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Richard A. Givens

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THE SEARCH FOR AN ALTERNATIVE TO PROTECTION

*RICHARD A. GIVENS**

THE United States has sought for several years to encourage its trade with other free nations as a means of strengthening the economy of the free world, promoting cooperation with our friends abroad, and replacing in part the need for direct foreign aid.[1] But at the same time, we have also sought the conflicting goal of protecting domestic industries from foreign competition. Such protection has been championed for a variety of reasons, among which are:

1. To prevent injury to domestic industries and hardship to domestic employees in specific industries and localities;[2]

2. To offset the competitive advantage of foreign producers who pay lower wage rates than domestic producers;[3]

3. To assist in maintaining the United States international balance of payments by preventing imports and expenditures abroad from rising beyond the level of exports and foreign receipts;[4] and

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1. See Stewart, The Trade Agreements Legislation, in Foreign Trade Policy: Staff for the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means, Compendium of Papers on U.S. Foreign Trade Policy 507, 512-16, 535-39, 556-57 (1958) [hereinafter cited as Compendium]; Gardner, A Critique of United States Foreign Economic Policy, 1959 U. Ill. L. F. 121.

2. U.S. Dep't of Commerce, The Role of the U.S. Tariff and the Effects of Changes in Duty Rates, in Compendium op. cit. supra note 1, at 223; see, e.g., N.Y. Times Feb. 29, 1960, p. 26, col. 7.

3. Fair Labor Standards Amendments of 1961, § 3, 75 Stat. 65, amending 52 Stat. 1060 (1938), authorizes the Secretary of Labor to investigate and report to the President and Congress on instances where foreign competition has resulted or is likely to result in increased domestic unemployment. See also the proposed "Fair Labor Standards Trade Act of 1961," S. 675, 87th Cong., 1st Sess. (1961), representative of many similar bills; N.Y. Times, Feb. 26, 1961, p. 1, col. 3 (views of AFL-CIO); id., Jan. 17, 1960, § 1, p. 57, col. 1 (views of John L. Lewis). See generally the comments of President Kennedy concerning possible boycotts of foreign goods, id., March 9, 1961, p. 16, cols. 6-7; cf. id., April 19, 1961, p. 1, col. 2; Final Report to the Senate Comm. on Interstate & Foreign Commerce by Special Staff on the Study of U.S. Foreign Commerce, 87th Cong., 1st Sess., The United States and World Trade; Challenges and Opportunities 120-26 (Comm. Print 1961) [hereinafter cited as the 1961 Senate Trade Report]; Ellsworth, The International Economy 388 (1950); Arnow, Foreign Trade and Collective Bargaining, 11 Lab. L.J. 662 (1960); Teper, Discussion of the Arnow Paper, 11 Lab. L.J. 671 (1960); Teplow, Comments on the Arnow Paper, 11 Lab. L.J. 676 (1960).

4. See Message to Congress by President Kennedy, Feb. 6, 1961, N.Y. Times, Feb. 7,

4. To maintain a strong domestic industrial base in fields of production vital to national defense.[5]

I. The Problem

There can be no question concerning the importance of the goals underlying these arguments for protection. However, a serious dilemma is created because protectionist policies hamper cooperation with friendly nations which is vital to our foreign policy.[6] Protection also lessens the amount of dollars available to foreign countries to purchase our exports and may tend to cause economic retaliation by means of increased barriers to United States products sold abroad. Further, it tends to promote higher prices for domestic goods, and leads to uneconomic use of resources by production at home of goods which could more economically be purchased abroad.

Some resolution of this dilemma is crucial to both our foreign policy and our economy. It is made particularly urgent because of a crescendo of demands for increased protection,[7] balanced by a similarly intensifying series of protests from our allies, at a time when need for closer cooperation with them is great. This conflict has led to a search for alternative means of promoting healthy domestic industries, high employment, and a strong mobilization base, which do not have the disadvantages of import barriers. One proposal has been to grant aid to domestic industries in adjusting to the consequences of reductions of trade barriers.[8]

1961, p. 16, cols. 3, 7; Anderson, The Balance of Payments Problems, 38 Foreign Affairs 419 (1960).

5. 68 Stat. 360 (1954), amended by 69 Stat. 166 (1955), as amended, 19 U.S.C. § 1352a (1958) (Supp. II, 1959-1960); see generally 1961 Senate Trade Report, op. cit. supra note 3, at 138-42; Friedman, Rights of Importers Under Section 7B of the Trade Agreements Extension Act of 1955, 25 Geo. Wash. L. Rev. 427 (1957); Vernon, A Trade Policy for the 1960s, 39 Foreign Affairs 458, 469 (1961); Note, 61 Colum. L. Rev. 505, 546 & n.253 (1961).

6. See Stewart, The Trade Agreements Legislation, in Compendium, op. cit. supra note 1, at 508-16; Gardner, Sterling-Dollar Diplomacy 7-23, 151 (1956); N.Y. Times, March 12, 1959, p. 47, col. 6; id., Jan. 25, 1959, p. E 2, col. 4; id., April 29, 1960, p. 4, col. 7.

7. See S. 2176, 87th Cong., 1st Sess (1961) (Senator Bridges' bill to regulate imports). See also N.Y. Times, Feb. 26, 1961, p. 1, cols. 2-3; id., Nov. 5, 1959, p. 51, cols. 2-3; id., Oct. 14, 1959, p. 20, col. 1; id., Oct. 4, 1959, § 1, p. 9, col. 1; id., Sept. 22, 1959, p. 29, col. 3; cf. note 3 supra.

8. E.g., S. 851, 87th Cong., 1st Sess. (1961); S. 3918, 86th Cong., 2d Sess. (1960); S. 1609, 86th Cong., 1st Sess. (1959); S. 3664, 85th Cong., 2d Sess. (1958); S. 2907, 85th Cong., 1st Sess. (1957); 101 Cong. Rec. 3997-99 (1955) (proposed amendments to Extension of Trade Agreements Act); 1961 Senate Trade Report, op. cit. supra note 3, at 144-60; Democratic Platform, "The Rights of Man," Report of the Committee on Resolutions & Platform as Adopted by the National Convention (1960), Section on "World Trade" 9 [hereinafter

This, however, has encountered criticism on several grounds, one of which is that adjustment to increasing imports is only one facet of a much broader problem of adjustment to economic change in our economy.[9]

The problem of domestic unemployment and injury to domestic industries is in large part a problem of idleness of human and physical resources. Such idleness sets back the nation's economic growth and reduces the product available for national purposes including national security. At the same time it imposes severe hardships[10] upon individuals and businesses. And this quite naturally engenders resistance to economic change which it is feared might intensify the injury or cause it to recur.[11] Some of the chief causes of economic injury[12] are:

1. Business cycles, which at worst can produce catastrophic idleness as in the nineteen thirties;

2. Technical advances which displace workers and sometimes entire industries;[13]

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cited as Democratic Platform, section on World Trade (1960)]; Ruttenberg, Problems of Adjustment for American Industry in the Light of United States Foreign Trade Policy, in Compendium, op. cit. supra note 1, at 781-82; Proposals of David J. McDonald of the United Steelworkers of America in Report to the President and the Congress, Commission on Foreign Economic Policy 56 (1954) [hereinafter cited as Randall Report]; Staff Papers, presented to the Commission on Foreign Economic Policy, 884-96 (1954) [hereinafter cited as Randall Staff Papers]; Lindeman & Salant, Assistance for Adjustment to Tariff Reductions, in U.S. Cong., Senate Special Comm. on Unemployment, 86th Cong., 2d Sess. (1960) [hereinafter cited as Lindeman & Salant]; Ruttenberg & Seidman Trade Adjustment Program, in Committee for a National Trade Policy, Conference on Trade Policy (Roundtable No. 5) (1960); United States Council, International Chamber of Commerce, Principles of an International Trade Policy for the United States 6 (1961); New York Chamber of Commerce, A Foreign Trade Policy for the '60s (1961); Clubb & Reischer, The Trade Adjustment Bills: Their Purpose & Efficacy, 61 Colum. L. Rev. 490 (1961); Neal, New Economic Policies for the West, 39 Foreign Affairs 247, 250 (1961); Reischer, Adjustment to Imports and the National Interest, 26 J. Bus. 254 (1953); Reischer, Assistance in Adjusting to a Tariff Reduction, 26 J. Bus. 103 (1953).

9. Randall Report, op. cit. supra note 8, at 54; Wilcox, Relief for Victims of Tariff Cuts, 40 Am. Econ. Rev. 884 (1950).

10. Some of the effects of unemployment are discussed in Economic Brief for Appellees, pp. 46-58, Chamberlin v. Andrews, 299 U.S. 515 (1936). One of the most serious forms of damage is psychological: a feeling on the part of many unemployed workers that they are nonessential, that society does not care about them. See Drucker, Concept of the Corporation 140, 179 (Beacon paperback ed. 1960); Drucker, The Future of Industrial Man 101-117 (1942).

11. See, e.g., Barnett, Machinery and Labor (1926).

12. See generally S. Rep. No. 61, 87th Cong., 1st Sess. (1961); Economic Brief for Appellees, pp. 61-93, Chamberlin v. Andrews, 299 U.S. 515 (1936).

13. For some striking examples see generally National Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403 (1923); Manpower Utilization and Retraining, Hear-

3. The growth and improvement of transportation services which continually enlarge markets, making available new sources of supply and limiting the market power of producers within any geographical area;[14] and

4. Changes in plant location and movements of industry from one part of the country to another.[15]

While the injury which would be caused by a thoroughgoing reduction of our present trade barriers may be small in relation to the injuries due to other causes with which we must deal,[16] this injury would be concentrated in specific industries and localities[17] whose claims to fairness cannot be ignored.

The problem of low-wage competition is closely related to that of economic injury. Low-wage competition disturbs us as profoundly as it does because it destroys opportunities for high-wage employment for American workingmen when other equally valuable opportunities are

ings Before the Subcommittee on Unemployment and the Impact of Automation, of the House Committee on Education and Labor, 87th Cong., 1st Sess. (1961); Training of the Unemployed, Hearings Before the Subcommittee on Employment and Manpower, Senate Committee on Labor and Public Welfare, 87th Cong., 1st Sess. (1961); Hearings on the Impact of Automation on Employment Before the Subcommittee on Unemployment and the Impact of Automation of the House Committee on Education and Labor, 87th Cong., 1st Sess. (1961), and accompanying report; Hearings and Report of the Subcommittee on Economic Stabilization, Joint Committee on the Economic Report, Automation and Technological Changes, 84th Cong., 1st Sess. (1955); AFL-CIO, Automation and Major Technological Change: Collective Bargaining Problems (1958); Adams & Aronson, Workers and Industrial Change: A Case Study of Labor Mobility (1957); Barnett, Machinery and Labor (1926).

14. Commons, American Shoemakers, 1648-1895: A Sketch of Industrial Evolution, 24 Q. J. Econ. 39-84 (1909). Thorp, Economic Institutions 93-96 (1928). The judicial response to this extension of markets may be seen in the expansion of the scope of the federal commerce power. See United States v. Women's Sportswear Mfr's Ass'n, 336 U.S. 460, 464 (1949); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-31 (1948). Compare Hammer v. Dagenhart, 247 U.S. 251 (1918) and United States v. E. C. Knight Co., 156 U.S. 1 (1895), with Wickard v. Filburn, 317 U.S. 111 (1942) and United States v. Darby, 312 U.S. 100 (1941).

15. See Kennedy, New England and the South: The Struggle for Industry, 193 Atlantic Monthly 32 (1954).

16. U.S. Dep't of Commerce, The Role of the United States Tariff and the Effects of Changes in the Duty Rates, in Compendium, op. cit. supra note 1, at 223; Piquet, Tariff Reductions and United States Imports, in Compendium, op. cit. supra note 1, at 231-32; Salant, The Short-Term Domestic Economic Effects of Reducing Import Barriers, in Compendium, op. cit. supra note 1, at 278-79; Randall Staff Papers, op. cit. supra note 8, at 373; Lindeman & Salant, op. cit. supra note 8, at 261-66; Piquet, Aid, Trade, and the Tariff (1953); Salant, Employment Effects of United States Import Liberalization, Papers and Proceedings of the Seventy-Second Annual Meeting of the American Economic Ass'n, in 50 Am. Econ. Rev. 419 (1960).

17. See authorities cited in notes, 2, 8 & 16 supra.

hard to find without undertaking the expensive and risky burden of moving to a new location or learning a new trade. If there were an abundance of available and appropriate jobs without the necessity of a displaced employee moving or financing the learning of new skills, we might be more willing than we are to purchase the items sold by the low-wage competitors, thereby obtaining the goods at less cost to ourselves, and turning the displaced manpower into more efficient industries. However, this ideal situation does not exist. Economic injury to domestic industries, whether due to domestic or foreign causes, low-wage or otherwise, leaves both businesses and workers with lessened opportunities and the unpleasant prospect of changing locations or trades if they are to earn a living.

The problem of maintaining an adequate industrial base for our national defense is also closely related to the basic problem of economic injury. There are some items which should undoubtedly be produced at home or in nearby nations for defense reasons. But because of the problem of economic injury, every domestic industry is tempted to assert that its product is vital to defense and hence must be produced at home. The resulting political pressures inevitably tend to convert the defense problem into an excuse for broadening protectionism at the cost of consumers, taxpayers and our foreign policy,[18] far beyond any extent actually justified on defense grounds. In any event, anything approaching full self-sufficiency even in defense-related items is impossible as a practical matter.

The balance of payments problem is also closely related to the question of economic injury. If this problem were the only issue, it could be approached by seeking to increase our own productivity and seeking to have other countries remove their barriers to United States exports and share in giving aid to developing areas, rather than by invoking protectionism.[19] Furthermore, there have been indications that U. S. exports

18. See Schulsinger, Legal Aids for Meeting Import Competition, Prac. Law., Oct. 1959, p. 27.

19. See Message to Congress by President Kennedy, Feb. 6, 1961, N.Y. Times, Feb. 7, 1961, p. 16, cols. 3, 7, wherein the President stated that "a return to protectionism is not a solution. Such a course would provoke retaliation; and the balance of trade, which is now substantially in our favor, could be turned against us with disastrous effects to the dollar. . . . Quota discriminations against American exports have largely disappeared with the return of currency convertibility. We will press for prompt removal of the few restrictions that still exist, as well as for the maximum liberalization of remaining nondiscriminatory quotas in other industrialized countries, which apply mainly to agricultural exports. In the tariff negotiations now going forward under GATT we shall seek the fullest possible measure of tariff reduction by foreign countries to the benefit of our exports." See also Gardner, Strategy for the Dollar, 38 Foreign Affairs 433 (1960); cf. Viner, Economic Foreign Policy on the New Frontier, 39 Foreign Affairs 569, 573-77 (1961).

have excellent long-term prospects.[20]

The basic dilemma, around which these difficulties revolve, is how to deal with economic injuries to domestic industries—injuries due to many differing causes. Protection is one of several possible approaches to this problem.

II. Alternative Approaches to Dealing With Economic Injury

A. *Protection*

One response to injury due to economic change is to seek to prevent the change or to cancel its effect by restricting the supply of the commodity or service or raising its price. In a broad sense all such efforts may be considered as forms of "protection" because they seek to shelter existing economic positions from change. Private agreements to fix prices,[21] share markets[22] or exclude new competition[23] as approaches to protection in this broad sense have been subjected to antitrust prohibitions; but similar objectives may be sought by other means within the domestic economy, such as securing regulatory action to limit entry into an industry[24] or regulatory approval of price coordination among competitors.[25]

Employees have also sought protection in some cases through restrictive work rules, by limitations upon entry into skilled trades, and jurisdictional rules assigning categories of work to limited groups.[26]

20. See N.Y. Times National Economic Review, Jan. 11, 1960, p. 93, col. 8; cf. Foreign Commerce Weekly, Dec. 21, 1959, pp. 16-21.

21. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); see United States v. Trenton Potteries Co., 273 U.S. 392 (1927). On the underlying similarity of private "protectionism" and import barriers, see Thorelli, Federal Antitrust Policy 62 (Stockholm ed. 1954); Goldstein, The Tariff is the Mother of Trusts, 39 Texas L. Rev. 711, 715 (1961).

22. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241 (1899); Report of the Attorney General's National Committee to Study The Antitrust Laws 26 (1955).

23. See Lorain Journal Co. v. United States, 342 U.S. 143, 148-49 (1951); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

24. For varying views on this problem see Edwards, Maintaining Competition (1949); Hale & Hale, Competition or Control (pt. 1): The Chaos in the Cases, 106 U. Pa. L. Rev. 641 (1958); Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436 (1954). Compare the attitude expressed in FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), with FCC v. RCA Communications, Inc., 346 U.S. 86 (1953). Also compare Note, Economic Injury in FCC Licensing: The Public Interest Ignored, 67 Yale L.J. 135 (1957), with R. A. Givens, Refusal of Radio and Television Licenses on Economic Grounds, 46 Va. L. Rev. 1391 (1960).

25. E.g., 62 Stat. 472 (1948), as amended, 49 U.S.C. §§ 5a-5b (1958) (railroad rate bureaus).

26. See Slichter, Union Policies and Industrial Management 164-66 (1941).

Collective bargaining, however, is not protectionist where it seeks to assure a wide distribution of the benefits of economic change through improvements in wages, hours, and working conditions, or to allocate the burden of economic injury when it occurs through seniority rules and work-sharing arrangements rather than to block economic change.[27] Organization of employees to counterbalance the unified bargaining power of their employer is not comparable to organization of sellers in a consumer market. Consumers are normally unorganized so that their power does not need to be balanced by countervailing power.[28] This distinction has been recognized in the legal protection[29] and antitrust immunity[30] granted to collective bargaining. However, combinations of unions and employers which control the market available to the consumer have been held to constitute antitrust violations[31] and some statutory provisions aimed at practices such as make-work devices[32] and jurisdictional strikes[33] have been enacted.

The drive of producers to limit outside competition and to secure governmental aid to do so has powerful political force. However, it is balanced by strong opposition from other domestic producers and industries which also fight for their competing interests. These countervailing efforts offset each other, and the airing of the conflicting arguments can help the public to make choices based upon paramount national interests. Each producer has a greater interest in *his* product than a consumer has in any single product, and hence the political influence of producers may be more powerful than that of customers in any given case. But so long as each producer's interest is counterbalanced by the

27. See generally Barnett, Machinery and Labor (1926).

28. Cf. Galbraith, American Capitalism 117-39 (1956).

29. See National Labor Relations Act § 7, 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 157 (1958).

30. United States v. Hutcheson, 312 U.S. 219 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); see Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); Dooley, Antitrust Legislation and Labor Unions, 11 Lab. L.J. 911 (1960); R. A. Givens, Dealing With National Emergency Labor Disputes, 34 Temp. L. Q. 17, 28-31 (1960) and authorities cited.

31. Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1945).

32. 61 Stat. 140 (1947), amended by 65 Stat. 601 (1951), amended by 73 Stat. 525, 542 (1959), as amended, 29 U.S.C. § 158(b)(6) (Supp. II, 1959-1960). The effectiveness of this limitation on "featherbedding" was severely limited by NLRB v. Gamble Enterprises, 345 U.S. 117 (1953), and American Newspaper Pub. Ass'n v. NLRB, 345 U.S. 100 (1953). Compare also United States v. Petrillo, 332 U.S. 1 (1947), with the same case in the district court, 75 F. Supp. 176 (N.D. Ill. 1948).

33. 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(4)(d) (Supp. II, 1959-1960); see NLRB v. Radio & Television Broadcast Eng'rs. Union, 364 U.S. 573 (1961).

interests of others competing with him[34] the consumer voice remains important in determining the outcome.

It is obvious that lack of representation in the political forum of an important group of competitors completely upsets this balance. Lack of representation in the political process on the part of groups affected by its results is in fact considered to have such a prejudicial effect that the courts have exercised particularly searching judicial review under such broad constitutional provisions as the due process clause and the commerce clause in order to protect such groups.[35]

In view of the lack of political representation of foreign producers, it is not surprising that restriction of competition from them has been a popular way to seek protection from economic injury. To a considerable extent this has meant not merely protection from injury due to imports, but also limitation of imports as a means of strengthening the position of a domestic industry against economic injury from other sources. For this reason it is natural that demands for protectionist measures become most vocal during business downturns or when an industry is threatened by technological change, competition from other industries or parts of the country, or changes in tastes.

Our tariffs have had a fluctuating history, dependent upon changing economic needs and political pressures, and attaining one of the highest levels with the Smoot-Hawley Tariff of 1930.[36] Considerable reductions have been achieved under the Reciprocal Trade Agreements Act as successively extended by Congress.[37] However, the trade program has been qualified by the insertion since World War II of a "peril point" provision[38]

34. Compare the "private attorney general" function performed by private antitrust suits and the role of competitors in regulatory proceedings. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940); Note, 58 Colum. L. Rev. 673, 683 n.71 (1958).

35. Chief Justice Stone led the Court in developing the doctrine that where resort to the ballot and to the processes of democratic government were available, the Supreme Court should exercise careful judicial self-restraint in passing upon the validity of legislation, but where political checks were not adequate or where the political processes or freedoms necessary to them were endangered, searching judicial review of legislative judgments was justified. Williamson v. Lee Optical, 348 U.S. 483, 488 (1955); Southern Pac. Co. v. Arizona, 325 U.S. 761, 767-68 n.2 (1945); see United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); Dowling, The Methods of Mr. Justice Stone in Constitutional Cases, 41 Colum. L. Rev. 1160, 1165-78 (1941); R. A. Givens, The Impartial Constitutional Principles Supporting Brown v. Board of Education, 6 How. L.J. 179 (1960); R. A. Givens, Federal Protection of Employee Rights Within Trade Unions, 29 Fordham L. Rev. 259 (1960) and cases cited.

36. 46 Stat. 590 (1930), as amended, 19 U.S.C. § 1001-654 (1958) (Supp. II 1959-1960). On tariff history, see Snider, Introduction to International Economics 422-27 (Rev. ed. 1958); Taussig, Tariff History of the United States (8th ed. 1931).

37. 48 Stat. 943 (1934), as amended, 19 U.S.C. § 1351-67 (1958).

38. Trade Agreements Extention Act of 1951, 65 Stat. 72, as amended, 19 U.S.C.

requiring a determination prior to the granting of a concession whether it will seriously injure domestic industry, and an "escape clause"[39] under which the Tariff Commission must recommend to the President the withdrawal or modification of any concession which is causing serious injury to domestic producers. Presidential disapproval of "escape clause" recommendations is subject to overruling by two-thirds of both Houses of Congress.[40] Furthermore, the President, advised by the Office of Civil and Defense Mobilization, is directed by a provision[41] first enacted in 1954 to limit imports which are found to imperil national security. In 1959 mandatory oil import quotas were established under this provision.[42] One problem concerning the national security provision is that import curbs motivated by politically inspired pressures for protection can be nominally imposed on national security grounds which it is difficult for opponents to challenge effectively.[43] The President may also impose import restrictions to effectuate the aims of the domestic farm price support program.[44] Another protectionist measure is the Buy American Act of 1933, granting preferences to domestic suppliers in Government procurement.[45]

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§ 1360 (1958). On the effect of this kind of procedure on trade liberalization, cf. Kreider, Democratic Processes in the Trade Agreements Program, 34 Am. Pol. Sci. Rev. 317 (1940).

39. 65 Stat. 73 (1951), as amended, 19 U.S.C. §§ 1363, 1364 (1958).

40. 65 Stat. 74 (1951), as amended, 19 U.S.C. § 1364(a) (1958).

41. 68 Stat. 360 (1954), amended by 69 Stat. 166 (1955), as amended, 19 U.S.C. § 1352a (1958). On the national security provision, see generally 1961 Senate Trade Report, op. cit. supra note 3, at 138-42; Friedman, Rights of Importers Under Section 7B of the Trade Agreements Extension Act of 1955, 25 Geo. Wash. L. Rev. 427 (1957); Vernon, A Trade Policy for the 1960s, 39 Foreign Affairs 458, 469 (1961); Note, 61 Colum. L. Rev. 505, 546 & n.253 (1961).

42. Proclamation No. 3279, 24 Fed. Reg. 1781 (1959); see N.Y. Times, March 11, 1959, p. 47, col. 1, p. 57, cols. 2-4. For criticism, see, e.g., id., March 22, 1959, § 3, p. F1, col. 8; 6 National Review 606-07 (March 28, 1959).

43. "There are now a substantial number of administrative procedures intended not to eliminate foreign trade or to preserve intrinsically uneconomic industry but rather to eliminate foreign trade abuses, to temper the economic impact of imports, and to maintain the mobilization base required by the national security. These procedures may significantly aid the American businessman in his efforts to hold and to expand a fair share of the American market against foreign competition. . . . The guidelines include consideration of national defense needs, anticipated availabilities, industrial growth requirements, the impact of foreign competition on the economic welfare of individual domestic industries, unemployment, loss of investment—all in the context of national security." Schulsinger, Legal Aids for Meeting Import Competition, Prac. Law., Oct. 1959, pp. 27, 32.

44. 49 Stat. 773 (1935), as amended, 7 U.S.C. § 624 (1958). Since 64 Stat. 261 (1950), as amended, 7 U.S.C. § 624(f) (1958), this section explicitly prevails over any trade agreement in case of conflict.

45. 47 Stat. 1520 (1933), as amended, 41 U.S.C. §§ 10a-10d (1958). For criticism see, e.g., 1961 Senate Trade Report, op. cit. supra note 3, at 143; Gantt & Speck, Domestic v.

The original objective of the Trade Agreements Act of 1934 was stated to be to assist recovery from the depression by stimulating U. S. exports.[46] The act sought to expand our trade by permitting us to bargain for the reduction of other nations' trade barriers and by importing more so that other countries would have dollars with which to pay for our exports. These objectives conflicted with the desire to protect domestic industries by restricting imports, but the conflict was largely a matter of the extent to which trade liberalization or import restriction would most effectively promote the common objective of both policies—the promotion of domestic prosperity. During World War II, however, trade liberalization began to be viewed as not merely a means to domestic prosperity, but also as a key part of a structure to promote world cooperation and lasting peace.[47] Since 1946, the struggle to strengthen the free world against Soviet imperialism has been uppermost as the goal of our foreign economic policies, including our trade policies.[48] These objectives are of a different order than the promotion of domestic prosperity alone, and therefore the conflicts between protection and trade liberalization have taken on a new dimension, even though the formal purpose clause of the Trade Agreements Act does not yet reflect the altered reasons for its periodic extensions[49] and the altered spirit animating its administration.[50] Whether the change in administration in advance of a change in language is improper[51] depends on one's view of the functions of statutory language. It might be argued that our system of government can only work effectively if the pressure of facts and events[52] lead us to interpret language so as to fulfill its fundamental objectives

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Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order, 7 J. Pub. L. 378 (1958); Knapp, The Buy American Act: A Review and Assessment, 61 Colum. L. Rev. 430 (1961).

46. 48 Stat. 943 (1934), as amended, 19 U.S.C. § 1351(a)(1) (1958); see Stewart, The Trade Agreements Legislation, in Compendium, op. cit. supra note 1, at 508-11.

47. See id. at 512-16; Gardner, Sterling-Dollar Diplomacy 7-23 (1956).

48. See Lindeman and Salant, op. cit. supra note 8, at 264; Stewart, The Trade Agreements Legislation, in Compendium, op. cit. supra note 1, at 518-20; Gardner, op. cit. supra note 47, at 248-54; Neal, New Economic Policies for the West, 39 Foreign Affairs 247 (1961); Vernon, A Trade Policy for the 1960s, 39 Foreign Affairs 458 (1961).

49. Stewart, The Trade Agreements Legislation, in Compendium, op. cit. supra note 1, at 512-20, 556-57.

50. Id. at 535-39, 547-50, 556-57. See proposals for amendment of the act including the purpose clause, to accord with its changing objectives in Gardner, Proposals for Legislative Reform of the Trade Agreements Act, in Compendium, op. cit. supra note 1, at 491.

51. Stewart, The Trade Agreements Legislation, in Compendium, op. cit. supra note 1, passim.

52. Cf. Stone, Law and Its Administration 48 (1915).

as nearly as possible in light of the circumstances of their application.[53] It has accordingly been held that long-continued practice under a statute may be significant in its interpretation[54] even if the interpretation so arrived at conflicts with the usual or ordinary meaning of the words of the statute.[55] Of course, Congress retains the authority to correct any interpretation by making its intent clear through a statutory amendment. In the case of reciprocal trade, the underlying assumption,[56] properly attributed to Congress, of concern for our position in the world, together with the changed circumstances, would seem to justify the altered objectives of the administration of the act.

Import barriers, like other forms of protectionism in its broad sense, do not promote the allocation of resources most conducive to maximum efficiency.[57] They tend to raise domestic prices by limiting outside competition, thus contributing to any latent inflationary tendencies.[58] They may permit laxness and inefficiency to develop in an industry which would otherwise be stimulated to greater productive efforts.[59] What may be even more critical is that they tend to injure our foreign relations in a serious way which is sometimes completely out of proportion to the economic interest involved. This may take the form of a publicized issue to which other grievances may be attached until the matter becomes a *cause célèbre*.[60] Friendly nations abroad are also injured economically, which in some cases may be more harmful to our world position—and harder to remedy—than would a similar economic injury at home. In the case of manufacturing industries vital to national defense, import curbs may tend to support a mobilization base, though at the expense of political friendship abroad which may have even more urgent defense implications. In the case of extractive industries, import curbs tend to exhaust domestic reserves[61] by using them up more rapidly, as well as to alienate nations which may be essential foreign sources of supply.[62]

53. See Stone, J. in United States v. Classic, 313 U.S. 299, 317-18 (1941).

54. Alaska S.S. Corp. v. United States, 290 U.S. 256 (1933).

55. See Holy Trinity Church v. United States, 143 U.S. 457 (1892).

56. Cf. Stone, J. in United States v. California, 297 U.S. 175, 188-89 (1936); Holmes, J. in Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930).

57. Ellsworth, The International Economy 111-219, 328-405 (1950).

58. Id. at 402-06; see N.Y. Times, Feb. 4, 1959, p. 21, col. 4; id., March 16, 1959, p. 21, col. 3.

59. See Tariff Cuts: Who Gets Hurt? Fortune, April 1954, p. 138.

60. E.g., Gardner, Sterling-Dollar Diplomacy 151 (1956); N.Y. Times, April 29, 1960, p. 4, col. 7; id., March 12, 1959, p. 47, col. 6; id., Jan. 25, 1959, § 4, p. E2, col. 4.

61. See Snyder, The Stockpiling of Strategic Materials 370 (1956) (unpublished thesis in Columbia University, Butler Library); see, e.g., the discussion of manganese in Rousch, Strategic Mineral Supplies (1939); See also 6 National Review 606-07 (March 28, 1959).

62. Snyder, op. cit. supra note 61, at 379-87. We may also interfere with our own

For these reasons, protection, while one approach to the problem of economic injury, has such serious drawbacks that every alternative to it must be examined.

B. *Reliance Upon Self-Adjustment*

The Commission on Foreign Economic Policy headed by Clarence B. Randall took the position in 1954, in its report to President Eisenhower and Congress, that the problem of injury due to imports or due to the reduction of trade barriers was part of a much broader problem, and that there was therefore no justification for singling out those injured by imports for special assistance denied to others.[63] The Commission reasoned that since it is not contended that the Government should bear the burden of all forms of economic adjustment in a free economy, there should be no special concession to those hurt by imports. The essential position taken by the report was that reliance should be placed upon self-adjustment by means of economic forces free from particularized intervention, using the measures which we had already adopted, such as unemployment compensation, the Federal Deposit Insurance Corporation, and the monetary powers of the Federal Reserve System as built-in devices tending to support stability for the economy as a whole. While many would find this a sound position from the viewpoint of economic theory, others might contend that the injury during the period of adjustment would require alleviation by governmental action. But in either event, it seems extremely doubtful that the strong and persistent political pressures working for protection can be overcome for any long period without some supplemental approach for dealing with economic injury.[64] Further, in the intensifying economic competition of the free world with totalitarian regimes, the idle resources accompanying economic injury are a serious drag upon economic growth, and also tend to encourage

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sources of supply by practices which create uncertainty in the administration of our import policies even where no restriction is ultimately imposed. See, on the administration of our anti-dumping program in this respect, Ehrenhaft, Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties, 58 Colum. L. Rev. 44 (1958). As to the essential nature of foreign supplies of many important minerals see Snyder, op. cit. supra note 61, at 370; Paley, Resources for Freedom (1952) (Report of President's Materials Policy Comm'n).

63. Randall Report, op. cit. supra note 8 at 54; accord, Wilcox, Relief for the Victims of Tariff Cuts, 40 Am. Econ. Rev. 884-85 (1950).

64. See 104 Cong. Rec. 6136-38 (daily ed. April 22, 1958); cf. N.Y. Times, June 11, 1958, p. 49, col. 1; id., April 30, 1958, p. 45, col. 6; id., April 22, 1958, p. 29, col. 5; id., April 15, 1958, p. 1, col. 6, p. 16, col. 3. Compare Ellsworth, The International Economy 401-02 (1950). Substantial, though not total, reliance on self-adjustment is, of course, assumed by the proponents of most of the assistance proposals. See 1961 Senate Trade Report op. cit. supra note 3, at 141-48.

political opposition to technological change and to other forms of economic advance. It is therefore essential to consider further approaches to supplement the self-adjustment relied upon by the Commission.

C. *Assistance Limited to Those Injured by Imports or by Reduction of Trade Barriers*

As early as 1950, proposals for some kind of assistance to industries injured by trade liberalization were under discussion.[65] As a member of the Randall Commission, David J. McDonald of the United Steelworkers proposed in 1954 that whenever the President rejected a Tariff Commission recommendation for an increase in import barriers under the "escape clause," the domestic industry concerned should become eligible for adjustment assistance.[66] The European Economic Community Treaty signed in 1957 looked toward assistance to those injured by the projected implementation of its Common Market.[67] Senators John F. Kennedy[68] and Jacob K. Javits[69] introduced bills providing for adjustment assistance similar to that proposed by Mr. McDonald. Support for legislation of this type has accumulated steadily in the past few years, as is evidenced by the fact that the underlying concept of adjustment assistance was also endorsed in the Democratic Platform of 1960.[70]

There are two possible concepts of such aid: (a) that it is compensation to the domestic industry and its employees for injury which they have suffered,[71] or (b) that the aid is not intended as compensation, but as transitional assistance to help the industry and its employees adjust to the altered economic realities by such means as entering new fields of work or increasing efficiency, and thus becoming again self-reliant.[72]

The compensation concept is particularly vulnerable to the criticism, made by the Randall Commission, that it is unfair to have the public

65. See Wilcox, Relief for the Victims of Tariff Cuts, 40 Am. Econ. Rev. 834 (1950).

66. Randall Report, op. cit. supra note 8, at 56. See also Ruttenberg, in Compendium, op. cit. supra note 1, at 781.

67. Treaty Establishing the European Economic Community, pt. 3, tit. III, ch. 2, arts. 125, 127, 298 U.N.T.S. 63, 64 (1957); id. tit. IV, 298 U.N.T.S. at 64. See Diebold, The Schuman Plan, A Study in Economic Cooperation, 1950-1959, 404-26 (1959).

68. S. 2907, 85th Cong., 1st Sess. (1957); 101 Cong. Rec. 3907-09 (1955) (with Senator Humphrey); S. 3650, 83d Cong., 2d Sess. (1954).

69. S. 851, 87th Cong., 1st Sess. (1961); S. 3918, 86th Cong., 2d Sess. (1960); S. 1659, 86th Cong., 1st Sess. (1959); S. 3664, 85th Cong., 2d Sess. (1958).

70. Democratic Platform, section on World Trade (1960), op. cit. supra note 3.

71. No compensation was given to the victims of other governmental policies such as prohibition, nor for the compulsory closing of gold mines during World War II. See United States v. Central Eureka Mining Co., 357 U.S. 155 (1958). But cf. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Holmes, J.).

72. See 1961 Senate Trade Report, op. cit. supra note 3 at 155-56; Lindeman & Salant,

bear the burden of economic adjustment for one group but not for others. Further, aid not tied to transitional efforts (such as any form of blanket tax benefit for an entire industry) might actually encourage new firms to enter the industry concerned and thus magnify the problem of future adjustment.

In an article,[73] written in 1950, Clair Wilcox points out two very cogent arguments against the entire concept of special aid to the victims of tariff cuts:

1. The debate over special assistance, which many domestic industries would not in any event prefer to protection,[74] would be bound to lead to exaggeration of the injury involved, so that the political difficulties of trade liberalization would become even greater than in the absence of an assistance program. This criticism is especially applicable where the assistance would be tied to a Presidential rejection of a Tariff Commission recommendation for relief under the "escape clause," since the choice before the President would appear to be between saving the taxpayer's money by adopting protection or aiding foreign industry at the taxpayer's expense. The fact that the consumer (who is also a taxpayer) pays both for protection and for increased defense costs if our foreign policy is placed in jeopardy, would be easily lost to view in such a context. If, contrary to the reasoning of Professor Wilcox, aid is to be limited to the victims of a single cause of economic injury, trade liberalization, such aid would still seem to be more workable either entirely independent of the escape clause or as a *substitute* for the escape clause rather than subordinated to it.

2. If eligibility is to depend upon the cause of dislocation, the problem of determining who is eligible for assistance would prove incredibly difficult. This criticism is borne out in large part by the difficulties already encountered by the Tariff Commission in defining serious injury under the "escape clause."[75] Depending upon the criterion for assistance adopted, it might also become necessary to determine the extent to which

op. cit. supra note 8 at 257-58; Democratic Platform, section on World Trade (1960), op. cit. supra note 8. This has been the concept of much of our foreign aid, such as the Marshall Plan and "Point 4" aid.

73. Wilcox, Relief for the Victims of Tariff Cuts, 40 Am. Econ. Rev. 884 (1950).

74. See N.Y. Times, April 30, 1958, § 2, p. 45, col. 6. See also Lindeman & Salant, op. cit. supra note 8, at 269.

75. See Hearings Before the House Committee on Ways & Means, on Renewal of the Reciprocal Trade Agreements Act, 85th Cong., 2nd Sess. 190-91 (1958); N.Y. Times, June 15, 1958, § 3, p. F1, col. 8. Compare the conflicting views of what constitutes injury expressed in U.S. Tariff Commission, Watches, Movements and Parts, Report to the President on Escape Clause Investigation No. 26 (1954), with the confusion and pressures faced by Congress in attempting to set tariffs directly as detailed in Taussig, Tariff History of the United States (8th ed. 1931).

injury was caused (or solely caused) by a tariff concession in negotiations in the recent past or even the distant past, an elusive task at best.[76] The determination of availability of aid to an industry or employee based on such uncertain criteria would be bound to be viewed as discriminatory and hence both raise resentment and leave the way open for charges of exercise of political pressure and improper influence.

It may be argued that aid limited to the victims of tariff cuts is not discriminatory because their plight is due to governmental policy. However, this is also true of injury due to other causes as well. The commerce clause[77] permitting free trade among the states of the Union, with its resulting benefits and hardships, is as much a governmental policy as trade concessions to other nations. So are the effects of increases or decreases in government purchases, wartime and peacetime regulation of all kinds, changes in interest rates, and other economic policies. Of course there may be a difference in degree where a particularly high trade barrier is lowered suddenly to the detriment of those who had entered or remained in the field in reliance upon it.

Another argument against special assistance solely limited to the victims of trade liberalization is that industries whose difficulties are not due to imports may seek protection against foreign competition as energetically as those whose injuries are due to imports or to reductions of trade barriers. Assistance would not be available to such industries if it were limited to the victims of reductions of import barriers, and hence, such assistance would not provide an alternative to the drive for increased protection in such cases.

The conclusion of Professor Wilcox's article, however, is not that we should fall back upon protection or rely upon self-adjustment alone. Instead, he calls for an overall effort to assist economic adjustments regardless of whether the necessity arises from increases in imports or from any other particular cause. Such an approach would supplement the self-adjustment envisioned by the Randall Commission, and yet avoid the objections to a program limited to the victims of tariff cuts. Furthermore, it would aid adjustment due to dislocation arising from other causes, such as changes in technology and shifts of industry within the country. Dislocation due to such causes as technological unemployment requires our attention as urgently as dislocation due to increases in imports.

Both a 1961 Senate staff study[78] and an article by Richard N. Gardner, then Professor of Law at Columbia Law School, now Deputy

76. Wilcox, Relief for the Victims of Tariff Cuts, 40 Am. Econ. Rev. 884, 889 (1950).
77. U.S. Const. art. I, § 8, cl. 3.
78. 1961 Senate Trade Report, op. cit. supra note 3, at 145-60.

Assistant Secretary of State,[79] have suggested that assistance to industries hindered by trade liberalization be coordinated with assistance for adjustment to economic injury due to other causes, such as the recently enacted depressed areas program.[80] Such integration of any program of trade adjustment assistance into overall programs for promoting economic development is of paramount importance in meeting the objections to a trade adjustment program pointed out by Professor Wilcox and by the Randall Commission. In order for these objections to be fully met and for the problem of discrimination to be entirely obviated, the integration should be *complete*. Assistance to those injured by trade liberalization would be a major *reason* for the overall development program, but the trade adjustment program would lose its separate identity. Eligibility would not depend upon whether the cause of injury was trade liberalization, technological change, or other causes, but rather upon the existence of a problem of economic dislocation, the types of assistance which would aid in adjustment, and the availability of private and governmental resources for such assistance. Under such a synthesis, the arguments for aid to those injured by tariff cuts would be of far-reaching importance in shaping measures for assisting adjustment to economic change, but the objections to a trade adjustment program which would apply if a trade adjustment program were separate would not exist. To examine whether such a program could prove workable and effective, we must consider some of the measures which have been proposed to promote the fullest use of human and physical resources as part of a trade adjustment program or otherwise.

D. *Measures to Promote Full Utilization of Resources*

Promotion of the fullest use of our resources is of great importance at a time when accelerated economic growth is urgent to strengthen the free world. Such an effort, while seeking to promote economic growth, would at the same time deal with injury due to trade liberalization and seek to provide an alternative to protection as a means of assisting individuals and businesses facing economic distress. The drawbacks found in aid limited to injury due to a single specific cause would not exist.

79. Gardner, Foreword, 61 Colum. L. Rev. 313, 317 (1961).

80. 75 Stat. 47 (1961); See generally S. Rep. No. 61, 87th Cong., 1st Sess. (1961); Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on S.1, S.6, S.9, & S.750, 87th Cong., 1st Sess. (1961); Report of Task Force on Distressed Areas, N.Y. Times, Jan. 2, 1961, p. 16, col. 1; Samuelson, Report to the President, Prospects and Policies for the 1961 American Economy, N.Y. Times, Jan. 6, 1961, p. 18; Randall Staff Papers, op. cit. supra note 8, at 389-90; Lubin, Reducing Unemployment in Depressed Areas, 50 Am. Econ. Rev. 162 (1960); cf. 69 Stat. 683 (1955), 7 U.S.C. § 347a (1958) (depressed farm areas).

Determination of the precise cause of injury in particular cases could be avoided and no implication of a right to compensation for injury due to any particular cause would arise. Steps in these directions have already been taken through such means as the Employment Act of 1946[81] and the establishment of the unemployment compensation system,[82] and the depressed areas program.

Full production policies have sometimes encouraged imports without correspondingly stimulating exports, thus creating or aggravating a deficit in the balance of payments of gold and foreign exchange.[83] But this problem, as President Kennedy has pointed out,[84] can be dealt with in many ways, consistent with encouraging a growing economy. For example, many nations have erected discriminatory trade barriers against United States exports because they did not have the dollars to pay for the United States goods which they desired, so that such dollars as were available had to be carefully hoarded for essential purchases.[85] Now that the dollar reserves of many other countries have risen, we can seek to deal with our balance of payments problem by pointing out that these discriminatory curbs, in which our Government had acquiesced as a means of easing the post-war dollar shortage, are now so unnecessary that we have vigorously pressed for their abolition.[86] Reductions in United States trade barriers could also be used as a bargaining lever to secure elimination of some of these discriminatory barriers.[87] In the past, we have sought complete elimination of such barriers, such as British Imperial Preference,[88] even though not specifically directed

81. 60 Stat. 23 (1946), as amended, 15 U.S.C. §§ 1021-25 (1958). Section 2 of the act declares it is to be the continuing responsibility of the Federal Government to promote maximum employment, production and purchasing power by means of the broad policies set forth. 60 Stat. 23 (1946), as amended, 15 U.S.C. § 1021 (1958).

82. 49 Stat. 626 (1935), as amended, 42 U.S.C. §§ 501-03 (1958) (Supp. II, 1959-1960). Other existing built-in stabilizers include the Federal Deposit Insurance Corporation and Securities and Exchange Commission disclosure requirements to protect investors, the effect of the federal income tax system of reducing tax liability and tax rates when income falls even in the absence of further change in the tax law at the time, Social Security retirement benefits, and many other state and federal programs.

83. Cf. Ellsworth, The International Economy 331-37 (1950).

84. See N.Y. Times, Feb. 7, 1961, p. 16 (text of President Kennedy's message to Congress on U.S. balance of payments).

85. See Gardner, Sterling-Dollar Diplomacy 331-36 (1956).

86. See note 19 supra.

87. Cf. Gardner, Sterling-Dollar Diplomacy 103, 151 (1956).

88. "The idea of 'preference' is that each part of the Empire should remain an independent fiscal unit, and levy such duties for revenue or protection as may seem good to it, but should relax them in part in favor of the rest of the Empire, thus taxing foreign goods on a higher scale than British goods." Chiozza-Money, Through Preference To . . . Protection 5 (1903).

against the United States,[89] but have been unwilling to make the necessary concessions to make this realistically possible.[90]

It may also be desirable to explore with our allies further permanent measures to assist in adjusting balances of international payments in cases where differences in domestic policies or other factors create a serious imbalance. The International Bank and Monetary Fund are partial answers to this problem, but a reappraisal of some of the ideas which led to the creation of these institutions in the light of subsequent experience may shed light on desirable improvements.[91]

Another problem concerning efforts looking toward the fullest use of resources is the possible aggravation of any tendency toward domestic inflation. But measures to deal with idleness in specific industries due to trade liberalization, technical advance, or similar causes would not likely be so large as to affect general price levels; the inflation issue is more relevant in considering massive measures to offset overall business fluctuations when they occur. We therefore turn to specific measures which have been suggested to promote the fullest use of resources and as alternatives to protection, including those recommended in proposals for aid limited to the victims of tariff cuts.

III. Specific Measures to Encourage the Fullest Use of Resources

Almost all of the bewildering variety of proposals to deal with economic injury involve assistance to producers facing economic injury, aid to depressed communities, aid to displaced workers, or measures to aid entire industries and promote growth in the economy as a whole, or combinations of these.

Some of the criteria which may be used in judging these proposals are:

1. How effective can they be in combatting injury?
2. Will they encourage economic growth or restrict it?
3. Will they stand up under the inevitable political pressures to alter their objectives in order to protect particular groups at the expense of the public?
4. Are they in accord with the tradition in our country of the type of action proposed, which may help to give us experience and guideposts for making them work and for judging their effectiveness?

89. See Gardner, Sterling-Dollar Diplomacy 12-23, 42-53, 107-09, 150-54, 158-61, 192-207 (1956).

90. See, e.g., id. at 151.

91. Id. passim. See Bronz, Book Review, 57 Colum. L. Rev. 451 (1957); Gardner, Strategy for the Dollar, 38 Foreign Affairs 433, 434-35 (1960).

This last test is particularly important because where a tradition has already been established for a particular kind of action, public understanding is most readily obtained,[92] politically inspired efforts to divert efforts from the basic purposes may be most readily combatted, and there is likely to be a pool of experts with experience in the detailed problems that will arise.

A. *Assistance to Producers Facing Economic Injury*

1. Technical Advice

The Federal Government has long supplied technical advice to farmers through the Agricultural Extension Service,[93] and provision has also been made for additional advice to farmers in depressed farm areas.[94] Research assistance for small business has similarly been authorized.[95] It would be only a small step to make such assistance available wherever idle resources impede economic progress, to assist producers in increasing efficiency, finding new uses for products or services, or converting resources to uses for which greater need exists.[96]

2. Credit

Governmental loans or assistance in private loans are already common under the FHA and small business investment program.[97] However, indiscriminate use of governmental credits is undesirable, because their use may not in every case advance the goals of the program in question, and may even aid producers to remain in a depressed industry rather than to convert to new products or services. Hence, adjustment assistance loans should be limited to those needed to carry out changes rec-

92. See Drucker, The Future of Industrial Man, 263-65 (1942). Such reliance upon Tradition does not mean that we should adopt new approaches, but rather that we should build wherever possible upon what has already been done. Progress is made in this manner even in the physical sciences. Compare Einstein & Infeld, The Evolution of Physics (1938). The same process is at work in legal decisions when it is recognized that our experience under an existing legal rule has given it new content which demands recognition in the form of a reformation of the rule. See Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 Mich. L. Rev. 151, 174-75 (1958).

93. 38 Stat. 372 (1914), as amended, 7 U.S.C. §§ 341-48 (1958) (extension program).

94. 69 Stat. 683 (1955), 7 U.S.C. § 347a (1958).

95. 73 Stat. 647 (1959), as amended, 15 U.S.C. § 636(d) (Supp. II, 1959-1960).

96. Cf. S. 851, 87th Cong., 1st Sess. § 10 (1961); S. 3918, 86th Cong., 2d Sess. § 10 (1960); S. 3664, 84th Cong., 2d Sess. § 3 (1958); S. 2907, 85th Cong., 1st Sess. § 6 (1957); Ruttenberg & Seidman, Trade Adjustment Program, Committee for a National Trade Policy, Conference on Trade Policy 3 (1960) (Round Table No. 5). But see Clubb & Reischer, The Trade Adjustment Bills: Their Purpose & Efficacy, 61 Colum. L. Rev. 490, 500 (1961).

97. Small Business Act of 1953, 67 Stat. 235, as amended, 15 U.S.C. § 636 (1958) (Supp. II, 1959-1960); Cf. H.R. 1067, 86th Cong., 1st Sess. (1959).

ommended under the technical assistance program or to convert facilities to new uses where a clear need is shown to meet economic injury.[98]

3. Tax Benefits

One of the most frequently advanced[99] suggestions for aid to the victims of tariff cuts has been accelerated depreciation or some other form of tax relief. A partial adjustment mechanism is already built into the federal income tax because a decline in income of a firm is reflected in a lower tax. However, special tax relief as a means of combatting economic injury has the disadvantage that those firms which have no net income and therefore are particularly in need of assistance will have no tax to pay and thus be unable to benefit from tax relief except where it can be offset against tax liability for other years.[100] Furthermore, tax benefits not conditioned upon any transitional effort might actually attract new industry into a field although conversion of resources from it to other fields was desired. Tax benefits conditioned upon conversion, on the other hand, would open a new field for tax administration, tax litigation, and statutory elaboration.

In addition to estimating the possible effectiveness of special tax benefits in combatting economic injury, we must weigh considerations of tax policy. Widespread use of special tax benefits to aid particular groups has tended to subvert the uniformity, fairness, workability, and predictability of the tax system.[101] The bewildering array of special tax provisions enacted by Congress has already made the Internal Revenue Code a labyrinth of exceptions and special rules for special groups, frequently characterized as "loopholes" by those who do not fall within them. The disadvantages of further complicating the tax system through additional special provisions would seem to outweigh

98. See note 94 supra. See also S. 851, 87th Cong., 1st Sess. §§ 7, 8 (1961); S. 3918, 86th Cong., 2d Sess. § 7 (1960); S. 2907, 85th Cong., 1st Sess. § 7 (1957); Randall Report, op. cit. supra note 8, at 56.

99. S. 851, 87th Cong., 1st Sess. § 9 (1961); S. 3918, 86th Cong., 2d Sess. § 8 (1960); S. 1609, 86th Cong., 1st Sess. § 5 (1959); S. 3664, 85th Cong., 2d Sess. § 4 (1958); S. 2907, 85th Cong., 1st Sess. § 11 (1957); Ruttenberg & Seidman, Trade Adjustment Program, Committee for a National Trade Policy, Conference on Trade Policy 3 (1960).

100. E.g., Int. Rev. Code of 1954, § 172(b); See Clubb & Reischer, The Trade Adjustment Bills: Their Purpose & Efficacy, 61 Colum. L. Rev. 490, 502 (1961).

101. See Cary, Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws, 68 Harv. L. Rev. 745 (1955); Surrey, The Federal Income Tax Base for Individuals, 58 Colum. L. Rev. 815 (1958); Surrey, The Congress and The Tax Lobbyist—How Special Tax Provisions Get Enacted, 70 Harv. L. Rev. 1145 (1957); cf. Cary, Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for a Moratorium and Reappraisal, 60 Colum. L. Rev. 259 (1960); Paul, Erosion of the Tax Base and Rate Structure, 11 Tax L. Rev. 203 (1956).

any advantages which special tax relief might have as a device for dealing with economic injury. What appears to be needed is study of the tax structure as a whole to determine how it can best promote a healthy economy[102] rather than the insertion of still further special provisions to benefit the victims of tariff cuts or other economic injury.

4. Antitrust Exemptions Versus Antitrust Applicability

While Senator Javits' 1958 trade adjustment bill[103] included a provision for exemption from the antitrust laws of activities approved by the Federal Trade Commission in connection with adjustments to reductions of trade barriers, his 1960[104] and 1961[105] bills omit this provision, which was never included in the Kennedy proposal.[106]

Departure from antitrust principles in cases of economic injury has been a controversial issue ever since the enactment of the Sherman Act in 1890.[107] The antitrust laws are essentially a safeguard against private measures for "protectionism" in its broad connotation. Since demands for protection in its myriad forms are greatest where economic injury is severe, it is not surprising that decisions and enactments departing from antitrust objectives have been most frequent during periods of economic hardship.[108] In addition, in part at least because of the political influence of producers who concentrate their attention upon the treatment of a particular industry, there has been a steady chipping away at the antitrust laws through innumerable special exemptions,[109] which taken together threaten a serious weakening of these laws.[110] Exemptions are

102. See Message of the President, April 20, 1961, H. Doc. 140, 87th Cong., 1st Sess., 107 Cong. Rec. 5992 (1961) (embodying many varied proposals); Federal Tax Policy for Economic Growth and Stability, Report Prepared by the Subcommittee on Tax Policy of the Joint Committee on the Economic Report, 84th Cong., 1st Sess. (1955).

103. S. 3664, 85th Cong., 2d Sess. § 2 (1958).

104. S. 3918, 86th Cong., 2d Sess. (1960).

105. S. 851, 87th Cong., 1st Sess. (1961).

106. S. 2907, 85th Cong., 1st Sess. (1957).

107. Sherman Anti-Trust Act of 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-7 (1958). Compare Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) and National Ass'n. of Window Glass Mfrs. v. United States, 263 U.S. 403 (1923), with United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) and Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

108. E.g., the National Industrial Recovery Act, 48 Stat. 195 (1933), held unconstitutional in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); cf. Rowe, The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective, 57 Colum. L. Rev. 1059 (1957).

109. See Note, 58 Colum. L. Rev. 673, 679-81 (1958) for a partial listing of some major exemptions.

110. This weakening has been offset in part by the extension of antitrust applicability arising from expansion of the federal commerce power, and by some internal improvements in the antitrust laws themselves. See id. at 675-77 and cases cited.

sought chiefly either where restrictive practices constituting "protectionism" in its broad sense are contemplated, or where a comprehensive regulatory scheme is adopted which may replace to some extent[111] the protection of consumer interests otherwise provided by the antitrust laws. In searching for an alternative to protectionism, antitrust exemptions should be carefully weighed to determine in each case whether they are actually necessary.

A provision exempting activities which are approved by a governmental body can in practical operation result in a severe lessening of the effect of the antitrust laws even where such approval is not granted. This is so because the courts have held that an agency possessing exemption power acquires primary jurisdiction to pass initially upon issues affecting the subject matter in order that inconsistent decisions may be minimized and the advantages of agency expertise be obtained.[112] There may also be some danger that agencies dealing with a particular industry or type of problem may tend to be particularly influenced by those whom they regulate and unduly sensitive to the political pressures of such groups.[113] Judicial review is a safeguard against this danger,[114] but only a partial one because of the great weight normally given to agency decisions brought up for review.[115]

111. See id. at 677-79. But cf. Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105, 1119-27 (1954); Schwartz, Legal Restriction of Competition in Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436 (1954).

112. See Convisser, Primary Jurisdiction: The Rule and Its Rationalizations, 65 Yale L.J. 315 (1956); Jaffe, Primary Jurisdiction Reconsidered. The Anti-Trust Laws, 102 U. Pa. L. Rev. 577 (1954); von Mehren, The Anti-Trust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929 (1954); Note, 58 Colum. L. Rev. 673, 689-94 (1958). The courts reason that where practices attacked in an antitrust suit could have been approved by an agency (even though they have not been) the matter must be referred to the agency to give it the opportunity to approve, if it wishes to do so, before the antitrust claim may be adjudicated. Far East Conference v. United States, 342 U.S. 570 (1952). Thus practices prohibited by the antitrust laws may be effectively instituted without securing agency approval and then submitted to the agency only later if and when questioned. See 342 U.S. at 578-79 (Douglas, J., dissenting).

113. See Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105, 1119-27 (1954).

114. See Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958); cf. Note, 58 Colum. L. Rev. 673, 694-98 (1958); Note, 53 Nw. U.L. Rev. 803, 812-13 (1959).

115. The force of this rule may be lessened as to findings of fact where the reviewing court considers the alleged findings to be only conclusions drawn from undisputed or clear underlying facts. E.g., Payne v. Arkansas, 356 U.S. 560, 562 (1958); Watts v. Indiana, 338 U.S. 49, 50-54 (1949); March v. Alabama, 326 U.S. 501 (1946); Kilby v. Folsom, 238 F.2d 699, 700 (3rd Cir. 1956); Philber Equip. Corp. v. Commissioner, 237 F.2d 129 (3rd Cir. 1956); Mars, Inc. v. Chubrilo, 216 Wis. 313, 257 N.W. 157 (1934); Cf. Norris v. Alabama, 294 U.S. 587 (1935).

For these reasons it would not appear that antitrust exemptions offer advantages sufficient to outweigh the detriment to antitrust objectives which would necessarily result. On the contrary, the antitrust laws could play an even more important part than they now do in encouraging economic growth by limiting restrictive practices if fewer special exemptions and exceptions had been carved out. Perhaps greater utilization of the inherent flexibility of the antitrust laws to take account of special circumstances and regulatory needs within the antitrust framework itself would lessen the pressure for outright exemptions, and thus help to permit greater effectiveness of the antitrust laws in encouraging economic growth.[116]

The most useful forms of aid to producers to combat economic injury and idle resources would thus appear to be technical advice and closely supervised credit assistance. Tax benefits and antitrust exemptions have been widely used to assist special groups, but experience indicates the undesirability of these methods if the tax and antitrust laws themselves are to be fair and effective within their own spheres. Producers may also be assisted, however, by measures designed to benefit communities, entire industries, and the economy as a whole.

B. *Aid to Depressed Communities*

Economic injury due to many causes has been frequently concentrated in particular communities.[117] With this in mind, Congress in 1961 enacted the Area Development Act,[118] a comprehensive scheme for assistance to geographical areas suffering from chronic unemployment; including credit for public facilities and for private projects important to economic development,[119] technical assistance,[120] urban renewal,[121] and occupational training.[122] The occupational training provisions of the act authorize use of federal funds to provide educational facilities or services needed to meet training and retraining needs in geographical areas of unusually high persistent levels of unemployment.[123] Funds may also be made available through the states for weekly subsistence payments to those undergoing occupational training under the act up

116. Note, 58 Colum. L. Rev. 673, 681-88 (1958); cf. R. A. Givens, Parallel Business Conduct Under the Sherman Act, 5 Antitrust Bull. 273, 284-92 (1960).

117. E.g., Compendium, op. cit. supra note 1, at 223. (injury due to import barrier reduction); Kennedy, New England and the South, The Struggle for Industry, 193 Atlantic Monthly 32 (1954) (changes in location of industry).

118. 75 Stat. 47 (1961); see note 80 supra.

119. Area Redevelopment Act § 7, 75 Stat. 47 (1961).

120. Area Redevelopment Act § 11, 75 Stat. 47 (1961).

121. Area Redevelopment Act § 14, 75 Stat. 47 (1961).

122. Area Redevelopment Act § 16, 75 Stat. 47 (1961).

123. Area Redevelopment Act § 17, 75 Stat. 47 (1961).

to a limit of sixteen weeks, the weekly payment to be equal to the average weekly unemployment compensation payment under the state unemployment compensation system.[124]

C. *Aid to Displaced Workers*

1. Retraining

Training in new skills for employees displaced by technical advance,[125] trade liberalization,[126] or other economic changes is a most effective way not only to overcome the injury to them, but also to help the nation regain the benefit of their productive effort. Although retraining cannot restore the position of one who has worked at a trade for the greater part of a lifetime and accumulated valuable seniority and pen-

124. Ibid.

125. See authorities cited note 13 supra; Levitan, Structural Unemployment and Public Policy, 12 Labor L. J. 573, 579 (1961). On August 23, 1961 the Senate passed S. 1991, the Manpower Development and Training Act of 1961. 153 Cong. Rec. 15704-09 (daily ed. Aug. 23, 1961). As passed by the Senate, the bill provides for a four-year program of federal aid for retraining for unemployed and underemployed persons regardless of the cause of distress. See S. Rep. No. 651, 87th Cong., 1st Sess. (1961). The Statement of Findings and Purpose recognizes: "The Congress further finds that the skills of many persons have been rendered obsolete by dislocations in the economy arising from automation or other technological developments, foreign competition, relocation of industry, shifts in market demands, and other changes in the structure of the economy; . . . that it is in the national interest that the opportunity to acquire new skills be afforded . . . in order to alleviate the hardships of unemployment, reduce the costs of unemployment compensation and public assistance, and to increase the Nation's productivity and its capacity to meet the requirements of the space age. . . ."

President Kennedy, in a message of May 29, 1961 recommending retraining legislation, stated: "The unemployed whose skills have been rendered obsolete by automation and other technological changes must be equipped with new skills enabling them to become productive members of our society once again. The skills of other workers must also be improved to enable them to meet the more demanding requirements of modern industry." N.Y. Times, May 30, 1961, p. 14, col. 3. See also President's Advisory Committee on Labor Management Policy, Statement on Automation, 1 Lab. Rel. Rep. (48 L.R.R.M.) 48, 49 ¶ 4(c) (1961); Impact of Automation, Report of the Subcommittee on Unemployment and the Impact of Automation, House Committee on Education and Labor, 87th Cong., 1st Sess. 20 (Comm. Print 1961); Senate Subcommittee Report, summarized in 1 Lab. Rel. Rep. (48 L.R.R.M.) 313 (1961); cf. Business Week, May 11, 1961, p. 161. On the uses of vocational training as part of the program for assisting depressed areas, see S. Rep. No. 61, 87th Cong., 1st Sess. 37 (1961).

126. E.g., S. 851, 87th Cong., 2d Sess. § 13 (1961); S. 2907, 85th Cong., 1st Sess. § 9 (1957); Lindeman & Salant, op. cit. supra note 8, at 259; Ruttenberg, in Compendium, op. cit. supra note 1, at 787; Randall Staff Papers, op. cit. supra note 8, at 393; Ruttenberg & Seidman, Trade Adjustment Program, Committee for a National Trade Policy, Conference on Trade Policy 3 (1960) (Round Table No. 5); Vernon, A Trade Policy for the 1960s, 39 Foreign Affairs 458, 462 (1961).

sion rights over many years, the opportunity to learn a new skill is the most important single measure to assist displaced workers.

Federal aid for education, whenever considered vital to the national interest, has a long tradition, beginning with college land grants[127] and continuing through the assistance to vocational education since 1917,[128] the "G.I. bill" providing educational assistance to veterans,[129] and most recently, the National Defense Education Act[130] of 1958. In addition there have been proposals for wider aid to education, one of which was passed by the Senate in 1961.[131] Another major step in this direction was made by the Area Redevelopment Act.[132] This, however, only deals with limited geographical areas.

Expansion of vocational education assistance and subsistence payments available to qualified students taking courses in skills vital to the national effort, would permit displaced workers, regardless of geographical area, to learn new skills and thus make a greater contribution to our economic growth. Because of the great need for highly skilled workers for our economic development and for the automated industries of the future,[133] it may be wise not to limit eligibility to those who can show that they have been displaced. Such a limitation would create severe dissatisfaction because a displaced worker able to take advantage of training opportunities might actually be better off than his neighbor who was not displaced and therefore ineligible. The employee denied training opportunities because he was "not fortunate enough to be displaced" would not readily be reconciled to the justice of any such distinction. Certainly an eligibility limitation based upon a single cause of dislocation would be unwise as well as discriminatory and extremely difficult to administer impartially. Although its cost would be greater, a program without any eligibility limitation at all based on displacement would

127. 12 Stat. 503 (1862), as amended, 7 U.S.C. §§ 301-40 (1958) (Supp. II, 1959-1960)

128. Smith-Hughes Act, 39 Stat. 929 (1917), amended by 60 Stat. 775 (1946), as amended, 20 U.S.C. §§ 11-34 (1958) (Supp. II, 1959-1960); McCarthy, Vocational Education, America's Greatest Resource 17-107 (1950).

129. See, e.g., 72 Stat. 1176 (1958), as amended, 38 U.S.C. §§ 1601-1669 (1958) (Supp. II, 1959-1960).

130. National Defense Education Act of 1958, 72 Stat. 1581, 20 U.S.C. §§ 401-589 (1958) (Supp. II, 1959-1960).

131. See S. 1021, 87th Cong., 1st Sess. (1961).

132. See notes 122-24 supra.

133. See Automation and Technological Change: Hearings and Report of the Subcommittee on Economic Stabilization, Joint Committee on the Economic Report, 84th Cong., 1st Sess. (1955); Morse, Promise and Peril of Automation, N.Y. Times, June 9, 1957, § 6 (Magazine), p. 15; cf. Kinker, Automation and Vocational Education, 46 Industrial Arts and Vocational Education 175 (June 1957).

make the maximum contribution to our resources of skilled manpower and at the same time help to relieve the consequences of displacement. Perhaps a compromise might give some preference to displaced workers who were otherwise qualified without making evidence of displacement an absolute requirement.

> The Senate, in passing the proposed Manpower Development and Retraining Act on August 23, 1961, did not *limit* retraining eligibility to the displaced or unemployed, but merely provided for *priority* for the unemployed; the Senate-passed bill further provides for subsistence payments for trainees, but here the bulk of payments must be to unemployed workers with more than three years job experience.[134]

The chief requirement for scholarship grants should thus be a good faith effort to learn a new skill which is of importance to national purposes, adequate progress in the studies undertaken, and some limitation on the length of time an individual could continue to receive benefits. Such an investment in new skills need not be limited to what has traditionally been known as vocational education, but could be linked with any over-all federal scholarship program for academic students, so that professions vital to our position in the world as well as various skilled trades would benefit.

One drawback to such a program would of course be the cost to the Treasury. However, our present federal contribution to education is far less than at the peak of benefits paid under the "G.I. bill" following World War II,[135] and it may be questioned in view of the posture of today's world whether it might not have been wiser to have maintained the post-World War II tempo.

Any vocational education program should also seek to take advantage of the extent to which on-the-job training in industry already supplements our formal educational system.[136] The possibilities providing for the training of displaced workers through collective bargaining arrangements[137] should also be carefully considered by employers and unions.

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134. See 153 Cong. Rec. 15578-80 (daily ed. Aug. 22, 1961); id. 15688-98, 15704-09 (daily ed. Aug. 23, 1961); S. Rep. No. 651, 87th Cong., 1st Sess. (1961).

135. See U.S. Dep't. of Commerce, Bureau of the Census, Statistical Abstract of the United States 135 (1958).

136. N.Y. Times, Feb. 7, 1959, p. 21, col. 3; id., Feb. 5, 1959, p. 30, col. 3; Compare American Council on Education, Matching Youth and Jobs 39-68 (1940), with Kinker, Automation and Vocational Education, 46 Industrial Arts and Vocational Education 175 (June 1957).

137. See Fanning, The Challenge of Automation in the Light of the Natural Law, 11 Lab. L. J. 875, 878-79 (1960); N.Y. Times, April 5, 1960, p. 36, col. 2; Business Week, May 11, 1957, p. 161; cf. 1 Lab. Rel. Rep. (48 L.R.R.M.) 249 (1961).

2. Unemployment Compensation

The federally sponsored structure of state unemployment compensation systems[138] constitutes an historic effort to deal with involuntary employee idleness. Because of the inadequacy of benefit periods in the face of prolonged or widespread idleness, however, Congress saw fit to provide special additional unemployment compensation benefits for veterans eligible for "G.I. bill" assistance, and to those displaced during the 1958 recession under an option available to the states.[139] A somewhat similar procedure was again enacted in 1961.[140] Special provisions for those idle due to particular causes of dislocation such as reductions of import barriers[141] have been suggested, but would create great difficulties in determining eligibility,[142] and would undoubtedly lead to the dissatisfaction of those denied benefits.[143] The alternative is to seek continued strengthening of the basic unemployment insurance structure rather than special provisions limited to particular groups.

Many unions and employers have sought to deal with inadequacies in state compensation plans by adopting supplemental unemployment benefit systems through collective bargaining. A controversy over whether these benefits constitute "wages," which bar state benefits, has arisen in many states, with most of them tending to hold that state benefits still are available.[144] In seeking to strengthen the unemployment compensation structure, some solution to this problem should be sought. A federal solution would be desirable since the collective bargaining relationships which will be encouraged or discouraged in this field are nationwide in scope. This would not constitute a serious

138. See 72 Stat. 171 (1958), as amended, 42 U.S.C. 1400-1400k (1958) (Supp. II, 1959-1960).

139. 72 Stat. 1217 (1958), as amended, 38 U.S.C. §§ 2001-14 (1958) (Supp. II, 1959-1960).

140. See 75 Stat. 8 (1961).

141. See S. 851, 87th Cong., 1st Sess. § 11 (1961); S. 3918, 86th Cong., 2d Sess. § 11 (1960); Randall Staff Papers, op. cit. supra note 8, at 392; Ruttenberg, in Compendium, op. cit. supra note 1, at 792; Ruttenberg & Seidman, Trade Adjustment Program, Committee for a National Trade Policy, Conference on Trade Policy 3 (1960) (Round Table No. 5).

142. Cf. Wilcox, Relief for the Victims of Tariff Cuts, 40 Am. Econ. Rev. 834, 835-39 (1950). These difficulties need not exist where a private plan for compensating employees due to economic injury can be tailored to the particular circumstances. See N.Y. Times, June 30, 1960, p. 62, col. 1.

143. Considerable problems concerning eligibility arise under existing state plans as to the cause of idleness. See, e.g., Note, 59 Colum. L. Rev. 209 (1959).

144. See Chernick & Naef, Legal and Political Aspects of the Integration of Unemployment Insurance and SUB Plans, 12 Ind. & Lab. Rel. Rev. 20 (1958), and cases cited; Fanning, The Challenge of Automation in the Light of the Natural Law, 11 Lab. L. J. 875, 880-81 (1960).

invasion of state autonomy, since there are already basic federal requirements which state plans must meet to avoid the application of a federal payroll tax on employers within the state.[145] To allow state and private unemployment benefits to supplement each other would encourage employers and unions to develop private plans for mitigating the effects of idleness.[146]

Integration of private and state plans, however, cannot be a substitute for improvement in the state plans themselves, because most employees are not covered by private plans. The chief needs for improvement in state plans concern the amount of benefits and the length of the period during which benefits are available.[147]

3. Fairness to Older Workers

Since an older worker who is displaced may face heartbreaking difficulties in beginning a new career,[148] various forms of assistance have been suggested. Acceleration of Social Security retirement benefits has been proposed as one way to aid such workers.[149] However, to grant such benefits to a "displaced" group, or worse yet to a group found to have been displaced due to a single cause, while denying them to others would certainly create severe dissatisfaction. An alternative approach is renewed efforts to promote more jobs for older workers. New York has attempted to expand job opportunities for older workers by an Age Discrimination Law[150] making certain types of age discrimination in employment illegal. The workability of the Law may be questioned, however, because as the statute recognizes,[151] age discrimination may be justified for some kinds of work, and because such discrimination may

145. The constitutionality of the interlocking federal-state unemployment insurance structure was upheld in Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937).

146. E.g., N.Y. Times, Oct. 20, 1960, p. 1, cols. 1, 2.

147. Cf. Randall Staff Papers, op. cit. supra note 8, at 397; Economic Report of the President 40 (1959) (option of aid to states to lengthen benefits in 1958 recession).

148. Skills are the most important safeguard against poverty in old age, but may be hard to acquire anew when an older worker is displaced. See generally A.M. & J.N. Ross, Employment Problems of Older Workers, in U.S. Congress, Senate Special Committee on Unemployment Problems, Studies in Unemployment 97 (1960); M. B. Givens, Prevention of Poverty in Old Age, in Good News for Later Life, Report of the N.Y. State Joint Legislative Committee on Problems of the Aging 59-62 (1958).

149. See S. 851, 87th Cong., 1st Sess. § 12 (1961); S. 3918, 86th Cong., 2d Sess. § 12 (1960); Ruttenberg, in Compendium 792, op. cit. supra note 1; Ruttenberg & Seidman, Trade Adjustment Program, in Committee for a National Trade Policy, Conference on Trade Policy 3 (1960) (Round Table No. 5); Clubb & Reischer, The Trade Adjustment Bills: Their Purpose and Efficacy, 61 Colum. L. Rev. 490, 499 (1961).

150. N.Y. Executive Law § 296; see Comment, Age Discrimination in Employment: Legislative and Collective Bargaining Solutions, 53 Nw. U. L. Rev. 96 (1958).

151. N.Y. Executive Law § 296(1)(c).

prove extremely difficult to detect in practice. It would appear that seeking voluntary cooperation on the part of employers may be the most fruitful approach in working to expand employment opportunities.

Another serious problem for the displaced older worker is the loss of seniority and pension rights which may have taken years to accumulate.[152] In industries where industry-wide collective bargaining is practiced, employers and unions should seriously consider the impact upon the older worker of loss of accumulated pension rights, and the practicability of granting earlier vesting of the right to benefits based upon the number of years worked prior to layoff. This would make it possible for a displaced employee to receive at least some retirement benefits even though not the normal full amount. A partial step in this direction may be taken where several employers pool their pension systems so that at least under certain conditions work for any of them is credited to the employee.[153] If private action does not solve this problem,[154] it may be that state or federal legislation to encourage earlier vesting through tax incentives[155] should be considered. Tax advantages for pension and welfare funds are already provided by the Internal Revenue Code, and the question would be only whether these requirements should encourage earlier vesting under qualified employee retirement plans.[156]

152. See Randall Staff Papers, op. cit. supra note 8, at 393; cf. Porter, Job Property Rights 76 (1954); Tilove, Pension Funds and Economic Freedom 20-28 (1959) (A Report to the Fund for the Republic); Brissenden, Labor Mobility and Employee Benefits, 6 Lab. L. J. 762 (1955).

153. This may be an ultimate outgrowth of the tendency toward uniform collective bargaining provisions under industry-wide bargaining. Goldner, Area Pension Plans Under Collective Bargaining, 3 Lab. L. J. 825 (1952); White, Pension Plans in Labor Agreements v. Older Workers, 12 Lab. L. J. 32, 50, 88 (1960); cf. Goodman, Multiemployer Pension, Profit-Sharing and Stock Bonus Plans, 11 Lab. L. J. 1103 (1960); Pollak, Social Implications of Industry-Wide Bargaining (1948).

154. On employee rights concerning pension plans and changes in them, see generally Isaacson, Employee Welfare and Pension Plans: Regulation and Protection of Employee Rights, 59 Colum. L. Rev. 96 (1959); Note, Protection of Beneficiaries Under Employee Benefit Plans, 58 Colum. L. Rev. 78 (1958); Note, Contractual Aspects of Pension Plan Modification, 56 Colum. L. Rev. 251 (1956).

155. See Int. Rev. Code of 1954, § 401; Note, 58 Colum. L. Rev. 78, 98-99 (1958); Note, 70 Harv. L. Rev. 490 (1957).

156. Where a deferred compensation plan is not "qualified" under Int. Rev. Code of 1954, § 401, until recently the tax law actually encouraged delay in vesting, because if the future payments were contingent, they would be less likely to be considered the equivalent of cash and thus taxable as "constructively received" prior to actual receipt. See Treas. Reg. § 1.451-2 (1957); Renton K. Brodie, 1 T.C. 275 (1942) (payment to third party for employee's benefit the equivalent of cash). However, under Rev. Rul. 60-31, 1960-1961 Int. Rev. Bull. at 174, it is indicated that it is no longer necessary that future payments be made contingent in order to avoid constructive receipt, if there are no payments

4. Moving Allowances and the Rights of Nonresidents

Allowances to help workers to move to new locations have been suggested as a further means of combating unemployment in depressed areas.[157] However, to move may uproot old associations without guaranteeing success in the new location. Although the widespread mobility of many families today has been claimed to be healthy in the long run,[158] artificial encouragement of moving might accentuate social problems created by large-scale migration, such as interruption of education for the migrants' children[159] and overcrowding of community facilities in areas to which moving occurs.[160] If hoped-for job prospects do not materialize after a move, disappointment is bound to be intense, and there would undoubtedly be demands for further governmental assistance for those stranded at an undesirable location. Further, some groups might be quite unwilling to move.[161] There are, however, measures short of the actual granting of moving allowances to depressed areas which could assist those willing to move in search of better opportunities.

At present, far from granting allowances to those willing to move, we actually discriminate against them in many ways. Although the Supreme Court has held that it is an unconstitutional interference with interstate commerce for a state to attempt to bar migration from other states,[162] states and localities have many practices designed to discourage the entrance of poor persons.[163] Eligibility for relief and other

to a third party for the benefit of the employee and the deferment of payment is binding upon the employee and agreed upon either in arm's-length bargaining for sound business reasons or before the work involved is done. But see Wood, Contingencies May Still Be a Good Idea in Deferred Compensation Contracts, 12 J. Taxation 210 (1960); Revenue Rulings have on occasion been retroactively revoked. See Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957). Consequently tax reasons may continue to encourage delays in vesting which are not otherwise economically desirable.

157. S. 851, 87th Cong., 1st Sess. § 14 (1961); S. 3918, 86th Cong., 2d Sess. § 13 (1960); S. 2907, 85th Cong., 1st Sess. § 9 (1957); Randall Staff Papers, op. cit. supra note 8, at 393; Ruttenberg, in Compendium 792, op. cit supra note 1; Ruttenberg & Seidman, Trade Adjustment Program, Committee for a National Trade Policy, Conference of Trade Policy 3 (1960) (Round Table No. 5). Moving allowances were, however, rejected by a Senate Labor Subcommittee in June 1961. See 1 Lab. Rel. Rep. (48 L.R.R.M.) 313 (1961).

158. See Schorr, Families on Wheels, 216 Harpers 71, 78 (January, 1958).

159. See Interstate Migration, H. Rep. No. 369, 77th Cong., 1st Sess. 29-30, 53 (1941); Barclay, Children on the Move, N.Y. Times, May 8, 1960 § 6 (Magazine), p. 80; Barclay, Child in a New Neighborhood, N.Y. Times, Oct. 5, 1958 § 6 (Magazine), p. 53; 39 School Life 4 (Jan. 1957) (one out of five children move in the course of a year).

160. See Kerr, Migration to the Seattle Labor Market Area 1940-1942, 11 U. of Wash. Publication in the Social Sciences 129, 164 (1942).

161. Cf. Florinsky, Integrated Europe 68-69 (1955).

162. Edwards v. California, 314 U.S. 160 (1941).

163. Interstate Migration, H. Rep. No. 369, 77th Cong., 1st Sess. 622-35 (1941); cf. id. at 635-48.

benefits as well as the franchise are widely restricted on the basis of length of residence.[164] Also the federal income tax laws discriminate against persons moving to seek new jobs. The transportation of machinery to a new location is deductible as a business expense,[165] but if an employee spends his own funds to travel to the new location of his job or to seek or accept a new job he receives no such deduction or exclusion from taxable income.[166] Before considering such a step as the granting of moving allowances we would do well to reconsider the merits of the discrimination we still practice against those who pick up stakes and seek opportunities in new locations. If a moving allowance program is adopted, it will be vital to assure that new jobs, adequate housing and other facilities are available at the new location before moves are encouraged.

Thus retraining programs appear to offer the most attractive avenue for assisting displaced employees. Other available means of mitigating injury to displaced employees would include closer integration of unemployment insurance and supplemental unemployment benefit plans, earlier vesting of benefits under employee retirement plans, and lessening of discrimination against employees who move in search of better opportunities.

D. *Measures to Aid Entire Industries and to Promote Growth in the Economy as a Whole*

1. Research

Development of new uses for existing products and raw materials, and of more efficient methods in existing industries can serve the dual purposes of combatting injury to the industries affected[167] and increasing our economic potential.[168] Even more important, basic research in the fundamental sciences where no immediate practical objective may be in view can open up the way for the creation of entirely new

164. The concepts of residence and domicile are often highly indefinite in practice, thus making it difficult in some instances for the individual to predict what rights and obligations he is acquiring. See Reese, Does Domicil Bear a Single Meaning?, 55 Colum. L. Rev. 589 (1955); Reese & Green, That Elusive Word, "Residence," 6 Vand. L. Rev. 561 (1953).

165. Fowler & Union Horse Nail Co., 16 B.T.A. 1071 (1929).

166. York v. Commissioner, 160 F.2d 385 (D.C. Cir. 1947); William C. Byers, 14 CCH Tax Ct. Mem. 153 (1955); Rev. Rul. 54-429, 1954-2 Cum. Bull. 53.

167. Technological change is, of course, a cause of economic injury as well as a means of treating it, cf. note 13 supra, unless measures are taken to avoid that result.

168. Slichter, The Industry of Discovery, 128 Science 1610 (Dec. 22, 1958); cf. Pfeiffer, The Basic Need for Basic Research, N.Y. Times, Nov. 24, 1957, § 6 (Magazine), p. 23. For one such proposed program, see Johnson, If We Could Take the Salt Out of Water, N.Y. Times, Oct. 30, 1960, § 6 (Magazine), p. 17, col. 7.

industries and methods.[169] Federal assistance to research has grown through efforts to meet military needs and through activities of civilian agencies such as the National Science Foundation,[170] often by means of contracts with industry and educational institutions. Further extension of such efforts, within the limitations of the skilled manpower available, may be one of the most effective stimulants to economic growth and a great aid to depressed industries.

2. Stockpiling

The United States has stockpiled strategic materials since 1939.[171] The chief purpose has been to assure adequate supplies of critical materials in the event of emergency, but another ever-present and sometimes competing goal has been to aid industry by either stabilizing or supporting market prices.[172]

A multiple-purpose stockpiling program can serve both to provide a reserve of strategic materials available in case of emergency, and to provide a buffer stock to even out fluctuations in output and price of the materials concerned.[173] Materials which are not perishable and can be cheaply stored without risk of deterioration, such as many metals and metal ores, seem especially appropriate for stockpiling, although to date it has been perishable farm products which have been stored in the greatest quantities by the Government, under the farm price support program.[174]

One of the great controversies which has surrounded strategic materials stockpiling has been the extent to which domestic producers should be given preference over foreign suppliers.[175] The Buy American Act,[176] granting considerable preferences to domestic suppliers, applies

169. See N.Y. Times, March 24, 1959, p. 38, col. 5, as an instance of the growing recognition of our need for greater support for basic research.

170. National Science Foundation Act, 64 Stat. 149 (1950), as amended, 42 U.S.C. §§ 1861-79 (1958) (Supp. II, 1959-1960).

171. See 53 Stat. 811 (1939), as amended, 50 U.S.C. §§ 98-98h (1958).

172. See Snyder, The Stockpiling of Strategic Materials 19-97, 253-57, 346-59 (1956) (unpublished thesis in Columbia University, Butler Library); cf. Business Week, Sept. 17, 1955, p. 31.

173. See Knorr, Tin Under Control 295-98 (1945); Business Week, May 26, 1956, p. 191; cf. id., Sept. 17, 1955, p. 31; Report of the President's Materials Policy Commission, "Resources for Freedom" (1952).

174. 63 Stat. 1054 (1949), as amended, 7 U.S.C. §§ 1421-68 (1958) (Supp. II, 1959-1960).

175. See, e.g., Snyder, The Stockpiling of Strategic Materials 253-57, 346-59 (1956) (unpublished thesis in Columbia University, Butler Library); Hearings Before the House Committee on Public Lands, on Stockpiling of Strategic and Critical Materials, 80th Cong., 1st Sess. (1947).

176. 47 Stat. 1520 (1933), as amended, 41 U.S.C. §§ 10a-10c(1958).

to our present stockpiling program,[177] but the bulk of purchases have nevertheless been made abroad[178] because the materials stockpiled are chiefly those expected to be unavailable domestically in case of emergency. The result has been continuing political agitation for greater preferences for domestic producers.[179]

Preference for domestic producers may strengthen United States productive capacity which may be important in case of emergency, but may also tend to deplete domestic underground reserves of minerals,[180] and, of course, is frequently more expensive than purchases from the cheapest available foreign source. Furthermore, preferences for domestic suppliers tend to alienate politically the foreign nations from which supplies are derived, thus undermining our strategic position and jeopardizing future access to such sources.[181] Preferences also weaken friendly nations economically, making them more susceptible to agitation from the extreme left or right and at the same time forcing them to seek other markets for their products among less friendly powers. Purchases from domestic suppliers at higher than the world market price also involve either the administratively difficult task of allocating profitable high priced sales among domestic suppliers[182] or the creation of a domestic price level above the world market price. This in turn may lead to the necessity for import restrictions to protect the artificially raised domestic price level from foreign competition.[183]

Stockpiling giving effective preference to domestic suppliers is actually then a *form of protection* rather than part of an alternative to protection. The protectionist aspect tends to result in a need for further restrictions on the industry itself. In order to sustain a high-cost subsidized domestic industry which has become dependent upon subsidy,

177. 53 Stat. 811 (1939), as amended, 50 U.S.C. § 98b(a)(2)(1958), applying 47 Stat. 1520 (1933), as amended, 41 U.S.C. §§ 10a-10c (1958) (Supp. II, 1959-1960).

178. Hearings Before the House Committee on Public Lands, on Stockpiling of Strategic and Critical Materials, 80th Cong., 1st Sess. 65-66 (1947).

179. See note 175 supra.

180. Snyder, The Stockpiling of Strategic Materials 370 (1956) (unpublished thesis in Columbia University, Butler Library); see Paley, Resources for Freedom (1952) (Report of President's Materials Policy Comm'n).

181. See N.Y. Times, March 22, 1959, §3, p. F1, col. 8; Paley, op. cit. supra note 180, at 77; Snyder, op. cit. supra note 180 at 379-87.

182. N.Y. Times, April 12, 1959, § 1, p. 22, col. 1 (oil import quotas); cf. note 175 supra.

183. E.g., the import curbs authorized and extensively used to protect the domestic farm price support program. See note 44 supra. Similarly, airline subsidies have been used as an argument for excluding foreign competition lest business be diverted from domestic carriers and thus increasing the Government's subsidy burden in supporting the domestic firms. See N.Y. Times, April 18, 1959, p. 46, col. 5. The adverse effect on foreign relations appears to be clear.

and at the same time limit the financial cost of governmental support, restrictions on production and limitations on entry tend ultimately to become necessary. Then we have come full circle from an effort to encourage domestic production to the necessity of restricting it to keep the cost to the government within bounds. Indications of the link between subsidy and restriction can be seen in the acreage limitations growing out of the farm program[184] and the limitations on entry imposed with varying intensity in the varyingly subsidized airline industry.[185] These consequences, however, have only delayed immediate impact upon those who are most directly concerned with the particular industry, and are represented in our domestic political processes; hence powerful pressures tend to promote ever increased preference for domestic producers whenever governmental leaders fail to resist these pressures in the longer-range interest of those concerned and of the nation.

In the interest of our own long range security we should seek to use our power to encourage stable and growing economies in friendly nations throughout the world as well as at home. The stockpiling program should be no exception. An enlarged multiple-purpose stockpiling program with both strategic purposes and the economic objective of avoiding unduly sharp fluctuations in the price of readily storeable commodities, would both strengthen our reserves of critical materials in the event of emergency and offer important advantages to industries at home and in friendly nations by seeking to even out fluctuations in demand and price.[186] The benefit to domestic industry from such buffer stockpiling could best be enhanced, not by increased preferences, but by including in the stockpile materials which have fluctuating markets, can be stored cheaply and do not become obsolete. A workable buffer stock program aimed at stabilizing the market would of course contemplate the sale of buffer stocks whenever prices were higher than normal,[187] as well as purchases when prices were lower.

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184. For an extreme illustration, see the facts involved in Wickard v. Filburn, 317 U.S. 111 (1942), unanimously followed in United States v. Haley, 358 U.S. 644 (1959).

185. E.g., Southern Service to the West, 12 C.A.B. 518, 532-34 (1951). On the significance of freedom of entry, see Bain, Barriers to New Competition (1956); Edwards, Maintaining Competition 186-248 (1949); Stocking & Watkins, Cartels or Competition? 136-38 (1948).

186. An alternative method of promoting stabilization is to encourage or permit cartels, but their policies do not normally encourage economic growth. Cf. Pribram, Cartel Problems (1935). Another possibility is to utilize comprehensive governmental control, with its disadvantages. Cf. Knorr, Tin Under Control (1945).

187. See Knorr, op. cit. supra note 186, at 292.

Important dangers are that buffer stocks will be viewed as a cure-all,[188] that only purchases and never sales will be permitted,[189] that protectionism in the guise of preference for domestic suppliers will develop under the inevitable political pressures which arise in connection with such a program and that purchases to stabilize the market will displace or undermine the program of purchases for strategic reserves rather than complement the strategic stockpile.[190] If these dangers can be overcome, a buffer stockpile in addition to a strategic stockpile offers substantial benefits to free world markets and through them to domestic producers as a vital element in these markets. It may thus contribute to an alternative to protection by lessening economic injury through evening out price fluctuations, and promoting the fullest use of our resources through production for stockpile during slack periods or recessions.[191]

3. Defense Contracts

Our defense procurement, like the strategic reserve aspect of stockpiling programs, must be based on national defense needs rather than economic considerations. Nevertheless, whenever substantial unemployment occurs, acceleration of the procurement of items which will strengthen our defenses would be wise if the items are needed, since the human and physical resources thus put to work might otherwise be idle and make no contribution to the national welfare. Also preferences in defense contract placement have been given to depressed areas and depressed industries in many instances.[192]

Defense contracts can serve another important role in our search for an alternative to protection because one basis for protection is the desire to safeguard a domestic mobilization base for use in case of emergency.[193] Such a mobilization base may be maintained, in large

188. Id. at 295; Davis, New International Wheat Agreements, 19 Wheat Studies of the Food Research Institute 79 (Stanford University, 1942).

189. Current restrictions on dispositions are severe, and are appropriate to purely strategic, not buffer stock objectives. See 53 Stat. 812 (1939), as amended, 50 U.S.C. § 98d (1958); cf. N.Y. Times, April 18, 1959, p. 29, col. 5.

190. See Snyder, The Stockpiling of Strategic Materials, 19-27, 253-57, 346-59 (1956) (unpublished thesis in Columbia University, Butler Library).

191. Id. at 548. When demand for minerals is unusually low, threatening economic injury, increased purchasing for stockpile can be a very real alternative to protection. See N.Y. Times, June 11, 1958, p. 49, col. 1; id., April 15, 1958, p. 1, col. 6. But producers may tend to prefer protection to either stockpiling or direct subsidies. See N.Y. Times, April 30, 1958, p. 45, col. 6. The position of the Paley Report is that buffer stockpiling should be organized on an international basis. Paley, Resources for Freedom, 87-90 (1952) (Report of President's Materials Policy Comm'n). But cf. Knorr, Tin Under Control (1945), for skepticism of such arrangements.

192. E.g., Exec. Order No. 10582, 19 Fed. Reg. 8723 (1954).

193. See notes 41-43 supra.

part, by actual procurement of items needed for defense purposes through defense contracts. For this reason there may be some justification for granting a preference to producers in the United States and geographically contiguous areas, such as Canada,[194] from which supplies would be available in case of emergency, where the products purchased are highly essential and the industry concerned would otherwise suffer serious injury. The Buy American Act of 1933, however, gives considerable preference to U.S. suppliers of even non-essential goods and services without any showing of actual or threatened injury.[195] The act was, of course not originally enacted with defense considerations primarily in mind, but rather with protection as a means to domestic recovery in view. For defense purposes, producers in Canada should be entitled to the same favorable treatment as those in the United States, but the Buy American Act fails to provide for any such preference.

The great danger in recognizing the propriety of even limited preferences for defense reasons is that political pressures for protection may cause preferences to be granted under color of national security. Hence, preferences on defense grounds should be closely restricted to highly essential industries which can clearly show immediate danger of serious injury.

4. Transition Periods in Implementing Trade Liberalization as a Substitute for the Escape Clause

The present "escape clause"[196] which looks toward revocation of any trade concession seriously injuring domestic industry, and the "peril point" provision[197] seeking to prevent such concessions from ever being made, are fundamentally inconsistent with the purposes of our foreign policy since World War II. Our trade program still has the promotion of domestic prosperity as one of its objectives; but the reasons for the successive extensions of the Trade Agreements Act[198] and the aims which can be inferred from its administration over a considerable period make it clear that the real purposes are much broader. These purposes include cooperating with friendly nations and improving their economies as part of long range strategy to strenghten the free world and build a just and lasting peace.[199] The peril point and escape clause

194. See N.Y. Times, May 1, 1959, p.l, col. 71. When pertinent defense industries are located there, Mexico might also be given appropriate preferences in cases where the industry is near enough to the site of probable use of the product.

195. 47 Stat. 1520 (1933), as amended, 41 U.S.C. §§10a-10d (1958).

196. 65 Stat. 73 (1951), as amended, 19 U.S.C. §§ 1363-64 (1958).

197. 65 Stat. 72 (1951), as amended, 19 U.S.C. § 1360 (1958).

198. 48 Stat. 943 (1930), as amended, 19 U.S.C. § 1351 (1958).

199. See notes 46-50 supra.

provisions in their present form are inconsistent with these objectives. Yet it is reasonable that risks of injury to domestic industry should be taken into account in timing the effectiveness of trade liberalizations.

For this purpose, it has been suggested that where serious injury is expected or found by the Tariff Commission, the recommendation should not be for the withdrawal of a concession or that one not be granted, as under present law,[200] but for a transition period in the effectiveness of the concession, or for its temporary suspension during a short and limited period to give time for adjustment.[201] At the end of a transition period during which the trade concession would be given increasing effect (for example in steps of twenty-five per cent of its full extent annually until the full concession is permanently in effect) no further "escape" would be authorized. The device of a transition period is provided for by the European Economic Community in the creation of the Common Market[202] and merits serious consideration as a substitute for the present peril point and escape clause provisions. Its effect would be to soften the sudden impact of trade liberalizations upon domestic producers at any given time, permitting them to plan ahead in attempting to increase efficiency or convert to other products or services, but without permitting the indefinite postponement of reduction of import barriers in the interest of protection.

5. A Self-Reinforcing Transition From Protectionism

Protectionism, in its broad sense, on behalf of a particular group may benefit that group in the short run[203] at the expense of consumers and of economic growth. But even these benefits may be negated by the effects of protection secured by other groups. Thus a particular group may receive more because of a high tariff, an import quota, or other form of protectionism, but at the same time be a victim of higher costs imposed by other groups which have also secured one of the many forms of protection against the forces of economic change. It is easier, from a political point of view, to concentrate on securing protection for

200. See notes 196, 197 supra.

201. See Kindleberger, Imports, The Tariff, and the Need for Adjustment, in Compendium, op. cit. supra note 1, at 73, 86; Telles, To Facilitate Adjustment to Liberalized Trade, in Committee for a National Trade Policy, Conference on Trade Policy (1960) (Round Table No. 5); Vernon, A Trade Policy for the 1960s, 39 Foreign Affairs 433, 462 (1961).

202. Treaty Establishing the European Economic Community, pt. 1, art. 8, 298 U.N.T.S. 17 (1957).

203. It will benefit the group only until too many others are attracted into the field unless a restriction on entry to "protect the protection" is secured and defended against attempts to overcome or dislodge it.

one's own industry than to take an active interest in opposing each of the myriad demands for special dispensations made by others. Therefore strong leadership and political courage is required if we are to begin to reduce the various forms of protectionism or even resist adding new ones. It is necessary to educate the public so as to make it clear that when everybody is restricting, economic growth is slower and there is less for all.

But once a trend toward relaxing some of the barriers of protection is initiated it could prove self-reinforcing if vigorously pursued. The lessening of protectionism favoring one group will benefit others, who may then be more willing to give up special measures favoring themselves. To this extent a transition from protectionism can itself be an important part of a viable alternative to protection. This will be possible, of course, only if other measures such as some of those discussed above are also taken to deal with economic injury by promoting the fullest use of resources. There are several areas in which the possibilities of measures looking toward a lessening of restrictive features might be considered.[204]

a. Import Barriers

Not only our present tariff rates, but the escape clause and peril point provisions,[205] the Buy American Act,[206] and import restrictions stated (though not always accurately) to be based on national security grounds, should be re-examined to determine whether their benefits outweigh their disadvantages, including their interference with our foreign policy objectives. Study might also be given to our farm price support program to determine whether the restrictive and protectionist features could be lessened by seeking to make governmental purchases serve additional purposes, such as in school lunch programs and in relieving food shortages in developing areas of the world as a contribution to their capital for development.[207]

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204. Cf. N.Y. Times, Feb. 4, 1959, p. 21, col. 4.

205. 65 Stat. 73 (1951), as amended, 19 U.S.C. §§ 1363-64 (1958) (escape clause); 65 Stat. 72 (1951), as amended, 19 U.S.C. § 1360 (1958) (peril point provision). See authorities cited in note 201 supra on the proposal for a transitional period rather than withdrawal of a concession as the recommendation to be made under the escape clause and peril point provisions.

206. 47 Stat. 1520 (1933), as amended, 41 U.S.C. §§ 10a-10d (1958) (Supp. II, 1959-1960); see note 45 supra. The act might be limited to preferences in national security cases as an alternative to its complete repeal.

207. If our farm productivity were utilized so that it became truly a national asset rather than a liability, protection would appear less necessary.

b. Restrictions on Entry, Service, and on Price Reductions in Regulated Industries

Further study might be given to the extent to which competition and regulation may be regarded as complementary means of safeguarding the public interest rather than as antithetical or mutually exclusive.[208]

c. Antitrust Exemptions

The myriad of special antitrust exceptions and exemptions, under regulatory statutes and otherwise,[209] should be carefully reviewed, with a view to making greater use where possible of the inherent flexibility of the antitrust laws[210] rather than of complete exclusions from their coverage.

d. The Robinson-Patman Act

Study should be given as to whether or not price reductions due to economies made possible by large-scale buying are discouraged under the Robinson-Patman Act[211] because cost justifications of price differences are too difficult to establish.[212] This should be done with a view to developing amendments or interpretations of the act which will reconcile it with the aims of other antitrust policies to the extent possible.[213]

e. Fair Trade

The desirability and need for continuing to permit state-approved retail price maintenance as an exception to the Sherman Act's ban on

208. See Dirlam & Stelzer, The Insurance Industry: A Case Study in the Workability of Regulated Competition, 107 U. Pa. L. Rev. 199 (1958); cf. R. A. Givens, Refusal of Radio and Television Licenses on Economic Grounds, 46 Va. L. Rev. 1391 (1960); Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105, 1119-27 (1954); Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436 (1954); Note, 58 Colum. L. Rev. 673 (1958); Note, 57 Colum. L. Rev. 1036 (1957).

209. For an abbreviated catalogue of a few of the major exceptions, see Note, 58 Colum. L. Rev. 673, 679-80 n.56 (1958).

210. See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933); Handler, Antitrust in Perspective 3-28 (1957); R. A. Givens, Parallel Business Conduct Under the Sherman Act, 5 Antitrust Bull. 273 (1960); Note, 58 Colum. L. Rev. 673, 681-83 (1958).

211. 49 Stat. 1526 (1936), as amended, 15 U.S.C. §§ 13-13b, 21a (1958) (Supp. II, 1959-1960).

212. See Taggart, Cost Justification (1959); Rowe, Cost Justification of Price Differentials Under The Robinson-Patman Act, 59 Colum. L. Rev. 584 (1959).

213. See Standard Oil Co. v. FTC, 340 U.S. 231, 248-51 (1951); Rowe, The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective, 57 Colum. L. Rev. 1059 (1957). See also FTC v. National Lead Co., 352 U.S. 419 (1957); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958); Standard Oil Co. v. FTC, supra.

price-fixing agreements[214] should be reappraised, and a nationwide federal fair trade act should not be passed.

f. State and Local Licensing and Regulatory Laws and Building Codes

Many state laws restrict entry into widely differing fields in order to protect health, safety, and quality standards, and sometimes also with the objective of protecting those already in the regulated field from outside competition, or to prefer local over out-of-state interests. With the steady expansion of transportation facilities and the increasingly interstate character of our economy,[215] the commerce clause[216] of the federal constitution may well play an increasing role in the future in limiting the restrictive features of state statutes. In passing upon the validity of state statutes affecting interstate commerce, the underlying policies of federal statutes are significant because Congress exercises the ultimate authority over interstate commerce.[217] Therefore, the federal antitrust laws and the national policy they declare should be reflected in particularly close and careful scrutiny of state statutes affecting interstate commerce which might interfere with these objectives.[218]

g. Restrictive Work Rules

If more effective measures for preventing unemployment and providing retraining for displaced workers were adopted, the unions might be more willing to consider relinquishing restrictive practices which are designed to safeguard jobs from the threat posed by technological advance.[219]

214. Sherman Anti-Trust Act of 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-7 (1958).

215. See note 14 supra.

216. U.S. Const. art. I, § 8, cl. 3.

217. See the discussion in Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) (Stone, C.J.), acted upon in Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946). This ultimate congressional control avoids the danger of unwise judicial invalidation of state action which cannot be corrected by legislative action, present in the pre-1937 economic due process cases, e.g., Lochner v. New York, 198 U.S. 45 (1905). See Dowling, Interstate Commerce and State Power—Revised Version, 47 Colum. L. Rev. 547 (1947).

218. See Southern Pac. Co. v. Arizona, supra note 217, at 764-65 (objectives of national transportation policy); Parker v. Brown, 317 U.S. 341, 367-68 (1943) (purpose of federal farm program taken into account in sustaining state program); Buck v. Kuykendall, 267 U.S. 307 (1925) (federal highway aid objectives). Compare Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 12-13 (1936).

219. Existing public policies seeking to discourage "featherbedding" have met with scant success. Section 8(b)(6) of the National Labor Relations Act, 49 Stat. 452 (1935), amended by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(b)(6) (Supp. II, 1959-

The workability of lessening protectionism in any of these fields depends upon both effective measures to lessen injury in particular cases, and an overall economic climate of full utilization of resources. It is essential both in dealing with economic injury in avoiding protectionism that a high level of economic activity be maintained, and that severe depressions or mass unemployment be avoided. Although

1960), prohibiting attempts to secure payments "in the nature of an exaction, for services which are not performed or not to be performed" has been narrowly interpreted. NLRB v. Gamble Enterprises, 345 U.S. 117 (1953); American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953). A prohibition on make-work practices in broadcasting was upheld in United States v. Petrillo, 332 U.S. 1 (1947), but, perhaps in view of the criminal penalties involved, was held to require knowledge that the work involved was unnecessary. United States v. Petrillo, 75 F. Supp. 176 (N.D. Ill. 1948). And in Order of Railroad Telegraphers v. Chicago & N. Ry., 362 U.S. 330 (1960), the Court held that a strike to force retention of unnecessary jobs was not illegal in such a way as to permit it to be enjoined in spite of the Norris La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1958). See generally the differing views expressed in Aaron, Governmental Restraints on Featherbedding, 5 Stan. L. Rev. 680 (1953); Daykin, Featherbedding, 7 Lab. L.J. 699 (1956); Van de Water, Industrial Productivity and the Law: A Study of Work Restrictions, 43 Va. L. Rev. 155 (1957). It would appear likely that little progress can be made in this respect until some effective means of assisting employees displaced by technological advance is developed. A search for an alternative to make-work practices comparable to the search for an alternative to import restrictions as a form of protectionism in foreign trade is thus necessary. If limitations based upon the cause of injury are not imposed, many of the same approaches could help in providing an alternative to both forms of protection, such as vocational retraining. See generally Cox, The Uses and Abuses of Union Power, 35 Notre Dame Law. 624, 636 (1960); Fanning, The Challenge of Automation in the Light of the Natural Law, 11 Lab. L.J. 875, 880-891 (1960); R. A. Givens, Dealing With National Emergency Labor Disputes, 34 Temp. L. Q. 17, 38-40 (1960). In the case of technological displacement, however, the concept of "compensation" may be more appropriate than in the case of injury due to trade liberalization, since (a) the injured parties are more readily identifiable, and (b) the industry involved directly benefits from the change and hence can be reasonably asked to pay for some of its consequences. An approach to the problem along these lines has been suggested by Professor William Gomberg of the University of Pennsylvania in a report for a Commerce Department study of federal transportation policy. The suggested approach would view job opportunities as at least in some respects analogous to property rights (compare Perlman, A Theory of the Labor Movement (1928); Porter, Job Property Rights (1954)) but would permit a "taking" of this property in return for just compensation as under eminent domain. See Gomberg, The Work Rules and Work Practices Problem, 12 Lab. L. J. 643 (1961); Kossoris, Working Rules in West Coast Longshoring, 84 Monthly Labor Review 1 (1961); N.Y. Times, April 11, 1960, p. 18, col. 1; cf. N.Y. Times, June 30, 1960, p. 62, col. 1. A beginning has been made in this direction by unemployment compensation and by regulatory agencies being empowered to condition approval of changes in service eliminating jobs upon appropriate measures to relieve employee distress. See ICC v. Railway Labor Executive Ass'n., 315 U.S. 373 (1942). This is true, even though the employees' jobs need not be retained if they are compensated. See Maintenance of Way Employees v. United States, 365 U.S. 801 (1961).

the alternatives to protection considered here can make a contribution to this end, broader policies to deal with inflation and deflation in the economy as a whole form the indispensable foundation for the measures discussed.

IV. Conclusion

Protection against foreign competition as a way of dealing with injury to domestic industry has come into direct collision with the urgent needs of our foreign policy. Great politcal courage is therefore required, to overcome the pressures which naturally tend to cause a drift toward protectionism, including trade barriers in many guises. Protectionism can be lessened with effectiveness and with fairness to those who face possible injury only if workable alternatives are available.

As ably pointed out by Clair Wilcox, there are serious objections to any program limited to aid to the victims of reductions of trade barriers alone. It is therefore essential to search for a substitute for protection as a way of dealing with economic dislocation *regardless* of its specific cause; we must seek a program which will provide an alternative to "protectionism" in its broadest sense by assisting producers, workers, communities, and entire industries to participate to the fullest extent in an expanding economy.

We have many traditional methods available for these ends if we are willing to adapt them to changing conditions. These include technical advice and credit assistance for producers, retraining opportunities and unemployment compensation for workers, financial aid and technical advice for depressed communities, and measures to aid entire industries such as research, stockpiling, use of government contracts, and transition periods in the effectiveness of trade liberalization. Together with use of these methods must go a determination to launch a self-reinforcing abandonment of protection in all its forms, and to replace it with measures designed to limit economic injury by promoting the fullest use of our resources. These issues are initially economic issues, but they have deep moral implications, and our ultimate resolution of them will not depend upon economic theories alone, but upon our farsightedness, generosity, and courage.