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Review of “Government Price-Fixing,” By Jules Backman

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GOVERNMENT PRICE-FIXING. By Jules Backman. New York and Chicago: Pitman Publishing Corporation, 1938. Pp. xi, 304.

This book should be reviewed by a passionate partisan, for one who is inclined neither to bark at business nor to growl at government is going to find that anything he may say will be used against him.

The author's own position toward government price-fixing is as clear as Coolidge's (apocryphal) pastor's was toward sin: "He's against it." He strives rather visibly at times to maintain a dispassionate attitude toward the problem but cannot suppress his feelings. To choose a few selections seriatim: "The very essence of recent developments has been the expansion of personal government";¹ "But the difference between fighting an external enemy and attempting to cure a depression are [sic] so obvious as to need little comment";² "A program of scarcity cannot be the road to the 'more abundant life'";³ "It is always well to keep in mind that there are two things which the price-fixers have never been able to control: Mother Nature and human nature";⁴ "The farmers approved of the experiment [cotton control under the Bankhead Bill] * * * not because of a desire to be subjected to restriction or bureaucratic control, but rather because of the 'bribes' in the form of special payments which were offered to them in exchange for giving up their freedom of action";⁵ "The petty difficulties that arose during the life of the N. R. A. can be cited as an example of a situation in which many bureaucrats were so drunk with their power of life and death over an industry, that the business man was often prevented from running his business as he saw fit";⁶ "As compared with [the competitive price] * * * system, there is that of fixed prices based upon ethical or political values. The automatic, if imperfect, working of a competitive system is displaced by arbitrary decisions";⁷ "To regiment the producers alone is not sufficient. The consumers must also be told what they can eat, wear and do."⁸ The adjectives "regimented" and "arbitrary" suffer from overwork. This point of view may be entirely valid; certainly it is held by many responsible doers and capable thinkers; nevertheless it is proper to recognize that the author does possess and express a definite point of view before proceeding to examine his evidence and his conclusions.

What the book purports to do is to review a number of the more important price-fixing experiments of the twentieth century on the basis of their objectives, their processes, and their results, and to determine "the pitfalls involved in connection with price controls and, wherever possible, suggest means of avoiding them or minimizing their ill effects."⁹ The descriptive parts of the work are on the whole of a high order—succinct,

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1. P. vi.
 2. P. 36.
 3. P. 96.
 4. P. 99.
 5. P. 243.
 6. P. 246.
 7. P. 271.
 8. P. 276.
 9. P. 15.

clear, well-organized. Occasionally they rise to heights almost of brilliance, considering the complexity of the details and the terseness of their exposition; such portions of the book as Chapter 3, describing the multiform controls evolved under the N. R. A. and the evolution of administrative policy in that connection, and Chapter 8, describing the perhaps insuperable difficulties in the way of using cost of production as a basis for price-fixing, deserve unreserved praise. The examples chosen cover a wide range of commodities and communities, and yet the reviewer cannot help feeling that some of the most interesting examples, which the author should have noted especially because they rather militate against his general conclusions, have escaped his attention; for example, the elaborate Australian experiment which received its deathblow in *James v. Commonwealth of Australia*¹⁰ and the New Zealand marketing programs which at last reports¹¹ are still continuing with undiminished vigor. However, the book does illustrate a very generous sampling of experiments in price control, and it would perhaps be unreasonable to demand that every one of the multitudinous instances be included in what after all is intended to be a representative rather than a compendious discussion.

It is when one turns from the descriptive and analytical phases of the discussions to the critical that the blemishes occasioned by the author's staunch adherence to personal predilections, indicated in the excerpts already quoted, make themselves manifest. Just here, fortunately for present purposes, is the place where the economic and legal issues fuse and where the book most lends itself to criticism by one whose qualifications lie rather in the domain of the law than in the field of economics.

The problems of price-fixing, it need hardly be stated, are among that numerous class of matters in the current world which are neither purely legal nor purely economic, but involve the interrelations of government and business. Of these two disciplines, it is obvious upon a reading of his discussion that Professor Backman is acquainted only with the latter. His concession of a peculiar status to the transportation industry on the ground that its components are "public utilities," with apparent unawareness of the decision or the implications of the *Nebbia* Case;¹² his assumption that ease of determination of the period of operation of wartime controls differentiates them significantly from peacetime price measures, in happy disregard of the complexities attending the question of when a war is over;¹³ his failure to mention at any place in his numerous references to the decisions holding N. R. A. and A. A. A. unconstitutional that these decisions were not based on the issue of price-fixing as such, with its tendency to lead the non-lawyer reader to the impression that that was the ground of decision—in such details as these there is revealed a lack of intimate acquaintance with the legal materials in the field. Probably it would equally become the reviewer to stick to *his* last, since he professes to no greater

10. [1936] A. C. 578.

11. See (1938) 112 The Round Table 864, 865.

12. *Nebbia v. New York* (1933) 291 U. S. 502.

13. See *Ft. Frances Pulp & Paper Co. v. Manitoba Free Press Co.* [1923] A. C. 695, 703 et seq.

erudition in economics than one must have to understand the law nowadays. Only a settled conviction that the subject dealt with in the book under review involves matters which call for conjoint application of legal and economic doctrines has induced him to venture suggestions, or at least queries, of an economic character along with his legal remarks.

Professor Backman's book presupposes the orthodox economic argument that the free play of supply and demand is the only permanently sound device for price adjustment; that much may be granted *arguendo*. It further presupposes that there has at some time in the tolerably near past been something approaching the free market conditions, the undistorted supply-demand relationship, on which classical economic theory is predicated. Can that be granted? The evidence to that effect is by no means conclusive. The disruptions of the market caused by the commanding position which the large corporation has taken in twentieth-century America have been ably set forth by Berle and Means¹⁴ (in as happy a collaboration, incidentally, as economics and law have to their credit to date); and the studies of Chamberlin¹⁵ and of Robinson¹⁶ (not to mention others appearing in periodical publication) lend powerful support to the conclusion that, like it or not, we are not currently and have not been for some time in the past living under a regime of free competition (if indeed that condition ever prevailed outside the textbooks). True, Professor Backman recognizes that there is a good deal of private price-fixing (and disapproves of it), but his strictures on government price-fixing disregard this state of facts and proceed on the plane that it uniformly represents an interference with the operation of economic laws in the free market.

Conspicuously, private price-controls have been in the industrial field; as to finished goods, it may be very seriously questioned whether on the whole we are not today closer to oligopoly than to free competition. Conspicuously, government price-fixing has been concerned with agricultural products—"primary producers' marketing," as the British dominions have descriptively labelled some of their legislation. Now the Brookings Institution's studies have taught us that the income of farm families is disproportionately below that of the population generally and that to a very great extent farm income falls below the amounts necessary for a minimum adequate standard of living;¹⁷ that periods of prosperity are typically preceded by, and necessarily accompanied by and conditioned on, the maintenance of consumption at a high level;¹⁸ that consumption expenditures are relatively to income much greater among the lower income groups than among those in the higher brackets;¹⁹ and that comparatively small increases of uniform character in the income of low income recipients would

14. *The Modern Corporation and Private Property* (1933) especially at 345 et seq.

15. *The Theory of Monopolistic Competition* (1933).

16. *Economics of Imperfect Competition* (1936).

17. See Leven, Moulton, and Warburton, *America's Capacity to Consume* (1934) especially at pp. 58-62.

18. See Moulton, *The Formation of Capital* (1936) 26-48.

19. Leven, Moulton, and Warburton, *supra*, note 17, at 91-99.

provide added demand for consumption goods sufficient to take up all the slack currently existing in productive capacity.²⁰ If these findings are to be accepted as true, is there not much to be said, even from an economic standpoint, for the proposition that governmental action to produce increases of income among a numerically important low-income group will produce benefits to the community generally, vastly in excess of the immediate inconvenience entailed on the non-farming class by establishing or maintaining agricultural prices on an artificial level? Professor Backman's argument might be that the farmers, under the compulsion of a want of demand for their products sufficient to recompense them, will turn to other pursuits, thus cutting down on agricultural production and so producing a natural price increase. The reluctance of agricultural workers to move into other occupations and the tendency of agricultural production not only to maintain itself but actually to increase under the impact of low unit prices are, however, notorious.²¹ Furthermore while the farmer has sold in the past in a free competitive market, he has as to many items had to buy in a market where prices were fixed by private action of industrial sellers. Ideally, it may not be desirable to counterbalance rigid prices of finished or semi-finished goods, industrially fixed, by rigid prices of primary products, governmentally fixed; but the better method of removing all the conditions which promote or permit disruptions in the pricing process is hardly a practical program for the predictable future. In the actualities of present economic and governmental organization, is there not a good deal to be said for the utilization of a carefully devised system of governmental price-interventions in favor of agriculture to redress the unbalance produced by extragovernmental price controls affecting finished goods? Certainly it would seem that Professor Backman has too generally ignored the possible function of government price-fixing as a corrective for non-governmental price-fixing, even were no considerations of a non-economic character involved.

Moreover, the author seems committed to the view that government should limit itself to passivity and inaction where matters of economic import are concerned, to the view that "that government is best which governs least." This view is commonly held by the orthodox economists, but it is quite generally discredited in the juristic thought of the present day. The functions of government are not currently conceived of by any responsible group of legal thinkers as those merely of an umpire in a knock-down-and-drag-out fight with no holds barred. Long before economic planning was either watchword or bugaboo, the Preamble of the Constitution included as one of the purposes of government the promotion of the general welfare. Delimitation of the areas within which particular claims are to be recognized and others to be disregarded in order to assure a tolerable distribution of social benefits among all the citizens is a proper task of govern-

20. *Id.* at 115-124.

21. See Galbraith and Black, *The Maintenance of Agricultural Production During Depression: The Explanations Reviewed* (1938) 46 *J. Pol. Econ.* 305.

ment, not a matter which it is bound to let slip from its nerveless hands to be regulated by purely economic forces. Even if, then, no basis whatever existed for thinking that maladjustments would be redressed to a sounder ultimate result by government price-fixing, it is in accord with the whole trend of jurisprudence today to recognize the right of government to effect such an adjustment of benefits among the citizens as will secure on the whole the fullest recognition of claims to minimal human rights, whether this adjustment be made directly by taxes, indirectly by price regulation, or in any other effective manner. The issue is not one of propriety but one of effectiveness.

However, it can hardly be gainsaid that there has been much in the record of price fixing to date that is futile and much that is foolish. Ill-conceived and ill-executed plans have perhaps predominated. Rejection of the author's argument as to the inherent evils of price regulation involves no denial of the fact that he has collected much instructive material for the determination of the form which price-interventions can and should take. The evidence which he has accumulated is powerful to demonstrate that such regulation works best where it is of an emergency or temporary character; that it is a more usable device in connection with agricultural products than elsewhere, and perhaps that class of commodities is the only one as to which it can be employed; that control of prices almost necessarily demands a concomitant control over production; that the hopes for success vary materially, depending on how significant a proportion of the total supply is needed to fill the home demand and how much is an export commodity. The list of issues to which he directs attention cannot be exhausted in the brief space of a review. The flexibility which he notes as a feature of the relatively more successful price experiments also will indicate to the lawyer that here we have another of the situations calling for the continual supervision of an expert administration body rather than for handling through the cruder devices of detailed legislation. In its suggestions for the direction which price fixing may take, as well as in its accumulated evidence on past price-regulation, the book is a useful aid to modern thinking in the field of government and law; only its assumptions and conclusions are fraught with danger and they only for the unwarned or the unwary.

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