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Speech by Robert Morgan
On Price Fixing As a
Threat To Free Enterprise

Greensboro Rotary Club

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ON PRICE FIXING

No one will dispute that America is now living through its most dangerous season of discontent. Never before have so many people so seriously questioned the basic premises upon which our country operates.

And perhaps the most insistent attacks are levied against the free enterprise system itself. Though these attacks are loud and clamorous, they often seem disconnected and meaningless. But if one listens closely, a steady, significant strain can be detected amid all the clamor. And it is this muted strain which, if properly understood, enables one to discern a pattern and sense of purpose in the outraged cries about the failure of capitalism.

I believe we should listen closely to this sometimes elusive strain. Perhaps it points the way to a reconciliation of our differences and shows a path to the restoration of confidence in our economic system.

And what is this subdued strain to which I refer, this undercurrent of thought which points the way to an understanding of the criticisms of our free enterprise system? It is simply this: We are not being attacked so much for our system as for our failure to live up to it. In the language of the young and the disenchanted - for our hypocrisy.

Logically, the young cannot attack us for what we are. Are not "self-commitment" and "do your own thing" the watchwords of this new generation? The principal thrust of the new morality is to insure the right of every individual to go his own way, to "do his own thing," and without being made subject to censure for his personal ideology.

In this framework of individual freedom, censure and criticism are not directed against a particular belief, but in the failure to live up to it - in the failure to be true to one's self. The real attack then is not against the generation gap, but rather against the gap between what we

practice and what we preach, between our standards and our performances.

With this background, let us consider one aspect of the present operation of our economic system: price fixing.

Somewhere in this country - perhaps last week for the practice has been going on for many years - a group of the most respected men in the community got together. Very likely, the locale was the nicest hotel or the most exclusive businessmen's club in town. All the important men in a particular industry or trade were present, and the occasion was a trade association meeting or an industrial conference. The fare included a luncheon, or an industrial conference. The fare included a luncheon, trade reports, possible a workshop, an after-dinner speaker, and general good fun and fellowship for everybody.

But something else was included, too. During the course of the meeting these men - good

citizens, lay churchmen, local government officials, and other pillars of the community - these men who are influential in their particular area of trade, decided among themselves what the uniform price of their goods or services would be. Over coffee, they took control of and directed the forces of the market. They arranged to limit competition, the keystone of free enterprise. They short-circuited capitalism, by putting an artificial floor under prices.

As a result of this activity, the American housewife found herself paying more whenever she went to buy. She paid more at the corner drugstore for her children's medicine. She paid more at the bookstore for school supplies. She paid more for her son's haircut and for her own permanent. And when she had an accident with the car, she paid more for its repair, more for doctor's fees to care for her injuries, and more for her insurance when the rates went up later that month.

Yet the same men who set these prices, who made a mockery of the principle of free and open competition, are the same men who write letters to the editor praising the virtues of free enterprise, who speak at civic clubs about what a great system we have, and who never miss an opportunity to chastize our youth when they raise doubts about our economic system.

If our young people are more cynical than the rest of us, perhaps it is because they are more perceptive. For clearly what is happening in meetings such as the one I just mentioned is the perversion of our free enterprise system for personal gain.

Regardless what they preach, by acts such as these our "solid" citizens are saying competition is fine, so long as it is not likely to hurt me. But if the impersonal forces of the market endanger my position and my personal status, then there has to be a better way, through price fixing.

No wonder so many of our young people are disenchanted. We have corrupted the most viable, the most adaptive, the most challenging economic system in the history of the world into a tool for selfish gain and deceit. And I call this to your attention today not merely because I believe that a genuine return to the system ordained by our Founding Fathers will bring us closer together as a nation, but because I believe that the continued abuse of the free enterprise system will ultimately lead to its destruction.

As an attorney, my belief that the forces of the market must be left alone so as to give the small businessman a chance to better himself is squarely in line with one of the oldest doctrines of the legal profession. The law has always regarded artificial interference with the market as opposing the general welfare.

As early as the Fifth Century, Zeno of Rome commanded by royal edict that no persons would "combine or agree in unlawful meetings, that different kinds of merchandise may not be

sold at a less price than they may have agreed upon among themselves."

English jurisprudence has opposed artificial restraint of trade since the early 1400's, and the English doctrine against price fixing came into our own legal system at the birth of our country with our adoption of the common law.

As American business grew bigger and the possibility of injury to the consumer increased proportionately, the Federal government enacted such antitrust laws as the Sherman and Clayton Acts, aimed at restricting monopoly and other unfair trade practices.

In 1927, the Supreme Court said: "The ... result of price fixing, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.

Once established, it may be maintained because of the absence of competition secured by the agreement for a price reasonable when fixed." Thus, the Court recognized that in a free market the best safeguard for the people is not the goodwill of individuals but the impartial action of the market.

The market, unlike businessmen, is no respecter of persons. Even though the men who seek to restrict competition are good and honorable, they all have vested interests. The market has none.

The law, then, has always understood that the destruction of competition by price fixing is a socially harmful act in that economic waste and unfair advantage usually result from it. Perhaps the best example of this waste and unfair advantage is the chaotic, poverty-stricken society of Europe during the reign of the craft guilds. The law hopes never again to see trade regulated and controlled by a few self-interested individuals.

Despite the ancient tradition of the law, despite the economic penalties, both personal and

social, forced upon us by the practice of price fixing, I am sorry to admit that the general public is not overly concerned about price fixing and sees no criminality in the practice.

To be sure, people get excited when corporate giants are caught fixing prices. I simply ask you to remember the trust-busting era when public sentiment demanded the enactment of anti-trust laws and the disassembling of such corporations as Standard Oil and American Tobacco.

And in the regulated industries, such as insurance and utilities, where the government has granted monopolies to insure the production of essential goods and services, public sentiment has always favored governmental restriction limiting the power of these industries to set prices.

But in the area of business that is populated by numerous producers and sellers in which the products or services are not so vital as to require direct regulation, the public shows little concern about the practice of price fixing. And, this lack

of concern allows trade group organizations, industrial councils, and similar organizations to control prices to the detriment of the general welfare.

In trying to understand why the public allows such price fixing practices to continue, I have settled upon five paramount reasons. I believe all of them involve serious error.

First, the public believes that those who have labored long and hard for success in their businesses deserve to make a good profit out of it. I am in complete agreement, and I would be the last to deny that businessmen should receive a profitable return on their investments. However, such profits are easily attainable without price fixing; indeed, that is the cornerstone of American capitalism.

History and experience indicate that the economic interests of the public are best served by making certain that sellers' products and services continue to meet the public's needs and

wants. Public demand, created by public satisfaction, then insure a fair profit.

On the other hand, an artificial price floor frees sellers from responsiveness to public demand. They can produce what they want to and sell their products at previously arranged prices, and the public is compelled to buy. Huge profits may be realized, but at the expense of public satisfaction and the peoples pocketbooks. That expense is too great a price to pay.

Second, many citizens do not view price fixing as a criminal act. It is not criminal to try to make a dollar. What could be more American than that? Crime is a bank robbery, a mugging, a ghetto boy with a knife, not a businessman reading the Wall Street Journal.

This is a serious misconception, because price fixing is indeed a terrible crime. And the seriousness of the crime lies in its very nature. If a man robs a bank, he is considered a deviate and

is recognized so by all of society. But price fixing is not considered a deviate practice; it is widely accepted by businessmen and citizens alike. So we see the magnitude of the crime is that, while engaging in the accepted practice of price fixing, leaders of industry are chipping away at the foundations of capitalism and free enterprise. Price fixing goes against the basic principles of our economic system, and, therefore, it is a crime against all of society.

A third reason for the lack of public concern is that citizens do not regard established members of society as criminals, and this is understandable. But let's look for a moment at just who is doing the price fixing.

I know many of you have thought to yourselves as you sat in a barber's chair, "Isn't \$2.00 a little steep to pay for a haircut?" But have you tried to shop around for a less expensive barber? You probably found that \$2.00 was the identical price of haircuts all over town.

Do you realize that if you go to an auto mechanic to have your car's fender fixed, or if you go to a machine shop to have your lawnmower's handle welded, the price for labor will be \$8.00 per hour at every shop in town?

Do you realize that wholesale flower dealers issue a suggested schedule of retail prices to all their retail patrons, and that these schedules are posted in the very florist shops where you buy your wife's anniversary roses?

Or consider clothing. If you show me a \$125 suit in one clothing store, I will go to every other clothing store in the area, and I will find you a comparable suit at almost exactly the same price.

Even doctors and attorneys are not immune from price fixing. You can see for yourself that the fee schedules for the physicians or the lawyers in the same professional building will be strikingly similar.

And you cannot even escape when you die. The price for a decent funeral will be from \$800 to \$1000 at every mortuary in town.

Fourth, few people in America today realize the extent of price fixing. After all, how many of you go around to the different distributors of a product to compare their prices on that product?

Let me clarify one point here. By the term price fixing, I do not mean merely the conscious meeting of businessmen and their collaboration to set a price floor. I also refer to spontaneous price fixing - the type of price fixing that occurs when one seller raises the price of his product, and all the other sellers in the area increase their prices to meet the level set by the original mover. Price fixing of this type extends from such corporations as General Motors down to the examples I listed above.

Clearly, the need exists and the time is ripe for an awakening by the consumer to the extent and the dangers of price fixing.

Finally, even if the public is made aware of price fixing in our economy, too many people think that nothing can be done. This is the most serious misconception of all.

North Carolina is currently engaged in a great wave of consumer reform activities. The last session of our General Assembly saw to it that this State has adequate authority and law enforcement personnel to police this kind of activity. And through the newly-created Consumer Protection Division, the Attorney General's Office has become extremely active on behalf of the consuming public.

But government cannot do the job alone. We need the concerned activity of all the citizens. I solicit your aid in this respect because I firmly believe that the continued restriction of competition is sapping the very lifeblood of our economy. And unless modern American capitalism can meet the demands and the needs of the people, I fear that the prophecies of our more radical young people will

come true - free enterprise and competition
will be replaced by some other economic system,
a change many of us will dearly regret.

To prevent such a catastrophe from
occurring, to restore the operation of our economy
to the principles upon which it was founded, I
call the business community to quick and decisive
action, and I ask your continued help and support.

Knowing the membership of this group as
I do, I know that I will receive it.

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