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Anti-Chain Store Legislation

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ANTI-CHAIN STORE LEGISLATION

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The era of the industrial depression has produced more social legislation than any other period in the history of our country. Labor issues, farm problems, and questions of business regulation have been prominent in the legislative chambers of our government, federal, state and local. This period has also marked the growth and development of a powerful anti-chain store movement. While it is true that its legislative origin is to be found in some of our statute books prior to this period,[1] it was the depression which really caused it to generate strength and to attain its present prominence as a national issue.[2]

The purpose of this article is to trace the underlying causes which have initiated and fostered this movement, to study the various forms which the legislation has taken, to consider the purposes sought to be accomplished, the measure of success or failure which the legislation has achieved, its effect not only upon the chain store organizations, but also upon manufacturers, agriculturists, independent distributors and consumers, and in general the social desirability of such regulation.

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[1]As early as 1925, a city ordinance of Danville, Ky., which provided for a license tax on cash and carry stores (a common characteristic of chain stores), was being litigated in the courts, Danville v. Quaker Maid Co., 211 Ky. 677, 278 S. W. 98, 43 A. L. R. 590 (1925), and its unconstitutionality established. Two years later, Maryland prohibited by statute (Laws 1927, c. 554, §§ 1-3) the operation of more than 5 stores by anyone within a county, imposing a license fee on chains of over 5 stores. The same fate met this statute in a lower Maryland Court. Keystone Stores Corp. v. Huster, decided April 21, 1928, by a Circuit Court of Alleghany County, Equity 10922 (unreported). The same year the Public Laws of North Carolina (P. L. 1927, c. 80, § 162) provided for a license fee on chains of over five stores. The statute was held unconstitutional in The Great Atlantic and Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701 (1928). A similar Georgia statute (Laws 1929, p. 71, para. 109) received the same judicial treatment in F. W. Woolworth Co. v. Harrison, 172 Ga. 179, 156 S. E. 904 (1931). Subsequently modifications were made in the North Carolina statute after the initial attempt to tax the chains was declared invalid. N. C. Pub. Laws 1929, c. 345, § 162; N. C. CODE ANN. (Michie 1935) § 7880 (93). This statute differed from the previous one in that it defined a chain store as one in a group of two or more under one management. This was upheld in The Great Atlantic and Pacific Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930).

The anti-chain store movement really began, however, when the United States Supreme Court upheld the validity of the Indiana chain store act (Acts 1929, c. 207, p. 693; IND. STAT. ANN. (Burns 1933) §§ 42-301 to 42-313) which imposed a graduated license tax upon chain stores. State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 Sup. Ct. 540, 73 A. L. R. 1464 (1931). The effect that this case has had upon such legislation is evident from the fact that, of the 25 state acts now in existence, none antedate this case.

[2]Despite the unusually deflated business conditions in 1930, 1931 and 1932, the net earnings of the food chain stores maintained a comparatively constant level from 1928 to 1932. DEWING, FINANCIAL POLICY OF CORPORATIONS (3rd ed. 1934) 451. The net earnings of The Great Atlantic and Pacific Tea Co. and The First National Stores were greater in 1931 than they were in 1928 and 1929.

While the chain stores in operation today are of comparatively recent development,[3] the system of having a number of distributive units under a single management is a very ancient one.[4] Indeed, Judge Terrel said in *Louis K. Liggett Co. v. Amos*,[5] "We have conceived the chain store as a product of our industrial era, but by a well established chronology its roots sink deeper in our history, so deep in fact that it is coeval with the discovery of America, and it may be entirely possible that Columbus provisioned the Pinta, the Nina, and the Santa Maria from a chain store when he set out on his famous voyage in 1492."

From the last half of the nineteenth century, our chain stores have evolved through many stages into their present position of prominence. The last century marked the establishment of the multiple unit distribution system;[6] from the turn of the century until the close of the World War was a period of development;[7] the nineteen-twenties represent an era of rapid growth and expansion;[8] while in the nineteen-thirties is found a period of retrenchment and contraction.

It is not insignificant that the chain store system should start to develop at a time when feeling was running high against large combinations, and trust busting was the popular occupation of politicians. While the multiple unit organizations had not reached the stage where they merited the attention of these crusaders, the retail industry did not entirely escape from the bludgeonings of the "Big Stick" or lesser sticks. Then agitation was directed against department stores. The propaganda used against these institutions was strikingly similar to that now employed in the war against chain stores.[9]

[3]The Great Atlantic and Pacific Tea Company, the oldest of the modern chain stores, was established by George H. Hartford in Vesey St., New York City, in 1859. See Furnas, *Mr. George & Mr. John*, SATURDAY EVENING POST, Dec. 31, 1938, p. 8.

[4]In 200 B. C. On Lo Kass, a Chinese merchant, had such a system of stores throughout the Chinese Empire. In 1643 was founded a chain of apothecary stores in Japan, which even today is a prominent organization in the drug business. Germany contributed the Fugger Family, England its merchant adventurers, and early in the history of this continent is to be found the Hudson Bay Company's chain of trading posts in Western and Northern Canada. NICHOLS, CHAIN STORE MANUAL (1936). For a complete history of the origin and development of chain stores, see NYSTROM, ECONOMICS OF RETAILING (3rd ed. 1930) Vol. 1, 213 *et seq.*

[5]104 Fla. 609, 141 So. 153 (1932).

[6]During this period were founded the Jones Brothers Tea Company (now the Grand Union Tea Co.), F. W. Woolworth Co., S. S. Kresge Co., S. H. Kress Co. and the United Cigar Stores, among others. NYSTROM, *supra* note 4, 215.

[7]The development of the automobile concentrated trading in the more populous centers. Mass production and standardization of goods during this period fostered the development of mass distribution.

[8]During this era chain stores not only increased in numbers but the volume of business was quadrupled. Dr. Paul H. Nystrom of Columbia in *Chain Stores* (1930) shows that while in 1923 chain stores accounted for 8% of the retail business, in 1929 they did 18%. The United States Bureau of Census for 1930 reported approximately 46,000 chain stores in the grocery field doing 40% of the volume of the business.

[9]In a retail convention held during this period for the purpose of fostering legislation against department stores, it was said, "The growth of this movement [department stores] will close to thousands of young men who lack capital, the avenues of business

The result of the agitation was anti-department store legislation in Indiana,[10] Wisconsin,[11] and Missouri,[12] as well as a city ordinance in Chicago.[13] Difficulty was experienced in the courts, however, when it was attempted to enforce these laws,[14] and within a few years the agitation subsided and these organizations were recognized as legitimate and desirable merchandising outlets.

From 1905 to 1916, a wave of public sentiment, fostered ostensibly in the interest of small town independent merchants, arose against mail-order houses. This attack was spurred on by predictions that if such mail-order businesses were allowed to develop unmolested, the ultimate result would be that all retail business would be carried on through the Chicago Post Office. This agitation was never reflected in any federal legislation on the subject and the crusade soon exhausted itself.[15]

Those engaged in direct selling have always been the subject of regulatory legislation.[16] While the reasons given for this regulation are ostensibly

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which they should find open to them, local enterprises will be stifled, millions of dollars will be pulled into the already swollen coffers of Wall Street."

In commenting upon department store legislation at the 22nd annual meeting of the American Bar Association, President Charles F. Manderson made the following observation: "Did the lawmakers desire precedent for the attempted destruction of department stores they could have found absolute prohibition of the carrying on of more than one business under heavy penalties, among the discarded rubbish of the English law, in statutes of the olden times when the might of kings controlled the right of subjects. . . . It is unnecessary to state in this presence that long ages ago these impositions upon personal liberty were consigned, with many others of like import, to the dust-heap." (1899) 22 A. B. A. REP. 249.

[10]Acts 1897, c. 70, p. 113; IND. STAT. ANN. (Burns 1901) § 3451a.

[11]WIS. STAT. (1897) c. 373. Repealed by WIS. STAT. (1921) c. 243, § 311.

Both the Wisconsin and the Indiana acts were passed authorizing municipalities to license and regulate such department stores, but neither of these acts appear to have come up for a judicial interpretation and determination of their constitutionality.

[12]Mo. Acts of 1899, p. 72.

This statute provided that business in cities of over 50,000 inhabitants should be classified into 73 different classes, embodying about everything which is the subject of trade or barter. These classes were then divided arbitrarily into groups or grades. It was made unlawful to expose or offer for sale, in the same establishment, under a unit of management, goods at retail of more than one of the groups or grades without a license of from $300 to $500 per annum for each. For one establishment to deal in many classes would mean an amount to be paid for licenses that would be prohibitory.

[13]The city council of Chicago, without statutory authority tried to regulate department stores by arbitrarily prohibiting the sale of provisions or intoxicating liquors in any store where dry goods, jewelry, and drugs were sold.

[14]In Missouri, the statute was held void in State *ex rel.* Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265 (1900). The Chicago ordinance was likewise declared invalid in Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261 (1899), not only because of the absence of statutory authority for the ordinance, but also because of its violation of constitutional rights. These cases hold that regulation of business for the sole purpose of preventing many or several kinds of goods to be sold in the same establishment do not constitute a lawful exercise of the police power.

[15]BLOOMFIELD, SELECTED ARTICLES ON TRENDS IN RETAIL DISTRIBUTION (1930) 13; NYSTROM, *supra* note 4, 207-208.

[16]"From early times in England and America there have been statutes regulating the occupation of itinerant peddlers, and requiring them to obtain licenses to practice their

found in the nature of the occupation with its annoying methods of solicitation, its intrusive domiciliary visitations, the persistency of the salesmen in

trade." Mr. Justice Gray in Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 15 Sup. Ct. 367 (1895).

In England at the beginning of the eighteenth century by statutes (9 Wm. III, 1697, c. 27; and later by 29 Geo. III, 1789, c. 26) persons travelling from town to town with goods and merchandise were under the control of commissioners and were required to secure licenses. In 1810 (50 Geo. III, c. 41) the prior acts were repealed and a penalty was imposed upon peddlers going from town to town for the purpose of selling merchandise at retail. A conviction was upheld under this statute in Attorney-General v. Tongue, 12 Price 51, 147 Eng. Rep. 653 (1823). Baron Graham said that the intent of the statute "was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in town or other places, and paying rent and taxes there, for local privileges from the mischiefs of being undersold by itinerant persons to their injury; and on the other, to guard the public from the impositions practiced by such persons in the course of their dealings."

Statutes requiring peddlers to secure licenses were in existence in this country as early as 1713 in Massachusetts. 7 DANE AB. 72, STATS. 1713-14, c. 7 (1 PROV. LAWS 720). Today every state has some provisions for the licensing and/or taxing of those engaged in this line of business. This is either directly done by the states or more frequently delegated to the municipalities. Such statutes have been generally upheld where no discrimination is made against goods which come from outside the state and where no distinction is made between citizens and non-citizens engaged in the business. This power of regulation through the exercise of the police power includes also the power of prohibition under penalty.

In Commonwealth v. Gardner, 133 Pa. 284, 19 Atl. 550, 7 L. R. A. 666, 19 Am. St. Rep. 645 (1890), *writ of error dismissed,* 149 U. S. 774, 37 L. ed. 962, 13 Sup. Ct. 1047 (1893), an act of Pennsylvania (Act of April 17, 1846, P. L. 364, § 1) which forbade the sale of goods, wares and merchandise in the county of Schuykill by a barker or peddler was upheld as a legitimate exercise of the police power. Of similar import is the holding of the United States Supreme Court in Williams v. Arkansas, 217 U. S. 79, 45 L. ed. 673, 30 Sup. Ct. 493, 18 Ann. Cas. 865 (1910).

With respect to canvassers, who differ from peddlers in that they merely solicit orders which are subsequently filled by the manufacturer or distributor, and do not themselves carry about and dispose of goods, wares and merchandise, the cases are not in complete unanimity. In the case of Town of Green River v. Fuller Brush Co., 65 F. (2d) 112, 88 A. L. R. 177 (1933), it was held that an ordinance declaring the practice of going in and upon private residences by solicitors who had not been requested or invited by the owner or occupant, for the purpose of soliciting orders for the sale of goods, to be a nuisance punishable as a misdemeanor was proper and a valid exercise of the police power, it neither encroaching directly or indirectly upon the constitutional rights of due process or equal protection, nor constituting an undue interference with interstate commerce, as applied to a non-resident solicitor of goods to be shipped from another state. In Real Silk Hosiery Co. v. Richmond, 298 Fed. 126 (1924), on the other hand, a federal district court judge granted an injunction *pendente lite* against the enforcement against non-resident solicitors of an ordinance imposing penalties upon peddlers and solicitors who ring or knock at doors of dwelling places bearing a sign, "No Peddlers". The statute, according to the court, and particularly its application to the plaintiff's solicitors was an unwarranted interference with interstate commerce. The United States Supreme Court has held, Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 69 L. ed. 982, 45 Sup. Ct. 525 (1925), that a state statute which required persons going from place to place soliciting orders for future delivery, to secure a license and post a bond, violates the commerce clause of the Federal Constitution insofar as it is made to apply to agents soliciting orders in a state to be filled by C. O. D. shipments from outside the state.

On the subject of solicitors and canvassers, see Sawyer, *Federal Restraint on the States' Power to Regulate House to House Selling* (1934) 6 ROCKY MT. L. REV. 85; Hemphill, *The House to House Canvasser in Interstate Commerce* (1926) 60 AM. L. REV. 641. With respect to the regulation of peddlers, see Murphy, *Municipal Regulation of Peddlers* (1932) 4 DAK. L. REV. 121.

That legislation has not successfully wiped out peddling and canvassing is evident

pressing the merchandise on those who most often do not wish it, and the financial irresponsibility of transient solicitors, most regulations find their impulse in the demands of established shopkeepers for protection from such competition.

Similarly, chain store legislation has been to a large extent fostered by those who were responsible for the attack against these other distributive agencies. While practically everyone who has had any business interest in retail distribution could be found, at one time or another, marching under the banner of this movement,[17] most of the earlier adherents to such legislation were subsequently weaned away and there is left as the main proponents of measures of this nature unsuccessful independent retailers, legislators harassed by the problem of raising revenue in as painless a fashion as possible, and those who have shrewdly seen in the issue an opportunity for financial self-enhancement.[18]

The arguments advanced by those favoring chain store legislation are many and varied. A few of the objections are, if true, of such a nature that they can be eradicated by legislation only by a complete suppression of this form of distribution. Other objections are of such a character that they can be obviated without such a drastic measure.

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from the fact that those engaged in direct selling had $125,316,000 worth of net sales in 1935, as compared to $107,813,000 in 1933 and $93,961,000 in 1929. UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1937) p. 807, table no. 824.

[17]Silas H. Strawn, former president of the American Bar Association, in an address before the National Chain Store Association stated that the flow of anti-chain store legislation is the work of that ever busy trio, Tom, Dick, and Harry. "Tom is the fellow who has made a failure of his store, or perhaps is still hanging on in the hope that the father of his good wife, Mary, may soon die and leave some more money, which he will proceed to lose in trying to be a merchant. . . . Dick is the local statesman who, perhaps, owes Tom a bill and lends a sympathetic ear to Tom's harangue. . . . Harry is the local economist who has given special attention not to the payment of taxes upon his property, of which he has none, but to the increase of the tax burden upon others." Strawn, *Baiting the Chain Store* (1930) CHAIN STORE AGE 27. NYSTROM, *supra* note 4, 262, states that the enemies of the chain stores are not only the retail dealers but also small town newspapers patronized by the dealers, bankers whose retail accounts dwindle, local real estate men who do not participate in handling chain store properties, local insurance men, local painters, plumbers, fixture men, unions, farmers, manufacturers who have failed to work out satisfactory relations with the chains, wholesalers and travelling salesmen.

[18]ZIMMERMAN, THE CHALLENGE OF CHAIN STORE DISTRIBUTION (1931) 5, points out that in 1930 the ranks of those opposing chain stores included two radio propagandists, three pamphleteers, 12 anti-chain store radio stations, and 24 anti-chain store newspapers and publications.

Probably the most colorful character produced in this war was W. K. Henderson of Shreveport, La. The owner of a radio broadcasting station (KWKH), he discovered that vituperative attacks on the chain stores brought him national prominence. Capitalizing upon this he established the Merchants' Minute Men, an association to which any merchant could belong by simply sending $12. Later on, coffee was sold at a dollar a pound to anyone who wanted to contribute to the cause. Needless to say the cause proved to be a considerable source of revenue for Mr. Henderson. LEBHAR, THE CHAIN STORE—BOON OR BANE? (1932) 183. For examples of anti-chain store newspapers see ZIMMERMAN, *op. cit. supra*, p. 3

Some of the popular objections are that chain stores take money out of the community and so tend to bring about its impoverishment;[19] they drive out of business local retailers who are desirable citizens and whose interests should be protected; they destroy the flavor of local community life by their policies of standardization and tend to depersonalize the community; they concentrate ownership in the hands of a few absentees, as a consequence destroying the opportunities for young men; they are tending to produce a "nation of clerks", as a result of their policy of centralizing control at the home office;[20] and they disorganize distribution, forcing many readjustments, thereby raising the costs of marketing.

In answer to these contentions it is pointed out that although all retailers send most of their receipts out of the community to the manufacturers, all have equal local expenditures for rent, light, and advertising, payrolls and taxes; the allegedly small percentage of profit made by the chain stores which is sent out of town is more than compensated for by the savings which the local citizens make in dealing with these stores; those in all walks of life, desirable citizens or not, who can not survive competition of others must fall by the wayside; the community prefers the better service and lower prices to the picturesque small town store; a young man has more security and better opportunity for advancement in chain stores than in business for himself; statistics show that the chain stores have not eliminated the small dealers, and in its own ranks it offers unlimited opportunities for young men; the disorganization of distribution is due to the elimination of costly methods of handling merchandise and displacing them with more efficient ones, which is reflected in greater savings for consumers.[21]

It seems that the objections to the multiple store system, if they are well founded, can not be successfully cured by legislation because they arise from the very nature of the organization. The only remedy for them lies

[19]For an excellent elaboration of this argument, see an editorial in the Michigan Tradesman, April 13, 1929, *Modern Merchant and Grocery World.* LEBHAR, *supra* note 18; Palmer, *Economic and Social Aspects of Chain Stores* (July, 1929) Vol. II, no. 3, JOURN. OF BUS. OF THE UNIV. OF CHI.; Vol. 9, no. 3, BULL. OF THE UNIV. OF KY., March 1, 1930, p. 126.

[20]Mr. Justice Brandeis dissenting in Liggett Co. v. Lee, 288 U. S. 517, 568, 77 L. ed. 929, 955, 53 Sup. Ct. 481, 497, 85 A. L. R. 699, 725 (1933): "They [the citizens of the state of Florida] may have believed that the chain store, by furthering the concentration of wealth and power and by promoting absentee ownership, is thwarting American ideals; that it is converting independent tradesmen into clerks; that it is sapping the resources, the vigor and the hope of the smaller cities and towns." On the evils of large corporations generally see VEBLIN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE (1923) 86; BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) 46.

[21]FRYBERGER, THE ABOLITION OF POVERTY (1931); FLOWERS, AMERICA CHAINED (1931); CAMERON, OUR JUGGERNAUT (1932); Palmer, *supra* note 19; ZIMMERMAN, *supra* note 18; LEBHAR, *supra* note 18, at 59. For an excellent portrayal of the transition which has taken place in the small towns in the last twenty-five years see Sprague, *The Chain-Store Mind, Reflections of a Shopkeeper,* HARPER'S MAGAZINE, February, 1929.

in the complete elimination of the system. Whether they are serious enough to warrant such drastic action in view of the acknowledged advantages of this form of distribution is distinctly questionable.

Chain stores have also been charged with lowering the wage scale of labor throughout the country by paying their employees low wages. An impartial investigation discloses the fact that while the salaries paid by such organizations are not munificent they compare very favorably with salaries generally paid in the retail distribution field. The average wage of employees in independent stores in 1929 was $1,309; in the same year the wages paid by the chain stores averaged $1,345. During the depression, however, while the wages for independents dropped off 27.5% in 1933, the reduction in chain store salaries was 19.8% to $1,079.[22] At all events the solution of a wage problem would seem to lie in labor legislation rather than in legislation which burdens the industry or tends to extinguish it.

Another objection urged is that chain stores do not actually save money for the consumer; the popular impression that their prices are lower than those of the independent is the result of the use of "loss leaders", and not based upon fact; that the chain stores practice such unfair competition in order to destroy the independent merchant.

That the chain stores do actually sell at lower prices than independents and chains of co-operative independent merchants, now seems beyond dispute. Investigations on this subject not only by economists[23] and universities[24] but also by the Federal Trade Commission make this quite clear.[25] All

[22]BUSINESS WEEK, Feb. 9, 1935, p. 23.

[23]John T. Flynn, noted economist and author, in a study reported in NEW REPUBLIC, April 22, 1931, found that chains undersell independents on coffee, butter, bread, sugar and eggs from twelve to twenty-three percent.

In a survey made by Edward G. Ernst and Emil M. Hartl, economists with strong views against chain stores, it was found that in ten cities ranging in population from five to ninety thousand, prices on 124 standard items showed independents to be 7.3% higher, while in 400 different brands of canned goods chain store prices were 11% lower than independents' retail prices. THE NATION, Nov. 12, 1930.

[24]Professor Edgar Z. Palmer of the University of Kentucky conducted a survey in Lexington, Ky. He found that in dealing with chain stores the housewife saves slightly more than 14 cents on every dollar. Vol. 9, no. 3, BULL. OF THE UNIV. OF KY., March 1, 1930, p. 109.

Prof. Malcolm D. Taylor, Associate Professor of Marketing at the University of North Carolina conducted a survey of Durham, N. C. He found that the average prices of all chain stores were 13.75% lower than the average of all independent stores. HARV. BUS. REV., July 1930.

Dr. James T. Palmer, Professor of Marketing at the University of Chicago, conducted a survey in that city. In this investigation chain store prices were compared with cash and carry independents and service independents. It was found that on average prices for 75 items the chain stores undersold cash and carry independents by 9.32% and service independents by 11.39%. NEW REPUBLIC, April 29, 1931, p. 270.

An investigation made in Shreveport, La. and Newark, N. J., showed that chains saved customers from ten to fifteen cents on the dollar. A study made in Canastota, Cazenovia, Hamilton, Earlville and Sherbourne, showed that chains were 10% below voluntary chains, which were underselling the regular independents by 1.5%. NICHOLS, *supra* note 4.

[25]The Federal Trade Commission made a study of retail selling prices of chain

studies of prices have proved chain store prices to be much lower, usually about ten per cent.

It is often vigorously contended, and not unreasonably so, that the chain stores have exerted undue influence in their buying, frequently compelling manufacturers to sell at less than cost;[26] that they tend toward monopoly, and if allowed to develop, will control prices;[27] and tbat they do not bear their full share of the local tax burden.[28]

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stores and other distributors in Washington, Cincinnati, Memphis and Detroit. In the Washington survey, statistics were secured from 570 independent and cooperative grocery stores. Four hundred forty-eight items were listed for pricing. The chain stores involved were Sanitary Grocery Co., the Great Atlantic and Pacific Tea Co., and the American Stores. It was found that the independents were 6.4% higher than the chain stores. SEN. Doc. No. 62, 73d Cong., 1st Sess. (1933). In Memphis by a comparison of prices in The Kroger Grocery and Baking Co. and the Clarence Saunders Stores, Inc., and the independents, it was found that the prices for the independent grocery stores were 8.28% higher than for the chain stores. SEN. Doc. No. 69, 73d Cong., 1st Sess. (1933). In Detroit the chains studied were Kroger, A. and P., C. F. Smith Co. and National Groceterias. The prices for the independent grocery stores were found to be 10.47% higher than for the chain stores. SEN. Doc. No. 81, 73d Cong., 1st Sess. (1933). In Cincinnati the chain store prices were taken from Kroger, A. and P., Burke Grocery Co. and the Voss Grocery Co. It was found that the prices of the independent grocery stores were 8.84% higher than those of the larger chains and 9.85% higher than those of the smaller chains. SEN. Doc. No. 88, 73d Con., 1st Sess. (1933).

[26]Federal Trade Commission, *Final Report on the Chain Store Investigation*, SEN. Doc. No. 4, 74th Cong., 1st Sess.(1935) 24; H. R. REP. No. 2287, part 1, 74th Cong., 2d Sess. (1936) 3-4 contains evidence of price discrimination in favor of chain stores. See comment, *The Robinson-Patman Act in Action* (1937) 46 YALE L. J. 447.

In the hearing against the Great Atlantic and Pacific Tea Company before the Federal Trade Commission in 1937, it was brought out that the chain bought Fleishmann's yeast at 18 cents per pound whereas small bakers paid as much as 25 cents. When Del Monte refused to give the discount demanded, the A. and P. clerks were ordered to substitute other brands for Del Monte, buying was cut to a hand-to-mouth basis to annoy the California Packing Co. (Del Monte) as much as possible. TIME, April 12, 1937, p. 86. See ZIMMERMAN, *supra* note 18, 168.

[27]The United States Bureau of Census in cooperation with the Chamber of Commerce of the United States made a study of 11 cities in 1927. It was found that the chain stores report sales of 28% of the total retail trade. This ranged from 6.3% in Fargo, N. D., to 37.1% in Chicago. NYSTROM, *supra* note 4, 366. In 1935, however, the Department of Commerce Census of Business showed that the chain stores accounted for only 22% of the total retail volume in the U. S. and owned only about 8% of the stores. LITERARY DIGEST, May 29, 1937.

A. C. Hoffman of the Bureau of Agricultural Economics and L. A. Bevan of the N. J. College ot Agriculture made a survey of chain store distribution of fruits and vegetables in the northeastern states under the auspices of the U. S. Dep't of Agriculture in 1937. They state: "Insofar as the facts developed by this study warrant a conclusion, there is no evidence that the chain systems are in a position to exercise any significant degree of monopolistic control over the marketing of fruits and vegetables at the present time. The chains taken together are not retailing more than 30% to 35% of the total supply consumed in any of the cities studied, and no single chain has more than 10% to 12% of this total supply. The field of retailing is among the most competitive to be found anywhere in the economic system, despite the tremendous growth of the chains in recent years . . . . competition in grocery retailing is not less active than it was ten or fifteen years ago."

On the question of the possibility of the chain store growing to a monopoly, see ZIMMERMAN, *supra* note 18, 272, where it is contended that chains will never dominate distribution, for the reason that the personnel problem places definite limitations on chain store growth.

[28]The chains are said to pay less personal property tax than their independent com-

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Let us now pass from the various objections which have been leveled against this form of enterprise, to study what legislation has been enacted and the effect which it has had in the removing of these objections. Let us consider first the state license taxes on chain stores, generally referred to as state anti-chain store taxes.

State chain store taxes are of two main types.[29] The most prevalent type[30] is a license tax on each store of the chain located in the state which is graduated according to the number of stores operated by the chain within the state.[31] The second type of tax is in the form of a graduated fee based on gross receipts.

Prior to the decision of the United States Supreme Court in *State Board of Tax Commissioners of Indiana v. Jackson*,[32] some question existed as to the validity of license taxes which made a distinction between chain dealers and independent retailers.[33] This case held there was a sufficient difference

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petitors, owing largely to faster turnover, to the exclusion of wholesaling and transportation costs when valuing goods, and to the inaccessibility of books to local assessors. FACING THE TAX PROBLEM (Twentieth Century Fund, Inc., 1937) 503. Hardy, *Legal and Economic Aspects of Chain Store Taxation in Wisconsin* (1934) 9 WIS. L. REV. 382, 12 TAX MAG. 605; Krueger, *The Taxation of Chain Stores, With Special Reference to Wisconsin* (1933) 11 TAX MAG. 412.

[29]There are a few miscellaneous types of taxes that can not be classified under these two forms. Delaware (Laws 1917, c. 13; DEL. REV. CODE (1935) Art. 14, c. 6) has a tax of $10 plus 10 cents per $100 of aggregate cost value of goods received in excess of $5,000. Tennessee, as well as having a "Merchants' License Tax", has a chain store tax (TENN. CODE ANN. (Williams Supp. 1938) § 1248.121) which, after exempting the first store, assesses the second and succeeding stores $3 per 100 square feet of floor space in each store. Virginia has a graduated tax (VA. TAX CODE (Michie 1936) § 188) on wholesalers' purchases of $50 plus 13 cents per $100 on excess over $10,000.

[30]Twenty-one states now have this type of chain store tax.

[31]The Louisiana tax, unlike any of the others, graduates the fee on the stores within the state in proportion to the total number of the stores in the chain whether located within or without the state. (LA. GEN. STAT. ANN. (Dart 1932) §§ 8664-8674).

Indiana has a typical statute (Laws of 1929, c. 207; IND. STAT. ANN. (Burns 1933) Tit. 42, c. 3) with a tax rate of $7 for the first store; 2nd to the 5th, $10 each; 6th to 10th, $20 each; 11th to the 20th, $30 each; 21st and succeeding, $150 each, with a filing fee of 50 cents for each store payable annually.

[32]283 U. S. 527, 75 L. ed. 1248, 51 Sup. Ct. 540, 73 A. L. R. 1464 (1931).

[33]The first case involving this question was Danville v. Quaker Maid Co., 211 Ky. 677, 278 S. W. 98, 43 A. L. R. 590 (1925), where a city ordinance provided for a license and occupational tax with certain classifications being made and different rates imposed. The classes were: (1) regular service grocery stores not employing more than two employees, which were subject to a tax of $12 per year and $5 for each additional employee; (2) cash and carry grocery stores, not self-service and employing not more than two persons, which were subjected to a license tax of $50 per year and $25 for each additional employee; and (3) self-service, cash and carry grocery stores not employing more than two persons, on which grocery stores the license fee was $40 per year and $30 for each additional employee. Appellee was a cash and carry grocery store. It was held that the slight difference in the detail of conducting the business afforded no reasonable ground for classifying appellee on a basis of taxation different from that of the ordinary grocery store, and that consequently the ordinance was discriminatory and not uniform. A similar statute in Georgia subsequently met the same

between these types of stores to support the distinction in the taxation and that consequently it could not be branded as arbitrary and unreasonable,[34] although the minority opinion declared the difference to be merely one of degree and not of kind. Since the decision has been subsequently followed, the validity of such taxes now is unquestioned.

In the same year that the *Jackson* case was decided, Florida passed a law[35] enacting a graduated license tax on chain stores. One set of rates was fixed for chains operating solely in one county and a separate and higher rate was fixed for those which were operated in more than one county. The legality of this statute was tested in the United States Supreme Court

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fate. Douglas v. Southern Grocery Co., 180 Ga. 519, 179 S. E. 768, 99 A. L. R. 700 (1935).

In the next case, The Great Atlantic and Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701 (1928), a North Carolina statute (Pub. Laws 1927, c. 80, § 162) provided that the management of six or more stores should pay a license tax of $50 in the state for the privilege of operating and maintaining the same. The court held the statute invalid on the ground that there was no substantial difference between chain and other types of stores. In a concurring opinion it was stated that the tax is laid on chain stores only insofar as there are six or more stores under the same management or ownership. Five could be maintained free of tax but if the number be increased to six, not only would the sixth be taxed but the first five also, and as a consequence the tax was retroactive. The case was noted in (1928) 4 NOTRE DAME LAWY. 207; (1929) 77 U. OF PA. L. REV. 426; (1929) 3 TEMPLE L. REV. 322; (1929) 7 TENN. L. REV. 316.

In 1929, however, the statute was changed (N. C. Pub. Laws 1929, c. 345, § 162) so that every business operating or maintaining two or more stores where merchandise was sold at retail was deemed to be a chain store and a $50 tax was levied on each such store in excess of one. This act was upheld in The Great Atlantic and Pacific Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838 (1930), the court declaring that there was a real and substantial difference between merchants who exercise the privilege of carrying on their business by means of two or more stores and those who maintain and operate only one store. The previous case was distinguished on the grounds stated in the concurring opinion. The case was noted in (1930) 34 LAW NOTES 173; (1930) 9 N. C. L. REV. 64; (1931) 15 MINN. L. REV. 341; (1931) 37 W. VA. L. Q. 220; (1931) 5 TEMPLE L. Q. 461; (1931) 26 ILL. L. REV. 240.

[34]Mr. Justice Roberts said: ". . . There are many points of difference between chain stores and independently owned units. These consist in quantity buying, which involves the application of the mass process to distribution, comparable to the mass method used in production; buying for cash and obtaining the advantage of a cash discount; skill in buying, so as not to overbuy, and at the same time keep the stores stocked with products suitable in size, style and quality for the neighborhood customers who patronize them; warehousing of goods and distributing from a single warehouse to numerous stores; abundant supply of capital, whereby advantages may be taken of opportunities for establishment of new units; a greater turnover to ascertain relative profits on varying items; unified, and therefore cheaper and better advertising for the entire chain in a given locality; standard terms of display for the promotion of sales; superior management and method; concentration of management in the special lines of goods handled by the chain; special accounting methods; standardization of store management, sales policies and goods sold."

The case was widely noted, (1931) 9 N. Y. U. L. Q. REV. 94; (1931) 18 VA. L. REV. 72; (1931) 17 IOWA L. REV. 72; (1931) 11 ORE. L. REV. 99; (1931) 10 TEX. L. REV. 101; (1931) 7 IND. L. J. 179; (1931) 2 IDAHO L. J. 59; (1932) 12 B. U. L. REV. 310; (1932) 27 ILL. L. REV. 89. The case was subsequently followed in a *per curiam* decision in The Great Atlantic and Pacific Tea Co. v. Maxwell, 284 U. S. 575, 76 L. ed. 500, 52 Sup. Ct. 26 (1931); and also in a memorandum opinion in The Great Atlantic and Pacific Tea Co. v. Morrissett, 284 U. S. 584, 76 L. ed. 506, 52 Sup. Ct. 127 (1931).

[35]Fla. Laws 1931, c. 15, 624.

in *Louis K. Liggett Co. v. Lee*[36] and it was declared to be unconstitutional. In the majority opinion, Mr. Justice Roberts declared that there was no basis for the classification between a chain with all stores in one county and a chain where only one of its stores was in another county. "The classification is solely of different chains, and the difference between them consists neither in number, size, surrounding population, nor in any factor having a conceivable relation to the privilege enjoyed."[37]

In the following year, *Fox v. Standard Oil of N. J.*[38] raised the question of the validity of a tax where the rate was so high that it equalled the net earnings of the taxpayer. "The state may make the tax so heavy as to discourage multiplication of the units to such an extent believed to be inordinate and by the incidence of the burden develop other forms of industry. If only one form of chain chooses so to multiply its units, after having arrived at the topmost levels, as to make the burden heavy, it owes its position on the scale and the aggravation of the tax to the exigencies of the business and not to those of law."

The most recent case on this type of legislation involved the validity of a Louisiana tax statute,[39] which provided for a graduated tax on chain stores measured by the total number of stores in the chain whether situated within or without the state. In *Great Atlantic and Pacific Tea Co. v. Grosjean*,[40] such a statute was declare valid. The classification was held based not upon the location of the stores (as in the *Liggett* case) within or without the state, but upon the magnitude of the business, the advantages accompanying it and its economic results.[41]

Many municipalities, as well as states, have imposed graduated license taxes upon chain stores.[42] While some lower courts have declared such

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[36]288 U. S. 517, 77 L. ed. 929, 53 Sup. Ct. 481, 85 A. L. R. 699 (1933).

[37]See (1933) 33 COL. L. REV. 754; (1933) 17 MINN. L. REV. 676; (1933) 81 U. OF PA. L. REV. 722; (1933) 13 B. U. L. REV. 558; (1933) 28 ILL. LAW REV. 288; (1933) 17 MARQ. L. REV. 296; (1933) 10 N. Y. U. L. Q. REV. 551.

Mr. Justice Brandeis dissented in part on the ground that since all the taxpayers in this case were corporations foreign to the state of Florida, they could be subjected to a statute of this kind. "Since a State may fix the price for the privilege of doing intrastate commerce in corporate form, the State may make the price higher for the privilege of locating stores in two counties than in one."

Mr. Justice Cardozo likewise wrote a dissenting opinion. "Students of the chains have accepted the classification of the Census Bureau which divides them [chain stores] into three groups, local, sectional and national. . . . There is a definite line of cleavage between chains that serve customers within a single territorial unit and those framed for larger ends. . . . Where does the local have an end and the non-local a beginning? The legislature had to draw the line somewhere and it drew it with the county. Within the range of reasonable discretion its judgment must prevail."

[38]294 U. S. 87, 79 L. ed. 780, 55 Sup. Ct. 333 (1935), noted in (1935) 2 U. OF CHI. L. REV. 480; (1935) 10 IND. L. J. 462; (1935) 13 TEX. L. REV. 469; (1936) 9 So. CAL. L. REV. 166.

[39]LA. GEN. STAT. ANN. (Dart 1932) §§ 8664-8674.

[40]301 U. S. 412, 81 L. ed. 1193, 57 Sup. Ct. 772, 112 A. L. R. 293 (1937).

[41](1937) 21 MINN. L. REV. 847; (1937) 37 COL. L. REV. 1231; (1937) 26 GEO. L. J. 163; (1937) 23 WASH. U. L. Q. 136.

[42]Hamtramck, Michigan, imposed a license tax upon retail establishments which was

ordinances unconstitutional because confiscatory,[43] the supreme courts of Oregon, Virginia and South Carolina have upheld such regulation on the basis on which the state statutes have been sustained.[44]

The second type of chain store tax which the states have imposed, a tax on gross receipts, has been nullified by court decisions. A Kentucky statute of this nature was held invalid in *Stewart Dry Goods Co. v. Lewis*,[45] because the classification of vendors solely by reference to the volume of their transactions denied the equal protection of the laws. The tax on a sale was held to be a tax on the goods itself, which is required to be uniform by the Federal Constitution; here the rate was not uniform but was graduated progressively on the basis of sales volume, and not being a net income tax, it was bad.[46] In *Valentine v. The Great Atlantic and Pacific Tea Co.*,[47] the Iowa statute[48] provided for both a gross sales tax and a graduated license tax. The United States Supreme Court upheld the license tax and declared the gross sales tax unconstitutional on the basis of the *Stewart* case. These decisions have been followed in all the courts where the issue has been presented.[49] As a result this type of statute has been discarded.

Another discrimination against chain stores is to be found in a few states,

graduated to $1,000. Similar ordinances exist in Portland, Ore., St. Louis, Knoxville, Durham and Charlotte, N. C., Spartanburg, S. C., and Maplewood, Mo. BUS. WEEK, Jan. 11, 1933, p. 23; June 22, 1932, p. 9.

Apparently Augusta and Athens, Ga., are planning a municipal chain store tax similar in principle to that used in Louisiana. N. Y. Times, Nov. 27, 1938, § 3, p. 9.

[43]The Maplewood ordinance was held unconstitutional by the circuit court of the county of St. Louis, in Kroger Grocery and Baking Co. v. City of Maplewood (1933) Case No. 98057 (unreported) and the Hamtramck tax was declared unconstitutional as being confiscatory and beyond the power of the municipality in Kroger Grocery and Baking Co. v. City of Hamtramck (1932) Circuit Court, Wayne County, Mich., No. 200,825 (unreported). Judge Richter states, "There can be little doubt of the unconstitutionality of the ordinance itself. Whatever are the rights of the city to regulate food stores, they cannot, under the guise of regulation or taxation, enact an ordinance calling for the payment of different amounts for the same privilege, that of operating one store, just because one, two, three or four stores may be operated in addition to that one. This is an arbitrary, unjust, and illegal classification."

[44]Safeway Stores Inc. v. City of Portland, 149 Ore. 581, 42 P. (2d) 162 (1935); Fredericksburg v. Sanitary Grocery Co., 168 Va. 57, 190 S. E. 318 (1937); The Great Atlantic and Pacific Tea Co. v. City of Spartanburg, 170 S. C. 262, 170 S. E. 273 (1933). See *Constitutionality of State Chain Store Tax Based on Total Number of Stores* (1935) 44 YALE L. J. 619.

[45]294 U. S. 550, 79 L. ed. 1054, 55 Sup. Ct. 525 (1935).

[46]See the comment on this case in (1936) 36 COL. L. REV. 1366; also notes in (1935) 35 COL. L. REV. 606; (1935) 30 ILL. L. REV. 110; (1935) 83 U. OF PA. L. REV. 1024; (1935) 48 HARV. L. REV. 1434; (1935) 19 MARQ. L. REV. 258; (1935) 41 W. VA. L. Q. 422; (1935) 13 TEX. L. REV. 469; (1935) 33 MICH. L. REV. 1278; (1935) 21 LA. L. REV. 93; (1935) 20 MINN. L. REV. 89; (1936) 4 DUKE BAR ASSO. J. 42; (1936) 9 SO. CAL. L. REV. 167.

[47]299 U. S. 32, 81 L. ed. 22, 57 Sup. Ct. 56 (1936).

[48]IOWA CODE (1935) c. 329, G. 1.

[49]Similar Acts were declared invalid in Wisconsin, Schuster v. Henry, 218 Wisc. 506, 261 N. W. 20 (1935), and in Vermont, The Great Atlantic and Pacific Tea Co. v. Harvey, 107 Vt. 215, 177 Atl. 423 (1935).

in the form of a tax on the distribution of goods from chain store warehouses at a rate corresponding to that imposed upon wholesalers. Such statutes have been upheld in both Tennessee and Virginia.[50]

It appears that the purposes to be accomplished by such legislation are: first, the raising of revenue; second, the complete elimination of chain stores in the state; third, an equalization of the tax burden on chain and independent stores; fourth, the equalization of the competitive advantages which the chains have by virtue of their size.[51]

The need for revenue seems to be the dominant factor in the spread of such taxes. The movement was begun and developed during the depression years. The tax is collected comparatively easily, and there is no doubt but that the chain stores are a class which can readily pay taxes. It is to be noted that these tax measures are to be found mostly in the south and mid-west where personal income taxes and property taxes as sources of

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[50]TENN. CODE ANN. (Williams 1934) § 1248.66. The Virginia statute (VA. TAX CODE (Michie, 1930) § 188) provides as follows: "For every distributing house or place in this state (other than the house or place of manufacture) operated by any person, firm or corporation engaged in the business of a merchant in this state, for the purpose of distributing goods, wares and merchandise among his or its retail stores, a separate merchant's license shall be required and the goods, wares and merchandise distributed through such distributing house or place shall be regarded as purchases for the purpose of measuring the license tax." This act was upheld in Comm. v. Bisbee Grocery Co., 135 Va. 935, 151 S. E. 293 (1930); and again in The Great Atlantic and Pacific Tea Co. v. Morrissett, 58 F. (2d) 991 (1930), *aff'd*, 284 U. S. 584. See *Constitutionality of State Chain Store Tax Based on Total Number of Stores* (1935) 44 YALE L. J. 619.

On the general subject of chain store legislation in the various states, see Becker and Hess, *The Chain Store License Tax and the 14th Amendment* (1929) 7 No. CAR. L. REV. 115; Simms, *Chain Stores and the Courts* (1931) 17 VA. L. REV. 313; Hoge, *Power to Tax Chain Stores* (1931) 37 W. VA. L. Q. 220; Shapiro, *A Study in Chaining the Chain Stores* (1933) 7 ST. JOHN'S L. REV. 350; Krueger, *The Taxation of Chain Stores* (1933) 11 TAX MAG. 412; *Recent Chain Store Taxes Based on Volume of Business* (1935) 45 YALE L. J. 314; (1931) 80 U. OF PA. L. REV. 289; (1936) 36 COL. L. REV. 1366.

[51]Of all the chain store statutes, the Florida Act appears to be the sole one containing a declaration of policy. It is as follows (Acts 1935, 16,848, § 1): "It is hereby determined and declared that extensive revenues are required to promote education and to preserve the common school system of the State of Florida; and that in the raising of such revenue it is expedient to levy a privilege tax upon the occupation of engaging in and continuing in the business of operating retail stores in the State of Florida. . . . . ; and that due to the greater specialization in management and methods, the advantages of mass buying, of intensive selling, of more efficient utilization of capital assets, of the specialized character of their merchandising and the more efficient coverage and results obtained from their advertising, stores operated in multiple units enjoy an advantage over individually owned and operated single stores to the extent that it is fit and proper that such stores should be separately classified for the purpose of such privilege taxation; and further, that the increasing growth of chains and greater multiplication of units of stores tend to foster monopoly and to create unemployment by driving out of business their competitors who do not enjoy such advantages and that therefore the multiplication and extension of such units of chain stores should be discouraged as a matter of public policy."

Many of the other statutes provide that the revenue raised in this way shall be disbursed for educational or charitable purposes. Still others merely place it in the general treasury.

revenue were most unproductive during deflated conditions. As a consequence this tax proved to be distinctly popular.[52]

In some states, however, the chief objective seemed to be the driving out of such multiple unit distributive associations rather than the raising of revenue. This is the only conclusion that can be drawn from the tax rate fixed by the Texas act.[53] This act provides for a $750 tax for each store of the chain over fifty. While rates under the Pennsylvania act[54] are not quite as steep as the Texas one, it is more deadly because the stores located in the state are more numerous. The Louisiana tax[55] is fixed at $550 for each store in the state if the chain of which it is a member is composed of more than five hundred stores, wherever located. There is some indication that these statutes have been successful in reducing the number of units in these states.[56]

Because of their mass purchases, their mass distribution system and their mass advertising, it is indisputable that the chain stores have an advantage over the independent dealer who is not in a position to secure similar benefits.[57] Since these benefits increase with size, the tax which seeks to minimize the advantage of chain stores over independents should be measured by the

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[52]The tax yield for 1937 on chain stores amounted to $5,045,943, a relatively unimportant figure, being even less than the 8 millions collected from admission taxes. Florida collected the largest amount on this tax, $2,127,169, while Louisiana received only $20,084 from this source. The Texas statute is presently in litigation and the enforcement of it has been enjoined and consequently no collections have been made. No figures are yet available on the revenue collected by Pennsylvania. Vol. 5 TAX POLICY, No. 1, Nov.-Dec. 1937, pp. 3 and 7.

The revenue raised by this tax is most insignificant when compared with the receipts from other tax sources. Thus in Alabama the chain store tax produced $118,695 while a sales tax in operation between Jan. 1, and Sept. 30, 1937 yielded $3,104,840. Indiana raised 20 million by sales taxes and a half million by chain store taxes. Louisiana with its exceptionally high chain store tax secured more than ten times as much revenue through soft drink taxes as from this source. *Id.* 10.

For a somewhat earlier view of the chain store tax as a revenue raising measure, see Farber, *State Taxation of Chain Stores* (1934) 12 TAX MAG. 10, where the writer concludes that up until that time it had been distinctly disappointing.

[53]Tex. Laws 1935, 1st Spec. Sess., c. 400.

[54]PA. STAT. ANN. (Purdon Supp. 1938) tit. 2, §§ 3420-1 to 3420-11.

[55]LA. GEN. STAT. ANN. (Dart 1932) §§ 8664-8674.

[56]The Great Atlantic and Pacific Tea Co.'s annual tax bill in Pennsylvania under the tax was estimated at $1,050,000 per year. After the bill was passed the A. and P. closed 80 stores in and around Philadelphia; P. H. Butler Co. closed 50 of its 200 units, and the American Stores closed about 70 stores with a definite promise not to reopen, thus cutting its tax bill of more than $850,000 by $35,000. TIME, June 14, 1937, p. 68.

In Louisiana the A. and P.'s annual tax bill on its original 3,000 units was $1,650,000. LITERARY DIGEST, June 12, 1937, p. 36. The effect of this tax is evident from the fact that only $200,000 was the revenue produced by it in the last taxable year.

When Iowa enacted its chain store law in 1935 (IOWA CODE (1935) c. 329, G. 1), the Standard Oil Co. of Indiana decided that its 850 service stations in the state could not stand the increased tax burden, so the firm rented its retail outlets to individuals and turned all leased stations back to their owners.

[57]See opinion of Mr. Justice Roberts in State Board of Tax Commissioners of Indiana v. Jackson, *supra* notes 32 and 34, for a list of the advantages of chain stores over independent dealers.

size of the entire organization, and not merely by the number of stores operating in the state.[58] The only state which has a tax act which takes this factor into consideration is Louisiana. All the others disregard it so that a national chain with national purchasing power and national advertising, and a local chain with a lesser purchasing and advertising power, both having the same number of outlets in the state must pay the same tax.

Although it is conceded that the chain stores pay a minimum of personal property taxes because of their comparatively small inventories and frequent turnover of stock; that their distribution costs are generally charged to overhead rather than added to the purchase price of goods coming into the stores, lowering the recorded costs of inventory; and that it is difficult to determine what these costs are inasmuch as the books are usually kept out of the state, still Wisconsin is the only state which has attempted to remedy this situation through its chain store tax.[59] It was believed that this condition, which actually amounted to a tax subsidy to chain stores, could be cured through a gross receipts tax. The adoption of this method, which subsequently prove unconstitutional, did not remedy the situation. Other attempts at the solution of the problem were abandoned. Rather than experiment with new legislation, the method of chain store taxation which had met with the approval of the United States Supreme Court was adopted.

Such legislation tends to prevent the chain stores from achieving the monopoly which it is alleged would be theirs if allowed to continue unimpeded. The chain stores now have to bear a larger share of the tax burden than formerly, though the new levy bears no justifiable relationship to the previous personal property tax deficiency. It is difficult to see how any of the objections which were made to the chain stores have been met. That the benefits of this legislation are worth the price which undoubtedly must be paid in a higher cost of living is distinctly questionable.[60]

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[58]See dissenting opinion of Mr. Justice Cardozo in Louis K. Liggett Co. v. Lee, *supra* note 36. Mr. Justice Roberts in The Great Atlantic and Pacific Tea Co. v. Grosjean, *supra* note 40: "The facts found respecting the advantages of a larger chain as compared with a smaller justify as not unreasonable or arbitrary the imposition of a higher license tax on the units of the former which are maintained within the state. Even one unit of such a national chain located in Louisiana enjoys competitive advantages over the stores of the local proprietor consequent to its relation to the far-flung activities and facilities of the chain." The proposed Schwartzwald Bill in N. Y. is of this nature.

[59]See Hardy, *supra* note 28; Krueger, *supra* note 28.

[60]Chain stores did not expand to such great lengths in Europe as they did in this country. In Germany they figure in about 4% of the total value of the national retail business. Mele and Luporini, COMMERZIO, (No. 9, Sept. 1936). In this article the Italian situation is analyzed, with the finding that the uniform price system offers indisputable advantages to the consumer. In France anti-chain store legislation has been adopted (Law of March 1936) and restrictions have been made in Belgium. TRADE REG. REV. (Dec. 1936) p. 15.

II

The price discrimination laws and the sales below cost acts are other types of state legislation directly bearing upon the welfare of chain stores.

Price discrimination statutes are found in twelve states.[61] These acts make it unlawful to sell a commodity at a lower price in one place in a state than in any other place after due allowances have been made for variances in costs in the different localities for transportation of the merchandise, where the tendency of such a sale at a lowered price is to destroy competition.[62] While lowering a price to meet competitive rates in good faith is permitted under some of these statutes,[63] the regulation injures the chain store organizations because they can not reduce the price of a commodity in a metropolitan area, or portion thereof, to stimulate business without also reducing the price all over the state. It is difficult to see how anyone can hope to increase his own business in the retail field without intending to kill some of his competitors.

In the case of *Great Atlantic and Pacific Tea Co. v. Ervin,*[63a] the United State District Court for Minnesota declared unconstitutional that part of the Minnesota Unfair Trade Practices Act[63b] which prohibited sales in any

[61]Ariz., Ark., Calif., Colo., Iowa, Minn., Neb., and Wyo. have basically similar statutes on price discrimination. Those in Idaho, Oregon and Utah are modelled on the Robinson-Patman Act. It is interesting from the jurisprudential point of view to observe the geographical location of these states. Of this group, Colo., Iowa, Minn., and Mont. have chain store taxes; California had such an act but it was repealed by a referendum.

[62]The Arkansas act dating back to 1921 provides (ARK. CODE (1921) c. 177): "Any person, firm, company, association or corporation, foreign or domestic, doing business in the State of Arkansas, and engaged in buying any product or commodity in general use for manufacturing or other purposes; or engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of this State, in buying at a higher price or by selling such commodity at a lower rate in one section, community or city, than is paid or charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of buying or of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful. The buying at a higher price or selling at a lower price in one locality, community, or city than the party or parties pay for or sell a like commodity or article in another locality, city or community shall be prima facie evidence of intention upon the part of the person, company or corporation to unfairly discriminate between different sections."

It is to be noted that no provision is made for a possible higher operating cost in one section of the state than in another. It would appear that the chains can not price their articles with reference to the expenses of conducting business in a particular section, but must average them over the state. Through the use of supermarkets, operating expenses might be cut considerably in a given locality, but these savings can not be passed along to the consumer.

[63]No express provision is to be found in the acts of Ariz., Ark., Neb., and Wyo. permitting the lowering of a price to meet competition..

[63a]23 F. Supp. 70 (D. Minn. 1938).

[63b]Laws 1937, c. 116, part II, § 2.

part of the state at price lower than those exacted by the same person in other parts of the state, where the effect is to lessen, injure, destroy or prevent competition. The court held that the legislature's attempt to declare illegal honest price variations based solely on differences in sales costs at different stores was arbitrary and an unfair discrimination between merchants owning one store in one locality and those owning more than one store and doing business in more than one locality.

The sales below cost acts are also in a certain measure anti-chain store laws since they are directed at the elimination of "loss leaders", a sales policy which has been widely attributed to chain stores.[64] These acts, which are to be found in fifteen states,[65] range from those which merely prohibit the sale below cost[66] to the one in Minnesota[67] which provides that "any sale made by the retail vendor at less than ten per cent above the manufacturer's published list price . . . or in the absence of such a list price, at not less than 15% above the current delivered invoice or replacement cost, shall be *prima facie* evidence of a violation of this act". This legislation is particularly burdensome, not only because it has been the practice of such organizations to sell certain quick-moving non-perishable products at a price close to the market price, but also because the statute provides that the markup must be added to the current replacement cost or "list price" of the merchandise. Since this price is subject to any number of discounts the chain is unable to pass these discounts on to the consumer.[68]

III

The struggle over the right of chain stores to dispense food has given rise to another type of state law which is directed largely against the five and ten cent stores and drug outlets. The movement is sponsored by restauranteurs and labor union groups.[69] While numerous bills have

[64]LEBHAR, THE CHAIN STORE—BOON OR BANE? (1931) 178; NYSTROM, ECONOMICS OF RETAILING (1930) Vol. 1, p. 258; Grant, *Loss Leader Selling in Chain Stores* (1929) PRINTERS' INK, Sept. 1929.

[65]Of the states with price discrimination laws only Idaho and Iowa are without sales below cost acts. Other states having such acts include Ky., Md., Pa., S. C., and Tenn. All these states have chain store taxes.

[66]The term "cost" as used in most acts is defined as applied to production, as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution, it means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

[67]Minn. Laws 1937, c. 116. Nebraska, Oregon, and Tennessee have 6% provisions.

[68]*A. and P. Goes to the Wars,* FORTUNE, April, 1938, p. 63. On the subject of unfair practice acts see McAllister, *Price Control in the United States—a Survey* (1937) 4 LAW AND CONTEMP. PROB. 273, 297; Gerther, *Solidarity in the Distribution Trades in Relation to the Control of Price Competition* (1937) 4 LAW AND CONTEMP. PROB. 375, 386; Gerther, *Experience in California with Fair Trade Legislation Restricting Price Cutting* (1936) 24 CALIF. L. REV. 640; Copp, *The Unfair Practices Act* (1936) 10 So. CALIF. L. REV. 18.

[69]Hanson, *Restaurants* (1934) 13 ENCY. SOC. SCIENCES; 336, 337, gives figures of

been introduced in various legislatures upon the subject, only one state at present[70] has so restricted the dispensing of food as to eliminate the chains from this field.

IV

The various state resale price maintenance laws and the federal Miller-Tydings Act[71] also have a direct and substantial effect upon the prices of chain stores. This legislation is ostensibly to protect manufacturers of branded articles from having the good will of their products injured and the even flow of their distribution disrupted by price-cutting dealers. However, there is strong evidence that the real movement started with organizations of retailers, the bitterest opponents of chain stores, who desired to have high resale prices maintained in order to obtain, for themselves, larger profits.[72]

The epidemic quality of legislation is interestingly evidenced in the history of the spread of these acts. The movement originated in California in 1931. By 1936 nine states had enacted similar legislation. After the constitutionality of the California act was upheld by the United States Supreme Court in 1936,[73] twenty-eight states put legislation of this type upon their books within a period of eight months.

Under the state acts, in order to establish a resale price on his branded product, a manfacturer has merely to make one contract with a retailer stipulating the price at which the article is to be resold, and notice being

34,844 drug stores with food bars, 60,607 confectionery stores with fountains and an unknown number of department stores with fountains and restaurants. In the state of Colorado 650 stores and in California 2,129 drug stores are engaged in the vending of food according to DRUG TOPICS, Jan. 18, 1937, Feb. 15, 1937, and it is reported that in these stores this business represents about 26% of the total business and from 30% to 40% of the total profit.

[70]Col. Laws 1935, c. 118.

[71]26 STAT. 209 (1890), as amended by Public Act No. 314, 75th Cong., 15 U. S. C. A. § 1 (Supp. 1938).

[72]See minority view of the members of the Committee on the District of Columbia, Part 2, of Senate Report of July 8, 1937. "The National Retail Druggists' association printed instructions to its state and local lobbying members that they were to proceed as quietly as possible and so secure as many other types of retailers as possible so as to present a better front. My information is that in only three states were there public hearings upon these important price-fixing measures. I am receiving information, however, that consumers' groups are now organizing opposition in some states because they have discovered the malign effects of price-fixing legislation. I am informed that the National Association of Retail Druggists so controlled the situation in relation to the desired state enactments, and so unacquainted were many of the legislators with the provisions of the bill that 11 states passed bills tendered to them by the drug interests, each one of which contained a stenographic error, which resulted in the principal paragraph being meaningless so that a New Jersey court recently ruled the law to be unenforcible." In such manner does the sovereign make its laws.

[73]Old Dearborn Distributing Co. v. Seagram-Distillers Corp., and McNeil v. Joseph Triner Corp., 299 U. S. 183, 81 L. ed. 109, 57 Sup. Ct. 139 (1936); The Pep Boys, Manny, Moe and Jack v. Pyroil Sales Company, 299 U. S. 198, 81 L. ed. 122, 57 Sup. Ct. 147 (1936).

given to all other distributors (either by the manufacturer, or by the contracting dealer, or in any other manner), all retail outlets are thereby bound by the contract. Any variations from the stipulated price are actionable by anyone who has been injured by such price deviation. Because of this, even though one distributor purchasing in larger quantities can secure a better price for the merchandise, or by virtue of the efficiency of his organization can actually distribute at a lower cost than a less efficient distributor, he is unable to pass these savings along to the consumer if the article has been covered by such a contract. The public is deprived of the benefits of efficient distribution in this manner in order to provide profits for less capable independent retailers.[74]

V

The final type of anti-chain store legislation to be considered is the Robinson-Patman Act.[75] Prior to this act chain stores had a buying ad-

[74]Gerther, *Experience in California with Legislation Restricting Price-cutting, supra* note 68, at 676. "There can be no doubt that resale price maintenance under the California Fair Trade Act has made for higher prices on advertised products sold through cut-rate and chain store institutions. . . . In the metropolitan centers retail prices on advertised items were immediately raised on the average about one-third over 1933 prices and one-fourth of 1934 contractual prices insofar as they went up to the contractual level."

In New York under the Feld-Crawford Act, "Retailers are now forced by law to collect margins as follows:

	Mark-up on cost.
Cosmetics	65.6%
Drugs	57.2
Liquors	56.2
Books	70.4
Miscellaneous	60.2

"In other words, the efficient distributor, who does not need any such margin on these items to make a satisfactory profit on a satisfactory volume of sales, is required by law to take this additional profit. Naturally the increased price to the consumer may result in a reduced volume of sales and no more than his present total of profit for the year's business. But the consumer must pay the increased price, and particularly the consumer who thinks it is worth while to make his purchases at the popular-price chain stores throughout New York City and the downtown popular-price department stores. It is no doubt true that many drug stores are still charging the same prices that they formerly charged but the consumer's opportunity of buying these price fixed articles for less has been foreclosed." Minority view of the members of the Committee on the District of Columbia, *supra* note 72.

For the international situation, see Gerther, *Resale Price Maintenance in Great Britain,* UNIV. OF CALIF. PUBLICATIONS IN ECONOMICS, Vol. II, No. 3, 257, where it is pointed out that chains have thrived in foreign countries with effective price protection, and have not been seriously hampered by a prohibition against underselling. The largest chain in the world is reputed to exist in Great Britain, a country with rather strict price control, and in Germany, the chains have not been seriously affected by price control. The burden, of course, falls upon the consumer. TRADE REG. REV. No. 3, March, 1937, p. 4.

For a general discussion of State Fair Trade Acts and court decisions under such acts see notes in (1937) 22 CORNELL L. Q. 445; (1937) 50 HARV. L. REV. 667; (1937) 23 VA. L. REV. 914; (1936) 36 COL. L. REV. 293; (1936) 49 HARV. L. REV. 811; (1936) 13 N. Y. U. L. Q. REV. 267; (1936) 45 YALE L. J. 672.

[75]Pub. Act. No. 692, 74th Cong., 15 U. S. C. A. § 13 (Supp. 1938).

vantage over independent wholesale dealers, an advantage which usually was in the form of discounts.[76] These were of three kinds, promotional allowances, volume allowances and brokerage allowances.[77] The proper use of this discount system would seem to be unobjectionable because of the services rendered the manufacturers by the multiple unit organizations in newspaper and window advertising, and because of savings to the manufacturer accompanying large order purchasing and direct dealing with the consequent elimination of brokers and their commission.[78] That there bave been abuses of the discount system is undeniable. But it is submitted that the abuses of the system should be eliminated and not the system itself prohibited.

It is rather difficult to determine whether the purpose of the act is to correct abuses or to abolish the use of discounts entirely.[79] It is equally difficult to determine just how effectively the act will function.[80] At all

[76]Mr. Justice Roberts said in The Great Atlantic and Pacific Tea Company v. Grosjean, *supra* note 40, 422: "One striking illustration is furnished by the uncontradicted proof the Atlantic and Pacific Company received, in the year 1934, from its vendors, secret rebates, allowances, and brokerage fees amounting to $8,105,000 which were demanded by the company as a condition of purchasing from the vendors in question. The leverage which accomplished this was the enormous purchasing power of the company." As a sidelight to this case it is to be noted that the court cited this as an advantage of large chain organizations at a time when such practices had to a large extent been declared illegal under the Robinson-Patman Act.

See Federal Trade Commission, *Final Report on the Chain Store Investigation*, p. 90; Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store* (1936) 15 HARV. BUS. REV. 62.

[77]Phillips, *supra* note 76, at 64.

[78]*Id.* at 64 *et seq.*

[79]It is the hope of Representative Wright Patman of Texas, the author of the bill, to eliminate chain stores completely. He states, for example, with respect to discounts, in a paper entitled *Equal Opportunity in Business*, for presentation at the 34th annual meeting of the National Petroleum Asso., Atlantic City, Sept. 17, 1936: "It is admitted that a train load shipment can be made at much less cost per car than a single car shipment. If, however, lower rates were permitted in such a case, large dealers would be able to destroy small dealers. Our quantity provision will apply to all modes of transportation, including trucks, barges and railroads. This quantity limit will be fixed by the Federal Trade Commission and I presume at an equal amount to a car lot in most cases but smaller quantities in others. One who purchases such a 'fixed quantity' from a manufacturer will be permitted to receive it for the same price and terms as one who purchases many hundred such fixed quantities; the same theory that one who causes one car load of freight to be transported pays the same price per car as the one who ships thousands of cars at the same time."

[80]For a period after the passage of the act, The Great Atlantic and Pacific Tea Company eliminated all discounts whatsoever. In the spring of 1937, however, the company reverted to its original policy. The Federal Trade Commission centered an attack upon such practices and issued a cease and desist order. TIME, April 12, 1937; NEWS WEEK, March 13, 1937, p. 20; *Id.*, April 10, 1937, p. 37. The chain intends to appeal to the courts, arguing that the discounts received were "non-discriminatory", and were "available to purchasers on proportionally equal terms". See *Direct Buying Under the Robinson-Patman Act*, Brief of The Great Atlantic and Pacific Tea Company filed with the Federal Trade Commission, Dec. 1937.

On the act generally, see Learned and Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations* (1937) 15 HARV. BUS. REV. 137; Copeland, *The Problem of Administering the Robinson-Patman Act* (1937) 15 HARV. BUS. REV. 156; *A Symposium on Price Discrimination and Price Cutting* (1937) 4 LAW AND CONTEMP. PROB.

events, it has been definitely established that the benefits that chains have received through their purchases is a relatively small factor in accounting for the differential in prices existing between chain stores and independent merchants.[81]

In considering the effect which legislation has had upon multiple unit stores, a few observations upon the effect that the chain system has had upon the costs of the distribution of merchandise might not be entirely inappropriate. When Mr. Hoover was Secretary of Commerce, he said that at least eight billion dollars was wasted annually through inefficient marketing.[82] Estimates show that one third of every American dollar spent at retail stores in the early nineteen-twenties covered the actual cost of production, while the other two thirds were absorbed in distribution.[83] The present gross margin of chain stores, according to the Federal Trade Commission,[84] is 20% to 25% of sales. Inasmuch as these stores do most of their business with consumers whose annual incomes do not exceed $2,300 per annum,[85] any increase or decrease in the prices of merchandise distributed by these stores will have its greatest effect upon those marginal consumers who can least afford to meet an increase in the cost of living.

The task and accomplishment of these organizations has been to reduce

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271 *et seq.* (particularly McNair, *Marketing Functions and Costs under the Robinson-Patman Act, id.* at 334; George, *Business and the Robinson-Patman Act: The First Year, id.* at 392; McLaughlin, *Cost and the Robinson-Patman Act, Possibilities of a Strict Construction, id.* at 410); Gell, *Further Aspects of the Robinson-Patman Anti-Price Discrimination Act* (1937) 7 LAW SOC. J. 856; Smith, *The Robinson-Patman Act in Practice* (1937) 35 MICH. L. REV. 705; Gallagher, *The Robinson-Patman Act* (1937) 2 JOHN MARSHALL L. Q. 464; Hamilton and Loevinger, *Second Attack on Price Discrimination, the Robinson-Patman Act* (1937) 22 WASH. UNIV. L. Q. 153; Notes (1936) 50 HARV. L. REV. 106; (1936) 24 GEO. L. J. 951; (1937) 46 YALE L. J. 447; (1937) 85 U. OF PA. L. REV. 306.

[81]In the grocery field by far the largest part of the chain store's advantages is definitely not a result of special discounts, since of the 1.73% by which the independent's cost of merchandise exceeds that of the chain, but .45% can be traced to special concessions. In the Federal Trade Commission's cost studies for groceries it was revealed that 16.4% of the independent's higher selling price is a result of a greater cost of merchandise while 83.6% is caused by a larger gross margin. See *supra* note 25.

[82]BUEHLER, CHAIN STORE DEBATE MANUAL (1931) 26. In an address by Herbert Hoover before the National Distribution Conference, Chamber of Commerce of the United States, Wash., D. C., Jan. 14, 1925, it was stated: "The outstanding problem of our distribution system can be easily summarized in one question. Can we reduce the margin between our farmers and manufacturing producers on one side, and our consumers on the other? . . . I believe that in so doing we can make the greatest contribution to the improvement of the position of our farmers and that we can make a contribution to lowered costs of living." BLOOMFIELD, TRENDS IN RETAIL DISTRIBUTION (1930) p. 51. See also radio address of Dr. Julius Klien, Assistant Secretary of Commerce, May 4, 1929, found in SOMERVILLE, CHAIN STORE DEBATE MANUAL (1930) 25. See Plaintiff's brief in Louis K. Liggett Co. v. Lee, *supra* note 36.

[83]BUEHLER, *supra* note 82, at 26.

[84]*Supra* note 25. In SOMERVILLE, *supra* note 82, at 72, it is claimed that out of every dollar spent at The Great Atlantic and Pacific Tea Co. 83.5 cents goes to the manufacturer, 14 cents for local expenses, and 2.5 cents profit.

[85]Dayton D. McKean, *The Spread of Chain Store Taxes* (1936) NEW REPUBLIC, May 27, 1936.

the cost of distribution from the manufacturer to the consumer to the minimum, both of whom have profited through this efficient distribution. Although chain stores formerly were charged with maltreating farmers and producers, within the last three or four years they have been the greatest single factor in the country in stabilizing prices in times of overproduction, thereby saving producers from the threats of complete liquidation.[86] Immeasurable benefits have likewise accrued to the government because of this action.

The immediate apparent result of this legislation has been a contraction in the number of chain store units.[87] If they wish to continue in business under a unit tax two paths are open to the chain stores. They may lease their separate units to their managers and operate as a voluntary chain, the organization acting primarily as a manufacturing and distributing agency, with a considerable extension in this field,[88] or they may consolidate their

[86]This has been notable in the turkey industry, potatoes, dried fruits, apples and many other industries. The most outstanding piece of work done in this line was in beef. "The drought situation led to a request for chain aid from the packers and cattle raisers in the middle of June 1936. During July, while the campaign was being laid out, prices dropped steadily. In the week ending July 8, steer of good grade were selling at $8.00 per cwt. By the first of August when the month long drive got under way, they had dropped to $7.50. By the third week of August they were back to $8.25 and by the middle of Sept. after the drive had ended they had risen another 45 cents. Prices were boosted despite an increase in slaughterings over 1935; a 24.5% increase in July and a 15.9% increase in August. Total consumption of beef and veal in Augnst was 11.1% higher than a year earlier. Part of this increase was due to lower prices which averaged about 8% less for the month than in August 1935 but cattlemen credit the chains in large measure for obviating a catastrophe. The government which had to purchase 2,500,000 steers to relieve the ravages of the drought in 1934 bought only 5,000 cattle in 1936." BUS. WEEK, March 5, 1938, p. 31.

See statement of W. F. Jensen, Manager of the American Association Creamery Butter Manufacturers in New York Produce Review and American Crcamery, Jan. 29, 1930, with respect to the co-operation received from the chains and particularly the A. and P. in the distribution of butter when increased consumer demand was necessary.

[87]In the year ending Feb. 1, 1938, the number of A. and P. stores declined from 14,747 to 13,531. In 1934 the chain had 15,082 outlets. In 1929 there were 148,037 chain stores in the United States. In 1933 it dropped to 141,676 and in 1935 to 127,482. STATISTICAL ABSTRACT OF THE UNITED STATES (1937). Every chain store that is closed means the loss of a job for five men, counting managers, clerks, warehousemen, and office assistants. Their average aggregate salary is between $8,000 and $10,000 per annum. Closing a store also means loss of store rental averaging $1,500 per year or better. BUS. WEEK, June 15, 1937, p. 23.

[88]When Iowa enacted its chain store law in 1935, the Standard Oil of Indiana, decided that its 850 service stations in that state could not stand the increased tax burdens, so the firm rented its Iowa retail outlets to individuals and turned all leased stations back to their owners. This proved so profitable that the company extended the plan to several other states. NEWS WEEK, May 29, 1937, p. 25.

Such a plan would appear to be impossible under the Pennsylvania Act which provides (1937, P. L. 1656, § 6; PA. STAT. ANN. (Purdon Supp. 1938) tit. 72, § 3420-6) "Two or more stores or theatres shall, for the purpose of this act, be considered under the same general management, supervision, or ownership if, directly or indirectly, controlled by a single person or any group of persons having a common interest in such stores or theatres, or if any part of the gross revenues, net revenues or profits from any such stores or theatres, shall directly or indirectly, be required to be immediately or ultimately made available as rental or in any other manner whatsoever for the bene-

units into super-units of distribution.[89] To a certain extent both measures have been adopted.

What the future has to offer in the way of legislation on this subject is difficult to determine.[90] Despite the fact that chain store taxes have been repealed in two states,[91] and despite the fact that opponents of this type of legislation are becoming constantly stronger and better organized,[92] the

ficial use, or shall directly or indirectly, inure to the immediate or ultimate benefit of any single person or any group of persons having a common interest therein." It would seem also that this language is broad enough to include voluntary chains.

[89]In Pittsburg within two years the A. and P. has established seven super-markets with as many more in nearby areas. Among them are 4 or 5 of the largest outlets of the chain, grossing upward of a half million dollars a year, ten times the volume that moves through the average A. and P. Store. BUS. WEEK, July 3, 1937, p. 26.

[90]Not quite so difficult to determine is the position of Mr. Justice Black upon such legislation. In the United States Senate on Jan. 8, 1930, then Senator, Black stated: "Chain store systems are entering into every town and village in the United States. They are destroying business initiative of the individuals who built up those communities. . . . The little chains are being absorbed by the bigger ones. One springs up in my home town of Birmingham today. Tomorrow it is merged into a larger one. The next day it is merged into a still larger one, and they continue the merging, thus gradually concentrating into one center. Chain groceries, chain dry good stores, chain drug stores, chain clothing stores, here today and merged tomorrow—grow in size and power. . . . We are rapidly becoming a Nation of a few business masters and many clerks and servants. The local business man and merchant is passing, and his community loses his contribution to local affairs as an independent thinker, and executive. . . . A wild craze for efficiency in production, sales and distribution has swept over the land, increasing the number of unemployed, building up a caste system dangerous to any government."

[91]The potato growers were responsible to a large extent in the repcal of the chain store tax in Maine. LITERARY DIGEST, June 12, 1937, p. 36. In California after the legislature had passed a chain store act it came up for referendum. After a great deal of organizing by the chains working with Lord and Taylor, a New York advertising agency, the measure was killed by 64% of the voters. See Woodward, *How to Swing an Election—Why California Repealed the Chain Store Tax*, THE NATION, Dec. 11, 1937, p. 638; *The Lesson from California*, an editorial in THE PROGRESSIVE GROCER, Dec., 1936, p. 31. Statisticians figured that this tax ranging from $2 per single store to $500 for ten or over, would have raised 1.1 millions per year and would have pushed the price of food and other necessaries up from 5% to 10%. BUS. WEEK, Sept. 21, 1935.

On November 8, 1938, the electorate of Colorado voted "No" to a referendum to repeal the chain store tax of the state, the vote being 230,000 to 160,000. N. Y. Times, Nov. 10, 1938, p. 49. This tax, COLO. STAT. ANN. (Michie, 1935) c. 161, is the only chain store tax which was enacted into law by public vote. Initiated measure No. 7, adopted Nov. 6, 1934.

[92]Agriculturists, former opponents of chain stores, as has been seen have become allied to them in this struggle. Manufacturers likewise, realizing that a continuation of this legislation will drive the chains out of the retail business and into manufacturing, distributing their products to the members of the voluntary chains into which the present chain organizations would undoubtedly be converted, as well as to retail outlets presently outside the chain, prefer to see them continue in business as distributing agents rather than as competitors. With the widespread education of the consumers there are bound to be found many opponents of chain legislation.

Voluntary chains are looking askance at such legislation because there have been very definite indications that the next move on the part of the states is to tax them out of business also. In Georgia the Attorney General has indicated that he will try to stretch application of the tax to cover both chains and voluntary associations. BUS. WEEK, May 22, 1937, p. 15. And similar sentiments were echoed by Hon. Sol Bloom in the Congressional investigation prior to the passage of the Robinson-Patman Act. *A. and P. Goes to the Wars*, FORTUNE, April 1938, 63. The result has been that the Pennsylvania Grocers' Association spent $100,000 in allying with the chains to fight the taxes. LITERARY DIGEST, June 12, 1937, p. 36.

battle continues on many fronts. This past spring the Schwartzwald chain store bill was introduced into the New York legislature.[93] The author of the Robinson-Patman Act has now proposed a death statute on chain stores which will achieve their complete extinction in two years after passage.[94] While it seems distinctly improbable that this measure will become law, there is quite a possibility that the national legislators, in seeking desperately for more revenue that, to some extent, will meet their expenditures, may seize upon a modified form of the bill as a solution of their problem.

There are some indications that this type of legislation in the future will not be confined to corporate chains but will also embrace voluntary associations of independent dealers.[95]

The immediate prospect for the ultimate consumer is a gloomy one. Without any increase in legislation, an increase in the cost of living seems inevitable due to the present taxes, the financial burdens of diverse regulatory devices and the costly litigations relating to them. Though the chains do a rather small percentage of the total retail business,[96] an increase in their prices will certainly be reflected in all retail sales, inasmuch as they have been the sole factor in preserving low prices in the past.

Since the present policy of the government is to stabilize industry and particularly to plan production, it seems strange that an antipathy to planned distribution in the finest form should be so prominent. It is not uncontrovertably true that the current problem of overproduction which has

[93]This measure calls for a graduated tax of $10 to $550 per chain store in the state, based on the total number of stores in the system operating both in and out of the state of New York. NEWSDOM, Feb. 26, 1938, p. 3; March 5, 1938, p. 3. Those opposing the measure include the Real Estate Association of New York State, Leadership Institute, New York Board of Trade, Broadway Association, Brooklyn Real Estate Board, New York State Turkey Growers, Central Mercantile Association, Washington Truth Society, Crusaders, Inc., Citizens Union, United Real Estate Owners Association, Uptown Chamber of Commerce, 34th Street-Midtown Association, Merchants Association of New York, 23rd St. Midtown Asso., West Side Association of Commerce, and Brooklyn Consumers' Committee.

[94]The bill provides for a federal chain store tax ranging from a minimum of $50 per store for chains operating less than 10 units up to $1,000 a store for those operating more than 500 outlets, these being multiplied by the number of states, including the District of Columbia, in which any chain operates. National chains would pay $49,000 per store for each outlet in excess of 500. This would amount to a tax of $524,000,000 on the A. and P. or 60% of the 1937 sales volume and 6,000% of its 1937 net profit. See FORTUNE, *supra* note 92; BUS. WEEK, Feb. 5, 1938, p. 17; Editorial, *Killing Chain Stores,* BUS. WEEK, Feb. 5, 1938, 48.

This bill as introduced in 1938, H. R. 9464, was in committee last July when Congress adjourned. Its author, recently re-elected, has announced that the bill will be introduced January 3, 1939, as H. R. 1. As far as is ascertainable, the National Retail Druggists Association which was largely responsible for the federal and state retail price maintenance acts is supporting this measure. There is substantial opposition to the bill being furnished by chain stores, voluntary retail chains, manufacturer's associations, the grange associations, and lately, the American Federation of Labor.

[95]See *supra* note 92.

[96]STATISTICAL ABSTRACT OF THE UNITED STATES (1937) points out, (page 807, table no. 824) that in 1929 the chains made 20% of the total retail. sales; in 1933, 25%; and in 1935, 22%.

proved a curse rather than a blessing can be solved only by decreasing production. It is not inconceivable that in fostering chain stores by the removal of the present prohibitory bans on those commercial ventures which have made the greatest strides in solving the problem of distribution, would yield an answer to the yet unsolved puzzle of widespread want prevailing in a land of teeming plenty.