act was adduced as establishing a grant of the power. Instead Justice Rose spoke of it as "within the general jurisdiction conferred by section 91,"¹²³ thus apparently identifying it as one of those powers of indeterminate number and character embraced within the legislative control over matters affecting the "peace, order, and good government" of Canada, which are bestowed upon the Dominion. There was no indication from the facts of the case or from the discussion that the buying and selling functions of the Wheat Board had been conferred, or had ever been exercised, for the purpose of affecting internal price arrangements within Canada. Rather what was apparently intended was a licensing system by which the Dominion might supervise export arrangements at a period when international commerce and credits were badly disorganized. Whether the establishment of a deliberately regulative marketing scheme to affect prices would have been equally acceptable, one cannot say, of course. Still, it should be noted that the members of the court went out of their way to assert that the power was not dependent on the existence of emergency but would exist in equal vigor in times of the flattest normalcy. At least where nothing but kind words were called for, the

121. *Supra*, notes 7, 8.

122. (Ont. App.) [1923] 4 D. L. R. 443.

123. *Id.* at 451.

Ontario court showed itself most generous in its attitude toward Dominion trading.

Not the least interesting feature of the case was that it voiced its approval not only of Dominion selling but of Dominion buying as well, thereupon touching upon a phase of government activity seldom mentioned in the reports. Inadequate as is the body of materials on the subject of the constitutionality of government selling to break a price, it is inexhaustibly rich compared with that involving governmental buying to make a price. The reasons for this are not particularly obscure. The case system of law making postulates action to complain of and a person who may complain. For want of these, competitive control of prices in the interest of sellers by a program of government buying is pretty much unexplored territory.

Sporadic efforts in this direction have occasionally appeared. In Australia, for instance, Tasmanian metal purchases and Victorian lumber acquisitions served the purpose contemplated of keeping mines and mills in operation during the early days of the war, until the shrunken private demand could expand to its normal dimensions.¹²⁴ More extensive and more recent programs of the same general nature have been incidental to the recovery activities of the last few years in the United States, where purchases by the Federal Surplus Commodities Corporations and like agencies, particularly of foodstuffs, have served the double purpose of securing supplies for distribution to urban relievers and of raising the depressed prices of various commodities for the benefit of destitute rural producers.¹²⁵ Such in-

124. Wilkinson, *op. cit.* supra, note 103.

125. The Federal Surplus Relief Corporation was organized as a Delaware corporation on October 4, 1933, primarily as a relief agency; on November 18, 1935, the charter was amended, the name being changed to the Federal Surplus Commodities Corporation and the emphasis placed on removal of agricultural surpluses rather than general relief purposes. Report of Federal Surplus Commodities Corporation for 1935, p. 1. "The transfer of the direction of the Corporation from the Federal Emergency Relief Administration to the Department of Agriculture involved a shift of emphasis from the relief to the agricultural aspects of the functions of the Corporation * * * The controlling factor in the determination of policies became the removal of agricultural surpluses and the encouragement of domestic consumption rather than providing for the needs of the unemployed. At the outset the Corporation became the principal agency of the Agricultural Adjustment Administration for the disposition of surplus agricultural commodities procured by the Agricultural Adjustment Administration with a view to increasing returns to the producers, to preventing waste, and to developing domestic consumption through the diversion of the sur-

stances are exceptional. That no more widespread use has been made of buying as a price-raising instrumentality by governments federal, state, or provincial, is attributable perhaps to the fact that the exertions in recent years toward control by command have largely absorbed the attention of legislators. Even the little that has been done has been allowed to pass unchallenged.

The nature of the considerations which have produced this strange failure to attack them is perforce conjectural, but some explanations may be hazarded. There is, for one thing, the circumstance that the distributing middlemen, who in the first instance bear the brunt of the enhanced prices, are to a considerable extent enabled to shift them on down the line until the added cost per unit to each individual consumer is so imperceptible as not to arouse the impulse to sue. Thus psychology (or economics) renders it unlikely that anyone will sue. Law then does its share to discourage litigation by making it improbable

pluses from the normal channels of trade and commerce." *Id.* at pp. 1, 2. Initially procurement was in three ways, first, "direct purchase under competitive conditions with the Corporation's own funds"; second, "donation by the Agricultural Adjustment Administration" which had "purchased various price-depressing surpluses"; third, "donation by the several State Emergency Relief Administrations" acquiring particular commodities of which there existed "a highly localized surplus * * * which was seriously depressing the price for that commodity." *Id.* at pp. 2, 3. Later, the main reliance has been on direct purchase in various manners, *e. g.*, by purchasing "butter and eggs on the produce exchanges, * * * grapefruit and other fruits and vegetables at country shipping points, *f. o. b.* cars, * * * certain miscellaneous products, such as sugarcane sirup, directly from producers, * * * (and) dry skim milk and cheese * * * on the basis of competitive bids submitted in accordance with the usual governmental practise." Report of Federal Surplus Commodities Corporation for 1936, p. 2. The great bulk of the acquisitions has consisted of agricultural produce (especially food-stuffs, although cotton, cotton ticking, flax, hides and skins, wool, etc. have also been handled in considerable quantity). By Public Law No. 18 of the Seventy-Fifth Congress, the Corporation was also authorized to deal, and has accordingly dealt, in surplus fish and fish products. Report of Federal Surplus Commodities Corporation for 1937, p. 2. The principal channel for distribution has been via the various state and local relief agencies (see table of distribution by states and commodities, Report for 1936, pp. 11-16) supplemented by sales, *e. g.*, of seed grain to farmers at cost (Report for 1937, p. 2) and of hides and skins in small quantities on the open market (*id.*, p. 3). Some notion of the extent of the Corporation's operations may perhaps be given by a few representative figures; thus, in fiscal 1937, its commodity disbursements amounted to \$684,043; during that year it handled in excess of 12,349,000 pounds of fish, 287,000 cases of eggs, 1,300,000 pounds of dried beans, to mention but three out of forty-four classes of commodities dealt in (*id.* pp. 5-8). Its existence was continued by Pub. Law No. 165 of the Seventy-Fifth Congress, approved June 28, 1937, until June 30, 1939 (*id.* p. 3).

that anyone can sue. By limiting the right to attack legislation to those whose interests are adversely affected in some direct and appreciable way,¹²⁶ constitutional law on its procedural side practically refuses to hear any attack on the availability of government buying as a competitive weapon. Who can show the requisite interest? the consumers? the taxpayer? The injury is so remote and speculative, the claim to obtain goods at a price set by the competition of all the private members of society severally without also having to meet the whole public acting jointly as a competitor so tenuous, the relation of the government's action to any given transaction so indefinable, that the courts may well question whether, absent very special circumstances, anyone is entitled to call the legitimacy of such a system into question.

Whatever the cause, there is a startling poverty of case authority. Aside from the benedictional dictum in *Attorney General for Canada v. Alexander Brown Milling and Elevator Co.*,¹²⁷ the totality of judicial wisdom on the constitutional power of government to engage in the buying of commodities¹²⁸ seems to be embraced in the decisions on the North Dakota enactments involved in *Green v. Frazier*,¹²⁹ already mentioned in discussing a state's authority to enter the market as a competing seller. North Dakota had, by constitutional amendments and implementing statutes, adopted a program of buying, selling, and otherwise dealing in grain and other agricultural products of the state, and of acquiring elevators and mills to put the program into effect. The suit, in the form of a taxpayer's proceeding to enjoin the issuance of bonds and the disbursement of funds for such plants and structures, asserted that the scheme was in contravention of the due process provisions of the Federal Constitution in that the purpose of the statute was not a public

126. See Note (1938) 51 Harv. L. Rev. 897 on the standing to protest against federal expenditures.

127. (Ont. App.) [1923] 4 D. L. R. 443.

128. In *Howard v. New York City* (1923) 236 N. Y. 91, 140 N. E. 206, a contract to buy fish to supply inhabitants of the city, entered into by virtue of a wartime statute of New York authorizing cities under certain conditions to buy food and fuel to supply the inhabitants, was held invalid because of non-compliance with provisions of the New York City charter as to the manner in which contracts of purchase by the city should be made. No constitutional point respecting the power to authorize municipal buying for public purposes was raised or mentioned.

129. (1920) 44 N. D. 395, 176 N. W. 11.

purpose, and hence taxation to effectuate it transgressed the Fourteenth Amendment. In rapid succession, the Federal District Court for North Dakota¹³⁰ and the state supreme court¹³¹ disallowed the contention of unconstitutionality, and the decision of the latter was affirmed upon appeal by the United States Supreme Court.¹³²

While the statute embraced in its terms both buying and selling, and the state court did casually notice the matter of selling,¹³³ the burden of the discussion in all three courts dwelt on the importance of agriculture in the economy of North Dakota and the need for a parity of bargaining position on the part of the seller-producer if the state were to prosper. The selling activities of the state under the act were secondary and incidental.¹³⁴ Essentially the program was heavy artillery in support of the embattled farmer. The discussion of background factors was comparatively thorough, not to say impassioned, in the opinion of the district court and the state supreme court¹³⁵ and relatively sketchy in that of the United States Supreme Court, which evinced in large measure a willingness to accept the conclusions of the state court as to needs and conditions in the state, which were the governing considerations in establish-

130. *Scott v. Frazier* (D. C. N. D. 1919) 258 Fed. 669.

131. *Green v. Frazier* (1920) 44 N. D. 395, 176 N. W. 11.

132. *Green v. Frazier* (1920) 253 U. S. 233, 40 S. Ct. 499, 64 L. ed. 878.

133. See *Green v. Frazier* (1920) 44 N. D. 395, 176 N. W. 11: "All the grain raised in this state must be, and is, considered a prime necessity. It is needed and must be had to sustain the very life of the people, and without it the people would starve, as they would freeze if they had no fuel."

134. It does not appear very clearly that in actual operation either objective has been pursued consistently enough to raise materially the price paid to the North Dakota farmer or lower that paid by the North Dakota consumer, although this may be due in either or both cases to the construction of the plant in a period of high cost; see Cooke, *The North Dakota State Mill and Elevator* (1938) 46 J. Pol. Econ. 23.

135. "It is hopeless to expect a population consisting of farmers scattered over a vast territory as the people of this state are to create any private business system that will change the system now existing. The only means through which the people of the state have had any experience in joint action is their state government. If they may not use that as a common agency through which to combine their capital and carry on such basic industries as elevators, mills, and packing houses, and so fit their products for market and market the same, they must continue to deal as individuals with injustices that always exist where economic units so different in power, have to deal the one with the other." *Scott v. Frazier* (D. C. N. D. 1919) 258 Fed. 669, 680; and see the recital in *Green v. Frazier* (1920) 44 N. D. 395, 415, 176 N. W. 11, of the importance of agriculture in the life of the state.

ing the public purpose of the taxation, and so its conformity to the due process requirement. The federal district court and the United States Supreme Court confined their constitutional observations to the proposition that the scheme did not violate the Fourteenth Amendment.

The state court went beyond this to declare that the program was not opposed to any provision of the Federal Constitution—without express mention of anything other than the Fourteenth Amendment, however. Curiously there is a clear enough recognition in the course of the discussion in both the district court and the state opinions that the intended result of the statute was to strike at extrastate dealers and so to interfere with the accustomed movement of the grain in interstate commerce at their expense for the benefit of the local growers,¹³⁶ but, plainly as the fact was spelled out, there is not a syllable as to any possible inconsistency between the grain-buying program and the commerce clause. The blanket language of the state decision is the only statement conceivably applying to this phase of the case and, if even it does, the court is careful to keep the secret to itself. Possibly the matter was regarded as one of those measures of state police power which incidentally affect without directly regulating interstate commerce, *sed quaere*.¹³⁷

136. "The people have thus come to believe that the evils of the existing system consist, not merely in the grading of grain, its weighing, its dockage, the price paid and the disparity between the price of different grades and the flour-producing capacity of the grain. They believe that the evil goes deeper; that the whole system of shipping the raw material of North Dakota to these foreign terminals is wasteful and hostile to the best interests of the state." *Scott v. Frazier* (D. C. N. D. 1919) 258 Fed. 669, 679. "These vast losses sustained by the farmer are reaped as rewards by the great elevators and milling interests, commission firms, chambers of commerce, located in Minneapolis, St. Paul, and Duluth, or other cities outside the state. Into their hands they have passed, as profits, never to return to the farmers or business interests of the state of North Dakota. To prevent these losses, to retain in the state of North Dakota, in the future, these lost profits, to pay the farmer the full value of the product of the soil produced by him, and by thus so doing to secure the prosperity of every business and of every inhabitant of the state, the Constitution has been amended, laws enacted, and bonds, by the legislature, authorized and issued; for the purpose of affording the producers of grain within this state a market where they will receive the full value of their products." *Green v. Frazier* (1920) 44 N. D. 395, 417, 418, 176 N. W. 11.

137. The reader will also find the case of *Albritton v. Winona* (Miss. 1938) 178 So. 799 of interest. It involved the validity of a proposed bond issue for the construction of a hosiery and wearing apparel factory to be leased to private industry, pursuant to the terms of Miss. Laws 1936, 1st ex. sess., ch. 1, purporting to authorize municipalities to issue bonds to

The past and the present of price control by competition have been examined. What may we say of the future? In most of its phases, it is true, our only knowledge is that afforded by almost complete ignorance; but certainly control by competition has found the courts in a much more receptive mood than has control by command.¹³⁸

As to federal competitive buying, the cases are completely blank, except for a vague Canadian *dictum*. In state or provincial competitive buying, there are only the sparse materials of the North Dakota elevator cases, but they sustained such action without sugarcoating its competitive character and, what further strengthens their force, the legislation involved was deliberately calculated to disturb firmly established practises in interstate commerce and to govern the conduct of competing buyers located in another state.

The government as a competing seller has received more attention, both legislative and judicial, although there is not a great deal larger body of developed doctrine on the federal issues involved. Starting in such unrelated doctrines as those relating to control of intoxicating liquors and those with reference to public utilities, the law of state selling has more and more outgrown these garments of infancy. There has been a continual expansion of judicial lenience toward such activity. While the law is pretty much higgledy-piggledy as to why and where and when and how far states or provinces may control prices by competing for buyers with individual sellers, the significant thing is that they are becoming accustomed to engaging in this sort of activity and the courts to sustaining it. Probably in all

attract outside industry to the state and also to operate manufacturing plants themselves if such action were approved by the state. The court, in holding the statute valid, relied heavily on *Green v. Frazier*. The main support for the act was found in the fact that it was a measure to relieve unemployment but the court also indicated that another disclosed objective of the act, that of promoting agriculture by introducing or operating industrial projects, was an additional reason for holding the act constitutional, reciting that the natural resources and agricultural products of the state are being carried beyond its borders for processing to the detriment of the citizens. Attention is especially called to the following passage, from p. 804: "The specific question here is the validity *vel non* of the lease provision of the statute, but, if the Legislature cannot constitutionally permit municipalities to own and operate industrial plants for the accomplishment of the intended purposes, it cannot, of course, accomplish such purposes by permitting them to acquire and lease such plants for operation by private persons and corporations."

138. *Supra*, note 21.

three federations the power of state or province so to act will be recognized against whatever objections may be urged. What rationale will be improvised for the purpose is not yet clear nor does it seem profoundly important.

The most restricted area of control by competition appears to be that of federal competitive selling. There the emerging doctrine is, in Australia and the United States, that there must be some ascertainable granted power to which the selling may be said to be incidental. Any estimate of how much of a curb the qualification is must await further development of just what the legislatures are going to attempt, and the courts to swallow, as incidental exercise of power. Probably there will be no over-plus of consistency in the application of the doctrine. In Canada, whose Dominion government is constituted on a different basis, there is an apparent willingness to recognize the federal right to engage in selling without demanding that any explicit grant of power be found to support such action. Perhaps the best way in which the federal governments of Australia and the United States can act to promote such programs is to make loans or grants in aid to the states to assist in the financing of such as seem to call for that treatment.

The difference between the prospects for control by command and control by competition are striking. The former, whether in aid of buyers or of sellers, is at present a bruised and battered procedure, which has seldom been approved in theory and never in such form as to become effective in the face of objections based on the federal system and especially on interference with interstate or interprovincial trade and commerce. Control by competition, on the other hand, is now everywhere a successful thriving device, against which the argument of "interstate commerce" has never been employed successfully and seldom has even been mentioned. Failing the discovery of the undiscoverable line between interstate and intrastate commerce, to which the general and the constituent governments may advance there to join without touching, it begins to look as though, under the federal systems of the United States, Canada, and Australia, the only available method of price regulation is control by competition. In the great Anglo-American federal commonwealths, unconstitutionality of business regulation may yet drive the gov-

ernments to business operation as the only effective and constitutional way of controlling price relations.¹³⁹

139. See Keezer and May (1930) *The Public Control of Business*, especially at pp. 195, 196, 238-240, stating practically the same conclusion, arrived at after a consideration of somewhat different issues and difficulties and confined to the situation in the United States. Cf. the question posed as a result of a review of the ineffectiveness of anti-trust regulations, Jackson and Dumbauld, *Monopolies and the Courts* (1938) 86 U. Pa. L. Rev. 231 at 256, 257 ("And should the technique of legalistic regulation, now familiar in the field of public utility law, be buttressed by the indirect, but perhaps more effective use, of economic weapons, such as the creation of government competition in the form of 'yardstick' enterprises or the subsidizing of competition, where other methods do not avail?").