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THE ANTI-CHAIN STORE MOVEMENT IN THE
UNITED STATES, 1927 - 1940.

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Synopsis

This thesis is intended to provide the first considerable history of the sustained political offensive which was mounted against chain stores in the United States between 1927 and 1940. The work falls into five divisions. Part One examines the overall pattern of chain store development during this period and the impact of the changing interpretation and enforcement of the antitrust laws on the "chain store question". Part Two begins the chronological account of the anti-chain movement, describing the attempts made by independent merchants, principally in the South and the interior states, to whip up feelings of "home town loyalty" to encourage a popular boycott of chain stores. After 1930, agitation of this character subsided, but the chains were then confronted by a more substantial threat, that of discriminatory taxation. The development of the chain store tax weapon up to 1935, in which year the U.S. Supreme Court approved the principle of confiscatory chain store taxation and two states enacted severely repressive measures, is reviewed in Part Three. In 1935-1936 the chains also fell foul of Congress, a complex sequence of events - the subject of Part Four - resulting in enactment of the Robinson-Patman price discrimination law, the only substantial legacy of the anti-chain movement. To this point, the record was one of ever worsening danger for the chains, but 1936 proved to be the turning of the tide. The levelling off of chain store growth; the general economic upturn; the more relaxed competitive relationship between chains and independents fostered by price maintenance legislation, and the collapse of the broader politics of discontent which had done much to help the cause of the enemies of the chains in the mid-1930's, all served to hasten the demise of the anti-chain movement. Part Five relates its remorseless descent to oblivion.

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Preface

During the economic depression and political turmoil of the 1930's nearly every country in Europe imposed restrictions of various kinds on the opening of chain stores. In Belgium, the "Padlock" laws, enacted in response to the spread of unit-price (limited-price variety) stores, virtually stopped expansion of large-scale retailing outside the 15 major cities after 1936. In France, where there was a long tradition of hampering large retail companies by the use of discriminatory taxation, a 1936 law prohibited the opening of new unit-price stores for one year. A 1933 Swiss federal decree, introduced originally as an emergency measure but left in force throughout the decade, prohibited the opening of new or expansion of existing chain, department or large independent stores without a permit, and graduated sales taxes were also used to discourage large-scale retailing. Austria completely banned the operation of unit-price stores in 1933; Czechoslovakia prohibited the opening of new unit-price stores from 1933 and closed down the mail order shoe business. In Germany, Chancellor Bruening, in an effort to deflate the strong appeal made to the retailers by the Nazi Party, which promised the abolition of department and chain stores and cooperatives, in 1932 issued a decree prohibiting the opening of new variety chain stores in cities of less than 100,000 population for a period of two years. On assuming power, the Nazis prohibited the creation or expansion of chain stores, although modifications to this policy were subsequently introduced and the struggle within the party between the advocates of a populist "middle class syndicalism", urging the expropriation of big retailers, and forces identified with economic rationalisation and the supremacy of the needs of industry and the military, resulted in a

stalemate in which no action was taken to break up the existing chain and department stores. It seems that only in Britain and Sweden did the chains escape severe regulation in the 1930's, and in Sweden the modesty of chain store development made that escape of slight consequence.¹

When measured against this record the curbs imposed on chain stores in the United States may seem trifling. Twentyeight states enacted chain tax laws but without any severely restrictive tax ever coming into effect; Congress enacted an anti-price discrimination law (the Robinson-Patman Act) but failed to respond to calls for a federal "death sentence" tax on chains. However, another measure of the opposition to chain stores in the United States is not what it accomplished but what it attempted. For more than a decade militant independents mounted a sustained political attack on the very existence of the chains, an attack which was in some respects unequalled anywhere in Europe. In most European countries the restrictions on chain stores were only secondarily the result of distinct political movements of wholesalers and retailers; primarily, they had merely the character of extensions of the already rigorous licensing arrangements applied to distribution as a whole. In many countries the 1930's brought restrictions on entry into the trade for aspiring independents quite as much as for chain stores, with trade associations or governments or both in combination maintaining rigid trade regulation akin to that of the Medieval guilds. Quite often, such regulation was also used to prevent existing retailers

1. Jean J. Boddewyn and Stanley C. Hollander, Public Policy Toward Retailing: An International Symposium, Lexington, Mass., 1972, pp. 45, 284, 352; James B. Jefferys, and Derek Knee, Retailing in Europe: Present Structure and Future Trends, London, 1962, p.56; Christina Fulop, Competition for Consumers: A Study of the Changing Channels of Distribution, London, 1964, pp. 212-3; Paul Ucker, 'Swiss Retail Trade and Fascism', Journal of Marketing, vol. 6 (1941), pp. 50-53; Walter Froehlich, 'Changes in the Central European Retail Trade', Journal of Marketing, vol. 4 (1940), pp. 258-63; Temporary National Economic Committee, Monograph No. 40, 'Regulation of Economic Activities in Foreign Countries', p.92; David Schoenbaum, Hitler's Social Revolution: Class and Status in Nazi Germany, 1933-1939, London, 1967, pp. 136-50.

from adding sidelines (e.g. a greengrocer from selling bread) and to enforce price-fixing and standard hours, on pain of revocation of license. Thus the Nazi government in Germany not only controlled large stores: after 1933 no one could open a retail store without government permission, and in 1939, in the first steps to obtain labour for war purposes, the government decreed the closure of supposed superfluous outlets in 'overcrowded' trades. As few European countries had any significant chain store development - in southern Europe chain stores were almost non-existent and in the north of the continent only variety chains had shown much growth by this time - the principal impact of such controls was inevitably felt by the small independents.²

This sort of rigid trade regulation was unknown in the United States. Although trade associations, acting in concert with government, assumed unprecedented powers over prices, discounts and various trade practices under the National Recovery Administration, there were no controls on entry into the trade. Even within the ranks of the trade associations suggestions were rare that such controls should be actively sought and it was certainly never expected that such controls would be granted. Many American merchants in any case suspected that any form of licensing would be abused by politicians as a source of patronage, and there was also a quite common belief in the inviolability of the right of any man to try his luck in business provided that he kept within certain limits in his conduct. Only in the drug trade, whose peculiar character necessitated certain regulation, and, after 1933, in the liquor trade, was there any important exception to this broad freedom. Thus, in demanding curbs on chain stores, American

2. See works in Footnote 1, generally; also Walter Froehlich, "European Experiments in Protecting Small Competitors", Harvard Business Review, vol. 17 (1939), pp. 442-52; Richard Grunberger, A Social History of the Third Reich, London, 1971, pp. 167-74, pp. 180-1; Arthur Schweitzer, Big Business in the Third Reich, London, 1964, p. 158.

independents were deviating sharply from the principles upon which their own sector of the retail industry was conducted. They were also demanding curbs of much greater likely economic significance than those in Europe, for American chain stores were far more numerous and enjoyed a far larger share of the market than their continental European counterparts. The structure of retailing in the United States was comparable only with that in Britain where, with the consumer cooperatives included, large scale distributors had a similar share of total retail sales. However, in Britain there was neither anti-chain legislation in the 1930's nor any considerable demand for it. British shopkeepers seemingly aspired to little more than making life as comfortable as possible by means of resale price maintenance, which increased steadily to cover 30% of goods sold by 1938 notwithstanding the contemporaneous growth of chain stores. Conservatively-inclined, well-accustomed to chains - the growth of chains was apparently a more leisurely affair than in the United States, beginning well back in the nineteenth century and with no sudden great explosion in numbers such as occurred in America in the 1920's - and lacking any strong sense of identify of class or even interest, British shopkeepers had no collective political weight.³ They also lacked that widespread public sympathy for the 'little fellow' in business battling to make a living in the face of the big predatory corporations which was so distinctively American and an indispensable element in the building of a political movement against the chains.

American merchants had little of the obsessive preoccupation with status, that deference to 'betters' and dread of 'proletarianization' that is said, with what degree of caricature is uncertain, to have characterised merchants

3. James B. Jefferys, Retail Trading in Britain, 1850-1950, Cambridge, 1954, pp. 53-4, 61-63; F.G. Pennance and B.S. Yamey, 'Competition in the Retail Grocery Trade, 1850-1939', Economica, Vol. 22 (new series) (1955) pp. 303-17.

in Europe, especially in the countries of central Europe, at this time. There was no equivalent concept to the German Mittelstand, just as there were no organised middle class political parties.⁴ American independents in any case existed within the context of a society with a greater in-built tendency to favour free competition and the survival of the economically efficient, and they could not afford to neglect the straight economic struggle with the chains even while they opposed them politically. Many independent retailers, regardless of their general attitude towards the chain stores, declined to sink into a guild mentality and instead made every effort, often with much success, to copy or improve chain store methods to their own advantage. American independent stores, no less than American chain stores, tended in general to be many years ahead of those in Europe in their methods of operation, with widespread use of such innovations as the voluntary chain which did not appear in Europe until the 1950's or later. Trade regulation, in all its forms, was very much a second string to the independents' bow.

But, on the other hand, the very concept of the independent merchant possessed an ideological force it did not have in Britain. If the term Mittelstand cannot be properly translated into American idiom it is equally true that the ideas packed into the American expression "Main Street" cannot be similarly encapsulated in (British) English. No British Sinclair Lewis could ever have written a novel simply entitled High Street, and few British politicians have ever been known to dwell on the virtues of their old home town High Street with its little stores and easy ways, a stock in trade of American legislators in the 1930's. Likewise, the powerful sectionalism

4. Robert Gellately, The Politics of Economic Despair: Shopkeepers and German Politics, 1890-1914, London, 1974, pp. 8-10; Herman Lebovics, Social Conservatism and the Middle Classes in Germany, 1914-1933, Princeton, 1969, pp. 3-12.

found in the United States introduced an element into the anti-chain store agitation barely conceivable, at least in the solely economic sphere, in a geographically compact and economically tight-knit country such as Britain. For many of those active in the anti-chain store movement - especially for those not themselves involved in the distributive trades - the attempt to cut off the tentacles of the 'chain store octopus' was but a part of a wider battle to restore economic independence to the South and the West. Furthermore, the political ideologies of populism and progressivism, in all their diversity, have no real equivalent in mainstream British political thought. In Britain the main attack on big business came from socialism, and in the 1930's the shopkeepers in many cases merely formed part of that bland consensus which sustained the politics of the National Government against the left. In the United States, where socialism was a negligible force by the 1930's, the attacks on big business carried on an altogether different tradition, a tradition with which many small businessmen could and did identify with great enthusiasm. American merchants were not caught looking two ways - fighting socialistic cooperatives to the left of them and chain store combines to the right of them - as happened in parts of Europe. Their attack was all in one direction: against the chain stores. As a consequence, they proved able to mount a fairly uninhibited campaign of opposition to the chains, secure in the knowledge that no group in society was meanwhile plotting their own regulation or destruction. They also proved able to mount a truly independent type of political movement. That the militant opponents of the chain stores never won the backing of a nationally-organised political party inevitably frustrated many of their efforts, but it perhaps also proved a strength. Unlike German retailers, they were never absorbed into a party apparatus to be regimented and 'coordinated' in the interest of the party.

For a movement which threw up a huge contemporary record of itself, the anti-chain store movement has lain curiously forgotten since it expired. There has not been one considerable attempt - with due respect to the worthy but necessarily superficial treatment given in one short M.A. thesis - to describe the 'main line' of development of the opposition to chain stores, though the peripheral areas of the subject have not gone neglected.⁵ The thinness of the historiography appears to reflect a general indifference to the study of retailers' movements in other countries, though there are probably some additional explanations involved in the American case.⁶ The intention behind this thesis is to fill the gap by providing a straightforward narrative account of the principal episodes in the opposition to chain stores

5. Carl G. Ryant, 'The Unbroken Chain: Opposition to Chain Stores during the Great Depression', unpub. M.A. Thesis, University of Wisconsin, Madison, 1965; see also Ryant's article, 'The South and the Movement Against Chain Stores', Journal of Southern History, vol.39 (1973), pp. 207-222. Godfrey M. Lebar, Chain Stores in America (N.Y. several editions) also follows the track of the anti-chain store movement but without adding much not found in articles in Chain Store Age, the magazine of which Lebar was editor, in the 1920's and 1930's. Joseph C. Palamountain, The Politics of Distribution, Camb., Mass., 1955, intersects with this thesis at various points but is in fact largely about the economics, not the politics, of distribution.

6. For some comments on this indifference, see Arno J. Mayer, 'The Lower Middle Class as an Historical Problem', Journal of Modern History, vol. 47, (September 1975), pp. 409-36; and Gellately, op.cit., pp. 4-5. The anti-chain store movement was not directly part of the New Deal, which tends to be the unifying theme in most writing on the 1930's, and this may have deterred interest; the subject also straddles a number of disciplines in an awkward manner. Historical 'questions' also have a way of being overlooked altogether unless they have been answered in some way before. It is interesting, for example, to notice how T. Harry Williams in his monumental biography of Huey Long does not once refer to Long's opposition to chain stores even though virtually every issue of Long's newspaper, the Louisiana (American) Progress contains attacks on the chains. Obviously, Williams had read these speeches but they did not 'ring a bell' or fit into any context.

between 1927 and 1940. The economics of chain store distribution, the detailed effect of chain store competition on independent businesses - as opposed to the effect on the attitudes of independent businessmen - and even the subterranean efforts to hinder the chains by boycotts and other such sanctions internal to the trade are not considered below except where they bear directly on the political fight. The primary concern of the thesis begins where the merchants come into the open and oppose the chains in public and by political means.

In the several years taken in the preparation of this thesis I have benefitted from the assistance and kindnesses of many people. In the course of extensive correspondence with trade association executives and other individuals in the United States I have received much encouragement from the warmth of interest shown in my work and have obtained various types of background material which would not otherwise have come my way. Great thanks are also due to Professor Royden Harrison and members of staff at the Centre for the Study of Social History for their long-suffering patience; to my typist, Deirdre Hewitt; to my friends Nigel and Carol Rigby for their repeated hospitality upon my many visits to the British Library, and to my parents for their unswerving support during the period in which the fruits of research were turned into a piece of writing.

Abbreviations

ACCO	Atlantic Commission Co.
AGMA	Associated Grocery Manufacturers of America.
ARF	American Retail Federation.
AWGA	American Wholesale Grocers' Association (became USWGA, 1933).
CFDA	Cooperative Food Distributors of America (succeeded National Retail-Owned Wholesale Grocers' Association, 1935).
FGCSA	Food & Grocery Chain Stores of America (became National Association of Food Chains, 1936).
IGA	Independent Grocers' Alliance
IRMA	Independent Retail Merchants' Association.
LPVSA	Limited Price Variety Stores' Association, formed 1933.
MMM	Merchant Minute Men.
NAITD	National Association of Independent Tire Dealers.
NARD	National Association of Retail Druggists.
NARG	National Association of Retail Grocers.
NARMD	National Association of Retail Meat Dealers.
NAWGA	National-American Wholesale Grocers' Association (succeeded National Wholesale Grocers' Association, 1933).
NCSA	National Chain Store Association (Formed 1928: dissolved 1933).
NCSGA	National Chain Store Grocers' Association (superseded by NCSA, 1928).
NFBA	National Food Brokers' Association.
NRDGA	National Retail Dry Goods Association.
NRHA	National Retail Hardware Association.
NWGA	National Wholesale Grocers' Association (became NAWGA, 1933).
RCIPA	Retail Clerks' International Protective Association.
RGA	Retail Grocers' Association.
RMA	Retail Merchants' Association.
UCT	United Commercial Travelers of America.
USWGA	United States Wholesale Grocers' Association (succeeded AWGA, 1933).

PART ONE: The Chain Stores

i. The Growth of the Chain Stores

There had been chain stores in America for many years before they were first branded as a "menace" and threatened by agitators seeking to curb their practices or put them out of business. The Great Atlantic & Pacific Tea Co., the longest-lived if not the earliest-established chain store company in the United States, had its origins in 1859 and was trading under its modern name by 1869. The Kroger Grocery & Baking Co., the second largest grocery chain in the 1920's, developed out of the Great Western Tea Co. established by B.H. Kroger in Cincinnati in 1882. In the variety field, the first successful Woolworth store was opened in 1879, and several prominent companies, including the S.S. Kresge Co. and S.H. Kress & Co., made their first appearance in the 1880's and 1890's.¹

Early growth was nonetheless only very gradual and, when set against the rapid expansion of the nation's population and economy, almost insignificant. Comprehensive statistics are lacking for the period before the 1920's - the Federal Reserve Board began the compilation of retail trade statistics only in 1919 and there was no Census of Distribution taken until 1929, a circumstance which itself reflects the lack of public interest in or concern about the condition of retail distribution in earlier times. However, according to estimates made by the Federal Trade Commission

1. "The Early History of the Great Atlantic & Pacific Tea Co." by R.J. Bullock, Harvard Business Review, vol. 11 (1933), pp. 289-98; Paul H. Nystrom, Economics of Retailing, New York, 2nd edn. 1930, vol. I pp. 215-24. General accounts of the development of chains in all lines can be found in G.M. Lebharr, Chain Stores in America, N.Y., various editions; John P. Nichols, The Chain Store Tells its Story, N.Y., 1940; Tom Mahoney & Leonard Stone, The Great Merchants: America's Foremost Retail Institutions and the People Who Made Them Great, N.Y., various editions; Walter J. Hayward & Percival White, Chain Stores: Their Management and Operation, N.Y., various editions; William J. Baxter, Chain Store Distribution and Management, N.Y., 1928.

(estimates which the Commission described as being "merely approximations" and probably somewhat understate the early extent of chain store development), there were . . . in 26 principal lines of merchandising still only 3,300 units of chains of four or more stores in 1900. This compares with an estimated 95,386 such units in these lines in 1929. During the first decade of the new century a powerful expansionist trend set in, there being 15,800 chain stores in these 26 lines by 1914.² The chains were nevertheless still far from being a matter of public controversy or even of sustained trade attention or apprehension. Only two chains commanded much notice in those early years, the F.W. Woolworth Co. and the United Cigar Stores Co., and they did so as conspicuous individual businesses rather than as representatives of a new "system" of merchandising.³

Anti-chain campaigners in the 1930's rarely recalled, or seemed to be aware of, these early chain store developments. It was a recurrent theme of their rhetoric that the chains were a peculiar abomination of the post-war world, an unnatural imposition on a hitherto stable and orderly system of distribution in which manufacturer sold to wholesaler, wholesaler to retailer and retailer to consumer, each at a "fair" profit and without undue competitive aggression. And, most certainly, the trend

2. FTC, Chain Store Inquiry, Growth and Development of Chain Stores, pp. 66-67. See Appendix Table I. For full citation for reports of the Chain Store Inquiry, see bibliography.

3. Woolworth's success was symbolised by the opening of the Woolworth building, "The Cathedral of Commerce," in New York in 1913, at that time the world's tallest building. See John K. Winkler, Five and Ten: The Fabulous Life of F.W. Woolworth, Freeport, N.Y., 1970 reprint, pp. 183-201. George Whelan opened his second store only in 1901, but by 1914 his United Cigar Stores Co. had well over 1,000 units. As company vice-president H.S. Collins recalled, "We had plenty of opposition. The independents fought us tooth and nail - not because we were a chain but because we were supposed to be the outlet for the tobacco trust. In those trust-busting days, it was the easiest thing in the world to raise a hue and cry against anything connected with 'the interests'" ("Our First Twenty-Five Years" in Chain Store Age, May 1926). See also U.S. v. American Tobacco Co. 221 U.S. 106 (1911).

of growth in chain store numbers was such that it produced a colossal increase in the post-war period even though what happened then was really only a continuation of what had gone before. In rough terms, chain store numbers increased in geometrical progression, tripling each decade from 1900 to 1930. The result was that more than 66,000 stores were added in the period from the end of the war (1918) to the Wall Street Crash (1929), compared with only 29,200 in existence in 1918 after a period of 60 years development. The average size of chain units also increased markedly in the post-war period as the older types of chains such as the groceries began to carry wider ranges of merchandise and as new big-store chains like Sears, Roebuck entered the field, with the result that the rate of increase in sales was even more rapid. One good estimate, cited in a Senate resolution requesting the Federal Trade Commission to conduct an inquiry into the reasons behind the growth of the chains, was that chains did 4% of U.S. retail sales in 1921 and 16% in 1927. By 1929, chains of four or more stores did more than 20% of U.S. retail sales. What is more, because of a sharp increase in the number of mergers of chain store companies in the last few years of the decade the large chains grew faster than the industry as a whole, some of the very biggest chain store companies in existence as of 1929 having formed or achieved any prominence only in the course of the previous few years.⁴

Had this rate of progress been sustained, the chains would, of course, have long ago assumed responsibility for all the retailing in America; instead, after further definite advance in the early 1930's, the overall chain store share of retail sales became stable for the rest of the 1930's and most of the 1940's, before resuming a gradual trend to increase thereafter. As G.M. Lebhar, the founder of the magazine Chain Store Age,

4. Appendix Tables I, II; Sen.Res. 224, 70th Cong. 1st Sess., May 5, 1928. (Known as the Brookhart resolution).

later observed, "The rapid and spectacular progress the chains made between 1920 and 1930 carried them to a certain point, but that apparently was as far as they were destined to go". The consequence was that the "chain store question" - "if chain stores keep expanding at their present rate, how long will it be before the independent merchant is wiped out entirely?" - ceased to have any meaning.⁵ Not only did the chain store industry climb to undreamed-of heights in the 1920's, it accomplished its feats amid an unprecedented glare of publicity. The chains themselves contributed to this. In pre-war times, many chains, their owners instinctively preferring to keep their operations in the dark in order to avoid trade antagonism, did not publish details of their sales or number of stores. This older attitude - which, in view of events in the 1930's was perhaps the more prudent - gave way in the 1920's to a boastful and publicity-oriented approach. Perhaps the passing of control in many chains from the cautious grip of their original owners, nearly all of whom had begun as single store owners and well knew the mind of independent merchants, to a new generation of corporation men, more interested in exciting Wall street and the stockholders than in the reactions of the independents, played a part in this; undoubtedly too, the general public euphoria in the 1920's about the triumphs of American big business induced a relaxation of the older caution. In 1920, a dozen eastern grocery chains founded the first chain store association, the National Chain Store Grocers' Association; as the decade continued new magazines, notably G.M. Lebharr's Chain Store Age (1925), sprang up to foster the new chain store self-consciousness and cement its identity; then, in 1928, the leading chains in all lines, except the A & P, joined together to form

5. In the preface to Chain Stores in America, op. cit.

the National Chain Stores' Association. Chain store men freely offered their opinion that the chains represented a "mass distribution" to answer the "mass production" found in manufacturing industry, and they elevated their commercial success to the level of a major contribution to the greater wellbeing of society as a whole.⁶ Business and general circulation magazines joined in the chorus of approbation and some commentators felt quite convinced, in view of the apparently foolproof logic of the efficiency of chain store methods, that "the independent retailer as a real factor in present-day distribution is about to pass into the oblivion of business history" and that any protest raised by the doomed independents "will be swept aside as they are either eliminated or absorbed into the mechanism".⁷

The advance of the chains in the 1920's was led by the older types of chains which had first pioneered the methods of chain operation. By 1929, the F.W. Woolworth Co. had 1,825 stores, these being found in every town above 8,000 population as well as in some of less and producing a total of \$303 m sales. This being a type of merchandising actually originated by the chains, there were few independents in the field, and a handful of big companies were dominant. So important was the element of mass buying in variety chain operation - often involving exclusive purchasing arrangements with manufacturers - that it was difficult for independents to establish themselves, and profitability tended to increase in direct proportion to company size.⁸ It was the grocery chains, however, which were the

6. A.H. Morrill, "The Development and Effect of Chain Stores", in Ezra C. Buehler, Debate Handbook on the Chain Store Question, Univ. of Kansas, 1930, pp. 145-51; R.W. Lyons, "The Social and Economic Aspects of Chain Stores" in American Economic Review, March 1931, vol. XXI, No. 1, supplement pp.26-32.

7. J.T.A. Ely, "Tomorrow's Retailing - Will the Chain Store Do It All?" in Magazine of Business, November 1927, pp. 552-4 ff; George Soule, "Farewell to the Shopkeeper" in New Republic, April 4, 1928, pp. 210-212.

8. Charles F. Phillips, "A History of the F.W. Woolworth Company" in Harvard Business Review, vol. 13 (1935), pp. 225-36.

undisputed leaders of the chain store industry by the 1920's. As late as 1912, the A & P had only 400 stores and its largest rivals but 200 stores each. From about 1913, the chains began to turn to a new type of "economy store" in which traditional features of grocery store operation such as credit, delivery, premiums and elaborate fixtures were eliminated in favour of strict cash and carry principles, narrow ranges of fast-moving merchandise and austere store conditions. Everything seemed to work in favour of this new approach. Wartime inflation induced a new price-consciousness on the part of consumers, thus encouraging a new and daring emphasis on low prices. The new prominence of nationally-advertised brands, which were pushing out the old undifferentiated and often unpackaged staples, also proved of the greatest importance, for such goods were "pre-sold" household names of guaranteed quality and the customer could compare the price at which the chain store sold them directly with the prices prevailing in independent stores. No longer did cheap prices in the food trade imply cheap and possibly adulterated goods. Many grocers until well into the 1920's retained a somewhat pathetic belief that the success of the "economy stores" represented a mere craze, a transient aberration on the part of the consuming public. The American people were, they believed, too fond of service and too interested in making dollars rather than in saving cents to persist for long in their infatuation with the chains. Certainly, the chains did not retain the pristine rigours of the early "economy stores" during the 1920's, but rather drifted in the direction of "trading up" by making their stores more attractive and widening the range of merchandise sold. (The leading chains began from the mid-1920's to open so-called combination stores, selling fresh meat in addition to the regular lines of dry groceries). But cash and carry had

established its popularity, and the enormous increase in automobile ownership - most American families owned a motor vehicle by the end of the 1920's - served only to cement that popularity by making cash and carry physically more convenient to the customer. More and more independent grocers reluctantly moved over to cash and carry policies as they contemplated with dismay the success of the chains.⁹

The grocery chains were the focal point of the whole chain store question, their stores being the most numerous, their competitors being many and organised, and the competitive struggle in food retailing being the most intense. The A & P, building on its wartime success, increased from 3,799 stores in 1918 to 14,034 by 1925, in which year sales were \$440m; it then added relatively few stores (operating between 15,000 and 16,000 through the period from 1927 to 1934) but increased the size of its stores, thereby raising sales to \$1,054m in 1929. This Colossus of American retailing was, uniquely among leading chain companies, run almost as a family firm by the two Hartford brothers, John and George, who had full effective ownership and control and often stood in isolation against the general consensus of chain store opinion. The A & P's principal rivals were essentially sectional in scope. Kroger, the giant of the Midwest, rose from 799 stores in 1920 to 5,575 in 1929, with the help of some acquisitions of smaller chains, with 1929 sales of \$287m. Ranked by stores, Kroger came second to the A & P among chains of all types; ranked by sales, it came fourth behind A & P, Woolworth and Sears, Roebuck (including catalogue sales). Safeway Stores Inc., formed by a series of multiple mergers of small chains under the auspices of the New York investment bankers Merrill, Lynch & Co. in the late 1920's, was dominant in the western states; the

9. R.J. Bullock, "The History of the Great Atlantic & Pacific Tea Company Since 1878" in Harvard Business Review vol. 12 (1933) pp. 59-69; M.A. Adelman, A & P: A Study in Price-Cost Behavior and Public Policy, Cambridge, Mass., 1959 pp. 24-27.

American Stores Co., formed by merger in 1916, had 2,644 stores densely packed into a small area of eastern Pennsylvania and adjoining states; First National Stores Inc., formed by the merger of three Boston chains in 1925, had over 2,000 stores throughout New England, and the National Tea Co., hemmed in by Kroger to the south and Safeway to the west, operated in a territory stretching northwards and westwards from Chicago.

Although independent grocers played the leading role in the political fight against the chains, they received assistance from many non-food merchants, a situation which reflected the luxuriant diversification of chain store merchandising in the 1920's. In the drug store field, there were as few as 25 stores in chains of two or more stores in the whole United States in 1900, and although the Louis K. Liggett Co. and Walgreen both originated in the first decade of the new century, as late as 1920 there were still estimated to be only 1,563 stores in chains of three or more stores. Greater development was retarded by the difficulty of standardising methods, the need to employ trained pharmacists, the high capital costs, the complexity of operation, and the huge diversity of pharmaceutical stocks which compelled even the large chain retailer to make considerable use of wholesalers. Nearly all the drug chain stores at that time were found in a few large cities: the United Drug Co., for example, operated Liggett stores in the big cities, extending its influence to the smaller towns through the 11,000 Rexall agencies, independent druggists who carried brands manufactured by United Drug. But by 1929, although still with a heavily big city concentration, total drug chain numbers had increased sharply to 249 chains of four or more stores, with an aggregate of 3,513 stores which did 18.5% of total drug store sales. Peculiar significance attached to this upsurge because of the extremely high degree of trade organisation among independent retail druggists who

were, in relation to their numbers, the best organised of all retail groups. Several factors tended to deter the development of militant political activity against the chains in the drug trade, including the lack of enthusiasm of wholesalers who, unlike those in the grocery trade, enjoyed appreciable sales to the chains, the anomalous situation that some independent retail druggists were agencies of chain store companies like Walgreen or were stockholders in the United Drug Co., which operated Liggett's, and the fact that the chains were geographically rather patchy in extent. The trade preoccupation with resale price maintenance also acted as a diversion. Nonetheless, when the independent retail druggists did begin to join in the fight in the 1930's they brought to it a discipline not usually found from other retailers.¹⁰

The 1920's also brought notable chain growth in the apparel, dry goods, general merchandise and department store fields, lines in which chain store operation had hitherto been considered difficult because of the problems of adapting cash and carry, high turnover, unskilled mass retailing techniques to the very different requirements of selling "shopping goods". Much of the advance in these fields was in fact achieved by modifying ideas about the "chain store method" introduced by the variety chains, though the chains did tend to concentrate at the lower-price end of the market, leaving the higher-quality or more specialised merchandise to the independents. Most of the companies in these lines were individually relatively modest in comparison to the grocery or variety chains, but there were three outstanding department store chains by the end of the decade. The J.C. Penney Co., with small town origins in Wyoming in 1902, increased from 34 stores in 1912 to 1452 by 1930, the company operating in every state and having 85% of its units in towns of less than 25,000 population. Sears, Roebuck and Montgomery Ward, the great

10. Baxter, op.cit., pp. 76-109; Hayward & White, op.cit. (1928 edn.) pp. 505-518; Fortune, "500 Corner Drugstores; Walgreen Co.", September 1935, pp. 71-80 ff; Samuel Merwin, Rise and Fight Again, N.Y., 1935, interestingly relates the curious origins of the Liggett chain as an outgrowth of the retailers' cooperative organisation, the United Drug Co., which Liggett himself created.

Chicago catalogue houses, first opened retail stores in 1925 and 1926 respectively, in good measure because chains like J.C. Penney were eating into a rural market which was in any case declining relative to the national economy as a whole. Both companies opened several hundred stores in the last few years of the decade, Sears mainly in large cities and Ward mainly in small towns and medium-sized cities of up to about 75,000 population.¹¹

A virtual fever for anything in chains gripped financial promoters and the stock buying public in the 1920's. Not just chain stores, but chain restaurants, chain filling stations, chain soft drink stands, chain hotels and chain banks proliferated. A mode of business organisation hitherto confined largely to the grocery, variety and cigar store fields influenced every type of retailing and service trade, thus heightening awareness of the "chain store menace" and widening the circle of potential enemies of the chains. At the same time, the chains reached deep into geographical areas which they had little affected before the war, the South and the West and the small towns generally. Chains reporting to the FTC operated 42.6% of their stores in the three eastern states of New York, New Jersey and Pennsylvania in 1913; by 1928, that proportion had fallen to 30.8%. The FTC's data relating to the rate of growth in the different sections of the country showed a distinct trend for the area of most rapid development to slip steadily westwards, although even in the old chain store areas of the northeast expansion was still extremely rapid in the post-war years.¹² Symbolically, perhaps, the three leading chains of the pre-war period all established their first store in New York State, Woolworth in Utica, United Cigar in Syracuse and the A & P in New York City; in contrast, some of the new giants of the 1920's such as Penney

11. Boris Emmet & John E. Jeuck, Catalogues and Counters: A History of Sears, Roebuck and Company, Chicago, 1965, pp. 313-23, 338-53.

12. FTC, Chain Store Inquiry, State Distribution of Chain Stores, esp. p.4.

and Safeway had their beginnings west of the Mississippi. Everywhere, the chains enjoyed a higher proportion of the retail trade in the large cities than they did in the small towns, but by 1929 there was no obvious tendency for the chain store sales ratios to be lower in the large cities of the South and West than in similarly-sized cities in the Northeast. New York City, popularly regarded by merchants elsewhere in the country as being a city "lost" to the chains, actually had a lower proportion of its retail sales made through chain outlets than did many cities in the Midwest, its strong neighbourhood loyalties holding back the chains even in the grocery trade where they had been in operation for 70 years.¹³

The impact of the chain store on the small town was a principal source of public anxiety about the "chain store menace" and the FTC, as part of the chain store inquiry ordered by the Senate, devoted a special report to the subject. The Commission studied 30 small towns, widely distributed around the country and nearly all of which had between 2,000 and 5,000 population. The first known appearance of a chain store - and the Commission adopted the catholic definition that two stores under common ownership constituted a chain - in any of the 30 towns was not until 1904. From then until 1931 an aggregate of 246 chain stores was opened, only 24 of them before 1918 and with the number of openings reaching a peak in 1928-1929. In 1926 there were 910 independent and 115 chain stores in the towns; in 1931, there were 840 independents and 218 chain stores, an increase of 89.6% in the number of chain stores and a decline of 7.7% in the number of independents. The number of independents trading in the same lines as the chains fell by 72 (15.7%) during this period whereas the number in non-competing lines actually increased by 2 (0.4%). The

13. Compare the reports by city in the 1930 Census of Distribution (Retail Distribution, vol. I Part. II). *The 1930 Census data refer to 1929.*

total of 218 chain stores in 1931 was made up principally by 97 stores in the grocery field, 42 variety, 26 dry goods and apparel and 15 department stores. Typically these were units of large chains, whereas the smaller numbers of stores in the drug, furniture, jewellery, wallpaper and paint, ready to wear apparel and hardware lines were units of small chains.¹⁴

As long as the chains stayed mainly in the cities, being carried along on the tides of immigration and urbanisation, they provoked little concerted hostility. The rather gradual pace of early development also served to give independent merchants some chance to reconcile themselves and adapt their methods to meet the challenge. But the invasion of the small towns in the rural sections was accomplished by chains which were already at the height of their powers, inspiring immense panic among merchants who, unlike their city brethren, commonly had little conception of modern store management and were unused to the ways of vigorous competition. The small town merchant found himself under a double threat from the new chain stores in his own home town and from the attractions of the specialised stores in the larger cities which, thanks to the automobile and the breakdown of old credit ties in the farm states with the spread of a cash economy, were accessible to an ever-increasing public. No longer was the mail order catalogue or the occasional peddler the only

14. FTC, Chain Store Inquiry, The Chain Store in the Small Town, Tables 6, 15, 33 and 35. The 1930 Census found that there were 39,725 chain stores (units of four or more store chains) in all places of less than 10,000 population combined; excluding filling stations, that figure was 29,880. Of these no less than 13,355 were grocery chain stores. Furthermore, the stores in the grocery field tended to be operated by extremely large companies. The FTC found that in 1929 the A & P, Kroger and Safeway combined had 6,420 stores in towns of less than 10,000 population. These figures go some way to explaining the prominence of grocers in leading the wave of small town opposition to the chains which swelled up in the late 1920's. (1930 Census of Distribution, Retail Distribution, Vol. I Pt. I, Table 23, p. 976; Table 24, p. 977; FTC, Chain Store Inquiry, Final Report, p. 6).

"foreign" menace. By the late 1920's, many families in the rural sections thought nothing of travelling 100 or 150 miles to find the prices and the range and style of goods that the larger urban centres could provide. This magnetic effect of the big trading centres actually led to falls in sales for some small town merchants even in the generally prosperous 1920's.¹⁵

Students of the chain store problem detected in this a fundamental shift in the character of American small town life. Philadelphia and Chicago could no doubt accommodate the chain stores as a purely business mechanism with no great effect upon their social structure, but could the smaller cities and towns? The chains were viewed as the harbingers of a new uniform and nationalised culture being carried forward by chain newspapers, chain radio, Hollywood movies, and sometimes vaguely associated with such disturbances to morality as women who smoked and "gin and jazz". Some of the sense of emotional and intellectual confusion and loss which informed the great literature of the period also found a place in the humbler outpourings of many of those who saw in the chain store a symbol of the loss of the old simplicities of Main Street life before the war. Imprecise and elusive as such sentiments were, chain store men disregarded them at their peril for harnessed to political action by agitators at the end of the 1920's they proved an energetic fuel.¹⁶

15. President's Conference on Unemployment Recent Economic Changes, Vol. I, pp.331-341; Sales Management, January 21, 1928, "Small Town Merchants Feel the Chain Store Lash"; Bureau of Foreign and Domestic Commerce, Domestic Commerce Series, No. 19 (1927) Commercial Survey of the Southeast by John M. Hager, pp.175-181. The number of motor vehicles in the United States increased from 1,258,062 in 1913 to 26,523,779 by 1930, in which year the population was 122,775,046. The highest ratios of vehicle registrations to population were generally found in western farm states. In the South, the section where ratios were lowest, the increase in automobile registrations was faster than elsewhere in the nation during the 1920's.

16. See particularly, Charles Wesley Wood, The Passing of Normalcy, N.Y., 1929; Samuel Crowther, "Cash and Carry", World's Work, July 1930 pp.42-6; and the many essays of Jesse Rainsford Sprague, including "The Chain-Store Mind" in Harper's Monthly, February 1929 pp.356-66; "The Chain Store in Your Town" in Saturday Evening Post, Sept. 29, 1923, p.12 ff.; The Making

At the beginning of the 1920's, independent merchants in much of the country, and especially in the South and to the west of the Mississippi, were still only half-alert to the "chain store menace". At trade conventions, resolutions more commonly condemned the old enemy of the catalogue houses than the chain stores; indeed, even minor irritants such as peddlers and consumer cooperatives were often deemed more worthy of denunciation. At national conventions, even in the grocery trade, complaint about the chains came most loudly from the delegates from the eastern states, and their interests leaned more to cooperative buying, group advertising schemes, price maintenance and trade association work than to the overtly political and agitational techniques used against the "mail order menace" elsewhere. But by the end of the 1920's the tables had been turned. The delegates from the eastern states were yet more worried about the chains, but they were not in despair and some were confident that they had the measure of the chains. Those from the South and West, in contrast, were in panic about the chain store offensive, and in their panic some of them were ready to turn to any method to fight back, including a desperate appeal to public sentiment.

Agitation against the chain stores developed before the depression and although the first great wave of reaction and resistance reached its peak only after the Wall Street Crash that was perhaps little more than coincidence. The anti-chain fervour which swept through the South and the Midwest in the late 1920's was a direct reaction against the chains and was little affected by the broader political or economic conditions of the time, unless it was a provincial distaste for the excesses of Wall Street in that

16. (Cont'd)... of a Merchant, N.Y. and London, 1928, and High Pressure: What it is doing to my Town and my Neighbors, N.Y. 1938.

period. From 1930, however, the broader problems of the times impinged ever more acutely on the shape of the anti-chain struggle. Thanks to the depression and the New Deal, anti-chain agitation fanned back from the interior states even into those parts of the east where the position of the chains had seemed secure.

While the economy made its long and inexorable descent to the depths of early 1933 the chains proved able to make yet more gains at the expense of the independent sector, partly as a continuation of the growth of the 1920's and partly because of the appeal of their generally more economical stores in hard times. In 1933, chains did 25.4% of U.S. retail sales compared with 20.0% in 1929; furthermore, the large sectional and national chains did disproportionately well, taking 19.3% of retail sales even in 1935, when the beginnings of a reverse trend may have been under way, compared with 12.6% in 1929. Many of the leading chains in fact went through the trough of the depression relatively unscathed, closing a few stores and suffering reduced profitability at a time when whole sections of American business were thrown into bankruptcy. Particularly notable was the record of the variety chains, the four largest of which each operated more stores each year from 1930 to 1933. In general, the only large chains to be dragged into financial crisis were those which had unsuccessful subsidiary commitments, like United Cigar, or were forced, like Liggett, to undergo receivership and reorganisation to escape from excessive rentals taken on in the 1920's scramble for favourable store locations. There were also independents who prospered throughout the depression but the independent sector as a whole suffered direly. Not only did it lose ground to the chains, the absolute falls in sales volume because of the depression were not reflected in any thinning of the ranks. Unsuccessful storekeepers had no incentive to give up their stores, because they had no prospect of alternative employment; equally,

some of the unemployed, resorting to the traditional "safety valve" occupation of "subsistence retailing", opened front-room stores or roadside stands, thus cutting into the business left for established dealers. In 1933, with retail sales at only slightly more than half of their 1929 level, there were almost as many independent retailers in the country as in 1929.¹⁷

In 1933 there began the slow climb from out of the depths of depression, a climb interrupted only by the severe recession of late 1937 and the first half of 1938, which restored the economy approximately to its 1929 condition by 1939. The Census statistics show that between 1933 and 1935 independent stores increased by 9% and sales by 36%; chain stores decreased by 10% and their sales increased by only 19%, and in all but four states (Colorado, Maine, Vermont and the District of Columbia) the chain store share of total retail sales was less in 1935 than in 1933. Such overall statistics do somewhat distort the real position, because of sharp increases in the numbers of independent retailers in the filling station and eating and drinking places groups -outlets which were not thought of as properly being "stores" by most people - and in some fields, notably in the department store group, the chains were still advancing strongly. Nevertheless, the chain store advance along a wide front had clearly come to a halt and they had suffered definite reverses at some points. While at first the low aggregate volume of retail sales rather detracted from the beneficial effects of this upon the independent sector, by 1936 and 1937 a distinctly optimistic tone became apparent in discussions of the current conditions in independent trade circles. Most importantly in political terms, in the grocery and drug fields the chains were no longer increasing their share of total sales.

17, See Appendix Tables; Joseph C. Palamountain, The Politics of Distribution, Camb., Mass., 1955, pp. 8-15; also, for a comment on the situation in one city, Robert S. and Helen M. Lynd, Middletown in Transition, N.Y., 1937, pp. 11-12.

Although the political movement against the chains by that time had its own momentum, it was stealthily undermined in the late 1930's by the double effect of general national economic recovery and the arresting of the chain store advance at the expense of the independents - a directly opposite effect to what had occurred in the early 1930's. When set against the panic of the 1920's and the dire conditions of the early 1930's, the trends of the late 1930's took on something of the appearance of a miraculous deliverance.¹⁸

The braking of the chain store advance was caused partly by the problems of the chains themselves. The mid and late 1930's brought new tax burdens, arising from such measures as the Social Security Act and the mounting expenditures of local, state and federal governments, which tended to bear more heavily on large employers and corporations; unionisation, too, little known in the chain store industry before 1933, became a considerable factor in raising costs and reducing operating flexibility after the 1935 Wagner Labor Relations Act. Chain store taxes; the curbs on buying advantages imposed by the Robinson-Patman Act; adverse consumer sentiment stirred by anti-chain agitation; the burden of carrying the numerous unprofitable stores which were the legacy of reckless expansion in doubtful locations in the boom days of the 1920's; the loss of a certain amount of exceptional business enjoyed from unusually price-aware consumers in the period 1930-33; the drying up of sources of capital to promote risk ventures after the Crash - all these complications contrived to various degrees to work against the chains.

The independents also showed some capacity either to adopt new methods or to put their inherent strengths to good use. The essential advantages of chain store operating methods came down to the ability to perform a sequence of functions - purchasing, warehousing, advertising, displaying the goods and pricing them competitively - just a little bit more efficiently

18. Appendix Tables; also 1935 Census of Business, Retail Distribution, Vol. I, U.S. Summary, p.1-23; 1939 Census of Business, Retail Trade, Vol.I Pt.I, p.3.

at every stage than the independent competition. But there was no patented secret to this. Countless thousands of merchants responded to the challenge of chain store distribution by pooling their buying with other retailers or providing wholesalers with more concentrated orders, by installing new lighting and modern fixtures in their stores, by advertising more and by pricing competitively rather than relying on old-fashioned standard mark-ups. Such efforts varied from the private initiatives of individuals to the systematic imitation of chain store methods pursued by the big voluntary chains in the grocery field which, beginning only in about 1926, succeeded in establishing themselves as a major force in the nation's retailing in less than a decade. Instead of the casual relationships between wholesalers and retailers of earlier times, a majority of well-established grocers - the core of the trade associations - had some sort of affiliation with a voluntary chain, retailer cooperative or informal buying or advertising club by the mid-1930's. While few of the voluntaries or cooperatives could match the costs of the large corporate chains, they did help to close the gap and also assisted in bringing to the conduct of retail groceries an appearance of modern efficiency that was perhaps as important as the substance of such efficiency in attracting the consumer.¹⁹ Whereas the grocery chains during

19. Fully-developed retail grocery cooperatives operating their own wholesale warehouses were found mainly in the largest cities, where some had been in operation since the late nineteenth century and rivalled the chains for efficiency, but many more informal groups, pooling buying power for special purchases or conducting cooperative advertising, sprang up all over the country in the 1920's and 1930's. There were estimated to be 25,042 members of 161 retail grocery cooperatives as of 1939. However, this development had been far outstripped by that of the voluntary chains, which left the wholesaler-retailer relationship intact and simply tried instead to make it more effective. The largest of the voluntaries, the Independent Grocers' Alliance (IGA), which was largely the creation of one man, J. Frank Grimes, originated only in 1926 but by 1930 linked 8,500 retailers and 44 wholesalers in 33 states; its overhead organisation in Chicago provided a purchasing service for 70% of the affiliated wholesalers' needs, in the process obtaining quantity discounts and other allowances otherwise unavailable to the smaller wholesalers, and sent out merchandising counsellors to show the retailers how to remodel and improve their stores. A symbol of common identity was provided by the stores' IGA insignia and blue-and-ivory colours. All the voluntaries worked on basically similar lines, with variations in the stress laid on different aspects of the voluntary method.

most of the 1920's faced only a mass of uncoordinated service stores, by the mid-1930's they had to contend with powerful voluntary chains and many cash and carry independents, while also being harried by the new

19. (cont'd)... Voluntary chain growth began about 1925 and then rapidly gathered pace, continuing even through the depression years. After about 1933 the increase in numbers levelled off, and in 1939 there were an estimated 521 voluntaries with 81,081 members, ranging from the huge organisations like the IGA and the Red & White to small groups run by individual wholesalers which were barely distinguishable from ordinary wholesaler-retailer trading relationships. In the early years, this growth if anything probably encouraged the spread of anti-chain agitation by raising the consciousness of the grocers, but the very success of the voluntaries ultimately proved a conservative influence. Other grocers, especially those in the retailer cooperatives, often criticised the tendency of the voluntaries to mimic the chains - as in the provision of uniform store fronts - though in fact the indiscipline and stubborn insistence on doing as they pleased of the members proved a liability for the managers of the voluntaries in improving their competitiveness, and the attitude of the rank-and-file (as opposed to some of the executives) in the voluntaries towards the chain stores was often no different from that of other independent grocers. However the rift between small wholesalers and their customers and the big voluntaries on the question of buying advantages - an area in which the voluntaries were directly allied with the corporate chains - did develop into a source of acute division. Group purchasing schemes of various types also existed in non-grocery lines, but none possessed the distinct organisational and political identity taken on by the much more extensive voluntary and cooperative groups in the grocery field. (See, Craig Davidson, Voluntary Chain Stores and How to Run Them, N.Y. and London, 1930; Hector Lazo, Retailer Cooperatives - How to Run Them, N.Y. 1937; FTC, Chain Store Inquiry, Cooperative Grocery Chains, Cooperative Drug and Hardware Chains, Prices and Margins, Washington Grocery; Willard F. Mueller and Leon Garoian, Changes in the Market Structure of Grocery Retailing, Madison, 1961, pp. 37-43, 105-14; C.F. Phillips, "Chain, Voluntary Chain and Independent Grocery Store Prices, 1930-1934" and "Chain, Voluntary Chain and Independent Grocery Store Prices, 1938" in Journal of Business, vol. 8 (1935) pp. 143-9 and vol. 12 (1939) pp. 24-29.

price-cutting independent supermarket which, unburdened by the weight of carrying numerous old style small stores, was often able to cut prices below those found in the chain stores.²⁰

More negative forces also assisted the independents. Even in the late 1920's some of the older types of chains faced the problem that they were running out of suitable locations: for a chain to expand the territory in which it operated could mean ruinous competition with a major rival; to operate more intensively within an existing trading area meant moving into the less favourable locations, where the local volume of trade was perhaps inadequate or where the chain would have its own stores competing with each other. By 1929, the grocery chains, for instance, had reached a stage of a competitive "stand-off" with only two of the leading chains (typically the A & P and one other) operating in many of even the larger cities. This was a particular problem in the east, where the leading

20. There were some successful chains of small self-service stores, notably Piggly Wiggly, in the 1920's, but the modern type of supermarket was virtually unknown. Even self-service was found mostly in the area stretching from Texas to California, where it made its principal appeal to an automobile trade. In 1932-3, "animal markets" - so-called because of the penchant of their operators for names such as "Big Bear", "Giant Tiger", "Bull Market" and "Great Leopard" and because of what the rest of the trade considered their bestial practices - appeared in eastern cities. Many of these supermarkets opened in abandoned warehouses, and they specialised in distress merchandise and on making a huge turnover at incredibly low margins. At first chain store men derided the "animal markets" as a purely depression phenomenon and in some places, especially New Jersey, joined independents in putting pressure on wholesalers not to supply and the newspapers not to advertise them. Many of these price-wrecking markets were in fact secretly financed by wholesalers themselves, and some proved to be the basis of new chains, like Food Fair in Pennsylvania. In the late 1930's the leading chains, led by the A & P, began rather hesitantly to open supermarkets, though not using the same desperate price-slaughtering tactics seen in 1932-3. This resulted in closures of many of the smaller stores operated by the big chains. In 1940 there were estimated to be only 6,171 supermarkets - 1,200 of them belonging to corporate chains - but these did \$2½b sales. (See M.M. Zimmerman, The Super Market: A Revolution in Distribution, N.Y., 1955, esp. pp. 21-6, 31-68, 125).

chains tended to be trapped in enclaves.²¹ Whereas every unsuccessful, poorly-run or marginal store had to be carried by the chain as a whole (and many companies suffered from a deep reluctance to close unprofitable stores, for a variety of reasons including a hope that they might one day "come good", employee relations, and fear that investors might think it a sign the company was on the rocks, as well as big-firm inertia) each independent, being independent, could throw himself into the fray and succeed or perish without loss to the independent sector as a whole. Thus a continual process of the survival of the fittest was at work among the independents whereas the chains were impelled to fritter away their resources in caring for the weaklings among their stores.

Not that independents survived only or even primarily by facing the chains head on. Many found secure places for themselves in corners where the chains could not easily reach: in catering to an ethnic trade, or staying open at odd hours to catch evening rushes or factory gates, or in providing a personal service that the impersonal chain store was ill-equipped to match. Particularly in "shopping goods" lines, independents were able to maintain a niche for themselves by stocking ranges of merchandise not usually carried in chain stores: indeed in some fields, such as women's apparel, it could prove a positive advantage to be totally dissimilar to the cash and carry stores and to emphasize the prestige and service of the store without worrying about prices. Likewise, the small family stores, without outside labour and usually with minimal overheads, proved able to survive and provide a modest living for their owners while doing a volume of sales

21. In 1942, in 82% of the 211 largest American cities for which data were available only 1 or 2 of the top 20 food chains had stores. Not one of these cities had more than 4 of the nation's top 20 food chains operating in it. (Mueller and Garoian, op. cit., Table 12, p. 31).

on which no chain store could operate. Thus independents survived both by copying the chains and by making their appeal entirely opposite to that of the chains. The very diversity and individuality which in the 1920's seemed to many casual observers to be the likely undoing of the independents in the face of the advance of uniform, streamlined big business actually proved to be the key to the independents' survival.²²

The first instinct of established distributors when faced by the emergence of a new type of distribution has always been to brand it as "illegitimate". The big city department stores in the 1890's, the mail order houses in the years before the First World War, the "Big Bears" and "Giant Tigers" of the depression, and the discount houses of the 1950's and 1960's all attracted widespread condemnation by the trade as being fundamentally unsound and destructive, before eventually attaining respectability as they matured and the trade got used to them. In that respect, the opposition to chain stores may be seen as having its inception in a conventional reflex response.

Equally, while the trade has always shown a distinct preference for trying to frustrate the new forms of distribution by "private" trade disciplines and sanctions, such as boycotts of those manufacturers who foster the intruders, more public and politically-orientated means have been used from time to time. The trade-at-home agitation which developed against the chain stores in the Midwest and the South in the late 1920's had a direct precedent in the anti-mail order agitation which flared up intermittently in those same parts of the country from the 1890's onwards. "Shears and Sawbuck" and "Monkey Ward" were then denounced by chambers of commerce,

22. Perhaps the most extensive consideration of the factors at work in favour of the survival of a strong independent sector may be found in Theodore N. Beckman and Herman C. Nolen, The Chain Store Problem: A Critical Analysis, New York and London, 1938.

Chautauqua lecturers, small town newspapers and merchants' associations for their tendency to drain away local resources to Chicago and destroy local opportunity, a theme which - with New York generally substituted for Chicago - formed the core of the later case against the chain stores. Catalogues were burned on public bonfires by chambers of commerce; rumours were circulated among the populace that Richard Sears and Alvah Roebuck were Negroes; sometimes merchants who doubled as county postmasters refused to order catalogue goods until merchandise bought in the home town stores on credit had been paid for.²³

Similarly, merchants had a long history of demanding legislation to restrict various recognised "evils" such as coupons and trading stamps and peddler selling. Premiums and trading stamps were subjected to special taxes and prohibitions by many states in the years before the First World war when such merchandising devices were common; peddlers were persistently harrassed by an endless succession of special taxes and other discouragements. Even in the 1930's, when the chain store was overwhelmingly the major grievance of the day, merchants did not neglect to demand curbs on peddlers. One particularly effective type of deterrent, the so-called Green River (Wyoming) ordinance which prohibited peddlers from going onto private premises without having first been invited to do so by the occupants, was enacted by over 400 cities in the years 1935-9. License taxes were used by numerous municipalities to hinder itinerant vendors, bread and laundry vans coming in from other towns and other forms of "outside" enterprise. The autarkic tendencies encouraged by the depression, combined with a trend for the courts to take a broad view of the regulatory powers of municipalities

23. Louis E. Asher and Edith Heal, Send No Money, Chicago, 1942, pp. 105-112, 127; Emmet and Jeuck, Catalogues and Counters, pp. 150-68; Thomas D. Clark, Pills, Petticoats and Plows: The Southern Country Store, Norman, Okla., 1964, pp. 72-3.

in the 1930's, produced a deluge of petty regulations which some feared would ultimately, if unchecked, restrict interstate commerce and break down the interdependence of the national economy as a whole.²⁴

Consumer cooperatives were also regarded with suspicion by many independent merchants, though in this case the possibilities for legislative curbs were always considered limited. Many cooperative stores were established in the rural states in the periods of agrarian unrest in the late nineteenth century, but too close an association with transient movements of political protest proved the undoing of most of them. The inflation at the time of the World War evoked a fresh burst of interest, and around 1920 merchants in various parts of the country were somewhat perturbed by developments. However, the depression of 1920-1 brought down most of these cooperatives and the whole issue then subsided before undergoing something of a revival in the mid-1930's. In 1936, the enthusiasm of certain New Dealers for cooperatives received apparent Presidential approval when Roosevelt dispatched a commission to study the so-called "middleway" of consumer cooperation as experienced in Scandinavia and elsewhere in Europe, and some leading business figures - including chain store men hoping to distract the small merchants from the anti-chain battle - began to murmur about this new threat to the American system of business. But the temporary stir proved only a superficial affair, and many merchants were in any case openly scathing about the possibility of a mode of distribution they associated with economic backwardness and an alien way of life having any lasting success in America even if artificially imposed by ideologically motivated politicians or bureaucrats.²⁵

24. R. Cassady, "Municipal Trade Barriers", Harvard Business Review, vol. 19 (1941) pp. 364-76; articles in Law and Contemporary Problems, vol. 8 (1941) pp. 318-33, 359-75.

25. Solon J. Buck, The Granger Movement, 1963, Univ. of Nebraska Press edn., pp. 238-78; Nystrom, Economics of Retailing, vol. I, pp. 275-90; Samuel I. Rosenman, ed., The Public Papers and Addresses of Franklin D. Roosevelt, New York, 1938, Vol. V (1936), pp. 226-8 (303rd Press Conference).

What distinguished the chain store challenge from that of the other forms of disturbance to the "normal" channels of distribution was its intensity, its ubiquity and its widely-hailed irresistibility. The impact of department stores in the late nineteenth century had caused a flutter in a few big cities but it had scarcely affected the general run of everyday retailing. Likewise, the "mail order menace", disturbing as it was to country merchants, was limited by the obvious fact that people could not do more than a small part of their shopping by post. Catalogue sales were probably at a peak, as a proportion of total retail sales, around 1914, but their share then began to decline, principally perhaps because the unprecedented mobility brought by motor transport vastly extended the trading areas of cities and brought modern store merchandising within the reach of even the most isolated country areas. In 1929, catalogue sales in the entire United States amounted to only \$515m - 1.05% of total retail sales. Furthermore, the mail order problem was one which scarcely concerned merchants outside the rural sections and so it provided a weak base on which to form a political movement. Despite the long persistence of anti-mail order agitation its only legislative consequence was some ineffectual changes in the U.S. parcel post system in 1912.²⁶

Peddlers were considered more of a nuisance than a full-fledged "menace". Municipalities were rather easily persuaded to put special taxes on them because the peddler made no investment or other tangible contribution to the well-being of the town; but this was not a vital matter to most merchants, and life could no doubt have been made considerably more difficult for peddlers had the other merchants campaigned against them more vigorously.

26. Nystrom, Economics of Retailing, Vol. I, pp. 194-5, 208-11.

House to house selling accounted for only a fraction of one per cent of all retail sales even in the depression, when numbers of unemployed men were tempted to try their hand at this form of enterprise. The gross inefficiency and consequent high margins involved in direct selling necessarily doomed it to a very minor role in the overall distributive picture. Similarly, the activities of consumer cooperatives were a source of only mild annoyance to other merchants. In the cities, such cooperatives were almost unknown, the trade unions never sponsoring or encouraging the movement. During the depression, cooperative groups appeared in some urban areas, especially in Los Angeles and a few other cities elsewhere in the western third of the country, and these attracted a great deal of publicity, some of their members seeing in such cooperation the beginnings of a new economic order. However, most merchants more realistically assessed such cooperation as being a passing phase - and as involving people who in any case were short of money and so were not attractive customers - and so consumer cooperation attracted almost no concerted trade opposition. Even in the rural areas of the upper Mississippi Valley - the traditional stronghold of cooperation - the extent of consumer cooperative activity was distinctly limited. Many groups were attached to the farmers' cooperative marketing associations and retailed to their members only a restricted range of merchandise, such as petroleum and feedstuffs, specifically related to farm operation; they had little impact on the general run of retailers. Where tension existed it tended to have a cultural or political rather than simply economic origin. Thus in Minnesota, the state where full-scale consumer cooperatives on the European model were perhaps most common, those merchants who objected to them did so because they suspected the mainly Finnish patrons of the cooperatives as "foreigners" and "radicals". But even in Minnesota, merchants' attitudes tended to vary according to individual political and social outlook and there was no collective or

organised hostility to the cooperatives by the 1930's. The cooperatives had a loyal clientele but their very reputation as institutions founded by "foreigners" indicated the difficulty they had in establishing an effective appeal as an alternative "American" system of distribution. In Minnesota the cooperatives never really gained a foothold in the larger cities like Minneapolis and Duluth. By selling at prevailing retail prices and distributing any surplus as dividends - the Rochdale principle - the cooperatives perhaps reduced their appeal to the public as a whole but they certainly also mollified the independent merchants, who contrasted such behaviour with the lamentable tendency of the chains to sell at lower prices. Furthermore, as advocates of the consumers' cooperatives were often also opponents of the chains, merchants had every cause to tone down or even put aside any objections they had to the cooperatives in order to ensure support for action against the much greater threat posed by the chains. Overall, therefore, the predominant attitude of merchants' organisations to consumer cooperatives even in the upper Mississippi valley by the 1930's was one of grudging acceptance. In most other parts of the country, the cooperatives were too few or small to even attract notice. In 1936, when national public attention to cooperation was perhaps at a peak because of the interest being displayed by some of the New Dealers, there were only about 3,600 consumer cooperatives in the whole country, with 677,000 members. The aggregate of \$182m retail sales was less than the sales volume that year of several individual chain store companies.²⁷

27. Twentieth Century Fund, Does Distribution Cost Too Much?, N.Y. 1939, pp. 89-94; Monthly Labor Review, May 1938, pp. 1068-84, "Operations of Retail Cooperatives, 1936"; Leonard C. Kercher et al., Consumers' Cooperatives in the North Central States, (ed. Roland S. Vaile), Minneapolis, 1941, esp. pp. 33-40.

The chains were a problem of an entirely different magnitude to any of the various "menaces" that had gone before. They affected virtually every type of merchant in city and country alike, and they did not just nibble at the edge of the cake but seized a huge slice for themselves. Indeed, it seemed for a time to many merchants that the chains would ultimately leave nothing but the crumbs. It is not surprising, therefore, that the movement of opposition that developed against the chains far exceeded anything seen hitherto from independent merchants. Certainly, many elements in the character of the independent trade continued to work against an effective political engagement: the traditional disorganisation of the smaller retailers; the ambivalent attitudes of wholesalers anxious not to offend the chains because of the residuum of business still obtained from them; the lack of cross-trade contact except at the merely parochial Main Street level; the dominance of more successful, larger and often more conservative merchants in many trade associations; the distaste of some merchants for any association with political demagoguery; the belief that difficulties with the chains would be more efficaciously handled by quiet persuasion or internal trade discipline; the hope that the chain store problem would disappear of its own accord, or would never become too bad in some particular trade or town. Merchants in the past, for all their feuding with unwanted types of competition, had never succeeded in bringing their grievances to the status of a major issue in the political life of the nation as a whole, and they did not succeed in the 1930's in standing that past record on its head. Nevertheless, the intensity of feeling against the chains, in combination with the exceptionally favourable political environment of the 1930's, did provide an unequalled opportunity for that record to be modified. For the first - and thus far the last - time, America's independent distributors made a definite impression, especially in the South and West, on the broader public consciousness of the age.

ii. The Antitrust Laws and the Chain Stores.

When independent merchants began during the 1920's to cast about for some way of attacking the chains, they found little of use to them in the antitrust laws. The independents wished to see the number of stores owned by chains reduced, but it was the doctrine of the courts that "mere size is no offense". Only chains guilty of abuse of their size, or of unlawful methods in attaining such size, were even in theory at risk from the antitrust laws. What is more, antitrust enforcement in practice was far from vigorous in the 1920's, and the tendency during the decade was for enforcement to become progressively slacker. First under Harding and Coolidge "normalcy" and then under the policies of harmonious cooperation with business favoured by Hoover, the Department of Justice and the Federal Trade Commission, the latter the more reluctantly, moved away from the "harrassment" of business, especially of big business which by the late 1920's was in a position of great political and ideological ascendancy after a decade of economic triumphs. The states, meanwhile, virtually abandoned any pretence of enforcing the great body of antitrust law, some of it quite fearsome on paper, thrown up during the trust-busting days of an earlier generation.¹ Broadly speaking, no industry of average morality and conduct had anything to fear from the antitrust laws; and an industry such as the chain stores which actually won praise for lowering costs and helping the consumer had even more cause to feel invulnerable. Most chain store men in the 1920's seem to have thought of the antitrust laws as little more than a curious anachronism, of little practical significance to the conduct of business and not the slightest danger to the continued expansion of the chains.

1. FTC, Chain Store Inquiry, Final Report, pp. 78, 82-3; Columbia Law Review, vol. 32 (1932), pp. 347-66; Merle Fainsod et al, Government and the American Economy, N.Y., 3rd edn., 1959, p. 445.

Certainly, independents regarded it as a great breakthrough when, in May 1928, the Senate adopted a resolution drawn up by John Cunningham (the Secretary of the Iowa Retail Merchants' Association and a leading figure in the National Association of Retail Grocers) and introduced by Senator Smith W. Brookhart of Iowa, instructing the Federal Trade Commission to undertake a full inquiry into the nature of chain store distribution. The resolution asked the Commission to make any legislative recommendations it saw fit and drew its attention to such questions as the extent to which consolidations of chains might have been made in violation of the antitrust laws, the extent of monopoly concentration of control, any evidence of unfair methods of competition or of agreements, conspiracies or combinations in restraint of trade, and the effect and lawfulness of quantity price differentials granted by manufacturers to chains and not to their other customers. However, the resolution also allowed for the inquiry to bring to the fore the economic advantages of chain store distribution and chain store men confidently asserted that they had nothing to hide, expressing doubt only about the value of making sweeping investigations into the practices of entire industries instead of into alleged malpractices by specific companies. The adoption of the Brookhart resolution by the Senate may best be seen as one of a number of similar instructions given to the FTC to conduct "investigations" as a way of deferring immediate consideration or action by Congress itself. The FTC had not sought the resolution, and some of the Commissioners were known to be displeased about being handed this new burden. In the event, the inquiry which unfolded over the next seven years proved an inconclusive affair, some of the reports produced having no conceivable relationship to any possible breaches of the antitrust laws or even to the sources of chain store success, and the enormous significance which the eventual key legislative recommendation - that Congress should amend Section 2 of the Clayton Act - came to have, arose

more from a coincidence with other political events than from any convincing justification for it produced by the Commission. From the start of the investigation, the Commission's economists showed a clear determination, which was reinforced by the political complexion of the Commission, which had a Republican majority of Commissioners after 1925, to avoid any sort of muckraking at the chains' expense. Thus the inquiry produced little of the sort of one-sided criticism of the chains that independent merchants hoped to have to hand as ammunition in their political battles, and the reports contained few unfavourable comments about the chains which were not immediately balanced by some more friendly observation. On the whole, the chains emerged from the FTC's investigation into their methods with a much cleaner slate than most industries subjected to similar investigations although, ironically, the anti-chain movement was so strong by the time the Final Report of the inquiry was made at the end of 1934 that this did the chains little good.²

A frequent charge made by the critics of the chains in the late 1920's was that the wave of consolidations was tending towards the creation of monopolies in each line of distribution; indeed, in the loose rhetoric of politics the word "monopoly" was bandied around rather freely in connection with the larger chain systems. As not every merger attempted in the 1920's met with absolutely no resistance from the FTC and the Department of Justice such an argument was not entirely futile. However, several vital considerations ensured that no action was taken. In the first place, a common interpretation of the position taken by the U.S. Supreme Court in the U.S. Steel and International Harvester cases was that, as the FTC

2. S. Res. 224, 70th Cong. 1st Sess.; New York Times, May 13, 1928; Chain Store Review, July 1928 p. 12; Lebar, Chain Stores in America (1963), pp. 162-5; Thomas C. Blaisdell, The Federal Trade Commission, N.Y., 1932, p. 260.

expressed it, "if there should develop one gigantic all-inclusive chain-store system for each line of distribution, its status as a lawful monopoly could be attacked only to the extent it had violated the law as a means of attaining monopoly and exercised its monopolistic power contrary to law".³ Whether or not this was really the position of the U.S. Supreme Court, the fact that the FTC and many others thought that it was of itself created psychological and practical barriers to antitrust actions. The presumption was that mergers were innocent until proved guilty and that a great deal of serious abuse - not just incidental misdemeanours - had to be involved before that guilt was shown.

That the largest of the chains in each of the major lines of distribution were not significantly involved in merger activity also militated against action, for there was no suggestion that the giants were absorbing their major rivals so as to form some sort of "trust". The A & P accomplished its entire growth to more than 15,000 stores with the help of but one small acquisition of another chain; Woolworth made no acquisitions after 1912; Sears, Roebuck opened brand new stores when it went into the chain store field. Similarly, none of the "super-mergers" which were much discussed and seriously contemplated in the late 1920's - such as the combining of Safeway, Kroger and other big grocery chains to form a nationally-operating rival to the A & P, or the fusing of Penney, Montgomery Ward and Sears, Roebuck - was actually consummated. The typical merger was brought about largely with the aim of securing territorial expansion quickly rather than to eliminate an existing competitor. The fact that absorption of this sort also obviated the possibility of potentially destructive inter-chain competition was usually, though not always, incidental

3. FTC, Chain Store Inquiry, Final Report, pp. 19-20; U.S. v. U.S. Steel Corp., 251 U.S. 417 (1920); U.S. v. International Harvester Co., 274 U.S. 693 (1927).

to this primary purpose.⁴ As the aggregate number of chains in existence increased rapidly during the 1920's, it was clear that, the mergers notwithstanding, the base of the pyramid was becoming broader as well as its height rising.⁵ Here was not the beginning of some gigantic chain store trust. With a great wave of mergers flowing through the late 1920's in a wide range of industries - utilities, banks, services, dairies, amusements, food manufacturing and many others - the situation in the chain store field lacked a distinctive element of danger of imminent monopoly which could have separated it out as requiring special and urgent attention. Anti-chain agitation had reached such levels by 1930 that some sort of action might have been precipitated had the merger trend continued, but the Wall street crash in fact marked the end of the period of most frantic activity and the whole merger issue subsided thereafter. The FTC subsequently recorded its view that nearly all the mergers accomplished by chains had in any case been substantially invulnerable to direct attack because of a technical defect in Section 7 of the Clayton Act, and the decision of the U.S. Supreme Court in the International Shoe Co. case in 1930 also suggests that any proceedings would have been fraught with difficulties. In the absence of a suitable amendment to Section 7 of the Clayton Act - something which was not granted until the Celler-Kefauver Act of 1950 - the Commission took the view that its hands were well and truly tied.⁶

4. FTC, Chain Store Inquiry, Final Report, pp. 7-12. A notable exception (Final Report, p. 10) was Safeway's acquisition of MacMarr Stores Inc. in 1931, which eliminated its major competitor in several states in the Mountain and Pacific Coast regions.

5. FTC, Chain Store Inquiry, Growth and Development of Chain Stores, Table 32, p. 57. The rate of formation of new chains did, however, fall off sharply in most lines in the last few years of the 1920's.

6. Section 7 made it unlawful to acquire the capital stock of a corporation where the effect "may be to substantially lessen competition" but did not prohibit the acquisition of assets - the almost invariable method used in chain store mergers. Acquisition of assets was, for example, the method in the Safeway takeover of MacMarr Stores noted above, and in the Final Report

Chain store mergers also lacked a feature found in many of the landmark antitrust cases: a tendency to bring about "vertical" as well as "horizontal" monopoly. Vertical integration was, for example, at issue in the American Tobacco case, where control was supposedly exerted from plantation to cigar store, and in the Standard Oil case where the product was controlled from oil well to ultimate consumer. It was also a principal element in the suit brought against the "big five" meat packers, the 1920 consent decree into which the packers entered in order to escape prosecution disbarring them from holding any interest in public stockyard companies, terminal railroads, market newspapers or public cold storage plants; from engaging in the business of manufacturing, selling or transporting any of a wide range of specified foodstuffs, principally fish, vegetables, fruit and dry groceries; and from selling meat at retail.⁷ However, no chain store company exerted the type of control the packers had built up for themselves, the chains being in most cases simply retail concerns (with their own wholesale warehouses), and the 1920's mergers were aimed almost entirely at expanding those retailing activities. The ramified interests of the A & P were sometimes compared to those of the packers (not least by the packers themselves' which sought modification of the 1920 consent decree partly on the ground that they were being denied the advantages of vertical integration being allowed to the big food retailing chains which did some of their own manufacturing) but their range and extent was actually

6. (cont'd). (at pp. 20-21) the FTC strongly implied that it would have opposed that merger had it not been for this technical problem. See, Final Report, pp. 20-21, 94-6; FTC v. Western Meat Co., 272 U.S. 554 (1926); International Shoe Co. v. FTC, 280 U.S. 291 (1930); George W. Stocking and Myron W. Watkins, Monopoly and Free Enterprise, N.Y. 1951, pp. 40-41; Carl Eis, "The 1919-1930 Merger Movement in American Industry" in Jnl. of Law and Economics, vol. 12, (1969), pp. 267-96.

7. U.S. v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1 (1911). For the packers' consent decree and extended litigation through the 1920's and into the early 1930's which arose from the attempt of the packers, ultimately unsuccessful, to secure a modification of the degree, see summary in U.S. v. Swift & Co. et al., 286 U.S. 106 (1932). Also, Blaisdell, op. cit., pp. 183-208.

comparatively modest. Although the A & P increased the total of its manufacturing plants from 8 in 1920 to 70 by 1930, nearly all this increase was recorded in the first half of the decade, and between 1925 and 1930 the proportion of A & P's own manufactures to its total sales actually fell 3%. Overall, the A & P manufactured only a similar proportion of its sales to that found in manufacturing grocery and meat chains in general. Ultimately more productive of trouble to the A & P was its subsidiary the Atlantic Commission Co. (ACCO), which bought fruit and vegetables for A & P's own account and also for resale to the trade in general, but relatively little was heard about the activities of ACCO in anti-chain controversy until the late 1930's.⁸ As a rule, those chains selling a wide assortment of goods - food, variety, department store and drug chains - did little manufacturing. The inadequate sales volume provided by their own stores for any particular product; the difficulty of promoting a private brand in the face of strong nationally-advertised brands; the low return on capital investment in manufacturing as compared to opening retail stores; the weight of tradition; the lack of expertise in manufacturing, and the desire to pick and choose between suppliers all contributed to a reluctance to undertake this sort of integration. A common reason in earlier times for manufacturing - the difficulty of obtaining adequate supply from manufacturers under pressure from wholesalers not to sell direct - also ceased to be a consideration for those chains sufficiently large to undertake their own manufacturing. This was especially true of Montgomery Ward and Sears, Roebuck, the much-

8. FTC, Chain Store Inquiry, Chain Store Manufacturing, pp. 5, 14, 93; A.C. Hoffman, Large-Scale Organization in the Food Industries (TNEC Monograph, No. 35) Washington, D.C., 1940, pp. 11-23; Willard F. Mueller and Leon Garoian, Changes in the Market Structure of Grocery Retailing, Madison, Wis., 1961, Table 49, p. 172. ACCO was dissolved under the terms of a consent decree, entered in 1954, which brought to a conclusion a sequence of litigation in which the Government sought to break up the A & P. The rest of the A & P was left intact under the decree. See, Leihar, Chain Stores in America (1963) pp. 372-3.

hated catalogue houses, which both ran down their manufacturing operations in the post-war years as the last vestige of manufacturer resistance was broken down. Most of the integrated manufacturing and retailing chains were actually relatively small companies in specialist lines of business, such as confectionery, sewing machines and electric lamps, with the shoe industry most notable in this respect. However, the leading shoe chain, the Melville Shoe Co. was purely a retailing business.⁹

Perhaps the most notorious habit of the old trusts had been that of waging price wars in which a stubborn competitor was rooted out or brought to terms by the large combine cutting its prices locally below cost and subsidising these losses by profits taken from areas where a monopoly had already been achieved. During the 1920's complaints began to spring up that some of the chains were reviving this old evil, operating "fighting stores", most of the complaints on this score coming from the grocery trade. These charges led the National Association of Retail Grocers to conduct a study of the prices being charged by the A & P stores in different cities, and the discovery of substantial variations was a major influence in persuading the Association's rather conservative officers to support the demands of the militants among the membership, led by John Cunningham of Iowa, that it should seek a Federal Trade Commission investigation into chain store practices.¹⁰ However, little of consequence was ever done in response to such charges. A majority of states had laws prohibiting discrimination in price between localities where made with an intent to create a monopoly or destroy competition, but these laws, a legacy of the trust-busting days of a generation earlier, were moribund. Few independent merchants even knew

9. FTC, Chain Store Inquiry, Chain Store Manufacturing and summary of this in Final Report pp. 12-14; Paul H. Nystrom, Economics of Retailing, vol. I, p.198.

10. See the 'inside story' of the Brookhart resolution, told by John Cunningham in Interstate Grocer, January 26, 1935.

of their existence, and in the few states where they did submit circumstantial evidence of price discrimination to district attorneys they usually received a cool response.¹¹ Innumerable obstacles stood in the way of enforcement of these laws. Nearly all of them permitted discrimination reflecting differences in cost of transport or differences in grade, quality or quantity, as well as discrimination made "in good faith to meet competition". Such permitted differences may have been just about quantifiable in the case of an industry with a simple range of products and relatively stable costs, but they virtually defied analysis in the case of retail distribution. Equally, how could "intent" be proved, and whose "intent" was relevant in a chain store company where everyone from the headquarters in New York to the local manager on Main Street had some influence on prices in the stores? How could "predatory" price cutting be distinguished from the ordinary, often daily, fluctuations and local variations inevitable in retail merchandising - especially with foodstuffs? And how could the use of loss leaders as a form of advertising be distinguished from an overall policy of holding prices down in one store? The mere fact that a competitor had been eliminated was proof of nothing in the field of retail distribution where the rate of business turnover was extremely high and where the unsuccessful often blamed unfair competition for a discomfiture which more dispassionate observers were inclined to attribute to incompetence, bad management or simple bad luck.¹²

11. FTC, Chain Store Inquiry, Final Report, p. 51, states that "Thirty-one States have antidiscrimination laws but so far as is known to the Commission there have been no cases prosecuted under them against chain stores". The Final Report was made in late 1934.

12. For provisions of state laws see, FTC, Final Report, pp. 82-4. A good illustration of the problem may be seen from the case of H.S. Riddle, a Topeka grocer who filed charges with the Attorney-General of Kansas in 1926 accusing a nearby A & P store of cutting prices below those found in the other A & P stores in Topeka for the purpose of putting him out of business. This affair caused quite a stir, the Secretary of the NCSGA and the editor of Chain Store Age issuing dire warnings to chain operators about the dangers of indulging in such tactics. But a few months later, Riddle was still in business and the A & P store had closed up, a sure indication that its price-

Not surprisingly, state law officers, used to dealing with crimes of a more readily identifiable nature, preferred not to venture into these deep and treacherous waters of law and economics. The one body with the appropriate expertise and resources in this area was the Federal Trade Commission, which was empowered to prevent locality price discrimination under both Section 5 of the Federal Trade Commission Act, prohibiting unfair methods of competition, and Section 2 of the Clayton Act, which had been framed to stop the use of "fighting markets" in the wake of the Standard Oil and American Tobacco cases.¹³ However, the Commission had not issued a single order relating to locality price discrimination against any chain store company by the time of the appearance of the Final Report of the chain store inquiry in 1934. In the Final Report, the Commission came to the conclusion, for which it actually produced little evidence, that the ability to vary prices between localities was "one of the chief elements in the growth of chain store systems". Yet the Commission also showed a distinct

12. (cont'd). cutting had been nothing more than a last-ditch attempt to attract trade. (Interstate Grocer, October 23, 1926; April 9, 1927; Chain Store Age, December 1926, "Predatory Price-Cutting"). It may be noted that many of the merchants who were most vocal in accusing the chains of waging local price wars themselves seemed to have little difficulty in remaining in business and even boasted of how they had put neighbouring chain stores out of business.

13. Section 2 of the Clayton Act read: "It shall be unlawful for any person engaged in commerce...to discriminate in price between different purchasers of commodities...where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade".

preference for blaming such variations on "decentralization and difficulty of supervision" and on ordinary competitive response to local price conditions rather than on any deep strategic purpose. Noting the exemption allowed by the "meeting competition" proviso to Section 2, the Commission concluded that there was "no evidence which would establish that price discrimination has not been in good faith to meet competition and there is good ground to conclude that in many cases it has been for that purpose".¹⁴

This verdict was not the end of the matter. Subsequent to the Final Report, several states enacted unfair practice laws which included anti-locality discrimination provisions, and a few cases, none of any great consequence, were brought against chain store companies, mostly in western states. Section 3 of the federal Robinson-Patman Act of 1936, the Borah-Van Nuys amendment, also forbade local price cutting "for the purpose of destroying competition or eliminating a competitor".¹⁵ Then, in 1945, the charge made by the Department of Justice that the A & P had over a period of many years run its stores in certain cities and areas at a loss to drive out competitors became the centrepiece of a major antitrust proceeding - the first general antitrust case ever brought against a chain store company. Whatever view is taken about the evidence advanced by the Government in

14. Corwin D. Edwards, The Price Discrimination Law, Washington D.C., 1959, p. 8; FTC, Chain Store Inquiry, Final Report, p. 51; in the letter of submittal incorporated in the report on Chain Store Price Policies, the FTC noted that "Discussion of this question by officials of leading chain organizations indicates that it is quite a usual practice among them to cut prices locally not only to meet, but to go below, the prices of their competitors...it is interesting to note that, although perhaps aware of their existence, chain-store officials in discussing their price policies make little or no mention of State or Federal laws against price discrimination as influencing or limiting such policies". Generally speaking, these legal questions were a matter of indifference to most practical chain store men and perhaps only of academic concern, before the late 1930's, even to company attorneys.

15. See below, pp. 313, 329, n.11.

support of this charge - a plausible interpretation is that the A & P was forced to sustain losses in these localities because of particularly aggressive local competition, rather than engineered the losses to drive out its rivals - the fact that the Justice Department could bring such a case in the 1940's, using evidence culled from the company's records for the 1920's and 1930's, indicates that similar action could have been taken earlier had the will been there. Indeed, by common consent, it was accepted that price wars were far more common in the 1920's, when the chains were growing fast and jockeying for local advantage, than in later years when policies of "live and let live" were to the fore.¹⁶

It was actually the independent sector which suffered the greater inconvenience from such enforcement of the antitrust laws as occurred in the 1920's. In the early years of the decade, the FTC and the Department of Justice were both quite active in breaking up combinations of

16. U.S. v. Great Atlantic & Pacific Tea Co., 67 Fed. Supp. 626, 640-2, 664-71, 678. The 1954 consent decree which closed the A & P litigation enjoined the A & P from operating any Division at a loss "for the purpose of or with the intent of destroying or eliminating competition... The purpose or intent prohibited in this section shall not be presumed merely by reason of the operation of a Division at a loss". It has often been argued that such price wars would have been pointless anyhow because, entry into retailing being so easy, the elimination of one competitor would merely have been followed by the appearance of another, and so on indefinitely. Thus M.A. Adelman (A. & P: A Study in Price-Cost Behavior and Public Policy p. 14) declares of the Department of Justice charge against the A & P that "...such a campaign would have been foolish and useless...because it would have been impossible to claim the pay-off". This argument is flawed. There was, of course, an almost limitless supply of small grocers, but there were few companies which could compete head on with the A & P on a price basis. The obvious reason why, for example, the A & P withdrew from operating in wide areas of the western states in the 1930's was that it could not sustain an effective presence in the face of Safeway. One of the difficulties faced by the chains was that they competed with each other more directly than they competed with the less efficient independents. That is why even though the chains typically took less than half the grocery business in any city, a pattern existed whereby only one or two, at most three, of the leading chains operated in any one city. Any chain interloper faced an immediate attack by the preexisting chains, which would otherwise exist alongside the local independents without recourse to price wars.

competitors to restrain trade, and such combinations existed almost exclusively in the independent sector. As the FTC observed, with only a little exaggeration, "Practically no one has even alleged the existence of any contracts between, or combinations of, competing chains to fix prices, control production, divide territory, or otherwise seek to restrain competition by united action".¹⁷ Occasional "gentlemen's agreements" not to invade each other's territories fell far short of a pattern of activity likely to offend under the antitrust laws. Quite apart from the fact that the chains as a whole were still in the 1920's in a youthful and buoyant phase and enamoured of the joys of free competition, they had little opportunity or incentive to combine to restrain trade for they were unable to control the market. If they had stopped price competition, divided territories and fixed sales quotas they could have achieved nothing but the revitalisation of their independent competitors. In contrast, independents, especially wholesalers, instinctively resorted to boycotting schemes when chains began to undermine their position. Such schemes were easy meat for the FTC and the Department of Justice, for the courts, clinging to common law concepts of conspiracy, were hostile to activities performed by combinations of individuals which would have been considered lawful if performed by the one giant company. Especially notable was a series of actions brought against wholesale grocery associations in the South and West in the early and mid-1920's by both the Justice Department and the FTC, actions which helped to break down the first line of defence against the grocery chain onslaught in those sections. In a typical case, the FTC was upheld by the court in its order to the Arkansas Wholesale Grocers' Association to cease and desist from circulating bulletins to wholesalers urging them to boycott manufacturers who sold direct to the

FTC, Chain Store Inquiry, Final Report, p. 23.

chains. The fact that the association's bulletins referred warmly to a trade magazine produced by one Robert G. Duncan which carried a "list of undesirables" - manufacturers who sold to chains at wholesale prices - was accepted by the court as evidence of a conspiracy to hinder and restrain interstate commerce, in violation of Section 5 of the Federal Trade Commission Act, even though the Wholesale Grocers' Association forcefully maintained that it had "at most resorted merely to suggestion". Wholesale grocers in the South and West complained bitterly that they were being prevented by such prosecutions from even making representations to manufacturers at a time when their existence was being put in jeopardy, though cynical retailers noted that the wholesalers were happy enough to do business with the chains when they could get it, regardless of the harm this did to their other retailer customers. Whereas in the early 1920's they resorted to the weapons of boycott and trade restraint, in the late 1920's, frustrated by the courts and the unwillingness of manufacturers to heed their demands, these wholesalers shifted to a political attack on the chains, with the American Wholesale Grocers' Association - made up mainly of Southern wholesalers - playing a spearhead role in this. The political attack, although ultimately far more dangerous for the chains - trade boycotts rarely working well for long, even without the intervention of the courts - was, of course, perfectly lawful under the antitrust laws.¹⁸

18. Arkansas Wholesale Grocers' Assn v FTC, 18 Fed. (2d) 866 (C.C.A., 8th, 1927), Cert. Denied, 257 U.S. 533 (1927). Similarly, El Paso WGA v. FTC, 227 Fed. 657 (1922); U.S. v. Southern Calif., WGA., 7 Fed (2nd) 944 (1925) ; and Orders of the Commission against St. Louis WGA, 7 FTC 1 (1923); Wisconsin WGA, 7 FTC 489 (1924); Missouri-Kansas WGA, 9 FTC 153 (1925); North Dakota WGA, 9 FTC 266 (1925), Wisconsin WGA 10 FTC 409 (1926); New Orleans WGA, 11 FTC 415 (1927). See, Joseph C. Palamountain, The Politics of Distribution, Camb., Mass., 1955, pp. 85-7; G.M. Lebhar, Chain Stores in America, 1963, pp. 119-22; Ralph Cassady and Wylie Jones, The Changing Competitive Structure in the Wholesale Grocery Trade: A Case Study of the Los Angeles Market, Univ. of Calif. Press, 1949, p. 9.

Combination to fix prices, an activity often intimately related to efforts to control of the channels of distribution, was also consistently condemned by the courts, the rule being that the "reasonableness" of the prices so fixed was immaterial.¹⁹ Naturally, combinations among independent wholesalers and retailers to maintain or raise prices were of little concern to the chains, for the higher the independents raised their prices, the more likely were the chains to gain business. More significant was the inability of manufacturers to maintain a system of fixed minimum resale prices to be observed by all their distributors. In 1911, after some years of uncertainty as to the status of the practice, the U.S. Supreme Court ruled that the maintenance of resale prices through contracts constituted an unreasonable restraint of trade in violation of the Sherman Act. Subsequent decisions served only to draw in the net more tightly on the would-be price-fixer. A manufacturer was free to name a resale price and to refuse to sell to those who failed to abide by it, but he could not use his distributors or even keep his own records to keep a check on the price-cutters. Only through a definite agency arrangement could he control

19. Fainsod et al, op. cit., pp. 472-3. Note, however, the judgment of a District Court in U.S. v. Southern California WGA, 7 Fed. (2nd) 944 (1925), where the Court rejected the idea that any sort of combination to fix prices was inevitably a violation of the Sherman Act, sympathising with schemes whereby dealers, where one was cutting prices to the detriment of all, combined "in defence of their very existence in the trade" to "fix a price...which shall return to them a reasonable profit over a just and fair handling cost". This was in line with a provision in the state antitrust laws allowing combinations for the pursuit of "reasonable profit", a provision seemingly paralleled only in Colorado, with even the Colorado exemption being ruled invalid by the U.S. Supreme Court in Cline v. Frink Dairy Co., 274 U.S. 447 (1927).

prices all the way to the consumer.²⁰

Sometimes manufacturers were urged to attempt resale price maintenance just by exercising the right to refuse to sell, but it was generally accepted that without a system of contracts, scrutiny and collaborative action nothing much could be done, a price-cutting distributor always being able to get his hands on "bootleg" supplies. Such price maintenance as occurred relied on a tacit common acceptance of it by all distributors and broke down immediately when any individual dealer or group of dealers decided to break ranks. What is more, manufacturers themselves had an ever diminishing enthusiasm for resale price maintenance, even if they sometimes pretended otherwise to their independent distributors. The old-fashioned idea that the reputation and "goodwill" of a product would be devalued by being retailed in cut-price stores had begun to lose ground once the image of the low-price store shifted from that of a fly-by-night "gyp" operation to that of the modern and thoroughly reputable chain store. The risk to the manufacturer in allowing or encouraging unrestrained price-cutting of his product was actually the possibility of adverse reaction from the retailers, as expressed in demands for extra discounts to enable them to compete with the price-cutters or in informal boycotts of his product. More serious still,

20. Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911); U.S. v. Colgate & Co., 250 U.S. 300 (1919); U.S. v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); U.S. v. General Electric Co., 272 U.S. 476 (1926). Some of the states, notably California, were more flexible in allowing resale price maintenance in purely intrastate commerce, though it was hard for effective price maintenance to exist beyond the reach of the federal jurisdiction. The FTC was always keen on breaking up price maintenance schemes, partly because it considered them economically undesirable and partly because this was one of the few areas of antitrust enforcement in which the courts gave the Commission consistent support. The unusually relaxed situation in California kept alive a considerable interest in that state in price maintenance in the 1920's, with the consequence that when the prevailing political climate became favourable to price control laws in the 1930's, the trade in California led nationally in seeking appropriate legislation.

perhaps, was the danger that distributors would try to substitute their own price-protected private brands and many wholesalers and chain stores did in fact extend their range of private brand merchandise during the 1920's precisely because, although harder to sell, it was more profitable than the nationally-advertised brands which formed a natural target for loss leader selling. In the rhetoric of trade protest in the 1920's, it was the chain stores who were cast in the role of the villain of the piece, "baiting" gullible consumers with loss leaders and making their inflated profits on unfamiliar "blind" merchandise, but in fact selling goods at a loss for promotional purposes was something done at times by most retailers, including many of those who belonged to the very trade associations which constantly demanded the legalisation of resale price maintenance. Even in the 1920's, when a laissez-faire attitude prevailed, many chain executives formally disavowed the use of loss leaders and their actual pricing policies were perhaps not all that different from those which would have been adopted under full-scale price maintenance; no manufacturer was, after all, likely to try to fix a resale price so high that major distributors were reluctant to stock it.²¹ However, the chains were also unanimous - or believed to be unanimous, for they rarely took open positions on the subject - at this time in wishing to keep control over their retail prices entirely in their own hands. Some independents -

21. Nystrom noted in 1930 (The Economics of Retailing, vol. I, pp. 258-9) that "it has been frequently remarked that breaks or cuts in suggested resale prices during recent years have been more frequently made by independent stores than by either chain stores or department stores". The FTC found (Chain Store Inquiry, Chain Store Leaders and Loss Leaders, p. 4, only one chain executive in any line who was willing to speak up for the use of loss leaders as a good business practice, though many chains used them. In the 1930's, chain store men, in public at least, consistently condemned the use of loss leaders and sometimes blamed independents for wrecking stable price levels.

more, indeed, than trade association executives, whose every instinct was to set themselves up as managers of price-fixing schemes, cared to admit - also took this view. In such circumstances, few manufacturers in free competition with producers of rival nationally-advertised or private brands could afford to have their own prices stranded high and dry above the market level. Realistic leaders of the independent trade accepted this, but they did feel that price maintenance, even if incapable of leading to an abolition of price competition, might at least put an end to the more predatory type of loss leader selling, by whomsoever it was practiced, thus creating a price floor above which distributors would be free to compete on the basis of their own genuine efficiency.

Undoubtedly the most inflamed controversies in the 1920's flared up as a result of the conviction of independents that manufacturers, not content with selling direct to large chains were further fostering their growth, either as a result of a conscious choice that this was the form of distribution of the future or because of intimidation, by showering them with extra price concessions. Quantity discounts which were unobtainable by small wholesalers; so-called "advertising allowances" which were actually used by the chains to advertise themselves or simply to swell their coffers; brokerage commissions compelled by over-mighty chain buyers who demanded that manufacturers dispose with the services of the independent brokers - these were the stuff of more innuendo, more double-crossing, more intrigue and more angry calls for boycotts than every other aspect of chain store operating methods put together. The complaints of the wholesalers took on a moralistic tinge because, at root, they believed that it was really an abomination for the manufacturers to sell direct to the chains at all; the grievances of retailers were aggravated because they tended to compute the size of these extra discounts to the chains by

comparing their own retail prices with chain store retail prices, ignoring the extra costs added to distribution by the relative inefficiency of the wholesaler-retailer system once the goods had left the manufacturer.²²

In the early 1920's, in line with its policy at that time of acting vigorously to ensure a free flow of goods through the channels of distribution, the FTC sought to use Section 2 of the Clayton Act against this "buying end" price discrimination. In the Mennen case, the Commission's order required the Mennen Co. to sell to retail cooperatives at wholesale discounts when they bought in wholesale quantities. In the National Biscuit case, where the manufacturer's custom was to deliver to each store separately, the order required the company either to base its discounts to chain stores on the quantity delivered to each store, without reference to the overall purchases of the chain, or, alternatively, to allow independent grocers to pool their purchases to get the quantity discounts obtained by the chains on the basis of their large aggregate purchases. In both these cases, the Court of Appeals for the Second Circuit delivered crushing rebuffs to the Commission. In the first place, the Court took the view, based on its understanding that Section 2 had been incorporated in the Clayton Act by Congress solely with the intent of curbing locality price discrimination, that the Section had no applicability unless it had an effect to lessen competition between sellers, not between

22. The term "quantity discount" as used below refers to both volume discounts (granted on the basis of an aggregate of sales over a period of time) and quantity discounts made on the basis of a single large order. "Advertising allowance" refers to any payment, in money or kind, made actually or ostensibly by a seller to a retailer in order that he should give his product special display, advertising mention, tell his clerks to "push" it, etc. Brokerage commissions were almost entirely a food trade issue, independent food brokers existing to contact buyers on behalf of sellers, especially packers of fruits, vegetables, etc. Actual trade usage of these terms was never as precise as that of the economics textbooks. The term "rebates" was often used by independents to describe such allowances, at least when only the chains got them, because of its overtones of trust methods.

their customers. In neither the Mennen nor the Biscuit case was there any evidence that this had been the effect, and the ruling clearly seriously limited the usefulness of Section 2.²³

In the second place, the Court emphatically upheld the right of sellers to make reasonable classifications based on trade status and to adopt whatever differentials they saw fit between such classifications provided that there was no discrimination, except as authorized by the provisos to Section 2, within the classifications. Thus in the Mennen case, the Court argued that the fact that the retailers had established a cooperative for purchasing had not thereby converted them into wholesalers, because the character of the purchaser did not depend upon the method of his buying but upon the method of his selling. The Mennen Co. "did not discriminate as between retailers but sold to all retailers on one and the same scale of prices. And it did not discriminate as between wholesalers but sold to all wholesalers on one and the same scale of prices".²⁴ This doctrine was by no means unreasonable - most distribution, after all, depending upon the maintenance of an orderly graduation of function from producer, middleman, retailer to ultimate consumer - and on the FTC's theory the whole of established business practice would have been turned upside down, something which had never been contemplated by Congress in framing Section 2 even if, literally construed, it contained no protection for trade differentials. Furthermore, the Court did not insist that the seller was compelled to adopt this mode of classification, but rather allowed for considerable flexibility. Indeed, in the Biscuit

23. Mennen Co. v. FTC, 288 Fed. 774 (C.C.A., 2nd, 1923), Cert. Denied 262 U.S. 759 (1923); National Biscuit Co. v. FTC, 299 Fed. 733 (C.C.A., 2nd, 1924), Cert. Denied, 266 U.S. 613 (1924). See also, John P. Miller, Unfair Competition, Camb., Mass., 1941, pp. 133-134; Thomas C. Blaisdell, The Federal Trade Commission, pp. 63-67.

24. Mennen Co. v. FTC, 288 Fed. 774, at p. 781.

case, just one year later, it disregarded its own theory of what a wholesaler was by sustaining the right of the manufacturer to sell to the chain store at lower prices than other retailers even though a chain was, in the character of its selling, quite clearly a retailer. In the Biscuit case, the Court maintained that the extra discounts to the chains could be justified by the large volume taken by the chain overall and by its ability as a single business entity to promote the product, even though the FTC had found that it cost the Biscuit Co. no more to sell to the independent stores than it did to each unit of the chain. What the decisions in these two cases boiled down to was a statement by the Court that the granting of price differentials, in the absence of some substantial restraint of competition between sellers, should be left to the discretion of the manufacturers. The U.S. Supreme Court declined to review these cases - thereby in effect, if not strictly in law, confirming the judgments - and the FTC gave up the fight. The Commission might well have explored other lines of attack. For example, a case involving a discrimination as between a wholesaler and a chain store could have been brought to test out the limits, and reveal some of the implicit confusion, of the judicial attitude towards the reasonableness of trade differentials. Similarly, the granting of secret rebates might have been attacked with Section 5 of the Federal Trade Commission Act as an unfair trade practice. The Commission could also have tested what differentials were permissible within a classification based on quantity differences; but none of these things was done. In 1929, as a result of a private suit, the U.S. Supreme Court decided that Section 2 should be construed so as to apply to a lessening of competition between buyers as well as between sellers,²⁵ but the FTC did

25. Van Camp Co. v. American Can Co., 278 U.S. 245 (1929).

not seize the opportunity, its attention having been by this time diverted to the task of encouraging industries to disavow unfair rebates through the self-denying ordinances of trade practice conference procedure. In 1933, the Commission issued a complaint against the Goodyear Tire & Rubber Co., but the Goodyear case was not finally decided until 1939, three years after the old Section 2 had been rewritten by the Robinson-Patman Act. It is clear, therefore, that during the period of greatest chain store growth manufacturers were free to extend to chain stores whatever discounts they pleased.

The independent sector was not always the victim of this state of affairs. The Mennen and Biscuit cases notwithstanding, well established retailer buying groups were often quite successful in persuading manufacturers to extend them wholesale discounts or otherwise favourable terms.²⁶ Similarly, the weight of convention also sometimes ensured that manufacturers treated wholesalers more favourably than the quantity they purchased and their ability to provide service really warranted. In lines where chains were weak, wholesalers were able to ensure the persistence of discount structures which barred chains from the full advantages of direct buying. Nevertheless, the general view of independents was that the chains were getting limitless extra discounts and allowances and that these were the fuel upon which the engine of chain store expansion relied. So complex, variable and shrouded in secrecy - and so subject to deliberate obfuscation by the parties involved - were these buying concessions that opinion and prejudice, not solid fact, always determined the shape of

26. The FTC found (Chain Store Inquiry, Cooperative Grocery Chains, p.95) that only one-quarter of retailer cooperatives (in the grocery field) as of 1930 were having any difficulty in obtaining wholesale discounts from manufacturers, and that such difficulties as occurred were associated with a relatively few manufacturers. Following the controversy surrounding the Biscuit case litigation, the National Biscuit Co. itself extended the maximum 17½% discount given to the chains to members of the IGA and some retail-owned wholesale houses. (Interstate Grocer, March 10, 1928).

discussion. The FTC made some effort to get to the bottom of this murky subject - which was, significantly, the one area of its chain store inquiry in which it met with substantial obstructionism - but without coming to any definite conclusions. The discounts reported to it by manufacturers in the grocery, drug and tobacco fields indicated that the chains' buying advantage was an appreciable element in their lower selling prices without being of obviously decisive importance, but the Commission was evidently not entirely happy with this data and in the Final Report concluded vaguely that while "no exact measurement" of the relative effect of this factor was possible "it can be said, however, that lower selling prices are a very substantial, if not the chief, factor in the growth of chain-store merchandising and that lower buying prices than are available to independents are a most substantial, if not the chief, factor in these lower selling prices". Elsewhere in the Report, the Commission went so far as to refer to the 1920's as "a period when chain stores were enjoying an extensive growth based largely upon special price concessions from manufacturers". Nothing in its data justified that conclusion, which was certainly exaggerated, but the fact that the Commission could slip into such overstatement may make it seem less remarkable that many passionate opponents of the chain stores believed that this was the inner secret at the heart of their success.²⁷

27. See the several reports of the Chain Store Inquiry into Special Discounts and Allowances and the summary of these in the Final Report, pp. 53-63, 90. For forceful criticism of the apparently exaggerated emphasis placed on special discounts and allowances as a factor in chain store success in the course of the Final Report, see Hoffman, op. cit., pp. 104-7 and Charles F. Phillips, "The Federal Trade Commission's Chain Store Investigation: A Note" in Journal of Marketing, January 1938 pp. 190-2 and "The Robinson-Patman Anti-Price Discrimination Law", Harvard Business Review, vol. 15 (1936), pp. 62-75. Such criticism, it may be noted, relied on the FTC's own data, thus trusting to the Commission's judgment and competence in one respect but not in another. Perhaps the Commission's scepticism about its own Chain Store Inquiry data was encouraged by the findings of its investigation of the arrangements made in 1926 between the Goodyear Tire & Rubber Co. and Sears, Roebuck whereby Sears

Virtually every aspect of antitrust interpretation and enforcement in the 1920's was unfavourable to the independent trade. On the one hand, the chains were allowed to merge, receive lower buying prices and set their retail prices more or less as they pleased; on the other hand, counter-activities by the independents were always open to attack. Small business complained that it found itself in a peculiarly invidious position.

27. (cont'd). obtained "Allstate" private brand tyres on a very advantageous "cost plus" basis which enabled it in the course of a few years to become the leading tyre retailer in the country. According to the historians of Sears, Roebuck, the company's small "class C" stores, which concentrated on hardware and auto supplies, were "Generally profitable from the outset, largely because the "Allstate" automobile tyres they sold were priced about 20-25 per cent below other tyres of comparable quality". In 1926, 120,000 independent dealers did about 90% of the tyre renewal business in the United States; ten years later, there were only 60,000 independents left, with less than 60% of the business. Sears, Roebuck, Montgomery Ward and filling station chains were doing a quarter of the renewal sales with their private brands, with quickly growing auto accessory chains also becoming a force, and Goodyear, Goodrich and Firestone had themselves set up their own retail chains in direct competition with independent dealers carrying their tyres. This condition, and the constant price cuts forced by the chain private brands, led to the appearance of the National Association of Independent Tire Dealers in the mid-1930's as a factor in the political battle against the chains. Between 1926 and 1936 Sears was considered to hold the price initiative in the tyre business because of the "Allstate" contract, conditions easing after 1936 when, following enactment of the Robinson-Patman Act, the "Allstate" contract was cancelled. (See, Order of the Commission, 22 FTC 232 (1936); Emmet & Jeuck, Catalogues and Counters, p. 351, 617-20; Stocking & Watkins, Monopoly and Free Enterprise, pp. 364-6; Miller, Unfair Competition, pp. 136-9; Clair Wilcox, Competition and Monopoly in American Industry, (TNEC Monograph, No. 21), Washington D.C., 1941, pp. 49-50; Lloyd G. Reynolds, "Competition in the Rubber Tire Industry" in American Economic Review, vol. 28 (1938) pp. 459-68; 1939 Census of Business, Retail Trade Vol. I, Part I, p.7. See also below, pp. 278-83. Conditions in the tyre industry were abnormally acute, but it would be the merest speculation to suggest what importance the low prices obtained from manufacturers on private brands or merchandise not sold to other distributors hadⁱⁿ the success of variety chains, department store chains, etc., lines of trade which the FTC did not study in its Chain Store Inquiry precisely because the proportion of directly comparable merchandise was too low and indirect comparison too imprecise. For a discussion of the imprecision, variability and ambiguity implicit in any estimate of price discrimination, see Miller, Unfair Competition, pp. 122-130.

Farmers were allowed, in the conduct of cooperative marketing, to act substantially without restraint from the antitrust laws thanks to the 1922 Capper-Volstead Act and the Cooperative Marketing Act of 1926, and their combinations were actually fostered by many states. Similarly, as Paul Nystrom, Professor of Marketing at Columbia University and later president of the Limited Price Variety Stores' Association, put it in 1930, the "destructive price-cutter is to the regular, established retailer what the scab is to the trade unionist", but whereas labour was permitted to form unions and strike for higher wages and run boycotts against unsatisfactory employers, retailers were not lawfully able to combine to boycott unfair manufacturers or demand extra discounts or to raise prices to the consumer.²⁸ It was not as if small business was in the same position in this regard as big business, for one giant company, thanks to the fiction of the corporate form, was able to combine and coordinate the activities of thousands of stores under its control in perfect freedom.

There was throughout the 1920's a minority judicial viewpoint, most prominently represented by Supreme Court Justice Louis Brandeis, to the effect that the activities of small business should be judged according to a "rule of reason", just as those of U.S. Steel and International Harvester and other giant combines were, and not merely condemned out of hand as unlawful combinations in restraint of trade. Thus, in the period before his elevation to the bench, Brandeis was a prominent advocate of legalised price maintenance, which he identified with the preservation of a healthy small business, and from the bench, through a series of dissents, he pressed the idea that the actions of trade groups in respect of

28. Economics of Retailing, vol. II, p. 471.

the circulation of market information, price lists and the like should be judged on their merits in individual cases.²⁹ The judiciary as a whole, however, clung tenaciously to the view that once it started off down that road it could not begin to acknowledge the existence of permissible and perhaps even laudable combinations of this type without thereby becoming embroiled in endless political and economic controversy.³⁰

It was not Brandeis but Herbert Hoover, first as Secretary of Commerce and then as President, who served to bring about the first modifications in this situation. Hoover, unlike Brandeis, was no trust-buster, and his election to the Presidency in 1928 ensured that there was no possibility of any strong action to break up the big chains or impede their mergers. On the other hand, Hoover was a believer not just in getting the FTC and the Department of Justice "off the back" of business - the attitude of conservative Republicans - but in a positive philosophy, with a mildly progressive tinge, of using government to foster a spirit of business self-examination and self-regulation. The new philosophy was that readjustment of policies within entire industries by a process of constructive cooperation would be more beneficial both to industry and the public than the old-style method of singling out a few individual companies for attack, and that this more relaxed approach would assist the constructive forces within each industry and isolate the truly unscrupulous or predatory. This philosophy found expression in the holding of numerous trade practice conferences between the FTC and various industries after 1925, a conference for the grocery trade being held in 1928. The times were not yet ripe for any

29. Alpheus T. Mason, Brandeis: A Free Man's Life, N.Y., 1956, pp. 424-8; Dissent in American Column and Lumber Co. v. U.S., 257 U.S. 377 (1921). The first federal price maintenance bill, the Stevens bill first introduced in 1914, was drawn up under his direction.

30. U.S. v. Trenton Potteries Co., 273 U.S. 392 (1927); but see note 19 above.

overt abandonment of the old antitrust shibboleths, and the rules drawn up under the auspices of the FTC in such conferences tended to keep rather closely to bland restatements of existing law in addition to various high-sounding but often vacuous expressions of industry intent to avoid various practices which it and the FTC believed were undesirable without necessarily being illegal.³¹ Nevertheless, even these hesitant first steps to a new industrial order stirred considerable excitement. In the grocery trade practice conference, for instance, the contending factions within the trade found themselves obliged to openly examine their respective attitudes to various trade practices, in a collaborative setting, for the first time, and although the conference was too peripheral an event to distract the majority of independent grocers from anti-chain activities, and was also distrusted as a form of collaboration with the enemy by some of the most militant, it did provide the more conservative leaders of the independent trade with some ground to argue that there was a better way to meet the menace of chain malpractices than trying to whip up political agitation against them. In this subtly different climate, interest in the possibilities of legalised resale price maintenance also began to stir, hearings being held on a price maintenance bill by Congress in 1926 for the first time since 1917, Senator Arthur Capper of Kansas and Congressman Clyde Kelly (*Pennsylvania*) then reintroducing their bill, to an increasingly considerate reception, each year thereafter. Undoubtedly these climatic trends also proved beneficial to the spread of retail cooperatives and voluntary chains towards the close of the decade, for it meant that the widespread practice in these groups of members meeting together to fix the

31. Blaisdell, The Federal Trade Commission, pp. 75-94; Miller, Unfair Competition, pp. 267-82; G. Cullom Davis, "The Transformation of the Federal Trade Commission, 1914-1929", Mississippi Valley Historical Review vol. XLIX (1962), pp. 437-55.

prices of the week's bargain "specials" went unchallenged by the FTC or the Department of Justice. Although the aim of such pricefixing was to reduce prices and make the independents more competitive, it was, on the interpretation of the law favoured by the U.S. Supreme Court, of extremely doubtful legality.³²

The trade practice conference procedure was sharply downgraded by the Federal Trade Commission in 1930, in a feeble capitulation to criticism from sections of the Congress and the Department of Justice that it had allowed self-regulation to develop into price-fixing and market-rigging.³³ Similarly, although the House passed a severely amended version of the bill in 1931, Congress failed to act on the Capper-Kelly bill. The result was that between 1930 and 1932, as prices fell and millions lost their jobs, little or no action was taken to build on the earlier ventures into "cooperative competition". The desperate conditions of the depression made industrial self-regulation an impossibility in industries such as the retail trade with many competitors of varied size and interests, and increasingly suggestions came, even from organisations like the U.S. Chamber of Commerce, that government would have to modify the antitrust laws and enforce some scheme of industrial discipline if the downward spiral was ever to be arrested.

The answer came in the National Industrial Recovery Act, the core of the First New Deal of 1933. For nearly two years, from the Summer of 1933 to the Spring of 1935, the antitrust laws were, in effect, put in a state of suspension while business and government, with token representation from consumers and labour, joined to formulate codes of fair practice for

32. This point is noted by the FTC itself, in Final Report, p. 20.

33. Blaisdell, The Federal Trade Commission, p. 96.

each industry, codes which were not just bland restatements of existing law or airy expressions of industry sentiment as the trade practice conference rules had been, but detailed and draconian prescriptions backed up by a vast if creaking machinery of enforcement. Many of the activities hitherto condemned and punished as combinations in restraint of trade were now condoned, indeed required, by Government, and in the new language of politics and business alike it was the "chisellers", "ruinous competition" and "rugged individualism" which were held to be the cause of the nation's blight. All the inhibitions built into the FTC's trade practice conference procedures were cast aside, as indeed was the FTC itself. Trade associations ascended to hitherto unimagined heights of power as their officers constituted themselves into local, state and national code authorities, often with very loose supervision by the National Recovery Administration, raised levies from the trade to pay for their work, and issued a stream of decrees as to what practices were or were not henceforth to be allowed.

The National Industrial Recovery Act was not specifically the result of conditions in the retail trade, let alone of the conflicts between chains and independents. On the contrary, retailing was a forgotten industry in the early New Deal, its problems passing almost unnoticed amid the attention given to the banks, agriculture and manufacturing industry. A strong body of opinion within the NRA believed that the extension of the codes to the distributive trades was futile and dangerous, both because retailing was carried on through so many outlets and was therefore impossible to supervise, and because, as an area of the economy with only a minor component of interstate commerce, such extension was vulnerable constitutionally. However, the NRA was a monster which no one could control: every industry, and every minor branch of an industry demanded its own code, and the supply increased irresistibly to meet that demand. Within retailing and wholesaling, dozens of codes and sub-codes were adopted, some of them mutually contradictory or patently designed to help one small group at the expense of another.

The NRA from the first had a split personality. On the one hand, a

strong element of compulsion, even intimidation, featured in its activities, an aspect symbolised by the use of the Blue Eagle, those permitted to display this emblem having the status of approved members of a sort of gigantic national "white list". On the other hand, after the initial period of hysteria with its Blue Eagle parades and mood of a national emergency, this element of compulsion gave way to a more subdued process of fostering business compliance through cooperation. Increasingly disturbed by the difficulty of achieving compliance through the courts and by Congressional and business criticism of the arbitrariness of many of the codes it had permitted, and racked by internal differences over fundamental questions of purpose, the NRA progressively settled back into an attitude of merely monitoring the cooperative activities of business. Thus although in many industries small coteries worked assiduously to use the machinery of the NRA to do damage to those of their competitors against whom they had a grudge, in general the NRA codes proved effective only where they were backed up by a wide consensus within the industry.³⁴

In so far as independent merchants looked to the NRA as a way of using the power of Government to cripple the chains they were bound to be disappointed, though in the excitement of the hour they were slow to realise it and some insisted on making the attempt. Of particular importance for later history was the struggle which developed in the grocery trade between the smaller wholesalers and retailers and the big buyers. The militant

34. Leverett S. Lyon, et. al., The National Recovery Administration: An Analysis and Appraisal, Washington D.C., 1935, pp. 238-242. Ruth Prince Mack, Controlling Retailers: A Study of Cooperation and Control in the Retail Trade with special reference to the NRA, N.Y. 1936 (1968 reprint), passim. Charles F. Roos, NRA Economic Planning, Bloomington, Ind., 1937, (New York, 1971, Reprint) pp. 78-81

United States Wholesale Grocers Association (the former American Wholesale Grocers' Association) led an alliance which included the National Food Brokers' Association and large sections of the retail grocery trade in an effort to wrest from the NRA severe restrictions on the discounts, allowances and brokerage commissions available to the big buyers. Their extreme demands were unacceptable to the big voluntary chains, which were consequently drawn into a new and uneasy alliance with the corporate chains, and the economic struggle was further exacerbated by bitter factional rivalries, notably between the two major wholesale associations, the United States and the National-American. This whole conflict was about the fundamental character and future of the grocery trade - whether the old small wholesaler-retailer system or the new chain systems, voluntary and corporate, should prevail - and this was a question that could not possibly be resolved by the NRA. The issues undecided, the struggle then spilled over into the campaign for what became the Robinson-Patman Act.³⁵

Relationships between chains and independents tended to be more harmonious in formulating attitudes towards retail price control. This was outstandingly true of the drug trade, where the large chains, headed by Liggett and Walgreen,

35. See below, pp.289-91. In 1933, at the very beginning of the NRA, the American Wholesale Grocers' Association (mainly Southern) and the National Wholesale Grocers' Association (mainly Northern) attempted a merger, apparently because of fears that the NRA might otherwise not recognise either as the voice of the wholesale grocery trade. The merger almost immediately fell apart, amid accusations from AWGA president J.H. McLaurin that the National's officers had "sold out" to the chains, especially on the question of the retention of brokerage and advertising allowances. Following this, McLaurin reestablished the American Association under the new name of the United States Wholesale Grocers' Association, the National adopting the title of the National-American. Both associations had substantially the same memberships as before the attempted merger, but they emerged with the ideological differences between them considerably sharpened. (Interstate Grocer, June 24, August 19, September 9, October 21, 1933; February 17, March 24, 1934).

had agreed in 1932 to cooperate with the National Association of Retail Druggists in its campaign for the Capper-Kelly price maintenance bill.³⁶ With the coming of the National Industrial Recovery Act the Capper-Kelly bill was shelved, and the combined forces of the drug trade

36. NARD Journal, June 16, 1932. There seem to have been several factors behind the drug chains' change of position: (1) the underlying tendency, seen repeatedly in distribution, for erstwhile "upstart" elements, once they achieve a certain maturity, to follow policies which increasingly converge with those pursued by the older-established groups in the field. This tendency was accelerated by the peculiar psychology of the depression, with its general business revulsion against unrestrained competition. (2) The disturbance caused by a small but irritating fringe of "pineboards", price-cutting independents and local chains, which sprang up in the depression and did not carry the overheads of expensive store fixtures, high rent locations and unprofitable outlets which burdened the larger chains. Drug chains were also affected by loss leader sales of drug store merchandise in grocery, variety, department stores etc. (3) Comparison with the immense success of the Boot's Pure Drug Co. in England, which had grown to a greater size than any U.S. drug chain under conditions of strict resale price maintenance. A holding company, Drug Inc., controlled both Boot's and Liggett's until 1932. (4) The relatively small and cohesive nature of the drug trade, and the considerable degree of interlocking of ownership, made a system of thorough price maintenance seem far more feasible than in most other trades. (5) The strength of the NARD and its state and local organisations. The semi-professional status of pharmacy, the homogeneity of the independent sector and the restrictions on entry imposed by the pharmacy laws encouraged the idea that resale price maintenance would be effectively observed by the overwhelming majority of the independent retailers. The restrictions on entry removed the obstacle to price maintenance found in other lines that any enhancement of prices tended to bring in an influx of new distributors, thus reducing the volume of business available to each. This discipline in the independent sector meant that the chains, which because of their size could not disregard fixed prices without attracting notice, could follow maintained prices secure in the knowledge that the independents would follow suit. (6) Only in the drug trade, apart perhaps from the tobacco trade, did the independents consistently and loudly ask the chains to support price maintenance.

See, Ewald T. Grether, Price Control Under Fair Trade Legislation, N.Y., 1939; Palamountain, The Politics of Distribution, pp. 90-106; National Recovery Administration, Division of Review, "Restriction of Retail Price Cutting with Emphasis on the Drug Industry" (Work Materials No. 57, 1936); U.S. Congress, House Judiciary Committee, subctte., Hearings on... Resale Price Maintenance, 75th Cong., 1st Sess., January 1937, pp. 22-25 (Statement of F.J. Griffith, exec. secy. National Association of Chain Drug Stores).

sought the legalisation of price maintenance from the NRA. This the NRA was unwilling to grant, but it did ultimately approve a "loss limitation" provision which prohibited sales below manufacturer's wholesale list price in dozen lots. This was less than the trade had hoped for - a typical minimum retail margin of 15%, as opposed to the NARD's historic demand for 33 1/3% - but it was a crucial breakthrough.³⁷ Meanwhile in California, long the stronghold of price maintenance sentiment and where the courts had traditionally been sympathetic, the independent and chain druggists combined their efforts to give effect to the first (in 1933) of a new wave of resale price maintenance - what the trade called "fair trade" - laws. Between 1935 and 1939, 43 more states passed "fair trade" laws, the greatest rush coming in 1937 after the U.S. Supreme Court in December, 1936 performed a stunning about-turn and upheld the California and Illinois fair trade laws, including their vital provisions binding non-signers. In 1937 Congress was also persuaded to pass the Miller-Tydings bill exempting the use of price maintenance in interstate commerce from attack under the Sherman and Federal Trade Commission Acts.³⁸

These fair trade laws were all fundamentally similar in content, being based either on the California model, which had been drawn up by the retail druggists, or on a slightly revised model bill produced by the National Association of Retail Druggists, or being a synthesis of these two. Two limiting provisions in the laws required that all price maintained items

37. Miller, Unfair Competition, pp. 240-1; Roos, N.R.A. Economic Planning, pp. 269-270; NARD Journal, August 17, September 7, 1933; June 21, 1934.

38. Federal Trade Commission, Report on Resale Price Maintenance, Washington D.C., 1945, pp. XXVI - XXVIII, 67-87. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

should be in "fair and open competition with commodities of the same general class produced by others" and that legality was not conferred on agreements "between producers, or between wholesalers, or between retailers as to resale prices". These limitations proved invaluable in steering fair trade through the courts, the U.S. Supreme Court itself approving the legislation with much comment about the supposed safeguards provided and on the theory that manufacturers should be allowed to protect the "goodwill" of their product. But from a practical business point of view such limitations were meaningless. The real demand for price maintenance came not from manufacturers desirous of protecting the "goodwill" of their products but from the distributors, and from the first price maintenance was spread in the drug trade by distributors coming to agreements to boycott the goods of manufacturers who failed to name a resale price (or named a price which was too low) or, alternatively, giving special promotion to those products which were satisfactorily priced. In one particularly celebrated case, the Pepsodent Co. was brought to heel in California in 1935 by a statewide boycott which kept its products out of every drug store except for a small fringe of cut-raters, a partial boycott in sympathy also spreading to other states. Until about 1938, when concern began to develop in the trade about the increasingly close attention being paid to its activities by the Department of Justice and the Federal Trade Commission (which was an impotent body during the NRA period and for a year or two thereafter before reviving as the decade went by) there was not even any particular effort made to disguise the element of "horizontal combination" between dealers to "encourage" manufacturers to toe the line,

and within about three years most drug items and also many sundries sold in drug stores were under resale price maintenance.³⁹

These fair trade laws were enacted by domino effect, usually with little debate, simply because their supposed purpose to stop unfair loss leaders sounded vaguely satisfactory to most legislators and because they saw no reason to deny what the legislators in every other state were granting. This domino effect reached its climax when the U.S. Congress enacted the Miller-Tydings amendment, despite the opposition of the Roosevelt administration, largely under the sway of the argument that it was not itself expressing an opinion on price maintenance but was merely enabling the several states to give full expression to their own legislative wishes. The widespread view at the time that "chiselling" had been a major cause of the depression and that there was such a thing as a "just price" provided the favourable political psychology and the National Association of Retail Druggists, which ran the whole campaign through its state organisations, demonstrated immense ability and discipline in capitalising upon it.⁴⁰ The failure of the chains to oppose this movement also ensured that there was no focus of opposition, at least until about 1937 when farm and consumer groups began to stir. Active support for the fair trade bills came from the drug and tobacco chains, and most chains in other lines adopted an attitude of neutrality or indifference. Trade opposition in fact came almost exclusively from the department stores' organisation, the National Retail Dry Goods' Association (NRDGA), and even this body was somewhat split on the issue, such a prominent department store operator as John Wanamaker in Philadelphia

39. FTC, Report on Resale Price Maintenance, (1945), pp.92-102, 166-249. Grether, Price Control Under Fair Trade Legislation, pp. 90-105, 347-51; Corwin D. Edwards, Maintaining Competition, N.Y., 1949, p.72. Only one state (Wisconsin) provided for any review of prices by a state agency so that "unfair and unreasonable" contracts could be nullified.

40. Palamountain, The Politics of Distribution, pp. 235-253.

strongly endorsing the legislation. One company, R.H. Macy & Co., which for years had fought the other New York department stores tooth-and-nail and boasted that it would under sell anyone, stood alone in waging an unflagging campaign through advertising, pamphlets, and at legislative hearings against price-fixing in all its forms, but not even in New York State was Macy strong enough to block the movement.⁴¹ Among the leading chains, Sears, Roebuck was the only ostentatious opponent of the fair trade laws, but it was unable to carry Montgomery Ward or the Mail Order Association, which had no official position, in this attitude. Furthermore, Sears' opposition was clearly intended mainly as a publicity stunt, to advertise its lower price private brand drug lines, rather than as a serious intervention in the legislative process.⁴²

Price maintenance was looked upon as being mainly a drug trade affair and therefore of little concern to other chains. Most chain store men seem also to have reasoned that price maintenance, if it was to be tried in other lines, would operate merely to create price floors, thus curbing the "chisellers" without artificially inflating prices or preventing the lower-cost distributors from passing on the advantage of their economies to the consumer. The only significant use of fair trade other than in the drug trade developed in specialist lines like liquor, electrical goods, the book trade and tobacco products (except cigarettes) where the retailers for whom these products were the core of their trade were united as to its value and had suffered from retailers in other lines, chain and independent,

41. House Judiciary Cttee., Hearings On...Resale Price Maintenance, 75th Cong. 1st Sess., January 1937, pp. 124-81, 200; "Why United Cigar Opposes Price Cutting", Chain Store Age, August 1935; "As We See It", Chain Store Age, December 1935; Tobacco Leaf, May 11, 1935, p. 3.

42. House Judiciary Cttee., Hearings On...Resale Price Maintenance, 75th Cong., 1st Sess., January 1937, pp. 113-7; Senate Judiciary Cttee., Hearings On...Resale Price Maintenance, 75th Cong., 1st Sess., March 4, 1937, pp. 18-27.

using their products as loss leaders when they themselves had to sell them at a profit in order to survive. Around 1937 there was considerable interest in resale price maintenance in most trades, but this soon subsided because of a general belief that price maintenance was not practicable.⁴³

An alternative line of development from the NRA came in the enactment of state legislation prohibiting below-cost selling by wholesalers or retailers. In all, 25 states had enacted general sales-below-cost laws by May 1, 1940, and two other states, Michigan and Louisiana, had laws covering limited ranges of merchandise only. In 12 states, all of them in the South or west of the Mississippi, the areas where the antitrust tradition was strongest, the laws were of a type generally known as "unfair practices acts", regulating not only sales below cost but price discrimination. The anti-discrimination provisions, which in general were little used, perpetuated the old idea of preventing the use of price wars to drive out competitors and were at least in part an anti-chain gesture. In 15 states, these being geographically more widely distributed and including four of the New England states, New Jersey and Pennsylvania, the laws were of a type known as "unfair sales acts" and were designed only to prevent sales below cost. The connection of this latter variant of anti-loss leader legislation with past state antitrust laws was remote: indeed, the thrust of the laws, however well camouflaged in the language used, was arguably exactly opposite to the antitrust tradition.⁴⁴

43. Resale price maintenance is thought to have reached its peak about 1950-1952, then declining in the face of adverse court decisions striking out the essential provision binding non-signers, the systematic defiance of the new discount houses and the general business laissez-faire mood of the 1950's. For general discussions of the limited applicability of resale price maintenance, see FTC, Report on Resale Price Maintenance (1945); Grether, Price Control Under Fair Trade Legislation and S.C. Hollander, essay on United States, pp. 67-100, in B.S. Yamey, ed., Resale Price Maintenance, London 1966.

44. FTC, Report on Resale Price Maintenance (1945), pp. 87-91. The terms "unfair sales" and "unfair practices" laws were not always clearly distinguished and this type of legislation was also commonly given other names such as "loss limitation", "fair sales", "sales below cost" laws etc. Many merchants and also many legislators had only the haziest notion of the distinction between such legislation and fair trade (resale price maintenance) laws, both

Certainly, in the 1920's, the FTC had frequently condemned the use of sales below cost where made for a predatory or a deceptive purpose and had worked such condemnations into most of the rules adopted under trade practice conference procedure. However, the courts at that time were emphatic that sales below cost, considered in isolation and when occurring in the ordinary course of business, were perfectly lawful; only when set within the context of a broader "fraudulent scheme of oppression" were they unlawful.⁴⁵ In practice, retailers priced their goods exactly as they pleased and the possibility that they might be restrained in certain situations was only of theoretical interest. Under the NRA the position altered totally. The NRA codes usually had price control as a principal feature. Thus, in the grocery codes, retailers were supposed to add on a mark-up of at least 6% to the invoice or replacement cost (whichever was lower) of their goods, and wholesalers to add on 2%. In the general retail code, which covered dry goods, furniture, hardware, etc. the minimum retail mark-up was fixed at 10%. The NRA sales-below-cost provisions disregarded the issue of the purpose behind sales below the stipulated mark-ups; they were blanket prohibitions. The emphasis had altered fundamentally, for no longer was the evil purpose of the price-cutter seen as being of primary importance. What mattered was to stabilise business as a whole and to save it from the supposedly ruinous effects of the unrestrained price-cutting to which all were being driven by the depression conditions regardless of their most sincere determination to try to avoid such cutting. Moreover, the NRA prohibitions did not exist at

44. (cont'd)... being passed amid general expressions of sentiment about the need to stop ruinous price cutting; the unfair sales laws tended to produce rather more political resistance because they rather more obviously involved price-fixing, especially where the mark-up was specified in the statute, even though unfair sales law mark-ups actually provided only a price floor, below the gross margin of any permanent distributor, whereas resale price maintenance had every potential for raising prices and probably did to some extent in the drug trade.

45. Sears, Roebuck Co. v. FTC, 258 Fed. 307 (C.C.A., 7th 1919); Sinclair Refining Co. v. FTC, 276 Fed. 686 (C.C.A., 7th, 1921); Miller, Unfair Competition, p. 228.

the level of a theoretical abstraction, but were given widespread and routine effect through the code authorities, which at local enforcement level were staffed entirely by the representatives of the trade itself. Under the NRA, the trade for the first time had a chance to practice a degree of price control in the open, and the experience built up with the code authorities provided a foundation for the subsequent enforcement of the "loss limitation" laws.⁴⁶

In deference to the older antitrust tradition, the state below-cost laws enacted from 1935 onwards usually included language formally limiting the prohibition to sales below cost where made with an "intent" or "purpose" to damage a competitor or deceive customers. Indeed, in some states the courts obliged the legislature to reenact the laws originally passed with such a limitation included. However, the actual operation of such laws to a marked degree represented a continuation of the NRA code authority methods and the courts, which could have demanded the strictest construction of the language regarding intent and no doubt would have done had any such legislation come before them in the 1920's, generally accepted the mere fact that a sale had been made below cost as presumptive evidence of intent, requiring the person charged to prove his innocence - an almost impossible task. In some states, the definition of cost - typically the cost of goods to the dealer plus a mark-up - was built into the statute; in others, the trade itself was empowered to conduct surveys to determine the minimum "cost of doing business" for each particular industry in each trading area and these surveys were accepted as "competent evidence" in injunction suits, the courts thereby being enabled to avoid having to face the essential ambiguity and perhaps meaninglessness of the very concept of "below cost selling". Thus was the

46. Mack, Controlling Retailers, pp. 158-60, 189-98, 261-2; Herbert F. Taggart, Minimum Prices Under the NRA, (Michigan Business Studies, Vol. 7, No. 3 (1936)).

trade handed something it had been denied even under the NRA; the power to fix its own minimum mark-ups, without any form of supervision by or interaction with government as had happened under the NRA, and to have them enforced through the courts. In only two states before 1940 - New Jersey (1938) and Michigan (1939) - did the courts unequivocally condemn the basic concept of such legislation as allowing price-fixing by private interests; elsewhere the courts permitted it by calling it something else. As generally used and understood by the trade, the laws became blanket prohibitions on sales below a fixed mark-up, and the essential limitations on the use or abuse of the laws were those imposed by the practicalities of competition and the desire to avoid adverse political criticism.⁴⁷ Not until 1941, when the Department of Justice, under the leadership of Thurman Arnold, the head of the Antitrust Division, brought a notable series of cases against the enforcement bureaus set up in various states, principally by the grocery trade, did this trend to permit price-fixing receive a serious setback. Most of these cases were settled by the enforcement bureaus and other defendants submitting to consent decrees which dissolved the bureaus, thus severely impeding enforcement in those states and intimidating the trade in other states. However, the Antitrust Division shied away from attacking the laws themselves - arguing merely that price-fixing had gone beyond the letter of the law, to the point where arbitrary regular price lists, backed up by threats of prosecution, were being substituted for truthful cost surveys - and the structure, though shaken, did not topple. Indeed, several more states enacted similar legislation during the 1940's, thus perpetuating into times when prices were in any case generally high and stable the

47. FTC, Report on Resale Price Maintenance, pp. 114-23. Yale Law Journal, vol. 57 (1948) pp. 391-425, "Sales Below Cost Prohibitions: Private Price Fixing Under State Law".

artificial price supports brought in as protective measures in the years of depression.⁴⁸

Many trades made some use of these "loss limitation" laws, the laws effectively being permissive and of no significance in those trades where the trade itself took no action to ensure enforcement. Quite often unfair sales provisions were used to supplement the fair trade laws, retailers and wholesalers using the mark-up provisions for protection on those products for which manufacturers refused to name a resale price. In general, the margins provided by sales below cost provisions were lower than those obtained under resale price maintenance contracts, but as they applied to all merchandise they helped to prevent a situation where non-price-maintained items were used for price-cutting. This was a valuable consideration in persuading manufacturers, who always feared that consumers would buy the non-price-maintained products of their competitors, that it would be "safe" to fix a resale price. But although no one group was so overwhelmingly influential in securing enactment of the sales-below-cost laws as were the druggists in spreading the cause of resale price maintenance, the grocery trade was very much the principal force behind these laws. In general, the chains, badly shaken by the depredations of price-wrecking supermarkets and the reckless cutting of smaller independents (many of whom committed commercial suicide in the process, but always had replacements ready to take up where they had left off) and anxious to find areas of agreement with their politically powerful independent competitors by the mid-1930's, proved good supporters of these laws, provided they did not go to extremes. Nationally,

48. U.S. v. Massachusetts Food Council; U.S. v. Retail Lumbermen's Assn.; U.S. v. Connecticut Food Council; U.S. v. Rhode Island Food Council; U.S. v. Maine Food Council, in Commerce Clearing House, Trade Cases, 1940-3, pp. 611-20, 646, 659; U.S. v. Food and Grocery Bureau, 43 Fed. Supp. 966 (S.D. Cal. 1942); Food and Grocery Bureau of S. Calif. v. U.S., 139 Fed. (2nd) 973 (S.D. Calif. 1942); California Retail Grocers' and Merchants' Assn. v. U.S., 139 Fed. (2nd) 978 (C.C.A., 9th, 1943), Cert. Denied, 322 U.S. 729 (1944).

the Food and Grocery Chain Stores of America cooperated in setting up a "National Food and Grocery Conference Committee" which included all major interests in the trade except the extremist United States Wholesale Grocers' Association. The Conference Committee dithered for more than 18 months after the death of the NRA in May, 1935 - an interval in which the United States Wholesale Grocers' Association proved able to hold the political initiative - before producing a model bill, this rather anticlimactically proposing the reintroduction of the old NRA retail grocery code 6% mark-up as well as some bland provisions declaring the use of unearned secret rebates to destroy competition to be an unfair trade practice. The Conference Committee subsequently produced various other rather similar model bills and never really established a grip on the legislative situation; nevertheless, its influence, or the influence of its members acting separately, was seen in the fact that in those states where a mark-up was fixed in the statute the NRA grocery code of 6% retail and 2% wholesale was commonly used.⁴⁹ The model for the actual implementation of the legislation was, as with resale price maintenance, provided by California, which enacted the first Sales Below Cost Act in 1933 (which never had much effect because the NRA took its place) and followed this up with the 1935 Unfair Practices Act. The Act was of the type which provided for the trade to conduct its own cost surveys, and the grocery trade in the state quickly set up enforcement bureaus which were based on the recently abandoned NRA code authorities and these set the mark-up at the same level as under the NRA. Typical of such enforcement bureaus was the Food Trades Institute in San Francisco, which

49. Interstate Merchant, December 5, 1936; October 30, 1937. In some states, department store interests opposed sales-below-cost legislation, though the NRDGA officially considered it acceptable and certainly preferable to resale price maintenance. Otherwise there was no significant trade opposition to below-cost bills in the legislatures.

fixed the mark-up at 6%, this rising to 8% in 1938 and 10% in 1939 because of increasing costs. The Institute, although sponsored by the San Francisco and California Retail Grocers' Associations had as its largest single financial contributor Safeway Stores Inc., by far the most important chain in the state, which was also the most active single instigator of complaints - which were almost always directed against independent cut-rate supermarkets - under the Act. As of 1940, no suit had been brought against a chain store company by the Food Trades Institute. Similar conditions prevailed elsewhere in the state. The willingness of the chains to cooperate was crucial to the effective implementation of such legislation, for to work it required a consensus in order to isolate the rogue element, thus allowing operation to proceed mostly by "gentlemen's agreement" with only occasional suits against persistent violators. In view of the lack of interest of district attorneys in prosecuting cut-rate stores, and the potential dangers of a public outcry against price-fixing, this harmony - and even secrecy - was vital. The potentially more divisive provisions of the Act - those prohibiting price discrimination - were generally left unused.⁵⁰

There were certainly limits to chain store cooperation. In Colorado, in 1940, Safeway withdrew from the so-called Food Distributors' Association when it raised the retail mark-up from 9% to 12%, creating a combined retail and wholesale mark-up of 14%. Safeway seems partly to have been worried that the price-fixing was getting out of hand - the mark-up was practically at the full gross margin of many supermarkets - and partly afraid of falling victim to the Department of Justice. This last increase proved to be the straw that broke the camel's back for a local company, the Save-A-Nickel Markets - which appealed directly to Thurman Arnold for relief and was

50. FTC, Report on Resale Price Maintenance, (1945) pp. 854-63; Grether, Price Control Under Fair Trade Legislation, pp. 125-131.

rewarded by the indictment of the Food Distributors' Association and many of the leading factors in the trade in the state, including Safeway.⁵¹ Elsewhere, the A & P, which was not a member of the food chain association and rarely cooperated with the rest of the trade on anything much, sometimes proved of a baulky disposition. In Minnesota, it successfully challenged in the courts a law fixing a 10% minimum retail margin, claiming, to good public relations effect, that it could sell many lines of merchandise in its new supermarkets at a much lower mark-up and still make a profit. In several states it refused to cooperate with enforcement agencies with dubious claims to legality. On the other hand, the A & P proved to be a pillar of the Food Councils set up to enforce the unfair sales laws passed in the New England states; an official was treasurer of the Maryland Food Council; and in Philadelphia the company participated for several years after 1935 in the work of Food Distributors' Association, a body which carried on the "spirit" and some of the provisions of the NRA codes even without protection of state legislation as well as acting to oppose "radical" legislation like chain store taxes. Within the A & P, a division of opinion existed between the company's attorneys, who constantly feared that such involvements might one day lead to legal disaster and that the A & P would be singled out for special condemnation because it was the largest chain in the country, and the local officials who sometimes found such cooperation advantageous both in a business sense and in their political relationships with the independents. The A & P proved most cooperative in the eastern states where its clear policy was to cement relationships with the dominant independent interests in those areas and so break up the alliance between

51. Interstate Merchant, November 30, 1940; Modern Merchant and Grocery World, December 21, 1940.

them and the more militantly anti-chain grocers of the South and West.⁵²

In general, the implementation of such legislation proved a relatively painless way for the chains to improve relations with the independent trade. Laws to set price floors below the cost of doing business of the lowest cost operators could never be fully satisfactory to high-margin independent distributors; but to many trade associations they represented an attractive alternative to bitter, exhausting, costly and often futile struggles to enact punitive anti-chain legislation. This became an especially important consideration after 1936 as more and more independents came to accept that it was neither necessary nor possible to drive the chains out of business and that the best tactic was to make sure that the opportunity was taken to stabilise conditions in the trade so that everyone could make a profit. Thus the passage of such legislation tended to reinforce the other tendencies - the revival of the economy and the end of the chain inroads into the independent sector - which undermined extremist attacks on the chains. The legislatures passed sales below cost laws in the belief that they would

52. Great A & P Tea Co. v. Ervin, 23 Fed. Supp. 70 (D.C. Minn., 1938), U.S. v. Great Atlantic & Pacific Tea Co., 67 Fed. Supp. 626 (E.D. Ill., 1946), pp. 671-3. It was a curious feature of the case presented by the Department of Justice in the 1945 A & P trial that it made much of the fact that the stores in New England and Philadelphia were run at a loss throughout the period 1934-40 as a prime example of the use of "price wars", while at the same time accusing the A & P of joining in price fixing in the Philadelphia Food Distributors Association and the New England Food Councils. The two charges are admittedly not totally incompatible: the typical 6% retail mark-up under the unfair sales laws was less than half the gross margin of an A & P supermarket and about one-third of the gross margin of one of the old type small stores, thus making it possible to sell all merchandise above the price floor and still make a loss. However, the common sense inference - and one which is borne out by the general tenor of comment in the New England Grocer and the Pennsylvania Grocer over a period of several years - is that the A & P was taking losses in those areas principally because it was finding it difficult to compete, just as it was prepared to cooperate in fixing price floors, despite the legal risks, because it was under great political and economic pressure from other distributors. Certainly, the independent trade in those areas did not see in the A & P's losses an indication of the use of predatory strength, for relations were far better between the company and the independents than in many of the parts of the country where A & P was operating profitably.

thereby help the independent distributors, and although not proposed as anti-chain measures, anti-chain sentiment was often not far below the surface when the politicians gave their reasons for trying to stop "cut-throat competition". However, as Corwin Edwards of the Department of Justice pointed out to the 1941 Convention of the National Association of Retail Grocers - a body in uproar over the Justice Department's campaign against the enforcement bureaus - it was in fact the chains which had paid the bulk of the money to finance the work of the bureaus and "in so doing some of them have averted the enactment of state chain store taxes which threatened their existence". The political consequences were perhaps more considerable than the economic. In this respect, as in the drug trade over resale price maintenance, the chains were able to go some way towards establishing themselves as "insiders" and dispelling the idea that they and the independents must forever be at war.⁵³

Such cooperation would have been unthinkable in the 1920's: it took the depression, the economic fightback by the independents and the political menace of anti-chain legislation to knock the arrogance out of the chains and make them amenable. Equally, such cooperation would have been quite impossible under the antitrust laws as they were understood in the 1920's. In the matter of trade practices, there were really two quite distinct eras: before 1933 and after 1933. Before 1933, despite the flicker of hope stimulated by such things as the trade practice conferences and the Capper-Kelly bill, the independents considered themselves to be lost in a competitive jungle. Frightened by the apparently irresistible onrush of the chains and unable to exercise any sort of control over competitive conditions in the trade, they turned to weapons of indiscriminate destruction

53. Interstate Merchant, June 21, 1941.

like the chain store tax to try to solve their problems. But after the National Industrial Recovery Act a new world opened up. It became possible to do things which were hitherto unlawful and the discovery was made that the chains were no longer so unreasonable as had previously been supposed.

Old-style trust-busting never became an element in the fight against the chains. In the 1920's the mood of "normalcy" and cooperation with business ensured that there would be no attempts to break up the chains; in the 1930's, when business proved quite effective in busting itself without any help from the politicians or the courts, the aim of government was to preserve and stabilise business. Although there were trust-busters among the New Dealers, their attitudes were dismissed by most in the administration, at least until 1938, as a sort of self-indulgent idealism appropriate only to prosperous times. Not one figure of any significance in the Roosevelt administration ever advanced the proposition that the chains should be broken up - if such a thing had been possible - by means of the antitrust laws. Although the antimonopolists became more influential in Washington after 1938 - an influence given practical expression by Thurman Arnold - it is interesting to note that the first major engagement of the eager new Justice Department in the retailing field came when it tried to break up the sales-below-cost enforcement agencies. It was only after this - and perhaps stung by criticism that it was hitting small business by its actions - that the Department in 1942 launched its attack on the A & P. The only important attempt in the 1930's to use the antitrust laws against the chains occurred in the Robinson-Patman Act. Otherwise, the principal impact of the antitrust laws on the chain store problem came not through their enforcement or strengthening but through their suspension in 1933 and their effective rewriting by the price-fixing laws. The main weapon used to attack the chains directly - the chain store tax - was a legislative device entirely unrelated to anything in the antitrust laws.

PART TWO. The Appeal To Community Sentiment: Trade-at-Home
Agitation, 1927-1932.

i. The Beginning of Local Agitation.

Independent merchants, especially those in the smaller cities of the South and Midwest, had a long tradition of exploiting, or trying to exploit, sentiments of home town loyalty among the public at large in order to repel the challenge of outside competitors, whether of the catalogue or itinerant vendor variety. Inevitably, the surge of chain stores through the interior heartlands of the United States in the 1920s provoked a similar appeal to community sentiment to repudiate the new "menace".

The first significant trade-at-home campaigns occurred in 1926. In March of that year, 500 retailers, wholesalers and sympathisers gathered in Petersburg, Virginia under the auspices of the chamber of commerce, for "the first mass meeting ever held for the purpose of carrying the fight against the chain stores". A large war chest was raised to finance anti-chain publicity and one chain store manager was moved to send an "S.O.S." to Chain Store Age advising that "it has become very bitter and they are using every means to boycott all chain stores". The chamber of commerce in Jacksonville, Illinois, soon followed this lead, sponsoring a campaign of advertising in the local newspaper. The advertisements were prepared by George Schulte, the editor and publisher of the Interstate Grocer, the best-selling grocery trade paper in the territory between the Appalachians and the Rockies. The Interstate Grocer was already conspicuous for the intensity of its opposition to chain stores, but for Schulte the Jacksonville campaign was a watershed, his "declaration of war". This war, Schulte announced, was to be "waged ceaselessly and indefinitely. No quarter will be asked and none will be given". He proved as good as his word, for

The Interstate Grocer quickly began to fulfill the role of "clearing house" for news of anti-chain activities around the country, and Schulte himself remained at the forefront of the fight until it died away in the 1940's.¹

The Jacksonville advertisements set the pattern for the future. Mail order and peddlers were condemned in passing - most of the arguments proffered being interchangeable - but the main focus was the chain stores. The independent merchant was portrayed as a worthy fellow who paid his taxes, supported local charities, extended credit to those who had fallen on hard times and, if this were not enough, actually had competitive prices, if allowance were made for the extra service provided. The central theme was, however, the devastation supposedly caused by the chains in pumping money out of Jacksonville: they took all the "cream", leaving only the "skimmed milk", a diet which would make for a "weakly city". New York, it was suggested, was the nation's largest city precisely because it was the nation's money centre; Jacksonville, therefore, would prosper and grow just as much as it hung on to its money. If the chains were allowed to gobble up all the business, "Jacksonville would be dead, there would be no work for anyone except at starvation wages, newspapers would decline in value and there would be no amusement of any kind. The younger generation would have nothing to look forward to, while to the older people life would be a humdrum affair". In contrast, if the people spent their money with the home-owned stores, it would "revolve", from farmer to doctor, to carpenter, to lumber dealer, to druggist, to plasterer to dentist, and so on, each retaining a small percentage of profit. In short,

1. Interstate Grocer, March 13, May 22, 1926; Chain Store Age, April 1926.

the principal argument was one of undiluted mercantilism, a philosophy with deep roots in the traditions of the isolated, self-contained small communities built up by the pioneers and which still commonly surfaced regardless of the obvious historical fact that the country's prosperity had grown in step with the expansion of trade between cities and sections. Neither was it a philosophy destined for imminent extinction, for if its appeal weakened in the 1920's with the growing "nationalisation" of social and economic life, it would revive with redoubled vigour in the hard times of the 1930's.²

Chain Store Age commented that the Jacksonville and Petersburg campaigns represented the "strategic error of abusing the enemy", and that although they were causing "some concern" on the part of chain store managers, such "campaigns of vilification" would achieve no more than had similar offensives against house to house peddlers in the past. Even Schulte admitted, after three months of advertising in Jacksonville, that the results had been "nothing startling" in terms of winning back chain store customers. Many merchants were frankly uncertain how the public would react to anti-chain store propaganda and were inclined to fear, as the favoured expression had it, that "every knock is a boost".³

Nevertheless, the number of cities experiencing trade-at-home agitation increased slowly but surely in the years 1927-9. Although chambers of commerce had sponsored the Petersburg and Jacksonville campaigns, very few chambers, even in the small towns, were willing to be drawn head first into attacks on the chains, and anti-chain enthusiasts were usually

2. The advertisements, as they appeared in the Jacksonville Daily Journal, were printed in the Interstate Grocer in 26 consecutive weekly issues from May 15, 1926.

3. Chain Store Age, July 1926; Interstate Grocer, August 28, 1926; National Grocers' Bulletin, June 1926, "To Fight Chains with Publicity".

driven to create entirely new organisations in which different lines of business could pool their resources to fight the common foe. "Allied businessmen's associations", "independent merchant associations", "community builders" and similarly styled groups cropped up in scattered towns and cities at points from Pennsylvania westwards and southwards.

Typical of these organisations were the "Home-Owned Stores" movements which appeared in numerous towns in the Midwest, especially in Illinois and Michigan. The initial promotion came from wholesale grocery associations seeking to respond to the demands of their retailers that they "do something"; the wholesalers paid for advertising copy designed to "sell" the home-owned store ideal while, in return, the retailers smartened up their stores. As local campaigns developed, a wide range of business interests were often drawn in. In Kalamazoo, Michigan, which was regarded as a model campaign, local leadership was provided by an insurance man whose merchant clients were finding it hard to pay their premiums, and who had finally been provoked into action when, while collecting for the community fund, he had been "turned down cold" by the chain stores. Costs of sponsorship in Kalamazoo were shared by wholesalers dealing in groceries, hardware, candy, tobacco, fruit and meat, as well as three bakeries, three biscuit companies, four banks and a sausage manufacturer. More than 90% of local stores were said to have affiliated, Newspaper advertising, contests for the best letters on the virtues of "trading at home", and talks to clubs and lodges were used to put the message over to the general public, while experts were drafted into town to help the merchants to improve their stores.⁴

4. Sales Management, July 21, 1928, pp. 137-8, 164, "Six Chain Stores Throw Up The Sponge"; Interstate Grocer, July 30, 1927.

In Kalamazoo, the emphasis was placed on "positive" arguments in favour of the home-owned stores, to the exclusion of "negative" derogatory statements about the chains. Such tactics broadened the spectrum of merchants willing to be involved, but they were too tame to appeal to the most militant. Throughout the country, numbers of merchants, especially in the grocery trade, came to feel that war against the chains could not be conducted without risk and by entirely antiseptic methods. Despite the contrary advice of many trade leaders, retailers proved ready to distribute to customers, or insert in their windows, pamphlets in which the vices of the chains were dwelled upon in lurid fashion. The American Wholesale Grocers' Association was especially active in the production of such pamphlets, in 1928 and 1929 publishing Sons and Daughters For Sale, A Business Built on Bunk, The Chain Store, The Catalogue House and the Taxpayer and What Every Woman Wants To Know About Grocery Shopping. Two million copies of the last-named pamphlet, which warned shoppers against adding machine frauds, short weights and price baits, were distributed in the first 18 months. Locally, anti-chain enthusiasts experimented with methods to reach public opinion. In Portsmouth, Ohio, merchants lectured farmers who drove into town on Sears, Roebuck tyres; in Berlin, Pennsylvania merchants produced one of the very first anti-chain pamphlet-newspapers, the "Town and Rural Booster"; in Homestead in the same state, the independent merchants' association staged "educational dinners" for each of the religious denominations in the city, the congregations being treated to a meal and community singing, interspersed with homilies on the virtues of trading at home. These local campaigns were too scattered, too short-lived to make much difference to the chain stores but through 1929 militant independents expressed a growing confidence that they were beginning to shape into a coherent offensive. As George Schulte expressed it in the

August, "All of these movements are just feathers showing how the wind is blowing...while these movements are independent, it is not too much to expect that the time is coming when there will be a joining of the anti-chain store forces".⁵

Chain store men were not oblivious to this trend. Through the late 1920's a progressive wing of the industry, most prominently represented by such men as E.C. Sams, the president of the J.C. Penney Co., Godfrey M. Lebar, the editor of Chain Store Age, and W.T. Grant, urged the importance of a process of community integration as an insurance against political attack. The formation of the NCSA - which was, in effect, the recognition by the leading chains that they had a public relations problem and that acceptability could no longer be assured merely by providing lower prices - hurried forward the process of community integration. The 1928 NCSA convention, the first, adopted a "code of ethics" which pledged support for all "worthy local civic enterprises". It was, a chamber of commerce manager commented, "the day the chain-store business grew up".⁶ A double-edged strategy quickly developed. The NCSA fought every anti-chain legislative proposal as aggressively as possible, while at the same time turning a benign and conciliatory face towards the local communities. Particular emphasis was placed by the member chains on the desirability of strengthening ties with chambers of commerce, which because of their prestige and representative character were potentially much more dangerous adversaries than ad hoc anti-chain groups like "community builders" and "independent merchants' associations". Hitherto some chains had taken a somewhat petulant attitude towards local chambers, refusing to have anything to do with them if they offered a word of criticism; and, undoubtedly,

5. Interstate Grocer, November 3, 1928; April 20, July 27, August 24, 1929; N.Y. Journal of Commerce, December 7, 1929.

6. Samuel B. Botsford, "The Chain Store Comes of Age", Nation's Business, April 1929, p. 70. The A & P, the one national chain not in the NCSA, also notified the commercial secretaries' association that it would henceforth support local chambers and community projects with more vigour than it had shown in the past. Interstate Grocer, September 15, 1928.

some chamber of commerce work - such as the raising of subscription funds to bribe factories to come to town, sometimes to the loss of other towns where the chain also had stores - could be extremely tiresome to the chain store man.⁷ But if the big chains could not be enthusiastic over every aspect of chamber of commerce work, they were content to tolerate a little inconvenience for the sake of "keeping in". By July 1930, according to a survey by the National Association of Commercial Organisations' Secretaries, all but one member of the NCSA supported local chambers.⁸

7. The position of some prominent chains immediately before the formation of the NCSA can be seen in "The Chain Store And Your Community", Nation's Business, May 1928, pp. 17, 116-8. F.H. Massmann, vice-president of the National Tea Co. stated that his company had memberships in the associations of commerce in Chicago, Des Moines, Minneapolis and Milwaukee, but not in the smaller cities where local chambers were "dominated by men antagonistic to our organisation". Michael O'Keefe, president of the First National Stores, Inc. believed that to provide lower prices was of itself a sufficient demonstration of being "community-minded", a position similar to that taken by the Walgreen Drug Co. The president of the Regal Shoe Co., Boston, had no wish to encourage "clubitis" among the managers: "They want to join every organisation in the city - dues chargeable to expenses". See also, Chain Store Review, February 1929, p. 62, "Chain Stores Tell What They Think About Chambers of Commerce". In general, grocery chains, with multitudes of small, low profit stores, and also with multitudes of enemies, had been most inclined to turn their backs on local business communities; department store chains like Penney or Ward, with fewer and larger, and usually much more profitable stores represented the opposite extreme. In the grocery field it was Safeway, the fast-growing western giant, which led the way for the big chains in community integration. For criticisms of civic groups by a chain executive known for his advocacy of the community-integration approach, see J.C. Penney, "The Community and The Chain Store", in Saturday Evening Post, February 22, 1930, p. 11. Penney criticised the bribing of factory owners to come to town, the raising of funds by professional promoters working on a percentage basis and the occasionally preposterous demands made of chains - up to \$300,000 in one locality in the case of the Penney Co. He also noted that the shortcomings of the chains "sometimes supplies a convenient excuse for not subscribing on the part of those merchants who never had the intention of giving anything".

8. Godfrey M. Lebhar, How To Meet Unfair Charges Against Chain Stores, N.Y. 2nd, 1936, edn. pp. 36-8. For the shift of policy made by one chain, the Melville Shoe Corp., see Ray Dovell "Chain Stores Can Be Good Citizens", Nation's Business June 1931. The organisation allocated 0.1% of gross receipts to its civic and charity budget, and managers were active in chamber of commerce work, helping boy scouts, running baseball teams etc. Particular stress was placed on such activity in the company's Thom McAn stores, which were mainly in smaller cities.

Chain store men became increasingly boastful about their new-found concern for the good old home town. In March, 1929, the NCSA brought out the first issue of a monthly propaganda organ, Chain Store Progress, which laid great emphasis on the willingness of the chains to help the towns in which they located. Chain Store Progress was sent free and unsolicited to "opinion-formers" such as editors, teachers, bankers, politicians and civic leaders, circulation reaching as high as 65,000 monthly by 1931, in which year it was abandoned. "Community-building" was the theme of the second NCSA convention, in September, 1929, where there was much concern as to how long it would be before, as G.M. Lebharr expressed it, "the public begins to prick up its ears in sympathetic attention" to the cries of the small retailers. Delegates were sufficiently troubled by an exhibition of hostile press clippings staged by NCSA executive vice-president R.W. Lyons to set up a \$250,000 advertising fund to counter adverse propaganda, and some of the chain store men also wanted to make a commitment to the allocation of a fixed 1/3 of 1% of gross receipts for the benefit of the communities in which their stores were located. Thus the elite, the top few dozen, mainly very large chains which made up the NCSA, were hard at work trying to compensate for past neglect. Within weeks of the NCSA convention, however, events took a dramatic and unexpectedly sudden turn for the worse.⁹

9. Proceedings of the (2nd Annual) NCSA Convention, September 23-5, 1929; Chain Store Review, November 1929, p. 41; Printers' Ink, October 3, 1929; "Chains Will Now Court Public Opinion In Earnest".

ii. W.K. Henderson.

In October, 1929, the hitherto scattered and rather lonely bands of anti-chain agitators gained a leader. W.K. "Old Man" Henderson, the owner of radio station KWKH, Shreveport, discovered the "chain store menace", and through the winter of 1929-30 devoted his station to the broadcast of anti-chain propaganda. The broadcasts released a tidal wave of sentiment: Henderson was deluged with money and gifts, thousands flocked to join his anti-chain army, the Merchant Minute Men, and hundreds of local anti-chain organisations sprang up to carry on the crusade.

William Kennon Henderson Jr. was a wealthy Shreveport businessman, for whom broadcasting was a hobby. In 1919, on his father's death, he inherited the family business, becoming president of the W.K. Henderson Iron Works and Supply Co., one of the largest businesses in the city. He also owned the Henderson Land, Timber and Investment Co. and telephone lines to, and oil and natural gas wells on, his country estate at Kennonwood, 18 miles north of Shreveport. Henderson was a partner in Shreveport's first radio station, WGAQ, and in 1925 the call letters were changed to KWKH, Henderson having become the principal partner. Subsequently, Henderson became the sole owner of the station, and the main studios were moved out to Kennonwood. By day, Henderson attended to his business interests in town, and in the evenings he devoted himself to broadcasting. As sole owner of KWKH, he conducted the broadcasting exactly as he pleased. Henderson pioneered the playing of recorded music, but the main attraction was his racy and opinionated commentaries on contemporary issues, which were introduced by variations on his celebrated invocation, "Hello World, don't go away, now, doggone your buttons!" Henderson was frequently a fiery performer, littering his monologues with "hells" and "damms", and he proudly referred

to the Kennonwood studio as being "asbestos-lined" because of it. Each night he flavoured his programmes with excerpts from the hundreds of telegrams received over the Western Union teleprinter in the studio, and often stayed on the air until the telegrams and phone calls began to dry up or he tired.¹

Henderson threw himself into several causes in the late 1920's. He ridiculed the Prohibition laws by rattling a glass of liquid and ice close to the microphone and advising his listeners that the glass contained something stronger than water. In 1928 he was fervent in his advice to the South that it should vote for Al Smith and not desert the Democratic standard. Henderson was also one of Huey Long's most energetic supporters and extended Long considerable financial support, free air time, and the use of equipment for his touring sound trucks in his successful 1928 campaign to become Governor of Louisiana. But the broadcaster was perhaps best known for his feud with the Federal Radio Commission, the body set up under the Radio Act of 1927 to regulate the chaotic condition of the airwaves. The Commission's powers were vague and untested, and Henderson fought it at every turn. In 1927, the FRC ordered Henderson to operate with no more than 1 kilowatt of power and when Henderson proved defiant, often using as much as 3,000 watts, the Commission recommended to the Justice Department that he be prosecuted for "illegal operation", the first such recommendation ever made by the Commission. The Justice Department failed to take any such action, however, and Henderson maintained a vigorous assault on the FRC over the airwaves, calling the Commissioners

1. Considerable biographical detail about W.K. Henderson was provided by correspondence with Mr. Stedman Gunning, who was Henderson's engineer, announcer and general assistant at KWKH from 1926, and continued to work at the station until his retirement in 1978. C. Joseph Pusateri, "The Stormy Career of A Radio Maverick, W.K. Henderson of KWKH" in Louisiana Studies, Winter 1976, pp. 389-407, is especially useful on Henderson's dealings with the Federal Radio Commission. The Shreveport Times, September 21, 1975, "The Friendly Giant Is 50", puts the Henderson years at KWKH in a 50-year perspective.

"parasites" and "sapheads" who were "denying the South free speech by denying the Southern stations power when they want it". According to Henderson, the FRC was in league with the fast-growing eastern radio chains, the NBC and Columbia systems, and his private interests meshed in with an upsurge of sectional sentiment on the matter. In March, 1928 Congress adopted an amendment to the Radio Act, whereby each section of the country was entitled to "equality" of broadcasting provision, a requirement which, when put into practice by the FRC gave the South eight highly desirable cleared channels - one of which was given to Henderson on a shared time basis (the evening broadcasting hours were divided between KWKH and a New Orleans station, WWL). Thus the South had as many cleared channels as either the Northeast or Midwest, the country having been split into five sections each with eight cleared channels. In addition, the FRC authorized increases in the power of KWKH, Henderson being permitted 5,000 watts by 1929. This wattage and the cleared channel meant that reception for KWKH was very good in winter over large areas of the United States, only the west coast and the northeastern states, and a few localities with special reception problems, being out of reach at that time of year (in summer the area of satisfactory reception shrank considerably because of interference problems). Thus, while Henderson ran KWKH as a hobby and as a purely personal mouthpiece, he possessed a powerful station and enjoyed the right to reach into the homes of millions without any noticeable restraint on what he said, and without any compulsion to provide "equal time" or balance in the interests of those he attacked.²

2. "History of KWKH", Shreveport Times, January 29, 1978; Pusateri, pp. 393-4; Stedman Gunning.

If there were any doubts about Henderson's popularity and influence, they were laid to rest by the way in which, in the early months of 1929, he defeated a license challenge made by William G. Skelly, an oil man and owner of KVOO, Tulsa. Skelly urged that KWKH was "used largely for personal attacks" and that the citizens of Oklahoma deserved to be freed from "obscenity, slang and vulgarity over the air" by the reallocation of the KWKH wavelength to KVOO. Skelly's appeal met with sympathy within the FRC. At hearings in Washington, Orestes H. Caldwell, one of the Commissioners, dramatically accused Henderson of having killed the first chairman of the FRC, Admiral W.H.G. Bullard, with his lies and slanders. But the Commission had also to consider the very clear evidence of a great weight of support for Henderson, whose railroad car en route to Washington had been greeted by brass bands and cheering crowds at each important station, and who produced 163,000 affidavits from listeners, blanks for which had been published in Southern newspapers, testifying that KWKH was their "favorite station". Henderson also enjoyed the energetic backing of Governor Huey Long and the Louisiana congressional delegation, and the majority of the Commissioners, whatever their private feelings, decided that the KVOO appeal must be denied. Henderson, by this success, confirmed his reputation as a Southern hero who actually won his battles.³

Henderson was aptly styled a "Moses by accident",⁴ for he had no previous connection with the opposition to chain stores when he abruptly took up the cause in October, 1929. Neither did he have a reputation as a protagonist of the independent merchants. He apparently knew little of

3. Pusateri, pp. 395-8.

4. In "Chains Face First Real Fight As South's Politicians Seize Issue", Business Week, March 5, 1930, p. 21.

their problems, for he obtained his own supplies from the commissary maintained on the Kennonwood estate for the benefit of the employees;⁵ furthermore, he had come in for criticism from independent merchants for his practice of merchandising over the air such items as "Hello World" coffee - which at one dollar a pound was said to be the most expensive in America, Henderson justifying the price by reference to the "souvenir" portrait of himself which appeared on the cans. Even when he became the great leader of the independents he kept up this activity and extended the range and volume of merchandise sold, which included insurance policies, a talking radio clock, a "Life of W.K. Henderson", "Lucky" ivory elephants, bibles, patent medicines, pecan trees, real estate and oil wells.⁶

Henderson learned about the "chain store menace" from Philip Lieber, the president of the First Federal Mutual Building and Loan Corporation of Shreveport, who had experienced difficulty in securing repayments on loans made to local merchants. Lieber himself initiated anti-chain broadcasting over KWKH. The chain store invasion was, he thought, comparable to an eruption from Mount Vesuvius, "the slow but irresistible advance of the stream of molten rock, the lava, stopped neither by nature nor by man, but advancing, creeping, pushing everything before it, inexorably destroying everything in its path" until "nothing but poverty and hopelessness remained". The independents had pioneered the cities and towns of America, wrested civilisation out of a wilderness, but now those cities and towns were being turned into mere trading posts for the "New York gang" of chain stores, power trusts, insurance alliances and manufacturers' combinations,

5. Stedman Gunning.

6. Interstate Grocer, March 30, 1929; Pusateri, p. 398.

destroying opportunity for the young, creating "routine-trained" workers capable only of doing what the "central power" directed, and ultimately impoverishing the people. Lieber put the issue squarely to the KWKH audience:

"Are the United States of America to resolve into a feudal system of 125,000,000 souls with a couple of hundred overlords and all the rest of us eternally consigned to a condition of peasantry, whose chief duty will be to bring to the laps of these Molochs of business the fruits of our unremitting labor? The answer is in the minds and the solution in the hands of our people themselves". 7

Lieber's question brought forth a huge, and perhaps unexpected, response as KWKH was deluged with thousands of letters and telegrams both for and against the chain stores, but mostly against. Henderson eagerly seized the opportunity to launch a new and exhilarating crusade. "American people, wake up!", he urged. "We can whip these chain stores. We can whip the whole cock-eyed world when we are right ... I know the chain store game. I'll be your leader. I'll whip hell out of them if you will support me. We can drive them out in thirty days if you people will stay out of their stores". As the campaign developed, the normal office staff of three or four had to be increased to fifty to handle the volume of mail; readers of Radio Digest voted KWKH "the most popular radio station in the South". Henderson invited trade leaders to speak over the air: to George Schulte KWKH was the "missing link" between his newspaper and the general public, and he made several trips to Shreveport to consult with Henderson and to broadcast. Politicians, too, participated in the radio crusade, notable speakers over KWKH including Governor Flem Sampson of Kentucky, Charles C. McCall, the attorney-general of Alabama and Governor Huey Long, who made

7. Philip Lieber, "The Menace of the Chain-Store System", Congressional Record, vol. 72, pt. 3, 71st Cong. 2d Sess., pp. 2479-2481.

the most of the opportunity to reach a large audience throughout the South with news of his highway improvement programme and war on illiteracy, as well as with extravagant attacks on the chains which, he warned, "need not look to Louisiana to locate their stores".⁸

Dramatic exposures of chain practices, entertainment laced with vitriol, provided a principal element in Henderson's broadcasting. Much of his commentary consisted of excerpts from letters and telegrams, to which he added quips and drolleries in his Southern drawl; the listeners were encouraged to keep a close watch on the chains in their home towns and to serve as Henderson's eyes and ears. "You common people", as he called his listeners, were instructed to stay out of chain stores, except for purposes of spying on them. This injunction was backed up by a constant stream of allegations that the chain stores systematically "gouged" their customers, a stream fed by the listeners themselves. "I saw a chain store man short change a blind man today", read one telegram; affidavits were received from three grocery chain store managers in Louisville in which they admitted giving short weights and blamed it on the pressure to balance the inventory. In some towns, children teased harrassed chain store clerks that "you'd better watch out or Old Man Henderson will get you". Charges which many independents had not dared to put before the public were now given the stamp of approval by an "outsider" and borne nightly into the homes of thousands.⁹

Henderson also intimated that there was a sinister conspiracy between the chains and big manufacturers, whereby the latter provided the chains with nationally advertised brands in fractionally smaller containers, or with slightly less contents, which the chains were able to

8.. Interstate Grocer, December 7, 21, 28, 1929; January 4, March 8 1930; Pusateri, p. 401., Louisiana Progress, March 27, 1930.

9. Interstate Grocer, December 14, 28, 1929.

pass off as the same size and quantity sold in the independent stores. Thus a can of Van Camp's pork and beans obtained from a chain store contained 1lb net weight, but one from an independent grocer weighed 1lb $1\frac{3}{4}$ oz.; a can of Del Monte peas from a chain store was only three-quarters full; the Quaker Oats Co. manufactured a 6 oz. package of "Crackels" but the independents only got a 7 oz. size. Henderson kept the offending items at the Kennonwood studios for inspection, and visitors confirmed the charges. "I have in my hand", Huey Long told listeners, "two bars of soap of the same brand, one of which weighs less than the other, the smaller cake having been purchased at a chain store". Long was convinced that the chains had been "convicted of almost everything" and that they were as much good to Louisiana as yellow fever or cholera. Several prominent manufacturers accused by Henderson eventually bestirred themselves to issue denials that there was anything wrong with their practices. Thus the Quaker Oats Co. denied flatly that it packed "Crackels" in different size packages for chain stores or any other distributor; the Procter & Gamble Distributing Co. made a similar assertion, attributing any variations in the weight of its soaps to evaporation of moisture; the Van Camp Products Co. and the Gold Dust Corporation explained variations as being due to some independent retailers carrying discontinued package sizes on their shelves longer than their chain competitors, because of a slower stock turn. It is doubtful, however, whether the rather belated denials of the manufacturers were heard, or believed, by as wide a public as had been reached by Henderson's original charges.¹⁰

10. Interstate Grocer, December 28, 1929; January 11, February 8, August 30, December 13, 1930; Chain Store Progress, "The Truth About Package Weights", May 1930 p.3, 7. The Better Business Bureaus of Indianapolis and Columbus, Ohio, conducted their own investigations into Henderson's charges and considered them unfounded. However, these investigations were made several months after Henderson first broached the issue, and a few errant manufacturers had altered their distribution policies to make sure independents had access to the smaller packages. See Chain Store Progress, "Better Business Bureaus Exonerate Chains", December 1930, pp. 1, 2, 7. The packaging of special small packages for use by variety chains was quite common, especially in toiletries, and was not curtailed.

The charges of short weighing and adding machine frauds were the most damaging made by Henderson, for they alarmed those who might have resisted the more philosophical side of the anti-chain argument. Henderson taunted the chains to test his charges: "We have a fine court house down here in Shreveport", he told his listeners. "They know where I live. We have a good sheriff. Let them bring a suit against me. I am ready for them and will prove my case as I have the evidence against them".¹¹ Chain store men tried to give the impression that they felt it beneath their dignity to engage in combat with the broadcaster, but that was not the essence of their problem.

Any trial in Shreveport would have been turned by Henderson into an anti-chain carnival, with consequent adverse publicity for the chains regardless of the formal verdict. Furthermore, it is quite likely that Henderson could have won in such a trial, for his boast about having the evidence was not an idle one. His short weight charges, when they came down to specifics, were usually based on affidavits and on newspaper and trade press clippings sent in by his supporters. What was questionable was, rather, the generalisations about the "chain store system" which Henderson made. According to chain store men individual cases of abuse - even when they added up to hundreds of prosecutions for short weight over the country as a whole - proved absolutely nothing except that individual chain clerks and managers were fallible or, occasionally, crooked.¹² According to Henderson and his trade advisers, the prosecutions were just the tip of an iceberg, and short weighing arose not from the personal shortcomings of chain store employees, but was inherent in the system. Such evidence as

11. Interstate Grocer, January 4, 1930.

12. One manual for chain employees advised that the correct response to allegations of short weights was that "isolated instances of this kind prove absolutely nothing". Lebar, How To Meet Unfair Charges Against Chain Stores, p. 4.

there was, or would likely have been produced had Henderson been brought to trial, was elusive and ambiguous. There was no clear, objective and self-evident truth. Grocery chains did not rely on short weights to succeed, neither did their executives require their employees to be given instruction in short weighing as vital knowledge to the business. Nevertheless, many managers most certainly believed that they had to make so-called "stock gains" or "overages" and many superintendents also encouraged them in that idea. Insofar as grocery chain executives accepted stock gains on a routine basis, they also accepted that their clerks were engaging in a small amount of short weighing. Most probably, executives assumed that if the employees were not kept under pressure from the inventory, they would dabble in fraud at the company's expense, and so it was better that the company should gain; and it is in any case doubtful whether stock gains were markedly more common in chain than in independent stores. But the question was a delicate one, and there can be no real surprise that chain store men preferred to issue only the blandest disclaimers, without putting themselves in a position where unpleasant facts might be brought out under the spotlight of public scrutiny.¹³ As a strategy it worked, for although Henderson succeeded

13. There is little unbiased contemporary literature on this subject. Edward G. Ernst and Emil M. Hartl (in The Nation, Nov. 12, 1930 p.518) reported that "We succeeded...in getting a few of the managers to talk, after they were sure their names would not be made known. Several asserted dogmatically that 'no man can work for a chain grocery store and be honest'...Every item is billed to the individual store at selling price only, and no manager knows anything about the cost price. When the superintendent makes his rounds he allows credit for spoilage of fresh fruits and vegetables, but none for shrinkage of staples sold in bulk and measured out by the managers or their help...Butter comes in tubs containing 64 pounds bulk; it is impossible for any man to weigh out more than 62 pounds. A 100-pound sack of sugar when weighed out into small lots loses at least 2 pounds. Beans will shrink an ounce per pound in a week's time...these little losses count up, and the manager is twenty or thirty dollars behind". Ernst and Hartl suggested that the method "most often used" by managers to balance the inventory was simply to sell some of the merchandise at a slightly higher price than billed, a practice which cannot be considered fraudulent or deceptive from the point of view of the customer. However, some managers, these writers found, also resorted to short weighing and adding machine frauds. Ernst and Hartl concluded that such practices accounted for only a "very small percentage" of grocery price advantage, and they had heard no such allegations about other types of chains to explain their success. A study prompted by Henderson's

in generating a brief scare, his efforts did not lead to a more enduring scepticism about the chains. Many independent trade leaders were also anxious to play down the short weights controversy, vaguely supposing that such allegations were unethical and also trembling lest someone decided to turn the same weapon against the independents. Short weight charges were made persistently against the chains during the 1930's, but their position in the rhetoric of opposition to chain stores shrank considerably after 1930. It also happened that militant opponents of the chains were of the view that short weighing in chains decreased in the 1930's; in 1938, George Schulte, who had pioneered the exposure of chain malpractices, was willing to concede that "short weights have not been so prevalent in recent years". Schulte attributed this change to the discovery of new ways by the chains to "take advantage of the people" and also to the adverse consequences of exposure.

13 (cont'd). broadcasts (M.D. Taylor, "A Study of Weight In Chain and Independent Grocery Stores in Durham, North Carolina", Harvard Business Review, vol. 9, July 1931, pp. 443-455) found that "chain stores in Durham are giving more accurate weights on bulk commodities than independents", with both chains and independents giving both under and over weights. The FTC (Final Report of the Chain-Store Inquiry, pp. 46-9) found that consumers were "somewhat" more likely to get short weight in the grocery chain store and "appreciably more likely" to get excess weight in the independent store in the purchase of bulk commodities (the Commission studied beans, prunes, crackers and sugar). In four cities very intensively shopped by the FTC the "aggregate net shortage in weight on total purchases from the chain stores was 0.321 of 1 per cent, while the actual net overage on purchases from independent stores...was 0.096 of 1 percent...While the size of the shortage for chains may seem insignificant to many, it would amount to 3.41 percent on the investment in these commodities, figured on the basis of the average stock turn of grocery and meat chains of 10.61 times per annum". However, the chains had a smaller proportion of shortweights on preweighed items than did the independents, and also more often gave exact weight. The FTC clearly placed little reliance on this data, which in any case only concerned bulk goods, a small part of grocery sales. Short changing, adding machine frauds, substitution of inferior merchandise etc. were not investigated by the Commission, and no study was made of non-grocery chains. The Commission failed to confront the widespread view that the grocery chain system was inherently inclined to produce frauds against the consumer because the managers otherwise could not balance their inventories.

14. Interstate Merchant , December 10, 1938.

The "settling down" of the grocery chains after the scramble of the 1920's must also have played a part, with the adoption of more disciplined and considered policies than prevailed in the 1920's when a high-pressure mentality at the top, and influxes of raw recruits at middle and lower levels all straining to "get results" produced some unsavoury trading methods. In the 1930's executives woke up to the fact that the chains, to secure their futures, would have to impose restraints on some of those methods, to appease both their competitors and public opinion. A desire to keep short weighing under control was naturally one of those restraints - as evidence from the 1945 A & P trial would suggest.¹⁵

15. In the A & P trial, the internal records of the A & P were produced to show how, before about 1930, stock gains as high as 3% net (i.e. real gains after absorption of stock losses through shrinkage, spoilage, stealage and waste) were accepted without condemnation of store managers. The records, which covered 1927-41, showed stock gains at a peak in 1927, when the aggregate net gain was \$5,567,524, compared to a retail operating profit of only \$1,555,861. According to the Government, the "headquarters group" became concerned about prosecutions of its employees for short weights and in 1930-5 tried to reduce "excessive" gains. Stock gains of \$4,214,626 net in 1929 were cut back to \$1,974,000 net in 1931. In late 1935, the A & P was exposed to intense adverse publicity as a result of a series of trials in Washington D.C. in which managers were found guilty of giving short weights on chickens (see below, p.412), and John Hartford ordered the elimination of stock gains of more than 2% (later lowered to 1%), though in fact stores continued to show higher gains without their managers being disciplined and a rising trend was seen 1935-7, until the advent of supermarkets, which reduced opportunities to make gains while at the same time increasing losses through stealage. The Government argued that stock gains of more than 1/2 of 1% were illegitimate, that the headquarters group knew this, and that by continuing to accept higher stock gains they demonstrated to lower level employees that warnings against short weighing etc. were to be disregarded. The practice of billing goods, except meat, at retail prices, and the failure to make due allowance for inevitable losses were seen as having "indelibly established" the idea of the necessity of making stock gains in the minds of managers so that requests or warnings to the contrary were "like water off a duck's back". In its defence, the A & P contended that stock gains could arise from a number of perfectly legitimate causes, including sale of merchandise at a higher price than billed, and urged the sincerity of the efforts made by the company to prevent abuses. The evidence produced actually indicated that the different levels in the company's hierarchy were not really sure either what subordinates were doing or what superiors wanted, a confusion found in other aspects of the A & P's affairs, as, no doubt, in other large chains. The boundary between "reasonable" and "excessive" stock gains was not a clear one and the higher echelons seemed to feel that

Such efforts as the chains did make to silence Henderson misfired badly. In November, 1929, the FRC announced the receipt of many protests from chains complaining of the effect Henderson was having on business; a letter from the NCSA seized in particular on the intemperance of his language, calling it an "unwarranted abuse of the power which inheres in a license to broadcast". Henderson's language subsequently also attracted the ire of U.S. Senator Clarence Dill of Washington, who thought it a "disgrace to this country". According to Dill, the FRC had ample powers to regulate Henderson in accordance with the criteria of "public interest, necessity or convenience" laid down by the 1927 Radio Act, and he also pointed out that the Act prohibited the use of "obscene, indecent, or profane language by means of radio communication", providing for a penalty of up to \$5,000 in fines and five years in prison for violators. From the floor of the Senate, Dill demanded that the FRC should either revoke or suspend Henderson's license, or else should call upon the federal district attorney to enforce the penal provisions of the law against the broadcaster.¹⁶

15. (cont'd). if they repudiated all stock gains, the men would become negligent about losing stock or would pocket gains for themselves. The evidence was sufficiently ambiguous for Judge Lindley, who found against the A & P on many other points, to conclude that "I cannot convince myself that the evidence is conclusive that stock gains were intentional or other than what might happen from a number of reasonable causes". However, the evidence also seems clearly to indicate that very high stock gains were prevalent in the A & P in the 1920's, and that it took public antagonism to bring about some degree of restraint. There is no reason to suppose the A & P was unique among grocery chains in that respect. Exhibits and testimony in A & P trial relating to stock gains are in Interstate Merchant, May 5, June 30, October 13, November 3, 1945; April 6, October 5, 1946.

16. Interstate Grocer, November 23, 1929; Congressional Record, vol. 72 p. 1108 (71st Cong. 2d. Sess.) Radio Act of 1927, 47 USCA Sec. 109, 113.

Henderson capitalised on the publicity afforded by Dill's attack. He refused to concede that his language was unacceptable, pointing out that "there is hardly a minister in the country that does not use the word hell frequently". The "Old Man" challenged "Senator Pili" to come off the floor of the Senate and "fight it out", and his supporters wired in their advice to "pickle Dill". The controversy put the FRC itself in something of a pickle. FRC chairman Ira Robinson admitted that he was not sure whether Henderson's "hells" and "damns" were in violation of the law, and the issue raised delicate problems of censorship. The Radio Act condemned certain types of language, and established guidelines of "public interest, necessity or convenience" but it also expressly forbade censorship, and it was not easy to see how those different requirements could be reconciled, especially in a case such as that of KWKH where excesses of language occurred in the context of the airing of opinions, any curb upon which would have been regarded by some as political censorship. Furthermore, having been trounced by Henderson before, the Commission had no desire for a further tangle at a time when the broadcaster had never been more popular. Not surprisingly, the Commission equivocated, though Chairman Ira Robinson did drop a hint that he had in mind the possibility of shifting Henderson to a regional channel "so that he might be heard by those desiring to listen without offending others at a distance who have protested against him".¹⁷

Henderson relished the notoriety, but expediency dictated a strategic withdrawal. As he had ambitions to be granted more wattage and undivided time for KWKH, he had a strong incentive not to make life too difficult for the FRC; furthermore, many of his own supporters were of the opinion that, as George Schulte expressed it, "he could possibly tone

17. Pusateri, pp. 400-401; Interstate Grocer, January 11, 1930; New York Times, January 11, 1930.

his remarks down somewhat without hurting the justice of his cause". Henderson accordingly let it be known that he would in future desist from the use of "hell" and "damn" in order to preserve harmony in his radio audience, and although lapses frequently occurred Henderson did indeed moderate his behaviour, to the relief of all concerned except those chain store men who had hoped to see him put off the air altogether. The FRC responded with the "mildest possible reprimand" by issuing only a 30 day probationary license, this later being renewed without difficulty. Senator Dill, a progressive who had been acutely embarrassed by allegations that in this case he was siding with Wall Street, withdrew from the fray with the claim that he had "really done a service to those who want to permit Mr. Henderson to fight the chain store movement...because if he had not been stopped using language violating the law he would undoubtedly have been taken off the air". The most obvious consequence of the affair was that the newspapers gave publicity to KWKH, thus inflating the audience with legions of the curious.¹⁸

Henderson thrived on attempts to hit back at him, and it indeed suited his purpose to appear as the target of conspiracies to silence him, for it persuaded his followers that he really had the chains in a panic. He charged that "chain-controlled" radio stations were trying to drown his voice by interfering with his 850 kilocycles wavelength, with two Chicago stations, WENR, owned by the Insull utility interests, and WLS, formerly owned by, and still closely associated with Sears, Roebuck, being especially singled out for condemnation. Listeners were also advised of an attempt by Montgomery Ward to buy him off by asking to take advertising time, an offer which, according to Henderson, he had contemptuously spurned.

18. Interstate Grocer, January 18, 25, 1930; New York Times, January 17, 25, 1930.

Those who criticised Henderson for seeking to make money out of the cause were reminded that the chains were willing to pay Henderson far more just to be quiet. As a Memphis wholesaler told the KWKH audience, "They would buy him a private yacht, a chateau in France and build him a monument high as the Woolworth Building if they could stop this squirrel saying "Hello World".¹⁹

The advisability of saying nothing was perhaps most clearly demonstrated to chain store men by Henderson's mauling of a fellow Southerner, chain magnate Clarence Saunders. Saunders was himself an extravagant personality, reckless, boastful and unguarded. A one time puddler in a foundry, he had created America's first self-service grocery chain, the Piggly Wiggly, and had built himself a famous "Pink Palace" in Memphis, before losing his fortune through an ill-judged attempt to corner the market in Piggly Wiggly stock in New York in 1923. The way in which Saunders had been tied up and then stripped by the "Wall street slickers" had been one of the talking points of the day in the South. Recovering from disaster, Saunders had developed a second large chain, the "Clarence Saunders - Sole Owner of My Own Name" grocery stores, known for its flamboyant advertising, and Saunders was determined that Henderson should not spoil his success. In full-page advertisements in Southern newspapers he warned that the broadcaster's "slobbering mouth" would unleash the "red terror of Russia" and derided his creed as being to "stop all progress and let grass grow in the streets that the home cow may there graze". In reply, Henderson offered his listeners impressions of "Clawrence", whom he mimicked in a "high-pitched effeminate voice". To Saunders, Henderson's behaviour

19. Interstate Grocer, January 18, March 8, 1930; Wholesale Grocer News, March 1930.

proved him a "shiny-eyed rat" with "glittering eyes and a gnawing mouth" who "gnaws at night on the characters of responsible companies and not only does not offer to pay for his gnawing on other people's property, but asks to collect a toll for his dirty mouthings". Obviously resentful of Henderson's mimicry, Saunders demanded that "when you answer, do it like a man instead of in your sly rattish way...Talk with coherence, instead of spitting and spluttering so much". Saunders warned that "You said that if I were near you'd spit in my face. Now, listen to me, Rat Henderson, whenever you think you are skunk enough to try this let your spit spew on my face and there'll be a skunk hide that will show that something has happened to it".²⁰

So well known did these exchanges become that the Kentucky legislature invited the pair to stage a joint debate before it, an offer Saunders was willing to take up but which Henderson declined. Those chain store men who preferred to shelter behind the screen of corporate anonymity and assume an air of studied indifference had their analysis of the likely results of a counter-attack confirmed when, in July 1930, the Saunders chain went into receivership. The failure of the chain could be traced back, in part, to excessive price-cutting and overblown advertising, but Saunders himself put the entire blame onto Henderson's broadcasts.²¹

20. Interstate Grocer, February 23, 1924; February 22, March 1, 1930; Retail Ledger, First April Issue, "News From The Front In the War Against The Chains"; Harry Schacter, "War On The Chain Store, The Nation, May 7, 1930, pp 544-545.

21. Interstate Grocer, March 8, July 19, 1930.

iii. Extent of the 1930 Agitation

From the earliest days of his campaign, merchants sent in unsolicited donations to Henderson as a contribution to the expenses of KWKH and to encourage him to keep up the good work. After some weeks, at the suggestion of Philip Lieber, Henderson announced the formation of the "Merchant Minute Men", admission to which was to be secured by the payment of twelve dollars, and bonded agents were put on the road to collect subscriptions. The new organisation attracted a fervent support. As one butcher at an "Old-fashioned revival meeting" in Kansas City expressed it, "He has brought old customers back to me. I thought I had lost them for ever. And then they came in, one by one, and said they were converted". That one meeting produced \$1,132 in Minute Men subscriptions. All manner of dealers showed interest, and George Schulte excitedly reported that "hardware dealers, druggists, automobile agencies, banks, cleaning establishments, restaurants and all sorts of merchants are affiliating with the fighting, the brunt of which has been done by the retail grocers in the past". In the most aroused towns, Henderson's agents could recruit most of the merchants on Main street; in Nevada, Missouri, a town of 8,000 inhabitants, 102 joined the MMM, including the mayor, bankers, blacksmiths, cattle dealers, bookkeepers, hotel owners and the chief of police. To celebrate the success, a local restaurant served "Hello World" coffee.¹

Most of the recruitment occurred in the early months of 1930, a time when money poured into the Kennonwood studios at such a rate that it was reputedly stored in barrels before being transported to the bank. By the end of 1930, according to the findings of a Federal Radio Commission examiner, Henderson had collected \$373,500 from 35,000 Merchant Minute Men,

1. Butchers' Advocate, February 19, 1930, p.13; Interstate Grocer, January 18, March 15, 1930.

who were found in 4,000 towns; about 60% of the money had come by mail in response to the radio appeals, and the remainder from the labours of the bonded agents. Henderson also enjoyed the profits of his retailing ventures such as "Hello World" coffee and, according to Schulte, received outright gifts of \$50,000 in the six months from December 1929, as well as being flooded with gifts of hams, Navajo blankets, cakes and other presents at Christmas, 1929. Furthermore, some losses occurred, as there were numerous unauthorized Minute Men canvassers in the field, and even whole breakaway groups such as the Ohio Minute Men, siphoning off money which would otherwise have gone to Shreveport. Such huge sums may be set beside the annual budget of the National Association of Retail Grocers, which ran to \$100,000, only \$7,000 or \$8,000 of which came from retailers, the rest being scraped together by sending the begging bowl to jobbers and manufacturers, and from the profits of trade shows and other commercial activities.²

Many independents thought the tide had turned. Wall street had crashed and now, it seemed, all the chain stores spawned by the financiers in the boom days of the twenties were about to come crashing down too. Trade papers euphorically asserted that "consumers literally by the thousands are coming into the home-owned stores stating that they are through with the chain stores",³ and to some, Henderson's deeds took on heroic dimensions:

"Listen, my children, and you shall hear
of the second coming of Paul Revere
For back in the year of 'Twenty-Nine
The Chain Store Gang were called to time

2. Elisabeth Salassi, "Hello World", Shreveport Magazine, April 1950 p. 17; Pusateri pp. 401-2; Interstate Merchant, January 23, 1937.

3. Grocers' Commercial Bulletin, February 1930, p. 8.

"They were a tribe who would sit and wait
Till all the frostin' was decked on the cake
Down they would sit in the handiest seat
Throw out their chests and commence to eat

Into the heart of our town they would chew,
Gobbling resources built for you,
Ruining loyalty, credit and pride,
On they went in their greedy stride

Till down at Shreveport, way down South,
A true American opened his mouth,
Over the air his voice yelled out,
Stop People! Think what it's all about

Hello World! Don't go away,
This is Old Man Henderson speaking today,
Up and ready to speak of the harm,
Done your progressive city and farm

Not on a horse with a saddled seat,
No clatter of hoofs on a village street,
No lantern aloft in a belfry tower,
But over the air rode the Man of the Hour." 4

All over the Southern and central states there sprang up "citizens' protective leagues", "loyalty leagues", "better business associations", "community builders", "home defense leagues", "welfare associations" and "civic defense leagues". Ephemeral anti-chain newspapers proliferated, with titles such as Chained, Break The Chains Weekly, Truth, The Anti-Chain World, Hello World and Chain Store Menace.⁵ Henderson's disciples roamed the land. In the Carolinas, the Rev. B.F. "Cyclone Mack" McLendon entertained revival meetings with his assaults on the "fat-jowled, pig-eyed millionaires" and declared that "if I had a glue factory in hell, and they brought down a chain store thief, I would throw him back, for well I know there could not be enough deodorizer to disinfect him". In Portland, Oregon, Robert G. Duncan, the self-styled "Oregon wildcat", made radio broadcasts against the chains with so little caution as to what

4. Part of a "Modern ballad", The Coming of Paul Revere contributed to Interstate Grocer, March 15, 1930 by a Kansas City dry goods dealer.

5. See below, pp.473-4.

he was saying that the owner of the station soon had his license revoked by the FRC and Duncan was himself arrested by federal marshalls.⁶ In Grand Rapids, Winfield H. Caslow, "The Main Street Crusader", an ex-chairmaker and publisher of neighbourhood weeklies, who already had an anti-chain novel to his credit, set himself up as the Henderson of central Michigan with broadcasts over Radio WASH. Caslow's broadcasts challenged chain managers to go into business for themselves; asked children to shame their parents if they entered chains, and for parents to ask teachers to forbid children to buy chain store candy; chain operators were warned that "we found the stones your clerks put in the potatoes". One owner of a small local grocery chain accused of such malpractices came penitent to the microphone, "where he made public apology ... tearfully reading a statement supposed to have been drawn up by the "crusader" himself".⁷

In numerous towns, independents mounted vigorous attacks on deceptive practices by chain stores. In Detroit, the Independent Merchants' Association used shoppers to check on chain weights, and broadcast their

6. N.Y. Journal of Commerce, June 7, 1930; Interstate Grocer, April 19, June 7, November 22, 1930. For other mention of Duncan, see p.42 above. Duncan was brought to trial and sentenced to six months in jail, and fined \$500, under the penal provisions of the Radio Act. In denying his appeal against conviction, the Court of Appeals for the Ninth Circuit found Duncan guilty of the use of "profane" language in expressions such as "I'll put on the mantle of the Lord and call down the curse of God on you, that's what I'll do". The Court made the test of profanity the imputation of Divine condemnation, and distinguished this from mere oaths like "Go to hell". It also found that Duncan's use of phrases such as "sewer rat", "grave robber", "grafting thief", and worse, about named chain men and public officials did not constitute "indecent" or "obscene" language, because it did not "arouse lewd or lascivious thoughts". Had such criteria been applied to Henderson's broadcasts, it seems certain that he would have been acquitted, for his turn of phrase was more temperate, and he did not suggest God was against the chains, only that W.K. Henderson was. See, Duncan v. United States, 48 F. (2d) 128; Certiorari denied 283 U.S. 863.

7. Advertising & Selling, April 16, 1930, "All Quiet On The Western Front"; Winfield H. Caslow, The Sob-squad, a novel, Grand Rapids, 1928.

findings over a local station. In Jacksonville, Florida, the Loyalty League held an exhibition of light weight cigarettes obtained from a chain store, hundreds of citizens attending. The Kentucky Senate, responding to Henderson's allegations, passed a bill requiring all advertisements of packaged goods to include a statement of net weight. The bill was lost in committee in the House following opposition from newspapers and advertisers, but the legislature passed a chain tax law instead. Weights and measures officials were pressured to "get after" the chains, and occasionally responded. In Piqua, Ohio, a judge, while fining a Kroger manager \$10 for short weighing, criticised the motivation behind the prosecution which he traced back to a "certain gentleman in Louisiana, who has been attempting to boycott the chain stores". "The Court is no place to settle a trade war", declared the judge.⁸

Eastern journals testified to the intensity of the agitation sweeping wide areas of the country. A report from Georgia in the New York Times noted that the state was aroused by two great stirrings, "the beginning of the labor campaign to unionize the textile workers of this section and the efforts of independent merchants to break the shackles that they think are being welded for them by the chain stores". In The Nation, Harry Schacter declared that "A new battle on evolution is raging in the South" and called the "chain-store menace" the "question most talked of below the Ohio". The Philadelphia Retail Ledger detected a striking resemblance to the Klu Klux Klan, which had waxed great in the same sections just seven years earlier; Printers' Ink, in contrast, thought the agitation comparable to the populist uprising of the 1890s, and thought the new

8. Retail Ledger, First May issue, "Detroit Independents Stage 'Educational' Drive Against Chains"; Tobacco Leaf, May 31, 1930 p. 24; N.Y. Journal of Commerce April 5, 1930; Interstate Grocer, March 8, 1930.

agitators had an appeal similar in its potency to that of "Sockless Jerry" Simpson and Mary Ellen Lease.⁹

By May 1930, the NCSA had a record of anti-chain bodies active in 328 towns and cities, with 13 radio stations and 43 publications, including trade journals, regular newspapers and ephemeral anti-chain news sheets also involved. All sources agreed that the smaller towns were the most affected; they divided as to whether the South was the liveliest section or was equalled by the Midwest. George Schulte, who travelled on a speaking tour in the early weeks of 1930, addressed large meetings in towns from Minnesota to Alabama, and found similar enthusiasm everywhere. A survey in Business Week, in early March 1930, supplied a breakdown of 260 anti-chain organisations at work in 35 states, including 81 units of the Merchant Minute Men. 110 of these organisations were found in 15 Southern states, led by North Carolina (24), Georgia (19), and Texas (13). 119 organisations were located in 12 Midwestern states, led by Illinois (17) and Wisconsin (14). In contrast, only 4 such organisations were located in the six New England states, and only 3 in the Pacific coast states. While the Business Week survey was far from comprehensive as to the number of such movements, it did accurately suggest the geographical distribution.¹⁰

Henderson exempted from his condemnation both voluntary chains and purely local chains of five or less stores. Nevertheless, some zealots attacked any but the simon-pure single store independent, and the general public necessarily had difficulty in distinguishing the different types of chains. In the hotbeds of agitation, local chains sought to emphasise that they had nothing to do with Wall street. Thus in Tulsa, the Sipes'

9. New York Times, February 2, 1930; Schacter War On The Chain Stores, p. 544; Retail Ledger, First March Issue, editorial; Printers' Ink, February 20, 1930, p. 3.

10. Commerce & Finance, "And Now, The Anti-Chain Store Menace", June 4, 1930, p. 1099; Interstate Grocer, April 5, 1930; Business Week, April 9, 1930, p. 24.

Self-Serving Stores, with seven markets in the city and more elsewhere in Oklahoma, advertised itself as "A 100% Tulsa Home Owned Institution. We buy here! We sell here! We live here! We invite you to tune in KWKH..." Elsewhere, retailers in partnership chains obliterated reference to their partners who ran stores in different towns; voluntary chains, which hitherto had played up the chain store image, in some cases made a rapid "ludicrous about face" and sought instead to emphasise the aspect of individual ownership. Although this "about face" made no difference to the basic operating methods of the voluntaries, it left a legacy inasmuch as from this time on those who ran such chains much preferred the expression "voluntary groups" to "voluntary chains". Even some corporate chain store men seemed to have their doubts about the name they had striven so hard to hammer into the public consciousness: J.C. Penney reflected that "the word 'chain' is very unfortunate, for it brings up the thought of bondage. The British term 'multi-store' is much happier".¹¹

iv. Division and Opposition

Henderson's success attracted into the field of anti-chain agitation many alert promoters who made up in extravagance of rhetoric and adeptness in raising funds for what they lacked in knowledge about the chain store question. Even the most militant opponents of the chains expressed alarm at the way the crusade had run out of control. George Schulte was disturbed by the profusion of anti-chain newspapers bearing "flaring headlines in red which take on the appearance of an anarchistic tinge"; there were "leeches thick as flies", raising money for anti-chain organisations which had only a paper existence, and fighting each other to get the merchant's

11. New York Times, April 27, 1930; Tulsa Daily World, February 14, 1930; Davidson, Voluntary Chain Stores and How To Run Them, pp. 8, 32; Saturday Evening Post, J.C. Penney, "The Community and the Chain Store" Feb. 22, 1930

dollar. Schulte's view by the late March of 1930 was that "it has got to the point now where the success of the movement is at stake due to the bleeding process which is being attempted."¹

There were some willing to find justification for the excesses. Montaville Flowers, a Pasadena orange grower and professional publicist who delivered a season of anti-chain broadcasts over stations in the Pacific Northwest, admitted that the "guerrilla warfare" had been undisciplined and adversely reported. However,

"...this kind of warfare has always characterized the beginnings of a great revolution against an established evil, to which men have long submitted, but such methods are soon raised to a higher place. The American Revolution began in disguised mobs, in shootings on the Boston Common, in inspired murder of Colonials at the hands of Indians. And the Civil War began by bloody affairs in Missouri and Kansas, and by John Brown's raid at Harper's Ferry. But these outlawed efforts, calling the attention of the people to the principles involved, merely stir the public spirit and the public mind to investigate the causes at issue, and when they have found, under the turmoil, great principles of right assailed and in danger, the people have then taken up the battles and have fought them out on facts in the interest of the public good".²

Such a sanguine interpretation was not shared by most nervous trade executives. Instead they saw the image of the independent trade falling into disrepute. The whole strategy of stirring anti-chain feeling, not just the fringe of unreliable and unscrupulous promoters, came under vigorous attack from prominent figures in independent retail circles, some of whom could only see in the rank-and-file support for the agitators a conclusive demonstration that, as H.P. Sheets, the managing director of the NRHA, put it, "We have all inherited something of those belligerent traits which dominated our distant ancestors". The most damaging attacks

1. Commerce and Finance, "The Anti-Chain Store Racket", March 19, 1930, pp. 580-1; Interstate Grocer, March 22, 1930.

2. Montaville Flowers, America Chained, a Discussion of "What's Wrong With The Chain Store". (Montaville Flowers Publicists Ltd., Pasadena, California, 1931), p. 18.

on the agitators came from C.H. Janssen, the secretary of the NARG. In an editorial widely reprinted in journals hostile to the anti-chain cause, Janssen roundly condemned the "literally thousands of individuals interesting themselves in anti-chain store campaigns purely for the money they can make out of it for themselves", and pointedly included Henderson's Merchant Minute Men amongst those to be condemned. Janssen was willing to concede a grudging approval for strictly local civic-boosting movements where control was vested in the organised trade, and which avoided "extravagant criticism and condemnation of rival business concerns", but his real hopes lay elsewhere, in the cultivation of better relations with the chains through trade practice conference procedure and in the "new trade association" idea of business self-regulation.³

Janssen's attitude was greatly resented by wide sections of the grocery trade, and at the annual convention of the NARG in June 1930 an uprising of the rank and file led by John Cunningham, the Iowa secretary, resulted in the adoption of a motion pledging commitment to a "more aggressive policy" against the chains.⁴ Similarly, in the hardware association, H.P. Sheets' attitude to "name calling" was not even shared by the National Secretary Rivers Peterson.⁵ However, in trades where fear

3. Hardware Retailer, March 1930, editorial; National Grocers' Bulletin, March 1930 editorial: "Shall We Encourage Fight Promotion For Private Profit?" and "In Support of Locally Owned Stores".

4. President E.S. Berthiaume warned the convention that "One can ill conduct both a war and a constructive program at the same time", but the prevailing mood was that, as one delegate expressed it, "the time has come when people with jelly backbones won't get anywhere...You want to hit them (the chains) a wallop, and once in a while hit them right between the eyes". Some of the state grocery associations, including those of Maryland and Missouri, two of the half dozen most influential, had enrolled in the MMM en masse. At the opposite extreme, the California president declared opposition to "radicalism in all its forms". In practice, the "more aggressive policy" meant little, for the convention did not say what that policy should be and the National Board made no perceptible shift. See, National Grocers' Bulletin, 1930 Convention Issue, pp. 23-4, 102-9.

5. Hardware Retailer, "Just Chat", October 1930.

of the chains was less strong, and where the rank and file of small merchants were less influential, conservative leadership set the tone of trade association response. The NRDGA, dominated by the big department stores, condemned the agitation as "unethical" and declared unequivocal opposition to political anti-chain activity. Around the country, retail merchants' associations, which were normally controlled by the larger type of downtown stores, worked to undermine the efforts of the agitators. Thus in Raleigh, North Carolina, the secretary of the retail merchants' association boasted of success in "curbing all anti-chain movements": "fanatical merchants" had attempted to hold meetings, but their efforts had been subverted by the planting in the meetings of "level-headed conservative merchants" who "immediately took to the floor" and persuaded the majority that "cleanliness and service should be paramount, rather than unscrupulous attacks on chain stores". In cities where the anti-chain forces were especially well organised, such as Tulsa, where 185 grocers and 33 druggists joined the Minute Men, the retail merchants' association was forced into a neutral position. However, only in some smaller cities and towns, in the most agitated sections, was there sufficient breadth of support for the agitators to draw general, all-trade retailers' associations into a position suggesting endorsement.⁶

With retailers themselves divided, it was not surprising that organisations representing all types of business interests showed the greatest reluctance to become involved in anti-chain propaganda work. The Business Week survey of 260 anti-chain organisations reported only 5 chambers of commerce as being involved. In the very small number of cities where local chambers endorsed or sponsored anti-chain groups, the usual reason was fear that the merchants would otherwise bolt the chamber and

6. New York Times, June 8, 1930; Retail Ledger, First April Issue, 1930, "Retail Secretaries' Opinions of Merchant Minute Men".

establish rival organisations. In most small towns, chambers of commerce tried to sit on the fence and to avoid an irreversible confrontation with either the chain or independent merchant members. Belated and ineffective as the chains' community integration strategy was proved in many respects, the neutralisation of the chambers of commerce was revealed as remarkably thorough. By 1930, the chains were entrenched in the chambers in even the smallest towns, and their presence reinforced the disposition of these bodies to look upon the agitators, some of whose attitudes smacked of anti-business radicalism, with the most thorough scepticism.⁷

The chains had individual bitter enemies in every line of business, and in some towns those individual enemies could be numerous. However, few classes of businessmen, other than those engaged in retail and wholesale distribution, had a unifying general interest in opposing the chains. Owners of small town hotels complained that their business had been damaged because the chains reduced the numbers of travelling salesmen; insurance agents were frequently identified in the thick of local agitation.⁸ Many small town bankers also had a sense of grievance about the way in which chains maintained negligible local deposits and sent out the bulk

7. Business Week, April 9, 1930, p. 24. Flowers, America Chained, pp. 146-159. In the thirty small towns studied by the FTC in 1931, chain stores reported an aggregate of 128 memberships in service clubs, 72 of these being in chambers of commerce and the remainder in such bodies as Kiwanis, business bureaus, merchants' associations, Lions clubs, Rotary clubs etc. (FTC Chain Stores, The Chain Store In The Small Town, pp. 60-63)

8. FTC, Chain Stores, The Chain Store In The Small Town, p. 71; C.W. Wood, The Passing of Normalcy, p. 215 noted that for the most hostile stories about the chains "it is best to go to some local fire-insurance office ... The chain stores arrange for their insurance on a national plan, whereas the owner of one store is likely to insure through some local agent or broker. The chain stores also are standardized, and the risk of fire brought to a minimum, making the insurance rates generally the very lowest obtainable".

of their receipts to be banked in headquarters cities.⁹ But support for the anti-chain cause from these sources tended to be uneven and contributed little extra weight to the independent merchants. At the same time, the chains had some natural allies. Real estate owners tended to be strongly favourable towards the chains, for the 1920s scramble for locations had in many towns led to the doubling and tripling of Main street rentals and broken up long standing "gentlemen's agreements" among the local merchants that they would not bid against each other or above certain limits.¹⁰ Similarly, newspapers were bound to the side of the chains by the heavy volume of chain store advertising. Throughout the country, independents complained that the newspapers, to avoid difficulties with their advertisers, simply pretended that no agitation was going on. Only three daily newspapers of any prominence were recorded as actively backing the anti-chain campaign, and even most small weeklies also tried to avoid taking a position. With both chambers of commerce and

9. Craig Hazlewood, the president of the American Bankers' Association, warned the 1929 NCSA convention that there were many complaints from small town bankers about the difficulty of making a profit on chain store accounts. "The banker's good will should be courted...Like the minister and judge, he occupies an important place among his fellow citizens. His advice is asked on many problems...By establishing cordial relations with him, the chain store operator goes far in the direction of obtaining a hearing in communities where he is only too apt to need friends..." Following this, the NCSA and the ABA formed a committee to study the problem, which recommended the maintenance of adequate deposits in small town banks. See, Convention Speeches, 1929 NCSA Cnvn.,; American Bankers' Assn Journal, "Chain Stores And Banks Get Together", January 1930, p. 665; Chain Store Review April 1930, pp. 15-16. In its survey of 30 small towns, the FTC found that "a distinct majority of the bankers clearly expressing themselves on the question believe that chain-store deposit accounts are satisfactory. The opinions divide about equally between those that say chain accounts are more satisfactory than independent merchants' accounts and those that express a preference for the latter". (FTC, The Chain Store In The Small Town, pp. 59-60 and see also the miscellaneous comments of bankers at pp. 74-84).

10. Nystrom, Economics of Retailing, 1930, vol. 2, pp. 171-2.

newspapers either opposing or ignoring them, anti-chain agitators were denied the chance to achieve an image of respectability, and operated mainly on the margins of organised business society.¹¹

Of course, all local businessmen favoured a degree of "civic boosting" and working up of feelings of home town loyalty. Business clubs thrived on such activity. Peddlers and mail order companies which lured away the consumer's dollar brought no advantage to any local businessman, and received general condemnation. But the chain stores were a different matter. The chains located on Main street: they rented property, they hired clerks, they advertised in the newspaper, they enrolled their managers in business clubs and contributed, however reluctantly, to the community fund. From the point of view of businessmen not in competition with the chains, their presence was far from being an unmitigated disaster. Furthermore, such businessmen inevitably had to ask themselves what was the alternative to accepting the evolutionary process in distribution. If all the chain stores could be driven out of town, would not prices then rise, and consumers be encouraged to shop elsewhere? In the age of the automobile, no town could hope to insulate itself from the outside world and force trade to be conducted just as it had been a generation earlier. Small towns throughout the rural sections were engaged in a constant struggle with rival small towns and with more distant big cities to hold their home trade, and to extend their trading areas. Although grocery chains made little difference in that struggle, chains of the Penney, Ward

11. The three anti-chain dailies were the Johnstown Democrat, the Tulsa Daily World and the Raleigh News & Observer. The editor and publisher of the last-named was Josephus Daniels, former Secretary of the Navy in the Wilson administration and one of the South's most prominent liberals. For a description of the "non-partisan" position taken by Georgia newspapers, see J.J. Ellis, "The War On The Chain Store" in Nation's Business, December 1930, pp. 92, 94. Georgia independents, denied access to the press, circulated their own anti-chain paper "Truth", published in Decatur. Most independent merchants, particularly small merchants in lines worst hit by the chains, did little or no newspaper advertising, whereas the FTC found an average per store expenditure on newspaper advertising by 1,030 chains of \$683. (FTC, Chain Stores, Final Report, p. 46).

or even Woolworth type, gave the towns in which they located a valuable magnet which drew in consumers from the farms and from less favoured towns. Even some merchants appreciated that, and their opinions tended to be divided as to whether the arrival of a prestigious chain store of the Montgomery Ward type was or was not, on balance, harmful.¹² As for those businessmen who were in any case not trying to compete with the chain stores, they could only regard with some enthusiasm any agency which increased the number of people coming into town and lent to its reputation for being up-to-date and having the stores that were found in the cities. Their interest lay more in the direction of encouraging the chains to keep their profits in the town than in attempting to drive them out.

Often disappointed by the attitude of their fellow businessmen, militant merchants looked to labour for sympathetic consideration. Sometimes they were rewarded. As early as 1927, the Illinois and Iowa State Federations of Labor adopted resolutions condemning secret rebates to chain stores and, in the case of Illinois, asking union men to give preference to home owned stores. Henderson's campaign inspired considerable labour sympathy. In his own Louisiana, the State Federation of Labor, in annual convention, declared chain stores to be symptomatic of a trend to monopoly and that they reduced employment, and resolved "to call on all workers...to do every lawful thing discouraging the chain system of merchandising, and to do every lawful act which will have the effect of

12. Inter-town rivalry found expression in "trade trips" or "fellowship trips" where merchants drove in convoy through the countryside distributing advertising and free gifts, trying to capture territory surrounding other towns. See, Walter Burr, Small Towns: An Estimate of their Trade and Culture, N.Y. 1929, pp. 143-4. For the welcome given to Montgomery Ward stores for this reason, see George B. Everitt, "How The Chain Store Helps The Independent", Nation's Business, October 1929. Many merchants had their best ever sales, in "spin-off" trading, the day Ward came to town. This factor was particularly strong in western states, where ownership of automobiles was most extensive, and where families thought nothing of travelling 100 or 150 miles to patronise their favourite stores. See, President's Conference on Unemployment, Recent Economic Changes vol. I, pp. 331-41 for changes in trading areas. This trend was especially pronounced in fashion goods, and but little apparent in grocery shopping.

encouraging individual enterprise". Union men were generally considered to be open to arguments about the need for "reciprocity" and building home town employment even if they often patronised chain stores.¹³

There were some serious limitations to labour support, however. Officers of unions in the retail field inclined to a policy of strict neutrality in conflicts between chains and independents. The secretary-treasurer of the Retail Clerks' International Protective Association, C.C. Coulter, while regularly denouncing the excessive hours and low wages prevalent in chains, and their use of spies to root out unionism, nonetheless insisted that wages and conditions should be the "sole ground of contention against the chains". Likewise, Patrick Gorman, the president of the Amalgamated Meat Cutters and Butcher Workmen of America, the leading union in the grocery chain field, espoused a "live and let live" philosophy towards the evolution of the chains, never once opposing their expansion, and demonstrating stern disapproval to those locals which discriminated against the chain stores in any way.¹⁴ Although at the start of the 1930s most chains were antagonistic to unionisation, union leaders had some hope that large-scale retailing might lead to large-scale retail unions by a process of "organising the employer", an impossibility when retailing was conducted by a multitude of small stores. Even in 1930, the unions had enough of a foot in the door in labour strongholds and in some of the progressive chains like Grant and Penney, for such a possibility to seem more than an idle illusion. To some extent, this strategy put the retail field unions at cross purposes to the philosophical outlook found in some other unions.

13. Interstate Grocer, October 15, 1927; Louisiana State Fed. of Labor, Proceedings of Annual Convention, 1930, p. 44.

14. See Coulter's editorials in Retail Clerks' International Advocate, "Chain Store Profits and Wages" (July 1928), "The Spy System Spreads" (January/February 1930), "Official" (May/June 1930), "Chain Systems Dictate Terms of Employment" (September/October 1930); Hilton E. Hanna and Joseph Belsky, Picket and the Pen - The "Pat" Gorman Story (1960) p. 153.

In 1932, the AF of L convention adopted a resolution moved by Pat Gorman calling for the unionisation of chain store workers. Such a resolution, in reference to virtually any other industry, would have been accepted without hesitation, but not all the delegates were happy about the idea of organising the chain store. Andrew Furuseth, the seamen's leader, expressed the view that not unionisation but antitrust prosecution and federal taxation was needed, because if government did that "they could not only minimize but in my opinion completely destroy a system which inevitably leads to much worse conditions than we have now". Furuseth feared that unionisation "will simply make the chain stores more secure, because it is a method through which they will have the sympathy of labor behind them if they are wise enough to comply with the resolution".¹⁵

The impact of such union support as existed on behalf of the anti-chain cause was limited by the fact that most workers were not union men. After a decade of organisational decay, by 1930 only 10.2% of the non-agricultural workforce was in unions, mainly in construction, coal, railroads, printing, clothing and street railways.¹⁶ There were many pockets of union strength dotted about the Midwest, but the South was largely unorganised. In practice, few American workers read labour journals or attended union meetings where the chain store controversy might be discussed, and anti-chain campaigners often found the unorganised worker more apathetic to the idea of reciprocity and building home industries than his union counterpart. Furthermore, however many resolutions were passed by union men, it was their wives who did most

15. American Federation of Labor, Proceedings of Annual Convention, 1932, p. 209.

16. Irving Bernstein, The Lean Years: A History of the American Worker, 1920-33, 1966 edn. p. 84.

of the shopping, and the fate of trade-at-home agitation was determined not by hands raised in meetings but by the number of feet crossing the thresholds of chain stores. The shift to a pattern of shopping by women - a generation earlier men had done much more, if not most, shopping¹⁷ - divorced the role of producer, a role which encouraged a stress on preserving jobs and building home businesses, from that of consumer, where price and purely shopping considerations became paramount. The consequences of that divorce were well noted by a 1931 survey in San Francisco and Oakland where "the interviewers commented that the general anti-chain arguments often seemed to be traceable to the opposition of the husband who was a member of a trade union. Also, quite commonly, wives of these husbands remarked that they patronized the chains anyway".¹⁸

Even sympathetic labour voices were discouraged by some of the activities of anti-chain campaigners. A complete cycle of hopeful greeting and pained disillusion sometimes occurred in but a few weeks. In St. Paul, the organ of local labour at first hailed the agitation as a sign that "at last" the merchants had "awakened"; there was a belief that a "circle of exchange" of St. Paul-made goods through St. Paul-owned stores could be created, and a hope of united action by merchants and union men against the open shop organisation, the Citizens' Alliance, which was itself allied with the National Tea Co. and the Piggly Wiggly stores. However, a sour note was soon heard: the agitation was throwing up too many "professional racketeers"; merchants were coming to believe they deserved patronage without improving their stores and prices;

17. Nystrom Economics of Retailing, 1930, vol. I, pp. 26-7.

18. Commonwealth Club of California, Transactions, vol. XXVI, No. 4, July 14, 1931, pp. 181-241, "Chains v. Independent Stores", p. 208.

St. Paul anti-chain campaigners failed to condemn chain banks, had their literature printed in Minneapolis or were anti-union. Ultimately, the Trades and Labor Assembly felt compelled to cease active endorsement of the agitation when the Barrow Garment Manufacturing Co., which employed several hundred union men in the city on work for a chain system, warned that the turmoil was costing it business and would lead to loss of jobs.¹⁹

It was W.K. Henderson himself who caused the most scepticism about the direction and character of the anti-chain campaign. In April, The Progressive, the newspaper of the Wisconsin La Follettes, exposed the Henderson Iron Works as an open shop, revealing that Henderson was hostile to what he termed "dirty union bums", and that he had played a prominent part in breaking a 1922 railroad shop strike by repairing locomotives in his workshops with non-union labour. Elsewhere, William A. Odom, who had once tried to organise the works, reviled "Hog Henderson" as "one of the biggest slave-drivers and union-haters in America", and accused him of having led the open shop movement in Shreveport after the war, thus setting the union men and the home merchants against each other and letting in the chain stores. "Yes, that is the same dirty hog who is fooling you to make you believe that with your help and his hot air, and greed for more money, he will destroy the very thing that he imported in there". These charges were given wide circulation, and some of Henderson's dismayed supporters applied pressure on him to mend his ways. As a result, an agreement was hastily drawn up allowing the unions entry to the iron works, and Henderson himself abruptly became a forceful champion of the rights of organised labour. Many were satisfied by this adjustment, The Progressive, having been belaboured by some of its readers for its tactless handling of the subject, was pleased to praise the "valuable

19. Minnesota Union Advocate, February 6, 13; March 13, 20, 27; April 10, 17, 1930.

public service" done by Henderson on the chain store issue and thought that he could "accomplish great things for the common good". F.D. Laudemann of the International Association of Machinists, who had played a major part in negotiating the admittance of the unions to the iron works, became a prominent supporter of the Minute Men movement. Nevertheless, the affair left a residue of suspicion and reserve, and diminished Henderson's standing as a fearless foe of Wall Street.²⁰

In parts of the Midwest, attempts were made to forge alliances between independent merchants, labour and farmers, on the assumption that the chain store issue had at last brought the merchants into the anti-monopoly anti-Wall street camp. Some politicians zealously proselytised for this new fusion of interests. In Wisconsin, Philip La Follette was elected as a progressive Republican governor in the 1930 elections on such a platform. In Minnesota, Floyd Olson, the gubernatorial candidate of the revived Farmer-Labor Party, swept to a handsome victory in a campaign emphasising an attack on concentration of wealth, chain banks and chain stores. In Iowa, the formation of a Farmer-Labor-Independent Retail Merchant Council was attempted, the officers of the Council being the president of the Iowa R.G.A., the vice-president of the Iowa Farmers' Union and the past president of the Sioux City Trades and Labor Assembly. The Council proposed to seek cost of production for the farmer, just compensation for labour and legislative action against the chain stores for the merchant.²¹

Midwestern politicians could be quite starry-eyed about the prospects for such alliances. Senator Brookhart of Iowa, a hero to the small merchants because of the senate resolution in his name which had created

20. The Progressive, April 26, May 31, 1930; International Molders' Journal, May 1930 pp. 293-6, June 1930, p. 343.

21. Minnesota Union Advocate April 24, 1930; George H. Mayer, The Political Career of Floyd B. Olson, St. Paul, 1951, pp. 48-56; Interstate Grocer, October 25, 1930.

the FTC's chain store investigation, urged the 1928 NARG convention to join with farmers and labour to fight against the exactions of monopoly.

"You can not win alone...You must join with your customers for the control of corporations, of transportation, of excess profits, of credit and of marketing. Cooperation is the word. When I say cooperation I do not use that word in a flimsy and uncertain sense. I mean the genuine old Rochdale system. There are no substitutes and no short cuts. Some time I will be glad to present it to you with details for its operation....."

So well was this speech received - delegates voted support for the Senator's bill to permit cooperative national banking, as a reward for his services - that Brookhart delivered substantially the same speech to the 1929 convention of the National Association of Retail Druggists, where it was again warmly applauded. But did Brookhart or the delegates really know what they were advocating? Brookhart advised the druggists to read the People's Year Book, the bible of consumer cooperation, and he spoke with enthusiasm of a visit he had made to see English cooperatives at work. Yet he also suggested that "there are at present over 50,000 stores in the United States organized somewhat under the cooperative plan which I have suggested to you" and advised that "you get in touch at once with all these cooperative organizations and bring them together in a great national federation". How existing retail cooperatives, which reinforced the principle of individual ownership and private profit, could be reconciled with the "genuine old Rochdale system" where the shopkeeper was merely a manager and the consumers took the profits, was not explained.²² It was not beyond the wit of government in the Midwest to

22. National Grocers' Bulletin, 1928 Convention Proceedings, pp 53, 158-160; NARD Journal, October 3, 1929.

encourage retail cooperatives one step removed from the purely commercial, but the ultimate incompatibility remained.²³ It proved a constant dilemma for progressive politicians in Wisconsin and Minnesota, where they held power at times in the 1930s, how to balance their commitments to fostering consumer cooperatives with their rhetoric in favour of the independent merchant. Most usually, they sought to mollify independents troubled by state encouragement for consumer cooperatives by showing a commitment to harrassing the chains by strenuous trade practice and tax legislation.

Farmer-labour politics, which in 1930 were mostly conducted on the progressive flank of Midwestern Republicanism, were held together by the cement of historical tradition and sentimental mythology, despite the many tensions arising from the conflicting interests of wage earners and rural property owners. But there was no such cement to hold together a farmer-labour-merchant alliance. On the contrary, the farmers and merchants had a long tradition of bad relations, stemming from the deep-seated rural prejudice against "middlemen". In the great movements of farm revolt, the merchant had taken his place among those condemned, and if less resented in the abstract than the trusts and the railroads, in practice he had taken the brunt of anti-middlemen expression, because it

23. The "Central Wisconsin Food Stores Cooperative" of 50 independent groceries in the Madison area was set up in 1930 as a "partial state function...under the supervision of the Department of Agriculture and Markets". This followed on from the Department's work in organising marketing cooperatives for farmers. The grocers retained their independence and the profits of business, the cooperative functioning essentially like any other retailer cooperative, and it was in no sense on the Rochdale plan. Even so, the state sponsorship would have been considered creeping socialism in most states, and was unique to Wisconsin. (Modern Merchant & Grocery World, July 18, 1931).

was he who was in contact with the farmer.²⁴ During the years of the Granger movement in the 1870s, Montgomery Ward made its first strides by advertising as the "original Grange supply house" which cut out the middleman, and extended special terms to Granges. The favour of the farm population for the catalogue houses in the following decades effectively short-circuited the sporadic attempts of merchants to agitate feeling against the catalogue, and the catalogues proclaimed the mail order method as being the farmers' liberation from the "tyranny of the country merchants."²⁵ It was likewise the farmers rather than urban labour which had given the main support for consumer cooperatives, with hundreds of stores being formed in great waves in the late nineteenth century. Although few of these stores had lasted long, an element in the rural population retained a persistent enthusiasm for running its own stores, and every upsurge of economic discontent led to a parallel upsurge in cooperatives. While such cooperatives were, by 1930, of slight

24. That contact could be unpleasantly intimate. Upper stories of Southern country stores were often occupied by lodges, Granges etc. "Frequently a merchant entered into a peculiar arrangement whereby he would build the lower section of the store, the fraternities the upper, and they jointly financed the roof.... Patrons of Husbandry and Grangers used the lodge hall to lambaste the merchant below for his impoverishing trade practices. Often these irate agrarian organizations adopted resolutions creating trading contracts which forced storekeepers to cut their profits and meet many of the cotton farmers' terms of credits". (Clark, Pills, Petticoats and Plows: The Southern Country Store, p. 20). Storekeepers who foreclosed on mortgages when farmers' crops failed and they could not pay their bills for goods bought under the lien system were, of course, especially disliked: although most merchants went to great lengths to avoid foreclosing, some became considerable landowners in that way. Storekeepers were expressly excluded, as "obnoxious to the Constitution", from the Farmers' Alliance, which also denied membership to bankers, bank employees, railroad employees, lawyers, brokers, real-estate dealers, cotton buyers and salesmen, and warehouse owners. (C. Vann Woodward, Origins of The New South, 1877-1913, p. 193).

25. Emmet and Jeuck, Catalogues and Counters, pp. 20-21; Asher and Heal, Send No Money, p. 72.

importance in the United States as a whole, they were found in greatest concentration precisely in those areas of the upper Midwest where prevailing political attitudes were most inclined to favour the idea of merchant-labour-farmer alliances, and their presence was a daily reminder of the unreality of such an idea when brought down from the soaring heights of political oratory to the mundane truths of economics and sociology.²⁶

Certainly, much of the red-hot antagonism of earlier decades had died away by 1930. Farm leaders did not spend their time denouncing the country merchants, and consumer cooperatives were relatively few and provided only modest competition for the independent dealers. Relations had become less strained because of the spread of the cash economy, which broke up the oppressive and woefully costly systems whereby farmers pledged crops or land to buy supplies on credit, and which also encouraged the spread of the chains, thus giving an extra element of choice and price competition. Nevertheless, few farmers were prepared to do anything to see the independents re-establish their old supremacy however much they might mistrust the intentions of the Wall street chains. Radically-minded farmers could not shrug off the traditional antipathy towards the merchants and the "middlemen" who stood behind them, and business-minded farmers could see substantial benefits in securing access to distant urban markets through chain store distribution.

Most farm journals recognised that there was a "chain store question", but they also recognised that it had two sides. Rather than taking a definite position, journals opened their columns to expressions of the

26. See pp. 24, 26-27.

rival points of view.²⁷ The Interstate Grocer, with its network of contacts throughout the farm states, could record only one farm paper as having come out "flat-footed" against the chains, and a survey by the Farm Journal, which had one and a half million readers, indicated that most farmers were indifferent to the chain store issue, and that those who had definite opinions tended to favour the chains.²⁸ Anti-chain agitation was greatest in the rural sections of the United States, but within those sections it was very much a phenomenon of the towns and cities, which lay beleaguered in a sea of rustic indifference. Probably many farmers, especially poor farmers in the South, very few of whom owned radios or had regular contact with the towns, really had much idea that there was actually a great fight against the chain stores going on.²⁹

27. See, e.g. Bureau Farmer, July 1930, pp. 4-5; "What Chains Offer The Farmer" by J.C. Penney, and "What The Chain Store Costs Farmer" by J.H. McLaurin.

28. Interstate Grocer, June 28, 1930. The Farm Journal survey, quoted in Chain Store Review, August 1930, p. 64, produced 952 letters from readers, of which 716 were favourable to the chains, 197 unfavourable and 39 neutral. Interestingly, two-thirds of the replies came from women, which suggests the primacy of "consumer" over "producer" considerations. Among the points cited in favour of the chains was "no favoritism in serving customers", a reflection of the belief of some farm families that the merchants looked down on them. Letters critical of the chains stressed general points about community-draining rather than grievances specific to farmers.

29. In 1930 ownership of radio sets ranged from 63.3% of households in New Jersey to 5.4% in Mississippi. Within each state, the rural districts had the lowest ownership: thus in Alabama, 26.7% of households in Birmingham had sets, but only 1.4% in one rural county. (President's Research Committee on Social Trends, Recent Social Trends in the United States, vol. I, p. 211).

The failure to mobilise farm sentiment points to the fundamental weakness of trade-at-home agitation. To succeed, it required a very high, and sustained, level of popular support. When the merchants shifted their main attack to legislation, they needed to win just once - or rather, twice: first in the legislature, and then in the courts. Once a chain tax was on the statute book, its enforcement then became a mere matter of administrative routine, and no further expenditure of effort was required by the merchants. Trade-at-home campaigning, in contrast, required that the people be convinced again every day of the year, and the revivalist nature of the 1930 agitation militated against such a long drawn out process. As the NCSA noted, with relief, local campaigns rarely lasted more than 90 days, and everywhere, as the summer heat increased, activity dropped off by May and June. Furthermore, even at its height, the pattern of agitation was somewhat patchy, so that it was found that "in one town the fight may have reached a fever heat, yet in the very next county they are doing nothing about it". In such circumstances chain store men were able to sit back and wait for local drives to run out of steam.³⁰

Unable to win over unanimous voluntary support, independents tried some mild methods of coercion. Attempts to turn public feeling against chain patrons were made in some particularly "hot" localities: citizens were asked to sign pledges declaring they would not enter chain stores, and those who persisted in doing so were "named" in pamphlets or newspapers. "In some localities, local bodies even place pickets in front of chain stores attempting to shame people who trade there. They succeed to some extent and now and then influence as many as half of those proposing to enter to buy elsewhere". Very rarely, yet more drastic methods were used.

30. Progressive Grocer, April 1930, p. 82; Chain Store Review, July 1930 p.14.

In Sanford, North Carolina, the mayor warned city employees not to enter chain stores and that "if they don't know they shouldn't they're too ignorant to hold their jobs anyway, and after this God help them if they do it again". In one Michigan town, a schoolteacher was denied renewal of her contract because she had been seen in a chain store. Elsewhere, wives of prominent citizens received letters from anonymous "friends" who sought to "advise" them against entering chains. But even many of those who considered it right to abuse the chains thought attempts to stigmatise or bully chain store customers were unethical and likely to lead to a hostile reaction. In general, attempts to "educate" public opinion did not go beyond the stage of making arguments, just as attempts to close the chain stores did not go beyond trying to win back their customers. The small towns of the South did not resort to the ultimate sanctions of community discipline. No hooded men gathered outside the homes of chain store managers to burn fiery crosses; customers were not tarred and feathered on their return from shopping expeditions; chain stores did not have their windows broken or their doors daubed with painted slogans. Strong feelings were released, but they did not well up from the morbid depths of the psyche.³¹

31. Progressive Grocer, March 1930, p. 60; Interstate Grocer, March 1, 1930. Ernst and Hartl, "Chains Versus Independents. IV. The Fighting Independents" in The Nation, December 3, 1930, p. 606. Probably the most drastic action taken against a chain store in 1930 occurred in St. Clairsville, Ohio. In earlier years, the local A & P had repeatedly failed to observe the proclamations of the city authorities requesting that all stores should close on Armistice Day; in 1930, a platoon of war veterans, led by the commander of the Belmont County American Legion, marched on the store wearing steel helmets and carrying rifles, and sent customers fleeing with a tear gas attack. After upsetting some displays and a fruit stand, the veterans posted a sign stating "Closed for the Day". Less significant, perhaps, than the attack itself - which was an isolated incident - was the community reaction. Customers in the store at the time, who included the president of the St. Clairsville 1st National Bank, declined to take any action or even to condemn the veterans who had driven them out into the street with eyes streaming. The veterans claimed that they had public support, and the A & P perhaps thought so too, for it filed no charges, although the culprits were all known. (Associated Press, in Modern Merchant and Grocery World, November 22, 1930; see also Interstate Grocer, November 15, 22, 1930).

Thus while a public sentiment developed, albeit briefly, that being seen in a chain store was just a little shameful, even in the "hottest" areas there was no consensus that a self-respecting person should not enter a chain store. The sin was regarded as a minor transgression, at worst, and no deep, dark, silent, implicit unity of purpose bound the people of the South or anywhere else on this matter. Many who felt that they "ought" to patronise the independent store nevertheless carried on going to the chain store because they liked its prices, and their struggles with their troubled consciences were usually perfunctory. There were, in addition, many others who made no secret of their belief that the chain stores had brought a lot of advantages. Thus, in the thirty small towns studied by the FTC, 180 people offered opinions unfavourable to chain stores, but no less than 162 gave favourable opinions.³² And, of course, consumers were capable of harbouring quite intense animosities to certain aspects of chain operation, without those animosities keeping them out of the stores. Probably rather few chain store customers, for instance, would have approved of the granting by manufacturers of secret rebates to chains when these denied the independents a fair chance to compete; likewise, those who crowded the aisles of the chain stores were quite capable of siding with the clerks and managers against the company, on the ground that they were local men

32. FTC, Chain Stores, The Chain Store In The Small Town, pp. 56-9. Most of the opinions unfavourable to the chains emphasised the harm to the community; in contrast, only four statements directly criticised independents as being harmful to the community. Clearly, most people distinguished between materialistic considerations, on which the chains were praised, and moral or ideological considerations, which encouraged support for the independents.

who were badly oppressed by the "foreign" owners.³³ When it came to trade-at-home boycotting their feelings and reservations were unimportant: what mattered was simply whether or not they continued to spend their money in the chain store.

The high excitement of the merchants in the early part of 1930 was fuelled by expectations that, as Henderson had expressed it, "we can drive them out in thirty days if you people will stay out of their stores". Many hoped, as Schulte predicted, that "it should not be too long now until tangible evidence will be appearing of wholesale closing of branches of chain stores", and local anti-chain groups competed to win "scalps" in the form of boarded-up chain stores. When independents began to realise that the chains were not in a state of collapse, they tended to relapse into pessimism and apathy, and real, if modest successes - a few new customers for the home stores, a marginal neighbourhood chain store pushed over into the red ink column - were forgotten. The very revivalist temper that whipped up feelings to such a frenzy in the early days ensured that disappointment would follow, and follow it soon did. By the end of June, with agitation rapidly dwindling, a worried Schulte, his initial hopes dashed, could only warn that "no mill wheel can be turned with water that has already gone over the dam".³⁴

That the agitators did have some effect was generally believed. H.M. Foster, a trade commentator who was usually well-informed about chain thinking, reported that it was "admitted by chain store men, that

33. A dramatic illustration of this came in a store of the American Stores grocery chain in Annapolis, Md. in 1935, when a superintendent walked in on a busy Saturday night and abruptly, and publicly, told the manager and clerk they were dismissed because "Annapolis men don't produce", and were to be replaced by men from Baltimore. Several customers at once grabbed the superintendent, and he fell to the floor under a barrage of blows. The police rescued the hapless overseer from a hostile crowd which fast grew to several hundred and, his car tyres having been slashed by the mob, escorted him to the railroad station, from which he made his escape. The incident arose from dissatisfaction over the arbitrary "checking out" of chain store employees in the city. (Interstate Grocer, August 31, 1935).

34. Interstate Grocer, February 22, June 28, 1930.

sales in the chain stores in the Middle West and South have fallen off a good deal lately, and the decline is attributed to Mr. Henderson".

R.W. Lyons, while claiming that anti-chain propaganda would eventually work to the advantage of the chains by advertising them, also stated that sales "in some localities, have fallen off, occasionally as a result of the radio attacks, but generally as a result of business depression". There were also plentiful accounts of observed falls in chain patronage in some highly aroused towns.³⁵

But the chains did not come crashing down, and their sales reports did not suggest that such an eventuality was imminent. In February, 1930, which was just about the peak month for anti-chain activity, S.H. Kress & Co., the leading Southern variety chain, achieved sales 6.5% in excess of those in February, 1929, with only 6.2% more stores. Such a performance compared favourably with that of the W.T. Grant Co., the New England variety chain, whose stores were well clear of the agitation, which increased sales by only 11.2% with 26.7% more stores. Whatever the local problems of the variety chains (the major type of chains in the small towns other than the groceries) overall their expansion continued quite steadily through the months of the Henderson agitation. Between October 1929 and July 1930, Woolworth made a net increase of 48 stores, (to a total of 1,871), Kresge of 77 stores (to a total of 645) and Kress of 11 (to 211). In each case, the total of stores operated was the same or higher in each successive month. In the department store field, Montgomery Ward found itself in heavy weather, its sales in February 1930 being 1.3% below those in the same month in 1929. However, the principal cause of this malaise lay in the weaknesses of a management unused to running retail stores, rather than in the agitation. The J.C. Penney Co. -

35. N.Y. Journal of Commerce, April 5, 1930; R.W. Lyons, "Are The Radio Attacks Hurting The Chain Stores?", Advertising & Selling, June 11, 1930, p. 88.

while admittedly less disliked - which was the established leading chain in the field, had February sales 19.4% up on those in February, 1929, and the 1,115 stores in operation in both periods showed an increase of 7.45%.³⁶

Particular attention was focussed on the sales of the big grocery chains. Henderson notwithstanding, the two biggest groceries in Louisiana, the A & P and the H.G. Hill Stores, both increased the number of their units in the state in the early part of 1930. In the country as a whole, a sharp sectional pattern was apparent. In the first six months of 1930, Kroger and the National Tea Co., in the Midwest and border South, had sales 5.7% and 4.22%, respectively, below those in the same period in 1929. The A & P, with stores nearly everywhere, increased sales by 8.13%, and the First National Stores, in tranquil New England, increased sales by 19.3%. But the exact meaning of these figures was far from clear. Kroger and National Tea were plagued by management problems, which were met, in the case of Kroger, by a top-level purge in 1930, and in the National Tea persisted for several years: in contrast, First National was considered to be most effectively managed. To some extent, the two big Midwestern chains were by 1930 suffering the consequences of over-expansion in the 1920s when many marginal stores were added. More importantly, the impact of the depression also showed a marked sectional variation, with the South and interior states affected before the west and east coasts. Thus department store sales in the first six months of 1930 were 5% below the same period in 1929 in the country as a whole, but they were 8% lower in Minneapolis, 13% lower in Birmingham and 18% lower in Detroit. In contrast, sales were up by 1% in Boston

36. Survey of Current Business, April 1930, p. 44; 1931 Annual Supplement to Survey of Current Business, Table 82, p. 161; New York Times, March 5, 7, 1930.

and by 15% in New York. In that context, the varying experience of the grocery chains was to be expected, even if the exact influence of the various factors could not be apportioned. Independents welcoming new customers in the South and Midwest themselves noticed that not a few of those who offered themselves as new customers seemed to be interested primarily in securing a source of credit because they had lost their jobs or feared they would. As the depression deepened, independents actually had cause to regret the appearance of some of these converts.³⁷

v. The Eclipse of W.K. Henderson

Heavily preoccupied with the mounting difficulties of his iron works, which had passed into receivership, and disinclined to waste his energies during the radio "off-season" when reception was poor and audiences small, Henderson did little anti-chain broadcasting through the summer of 1930. He did, however, find time to launch the "Hello World" Trading Stamp Corporation, in conjunction with the president of the St. Louis Cardinals baseball club and a trading stamp promoter. The stamps were made available only to members of the MMM and, according to Henderson, were intended to help finance KWKH, but the scheme provoked a storm of protest from organised retailers. Trade associations had actively opposed trading stamp schemes for decades, securing restrictive legislation in many states, on the ground that they obliged the retailer to surrender part of his legitimate profit, encouraged

37. Business Week, May 7, 1930, p. 15; Interstate Grocer, July 19, August 16, 1930; New York Times, August 10, 1930; Retail Ledger, First August Issue, 1930. The A & P was so pleased with its performance that it acceded to a request by the Department of Commerce that its sales figures, hitherto normally shrouded in mystery, should be published to prove to the public that the depression was not really so bad as rumour would have it.

consumers to believe that those not giving stamps were overcharging, and involved retailers in giving away merchandise which other retailers sold to make a living. Only a tiny minority of merchants who regarded trading stamps simply as a sales promotion device, still used them: even the United Cigar Stores, the most renowned chain exponent of premium schemes in the past, had given up, and Henderson's critics were determined that trading stamps should not gain a new lease of life in the guise of an anti-chain promotion. The California R.G.A. recalled that it had led the opposition to Henderson at the NARG convention because "we feared that Henderson would fall into the hands of the Wall Street crowd and exploit the individual retailer for selfish profit". Now that fear had been confirmed, and "Henderson, once hailed as the Messiah of the Independent Retailer, now appears cast in the role of a Judas Iscariot who would betray his friends, the retailers, for a Bank Load of Silver". For his part, the NARG secretary, C.H. Janssen could only demand, "Upon what meat doth this our Caesar feed, that he is grown so great?"¹

At first, Henderson seemed inclined to carry on, but the opposition of even his most loyal supporters, and the reluctance of rank and file merchants to enter the scheme, led soon enough to a change of heart, and he disassociated himself from the promoting company. While some loyalists like George Schulte were then prepared to laud the way in which Henderson "when convinced he is wrong does not hesitate to change his course", the broadcaster had stirred up suspicion and resentment by his folly.

1. Printers' Ink, August 7, 1930, "Henderson and Retailers Split on Trading Stamp Issue"; Retail Grocers' Advocate (San Francisco) August 29, 1930; National Grocers' Bulletin, September 1930, "Trading Stamp Schemes".

There was more of an inclination to heed the warnings of C.H. Janssen that "the Retail Grocer cannot safely place his trust in an individual or organization, just because he or it professes to have received a call to leadership".²

In an endeavour to re-establish his crumbling position, Henderson announced that he would hold the first convention of the Merchant Minute Men, which anyone could attend. At the same time, he made it clear that his interest in the cause was flagging, and his invitation was a rather surly one: "I've been fighting your battles for the last year", he told his listeners, "and if you're so cowardly and yellow that you won't come down here to this big meeting, I'll tell you right now that I won't let you make a goat out of me any longer. I'll tell you right where to go".³

The convention itself, which was held in late October, proved a fair success, drawing an attendance of one thousand, mostly retailers and wholesalers, but with a sprinkling from most walks of life, who came from thirty states. At the convention, the movement was renamed the "Modern Minute Men of America", the word "merchant" being dropped so as to signify that anyone could join. A board of directors was created, headed by Henderson himself, who was elected president "by acclamation", and plans were laid to create a new structure of membership fees, 75% of which were to go towards the expenses of KWKH and central organisation, and the remainder to a proposed network of state Minute Men organisations. Apart from dealing with these practical matters, the conventioners enjoyed some rousing oratory. The Mayor of Shreveport

2. N.Y. Journal of Commerce, September 27, 1930; Interstate Grocer, September 20, October 4, 1930; National Grocers' Bulletin, October 1930, "Whom Can We Trust?". Henderson later announced that "It is human to err. I made a mistake and openly acknowledged it...I hope it will be my last error - something I have my doubts about. Men who made no mistakes never accomplished much". (N.Y. Journal of Commerce, December 6, 1930).

3. Retail Ledger, First November Issue, 1930. "Henderson Tires of Being A Goat, But -".

welcomed them with the sentiment that "you are here to combat an evil, a great menace", and vigorous addresses were heard from well known opponents of the chains like John Cunningham, George Schulte and Fred Mann, the owner of the Mann department store, Devil's Lake, North Dakota, who was a member of the board of the U.S. Chamber of Commerce and the best known operator of a small department store in the country. An address was also heard from F.D. Laudemann, the man who had negotiated the agreement with Henderson to let the unions into the iron works, and Governor Huey Long delivered a characteristic speech, in which he declared the chain system a "slavery more devastating than in 1861". Less satisfying to the delegates were the contributions of Henderson, who proved a wretched speaker when not sniping in short bursts from behind his microphone, and of former Governor Charles Brough of Arkansas who spoke of his belief that boycotting could never put the chain stores out of business, and declared that the chains gave honest weights and that he sometimes patronised them himself. Despite a heated backstage conference, the former Governor could not be induced to withdraw these obnoxious remarks.

The convention also passed a lot of resolutions. The FRC was urged to give KWKH more power and an undivided channel; local tax officials were asked to be more vigilant in checking on reports made by chains of the value of stock and fixtures for property tax assessments; the Congress was requested to amend the Sherman act so as to eliminate the "rule of reason" read into it by the Supreme Court in the Standard Oil case. Other resolutions called for the "maintenance of the American standard of living" - a gesture to progressive and labour

opinion - and praised George Schulte for having "lighted the lamp which Mr. W.K. Henderson has held aloft" and Philip Lieber for his "intellectual leadership".⁴

At Shreveport were drawn together many of those who had, in their own home districts, developed and led the burgeoning anti-chain cause. But the assembly did not open the gateway to an era of national organisation. It celebrated the triumphs of the previous year, rather than laid a substantial foundation for the future. Very few state organisations were formed to carry forward the work of the Minute Men. In Ohio, a packed inaugural rally responded so well to the speech of Henry McFerren, one of the MMM vice-presidents, and a blind man, that there were "plenty of tears in his audience and when he was through they almost tore the place down". In Louisiana, the Minute Men were organised by an elderly attorney from Tulsa, Colonel L.M. Mott, who had decided to devote his retirement to the fight against the chain stores. In South Dakota, a start was made with a meeting of two thousand in Sioux Falls. But elsewhere little happened. Schulte blamed the habitual lethargy of the merchants, their tendency to wait on leaders to do it all for them, and the business depression which gave them other preoccupations.⁵

4. This account of the convention is based on: Interstate Grocer, October 25, 1930; N.Y. Journal of Commerce, November 8, 1930; Louisiana Progress, October 30, 1930; New Orleans Times-Picayune, October 23, 24, 1930. The principal officers appointed were: President, Henderson; three Vice-Presidents, Fred Mann, department store owner, Fred Marty, St. Louis grocer, and Henry McFerren, Tiffin, Ohio, manufacturer; Treasurer, M.W. Cavanaugh, a Henderson aide and previously secretary of the Missouri-Kansas W.G.A. The rest of the board comprised three retail grocers, one wholesale grocer, two small manufacturers, one clothier, one banker, one coal dealer, one baker, and Philip Lieber. The difficulties of consistency were seen when one speaker "stated that he had observed many of the delegates in chain stores...Another brought out the fact that delegates were stopping at a chain hotel and one stated that he moved his room when he found it out".

5. Interstate Grocer, December 6, 13, 20, 1930; New Orleans Times-Picayune, December 4, 1930.

Henderson had apparently lost most of his interest in the chain store fight, and the merchants much of their interest in him. His image, already tarnished, suffered further damage when an FRC examiner's report was made public, which recommended that his application for further power for KWKH be denied because of his bad language and because of his precarious and unsatisfactory financial condition. Henderson had, it was stated, diverted \$151,800 of \$373,500 received in Minute Men subscriptions to pay off the creditors of the iron works, and the examiner detected a "strong indication" that KWKH was "being used by an ingenious man for the purpose of soliciting funds for his personal aggrandizement and the settlement of his obligations".⁶ Probably very few of his supporters were either scandalised or particularly surprised by the revelation. Most of the money had been sent to him as a reward for the broadcasting, for Henderson to pay the expenses of KWKH and otherwise use as he saw fit. George Schulte had perhaps expressed their general attitude when he wrote that "We do not care whether Henderson makes a million or ten million out of it...he deserves whatever he gets...as nobody attempted to do what he has and none would have been interested unless he had taken the initiative". There was much more criticism amongst his supporters of the trading stamp scheme than of his appropriation of Minute Men money to subsidise his other business interests. Nevertheless, they could only be disappointed that Henderson, having made so much money out of them, rather lost his fire and his commitment once the funds ceased to flow. In the winter of 1930-31, Henderson in fact devoted most of his broadcasting time to other matters, including an attempt to raise money from railroad employees to finance

6. Pusateri, p. 403; Interstate Grocer, February 14, 1931.

a fight against trucks and buses, and the plight of the South's cotton growers. Those who had flocked to the standard of the Minute Men in early 1930 came to the conclusion that their erstwhile leader was a spent force. Not surprisingly, when in late 1931, with his business affairs in ruin because of the depression, Henderson delivered himself of a pathetic plea for the merchants to "come back to this station" and send him money, there was little response. Through 1931 and 1932 there were just occasional anti-chain broadcasts over KWKH, the most dramatic of which were those made by the Reverend G.L.K. Smith, then a little known preacher in Shreveport, who began his rise to fame with his performances over Henderson's station before continuing it on the coat-tails of Huey Long.⁷

None of Henderson's money-making schemes seemed to work any more. For eighteen months in 1931 and 1932, the staff of KWKH received only room and board, living at Kennonwood. Finally, the broadcaster's license came under challenge again and Henderson was no longer in a position to resist. His financial condition, the diversion of the Minute Men money, and his loss of the patronage of, the now Senator, Huey Long, with whom he had had a "falling out", all made the revocation of the license, without compensation, seem inevitable. To forestall this possibility and to pay his creditors, Henderson sold out for \$50,000 to another company, headed by Shreveport oil man Samuel D. Hunter, in the spring of 1933. Although not quite the last had been heard of Henderson, the loss of his station was effectively the end of any possibility of a comeback. Ironically, after a further sale, in 1935 KWKH became the 100th affiliate of the CBS radio chain which Henderson had so often condemned.⁸

7. Interstate Grocer, February 22, November 15, 1930; December 12, 1931; March 5, 1932.

8. Pusateri, pp. 403-5; Stedman Gunning.

vi. The Decay of Trade-at-home agitation.

The Minute Men movement was an affair of the spirit, a figment of a collective imagination. It was held together by the voice emanating from Radio KWKH, and when that voice fell to a whisper the Minute Men movement ceased to function, without ever having assumed solid organisational form. Nothing arose to replace it, and although local trade-at-home agitation persisted through 1931 and 1932, the level of activity was far lower than in 1930.

Expectations also tended to become less utopian. Independents realised that mere sound and fury would not bring down the chains, and they adopted more conservative, long-range policies with an abandonment of the more extreme forms of denunciation. A model for the more cautious approach was the Wichita Independent Business Men's association, founded in May, 1931, which based its work on the theory that "Without public sentiment nothing can succeed; with public sentiment nothing can fail". Restrained policies attracted a wide range of independent interests; a clerks' auxiliary was formed; the public was reached by an unrelenting programme of pamphlets and lectures. To the delight of the association, the last A & P store in Wichita closed its doors in 1933.¹ In some cities, the depression turned anti-chain associations into merchants' self-defence bodies. Thus the Syracuse, N.Y., Civic Defense League came to the rescue of the grocers, the main part of its membership, when in 1932 the city threatened to open a commissary for direct distribution of relief to the unemployed because of the inefficiency of the existing system of relief orders made on grocery stores. The League raised determined opposition, and succeeded in negotiating an agreement with the city whereby the system of orders was maintained on a cost plus basis

1. Modern Merchant & Grocery World, April 29, 1933.

(with a margin of 15%). The city probably gained from the arrangement - commissaries rarely worked well - and the scheme was credited with having saved large numbers of grocers from ruin.² In other towns, anti-chain bodies, in conjunction with regular trade associations, turned their energies to the fight to ensure that the independents got their share of relief orders and that everything did not go to the chains, which were often favoured by emergency relief committees because of their lower margins and the ease of dealing with them centrally. Independents in badly-depressed areas who were carrying countless old customers on indefinite credit saw no reason why the chains, which only sold for cash, should benefit from whatever profit there was in relief orders.³

Most of the outside promoters and agitators who latched onto the chain store fight in 1930 deserted the field, or turned their attention to raising funds to "put over" chain tax laws. The deepening depression, and the scepticism of many merchants arising from the collapse of the Henderson agitation, meant that the pickings were no longer rich, and

2. N.Y. Journal of Commerce, April 16, 23, 1932; Modern Merchant & Grocery World, September 15, 1934.

3. For a description of the burden of unpaid accounts on small shopkeepers in one city, see Mauritz A. Hallgren, "Mass Misery in Philadelphia", The Nation, March 9, 1932, pp. 275-7. For a graphic general survey, see the numerous local reports in American Federationist, January 1931, pp. 103-118. Typical comments: "Conditions in general are becoming more acute... Independent merchants are quite liberal in extending credit to well-meaning tradesmen. No chain stores extend credit for the necessaries of life". (Sioux Falls). "It is hard to get small loans unless high interest is paid. The home stores give credit" (Jacksonville, Ill.). "The unemployed have virtually no way to meet their needs...The small corner groceries are really the only ones that give credit for the necessaries" (South Williamsport, Pa.). "While small loans can be secured at a high rate of interest, yet I believe the small neighborhood stores are by far the best to the idle workers..." (Youngstown, Ohio). "Home-owned stores are the only merchants that will extend credit" (Muskogee, Okla.). Trade journals repeatedly warned retailers against extending excessive credit, but to no avail. Those unfortunate enough to be situated in badly-depressed areas either had to give credit, or lose customers. Either course could end in ruin - or, rather, a sequence of unpaid bills stretching back to the jobber and his suppliers.

freelance agitators had to take on other interests to make a living. Thus Winfield Caslow, the "Main Street Crusader", while remaining available for anti-chain speaking engagements, also set himself up as a radio personality in Chicago, ran for Congress as a "New Deal" candidate from Grand Rapids in 1932, doing very well against the incumbent Republican Carl Mapes, and then, in 1933, promoted a giant "depression money" scrip scheme back in Chicago, a scheme which eventually collapsed amid accusations of financial irregularities on Caslow's part.⁴ Most of the anti-chain newspapers which had sprung up in early 1930 folded up within weeks, rather than months, and their promoters disappeared as completely as did their newspapers. Rather few new such ventures were initiated in the next two or three years. Frederick Hardy, seeking anti-chain materials in 1932-33, wrote to "all the known sources of anti-chain agitation". "Some did not reply at all; some sent literature which had been published from three to five years previously; and some wrote that their activities had ceased and their organization disbanded, because of lack of "moral and financial support from independent merchants"! Henderson's reply put him in the last group. The only anti-chain literature that Hardy found which had been published since 1930 was a pamphlet "discovered accidentally upon a newsstand marked twenty-five cents, but sold for fifteen". Hardy overlooked some "sources of anti-chain agitation", notably the Interstate Grocer, but his general impression of a breakdown in the effort to take the chain store battle to the people was correct.⁵

Radio broadcasting likewise petered out, and what there was took place over low-powered local stations. Perhaps the only radio campaign

4. Grand Rapids Press, November 23, 1934.

5. Frederick K. Hardy, The Special Taxation of Chain Stores, unpublished Ph.D. thesis, University of Wisconsin, 1934 pp. 119-21. For examples of anti-chain literature at this time, see the bibliography below.

of any great significance was that waged by a Catholic priest, Father James R. Cox, over a Pittsburgh station in the winter of 1931-2, under the sponsorship of the Independent Retail Merchants' Association of Allegheny County. Cox's warnings against the chains were given added weight by his popularity in the city. His church, Old St. Patrick's, was the focus of charitable relief for Pittsburgh's unemployed, and Cox himself was elected "Mayor of Shantytown" by the inhabitants of the city's "Hooverville". In early January, 1932, the independent merchants' association helped the priest to organize an orderly and patriotic "march on Washington" designed to represent to the federal government the urgency of the need for relief and jobs. On January 6, the "army", estimated to number 15,000, arrived in Washington by car, truck and foot, and Father Cox presented petitions to Congressmen and to President Hoover. On his return to Pittsburgh, Father Cox told a rally of 55,000 at the Pittsburgh University stadium that he had begun "a movement which shall determine whether our government shall be the voice of Wall Street or Main Street" and announced plans to form a Jobless Party, with himself as its presidential candidate, if relief was not quickly provided.⁶

Cox had high hopes for his Jobless Party. He warned that it was "either my party or communism", and forecast that a convention planned for St. Louis in August would attract one million. In fact, only a few hundred, most wearing the blue shirt uniform of the party, made the trip to St. Louis. Plans to fuse the Jobless Party with the Liberty Party, which was headed by William H. Harvey, the 80-year old veteran of populist causes and the author of Coin's Financial School, also came to nothing. Harvey and Cox could not agree which of them should

6. Interstate Grocer, November 14, 1931, January 2, 1932; New York Times, January 6, 7, 17, 1932; Bernstein, The Lean Years, p. 432; Hardware Retailer, April 1932, p. 82.

be the presidential candidate, and the Liberty Party faithful, who had been expecting a joint convention, instead gathered in a field about a mile away from the speedway grandstand which accommodated the rally of the "Blueshirts". Running separately, both Cox and Harvey failed farcically. Harvey got only a token vote in the presidential election (53,425) and Cox, who ran out of money and failed in health and so had to abandon active campaigning, received only 704 votes, the lowest of any candidate that year. Both the Liberty and Jobless parties condemned chain stores - the Liberty Party platform denouncing the "national octopus" for depressing farm prices - but in neither case was the chain store question given particular prominence, the main issues being public works, the veterans' bonus, prohibition, the 30-hour week, farm relief, the banking system and unemployment insurance. The concern of these fringe parties about the chain stores made no impact on the campaign waged by the major party candidates, Hoover and Roosevelt, but it did indicate that the chain store was on the political agenda of the disaffected, albeit only in the fine print.⁷

The dwindling away of campaigns to turn public opinion against the chains did not indicate that independent merchants felt any less strongly. On the contrary, the depression intensified antagonism. Neither was the decline wholly, or even largely, due to disillusion, shortage of funds, or the organisational collapse and decay shown by virtually every type of body during these years, from labour unions to the U.S. Congress itself. Rather, independents turned their attentions towards a legislative attack, in the form of chain tax laws. As of 1930, the independents had no good legislative stick with which to beat the chains, for although several states had passed chain tax laws, the

7. New York Times, April 3, 18; July 17, August 15, 17, October 13, December 25, 1932; Interstate Grocer, August 6, 1932.

courts had invalidated them. Indeed, many independents believed they would get nowhere with legislation until they had won the "educational" debate. But in May, 1931, the U.S. Supreme Court transformed the situation by upholding an Indiana chain tax statute, and independents, having lost much of their faith in headlong assaults on the chains through trade-at-home agitation, moved to test this new line of attack. Hundreds of chain tax bills were introduced into state legislatures in the following two years.

The strategy of the NCSA demonstrated a parallel shift. In the period before May, 1931, the association relied on a continued long-range attempt to build a favourable public opinion. Symptomatic of this approach was the zeal shown by the NCSA in trying to influence the minds of the political and civic leaders of the future by distributing vast numbers of "debate handbooks" to schools and colleges. The independents in most cities failed to make an adequate reply and, not surprisingly, students taking the pro-chain side won 80% of the 5,000 debates on the "chain store question" held in schools and colleges in the academic year 1930-31. In addition, the pro-chain side won 9 of the 11 state high school debating championships where this was the topic.⁸ This was, no doubt, an approach of some relevance to countering trade-at-home feeling, and as an insurance for the future, but it was of little use to stop an immediate legislative threat. After the Supreme Court decision, the chains had to come to grips with case-hardened politicians, who cared more about votes than about the elegance of debating argument. Thus the emphasis was hastily moved from "education" to lobbying.

8. Chain Store Progress, July 1931, p. 2.

Trade-at-home agitation satisfied the desire of frustrated independents for action, and it released aggression built up during the 1920's. On balance, however, it probably did more to raise the morale of independents than to frighten chain store men. In the years 1927-1930, militant leaders like George Schulte had the greatest hopes that this sort of agitation would rout the chains, and although the events of 1930 proved that it would not, the whole assault on the chains had been launched, and legislative strategies evolved, before that discovery was made. If this preliminary agitational barrage did not exactly soften up the chain store enemy, it did at least encourage the independents to come out of the trenches in which they had cowered for most of the 1920's, and grapple with their foes. It also persuaded politicians, who had the sounds of battle ringing in their ears, that they had been summoned to do their duty.

PART 3. The Legislative Attack: the development of the chain store tax, 1927-1935.

i. 1920's Experiments.

The first chain tax bill was introduced in Missouri in 1923. The State legislature considered a bill sponsored by a short-lived federation of St. Louis retailers, the Association Opposed To Branch Stores, which proposed graduated license taxation of all chain stores, beginning with a fee of \$500 on the second store of the chain. The bill also provided that no person, firm or corporation might operate more than ten stores in Missouri.¹

The bill did not pass, and it was premature. Even many of its supporters admitted that it was politically impossible at that time, and that it would certainly have been ruled unconstitutional in the courts.²

1. Interstate Grocer, Feb. 10, 17, 1923; New York Times, March 18, 1923. Hardy, The Special Taxation of Chain Stores p.128 refers to a Delaware statute of 1917, imposing a flat fee of \$10, and a small levy on inventory, on branch stores of companies having their principal place of business outside the state. This was so mild that it was not contested in the courts. Hardy also, p.180, notes that Cedar Rapids, Iowa, in 1918 attempted to include chain stores under an ordinance requiring a license fee of \$10 per day from itinerant vendors. The Iowa Supreme Court ruled the attempt unconstitutional, on the ground that chain stores were not itinerant vendors. State v. Cater, 184 Iowa 667, 169 N.W.43. In 1923, the Missouri bill was spoken of as the first anti-chain bill, and it was certainly the first to arise from the activity of an anti-chain organisation. For general details of chain tax statutes: Maurice W. Lee, Anti-Chain Store Tax Legislation, University of Chicago, Studies in Business Administration vol. 9 no. 4, 1939; Nichols, The Chain Store Tells Its Story pp.127-186; C.F. Phillips, "State Discriminatory Chain Store Taxation", Harvard Bus. Rev. vol. 14, April 1936, pp.349-359; Alfred G. Buehler "Anti-Chain Store Taxation", Jnl. of Business, vol. 4, October 1931, pp. 349-369; FTC, Final Report of the Chain-store Inquiry pp. 78-82; Yale Law Journal vol. 40, pp. 431-441; Col. Law Rev. vol. 31, pp. 145-154; Harvard Law Rev. vol. 44, pp. 456-460. See Appendix Table "State Anti-Chain Store Tax Legislation", p.456, for bills introduced by year.

2. Interstate Grocer, Nov. 4, 1922; February 24, 1923.

For nearly four years more, only the most desultory interest was shown in the idea that the chains could be attacked by legislation. Chain tax bills were considered by the legislatures of Virginia and Mississippi, but were not enacted. Two or three cities also contemplated proposals for municipal chain tax ordinances. Ashland, Ky. adopted a chain tax, but subsequently repealed it, apparently after pressure from the NCSGA. Danville, Ky. passed an ordinance which required a license fee of \$50 from each cash and carry grocery store, and of only \$12 from the regular service grocery: in effect, if not in form, an anti-chain measure. The ordinance was, however, invalidated by the Kentucky Court of Appeals, which found in the "mere details" of credit and delivery no sufficient distinction to sustain a separate classification for taxing purposes.³

Any greater interest in the idea of anti-chain legislation was inhibited by the general belief that the courts would prove an insurmountable obstacle. The closest direct precedents were not encouraging. At the turn of the century, Missouri had attempted to meet the competitive "menace" of the fast-growing big city department store by imposing license taxation. A law was enacted which imposed a license fee of \$500 on each of a number of specified departments, in excess of one, in stores employing more than 15 people, in cities of over 50,000 population. However, the law had been ruled unconstitutional on the ground that the classification attempted was arbitrary and unreasonable. A similar fate had befallen a parallel Chicago ordinance. As the courts were considered to have become, if anything, less receptive to legislation of this general character and intent over the intervening years, the auguries were not good. At least until 1930, chain store men,

3. Interstate Grocer, March 22, 1924; February 5, 1927; Nat. Grocers' Bulletin, April 1925, "Taxing Chains in Kentucky"; City of Danville v. Quaker Maid Inc. 43 A.L.R. 590.

and most lawyers, expressed a strong conviction that the courts would not tolerate any form of anti-chain legislation and that in the 14th Amendment lay the guarantee of security for the chains.⁴

This attitude was little less prevalent among independents. Even the few convinced advocates of anti-chain legislation saw it essentially as a long-term strategy and, moreover, as one inferior in likely consequences to the effort to whip up trade-at-home feeling in the public at large. In the early years - certainly before 1931 - the legislative attack was very much the second string to the anti-chain bow. Furthermore, militants also saw it as logically secondary. They did not expect that the legislatures would pass, and the courts approve, anti-chain legislation until such time as public opinion had been aroused to the "menace" of the chains.

In that respect, the fate of the anti-department store laws was not so discouraging. The campaign against department stores had been but weakly and briefly prosecuted, and it had produced only the two pieces of tax legislation. The example held in mind by chain tax advocates was, rather, that of the long, hard and ultimately successful effort to secure constitutional legislation to curb, by license fees, the use of coupons, premiums and trading stamps.⁵

In 1916, the U.S. Supreme Court had upheld Washington State and Florida anti-coupon and trading stamp laws, even though the license fees involved were clearly designed to regulate and prohibit rather than to raise revenue.⁶ In so doing, the Court had reversed a long sequence of decisions in other courts in which such laws had been held violative of

4. Columbia Law Rev. vol. 31, P.145; State v. Ashbrook 154 Mo.375, 55 S.W.627 (1900).

5. Interstate Grocer, March 10, 1923; April 27, 1927.

6. Washington imposed a \$6,000 license fee on each merchant using coupons or trading stamps; in Florida he was required to pay a license tax of \$750 for himself, and for every person or firm who redeemed the coupons. Rast v. Van Deman & Lewis Co., 240 U.S.342 and Tanner v. Little, 240 U.S. 369. Both decided March 6, 1916.

the equal protection of the laws afforded by the 14th Amendment, and instead deferred to the insistent pressure of the legislatures in favour of such legislation, which had found expression in the adoption of anti-coupon laws in 26 states in the years 1888-1915. In deciding these cases the Supreme Court had bent over backwards to accommodate the legislatures. Most other courts had found in the coupon and trading stamp schemes merely a form of legitimate advertising, involving no lottery or deception or anything else inimical to public health, morals or safety; the Supreme Court, in contrast, scarcely able to deny that such was, on the surface, so, had stretched the public welfare argument almost to breaking point by offering hazy speculations that such schemes might "by an appeal to cupidity lure to improvidence" and that, although not lotteries, they could be seen as having the "seduction and evil of such". Thus, the Court had deftly observed that "it can be argued" that the reasoning of the other courts had been based on consideration of the "mere mechanism of the schemes alone and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities. As to all of which not courts but legislatures may be the best judges and, it may be, the conclusive judges".⁷

In the early years of the chain tax effort, the trading stamp victory was often cited as evidence that persistent pressure could pay off. The legislatures had been moved by the demands of the trade; and the courts, eventually, by the demands of the legislatures, The root of that whole controversy was the belief of the great majority of merchants that coupon and trading stamp schemes forced them to give up part of their profit, to the advantage only of the manufacturers and the customers. However, as finally approved by the Supreme Court, such legislation took all the trappings of measures intended to serve some great purpose of public morality. In view of that, it was at least

7. 240 U.S. 363-365, 375.

conceivable that one day the Supreme Court might be moved, in the face of a similar legislative insistence, to discover that the chain stores also had "insidious potentialities" deserving of punishment and regulation. In the mid and late 1920's the chains, and big business in general, were enjoying a period of moral and political ascendancy: in the short term, their position seemed impregnable. Nevertheless, the opponents of the chain store were well aware that, if the future was to be anything like the past, there was likely eventually to be a reaction and a revival of feeling against the "trusts" which would work to their advantage, first in the legislatures and finally, perhaps, in the courts. Their belief was that by arousing a broader agitation against the chains they could pave the way for an effective legislative attack; and that if many, and varied, anti-chain bills were offered around the country, a few could get passed, and even if the courts rejected them all, at least the ball would be rolling.

It was in 1927, in step with the burgeoning trade-at-home movement, that the drive for anti-chain legislation really began. In late 1926, NCSGA general counsel Clark McKercher had been able to assure the chain convention that "strike legislation in states and cities seems to have gone out of style". In the previous year, their independent grocer competitors had, in most states, shown more interest in legislation to curb peddlers than in any struggle with a giant adversary. However, the new year brought anti-chain bills in at least a dozen state legislatures, and the enactment of the first anti-chain laws. The NCSGA, the only chain organisation, was unable to meet the pressure, and frantic calls went out for non-member grocery chains and chains in other lines to provide assistance in the lobbies and before legislative committees.

This unpleasant and unpredicted experience provided a considerable impetus towards the formation of the NCSA the following year.⁸

In 1927, North Carolina and Georgia passed chain tax laws. The North Carolina statute required payment of a license fee of \$50 for each store of a chain operating more than five stores; Georgia imposed a tax of \$250 on each store in excess of five.⁹ As with all chain tax statutes there was, of course, no attempt to levy a tax on stores beyond the borders of the taxing state; and, as with all chain tax statutes before 1934 (Louisiana), and nearly all thereafter, the liability for taxation was determined solely on the basis of operations within the taxing state. Thus a chain with fewer than six stores in North Carolina was not liable under its chain tax, however many stores it might have elsewhere.

Several states in 1927, among them Kansas (where the retail grocers' association produced the model bill), Iowa, Wisconsin and Arkansas, considered bills which sought to prohibit altogether the operation of more than five stores under common ownership in the state.¹⁰ Such bills reflected the belief that a man should be allowed full freedom to own a handful of stores, but that five was "enough for anybody". In Maryland, a bill inspired by the Kansas model was actually enacted into law, but with application only to Allegany county, which contained only a few dozen chain stores. The bill, a last-minute substitution for a statewide measure, was sponsored by John G. Lynn, a wholesale grocer in Cumberland, the seat of Allegany county: it passed rapidly, with little scrutiny from the legislature as a whole, thanks to the unanimous backing of the Allegany county delegation. Whether a statewide measure could have passed

8. Chain Store Age, Nov. 1926, Proceedings of 6th NCSGA Convention; Chain Store Age, October 1927, NCSGA Convention Proceedings, report of Clark McKercher.

9. Laws of North Carolina, 1927, ch. 80; Laws of Georgia, 1927, p.89.

10. Chain Store Age, June 1927 describes bills; Interstate Grocer, February 26, 1927.

may be doubted, but Maryland grocers hoped that the Allegany county measure could be extended to the rest of the state if it survived the courts. Unfortunately for their plans, the statute was so confused in its phrasing that it stood no chance in the courts. Although the intention had been to prohibit chains of more than five stores in Allegany county, a taxing provision had been tacked on, apparently as a sort of back-up provision, and this made the statute incomprehensible, the stores in excess of five apparently being not only prohibited but taxed \$500 as well.¹¹

This garbled enactment was actually the first state anti-chain law ever passed, and it was the first to produce a court opinion, handed down in April, 1928. The preceding trial before Judge Albert A. Doub in Allegany county circuit court provoked great interest. A battery of attorneys from leading national chains were on hand to support the case of the plaintiff, Keystone Stores Co., a Pittsburgh grocery chain operating nine stores in Allegany county. On the other side, the presentation of evidence by the local independents was assisted by George Schulte and R.H. Rowe, the secretary of AWGA. There was no real expectation that the law would be upheld, if only because it was unclear in its terms, but the verdict of the Court came as a sweeping victory for the chains. In the common practices of the chains referred to by the independents, such as the use of loss leaders, the receipt of extra quantity discounts, cash and carry, and the export of funds to remote headquarters cities, Judge Doub found nothing of "essential characteristics...distinguishing them from independent stores in such a way that they can be made a basis for a

11. Maryland Laws of 1927, ch.554. For some conflicting descriptions of the meaning of the law: Col. Law Rev. vol. 31, p. 146; Buehler, "Anti-Chain Store Taxation", p.350; National Grocers' Bulletin, 1927 Convention edn. p.78. Interstate Grocer, April 16, 1927 gives the history of the law.

separate legal classification". The judge warmly praised the chains, and declined to see them as an appropriate object for the regulation contemplated by the statute. "Nothing in the record even remotely tends to show any relation of this act to protection of the general public in health, morals, good order, security, or general welfare". On the contrary, the chains provided clean and sanitary stores, made rapid stock turns which kept goods fresh, did not delude the consumer by extending him credit for goods he could not afford, paid regular rentals, gave steady employment, and sold at lower prices. The judge could see why owners of competing stores might wish to see the chains put under restriction, but no reason why the public interest required any such action. "Looking at the community as a whole...(the chain stores)... are more likely to give to the farmer, truckman and consumer part of the middleman's profit and so to become a blessing to society and the public generally". In all, the chains had "perhaps become essential to the efficient distribution of merchandise to the general public".¹²

The North Carolina and Georgia tax laws also fell in the courts. In both cases the basic objection of the courts was that there was no "real and substantial difference" between the ownership of more than five stores and less than five stores which could justify a separate classification for taxation purposes.¹³

Judicial disapproval was also laid upon another anti-chain act of 1927, affecting only drug chains. Pennsylvania passed a law which

12. Keystone Grocery & Tea Co. v. Huster, Circuit Ct. of Allegany Cty., April 21, 1928. The decision was unreported, but can be found in full in Chain Stores In The Law Courts, N.Y. 1939 (limited circulation, compiled by E.W. Simms for the Institute of Distribution) at pp. 1-17. See also Wall Street Journal, April 27, 1928. Interstate Grocer, Feb. 25, 1928 gives a detailed account of the trial. No appeal was made.

13. See Great A & P Tea Co. v. Doughton, 196 N.C.145, 144 S.E.701, (1928). The same fate befell a 1928 South Carolina statute taxing stores in excess of 5.

required that only a licensed pharmacist could own a drug store, and that, in the case of associations and corporations, all the members and stockholders had to be licensed pharmacists. Exception was made to allow the continued operation of drug stores which were in existence at the time of passage of the act and whose owners were not pharmacists. The law was essentially just another variation on the pharmacy laws, whereby the drug trade was kept as far as possible as a closed and self-regulating profession, but it was a variation with a decidedly anti-chain twist. The law was challenged in the courts by the Liggett Co., many of whose stockholders - as indeed Liggett himself - were not licensed pharmacists.¹⁴

The statute was upheld in Federal District Court, on the theory that the regulation of a profession involved principles different from those applicable to an ordinary trade or occupation. The Court considered that the legislature may have been motivated by the thought that a corporate owner, in purchasing drugs, "might give a greater regard to the price than to the quality" and accepted this as a reasonable concern. The reasoning of the Court was not, however, based on any evidence of adverse consequences to the public welfare arising from the fact that owners of drug chains were not pharmacists. Instead the Court seemed influenced by a rather dubious historical parallel:

A number of years ago the business of selling liquor was wholly in the hands of those who sold it. Innkeepers and tavern keepers stood high in the respect of their neighbors. The practice grew up of brewers and distillers taking over the ownership of places where intoxicating liquors were sold. The saloon, when ownership and management became separated, soon became a nuisance and a menace, so that its abolishment was demanded, and no one at any time would wish to witness its return. 15

14. Pennsylvania statutes, Supplement 1928, sec. 9377; Lebhar, Chain Stores in America (1963), p.136.

15. Louis K. Liggett Co. v. Baldrige, 22 Fed (2d) 993, 996. Dist. Ct. E.D. Penna., Dec. 8, 1927.

The United States Supreme Court then took the case on appeal, and, in a decision handed down on November 19, 1928, ruled the law unconstitutional. Justice Sutherland, giving the opinion of the majority, showed himself as unimpressed by the argument of the lower court. The State's pharmacy laws already adequately safeguarded the public health, Sutherland found, because the actual conduct of a drug store had to be in the charge of a licensed pharmacist, and none but a licensed pharmacist could compound prescriptions. In the light of this, "mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health". No evidence to the contrary had been adduced. The statute therefore denied the equal protection of the laws guaranteed by the 14th Amendment, and constituted an arbitrary interference with the exercise of an ordinary property right.¹⁶

Although Justice Holmes dissented, with Brandeis joining in his opinion, his argument did not effectively contradict the logic of the majority. Holmes declared that a "standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know any thing about it", but he did not explain how this condition had produced harm to the public in the case of drug chains, or how such a criticism applied with more force to drug chains than to any other type of corporation. Could the state therefore use its police power in this way to curb any type of corporation, without any clear and explicit evidence of a danger to the public welfare? Such seemed to be the underlying logic of the dissent, and it conformed to the general attitude of Justice Holmes that the Court should not set itself up to arbitrate in social and economic controversies in such a way as to detract from the responsibilities and rights of the State legislatures. This

16. Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 112-113.

rather old-fashioned view of the function of the Court was, in 1928, most emphatically not shared by the majority, who would clearly not tolerate any arbitrary restriction on chain store corporations where such restriction was justified only by vague reference to the police power.¹⁷

Thus when the Courts were through with the anti-chain laws of 1927, chain executives had every reason to feel secure in the belief that independents were wasting their time and money in pressing for such legislation. Even if the politicians could be induced to pass such laws because the "boys back home" found the chains an obnoxious menace, it seemed impossible that the courts could be so stampeded. The various decisions seemed to mean that the chains could not be singled out for special taxation, because of the absence of a substantial difference from other retailers to justify separate classification, and that, in the view of the courts, the chains should not be singled out for regulation under the police power because they were not a menace to the public welfare.

Despite these setbacks, the demand for anti-chain legislation continued to mount. Its character changed, however. The invalidation of the Pennsylvania drug store law killed off further efforts in that direction, and the ambitions of the druggists to capitalise on their special status as a profession to gain a type of protection from the chains denied to other retailers came to naught. Over the next few years, the organised drug trade in fact concentrated its political energies largely on the pursuit of resale price maintenance and of pharmacy laws to keep drug items confined to drug stores, chain or independent alike. Similarly, bills proposing the outright abolition

17. Ibid. p.114; Yale Law Journal, vol. 40, p. 435.

of chain stores were generally abandoned as hopeless and utopian. Instead, most of the 142 anti-chain bills offered in 1929 and 1930 proposed relatively modest schedules of chain taxation, usually graduated according to number of stores; and the main weight of justification was shifted from the police power to the revenue power of the states.¹⁸ The aim was to establish the principle that the chain could be made subject to special taxation, without becoming bogged down in debate as to whether the chains were a public menace. After 1928, the futile extremism of the early anti-chain legislative proposals gave way to years in which the principles, legislative appeal, and constitutionality of chain taxation were established step by step.

ii. Graduated Sales Taxes, 1930-1933.

Before the onset of the depression, sales taxes were little known in the United States, except for taxes levied against specific merchandise such as tobacco and gasoline. Only in West Virginia (from 1921) was a general tax on retail sales employed as a significant element in the overall tax structure. The sales tax was, indeed, commonly regarded as a peculiarly "bad" tax, being regressive in its impact on consumers, and was also thought of as likely to be hard to enforce. In addition, the federal nature of the United States carried with it problems not experienced in some other countries, for each state feared that if it imposed a sales tax its consumers would cross state lines to buy - either in person, or by making interstate mail order sales. The fiscal needs of the States in the 1920's were not so great as to outweigh these negative considerations, whereas necessity and expediency had compelled the

18. Georgia, however, in 1929 reenacted its invalidated 1927 chain tax law, this time specifically framed as an application of the police power. Ga. Laws of 1929 p. 71. The State Supreme Court found the police power was not involved in chain store taxation and invalidated. (F.W. Woolworth Co. v. Harrison, 171 Ga. 891, 156 S.E.904).

imposition of sales taxes on a worldwide scale in the financial chaos of the years 1918-1923. The spread of sales taxes to a majority of the American states in the 1930's was similarly compelled by necessity and expediency.¹

This was, at least, certainly the case with the usual form of the sales tax, where the tax was applied at a uniform flat-rate on all retail sales. Following West Virginia (1921) and Georgia (1929) such taxes were in effect in 14 states by the end of 1933, among them New York, California and Illinois. Eleven of these sales taxes were made law in 1933, the year in which all scruples were abandoned as the legislatures cast about for new revenues to meet the burdens of expenditure which failed to decline as fast as revenues. In general, the main advocates of the flat-rate sales taxes were those who had most to gain from any reduction in the pressure on the property tax: real estate interests, utilities, landowners. Support also came sometimes from those whose incomes were directly tied in to new revenue being found, notably schoolteachers. Opposition came from labour unions, the more radical farm organisations, and above all, from retailers. Although these taxes were not - by the standards of a later day - unduly onerous (none in 1933 was higher than 3%, and most were well below) many retailers had a great dread of the sales tax, believing it difficult to pass on to consumers, and that it would demoralise trade, and this attitude only relaxed slowly, as experience proved it largely unfounded. Leadership for retailer opposition to flat-rate sales taxes was usually provided by the department stores, but it was not an issue on which the big and the small retailer

1. Carl Shoup, The Sales Tax In The American States, N.Y.1934, pp.3-8. The problem of sales made in interstate commerce was met by "use" taxes, designed to equalise the tax as between goods sold in purely intrastate commerce and those sold by mail order etc. Such legislation was approved by the U.S. Supreme Court in 1937. (300 U.S.577). However, unlike in many other countries, sales taxes were not applied to sales by wholesalers or manufacturers, except at nominal rates: immobile "sitting ducks", extractive industries and utilities, were sometimes hit by sales taxes.

had much cause to disagree. The 1929 Georgia sales tax, the first of the wave, was notable for its exemption of the first \$30,000 of sales, but small retailers were not normally so favoured in other states; in addition, small retailers, because of "economic friction" with the consumer - especially where they dealt in necessities - often had most trouble in passing the tax on.²

Graduated sales taxes had a different genesis and motivation. Such taxes were actively sought by anti-chain small retailers, even where they involved a small burden on themselves, because of the graduated impact. They were not favoured by the interests usually found backing flat-rate sales taxes. Between 1930 and 1933 such taxes were passed in six states. By 1933, the graduated form of the tax was very much the minor alternative, whether measured in terms of number of states with such laws, the revenues produced, or the size of the taxing states; in later years, crippled by court decisions and the desire of states to maximise revenues, the graduated form disappeared. However, for a few years, the graduated sales tax did pose a considerable threat to the chains. It appealed to independents because, unlike the license tax, it hurt all chains equally, and caught those such as Sears, Roebuck with few stores but large sales. It also appealed to chain tax advocates as it gave them an opportunity to hitch their cause, albeit rather insecurely, to the fast-accelerating sales tax bandwagon. The menace to the chains lay in the risk of legislatures seizing on the graduated form as an easy way of conferring popular appeal on a generally unpopular type of tax.

From the first, the graduated sales tax involved anti-chain campaigners in strife which did their cause no good at all: internecine strife. Unlike the license tax, the graduated sales tax hit not just chains but

2. Shoup, pp. 7-24, 102-103; Buehler, Anti-Chain Store Taxation, p.362.

department stores and, to varying degrees, other large independent stores. Graduated sales tax bills in the mid-1930s got round this problem by exempting the single store from its provisions, but this was not the case with most of the bills offered 1930-1933. Many reasons lay behind this: a belief that it would be unconstitutional to exempt single stores was sometimes heard; a degree of animosity towards the department stores; a conviction that the legislators could only be interested if the prospective revenues were inflated by payments from the individual stores. This circumstance made the graduated sales tax a source of far greater internal controversy within the ranks of the retailers than the license tax ever was, and sometimes allowed the chains to hide behind the skirts of the department stores, which were often politically well placed, and always sure of good treatment by the newspapers, which, in the cities, were absolutely reliant on their advertising.

The first such tax passed in Kentucky in March 1930, at the height of the Henderson agitation, and it threw this split in the merchant ranks into sharp relief. Some sort of chain tax law was just about guaranteed passage in Kentucky that year. Governor Flem D. Sampson had called in his annual message for legislation to curb the chains which "like great octopuses, are reaching their long viper-like tentacles into every nook and cranny of our country to suck the life blood from our home people", and both he and his attorney-general made rousing broadcasts over WKXH. Sampson's fervour was no less great for his having apparently never said anything against the chains before the advent of W.K. Henderson, and his mood was shared by many in legislature. At first, the favoured anti-chain bill was for a graduated license tax, but, discouraged by an unfavourable ruling on the Indiana License tax made on February 1st in Federal District Court, the sponsors switched to the sales tax approach. The new bill made a fairly easy progress through both House and Senate: in the House the roll was called amid cheerful cries of "Hello World, now

don't go away!", and there were only four contrary votes. As signed into law, the sales tax ranged from 1/20 of 1% on sales of less than \$400,000, to 1% on the excess of sales above \$1m, the sales of chain stores under common ownership being aggregated in determining liability.³

There was no doubt of the enthusiasm of many small retailers for the tax. An observer of their behaviour at a committee hearing recorded that "at times the gathering took on the appearance of a religious revival. When the speaker was in the midst of calling the chain all the names in the category a small merchant standing next to me kept yelling at the top of his lungs: "Get at 'em boy, hit 'em hard, Glory Hallelujah!" Not only was the tax on the small retailer only 1/20 that of the maximum tax on the big retailers, but also it was calculated that, when allowance had been made for credits for various existing license fees imposed on those selling cigarettes, soft drinks and various other items, nearly all small grocers, druggists and tobacconists would pay nothing at all. Thus these small retailers had nothing to lose.⁴

In contrast, the new tax was enacted in the face of intense opposition from large downtown stores and retailers in lines less troubled by the chains. Many associations joined the department-store dominated Kentucky Retailers' Association in condemning the tax, including the state associations of retail jewellers, hardwaremen, lumber dealers, and shoe dealers, and retail merchants' associations in all the larger cities. The pro-tax forces, except for the small town merchants, amounted mainly to the grocery associations and the Louisville Retail Hardware Association, and though numerous and vociferous were clearly not as representative of

3. Interstate Grocer, January 18, 1930; Louisville Courier-Journal February 20, March 5, 1930; Kentucky Laws of 1930 ch. 149.

4. Harry Schacter "War On The Chain Store", The Nation, May 7, 1930, p.545; Louisville Courier-Journal March 3, 1930; Tobacco Leaf, March 15, 1930, p.36.

the organised section of the trade across the whole retail spectrum. The Kentucky Retailers' Association indeed blamed the whole problem on the grocers: "A single trade group bent on harrassing the chain grocer", which had been blinded by its anti-chain fanaticism into playing into the hands of revenue-hungry politicians. For their part, the small retailers showed no great love for the downtown stores, which they likewise felt were being manipulated by the chains. As a spokesman for small town merchants sarcastically suggested at a committee hearing, "If these big merchants don't like the tax let them get down in our class and wear the same tax we wear".⁵

The big merchants feared that once the politicians had acquired the taste for sales taxation, they would not easily be dissuaded from gorging themselves at the retailers' expense. Events confirmed their fears. The graduated sales tax proved a poor revenue producer. Many retailers were legally excused all or significant payment, because of credits, and some others decided to excuse themselves. The rates of the tax were so low that they were difficult to assess or collect. Furthermore, defeating the object of the legislation, leading chains secured temporary injunctions, restraining any collection from them, pending the outcome of litigation. As a result, in 1931, the yield was only \$88,656, and the expense of collection amounted to \$44,621. In view of this, in 1932 a new Governor, seeking revenue, recommended a flat rate and higher sales tax (2%) and only the most vigorous action of the

5. Boot and Shoe Recorder March 29, 1930, p.84; Louisville Courier-Journal, February 25, 26, 28; March 1, 2, 3, 1930.

state's retailers, this time taking a united position, prevented such a tax from being imposed.⁶

The Kentucky controversy encouraged critics of anti-chain legislation to speak up and warn that the whole process of some retailers seeking taxes on others could only lead to trouble for all. As one put it, the Kentucky law had opened up a "Pandora's box, letting loose a boomerang", and this "boomerang" theory was given a wide currency. The NRDGA was especially active. It set up a National Anti-Sales Tax Council, under the direction of George Sheridan, the executive director of the Ohio Council of Retailers, and Sheridan travelled the country accusing anti-chain campaigners of having provided the politicians with an "entering wedge" for retail sales taxation in general. In 1931 and 1932, as more and more States considered sales taxes much, mostly unjustified, obloquy was heaped on the heads of anti-chain campaigners for supposedly having given the politicians the idea that retailers would be a good target. In the longer term, the task of opposing sales taxes encouraged the formation of statewide retail councils, like the Ohio Council of Retailers, which federated various retail groups under the leadership of the department stores, and in the late 1930s these state retailers' associations tended

6. There were many, and varied reports of the yield. These figures are from Hardy, op.cit. pp. 150-151, who obtained them direct from the State government. According to the N.Y. Jnl. of Commerce, March 31, 1931, only 17,000 of 55,000 blanks sent by the State Auditor to retailers had been returned; of these, 5,000 claimed complete exemption, and the average of tax admitted was only \$3.75. "Unscrupulous storekeepers" were also said to be raising their prices, and telling their customers it was because of the tax, even though not paying any. The NCSA claimed that cost of collection exceeded revenue (Nation's Business, July 1931 p.46). Chain Store Progress "Sales Tax Proceeds Inadequate", April 1931, p.7. The low size of the yield was of importance, as it encouraged the idea that graduated sales taxes were poor revenue producers and hard to enforce, thus diverting the interest of the politicians to flat-rate taxes. See also Shoup, op.cit. pp. 159-164 for a description of the desperate efforts of Kentucky retailers to avoid the flat rate sales tax. Most large retailers thought the proposed 2% flat sales tax too high a price to pay for the repeal of the graduated tax, though the chains showed themselves as half-hearted in opposition to the flat tax.

to act as counterweights to the alliances and federations set up by militant small merchants.⁷

Chain store men relished the opportunity to divide and rule, playing off the politicians against the independent retailers, and the retailers against each other. In October, 1930 R.W. Lyons explained the position of the NCSA as being that "We do not regard sales taxes as fundamentally bad in themselves and hence the association is taking no general stand against sales taxes". Lyons added that as many of the chains were foreign corporations in the various states in which they located, they "would not seek to interfere in any way in the enactment of purely domestic legislation with regard to taxes on sales or any other kind of tax", with the - obviously crucial - exception that they would "defend their rights" against "punitive" taxation aimed solely at chains. Thenceforth, chain lobbyists usually took up highly evasive and ambiguous positions, but always with the guiding principle in mind that where some sort of tax seemed inevitable. it was better to steer the politicians towards a general flat-rate sales tax. rather than see a graduated sales tax or license tax become law. Shoup considered that in at least one state the lack of assistance from the chains in opposing sales taxation was a critical factor in the imposition of a flat-rate sales tax.⁸

In all, six states, including Kentucky, enacted some form of graduated sales taxation between 1930 and 1933. But although flat-rate sales taxes were adopted in all sections of the country, and in such major states as New York, California and Illinois, the graduated form received favour only in the smaller and more rural states of Mississippi, Kentucky, Vermont, Minnesota, Wisconsin and New Mexico.⁹

7. M.M. Zimmerman, The Challenge of Chain Store Distribution, pp. 299-300. Retail Ledger, May 1931, p. 3; October 1931 p. 6; National Retail Clothier August 7, 1930, p. 70.

8. New York Times, October 12, 1930; Shoup, op. cit. p. 18, 192; Chain Store Age, Gen. Merch. edn., March 1934, p. 87.

9. The flat-rate taxes were in West Virginia (1921): Georgia (1929); Pennsylvania (1932); Arizona, California, Illinois, Indiana, Michigan, New York, North Carolina, Oklahoma, South Dakota, Utah and Washington (1933). Such taxes were voted down by referenda in Arkansas, North Dakota, Oregon (Shoup op. cit. p. 7)

The severity of these taxes varied considerably. Under the Mississippi graduated gross receipts tax of 1930 (replaced by a 2% flat sales tax in 1932), owners of more than five stores were assessed at the rate of 0.5%, other retailers at 0.25%. The Wisconsin graduated gross income tax of 1933 fixed a maximum of 0.65%, charged on the excess of chain sales over \$1m. Minnesota in 1933 imposed a tax graduated up to 1% on sales in excess of \$1m. The New Mexico statute imposed an annual license fee graduated up to 2.5% of sales in excess of \$400,000. The highest rate was that of the 1933 Vermont tax: from a bottom rate of 1/8 of 1%, the graduation increased sharply to 4% on sales in excess of \$2m. On its 1932 scale of operations, the A & P was thereby made liable to a tax of 4% on the 35% of its sales in excess of \$2m., and 2.331% on its aggregate sales, compared to its 2.337% net profit. This was an aggregate tax of \$71,150 on the 58 A & P stores in Vermont. Unlike the situation in Kentucky, no large department stores existed in Vermont to come into the higher tax brackets: only two companies, the A & P and First National Stores, had sales in excess of \$1m, and these two grocery chains stood to pay 80% of all the tax collected under the statute. However, neither chain actually paid anything, as temporary injunctions restraining enforcement were secured, and in March, 1935, the Vermont Supreme Court, following the lead of the U.S. Supreme Court shortly before in invalidating the Kentucky statute, ruled the tax unconstitutional.¹⁰

10. Laws of Mississippi, 1930 chap. 90; Wisconsin, Session Laws of 1933, chap. 469; Laws of Minnesota, 1933, chap. 213; New Mexico, Laws of 1933 chap. 73. Public Laws of Vermont, 1933, chap. 46. Great Atlantic & Pacific Tea Co. v. Harvey 177 Atl. 423 (Vermont Supreme Court, March 14, 1935).

The Vermont statute made retailers of less than \$50,000 annual sales - 95% of the total - exempt from any payment; and the graduated sales tax laws of other states also provided considerable, if less generous, exemption for small retailers. Obviously, the wider the exemptions the more isolated became the position of the chains and big department stores but, largely because of a desire to increase the yield, all but one of these states did include the single store under the tax. The exception was Wisconsin, which applied the tax only against owners of two or more stores.

The Wisconsin graduated gross income tax of 1933 was an unusually - perhaps uniquely - premeditated expression of public policy, as befitted the governmental style of that State. It was drawn up following a survey, conducted by the State Tax Commission at the request of Governor Phil La Follette, had found the existing property tax gave the chains an unfair advantage, and a complex of balancing credits allowed by the tax were designed to even up this differential and that between lines of trade with slow or fast-moving stock. The law was also intended to compensate the State for the injury caused by temporary technological unemployment and to cushion independents to some extent in the period of adjustment to chain competition. The maximum rate was set at less than 1% in the hope that such a split fraction would discourage the chains from trying to pass on the tax to the consumer. There was, however, no intention to put the chains out of business, the aim being "equality of opportunity" and not punitive taxation.¹¹

11. In contrast, proposals for flat-rate sales taxation in Wisconsin had been utterly rejected as a tax on the poor. The Tax Commission found these chain advantages under the property tax: (1) higher rates of stock turn meant chains usually did greater annual sales in proportion to stock on hand on the day of assessment. "There may not be very much in such a store at any one time, but like snow in Montana, "a great deal passes through"! This factor also advantaged, for example, filling stations as compared to lumber yards. (2) Merchandise assessed at cost, and chains paid less for their goods. (3) Chain records held in headquarters cities, and inaccessible to local assessors. Prof. Harold Groves, then Tax Commissioner, recommended that a chain tax could compensate this inequality; Frederick

The spread of the graduated sales tax was inhibited by one basic problem. While the license tax received U.S. Supreme Court approval in May, 1931, it was not until 1935 that the Court decided a graduated sales tax. Although 1930-1933 no Court ruled a graduated sales tax unconstitutional, and many lawyers believed the Supreme Court was most likely to sustain such taxation, this was a troubling uncertainty: furthermore, in the absence of such approval, the chains were able to engage in long drawn out litigation during which collection of the tax from them was suspended, and which put the state to a great deal of trouble and expense. This complicated situation compared unfavourably in the minds of most legislators with the operation of flat-rate sales taxes, which produced much larger revenues, and with lower costs of collection, and produced them immediately, without trouble with the courts. Especially in 1933, for most legislatures the need for revenue to meet an immediate emergency was the paramount concern, and graduated sales taxation did not meet that need as effectively as a simple flat tax on all retail sales.¹²

11. (cont'd). Hardy was the principal author of the resultant law. See Hardy, *op.cit.* pp. 228, 235-241, 254-257; also Hardy in Bul. of the National Tax Association, December 1933, vol. 19, pp. 16-72, "Wisconsin's new chain store tax and its relation to personal property taxation"; Harold M. Groves, Financing Government, N.Y. 1939 pp. 112-114. These general points, usually supplemented by allegations that chains moved stock out of one city and into another before assessment day, were commonly urged by independents to persuade legislatures that chain taxes were justified, though the possible differential was usually far below the chain tax sought. Actual conditions probably varied greatly from city to city, and from one assessment to another. It might be supposed that local (sometimes elected) assessors would be more inclined to favour the locally-owned store; further, that the understating of value of stock and fixtures when self-assessments were made would be more easily done by the independent than by the politically vulnerable chain. For a study showing chains did not pay less property tax in proportion to sales, A.E. Fish, "Comparative Chain and Independent Store Taxation in Nine Western States", Bul. of the National Tax Assn. June, 1939. The argument that chains paid less taxes was usually of purely rhetorical significance in chain tax controversies, and only in Wisconsin was a tax enacted after a proper study of actual conditions.

12. Yale Law Jnl. vol. 40, pp. 439-441 (January, 1931) forecast invalidation of license taxes and that the Kentucky law would survive the courts, setting the pattern for future anti-chain legislation. This view was not uncommon, and the belief that the graduated sales tax would be upheld by the Supreme Court was strengthened when in May, 1931 it upheld the, supposedly more shaky, license tax. However, passage of a graduated sales tax precluded the

Nevertheless, even after the Supreme Court upheld the principle of the license tax, many independents continued to believe that the sales tax approach - preferably with the single store exempt - would ultimately prove the more lethal anti-chain weapon. This expectation arose, in part, from the idea that as a tax on volume was more equitable than a tax on stores in its treatment of different types of chains it was more likely to appeal to the courts as "just" when really high levels of taxation were involved. It was an expectation ultimately proved false, but it was not an unreasonable one. Perhaps as important, legislatures consistently seemed more favourably disposed towards high taxes on sales than on numbers of stores. A 2% sales tax was the equivalent of a \$1,000 license fee on most chain grocery stores, and the equivalent of a \$2,000 or \$3,000 fee on a Penney or Woolworth store, but legislatures looked upon the 2% levy as less extreme, if only by analogy with ordinary flat-rate sales taxation. This illusion even affected independents to some extent: the passage of the 1933 Vermont sales tax, with its maximum of 4%, caused little comment, even in New England, but it is certain that had Vermont instead demanded a license fee of \$1,500 or \$5,000 it would have created a sensation. In fact, no state ever imposed a license fee above \$750, and although the overwhelming majority of chain tax statutes were of the store license variety, the highest taxes were all of the graduated sales type.

12. (cont'd).

operation of a revenue-yielding flat sales tax, whereas several states had both license taxes and flat-rate sales taxes, thus conveniently and constitutionally satisfying the anti-chain and revenue requirements. No state tried a graduated and flat sales tax at the same time, and it would presumably have been unconstitutional.

iii. The Indiana Decision, May 18, 1931.

The enactment of the Indiana graduated license tax of 1929 created little stir at the time. The law was a modified version of a bill introduced in the Indiana legislature by H. Curtis Bennett, a travelling salesman for a Cincinnati coffee house, which had provoked little interest until abruptly picked up and rushed through by the administration in the last days of the session, as a stop-gap revenue measure. There was no campaign on its behalf by Indiana independents, and R.W. Lyons, regretting this somewhat accidental passage, thought Indiana not a particularly anti-chain state. The schedule ranged from \$3 on a single store to \$25 on each store in excess of 20, which was clearly not a crippling exaction. However, the tax was serious enough for Lafayette Jackson, owner of the Standard Grocery Co., who was liable to pay \$5,443 on his chain of 225 small grocery stores, which made annual sales something over \$1m, and Jackson took his problem to the courts.¹

On February 1st, 1930, the tax was ruled unconstitutional by a Federal District Court. The Court found "no real and substantial difference" between the operators of chain and independent stores to justify their separate classification for occupational tax purposes. The Court noted the "theory of the defendants" to be that owners of chain stores took their money out of the community and in general proved themselves less valuable citizens than the owners of independent stores, and that they therefore belonged to a different class for occupational tax purposes. The court found, however, that "While that may be true as far as some owners of more than one store is concerned, yet that it not the universal

1. Interstate Grocer, March 23, 1929; Sample Case, January 1932 p.8; Nichols op. cit. p.133; Chain Store Progress, April 1929, "Anti-Chain Store Legislation"; Indiana, Acts 1929, chap. 207.

rule, and is not sufficient, within itself, to sustain the classification..." It was particularly noted that the plaintiff in the case, Lafayette Jackson, was himself a citizen of and large taxpayer in the city of Indianapolis, where all his stores were located.²

The case then went on appeal to the U.S. Supreme Court which, on May 18, 1931, reversed the decision of the lower court by a 5 to 4 vote. The conservatives, Justices Butler, McReynolds, Van Devanter and Sutherland, all voted to affirm the decision of the lower court; the three liberals, Holmes, Brandeis and Stone all voted to reverse it.³ Those seven votes were fairly predictable. What decided the issue was that Associate Justice Roberts and Chief Justice Hughes, who not infrequently held the balance on social and economic questions, thought the law was constitutional.

In the District Court the State Tax Commission had defended the statute both as an exercise of the police power and as a revenue measure levying an ordinary occupation tax. Before the Supreme Court, the Commission stood only on the latter ground, and in giving the decision of the Court Justice Roberts likewise declined to consider the regulatory aspect, if any, of the tax.

The well settled principles of the Court in considering such measures were outlined by Roberts. The equal protection of the laws did not require an "iron rule of equal taxation".

2. Jackson v. State Board of Tax Commissioners, Dist. Ct. S.D. Indiana, 38 Fed. (2d) 652, 658.

3. State Board of Tax Commissioners of Indiana v. Jackson, 283 U.S. 527. In the interval between the District Court and the U.S. Supreme Court decisions, the North Carolina Supreme Court had upheld that state's 1929 chain tax requiring a license fee of \$50 from each store in excess of one: the court found a "real and substantial difference" between the single store and the chain store. The same court - in an opinion written by the same judge - had previously struck down the predecessor 1927 law in which the \$50 tax had been applied on each store in excess of five. Those two cases well illustrated the difference between the merchant and judicial conception of what chain stores were. See Gt. A. & P. Tea Co. v. Maxwell, 196 N.C. 433, 154 S.E. 838.

"The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction...or if any state of facts reasonably can be conceived to sustain it...It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great".

In the past, the Court had upheld a Montana statute which imposed a license tax on hand laundries, with steam laundries exempt. It had similarly upheld a North Carolina statute taxing meat packing houses and not competing wholesalers; a Chicago ordinance which classified movie theatres for license fees on the basis of their admission charges; an Alabama statute taxing mobile vendors of sewing machines and not fixed-site vendors, and Florida and Washington laws taxing merchants who used coupons and trading stamps. Roberts found in the distinction between chain and independent stores equally sufficient differences to sustain a separate classification.⁴

Such differences included, on the part of the chains, "quantity buying, which involves the application of the mass process to distribution"; cash buying; "skill in buying"; integrated warehousing; abundant capital; "a pricing and sales policy different from the individual store, involving slightly lower prices"; greater turnover; unified advertising; standard displays for sales promotion; "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".

4. 283 U.S. 533, 537-541. These cases are cited, with others, at 538-541.

Roberts dismissed any comparison with voluntary chains, with the observation that "series of independent units cannot, in the nature of things, be as efficiently and successfully integrated as a chain under a single ownership and management". Similarly, as a department store was merely a "number of different sorts of shops under one roof" it could not achieve the mass buying and intensive, specialised merchandising of the chain store.⁵

What was striking about the case was not that 5 of the Court had agreed the law was unconstitutional, but that 4 had decided that it was not. The supposed principle of the Court was that it should sustain where any reasonable set of facts could be adduced to support a classification, even though other, equally cogent, arguments could be advanced to contradict it. Thus the legislature was to be given the benefit of the doubt unless the classification adopted was blatantly arbitrary.⁶ In the case of the chain stores the distinctions were actually self-proclaimed. There was a National Chain Store Association; magazines with titles such as "Chain Store Age"; textbooks which existed specifically to explain the methods of chain distribution. Chain executives themselves spoke of the new "science" of "mass distribution". Neither were the chain store men the only ones to perceive this distinction. In the year preceding the Indiana decision, in hundreds of towns merchants had banded together to denounce the "chain store menace", while legislatures had considered dozens of chain tax bills. Did not these evidences of the fact that real people made a "separate classification" count for anything? Did they not testify to a distinction at least as great as that, for

5. Ibid. 534-536.

6. E.g. 240 U.S.357, "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength".

example, between hand and steam laundries?

That four judges had apparently thought not naturally gave chain executives considerable comfort. Most of them seemed perfectly assured that, as the New York Times advised, "confiscatory taxation would not be permitted by the courts". The prevailing belief was that as the Court had only just produced a majority for a tax which went no higher than \$25 it could be relied on to frustrate anything more severe. Many independents believed the same, and a curious idea spread, based on the inferences of "common sense", that taxes of \$200, or even \$300, would be held constitutional, but taxes of \$500 or \$1,000 would not.⁷

It is, of course, quite possible that had a tax of \$500 or \$1,000 been the first to come before the Supreme Court the 5 to 4 vote would have gone the other way. The Court might well have decided that such a tax went beyond a revenue measure, and involved an attempt at regulation; and in so doing the Court might have decided that the chains had done nothing to require such regulation. The question would have been decided, presumably, by the judicial whim of Hughes or Roberts. It is also quite possible that had the Indiana law come before the Court immediately, in 1929, before anti-chain agitation really come to the attention of the public, the vote would have gone the other way. Indeed, it is quite probable, for the 1929 Court was differently constituted. It contained seven of the 1931 Court - Holmes, Brandeis, Stone, McReynolds, Butler, Sutherland and Van Devanter. However, the other two places on the 1929 Court were held by Chief Justice Taft and Associate Justice Sanford, not Hughes and Roberts. Both were men of decidedly conservative inclinations, and would almost certainly have ruled the law unconstitutional.

7. New York Times, May 20, 1931. Modern Merchant & Grocery World, May 30, 1931.

Nevertheless, once the Indiana statute was approved the odds on the Court approving a severe graduated license tax shortened very considerably. Once the Court had sustained the form of the tax, the precedents were very strong that it should then leave the severity of it to the discretion of the legislatures. The "common sense" notion that the Court would apply some sort of "rule of reason" and frustrate punitive taxation was rooted in the recent history of the Court, but it was not as sound as most businessmen and many lawyers believed in 1931.

A clear enough warning was sounded in the minority dissent, written by Justice Sutherland, the implication of which was rather overlooked. In the dissent, Sutherland vigorously attacked the separate classification of the chain stores. The only "so-called advantages" of chains, he maintained, were also enjoyed by all retailers with good management and large volume, including department stores and voluntary chains. Hence "the classification should fall because it is made to depend not upon size or value or character, amount of capital invested or income received, but upon the mere circumstance - wholly irrelevant so far as any of the advantages claimed are concerned - that the business of one is carried on under many roofs, and that of the other under one only".⁸

8. 283 U.S.545-548. For the view that Sutherland was right on this, C.F. Phillips, "An Economic Analysis of the Supreme Court's Decisions on Chain Store Taxation", Jnl. of Business, vol. 11, January 1938, pp.51-69. Phillips argued that the advantages of chains were not graduated by size, and that the classification was for that reason invalid. In so doing, he missed the legal point: the Court did not require a cast-iron rule of universal and smoothly graduated chain advantage, only a plausible case that the classification was not merely arbitrary. Ironically, Phillips based much of his argument on reports of the FTC "Chain Store Inquiry", the very existence of which was premised on there being discernible distinctions and advantages in favour of the chain store. It should also be observed that although Roberts and Sutherland had both framed the argument in terms of chain "advantages", the classification to be valid only really had to be based on discernible "differences" - as in the cases cited by Roberts at 538-541. Such differences were surely patent. On the economic point, Phillips relied too much on the FTC's figures on operating expenses showing higher expenses for the larger chains in some lines: these figures were meaningless because they failed to take account of the greater proportion of jobber expense absorbed in their own operations by the big chains.

Sutherland candidly recognised that the precedents tended to support the other side. In mitigation, he urged that,

"The decisions have depended not only upon the varying facts which constituted the background for the particular legislation under consideration, but also, to some extent, upon the point of view of the courts or judges who have been called upon to deal with the question. Some of the cases press to the limit fixed by the Constitution; and that fact...admonishes us to use caution in applying them to other sets of substantially dissimilar circumstances, lest, by doing so, we pass into the forbidden territory which lies wholly beyond the verge".

Clearly the reason for refusing to sustain the classification in this case was not so much the belief that it was unsound, but the recognition of where the approval of the Indiana law might lead the Court. Sutherland - more frankly perhaps than Roberts - faced up to the fact that the Indiana statute was not an isolated occurrence, to be considered solely on its own merits.

Thus,

"It may be that here the maximum tax of \$25 for each store, while relatively high, is not, if considered by itself, excessive; but to sustain it will open the door of opportunity to the state to increase the amount to an excessive extent. This Court frequently has said, and it can not be too often repeated in cases of this character, that the power to tax is the power to destroy; and this constitutes a reason why that power, however moderately exercised in given instances, should be jealously confined to the limits set by the Constitution...In *Veazie Bank v. Fenno*, 8 Wall. 533, a tax of ten per cent. imposed on the notes of state banks was upheld, although it 'drove out of existence every State bank of circulation within a year or two after its passage'...in the face of this decision, and others which might be cited, there does not seem to be any sure comfort in the suggestion, sometimes made, that this Court may be expected to intervene whenever the tax reaches the point of destruction". 9

It was not one easy step from the Indiana decision to a decision upholding destructive taxation. In theory, once the Court had approved the principle of a revenue law, it had no concern with how high the rates were pitched: that was solely the province of the legislature. In practice, when the Court in the past had approved taxes which seemed to involve the "power to destroy" it had normally justified its approval by reference to some apparent iniquity requiring regulation, even if - as in the trading stamp cases - only "insidious potentialities" were involved. In at least one case, the Court had struck down a tax because it considered it a disguised form of regulation, and evidently disliked the regulation intended. Nevertheless, the "door of opportunity" to destructive taxation, if not wide open, was certainly ajar, and the ever growing numbers of chain tax statutes around the country constituted a weighty reason why the Court would find it difficult to force the door shut again.¹⁰

10. See, for e.g. Alaska Fish Salting & By Products Co. v. Smith (1921) 255 U.S.44, where Justice Holmes said, at 48, that "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk". For the same point, 8 Wall, 548; and McCray v. United States 195 U.S.27. Contrast Bailey v. Drexel Furniture Co. 259 U.S.20 where the Court invalidated a tax used to curb child labour, on the ground that although a tax might sometimes legitimately include an element of regulation as an "incidental motive", "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment". (p.38).

On October 26, the U.S. Supreme Court also affirmed the decision of the North Carolina Supreme Court in upholding that state's 1929 law (see note 3, above) 284 U.S.575. Thus the legislatures were free to enact both flat and graduated license taxes, and laws with or without the single store free of tax. Actually, the flat rate license fee died out, principally because it was not desired to have the owner of just two stores pay as much on his second store as did the owner of many stores. Graduated license taxes including the single store proved more common than those not so doing, if only because the Indiana law was the familiar model for those drawing up such bills. Independents preferred to see the single store exempt, but the fees on the single store were always low, and the question was not generally considered of any moment: the Indiana \$3 on the single store was typical. Of course, such a fee brought no complaint from the department stores: in contrast, a graduated sales tax with the Kentucky rates would have cost the largest department store in Indianapolis well over \$70,000 p.a., not \$3.

iv. The Spread of the Graduated License Tax, 1931-1933.

Not all prominent trade association executives greeted the Indiana decision with rapturous enthusiasm. Indeed, many showed apathy or even displeasure. The NARD Journal indicated no interest, and the NARD convention in the autumn passed no sort of chain tax resolutions: the preoccupations of the NARD remained totally bound up in its various price-fixing policies, and pharmacy laws, and the association made no commitment to chain taxation at its 1932 or 1933 conventions. Likewise, Rivers Peterson, the secretary of the NRHA, advised that chain taxes were no answer to the problems of hardwaremen, and the 1931 NRHA convention's only tax resolution was one opposing all increases in federal, state or local taxes. Even the 1931 NARG convention, despite some dissension, was persuaded by its conservative leaders to avoid adoption of any chain tax resolution, secretary-manager C.H. Janssen insisting that "the trade practice evils which are the root and cause of our discomfort are not cured, abated or quieted by such legislation, but on the other hand are excited to a greater activity". Thus none of the three largest retailer associations was induced to take up the task of organising the chain tax fight. The National Association of Retail Meat Dealers did back chain taxation, but its practical activity was limited. Among wholesale associations, only the American W.G.A. - which had helped chain tax efforts from the start - lent positive assistance, and even it had other priorities.¹

10. (cont'd). Note also the Court at this time upheld a 1928 Virginia warehouse tax (284 U.S. 584) which was intended to equalise taxation as between wholesaler-retailer distribution and the chain operating its own warehouses. This decision was of no great consequence as the tax was not discriminatory.

1. See convention proceedings for 1931 in NARD Journal October 15, 1931; Hardware Retailer July 1931; National Grocers' Bulletin, September, 1931, Cnvn. edn., esp. pp. 26, 71. Butchers' Advocate, January 15, 1932 p. 32.

The lack of enthusiasm demonstrated by the crowned heads of the big associations was not, however, shared by many of the rank-and-file, whose influence predominated in the state and local associations. The chain tax drive did suffer to some extent from a lack of coordination - there was never any sort of "model" bill, and legislatures often received conflicting bills from different sources - but its militancy was not sapped by the indifference of conservative leaders. Indeed, the scale of the movement to chain taxation in the aftermath of the Indiana decision illustrated graphically the extent to which the national associations were essentially paper bodies, whose policies carried little weight even with the leaders of the affiliated state and local associations, let alone the rank-and-file. The Indiana decision greatly increased the prestige of the militants, for it conferred on the chain tax both practicality and respectability. The Supreme Court had, of course, disclaimed any concern or intention to approve or disapprove the motive behind such legislation, but that was not how chain tax advocates saw it. They felt that they had been vindicated, and in a sense they were right. Chain taxation had been pictured, even by some independent leaders, not just as unconstitutional but as almost unethical and un-American. The majority of the Court had held otherwise, and if they had not approved the motive, neither had they condemned it as odious to all right-thinking citizens. Not only did the Supreme Court decision confer on chain taxation an aura of respectability; it made such taxation seem a more likely paying proposition to tax-hungry legislatures, although chain attorneys continued to contrive some ground for litigation with most chain tax statutes. As the chains, in many cases, did good business while times were hard for most other taxpayers, they made a natural target. 525 chain tax bills were offered in state legislatures, 1931-1933. In the period between the Indiana decision and

the end of 1933, 18 chain tax statutes were enacted, and 13 new states adopted such legislation. The Supreme Court decision also ensured that the graduated license tax, rather than the graduated sales tax, was dominant: of these 18 chain taxes, 14 were of the graduated license variety, and one other a combined license and sales tax.

The movement spread geographically. Hitherto, the main success had been in the South. Furthermore, those laws enacted outside the South had proved little about the appeal of the anti-chain cause. The Pennsylvania drug store ownership law, originating in a concern for the special status of pharmacy, had posed no risks for other chains, and the Indiana law had slipped through almost by accident. Chain taxes confined to the South were little threat to the overwhelming majority of chains, whose stores were either wholly or largely in other sections. The South was a far-flung outpost of empire for the big national chains, where their political position was most precarious, and their uneasy status as invaders most pronounced.² It was also a section in which the prevailing business license system tended to weaken the argument of the chains that they were being singled out for cruel and unusual punishment. The South was not, however, a section in which the sprawling octopuses of the national chains could be dealt a mortal blow.³

2. The Census showed 5,015 units of sectional and national chains in the five Southern states which adopted the chain tax before the Indiana decision (Georgia, North Carolina, South Carolina, Kentucky and Mississippi). There were 66 such stores in Allegany County. These figures compare with - to cite key Midwest battlegrounds - 6,718 in Ohio, 3,044 in Missouri and 6,821 in Illinois. (1930 Census of Distribution, vol. 1 pt. 1 pp. 69-70; vol. 1 pt. 2 p. 1037).

3. In most of the U.S. business license taxes were used sparingly, and generally as an exercise of the police power, but in the South, which had inherited the French system, such taxes were imposed routinely for purely revenue purposes. There were many examples in Southern states of business taxes graduated according to floor space, number of employees, size of product, etc. Such taxation was commonly regressive and arbitrary. In that context, taxes based on the number of stores seemed less exceptional than in the North. See, Roscoe Arant, "Business Taxation in the Southern States", The Tax Magazine, July 1938 p.403 ff., for many examples of such Southern business license taxes. Also Groves, op. cit. pp. 274-275.

The new chain tax states, outside the South, were Arizona, Idaho, Maine, Michigan, Minnesota, Montana, New Mexico, Vermont, West Virginia and Wisconsin. Thus while spreading geographically, the chain tax had not been adopted in the major industrial states, Michigan excepted. Whatever the influence exerted by the interest of the legislatures in finding revenue, it had not proved of decisive importance. The flat-rate sales tax, in contrast, to be found in fewer states than the chain tax at the end of 1933, had been adopted impartially by the different sections, including New York, California and Illinois. The revenue consideration was only effective to tilt the balance where the independents were already strong, and anti-chain sentiment manifest.

That is not to say that anti-chain campaigners did not put up a fight in every state. On the contrary, the independents bestirred themselves everywhere, even in the eastern power centres of the chains such as Massachusetts and New York. The retailers of Massachusetts, generally regarded as apathetic and unorganisable, astounded the editor of the New England Grocer and Tradesman by coming forward in their hundreds in the winter of 1931-1932 to attend rallies in Boston and other cities and pledge their support to chain tax proposals. An Allied Independent Merchants Association was formed to press a \$250 chain tax bill. Although sceptical of the good faith of the politician who introduced the bill in the legislature, and feeling the attempt was premature, the conservatively-inclined New England Grocer displayed what passed for passionate militancy in Massachusetts.

"It is not very much unlike the Sino-Japanese situation. The independent has the numbers and the public sympathy but the chains have the weapons of wealth, cunning,

training and perfect organization. Even so, we had a Boston Tea Party, a Lexington, a Paul Revere once upon a time and wonders may not have ceased and it is perhaps better to have tried even if the chances for success may seem small". 4

The pro-tax alliance was a narrow one, however. When the case was taken before public hearings, the bulk of the support came from grocers, meat dealers, and a few tobacconists. In contrast, the chains in Massachusetts enjoyed the effective leadership of the treasurer of the First National Stores, Charles F. Adams. Adams contrived both to arouse the opposition of many chambers of commerce and consumer groups to the bill, which smoothed the path of the legislature to killing it, and to do so while still maintaining a conciliatory attitude to the conservative leaders of the independents.⁵ In 1932, Adams wooed the grocery associations with suggestions that more might be achieved by exploring common ground on price-cutting and other trade evils; when the NRA came in 1933, these coy overtures were succeeded by a marriage of convenience. Chain tax bills were introduced year after year thenceforth, often enjoying a lot of rank-and-file support, but without getting a full-hearted trade association backing. Seeing more profit in accepting the chains as a fact of life, to be cultivated rather than harrassed, the New England Grocer, after the 1932 failure, climbed back onto the fence, and never left it again. Although professing not to oppose any sort of chain taxation, in principle, the New England Grocer never came across a bill in practice that it cared for, and indeed regularly sniped at their promoters as being sharp politicians wishing only to line their pockets at the expense of the gullible merchants.⁶

4. New England Grocer & Tradesman, November 27, December 18, 1931; February 26, 1932; Tobacco Leaf, November 21, 1931 p.38. The \$250 bill was decided on after the first idea, a tax up to \$2,700, was rejected as unreasonable.

5. New England Grocer & Tradesman, March 4, 1932; Chain Store Review, April 1932 p.13, 29; Boston Daily Globe, February 24, 1932.

6. New England Grocer & Tradesman, July 1, 1932; April 1934 p.13.

Much as in Massachusetts, New York independents were inspired by the Indiana decision and the exertions of their brothers in the more militant sections. In the summer of 1931, led by the state meat dealers' association, many trade associations affiliated to a newly-formed "holding company" set up solely to demand a chain tax, the Independent Retail Merchants' Association. It was, according to the president of the IRMA, the "last stand of the independent business man". The bill, for taxation up to \$1,000 per store, was drawn up by U.S. Congressman Emmanuel Celler, who was the attorney of the meat dealers' association and was sometimes referred to as the "butchers' Congressman". According to Celler, the depression had made the tax necessary. In a radio broadcast, Celler complained that the chains were concentrating wealth, and that three-quarters of the \$30m. profit made in one year by the A & P had accrued to one man, John Hartford. "I would not have dared to give utterance to these observations three or four years ago", continued the Congressman, "for fear that I would be labelled as a radical. But today we are in the depths of economic chaos and chains are only making for the greater unequal distribution of wealth which renders it more difficult to rescue ourselves from our economic plight".⁷

The IRMA bill in fact received no serious consideration at Albany. Furthermore, the independents proved unable to mount any sort of concerted campaign. The different trades were unused to working together; the New York City retailers were jealous of the upstate Civic Defense League

7. New York Times, July 21, 30, 31, October 20, 1931; New York Retail Grocers' Advocate January 6, 1932. Associations sponsoring included N.Y. Retail Druggists' Assn., N.Y. Wholesale Grocers' Assn; N.Y. City Retail Jewelers' Assn., N.Y. Retail Grocers' Assn., National Assn. of Retail Meat Dealers; Independent Retail Tobacconists' Assn. of America and the Syracuse Civic Defense League.

which played the most active role at Albany; some believed that if they sought restrictions on chains the politicians would turn next against the independents. Fatalism and apathy were also apparent. "Sure, the chains ought to be taxed", complained one meat dealer. "They ought to be taxed out of existence, but they won't be". He forecast that the "big men" would eventually drive their country to revolution by their destruction of the middle class (meaning such as himself), but until this happened their money would ensure the defeat of any chain tax. Such men were not confident of their ability to remake the world. As another meat dealer resignedly commented, "you can bet that the bigger chains, who would have to pay the largest taxes, would find some way to evade the tax. The small independents with one, two or three stores would be left holding the bag".⁸

The chains were not seriously threatened by tax bills in the big Eastern states. They faced much greater danger in the large Midwestern states, where the issue was often finely balanced, and where there were many stores at risk. Chain lobbying, and the disorganisation of the independents, staved off any debacle in these key states. In Missouri, in 1933, a bill passed the House by 125 votes to 3, but was then quietly buried in the Senate Committee on Private Corporations, known as the legislative "graveyard", where well-oiled lobbies and machine politicians kept a tight control. In Illinois, in 1931, the House passed a bill for a tax of \$1,000 on each store in excess of three by the tremendous margin of 135 votes to nil. After the vote, Anthony Pintozi, who had introduced the bill, was, in the disgusted words of Chain Store Review, "cheered as

8. N.Y. Retail Grocers' Advocate, August 13, 1932; Butchers' Advocate February 29, 1932, p.14.

though he were a college hero, dozens of his colleagues rushing forward in congratulation, and page boys hurrying bouquets of flowers from the anterooms". Such a tax was no light matter for some chains: the National Tea Co. had made an average net profit of only \$738 on each of its 859 Illinois stores in 1930; Kroger had netted only \$293.50 average on its 633 stores. But, despite the euphoria in the House, the bill was quietly shelved in a Senate committee. To discourage a repetition, the chains in early 1932 formed the Illinois Chain Stores Association, the first of the many State chain associations formed in the 1930s.⁹

Midwestern advocates of chain taxation made their most considerable breakthrough in Michigan, the biggest state to adopt the chain tax up to 1933. The enactment of the 1933 graduated license tax, which taxed chains up to \$250 on each store in excess of 25, followed several years of general anti-chain agitation in the state, and in particular, two years of chain tax campaigning by Clyde V. Fenner and his Home Defense League. Fenner, who came from Louisiana, first came to the fore broadcasting over KWKH in 1930; he soon moved to Michigan and set up the Home Defense League, which in the first 18 months reportedly recruited 6,000 members. The League took on a variety of issues, campaigning to channel the unemployed welfare business through the hands of the independents and for local ordinances to curb the rash of roadside stands and booths on vacant lots which spread throughout the depressed cities of the state.¹⁰ Its main policy, however, was the chain tax. In 1931, the League set its sights on a graduated sales tax, and the ensuing conflict pitched the food dealers and small town retailers against the Detroit department

9. Interstate Grocer, March 4, 25; April 8, 1933; Chain Store Review, January 1932 p.7, March 1932 p.2; Buehler, Anti-Chain Store Taxation, p.351.

10. Michigan Laws of 1933, Act 265; Business Week, October 7, 1931 p.13.

stores and the bigger downtown merchants generally. Many of the rural legislators were won over by the prospect that the sales tax could be used to relieve the pressure on the property tax, which was drawing howls from the farmers, but the Detroit legislators feared the effects on prices. The fight reached a climax when the bill suffered a narrow and unexpected defeat in the House, all but one of the Detroit delegation voting against it: amid uproar, Fenner rushed onto the floor of the chamber and "mingled" with House members who had voted against in a "turmoil...that bordered on physical violence", before being escorted from the floor by friends. Apprehensive legislators who had voted down the bill insisted on the insertion in the House Journal of special "explanations" of their action, including arguments that a sales tax would encourage "bootleg" sales across the state line, that it would stimulate mail order, and that it was unconstitutional.¹¹

In 1932, the Michigan Senate felt the issue to be so politically sensitive that it discussed the chain tax in a rare executive session, behind closed doors. The bill went down that year amid charges that Fenner had demanded \$10,000 from Detroit department stores for an offer to abandon the graduated sales tax approach. Then, in the November 1932 elections, the Democrats were swept in at Lansing for the first time in 50 years, and they brought a chain tax in their platform. In July 1933, a graduated license tax was enacted, over Governor Comstock's veto, amid

11. The opponents of the bill were led by the J.L. Hudson Co., Detroit's leading department store, and included the Detroit Board of Commerce, Detroit R.M.A., S.S. Kresge Co. (the largest Detroit-based chain), the Michigan Retail Clothiers and Furnishers' Assn., Michigan Retail Hardware Assn., Michigan Retail Furniture Assn. and retail merchants' associations from the leading cities. The sponsors of the bill, James N. McBride (Burton) and Ate Dykstra (Grand Rapids) were also prominent advocates of a state income tax. Detroit Free Press, March 26, 31; April 9, 10, 22, 23, 1931; Detroit News, April 23, 1931; Retail Ledger, May 1931 p.6; House Journal, April 22, 1931, No. 66, pp. 855-858.

scenes of great jubilation from the members of the Home Defense League massed in the galleries. With the license tax method being used, the chains had lost the committed support of the department stores and other big retailers, and by 1933 the state's need for revenue had become so great that the legislature was determined to have a chain tax regardless of any effect on prices. This time round the entire Detroit delegation voted in favour of the chain tax.¹²

v. Taxation by Cities.

Little interest was shown in the idea of municipal chain taxation before the Indiana decision. As long as the courts continued to find state taxes unconstitutional, few imagined that cities, whose powers were somewhat vague, but in general less than those of the States, would be allowed to impose such taxes. Once the right to tax chains had been granted to the States by the Supreme Court, it became an open question whether cities might be permitted to follow suit. Potentially, this was a dangerous new front for the chains, for if it was difficult to police 48 state legislatures, it was clearly impossible to maintain an adequate vigilance over the affairs of several thousand towns and cities.¹

12. Financial need compelled Michigan to adopt a 3% flat-rate sales tax at this session, and Governor Comstock claimed, somewhat implausibly, that the chain tax might endanger the constitutionality of the sales tax. Grocers' Commercial Bulletin, May 1932, p.14; Chain Store Review, July 1932 p.14; Interstate Grocer, October 15, 1932; Detroit Free Press, July 13, 18, 19, 1933.

1. For details of municipal chain tax ordinances, see Hardy, The Special Taxation of Chain Stores, pp. 180-188; Nichols, op.cit. pp. 150-154; Lee, Anti-Chain Store Tax Legislation, pp. 22-24; Beckmann and Nolen The Chain Store Problem, Appendix K (lists ordinances and provisions); Law and Contemporary Problems: Municipal Legislative Barriers to a Free Market, by J.A. McIntire and C.S. Rhyne, vol. 8, September 1941 pp. 359-375; Harvard Business Review, vol. 19, 1941, pp. 364-376, "Municipal Trade Barriers" by R. Cassady.

About a dozen cities had tried chain taxation by the end of 1933. Durham, N.C. led the way in July, 1931 with a municipal ordinance imposing a \$50 license fee on the second, and each succeeding, store of a chain. The highest taxes were imposed by Hamtramck, the self-governing Polish enclave of Detroit, which applied the tax only against chain grocery stores, with a top rate of \$1,000 on each store in excess of three, and by Maplewood, Mo., with the same top rate, applicable to any type of chain store. The tax schedules adopted by the other cities were very diverse.²

The taxing cities, though few in number, presented the NCSA with a considerable headache, for they were widely scattered, and some of them were in states where the chains had the situation in control as far as the state legislatures were concerned. Thus the enactment of such local taxes was hard to monitor or predict. In 1932 especially, independents in states without chain tax laws pressed for municipal ordinances in those cities where they were well organised or where local conditions seemed favourable. The most striking success was in St. Louis, the largest city to adopt chain taxation, where the independents secured a victory beyond them in the state legislature by pushing through a tax graduated up to \$250 on each store in excess of 25. The Community Protective Association, which originated in the offices of the Interstate Grocer, roused public attention with the distribution of an anti-chain newspaper, The Home Defender, and impressed the Board of Aldermen with

2. Interstate Grocer, August 15, October 31, 1931; November 5, 1932; Modern Merchant and Grocery World, December 5, 1931. The cities were Portland, Ore.; Durham, N.C.; Red Bank, N.J.; Knoxville, Tenn.; Fredericksburg, Va.; Capitol Heights, Md.; Aberdeen, Wash.; St. Louis, Mo.; Maplewood, Mo.; Hamtramck, Mi.; Spartanburg, S.C.; Charlotte, N.C. The Red Bank ordinance was quickly repealed by the city council. Tax rates adopted included: Fredericksburg, \$250 on each store in excess of one plus a tax based on sales; Portland, \$6 on 1 store, up to \$50 on each over 20; Red Bank, \$50 on each store of chains operating more than five stores in New Jersey; Knoxville, \$25 on each store in excess of one; Aberdeen, a license of \$100 for each store of non-residents who also owned one or more store outside Aberdeen.

documented allegations that the chains were understating the value of their stock and fixtures to avoid taxation and were failing to support the community fund.³ Although the chains beat down chain tax proposals in other major cities, they came under threat in 1932 in Cleveland, Syracuse, Pittsburgh, Milwaukee, Newark, Youngstown and Rochester.⁴ The municipal tax idea was even mooted in New York City, the very citadel of the chains, where in early 1933 the Business Independence League was formed to seek a tax "on the ground that the chain stores send the money spent in them out of New York to be spent in cities where their manufacturing plants, warehouses and offices are located".⁵

3. Interstate Grocer, February 27, April 9, May 28, June 4, 11, 1932. Business Week, June 22, 1932, p.9. Among the arguments advanced by independent businessmen in hearings before the Board of Aldermen were that: the property tax was burdensome; the chains sold below cost and got rebates; if the chains were not destroyed the independents would be, thus creating only two classes, with the chains in the upper class; the chains enslaved their clerks, and Walgreen sales girls had been forced to take shaving cream in lieu of wages; the grocers were carrying the unemployed on credit, while the chains got all the cash; "not because of any acrimony but our backs are to the wall and to help pay the policemen who are placed in chain stores for their protection".

4. The highest tax proposed was in Milwaukee, where the Common Council held hearings on a bill to tax chains up to \$2,650 on each store in excess of nine. The promoter of the bill was "Dr." Charles F. Gillman who, with his wife, ran "World Vigilance, Inc. - United States Division", and solicited subscriptions from Milwaukee retailers at \$16 a time. Gillman was typical of a type of freelance chain tax promoter, and had been pushing chain taxes since 1928, in which year he reportedly had offices in Washington, New York and Chicago and was soliciting funds to put over an astronomical federal tax. (Hardware Retailer, August 1932, p.48; Interstate Grocer, November 3, 1928, June 18, 1932).

5. Chain tax bills, introduced by Alderman Walter Hart, were seriously considered by the Board of Aldermen in both 1933 and 1934. New York Times April 19, 1933; March 9, 14, 15, 1934; Chain Store Age, Gen. Merch. edn. June 1933 p.75; N.Y. Retail Grocers' Advocate, June 24, 1933. In 1933, the chairman of the board of the Business Independence League, grocer John Reimers, made a trip to the west coast where he found signs in the windows of independent stores warning consumers that the money spent in chain stores all went to New York. Evidently confused, Reimers could only conclude that "the chain is not spending money anywhere, they hire their own crews, do not give a local carpenter, plumber or anybody else a chance to do some work for them but hire some cheap help to do their work". (N.Y. Retail Grocers' Advocate, October 15, 1933).

The municipal chain tax, despite considerable activity and interest in 1932 and 1933, never really became established as a principal weapon in the hands of the anti-chain campaigners. The diminished urgency for the cities to find new revenue to support unemployment relief projects from 1933 had something to do with the general decline of the city tax after that date. More importantly, independents felt the best hope lay in state taxes, because they affected more chain stores and because their constitutionality was more secure. The legal status of municipal chain tax ordinances was doubtful. In the first case brought to trial, the severe Hamtramck ordinance was ruled unconstitutional by a lower court in December, 1932. The court could probably have found ample ground for invalidation in the fact that the tax applied only to grocery chains, but instead it attacked the pretensions of Hamtramck to adopt any sort of chain tax, regardless of the rights of the states in such matters. The city council did not appeal. The Maplewood ordinance was similarly held unconstitutional, on the ground that it was confiscatory and beyond the power of the municipality.⁶

Not all city ordinances were overruled in this way. The Supreme Court of South Carolina upheld the Spartanburg license tax, graduated according to chain gross income, on July 20, 1933; similarly, the Portland license tax, having survived a referendum test in November, 1932, also survived a court test, when in 1935 its constitutionality was upheld by the Oregon Supreme Court. In 1937, the Virginia Supreme Court of Appeals likewise sustained the Fredericksburg ordinance of 1932. In all

6. Kroger Grocery & Baking Co. v. City of Hamtramck, Circuit Court for Wayne County, December 27, 1932. Unreported, but text in The Chain Stores in the Law Courts, pp. 469-470. For Maplewood, also unreported, see Yale Law Jnl. vol. 44, p.629, n.37. The St. Louis tax underwent protracted litigation, and was ultimately invalidated in 1937 by the Missouri Supreme Court. (Kroger Grocery & Baking Co. v. City of St. Louis, 341 Mo.62, 106 S.W. (2d) 435).

these cases where the tax was approved, the reasoning of the courts was essentially the same: the cities had merely carried out the power to tax conferred on them by the respective states in their charters, and they had adopted a taxing classification approved by numerous courts, including the U.S. Supreme Court. In such circumstances their ordinances had the same force and effect as a state law. These courts found no ground for invalidation in that the state either had a different sort of chain tax - as with Spartanburg and South Carolina - or, as in the other two cases, that the state legislature had itself declined to enact chain tax legislation. Clearly, although hazardous, municipal chain taxation was not always a futile quest.⁷ Nevertheless, the general impression prevailed that municipal chain taxation was built on insecure foundations, and this greatly reduced its attractiveness when compared to state measures.

It also appeared certain that the courts would never allow the cities as much latitude in the adoption of punitive taxation as was permitted the states, because the powers of cities were essentially derivative from, and inferior to, those of the states. Thus while quite severe ordinances were proposed, and adopted, in a few cities in the late 1930s, the main battleground proved to be the state legislatures, with city taxation usually involving little more than petty harrassment. This was particularly so in the years 1934-1937, when the issue of destructive taxation was very much to the fore. In all, by the end of 1938, only about 27 municipal chain tax ordinances had been enacted, and

7. Great A & P Tea Co. v. City of Spartanburg, 170 S.E.273; Safeway Stores Inc. v. City of Portland 42 P. (2d) 162; City of Fredericksburg v. Sanitary Grocery Co. 110 A.L.R. 1195. See there the annotation, at pp. 1202-1211, which discusses the rights of cities to make classifications different from those made by the state.

of these only 19 were still in effect. Of the 19, 8 were in North Carolina, where the state chain tax law specifically authorised municipalities to impose their own chain taxation, this not to exceed \$50 per store. Similar authorisation could presumably have been written into the tax laws of other states, but this was not done, and chain tax campaigners apparently never gave the possibility much attention. It should also be observed that nearly all the municipal ordinances in effect at the end of 1938 were in a few Southern states, where the tradition of city business license taxes undoubtedly favoured the chain tax.⁸ No city chain tax case came before the U.S. Supreme Court, a favourable decision from which might well have stimulated great activity around the country. Fortunately for the chains, in the mid-1930s when independents were at the peak of political strength they had their ambitions directed at nothing less than state or federal legislation and rather overlooked the opportunities to impose local chain taxes which, while in each case of minor importance to the big chains, could have accumulated into a very considerable burden. The interest in city taxation provoked by the 1931 Supreme Court approval of the state laws was thus short-circuited by the general tendency of anti-chain activity to move upwards and onwards from local agitation to state and then finally federal measures.

8. Nichols, op.cit. pp. 154-155. The ordinances were distributed thus: 8 in North Carolina, 3 in West Virginia, 2 each in South Carolina, Virginia and Georgia, and one each in Florida and Oregon.

vi. The Threat of Confiscatory Taxation

The spread of discriminatory taxation to ever more states in the years 1927-33 did not of itself threaten the future of the chains. By the end of 1933, many chain store men seem to have become almost reconciled to the fact that some sort of extra burden would have to be carried, at least in the states of the South and the interior, and for the duration of the depression. What mattered was the level of taxation and, in general, existing chain store taxes were rather mild. At the end of 1933, only one state - Idaho - imposed a graduated license tax with a top per store rate in excess of \$250. Although some of the graduated sales taxes were more oppressive, their enforcement was largely restrained owing to litigation, and their constitutionality had still to be decided by the U.S. Supreme Court. Naturally, any sort of chain tax was unbearable to those chains standing on the verge of bankruptcy, and locally-concentrated chains with large numbers of small stores could be troubled by even quite moderate taxes. In the Indiana case, Lafayette Jackson had complained of a bill of \$5,443 on his 225 little stores, which produced aggregate receipts of rather more than \$1m. The rates of the Idaho law - \$500 on each store of chains with more than 19 stores - would have placed a total tax of \$112,500 on such a chain, a colossal burden certain to have closed many of the stores. Nevertheless, for most chains, and especially for the big national chains, the prevailing level of taxation was little more than an irritant.¹

1. The ability of chains to pay chain taxes is discussed in Lee, op.cit. pp.40-51, Phillips State Discriminatory Chain Store Taxation, pp.356-7. Net profits per store for some leading chains in 1932 were: Woolworth, \$9,051, Kresge, \$7,867, Penney, \$3,449, Walgreen, \$3,405, Melville Shoe \$1,516, Kroger \$347. A typical chain grocery store of the A & P, Kroger etc. produced sales at least ten times as great as the average for the Lafayette Jackson stores.

Through the second half of 1933, and into the Spring of 1934, most politically active independents were preoccupied with the emerging codes of the NRA, and interest in chain taxation subsided. The 1934 legislatures received only 40 chain tax bills, the lowest total since 1928. However, two of the four tax laws enacted in 1934 were loaded with ominous significance for the chains. The Colorado tax - a license tax graduated up to \$300 on each store in excess of 25 - made an especial impact because it was an expression of the people's will, voted into law as Proposition 7 on the ballot at the November general election. Its enactment contradicted the complacent view of some chain store men that only a minority of vociferous independents wanted to see them taxed. There had been only one previous popular vote on a chain tax, in 1932, when the people of Portland, Oregon, ratified an ordinance passed by the city council the year before. This had been a somewhat inconclusive result, however: the tax was a modest one (only \$50 per store at its maximum) and the vote had been close, 53,871 to 51,782. The Colorado tax was heavier, and the margin of victory greater, 197,144 to 155,417. Furthermore, the people of Colorado could not be said to have cast their ballots in ignorance of the issues, for the two sides - the pro-tax forces organised as the "Colorado Civic association", and the chains led by Safeway - had locked in such vigorous combat in the run-up to the election that Proposition 7 was adjudged the "most bitterly fought of all the proposals" on the ballot that year. In their publicity, the chains emphasized the idea that the chain tax was just a disguised sales tax, which the consumer would have to pay: chain store prices would rise, and so would those of independents, "in sympathy". That sales taxes were unpopular could not be doubted. Three states had thus far submitted ordinary flat-rate sales taxes to referendum, and in each case the tax had been crushingly defeated. The Colorado vote indicated that most people did not accept the chain store argument at its face value and

were inclined instead to prefer the Civic association theory that Wall Street would pay.²

No less portentous was the 1934 Louisiana chain tax. This statute introduced a new principle into chain taxation, whereby the taxing bracket into which a chain fell was determined by its total of stores anywhere in the world, not just those in the state imposing the tax. It was an administration measure, reputedly drawn up by Huey Long himself, who, although a U.S. Senator, personally managed the proceedings of the Louisiana legislature. As with so much of Huey Long's legislation, local political advantage and broad philosophical purpose were bound together in the same measure. The principal beneficiary of the new law was the H.G. Hill Stores Inc., a large Louisiana-based grocery chain; the principal victim was the A & P, the major competitor of the Hill stores. Under the previous (1932) chain tax, which was an ordinary graduated license tax, the two chains had paid similar amounts. As a result of the 1934 law the tax on the Hill company was reduced, to \$30 on each of its 87 Louisiana stores, its aggregate of stores anywhere placing it in the class of chains with 76 to 100 stores. The A & P, in contrast, became liable to a tax of \$550 on each of its 106 Louisiana stores, because it had more than 500 stores anywhere, thus coming into the top bracket.³ The Hill stores lobbied hard for passage of the law, and its

2. Interstate Grocer, Nov. 17, 1934; Lee op.cit. p.19; Colorado Springs Gazette Nov. 8, 1934; Shoup, op.cit. pp.147-9, 263, 302. In 1932-3, sales tax proposals were defeated by votes of 148,965 to 19,160 in Arkansas, 113,807 to 41,241 in North Dakota and 167,512 to 45,603 in Oregon.

3. Fortune, April 1938, "The A. & P Goes To The Wars", p.136; Louisiana, Acts of 1934, No. 51; Acts of 1932, No. 19. Details of the comparative burden on the A & P and Hill stores are from Great A & P Tea Co. v. Grosjean, 16 F. Supp. 499, 501-3.

enactment gained the administration credit with a major Louisiana company and confirmed its reputation as a defender of local, as opposed to "Wall Street", business.⁴ At the same time, the tax reflected a more elevated purpose. It gave expression to the belief that the "evil" involved in chain operation increased in proportion as they spilled across state lines. For the first time, a state had enacted a chain tax which hurt the big national chains more than those small local chains which had the misfortune to have all their stores in the taxing state. The Louisiana principle, apparently so obvious, had never been seriously proposed elsewhere. That failure in part reflected a constitutional uncertainty, a doubt that the courts might consider such a tax to be an attempt by the state to tax beyond its borders. Such uncertainty persisted until 1937, when the U.S. Supreme Court ruled the law constitutional, and it curbed the introduction of bills incorporating the Louisiana principle in the intervening years, the most critical in the history of chain taxation.⁵

Enactment of the Louisiana law provided a warning to chain store leaders that the various chains, harrassed by the independents and feeling mutual resentments born of the hard competitive conditions of the depression, might take up cudgels against each other. If the Hill stores could turn against the A & P then so could other local chains try to divert the political attack against the big chains. Yet more disturbing was the possibility that the chain tax issue might become enmeshed in a wider politics of discontent. Huey Long was himself a menace. His Share-Our-Wealth organisation claimed several million members

4. Senator Fred Oser, a foe of the chains, charged on the floor of the Senate that "The bill is only put in here to help the Hill stores..." and produced a telegram of opposition from the New Orleans R.G.A., which feared the new proposal would be unconstitutional and also saw no reason to help the Hill stores. New Orleans Times-Picayune July 8, 1934. See also N.Y. Jnl. of Commerce, May 3, 1935.

5. For a discussion of the possibility of a "fatal extraterritoriality" see Yale Law Jnl. vol. 44, Feb. 1935, at p.631 ff. For doubts of anti-chain side, Interstate Grocer, July 28, 1934. The Louisiana decision is discussed below, pp. 372-3

by the end of 1934, and its newspaper, the American Progress, mounted frequent virulent attacks on the chain stores - attacks which reached a larger public than did all the trade press combined.⁶ By the summer of 1934, there were 79 third parties in existence, most of them demanding that the New Deal be carried forward to radical extremes.⁷ Amid the ideological ferment, politicians were inclined to cast about for unpopular scapegoats for current ills, and some were prepared to condemn the chain stores as the cause of the national blight. Although the initial effect of the NRA - as late as the summer of 1934 - was to distract independents from chain taxation, the disappointment of the more radical expectations many of them had of the NRA ultimately drove them back to the pursuit of anti-chain tax legislation with a redoubled zeal.

As 1934 drew to a close, the anti-chain forces laid their plans for the 1935 legislative sessions in a political atmosphere which had never been more favourable. The time had come, the Interstate Grocer asserted, for the chain tax to be employed to bring about the "complete suppression of the chain evil in all its ramifications". Then, with a difficult year inevitable in any case, the chains were dealt a dire blow when, in January, 1935, in Fox v. Standard Oil of New Jersey, the U.S. Supreme Court, by a majority of 5 to 4, held that the fact that a tax confiscated a chain's profits provided no ground for invalidation. Justice Cardozo, who delivered the majority opinion, spelled out that "when the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers". This was the dreadful conclusion that

6. See, for example, the articles by Morley Cassidy in American Progress of February 15, 22; March 1, 1934. The last of the series was introduced by a page one headline declaring "Good Times Or Bad, Chain Store Octopus Tightens Stranglehold..March Of The Monster Swiftly Bringing United States To Ruin As Money Ceases To Circulate".

7. Plain Talk Magazine, June 1934, "Third Party Thunder", p.7. At least 70 of these parties opposed the monetary system, 65 opposed interest and 54 advocated limitation of the size of incomes.

had been forewarned to the chains by Justice Sutherland in his dissent in the Indiana case four years earlier. The Fox v. Standard Oil case seemed finally to remove the legal prop from under the chain stores and to shift the resolution of the whole chain-independent conflict to the legislatures. At the time of the Indiana decision, chain store men had been consoled by the thought that even that mild levy had produced 4 votes for invalidation, thus leaving it necessary for only one more justice to switch sides to strike down destructive taxation. However, the 5 to 4 division held good again in the Fox case, the Court splitting exactly as in the Indiana case, with the new associate justice Benjamin Cardozo assuming the place vacated by Justice Holmes, who had resigned in 1932, on the liberal wing of the Court.⁸

Between 1931 and Fox v. Standard Oil, the Court had decided only one chain tax case. In Liggett v. Lee (1933) the Court reiterated its approval of the graduated license tax, but ruled invalid a provision of the 1931 Florida statute whereby a slightly higher fee was exacted of chains operating stores in more than one county. The majority held a variation according to geographical location, which would result in chains with the same number of stores in the state paying different amounts, to be arbitrary. Of itself, the decision was of no great consequence, for the county variation was unique to Florida, a mere local curiosity, and the Court was not required to decide any question about how severe the rates of a tax could be made.⁹

A dissent by Cardozo, in which Justice Stone concurred, expressed the view that the county provision should be sustained as a "rough and

8. Interstate Grocer, September 15, 1934; Fox v. Standard Oil of New Jersey, 294 U.S.87.

9. Louis K. Liggett Co. et al v. Lee, 288 U.S.517. Florida Acts of 1931, chap. 15624. The statute imposed a maximum fee of \$40 for each store in excess of 75 where all the stores were in one county, the fee being \$50 where in more than one county.

ready form of justice", and because it was likely to have a "reasonable, average validity" in respect of the advantages of chains operated in more than one county. But what attracted most attention was a separate one-man dissent, of unusual length and exceptional breadth of argument, offered by Brandeis, which amplified some of the reasoning he had advanced five years earlier in the Quaker City Cab Co. case.¹⁰

Seizing on the fact that all the plaintiffs in the Florida chain tax case were corporations, Brandeis went on to argue that the corporate form was but the creation and creature of the state. Brandeis noted that "The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and hence, to be borne with resignation". However, until late into the nineteenth century, fear of corporations had led states to be sparing and restrictive in their grant of corporate charters. Such restriction had broken down, but the residual power of the states could still be seen in the fact that even in 1933 only nine states permitted statewide branch banking. That power had not diminished and, whatever the rights of natural persons, the corporation enjoyed only those rights permitted to it by the state. Hence, "the license fee is not merely taxation. The fee is the compensation exacted for the privilege of carrying on intrastate business in corporate form. As this privilege is one which a State may withhold or grant, it may charge such compensation as it pleases". There was, in Brandeis' view, no obligation on the state either

10. 288 U.S. 541-580, 580-586. See Quaker City Cab Co. v. Commonwealth of Penna., 277 U.S.389 (May 29, 1928) where the Court invalidated a law imposing a tax on the gross receipts of corporations operating taxicabs and not on individuals or partnerships in the same line of business. In his dissent in that case, Brandeis argued that the classification should be upheld because the difference between corporations and natural persons was of itself sufficient to justify the discrimination. The majority held the law amounted to a violation of the equal protection guarantee of the 14th amendment. The dissenters were Brandeis, Holmes and Stone.

to dress up anti-chain laws as ordinary revenue measures, or conversely, to demonstrate any adverse consequences to the public morals, health or safety to justify an application of the police power. On the contrary, it could deal with chain store corporations exactly as it pleased.

"If the State should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business as it prohibits excessive size or weight in motor trucks or excessive height in the buildings of a city...The elimination of chain stores, deemed harmful or menacing because of their bigness, may be achieved by levelling the prohibition against the corporate mechanism...Or, instead of absolutely prohibiting the corporate chain store, the State might conclude that it should first try the more temperate remedy of curbing the chains by imposing the handicap of discriminatory license fees...The State's power to apply discriminatory taxation as a means of preventing domination of intrastate commerce by capitalistic corporations is not conditioned upon the existence of economic need. It flows from the broader right of Americans to preserve and to establish from time to time, such institutions, social and economic, as seem to them desirable; and likewise, to end those which they deem undesirable...To that extent, the citizens of each State are still masters of their destiny". 11

This opinion of Justice Brandeis was handed down on March 13, 1933, the very depth of the depression, and with the nation awaiting the much-heralded New Deal. It was viewed, and clearly intended, as a manifesto for social and economic experimentation. The New Republic hailed it as a "document of permanent importance"; not because of any assistance it would give to chain taxation, which the New Republic thought "bad economics and therefore unwise social policy", but because it was an attempt by Brandeis to influence the Court not to interpret the Constitution in such a way as to obstruct the "unprecedented and drastic measures" that would come before it from the efforts of the

11. 288 U.S. 548, 569-70, 574, 578-580. Brandeis illustrated the breakdown of restrictions on corporations in great detail at 548-66, laying his emphasis on the traffic in corporate charters created by lesser states which removed restrictions so as to gain filing fees and franchise taxes from corporations which in reality transacted most of their business elsewhere. This had created a "Frankenstein". Five of the plaintiffs in the case were among the 200 largest non-financial corporations (A & P, Montgomery Ward, Liggett, United Cigar Stores and Woolworth).

legislatures to find a way out of the economic chaos. The Court had, the New Republic asserted, "committed itself to many fair-weather doctrines. The wonder is that it has not yet begun to feel the weight of its own shackles. When it does so, the critical question will be whether, and how soon, it will be able to rid itself of them".¹²

The majority of the Court did subsequently demonstrate a willingness to lighten the weight of those shackles. In upholding the New York milk emergency law and the Minnesota mortgage moratorium law in the early months of 1934 the Court pushed back its previously prescribed limits on the right of states to interfere with the exercise of private property rights, so as to allow regulation where there was no real relation - other than the existence of an "emergency" - to public morals, health or safety, and where the business thus regulated was not of a sort normally regarded as being affected with a public interest.¹³

However, the states did not explore the limits of the Court's liberality, for they produced little reform legislation in the 1930's. Only six states carried out "Little New Deals".¹⁴ "Bold, persistent experimentation"

12. New Republic, "The Florida Chain Store Case" April 12, 1933 pp.230-231. See also, The Nation, "Chain Stores And The Judges" March 29, 1933 p.335, American Federationist "The People May Control", May 1933 pp.470-487. Brandeis' favour for the individual in business was well known, but the dissent also noted (at p.579) that the State might foster the cooperative or the publicly-owned enterprise.

13. In Home Building & Loan Assn. v. Blaisdell, 290 U.S.398 (Jan.8, 1934), the Court upheld a 1933 Minnesota law intended to bring relief to mortgage debtors. The existence of an emergency was held to justify the exercise of the "protective power" of the state to interfere with private contracts. In the case of Nebbia v. People of New York, 291 U.S.502, (March 5, 1934) Leo Nebbia, a small grocer, had been convicted for selling milk below the minimum retail price fixed by a state milk board set up under the 1933 New York state milk control law. Again, the Court upheld the right of the state to carry out emergency legislation, the emergency being the circumstance that farmers were receiving below the cost of production for their milk. In both cases Sutherland, Van Devanter, McReynolds and Butler dissented.

14. James T. Patterson, The New Deal and the States, Princeton, N.J.1969 p.153. The "Little New Deal" governors were Frank Murphy (Michigan), Philip La Follette (Wisconsin), Floyd Olson (Minnesota), Eurith D. Rivers (Georgia), Herbert H. Lehman (New York) and George Earle (Pennsylvania). La Follette, Olson, Earle and Rivers were all strong believers in chain taxation and saw that chain tax laws were enacted under their administrations.

came instead mainly from the federal government, and much of that federal experimentation appalled the entire Court, including Brandeis, involving as it did wholesale delegation of legislative powers to bureaucratic agencies such as the NRA, and the usurpation of states' rights. The Court found itself in the position of being obliged to invalidate most of the essentials of the New Deal, and of appearing as the great obstacle to progress. There was, long before Fox v. Standard Oil was decided, more than a whisper from New Deal partisans that the Court might have to be "packed" or have its powers reduced. Thus the Court had every incentive to balance its sequence of rulings adverse to the federal experiments by showing an indulgent attitude to the experiments of the states. The decision handed down in Fox v. Standard Oil did not rely on the reasoning of the Brandeis dissent in the Florida case, and neither did it contradict the traditions of the Court in deciding taxing statutes. Nevertheless, the tension between the legislative and judicial branches of government, and the economic discontent in the country, worked in combination to make certain that the majority decided the case in the way it did. Although the four conservatives who had voted against the Indiana law in 1931 took a similarly negative position in 1935, they did so without having to assume the responsibility of having to justify their action which would have fallen upon them had they constituted the majority. The minority did not even produce its own opinion. It was perhaps this very difficulty that would have been involved in making such a justification that ensured that the minority was the minority, for the Court could not afford to set its face against the wishes of every source of elected authority.¹⁵

15. The Idaho Supreme Court, in approving in 1934 that state's graduated license tax, at the time the highest in existence, did seem to recognise Brandeis: "If the fees charged are so high as to unduly raise the price of merchandise sold by chain stores, thus resulting to the disadvantage of the consuming public, the Legislature is answerable for this lack of wisdom to the electorate, not to the courts...The citizens of each state must still remain the masters of their destiny, and when they speak through their Legislatures it is not for the courts to say that such shall not be the policy of that state." J.C. Penney Co. v. Diefendorf, 32 Pac.(2d)784, 794 (Apr.28, 1934).

Fox v. Standard Oil was a case arising from the enforcement of the West Virginia chain tax law of 1933, which imposed a license tax graduated up to \$250 on each store in excess of 75. It came to the U.S. Supreme Court on appeal from the U.S. District Court for the Southern District of West Virginia, which, on March 1, 1934, had found in favour of the taxpayer. In deciding it, the Supreme Court had to resolve two basic questions. The first was whether or not the Standard Oil filling stations met the definition of chain stores provided by the act - "any store...or...mercantile establishment...in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale". The lower court had decided that they did not. The second, and yet weightier question, was whether or not Standard Oil was denied the equal protection of the laws in that the weight of the tax fell disproportionately on gasoline chains and in so doing confiscated the net profits of 90% of the Standard Oil filling stations. The lower court had likewise decided that point in favour of Standard Oil.¹⁶

The District Court had not been the first court to deal with the applicability of chain tax statutes to filling stations. It was accepted that a state could exempt chains of filling stations from the provisions of such laws. The U.S. Supreme Court had itself said as much. In the Florida chain tax case, the chain attorneys had urged that the exemption of "filling stations engaged exclusively in the sale of gasoline or other petroleum products" was discriminatory, but the U.S. Supreme Court had held the exemption "not offensive to the guarantees of the Fourteenth Amendment".¹⁷ What was in doubt was whether the state could choose not to exempt filling stations. The Indiana Supreme Court had upheld the application of that state's 1929 law to filling stations. In contrast, the Wisconsin Supreme Court had found

16. Standard Oil Co. of New Jersey v. Fox, 6 Fed. Supp.494. West Virginia, Laws of 1933, Chapter 36.

17. Liggett v. Lee, 288 U.S. 517, 538.

that "in common language a filling station is not referred to as a store or a mercantile establishment where goods, wares, or merchandise are sold or offered for sale at retail", believing that "if one were to stop five hundred well-informed intelligent persons travelling into any city and ask them to stop at the first store or mercantile establishment...it is quite probable that not a single one would stop at a filling station or a service station..." The Wisconsin Supreme Court had ruled filling stations exempt, even though the legislature had defeated an amendment offered during course of passage specifically to exempt filling stations.¹⁸

The West Virginia District Court followed the line of reasoning of the Wisconsin Supreme Court. "The dominant characteristic of the business is the "filling" of automobiles with gasoline, oil and water, and the rendering of "service" to the motorist...Such transactions are in public thought quite distinct from the purchase of goods at an ordinary store". Chain filling stations had not driven out pre-existing independent retailers, there was no "body of public thought" identifying the filling station with the chain store problem, and at least 10 states had actually explicitly excluded filling stations from the effects of chain tax laws. As filling stations had paid 85.3% of all taxes collected under the act in 1933, it seemed implausible to the Court that the legislature could have intended them to be included without more "particularity of description" than provided by the mere words "stores" and "mercantile establishments".¹⁹

18. Midwestern Petroleum Corp. v. State Board 206 Ind, 688, 187 N.E. 882; Wadhams Oil Co. v. State 210 Wis. 448, 245 N.W.646. The Wisconsin Supreme Court also ruled that tailor shops, shoe shine parlors, lumber yards and other "mercantile establishments" not commonly referred to as "stores" were not liable to pay the tax.

19. 6 Fed. Supp. 508-14.

The West Virginia license tax - top rate \$250 - was not particularly severe in its effect on most chains. The question of confiscation arose because of the peculiarly disadvantageous effect of the tax on the outlets of Standard Oil, which were small and numerous. In 1933, Standard Oil operated 949 filling stations in West Virginia, 101 of them by direct company ownership and the remainder under agency agreements which Standard Oil did not deny amounted to operational control by it within the meaning of the act. There were also 54 bulk distribution plants, also liable to tax, which served the stations and did a small amount of retailing. For the year 1933 Standard Oil had paid \$240,173.50 in tax and filing fees, whereas the stations had sustained an average net loss for the first six months of the year of \$94.39. The burden of a \$250 tax could be seen from the fact that in 1932 the 948 agency stations had transacted an average gross business of only \$3,892, with an average net profit of only \$89.75. While the company-owned outlets were better placed - 1932 average gross sales of \$26,822, and average net profit of \$1,782 - it was clear that the continued operation of many of the Standard outlets was put at great risk by the tax.

The burden also fell disproportionately on the filling station chains, in comparison with other types of chains. Standard Oil alone had paid 42.16% of the aggregate receipts produced by the tax in 1933. The Court noted that "In 1932, the last year for which complete figures were available, 2,453 gasoline chain stations did an aggregate business of \$15,198,638, or 4.6% of the total business, and would have paid 84.46% of the total tax had the law then been in effect, while 1,889 general retail stores in chain organizations did an aggregate business

of \$75,454,257, or 22.9% of the total business, and would have paid 10.7% of the total tax".²⁰ The Court recognised that such legislation had its origins in the "hostility" of small storekeepers towards the chains, but found that "there is no evidence that the feeling is intensified, if indeed it exists at all" in relation to the gasoline chains. Furthermore, the West Virginia law had been adopted not with a regulatory intent but primarily as a revenue measure, in order to meet a need arising from the adoption in 1932 of a constitutional restriction on property taxes. The exceptional burden placed on the gasoline chains therefore seemed inappropriate and invidious. According to the reasoning of the District Court, in the previous U.S. Supreme Court decisions on chain taxes the essential element in justifying the classification had not merely been the number of stores but the specific advantages arising therefrom, and the District Court could not find that a large number of outlets had brought the gasoline chains such advantages in view of the poor sales and profits. "...while it is settled that an occupational tax need not be measured merely by the value of the privilege enjoyed, it has never been said that, in determining whether

20. Ibid. 496-502.

A table was provided showing the comparative burden the tax would have imposed in 1932.

	No. of Stores or Stations	Total Chain Store Tax	Total Gross Revenue	Av. Gross Revenue per Store
Sears, Roebuck & Co.	4	\$ 19.00	562,861.00	140,715.00
Montgomery Ward	7	45.50	1,058,083.60	151,154.00
S.S. Kresge Co.	12	118.00	1,685,141.00	140,428.00
F.W. Woolworth Co.	21	367.50	1,778,671.00	84,698.00
Kroger Grocery & Baking Co.	94	12,469.00	5,499,343.00	58,503.00
Great Atlantic & Pacific Tea Co.	198	38,521.00	12,455,017.00	62,400.00
Standard Oil - company owned stations only	98	23,569.98	2,628,615.00	26,822.00
- company owned & agencies comb.	1,046	251,573.46	6,428,701.00	6,145.98

a particular tax is unreasonable or arbitrary, all considerations of value may be excluded". In view of the confiscatory and disproportionate burden imposed on the plaintiff, the Court held there was a denial of the equal protection of the laws.²¹

If the principle that confiscatory chain taxation was permissible were to be disallowed, there could not have been a stronger case to have brought before the Supreme Court. The interlocking of the various arguments by the District Court had produced an opinion of some strength. Nevertheless, in giving the opinion of the U.S. Supreme Court, Justice Cardozo found force in none of these arguments, either separately or taken in concert. He considered that filling stations possessed the basic features of chain store operation cited in the Indiana decision four years earlier: "abundant capital; standardization in equipment and display; superior management; more rapid turnover; uniformity in store management; special accounting methods (a swipe at the fact that Standard Oil had declined to disclose the profits of its refining and other operations); and a unified sales policy..." Cardozo also noted that Standard Oil had billed its gasoline to independents at a price one-half cent per gallon higher than the price payable by agencies acting on a commission basis. Cardozo did not dispute that filling stations could be exempted from such taxes, as decided previously in the Florida case (an implicit weakness in his argument, for it is unlikely that the Court would have approved a chain tax law exempting, for example, just grocery chains or dry goods chains. Such exemption would probably have been held an unreasonable discrimination between taxpayers in the same general class - chain store merchants; that filling stations

21. *ibid.* 505-8. Standard Oil did, however, have the option, not discussed in this case, of selling off its directly-operated stations and loosening agency agreements so as to avoid tax, while still controlling supply to the newly created independents. Most oil companies moved in that direction during the depression, generally because of operating advantages arising therefrom rather than because of chain taxes.

could be exempted carried an implication that such outlets were not in the same class). However, Cardozo was satisfied that the wording of the West Virginia law clearly required inclusion, especially as an amendment to exempt filling stations engaged exclusively in the sale of gasoline and other petroleum products had been voted down in the Senate during passage. Thus the question of definition by popular understanding did not arise.²²

As for the disproportionate burden placed on the oil chains as against other types of chains, Cardozo held that "if the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict". All chains operating the same number of stores in the state were subject to the same tax, therefore equality of treatment was not denied.²³

The crux of the case was confiscation of profits and the contention of Standard Oil that it would be obliged to reduce the number of its filling stations in West Virginia. Cardozo formally disavowed any concern with motives or with the policy behind the tax. "We have no thought...to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only". The opinion purported to consider the tax only as a revenue measure, without consideration of any regulatory intention or effect. However, the opinion really left little doubt that the Court had recognised the question of public policy and regulation. In phrases not dissimilar to those of the Brandeis dissent, Cardozo asserted that

22. Fox v. Standard Oil, 294 U.S. 95-8.

23. Ibid. 101-2.

"A chain...is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of component links; and the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis...Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. In principle there is no distinction between such an exercise of power and the statute upheld in Magnano Co. v. Hamilton...whereby sales of butter were fostered and sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade". 24

The reference to Magnano Co. v. Hamilton was indeed most apposite. In that case, decided April 2, 1934, the Court had upheld a Washington state excise tax of 15 cents per pound on butter substitutes, even though "so prohibitive in amount as to destroy the intrastate business of a dealer in such products". Justice Sutherland had spoken for the Court, finding the tax was on its face nothing more than a revenue measure, and, that being so, the burden was a matter for the discretion of the legislature. Sutherland had allowed the existence of an escape route for the Court to evade automatic approval of destructive tax measures: an exception where the "necessary interpretation and effect plainly demonstrate that the form of taxation was indeed a mere disguise under which a different and forbidden power was exercised". Yet there

24. Ibid. p.100. In his dissent in the Florida chain tax case, Brandeis had really gone out of his way to emphasise the regulatory, rather than the revenue aspects of chain taxes, declaring that"...the raising of revenue is obviously not the main purpose of the legislation. Its chief aim is to protect the individual, independently-owned retail stores from the competition of chain stores...by subjecting the latter to financial handicaps which may conceivably compel their withdrawal from the State". (288 U.S. 541). Yet the maximum fee in Florida was only \$50, whereas it was \$250 in West Virginia. In the Louisiana decision in 1937, discussed below, the Court more positively embraced the letter, as well as the spirit, of the Brandeis dissent, at least in relation to the graduated license tax. The West Virginia decision was a half-way house, with the aspect of public policy and regulation brought in with some diffidence.

could not have been any real doubt that the excise tax on margarine was a "mere disguise", intended not to raise revenue but to cripple competitors of the dairy farmers. The tax had indeed had this effect, the appellant manufacturer having entirely terminated his intrastate business as a result of the tax. Sutherland had chosen to turn a blind eye to the nature of the tax, and to ignore the loophole whereby it might have been invalidated.²⁵

In Magnano v. Hamilton the four conservatives voted with the rest of the court. Why, then, did Sutherland and the three other conservatives decline to agree with the majority in the West Virginia chain tax case? The West Virginia tax was not unambiguously a repressive measure in the way of the Washington oleomargarine excise: the burden it placed on most chains was only a light one, and even Standard Oil had not been compelled to abandon its intrastate business. Of the possibility of the tax having been employed as a "cloak for something else" (which had been the principal complaint of the Magnano

25. A. Magnano Co. v. Hamilton, 292 U.S.40. The exception referred back to the child labour tax case, Bailey v. Drexel Furniture Co. 259 U.S.20 where the Court condemned a "so-called tax" as a disguised attempt at an unacceptable regulation. In regard to the oleomargarine tax, Sutherland suggested that had the fee been 5 cents per pound rather than 15 cents, "no one, probably, would have thought of challenging the constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised". This was an unreal doctrine in which the amount of the tax was dissociated from its purpose. The effect of the tax can be judged from the finding of the lower court that in 1930, before the act, Magnano Co. imported "Nucoa" margarine into the state at 17c a pound, sold it at 20c to retailers who in turn sold it to consumers at 25c. Butter prices were then 32 to 37c per pound. Thus a 15c tax on intrastate sales of margarine was intended to make it more expensive than butter. (A. Magnano Co. v. Dunbar, 2 Fed. Supp. 417). As prices fell in the depression, the proportional burden of the tax became even greater. The logic of Sutherland's opinion in this case - and such was the established logic of the Court - was that it was constitutional for a tax to put a taxpayer out of business as long as it was an accidental result of a revenue measure, but it was unconstitutional if the legislature went about a similar end with an explicit regulatory intent. Such logic encouraged legislatures to dissemble their motives and, in practice, allowed the individuals on the Court to indulge their own interpretations of the purposes of particular taxes.

Co. in the oleo case), Cardozo noted that "there is neither evidence nor even claim of any such abuse. On the contrary, the complainant has stated in its bill that the "act is, in effect, a tax measure", its validity or invalidity to be adjudged upon that basis". As there was no opinion from the minority, which merely concurred in the opinion of the Court below, it is not entirely clear why the minority felt that Standard Oil of New Jersey should be afforded a protection not granted to a manufacturer and distributor of margarine. It is a reasonable inference, however, that the conservatives felt that the chain tax case involved far more far-reaching consequences, so large being the plaintiff corporation, and so central to the economic structure being the field of retail distribution. In contrast, the status quo could comfortably survive the loss or discomfiture of a few manufacturers of margarine, especially if thousands of hard-pressed, normally conservative, but temporarily rebellious dairy farmers were thereby appeased.

What the contrasting attitudes of the minority towards the two laws does show quite clearly is the knife edge on which such decisions were balanced. The individual members of the Court decided these cases much as they pleased. Formally, the majority opinion in the West Virginia case simply picked up where the Court had left off in rendering the Indiana decision, with the reasoning that the legislature, once granted the power to levy a particular tax had discretion then as to the extent of the burden. In reality the line of descent was not so straightforward. The four conservatives, though now bound by the Indiana decision, refused to accept the next step. Had it not been 1935, the time of the New Deal, the time when the Court was beset by critics claiming that it was reactionary and obstructive, one justice might well have defected to the conservative camp and thereby have brought the whole

chain tax movement - except for minor lightweight revenue measures - to an abrupt halt. Spiritually, and perhaps tactically, the majority decision owed as much to the urgent plea for latitude embodied in the famous Brandeis dissent as it did to the drier logic of the precedents. If the majority did not espouse the Brandeisian doctrine in respect of chain taxation, they did at least nod in its direction. Anti-chain campaigners felt the warmth of this wind of change. The simple conclusion drawn from the judgment was that they now had a free hand to tax the chains out of existence. Thus the independents were able to go before the 1935 legislatures armed with chain tax bills with a strong confidence that at last the courts were no longer a problem and would stand aside so to allow the anti-chain forces to enjoy the fruits of any political victory. For the first time, there seemed every indication that the struggle between chains and independents could be resolved in the legislatures, without judicial interference to save the chains.

vii. "Double-barrelled" chain tax laws of 1935.

Thus inspired, the independents did not let their ardour be dampened when, a few weeks after the West Virginia decision, the U.S. Supreme Court held invalid the Kentucky graduated sales tax of 1930. The Court restated the essential point of the West Virginia decision, that "Every taxing law must pass the constitutional test applied by the courts to the method of imposition, but the measure of the impost rests in the discretion of the legislature..." However, the Court found nothing to commend the "method of imposition" of the Kentucky graduated sales tax. Justice Roberts, speaking for the Court, emphasised that the incidence of the tax bore no relationship to the varying net

profits enjoyed by different businesses from the same volume of sales, or to any other criteria of benefit or advantage: there was not even a "rough uniformity of progression within wide limits of tolerance". To avoid such inequality either an income tax or a flat tax on sales would suffice.¹

A dissenting opinion by Cardozo, which was joined in by Justices Brandeis and Stone, provided a lengthy statement of the view that the tax was a "sincere and rational endeavor to adapt the burdens of taxation to the teachings of economics and the demands of social justice", and that there was a "normal or average validity" in the "relation between the taxpayer's capacity to pay and the volume of his business". Cardozo argued, in particular, that the property tax had imposed an injustice on small retailers with a low turnover. Kroger, one of the petitioners, had paid a property tax of only 137/1000 of 1 per cent in proportion to its sales in comparison with an average of 934/1000 of one per cent paid by the 16,535 merchants whose sales were less than \$400,000 annually. "Kentucky is not chargeable with oppressive discrimination in superseding such a method of taxation by one more nearly equal in its burdens...It is not the function of a court to make itself the arbiter between competing economic theories professed by honest men on grounds not wholly frivolous".²

Many independents and chain store men were confused by the Kentucky decision. The inference had been drawn from the Fox v. Standard Oil case that the independents had carte blanche in the matter of chain store taxation and yet, just a few weeks later, the Court had opted to

1. Stewart Dry Goods Co. v. Lewis 294 U.S. 550 (Reversing 7 Fed. Supp. 438, 8 Fed. Supp. 396).

2. Ibid. 566, 568-9.

invalidate one of the most famous of the chain tax laws.³ There were, however, two reasons why the independents were not dismayed. The first was that laws of the Kentucky type were not appropriate to an attempt to tax the chains out of business: they had an equal impact on department stores, which were not the target, and which often enjoyed considerable local political influence. The second reason was that the Court itself apparently explicitly indicated that the decision implied no modification in its general position on chain store taxes. Despite the historical background of the Kentucky law, the State Tax Commission had defended it before the Supreme Court as a variant form of an ordinary sales tax, rather than as a chain tax. The majority opinion likewise clearly distinguished the case from the decisions rendered in the various chain tax cases which had come before it. Roberts observed of the graduated license tax that

"We found this classification reasonable because of advantages incident to the conduct of multiple stores and obvious differences in chain methods of merchandising as contrasted with those practiced in the operation of one store...The Kentucky statute ignores the form of organization and the method of conducting business. The taxable class is retail merchants, whether individuals, partnerships, or corporations; those who sell in one store or many; those who offer but one sort of goods and those who through departments deal in many lines of merchandise." 4

3. Interstate Grocer, March 16, 1935. Lebhar Chain Stores in America, pp. 150-151. All the graduated sales taxes passed 1930-33 were eventually invalidated because of the Kentucky decision. The first struck down was the 1933 Vermont law (Great A & P Tea Co. v. Harvey, 177 Atl.423, March 14, 1935). This was the most severe of the existing sales taxes, though some of its teeth had been drawn in 1934 by enactment of a curious "Remedial Act", whereby any merchant able to prove that the tax was confiscatory as applied to him was to be taxed only up to the maximum rate which was not confiscatory. The Court noted that the Remedial Act "does not touch the question which...is one of classification and not of confiscation".

4. 294 U.S. 565-6.

Many anti-chain campaigners were very keen to have chain taxation related in some way to the sales volume of chains, and not just to the number of stores, so that chains such as Sears, Roebuck should not escape while relatively humble local chains of groceries, candy stores and similar small-unit chains carried most of the burden. The inference they drew from the Kentucky case was that a tax could still be levied on chain store sales, provided that it took account of the "form of organization and the method of conducting business". Thus, in addition to a barrage of graduated license bills, the 1935 legislatures received "double-barrelled" bills which sought to tax both according to the number of stores and according to volume of sales. Hitherto only one state, Minnesota, had enacted such a double-barrelled law, and it had not been challenged in the courts. Within three months of the Kentucky decision, two more states, Iowa and Florida, adopted this type of taxation. In Iowa, the "form of organization and the method of conducting business" were taken into account by the exemption of the single store from any tax. Chain stores were subject to a license tax graduated to a top rate of \$155, and a sales tax which escalated to the equivalent of 10% on sales in excess of \$9m. In Florida, the single store was not exempted from a minimum burden. However, the principle of the chain store classification was followed by fixing the tax on sales not by reference to a sliding scale based on sales volume, but in accordance with the number of stores operated. The maximum rate was reached under both schedules as early as the sixteenth store, and applied retroactively, so that a chain with 16 or more stores in

Florida was liable to pay \$400, and a sales tax of 5% for every store. These Florida and Iowa statutes were by far the most severe chain taxes that had ever been enacted.⁵

The Iowa bill was drawn up in the offices of Charles Hewitt and Sons, Des Moines wholesale grocers, and was initially sponsored by the Mid-west Wholesale Grocers' Association. It enjoyed the support of Governor Clyde Herring. That it was enacted into law, in an essentially unaltered form, was due to the exceptional unity and militancy displayed that year by retailers and wholesalers in all lines, who pooled their strength and resources to form the Iowa

5. Iowa, Acts of 1935 chap. 75. Laws of Florida, 1935, chap. 16848. See also, Yale Law Journal, vol. 45, February 1935, pp. 314-324, "Recent Chain Store Taxes Based on Volume of Business".

The Iowa Law:

Schedule A: A graduated license tax up to \$155 on each store in excess of 50. No tax on the single store.

Schedule B: Gross Receipts Tax, with 27 classes. Single store exempt, sales of all stores under co-mon ownership aggregated.

Class	Total Gross Receipts	Tax for each additional \$10,000 of gross receipts	Range of Total Tax	Possible Range of % of Gross Receipts
1	\$50,000	-	\$25	.05% +
2	\$50,000 - 100,000	\$10	\$35 - 75	.06% - .08%
etc.to				
26	\$8,000,000 - 9,000,000	\$900	\$386,900 - 476,000	4.8% - 5.3%
27	Over \$9m.	\$1,000	\$486,000 -	5.3% +

(For full schedule see Yale Law Journal vol. 45 pp. 316-7 or 12.F Supp.761-3)

Florida: Created six classes of stores.

Class	No. of Stores	Tax per store	% of gross receipts
1	1	\$10	0.5%
2	2 - 3	\$50	1%
3	4 - 6	\$100	2%
4	7 - 10	\$200	3%
5	11 - 15	\$300	4%
6	Over 15	\$400	5%

Independent Businessmen's Association, specifically to get a chain tax. The Independent Businessmen's Association applied immense pressure on the legislature, with throngs of up to 2,000 retailers and wholesalers gathering at the capitol at the time of critical votes. Far from feeling abashed about "turning on the heat", the independents revelled in their new found vigour, prowling the lobbies to harangue recalcitrant legislators, and deluging them with letters and telegrams summoned up from the merchants of their home towns. Such was the pressure that the politicians opposed to the tax worked circumspectly, through weakening or confusing amendments, and by trying to reduce the proposed rates. Their efforts failed, the tax being passed with relative ease.⁶

The closest issue concerned the exemption of chain filling stations. The Independent Businessmen's Association, and the bill's managers in the legislature, were adamant that the oil companies should be included under the bill and hoped to see them confined to wholesaling to independent dealers. They narrowly defeated an amendment to exempt filling stations. Then, after the chain tax had been signed into law by Governor Herring, the oil companies made a last ditch effort, securing the introduction of an exemption bill, and transporting thousands of filling station employees to Des Moines to lobby for it. Once again, they were narrowly defeated. Complaining of the legislature's failure to recognise the distinction between chain stores and filling stations, Standard Oil of Indiana announced that it would abandon

6. Interstate Grocer, March 2, 9, 30; April 6, 20, 27, 1935.
Sample Case March 1935 p. 20.

direct ownership of filling stations in the state, and modify the leases on agency outlets so as to avoid liability.⁷

The chain stores announced a less dramatic response, but their plight was a real one. According to John Hartford, the A & P's sales in Iowa were \$8.5m, producing a net profit of 1.75%. Such a volume already made the last \$500,000 of A & P sales liable to a 9% sales tax. Furthermore, as the \$8.5 m sales had been achieved at a time of deep depression, it was inevitable that as soon as business began to pick up and prices to rise, the same number of A & P stores would produce additional sales, all of which would be taxed at the rate of 9%, and then, beyond \$9m, at 10%. It was inconceivable that the A & P could raise its prices by 10% without driving away many - indeed most - of its customers. Its prices would have become higher than those of most efficient competing service grocers. Thus the company would face a choice between subsidising its Iowa operations from other states, or closing sufficient stores to keep the aggregate of sales within the lower tax brackets. In effect, Iowa had imposed a ceiling on the A & P's operations in the state.⁸

Oppressive though the Iowa tax was, it was less onerous than that imposed by Florida. Even small chains in Florida were made liable at the maximum rates, and on their aggregate of sales, not just the increment of sales. And yet the tax had been adopted by the

7. Interstate Grocer, May 11, 1935; National Petroleum News May 8 pp. 17-18, May 29, p.24, 1935; Business Week, June 1, 1935 p.10. Exemptions were made, with little controversy, for dealers in coal, lumber, ice, grain, feed and building materials; for cafes operated in connection with chain hotels, and for stores in unincorporated villages where such stores were not more than 6 miles distant from every other store in the chain.

8. Interstate Grocer, May 11, 1935.

legislature as a "compromise" measure, as an alternative to the "Florida Recovery Act", undoubtedly the most punitive anti-chain measure ever to have come close to passage in any state.

The Florida Recovery Act was the brainchild of Robert H. Givens, an attorney in Tampa, who saw in the chain store the reason why the nation had failed to make a recovery from depression despite the efforts of the President and the loyalty of the people. Givens believed that by removing from the community the vital "profit on the last transaction" the chain store fatally impeded recovery, for without that profit money could not circulate locally and no work could be provided for the army of middlemen - travelling salesmen, bookkeepers, carpenters, insurance men, lawyers, sign painters and the like - who lived off the fruits of trade. In short, Givens believed, as did millions of Americans, that what was wrong with America was that the money was not "revolving", and while others recommended a dose of "sound money" (i.e. inflation), the abolition of the Federal Reserve System, or the Townsend Plan, Givens thought the abolition of the chain stores would suffice. His Recovery Act, he urged, "unlocks the door to the land of opportunity America was once known to be" without recourse to "the 'isms' of the Old World". The Recovery Act, as offered to the 1935 legislature, was, its preamble asserted, "Designed to eradicate the chain store, commissary and itinerant merchant evils, declaring an emergency to exist by reason of the spread of these evils etc." To "promote the general welfare" the Act intended the creation of a state licensing system for retailers. No permit would be allowed for the operation of any retail business not wholly owned in Florida, and no person, firm or corporation would in any case be allowed to operate more than one store.

Commissaries were attacked by a requirement that no license would be granted to any retail business subsidiary to any mill, mining or manufacturing concern. The Act was designed to have immediate effect (as of July 1, 1935), with no compensation for dispossessed owners.⁹

Givens professed a total certainty that the Recovery Act was constitutional. It derived its inspiration from the Brandeis dissent in the 1933 Florida chain tax case, in which Brandeis had so forcefully asserted the right of the citizens of Florida to be "masters of their destiny" and that they enjoyed the "right of Americans to preserve, and to establish from time to time, such institutions, social and economic, as seem to them desirable; and, likewise, to end those which they deem undesirable". Although three Senate judiciary committees, by 10 votes to 8, held the measure unconstitutional, Attorney-General Cary D. Landis disagreed with them. In the recent past, the unconstitutionality of such a measure would have been taken for granted, but by 1935 the old certainties were in doubt. Just a few years earlier most of the lawyers in America had been sure that the courts would not permit confiscatory taxation of chain stores, but the Supreme Court had done so nonetheless.¹⁰ The further step to outright prohibition no longer seemed such a long one.

9. The philosophy behind the Recovery Act is brought out in Robert H. Givens, Outlawry of Chain Stores, Tampa, Fla., 1936. Quote is at p.76. Interstate Grocer, April 13, 1935. Florida Times-Union, April 5, 1935.

10. Florida Times-Union, April 19, 1935. Outlawry of Chain Stores, pp. 81-143, gives a brief on legal aspects of the Recovery Act in its, slightly modified, 1936 version. The Recovery Act applied to any form of ownership, not just to corporations, whereas the Brandeis dissent, nominally, discussed only the regulatory powers of states in respect of corporations. This distinction was commonly overlooked in discussion of the Brandeis dissent, though of course the fact that Brandeis limited his discussion to corporate chain stores did not necessarily mean that he believed the states had no, or less, such regulatory power over other forms of ownership. It merely simplified

Critics of the Recovery Act could scarcely contain their rage and amazement. (It was felt to be "bad for the state to even have it talked about "out loud"). The eminent business pundit Roger Babson, speaking in Tampa, sympathised with them that it would be a "crime to let a good state like this go to hell". Some leaders of the anti-chain cause also felt it too extreme: J.H. McLaurin, himself a native of Florida, compared the Recovery Act to a law that a man could not own two suits of clothes. Nevertheless, the proposal received immense backing from Florida independents. The Act was sponsored by a newly formed "Better Business Association", for which Givens acted as counsel. The headquarters of the Better Business Association was Tampa, and its officers came from that city. In the House, the Act was introduced by the Hillsborough county (Tampa) delegation. The principal leader of the Recovery Act forces in the legislature was State Senator Henry C. Tillman, another Tampan, who had run against Givens for his Senate seat in the last election. Tillman was the son of "Pitchfork Ben" Tillman, rustic demagogue and one time Governor and U.S. Senator from South Carolina. Despite this dominance by Tampons, the Better Business Association had support statewide. It claimed members in 91 cities, and proved able to summon hundreds of merchants from every corner of the state to crowd the capitol during deliberations on the Recovery Act. In the 1920's Florida had been a boom state, growing fat on wealth exported from other parts of the country, an outpost of the North being constructed

10. (cont'd)

the argument. No state ever passed a law taxing only corporate chain stores, and the majority of the Court - as in the Quaker City Cab Co. case - would probably have found such a discrimination unlawful. A law totally forbidding the operation of corporate chain stores within the border of a state may well, paradoxically, have stood a better chance of being upheld. The state had a right to refuse entry to corporations but once it had allowed entry the corporation was held by the Court to enjoy the protection of the 14th Amendment equally with natural persons.

beyond the rural South. In their conviction that the chain stores should be prevented from funnelling the wealth back to the North, the independent merchants reacted much as any natives in a colonial economy whose wealth had been built up by outside capital but were unwilling to see any flow in reverse.¹¹

The Recovery Act was by far the hottest issue in the 1935 legislature, with scenes of independent militancy similar to those in Iowa. The House passed the measure, amended so as to exempt commissaries, to allow out-of-state persons to own up to 50% of the preferred stock in stores, and to require ratification by an immediate (July 23) popular referendum. These amendments were acceptable to the bill's sponsors. The real fight occurred in the Senate. Senators wrestled with their dilemma under the double pressure produced by hundreds of independents who crammed the galleries during debate, and the awareness that their actions were being followed by an unseen audience back home listening to their proceedings over WRUF, the state-owned radio station. One Senator declared the Act to be "the most damnable piece of legislation ever introduced, but the people of my district seem to want to be saddled with it and I am going to vote for it". Opponents of the measure lacked both the votes and the nerve to try to kill it outright, and instead worked through weakening amendments. As passed by the Senate, the Recovery Act exempted agricultural supply houses and seasonal merchants who maintained stores in hotels for not more than five months a year. Two major amendments exempted Florida residents whose

11. Interstate Grocer, May 25, 1935. Florida Times-Union April 10, 11, 12, 16, 1935.

retailing businesses were in existence at the time of passage, and provided for a referendum vote at the 1936 elections.¹²

The House, responding to the wishes of the Recovery Act forces, refused to accept the Senate amendments, and the Senate likewise declined to back down. The crux of the dispute was the referendum provision. According to the Senate opponents of the Recovery Act, the House referendum proposal was mere "trickery", as under it the Act would become effective at once upon receiving the Governor's signature. If the courts ruled the referendum provision invalid - as was quite likely, Florida having previously employed the referendum only to decide constitutional amendments - the law would remain in effect. Senator Tillman agreed that such was the case. In contrast, the Senate plan required a referendum vote in favour of the Recovery Act to give it force. The protagonists of the Recovery Act also feared that, given a 1936 referendum, the chains would be able to organise to defeat the measure by mounting an irresistible pressure on the newspapers, farmers and consumers. The independents felt they could win in an immediate poll but to wait until 1936 risked a shift to conservatism in the prevailing political climate.¹³

With House and Senate unable to reconcile their differences, the Recovery Act disappeared into a conference committee where it languished and finally expired. Tillman meanwhile switched his main attention to a double-barrelled chain tax bill. Some of the leading opponents of the Recovery Act were in favour of a chain tax, and a majority of the legislators embraced the chain tax with relief. It

12. Florida Times-Union April 26, 27, 30, 1935.

13. Ibid., May 15, 16, 17, 1935.

killed two birds with one stone. The independent merchants were mollified, and important revenues were secured. In the closing days of the session, the legislature, urgently needing to find extra revenues to top up the fund to pay for the public schools, came down to a choice between the chain tax and a flat tax on sales, and the unwillingness of the House to countenance an unpopular flat sales tax made the chain tax inevitable. The influence of the Recovery Act was shown in the incorporation in the chain tax statute of a "Declaration of Policy" which stated that the multiplication of chain stores "should be discouraged as a matter of public policy."¹⁴

An uncertainty as to the constitutionality of the sales tax feature was evidenced by the incorporation in the statute of a provision that the rates of the license tax were to be doubled in the event that the sales tax were found unconstitutional. Nevertheless, most of the criticism on this score in legislative debate came from those who were trying to undermine the chain tax bill and impose a flat sales tax instead. The statute was passed in part to let the politicians off the hook, but it was also intended to raise important revenues, and was not - as a justice of the Florida Supreme Court later charged - enacted simply to "pass the buck" to the courts. Ironically - in view of the ultimate Florida Supreme Court ruling - one opponent of the tax charged during debate that "The political situation in this state is in such a dastardly condition that we are told the Supreme Court has already arrived at an opinion", meaning an opinion that the law would be sustained. Some supporters of the

14. Ibid. April 29, 30; May 2, 24, 25, 29, 30; June 1, 1935.

tax preferred it to the Recovery Act precisely because they felt it would be sustained, whereas the Recovery Act most probably would not, thus proving a hollow gesture.¹⁵

The chains put up a pitifully disorganised opposition to both the Recovery Act and the chain tax, bringing no real counter-pressure to bear. After passage of the tax, 50 chain operators met in Jacksonville to form a state chain association, and to regret that they had not done so earlier. A court test was planned, but without much confidence. The chairman of the organisation meeting thought the tax had been "very cleverly drawn", with all the loopholes blocked. "If we had united...we could have stopped it. Now it has been passed and it is well known that none of us can pay the taxes asked, and we will have to go out of business". Neither had their opponents ceased their activities, for the Better Business Association was put on a permanent basis with chairmen appointed for each state senatorial district, to lay the foundations for a reintroduction of the Recovery Act in the next legislature.¹⁶

The advocates of chain taxation by no means swept the board in the early months of 1935. As ever, the efforts of independents were patchy. Chain tax laws failed to materialise in Texas, Minnesota and Pennsylvania despite the support of the respective Governors. While the merchants of Iowa stormed the capitol to demand legislation, chain tax bills in neighbouring Missouri and in Kansas perished quietly with little agitation in their behalf. In many states the

15. Ibid. April 30; May 2, 15, 24; June 1, 1935. Senator Gomez, one of the most active opponents of the Recovery Act, had his own bill for a tax graduated up to 8% on the sales of chains with 20 or more stores - compared with the 5% top rate of the Tillman bill. Gomez claimed in debate on the Recovery Act that Tillman "is not working for the independent merchant...This bill was put in by the chain stores to avoid tax measures". For the charge of passing the buck, see judgment in State Ex Rel. Lane Drug Stores v. Simpson, 122 Fla. 639, 166 So. 227, opinion of Justice Bu. ford.

16. Florida Times-Union June 11, 18, 22, 1935.

independents, through lack of militancy, missed an opportunity to press home their advantage. Only the California graduated license tax (top rate \$500 on each store in excess of nine) was as disturbing to the chains as the Iowa and Florida double-barrelled laws, principally because California was seen as a pacesetter likely to influence other large states. Nevertheless, it was obvious that the whole chain tax fight had entered into a new and critical phase. The Iowa and Florida laws threatened a widescale curtailment of chain business in those states and the balance of probability favoured the assumption that the courts would decide that these laws were constitutional. Even if the chains succeeded in securing a ruling against those statutes, the independents, armed with the West Virginia decision, and demonstrating an unprecedented appetite and capacity for political struggle, were well placed to strike back with crippling graduated license taxes. Hitherto chain taxes had not threatened any fatal consequences, but by the summer of 1935 a situation had developed where, unless the chains were able to arrest the taxing movement and, indeed, throw it into reverse, they faced the prospect of widespread store closures and savage reductions in profitability, if not outright extinction.

PART 4: Congress and the Chain Stores.

i. Years of Inaction, 1927-32.

The battles in state legislatures in the late 1920's and early 1930's over chain store tax legislation had no parallel in the United States Congress. Although Congressman Henry T. Rainey, the veteran liberal from Illinois, suggested as early as 1930 that the whole chain store problem would ultimately have to be faced head on by the use of federal taxation, no one in the Congress or in the independent trade believed that the time had yet come to force the issue.¹ Indeed, no federal chain tax bill would be introduced until 1938. In 1932, Congressman Emanuel Celler, the attorney for the New York State Retail Meat Dealers' Association, introduced a bill in the House which sought a graduated license tax on chain stores in the District of Columbia, thus attempting to bring the House up to date in the exercise of its local jurisdiction with what was happening in the states. No real interest developed in the bill, however, and a companion bill was not offered in the Senate.² It so happened that the District of Columbia was a chain store stronghold - the share of total sales enjoyed by the chains was greater than in any of the states - and a political weakpoint for independents. The anonymity and mobility of life in the District had discouraged any of the sort of trade cohesiveness and playing up to community sentiment which sustained anti-chain activity elsewhere.³ And while the enactment of a chain tax for the District would no doubt have sent ripples

1. Interstate Grocer, May 31, 1930.

2. Congressional Record, 72nd Cong. 1st Sess., pp. 10455-6 (May 17, 1932).

3. For the difficulty of arousing action in Washington D.C., see comments of president of the local grocers' association in "The Secretaries' Forum", National Grocers' Bulletin, January 1929.

into the states, and been a great symbolic victory, independents elsewhere were far too preoccupied with their own local conflicts to turn their attention to Washington. Even Emanuel Celler actually showed more interest in 1932 in the chain tax bill he had drawn up for introduction in the New York legislature. Not until 1937 would the idea of a District of Columbia chain tax be considered again.

Insofar as Congress gave any attention to the chain store problem in the period 1927-32 - and it gave very little - it tended to work all the way around the subject without tackling it directly. When the Senate adopted the Brookhart resolution in 1928, it effectively passed the buck to the Federal Trade Commission. Furthermore, it was the very Senate Progressives, like Brookhart himself, who had for years been most critical of the Federal Trade Commission as being dominated by big business who showed themselves as most eager to thrust the problem into its hands. And if it had not been obvious in 1928 that the Commission would take its time over the investigation, the extent of its willingness to prevaricate and equivocate soon became clear. The Commission showed no great enthusiasm for its task; equally, it was determined that if it had to do it, it would do it thoroughly. As a result, it laboriously assembled mountains of data over a period of more than six years, releasing most of it in unconnected, half-digested reports of obscure relevance while all around the economic order of 1928 crashed into ruins and desperate independent merchants sought their own remedies. Not until December 1934 did it make the legislative recommendations sought by Senator Brookhart in May, 1928.

That the FTC would take its time and err on the side of caution in coming to judgement was perhaps implicit in its very nature as an administrative, regulatory agency. The politicians were still at liberty to act on their own account to meet immediate need, even if their remedy might be rough and ready. Instead, most of them seemed to look up on the existence of the FTC's inquiry as precluding separate action, almost as if the chain store issue had somehow been rendered sub judice. At least one

Senator suggested that a Senate investigating committee might be able to bring matters to a head, by directly interrogating chain store men in public hearings, and by focussing on the sharp issues such as special rebates to chain buyers without the elaborate probing into totally non-controversial aspects of chain merchandising favoured by the Trade Commission.⁴ But nothing became of the idea, and the chains were able to shelter under the protective umbrella put up by the Commission.

The nearest Congress got to coming to grips with the chain store issue was the annual ritual of the Capper-Kelly price maintenance bill. Both Capper and Kelly frequently alluded to the bill as being designed to curb the predatory price-baiting chains, and it was generally accepted as the most useful thing the Congress could do for the small merchant short of a direct attack on the chains. Nevertheless, even the Capper-Kelly bill could not really be seen as a sort of federal alternative to the chain tax in the states. For one thing it lacked the urgent grass-roots appeal of the chain tax. Although trade association executives duly filed their statements in favour, year after year, with Congressional committees, only to the druggists, for whom price maintenance possessed a mystic significance indissolubly bonded with their conception of the profession of pharmacy, was the issue one of deep and abiding interest.⁵ Again, while most independents believed that price maintenance would do them good, in the unlikely event that it could be made to work, it was best characterised as being

4. (Senator McKellar of Tennessee). Interstate Grocer, December 20, 1930.

5. At the time of the Henderson agitation in early 1930, the NARD laid great emphasis on the desirability of obtaining pro-Capper-Kelly resolutions from local anti-chain groups in order to demonstrate to Congressmen the breadth of support for the bill. These efforts met with little success for, as the NARD Journal expressed it, "practically 99 per cent" of the work done for the bill was by retail druggists which "tended to create the impression in the mind of the average Congressman that the demand for the proposed legislation came from a single class". The idea was "deeply embedded" that it was "simply and solely a druggists' bill". (NARD Journal March 27, July 10, October 16, 1930).

pro-independent, rather than anti-chain, in intent. Reasonable doubts existed about the probable balance of power between chains and independents under a regimen of price maintenance, and those doubts were considerably heightened when the leading drug chains declared their hand in favour of Capper-Kelly in 1932. Price maintenance was the prerogative of the manufacturer, and manufacturers were not as a class noted for their hostility to efficient mass distributors, at least so far as their selling operations were concerned.⁶ In sharp contrast, the chain store tax was an exaction imposed by the government. It was a straight fine, with no ambiguity about who would be the victim.

Why then, did no movement develop inside or outside of Congress for the federal government to take more direct and explicit action against the chains? Part of the explanation may be found in the character of the independent trade itself. It made no clear demand for federal action, because it was not yet ready to do so. The natural fighting territory for the small merchants was in the home towns and in the state legislatures, and their quite striking successes in whipping up trade-at-home feeling and then in passing chain tax laws inevitably discouraged any thought of fighting battles on the unfamiliar terrain in Washington. A widespread conflict, fought out in many places simultaneously, naturally favoured the independents, who had the advantage of numbers and local knowledge over the chains, highly-centralised institutions which found it difficult to keep track of events. In contrast, no one could doubt that the chains were far better equipped to deal with affairs in Washington, to which the independents had only the most ill-defined lines of communication. It was symptomatic of the traditional preoccupations of the independent trade that the four

6. See above, pp. 43-46, 59-60.

largest national retailers' associations all had their headquarters in the Midwest, not in either New York or Washington.⁷ They were national associations primarily in the sense that they recruited nationally rather than that they engaged in federal politics. Not until the coming of the New Deal did that focus change. Before then, the national associations did little more than put on conventions to allow friends in the trade from around the country to get together for a few days and enjoy hospitality put on by courtesy of the wholesalers and manufacturers. Similarly, all trade relations tended to be "vertical" rather than "horizontal" thus reducing the possibilities for any combining of forces. Wholesalers or retailers in different lines had little organised contact with each other. There had been various suggestions from time to time to weld together the nation's retailers into a national federation, but the idea had always faltered through indifference and the reluctance of trade executives to do anything which might compromise their independence of action or threaten their own jobs. The only offshoot of such ideas was the Retailers' National Council, which was set up in 1923 and served as a loose organisation for the Secretaries of national retail associations, chain and independent alike. The Council provided a forum for the occasional exchange of views, but the Secretaries were careful not to allow it an independent existence which might compromise their freedom of action, and few rank-and-file retailers even knew of its existence.

7. Nat. Assn. of Retail Druggists and Nat. Assn. of Retail Meat Dealers in Chicago; Nat. Assn. of Retail Grocers in St. Paul; Nat. Retail Hardware Assn. in Indianapolis. The NRDGA and the NCSA, in contrast, were both based in New York. The unpretentious nature of the small retailers' associations is perhaps indicated by the fact that the NARG maintained its offices in out-of-the-way St. Paul simply because that was Secretary Janssen's home, and his children were in school there. It moved to Chicago in 1934 when Janssen resigned.

The lack of pressure from independent merchants was mirrored by the absence of any clear anti-chain faction in Congress itself. During these years - especially in 1931 and 1932 - Congress was a faltering, stuttering institution, incapable of finding a collective response to the calamity of the depression. It did little about anything, and it did nothing about matters upon which it was not under unrelenting pressure from well-entrenched vested interests. The most eloquent friends of the independent merchants were largely found in the ranks of the western Progressives, but their attentions remained fixed for the most part on farmers, the unemployed, the banking structure, Prohibition and such like issues of the day. Furthermore, it was not altogether clear what they had to offer the independent merchant, even had they enjoyed some degree of power. Their lack of decisive action was epitomised by the attitude of Senator Brookhart who, after introducing his chain store investigation resolution in 1928 offered no further anti-chain bill before losing his seat in 1932, never to be re-elected.⁸ Only a motley assortment of other politicians, mostly from the South, showed any interest in the chain store issue, and then to no particular purpose. No leader emerged in either Senate or House to lead an anti-chain crusade.⁹

8. For an acid description of the Progressive bloc as a "sorry bunch of weaklings and time servers" who "sit back, wait a bit, shake their heads, demand investigations, introduce endless and inane resolutions, and then take it out by "voting right"; see "Progressives of the Senate", American Mercury, April 1929 pp 385-93. George Norris of Nebraska and Tom Walsh of Montana were exempted from this description.

9. Some who promised much delivered nothing. When Huey Long first ran for the Senate in 1930 his own newspaper asserted that the chain stores had "kicked in with thousands of dollars" for the campaign of his opponent because the "chain store kings realize that when he is elected...he will begin federal legislation to prevent the unethical practices that they for so long have been thriving on". (Louisiana Progress, August 14, 1930). But although Long's Share Our Wealth organisation did channel much anti-chain propaganda to a mass audience, the Senator did not introduce a single anti-chain bill in his Senate career. Assassination in September, 1935 removed him from the scene just as the chain store was becoming an issue on Capitol Hill.

ii. The Federal Dimension, 1933-4.

The New Deal platform upon which Governor Roosevelt came to the office of the President in 1932 contained no threat, either explicit or implicit, to the chain stores. Indeed, if there can be said to be a dominant philosophical position in the early New Deal in reference to distribution - actually production got all the attention - it was that the efficiencies of the chains were an advantage to a struggling economy, provided that chain buying methods did not depress prices to farmers and other suppliers. It is also an indication of the insignificance of the anti-chain fight in national political controversy that Roosevelt felt no obligation to make any sort of gesture to independent merchants for electoral reasons which might have contradicted that philosophy.¹

Nevertheless, the atmosphere of regeneration and unbounded expectation was so pervasive in the early days of the New Deal that some independents were quite prepared to believe that utopia was just around the corner. Earnest appeals were directed to Roosevelt to remember that the country could never prosper without the restoration of a secure body of home merchants, and to take immediate action to legislate the chains out of existence.² Some hoped for the dramatic sort of direct action being taken at the time under the auspices of the new administration in Germany where Nazi stormtroopers, in pursuit of the early populist phase of the Nazi revolution, picketed Woolworth stores, while the government itself placed a ban on the opening of

1. See above, pp. 57, 75, 142.

2. Thomas Carroll Davis, Chain Stores vs. Farm Problem (George W. King Printing Co. Baltimore, 1933), a work inspired by the 1932 Presidential campaigns, warned against an over-emphasis on the problems of the farmer. Davis called on the government to compel the immediate liquidation of chain store companies and then force manufacturers to stick to manufacturing, retailers to retailing etc. With this done, the government could abandon all other "noble experiments" and leave business to itself. Ernest G. Shinner, The Forgotten Man, Chicago, 1933 appealed to the "spirit" of the New Deal to urge the limitation of any retail business to a gross annual volume not exceeding \$5m. The author was himself the owner of a chain of retail meat markets in and around Chicago - presumably with sales under \$5m.

new limited-price variety chain stores.³

Such dreams apart, what the trade longed for most by the beginning of 1933 was salvation from the tyranny of "cut-throat competition". The National Industrial Recovery Act was greeted with almost universal relief and gratitude in the independent trade as a sort of colossal trade practice conference, backed up by powers of administrative enforcement never enjoyed by the FTC. Trade association executives flocked to Washington to participate in the processes of code-making; federal regulation, for the first time other than in war, reached right down to the level of the small retail store on Main street. Inevitably, much of the code-making for the distributive trades involved the NRA in decisions on matters which divided chains and independents. The chain store problem arrived in Washington through the back door of the NRA while the Congress assumed a passive role and delegated its responsibilities. During 1933 and 1934, the independent merchants forgot all about old panaceas like Capper-Kelly and the Trade Commission investigation, and looked instead to the NRA to usher in a new and better age.

The one considerable attempt made by Congress to involve itself in the affairs of the NRA in the interests of the small businessman actually evoked little sympathy from most leaders of the independent merchants. In the winter of 1933-4, several of the Senate Progressives, notably Borah and Nye, mounted a vigorous assault of the NRA, claiming that it fostered monopolistic price-fixing and oppressed small business. In response to their complaints, and to avoid the creation of a Senate investigating committee, General Hugh Johnson, the head of the NRA, acceded to the establishment of a five man National Recovery Review Board, headed by the Chicago lawyer and publicist

3. Interstate Grocer April 8, 1933. Even so sober an observer as C.H. Janssen, NARG Secretary, observed that "Hitler goes at the problem without the resistance of our American political structure. The government there is shaped primarily to protect the middle class... Chain stores and consumer cooperatives are doomed under the present Hitler plan". (Modern Merchant & Grocery World, June 3, 1933). This trade enthusiasm for Hitler was, it should be noted, as short-lived as Hitler's enthusiasm for driving out the chain stores.

Clarence Darrow. The ostensible brief of the Review Board was to serve as a court of review in the interests of small business, and two of its members were apparently well-equipped to consider the problems of the small merchant. Samuel C. Henry was a director of the cooperative Philadelphia Wholesale Drug Co. and the recently deposed Secretary of the National Association of Retail Druggists, and Fred Mann was the one-time vice-president of the W.K. Henderson Minute Men. Despite this, few representative spokesmen for independent merchants found the proceedings of the Review Board to their liking. From the first, it conducted its inquiries in an unbalanced and partisan manner, cobbling together all manner of half-truths and innuendo in order to discredit the NRA, while suggesting no alternative but a return to an ill-defined state of free competition. Thus while trade leaders were perfectly prepared to take their detailed criticisms of the NRA codes to the Review Board, they were most careful not to fuel its fires by condemning the principle behind the NRA. Indeed, the Review Board got so little material to its liking from the small retailers that its treatment of the retail codes was reduced to the recitation of some ill-founded tittle tattle arising out of the private feud of certain New York department stores. The Board's methods made it an easy target for General Johnson's jibes that 95% of the "little fellow" complaints came from sweatshops and "chiselers" who thought their fortunes would revive with a return to competitive anarchy.⁴

4. Hugh S. Johnson, The Blue Eagle From Egg To Earth, N.Y. 1935, pp 271-282; New York Times May 5, 12, 13, 27, 1934. Hawley, The New Deal and The Problem of Monopoly pp. 81-5, 95-7.

To a prominent opponent of the chain stores like George Schulte, the Review Board seemed an opportunity wasted. Instead of the Board providing a counterweight to the big retailers to assist in the further improvement of the codes in the interest of the independents, it merely gave comfort to the enemies of the New Deal such as the U.S. Chamber of Commerce, thus threatening "a return to the old system which can only mean destruction". Schulte's persistent fear was that big business would succeed in operating through a front of disgruntled "little fellows" to bring down the NRA, with untold consequences, both political and economic, for the small men.⁵ Even those less enamoured of the NRA than was Schulte had to face the question of what critics like Nye and Borah could put in its place. Senator Nye had himself, in 1932, introduced bills to prevent sales below cost, to strengthen Section 2 of the Clayton act against price discrimination, and to make trade practice conference rules enforceable after approval by the majority in the industry. Nye had offered these bills, in good measure, specifically to help the independent merchants.⁶ To the trade, the aim of these bills seemed very much the same as that of the National Industrial Recovery Act, whatever the latter's deficiencies in actual operation. As for Senator Borah, he had something of a reputation as an obstructionist and negationist. Were not their attacks on the NRA in a sense an expression of pique, of impotence, because it was no longer the Senate but the New Deal agencies which held centre-stage? Their Progressive philosophy had apparently run into a dead end as far as the small merchant was concerned. The small man wanted more price-fixing, not less; he wanted governmental protection, not to be thrown to the wolf of free competition. Nothing done during the depression before the NRA had provided that protection, and the small man could naturally only subject the rhetoric of its critics to the tests of that experience.

5. Interstate Grocer, May 26, June 2, June 16, 1934.

6. New York Times, January 6, 1932.

For nearly a year, the NRA functioned virtually as an alternative business government, the creation, of course, of Congress, but not its creature. It applied its own administrative edicts with little respect for any of the pre-existing laws relating to trade practices enacted by the Congress. Although the NRA's psychological and practical grip began to weaken from the Summer of 1934, as it withdrew from some areas of the economy and reduced its involvement in others, the process of progressive debilitation was only very gradual. As a result, the appearance of the Final Report of the FTC's chain store investigation in December, 1934 made only a modest immediate impact. The character of the Final Report actually served well to point up the practical merits of the NRA. After six years of study, the FTC produced only three legislative recommendations, which it outlined in only the most cursory manner, despite the many complex economic and legal problems which each involved. Two of the recommendations actually arose from more general concerns of the Commission, and the Report did not explain their specific importance and relevance to the chain store issue. Only the proposal to amend Section 2 of the Clayton act, to curb discriminatory prices to trade buyers, really answered the grievances of independent merchants.⁷ Even then, the Report made no reference to the fact that the NRA was already grappling with the difficult issue of price discrimination and had written into the codes many restrictions not found in Section 2. The FTC had itself conspicuously failed in the past to enforce Section 2 - a failure which it ungraciously laid entirely at the doors of the Courts;⁸ now it sought amendment, without mentioning that for eighteen months Section 2 had effectively not existed, but had been replaced by the fiat law of the NRA. The Final Report did not even acknowledge that there was an NRA functioning as its rival to authority over business. Was

7. Final Report of Chain-Store Investigation pp 94-7. See also above, pp. 46 - 52.

8. Final Report, pp 90-1.

not this, perhaps, just the same impotent pique that had distorted the judgement of Senators Nye and Borah? The lofty disregard of the FTC for current political and economic realities scarcely boded well for a forceful and down to earth enforcement of a revised Section 2, even if such a revision could be obtained within a reasonable space of time from Congress. Not surprisingly, the first reaction of independent leaders to the Final Report was simply to file it away for future reference, and get back to the immediate task of battling for tighter controls on chain buying advantages from the NRA.

Then, through the early months of 1935, the NRA began to fall apart at the seams, and it became increasingly clear that its lawyers were just playing out time before the Supreme Court delivered the death warrant. Some independents never doubted in the NRA to the end and for months - even years - after it was killed off in May, 1935, there were recurrent reports that it was to be revived in a new, improved version which would somehow pass every test of constitutionality. But most trade leaders came to the realisation well before the Schechter decision that other options had to be taken up, if only as an insurance policy. Many of the ideas in vogue - price-fixing and loss limitation laws, trade practice conferences, industry self-regulation - implied a general drawing together of the trade, chain and independent alike. In contrast, the discussion of an attack on price discrimination sharpened up the conflict between chain and independent and even, to a lesser extent, between large and small in the independent sector.

In the Spring of 1935, several bills were introduced in Congress to attack price discrimination. The most enthusiasm from the enemies of the chains was directed towards the Bankhead-Huddleston "Equal Rights Trade Act", introduced in both Houses on March 11. Among its provisions was a fearsome restriction on chain buying, for the bill made it "unlawful... to discriminate in price between different purchasers of any commodity, regardless of the

quantity purchased". Exception was to be made only so that "a lower price may be charged in sales made to wholesalers in contemplation of resale to retailers; and that higher prices may be charged in sales made in good faith directly to consumers than are charged in sales of the same commodity to retailers". Thus the bill sought to destroy chain quantity discounts, while entrenching the rights of wholesalers to obtain functional discounts.⁹

While the bill helped to arouse trade interest in the whole subject of Congressional action to curb price discrimination, most observers considered it too extreme to have a good chance of passage. Such was the view of H.B. Teegarden, the attorney of the United States Wholesale Grocers' Association, who prepared a rather more moderate measure, which was first unveiled at the association's annual convention, held May 21-3. The convention responded warmly to USWGA President J.H. McLaurin's assertion that the bill was the wholesale grocers' "declaration of independence", and excited speakers from the floor spoke of raising a fighting fund of \$500,000 to \$1m. to put it into law.¹⁰ At first, however, the bill seemed to have no particular qualities or breadth of support such as would take it to the head of the pack of price discrimination bills. The bill really began its journey to ultimate enactment, as the Robinson-Patman law, when it was picked up by Congressman Wright Patman, who introduced it in the House on June 11. Thanks to a sequence of developments arising in the field of retailers' politics, Patman was able to create so much publicity for the USWGA bill that it rapidly pushed all other price discrimination bills into eclipse.¹¹

9. Bankhead-Huddleston Bill, introduced as H.R.6618/S.2211. See also H.R. 6246, H.R. 4995, H.R. 5062. (74th Cong. 1st Sess.).

10. Interstate Grocer, May 25, 1935.

11. H.R. 8442; Congressional Record 74th Cong. 1st Sess., pp 9077-8. Introduced as S.3154 by Senator Joseph T. Robinson.

iii. The Creation of the Patman committee

On April 17, 1935, a front page story in the New York Times announced the formation of the American Retail Federation. According to Louis E. Kirstein, the vice-president of William Filene's Son's Co., the Boston department store, the ARF was to serve as the "unified voice of the entire field of retail distribution on national legislation and economic problems". Kirstein explained that the need for such a "unified voice" had become apparent in the early days of the NRA, and that the aim was to create an organization of parallel prestige and importance to those maintained by oil producers, steel, auto manufacturers, railroads and farmers. As well as the national tasks of "coordination of all branches of retail distribution", furnishing statistics, and representing the interests of the member associations to government, the new Federation would also, Kirstein added, seek to create "well-organized and coordinated state councils". The position of president was to be taken by Colonel Clarence O. Sherrill, a Kroger vice-president, who was to be assisted by an executive committee of ten prominent chain and department store men.¹ Among those ten was Herbert J. Tily, the president of the Retailers' National Council, the thirteen member associations of which, Kirstein stated, would become "the nucleus of the new federation".²

1. New York Times, April 17, 1935. The executive committee comprised: Louis E. Kirstein; Percy S. Straus, president of R.H. Macy & Co., Inc.; John Burke, president, B. Altman & Co.; Lessing Rosenwald, chairman of the board, Sears, Roebuck & Co.; E.C. Sams, president, J.C. Penney Co.; A.H. Morrill, president, Kroger Grocery & Baking Co.; C.W. Kress, president, S.H. Kress & Co. Inc.; H.J. Tily, president, Strawbridge & Clothier; Fred Lazarus jr., vice-president, F. & R. Lazarus Co.; George M. Gales, president, Liggett Drug Co. The Times story also named 20 other retail executives as having played an active part in the conferences leading to the formation of the ARF. 14 were department store men, and 6 from the chains.

2. Nat. Ret. Dry Goods Assn; Nat. Assn. of Ret. Clothiers and Furnishers; Nat. Ret. Furniture Assn.; American Nat. Ret. Jewelers' Assn; Nat. Council of Shoe Retailers; Nat. Shoe Retailers' Assn; Nat. Ret. Assn. of Music Merchants; Mail Order Assn. of America; Limited Price Variety Stores Assn; Nat. Ret. Hardware Assn; Nat. Assn. of Ret. Druggists; Nat. Assn. of Ret. Grocers; Food & Grocery Chain Stores of America, Inc.

The ground had been ill-prepared for such a dangerous venture. Spokesmen for several of the national retail associations which were to be the "nucleus of the new federation" expressed surprise at the announcement. Even the NRDGA, some of whose most influential members were involved in the creation of the ARF, was not officially involved.³ To the large associations representing the smaller retailers - the NARG, the NARD and the NRHA - the announcement came as a declaration of war. H.C. Petersen, the secretary-manager of the NARG, stated that no invitation had been received to join the ARF, and that the association's attitude would be to "actively oppose it wherever possible". Rivers Peterson, the secretary of the NRHA, announced that "the Hardware Association will not join, and from this day is out definitely to establish a cleavage between the predatory Goliaths...such as the new federation represents, and the great body of smaller retailers". To John Dargavel, the secretary of the NARD, the ARF was but a "shoddy cloak being used by these big and unscrupulous business men to cover their real purposes...a diabolically clever scheme of propaganda and wirepulling".⁴

The intensity of the opposition demonstrated by these three associations testified to the impact of two years of the NRA and internal trade feuds over the control and content of the codes. They had become aggressive and politically aware and, moreover, were responsive to the demands of the affiliated state and local associations in a way which had not been the case before the New Deal. The creation of the ARF marked a watershed: in the first half of the decade, the national associations had

3. New York Times, April 26, 1935. Some reports, however, spoke of Harold Young, Washington representative of the NRDGA as an active participant.

4. New York Times, April 24, 1935; Retail Ledger, May 1935, "Retail Federation Dream Becomes A Nightmare"; NARD Journal, May 2, 1935.

played little part in the evolution of the anti-chain fight; for the rest of the 1930's they were to play a leading role.

While the three associations had all arrived at the same destination, their experience under the NRA had brought them by different routes. It was the NRHA which had made the most painful journey, and in declaring war on the "predatory Goliaths" of the ARF Rivers Peterson was seeking to atone for what many saw as having been the association's weak-kneed submission to the big retailers back in 1933 when the shape of the NRA code structure was being determined. At that time, the powerful NRDGA had fostered the idea of a uniform retail code to be administered by a National Retail Recovery Board made up by the associations on the Retailers' National Council. The plan had collapsed because the grocers and druggists had won their own codes, but its barebones survived in the form of the National Retail Code Authority, which administered the general Retail Code. This code was drawn up by a small number of executives of big chain and department stores, meeting privately "by invitation only", with the NRDGA assuming leadership in dealings with the NRA. The retail lines brought under the patriarchal guidance of the NRDGA were those in which the small dealers were disorganised, too few or too weak to compel separate recognition from the NRA.⁵

Trade associations, in order to be accorded recognition by the NRA, nominally had to be representative of 50% of the units in their field. In fact, the NRDGA only claimed as members 2 or 3% of the dry goods retailers in the United States. Most of the other associations on the National Retail Code Authority were also very small in relation to the number of retailers

5. Ruth P. Mack, Controlling Retailers: A Study of Cooperation and Control In The Retail Trade With Special Reference To The NRA. N.Y. 1936 (1968 reprint, AMS Press Inc.), p. 166.

in their fields or totally dominated by chains and big department stores. Only the NRHA could claim to be fairly representative of the mass of small dealers in its field and, not surprisingly, the other associations considered it prudent for Rivers Peterson to be pushed forward to serve as chairman of the Authority. As such he became a mere figurehead, presiding over a code which had been signed, sealed and delivered almost before the NRHA had realised what was going on.⁶

As the rank-and-file became increasingly dissatisfied with the content and enforcement of the code, the pleasures of unprecedented prestige and attention began to turn sour for Peterson, and he found himself increasingly at odds with the rest of the Code Authority. In April, 1935, a few days before the unveiling of the ARF, he resigned his post as Code Authority chairman and went before the Senate Finance Committee, which was holding hearings on the desirability of a further extension of the life of the NRA, to advise that it be left to expire. He was the only spokesman for a national retail association so to advise. Peterson brought to the committee

6. Ibid, pp. 164-5. In the autumn of 1933, the nine associations represented on the National Retail Code Authority had the following strengths:

	Stores in Assn.	Stores in Field
Nat. Ret. Hardware Assn.	11,303	47,224
Nat. Ret. Dry Goods Assn.	app. 4,000	168,844
Limited Price Variety Stores Assn.	6,739	12,046
Nat. Shoe Council/Nat. Shoe Retailers Assn.	6,334	18,836
Nat. Ret. Furniture Assn.	3,213	33,226
Nat. Assn. of Ret. Clothiers & Furnishers	1,789	22,373
Nat. Assn. of Music Merchants	app. 600	-
Mail Order Assn. of America	9 (with most of the business)	

Most of the stores in the LPVSA and shoe associations were in any case units in chains, thus making the NRHA the only association with a significant number of small independents in its ranks.

a catalogue of woes. His members were harrassed by endless rules and assessments imposed by a multitude of code authorities which claimed overlapping jurisdiction over the multifarious activities of the average hardware store; code labour provisions were unduly onerous to the small dealer without the staff to operate a shift system; retailers were being denied wholesale discounts because of classification clauses in manufacturers' codes; the chains were able to price goods above the 10% minimum retail mark-up and still sell for less than what the same goods cost the independent from his wholesaler because of special discounts and allowances. In essence, Peterson's complaint was that a code written by and for big department stores was unsuited to the needs of small hardwaremen. In that assertion he was right. Critics observed, however, that the NRHA had contributed to its own problem by not fighting for a separate code for hardwaremen back in 1933, and that it was blaming the NRA for its own failure in order to divert the criticism coming from the membership. The NRHA traditionally had had little involvement in politics - unlike, say, the NARD - and had believed in keeping government out of business. Thus when government had taken over the regulation of business, the association had been unable to cope.⁷ While Peterson could hardly admit this publicly, his every action over the next few years showed a determined eagerness to prove that he had learned his lesson and was thoroughly alert to the crafty ruses of the big retailing interests. Hence the strident denunciation of the ARF.

7. Hardware Retailer, May 1935, p. 22; Senate Finance Committee, "Hearings Pursuant to S. Res. 79, Investigation of the National Recovery Administration", 74th Cong. 1st Sess., pp. 1711-1727. For a forceful criticism of Peterson's attitude, see *ibid*, pp. 1829-1832 (Statement of Arthur Greenwood, secretary of the "Committee of Ten Thousand", a pro-NRA small business group).

For the National Retail Grocers' Association, the emphasis was a little different. In 1933, the grocers had waged a vigorous and successful fight to secure their own code. Even then, there had been calls from the more militant grocery associations that the National should sever its connection with the Retailers' National Council because of the NRDGA's attempt to work through it to bring about one overall retail code authority.⁸ Thus the announcement of the ARF was seen as a revival of this old unified code idea, and a challenge to grocery autonomy. At the same time, it came at the climax to a long period of increasing dissatisfaction about the way in which the National was conducted. In 1933, C.H. Janssen, then the Secretary-Manager of the National, had accepted the job of chairman of the National Food and Grocery Code Authority, while retaining his job with the NARG. In the view of many of the rank-and-file, Janssen leaned too far in his NRA work in the direction of acting as a neutral umpire in trade controversies and the resultant criticism forced his resignation from the NARG job in March, 1934. Despite this change at the top, the clique in control of the association persisted in policies designed to improve relations with the grocery chains, under the aegis of the NRA, without attempting to stage an all-out struggle with the chains on vital questions like brokerage and advertising allowances. As the NRA drifted towards oblivion, and with it the precarious gains of code collaboration, that position looked ever more untenable. By the time of the unveiling of the ARF, the leadership was under an obligation to demonstrate to the membership that it understood that there were limits beyond which collaboration must not be taken. The strong rejection of the ARF allowed all sections of the retail grocery trade to close ranks, for however keen the conservative leadership was to work with the grocery chains, as cooperating equals, it was absolutely opposed to any idea of being absorbed and "coordinated".

8. Interstate Grocer, August 5, 1933.

It was probably the National Association of Retail Druggists which revealed itself as the most vehement opponent of the ARF. For the NARD, the coming of the NRA had been the beginning of a glorious transformation. Hitherto, although a large and cohesive organisation, its record had been one of failure, if only because it had got nowhere with its keystone policy, resale price maintenance. But under the NRA it made a huge advance. The drug chains associated themselves with the demand for price maintenance, thus isolating the "chiseling five per cent" of price cutters, and although the drug code formally did not countenance resale price maintenance but only "loss limitation", the actual loss limit provision, set within the context of the economics of the drug trade, did give something of the substance of true price maintenance.⁹ The image and reputation of the association was so inextricably bound up with price maintenance that this success represented a far greater triumph than it would have done for any other national retail association. The NARD was able greatly to extend its influence over state and local druggists' associations, reporting large increases in membership, especially in the South and more rural areas, where it had previously enjoyed little adherence. At the same time, the appointment of new officers, after a purge of an old guard considered too slothful and conservative for the needs of the age, brought a much more militant style of leadership. John Dargavel, from Minnesota, became Secretary in 1933, and in the following year he was joined by Rowland Jones, who took over the NARD's Washington office, and J.A.O. Preus, a friend of Dargavel and a former Governor of Minnesota, who was appointed public relations counsel because of his "wide contacts in the national capital".¹⁰ These new leaders quickly set the NARD on a new course.

9. See above p. 61.

10. NARD Journal Sept. 25, 1933; Jan. 18, Aug. 2, Nov. 1, 1934. The ten states with the largest increases in membership in the ten months from October, 1933 were all in Southern and Southwestern states, ranging from 246% in Florida to 1,200% in North Carolina. Although the preponderance of the membership still came from the big industrial states, this heavy recruitment in the rural sections can only have encouraged the trend to assertively anti-chain policies.

Traditional activities such as "white listing" manufacturers were augmented by assistance for any sort of anti-chain activity, including chain store taxation, in which the NARD took an active interest for the first time in 1935.¹¹ By the time of the announcement of the formation of the American Retail Federation, the NARD was enjoying great success on a number of fronts simultaneously, with chain taxes and fair trade acts being considered, or having been enacted, in many states, while the NARD campaigned vigorously for the retention of the NRA. This was an association in the ascendant and increasingly arrogant about its own strength. The NARD's attitude was sharply illustrated by its two-sided relationship with the drug chains. It had entered into a blissful embrace on the price maintenance question. On that, the NARD and the drug chain association were united, with the chains deferring to the NARD's leadership. Yet this issue had been segregated from the chain tax question, so that the NARD was busily trying to throttle the chains with one arm while embracing them with the other. Whether or not such an approach was ethically, economically or politically consistent, it testified to the belief of the NARD that all things were now possible and it was the turn of the "little fellow" to call the tune.

The sponsors of the ARF cannot have been totally taken by surprise by the abuse heaped upon them. The meetings preliminary to the formation of the ARF had been far from secretive, apparently in an attempt to test the waters. Furthermore this had gone on for months, indicating that the need for caution was understood. That not all the retail associations would accept the ARF had been clearly demonstrated as early as February, 1935, when John Dargavel warned the druggists to "keep entirely and alertly

11. The NARD committed itself to the principle of chain store taxation for the first time at its 1934 convention. (NARD Journal October 18, 1934), though price-fixing remained its primary interest.

clear" of any move to create what was then being termed the "Institute of Retail Distribution of the U.S.A.", which would use "simple-minded small businessmen as "fronts" enrolling by loose hook-ups the various retail associations, thus making it appear at Washington that they speak for the small men". Dargavel had also warned the Retailers' National Council against becoming embroiled in plans for the new organisation and, apprehensive about the drift of events, had written to disaffiliate the NARD from the Council on April 8, a week before the ARF was announced.¹² While considerable allowance must be made for the fact that many of the sponsors of the ARF, including Kirstein, were not familiar with the undercurrents of sentiment among the small retailers, the element of risk involved in the ARF was apparent enough. Presumably it was hoped that, at the worst, only the grocers, druggists and hardwaremen would bolt, leaving most of the associations represented on the National Retail Code Authority, with the possibility of adding to these state retail associations. Where the sponsors miscalculated was in underestimating the new political influence of the independents and in ignoring the possibility that the internal conflicts within retailing might become intertwined with the general feeling in the country, and sections of the Congress, that big business was to blame for the depression, and deserving of punishment. Had it not been for this broader sentiment, the grievances of the small retailers might indeed have produced little more than a brief and inconclusive furore in the trade press.

Instead, one week after the initial announcement, St. Louis Democrat John J. Cochran introduced a House resolution calling for the investigation by a special committee of what he termed the ARF "superlobby". The ARF was, the resolution stated, "the greatest aggregation of rich and powerful department stores and chain stores of America ever brought together for

12. NARD Journal, February 7, May 2, 1935.

the purpose of directly or indirectly nullifying the effects of the N.R.A., the A.A.A., the Sherman Act, the Clayton Act, and other antitrust laws now on the statute books of this Nation, and by propaganda and other methods inimical to the public welfare to attempt to control and influence the Congress of the United States in its legislative deliberations". It further averred that the Federation was "proceeding upon a plan" to "force" the small independent retail merchants into contributing \$2m annually to its coffers with the intention that it "may thereafter hold out to members of Congress and to others in the Government that it represents a completely centralised and authentic voice for all retailers of the Nation". The allegations of the resolution were loosely based on the New York Times story, but it added the names of Harold R. Young, the Washington representative of the NRDGA and John Hartford, the president of the A & P, to the list of organisers of the Federation.¹³

The resolution was adopted by unanimous consent, after only a few cursory questions from other Congressmen: G.M. Lebar, the editor of Chain Store Age, later characterised the action as a "sneak attack as unprovoked and as unexpected, if not as world-shaking, as the one which was to lay Pearl Harbor low some years later."¹⁴ The Congress was at the time abnormally sensitive to any and all attempts at high-pressure lobbying for, in addition to the immense pressures generated by business groups for and against, especially against, the continuation of the NRA, the struggle over the administration's bill for a "death sentence" on utility holding companies was producing the most intense lobbying of the New Deal era. There were allegedly more utility lobbyists on Capital Hill than there were Congressmen, and their tactics led to the appointment of

13. (H.R.203) Congressional Record, 74th Cong. 1st. Sess. p. 6338.

14. Chain Stores In America , 1963 edn. p. 197.

special investigating committees by both the House and the Senate.¹⁵

To hard-pressed Congressmen, the ARF bore all the outward signs of being a similar type of lobbying machine.

Cochran was himself appointed to chair the seven man investigating committee. However, he fell ill before work could start and, upon his recommendation, Wright Patman, a fellow Democrat, from Texas, replaced him.¹⁶ It was an inspired choice. Patman had no record of opposition to chain stores, but he was known as a determined foe of "the interests", whatever shape or form they took. Since entering Congress in 1929 he had worked relentlessly for his veterans' bonus bill, the measure which best encapsulated all the grievances of the neopopulists in the early 1930's, enshrining as it did the belief that the soldiers should be compensated for having been led into Wall street's war, while at the same time offering the prospect of a shot of free money into the deflated economy. By the Spring of 1935 it was generally accepted, and taken for granted by Patman himself, that some form of the bonus bill would be passed without further difficulty at the start of the next session of Congress. Thus the main theme of Patman's Washington career to date was just about played out. He needed a new outlet for his energies, and Cochran was able to provide him with one. Cochran's illness proved a cruel twist of fate for the chains, for although he would no doubt have pursued his quarry with all due diligence had he been able, and although he unreservedly approved of the use Patman made of his opportunity, it seems impossible that he, or indeed anyone else, could have set out to

15. William E. Leuchtenburg, Franklin D. Roosevelt and The New Deal , N.Y. 1963, Harper Colophon edn. p. 155-6.

16. Congressional Record, 74th Cong. 1st Sess. p. 7741 (May 16, 1935). The other members of the committee were Sol Bloom (N.Y.-Dem.), Donald H. McLean (New Jersey -Repub.), Scott W. Lucas (Ill.-Dem.), William Sterling Cole (N.Y.-Repub.), John F. Dockweiler (Calif.-Dem.), Gerald J. Boileau (Wis.-Progressive).

harrass the chains with quite the remorseless tenacity which Patman brought to the task.¹⁷

On June 4, the House granted Patman supplementary powers, adopting a resolution for the committee to "investigate the trade practices of individuals, partnerships, and corporations engaged in big-scale buying and selling of articles at wholesale or retail and their associations". The House was informed, through Congressman Greenwood of the Rules Committee, that the further resolution was required because the ARF had incorporated since the passage of the original Cochran resolution and, pleading a "legal technicality", its founders were denying the Patman committee access to the information it sought. Asked how far the new resolution was to widen the scope of the investigation, Greenwood explained that "as I understand it...it is not the idea that the investigation shall be on any wider scale except so far as this information will disclose what efforts at lobbying have been carried on by this association". Patman himself offered only the most ambiguous explanation for the resolution, but despite this, the House adopted the resolution without much discussion.¹⁸

The committee began its work on June 5, and soon began to roam far and wide, with occasional returns to the subject of the ARF. On June 11 Patman introduced H.R.8442, the USWGA price discrimination bill, and soon his committee was deeply enmeshed in inquiries into the secret rebates enjoyed by the big chains. To chain store men, this rapid turn of events was both unpleasant and suspicious. Dark hints were dropped that Patman

17. Congressional Record, 74th Cong. 1st Sess. pp. 13575-6. A \$2b. bonus bill was enacted over Roosevelt's veto in 1936. For an examination of Patman's social and economic thinking in relation to the bonus and more generally, see the chapter "Wright Patman and the Fight For The Bonus" in Roger Daniels, The Bonus March, Westport, Conn., 1971).

18. (H.R.239) Congressional Record, 74th Cong. 1st Sess. pp. 8646-7.

had from the start planned to use the committee as a propaganda vehicle for the bill. As the Safeway attorney alleged, in refusing Patman's demand for that company's list of discounts and allowances, "...it has been apparent from the outset that your investigation is not bona fide but has been influenced by organizations antagonistic to the chain stores for selfish and pecuniary motives...I do not propose to permit United States Whole Grocers' Association, through you, to conduct an inquisition on its competitors under false guise of governmental investigation".¹⁹

Patman himself emphatically denied these charges. The supplementary resolution, he stated, had been solely to carry out the "real intent" of the Cochran resolution which, he noted, had referred to the ARF as being "designed to prevent small businesses from securing competitive opportunities equal to those enjoyed by corporations representing vast aggregations of capital". Patman also maintained that he had not even been aware that the USWGA had a bill which they desired to see introduced until that association approached him after two days of the hearings. There was, therefore, no "direct connection" between the committee's probe into secret rebates and his advocacy of the USWGA bill.²⁰

The allegation that Patman was planning to introduce the USWGA bill even before the committee began its work was based on nothing more than the circumstance that he introduced it six days after his committee's hearings got under way. It is difficult to understand why some have found this sufficient reason to doubt Patman's emphatic denials, for if he first received the bill after two days of hearings, as he claimed, he would presumably have been capable of reading its text and deciding that he liked it within the space of four days.²¹

19. Ibid. p . 12989.

20. Ibid. pp. 12989-90. Safeway did eventually back down and produce the information desired.

21. Joseph C. Palamountain repeats this allegation in The Politics of Distribution, Camb. Mass., 1955, p. 198.

Nevertheless, it was the case that Patman had not been entirely straightforward in obtaining the supplementary trade practice resolution. That resolution conferred on the committee "vastly broadened powers... rivaling the inquisitorial authority of the Federal Trade Commission."²² Indeed, as employed by Patman, the resolution allowed him greatly to exceed the inquisitorial authority of the Commission. No reasonable understanding of the phrases of the original Cochran resolution would have allowed the committee to have gone so deeply into matters such as special rebates paid to chain stores or chain lobbying methods in state legislatures.

Patman need not have been so disingenuous. Two months after the adoption of the trade practice resolution he came before the House again, seeking an appropriation to extend the life of the committee. By that time, chain store lobbyists were frantic in their representations to Congressmen that the committee was meddling in affairs totally unconnected with the ARF, and their complaints found a few sympathisers. Congressman Snell of New York, the minority leader, informed the House that the Cochran resolution would not have gone through by unanimous consent had it been known what course the committee would take. It was Snell's view that "we have gone far enough". But, despite this criticism, Patman carried the support of the great majority of Congressmen, and got his appropriation easily enough. The intense chain efforts to stop the committee were, he assured the House, a sure sign that "we are really getting pay dirt", and he reminded his fellow Congressmen that "thousands and tens of thousands of copies" of the committee's hearings were being sold. Obviously the "little fellows" liked its work. The whole chain store question, after several years agitation in the states and with the FTC's investigation concluded, was ripe for Congressional action. While

22. New York Times, June 5, 1935.

the committee exceeded the letter of the Cochran resolution, it gave expression to its spirit, for had it not been for the much wider conflict between chains and independents no one would have thought of investigating the ARF in the first place.²³

iv. The Patman Committee and the American Retail Federation.

Leading opponents of the chain stores from the first emphasised the chain, rather than the department store, background to the American Retail Federation. They took the view that its formation was a response to the cumulative threat of such developments as the Bankhead-Huddleston bill, the West Virginia chain tax decision of the Supreme Court and the Roosevelt administration's New Deal policies. Patman shared this interpretation and also believed that he had identified the guiding influence behind the ARF as being the Kroger Grocery & Baking Co. He referred to the Federation as having been "born in Cincinnati", the headquarters city of the Kroger company.¹

There was, most certainly, a strong Kroger involvement in the ARF. Colonel Sherrill, the man appointed to head the new Federation, was the former city manager of Cincinnati and had come to the Kroger company at the height of the Henderson agitation in 1930 to assume the position of vice-president with responsibility for public relations. In that role he had become well known to independent merchants throughout the Midwest for his regular appearances before legislative committees holding hearings on chain tax bills. Two of the ten man executive committee of the ARF were also Kroger men, A.H. Morrill, company president, and Fred Lazarus, a director.

23. Congressional Record, 74th Cong. 1st Sess., pp. 12654-8 (August 7, 1935).

1. Interstate Grocer, April 20, October 19, 1935.

Patman found a special significance in the fact that Morrill had been the president of the National Chain Stores Association, which was dissolved in 1933. The Congressman believed that the chains, led by Kroger, had decided to abandon the open style of campaigning established by the NCSA and to switch instead to covert lobbying operations and the establishment of "front" organisations. As evidence for this belief, he produced letters from the files of A.H. Morrill which showed how the Kroger president had been the instigator, in the autumn of 1932, of a scheme to "sell" the chain stores to the farmers through a publicity bureau nominally directed by men with a background in farm organisations, but actually controlled and financed by the chains. This delicate operation, which was financed by Safeway, Kroger and the National Tea Co., was put in the hands of one Stacy Van Patten, who had just completed four years special work at the national headquarters of the American Farm Bureau Federation, and was set up with the assistance of H.R. Kibler, the national director of information of that organisation.²

2. The scheme was inspired by a fear that the depressed state of agriculture might lead the "cornstalk brigade", as Morrill styled the farmers in one of his letters, to blame the chains for their plight and favour chain taxation to ease their own tax burdens. Despite initial grandiose plans to influence "key leaders" in the farming community, little seems to have been done beyond the publication of a mimeographed bulletin, "Farm To Market News". Sherrill testified that it was he who had recommended abandonment of the project - it was finally wound up in the Spring of 1934 - not because he thought it discreditable, but because it was ineffective. His correspondence indicates that Van Patten had lost many of his old farm contacts; moreover, a Senate committee in 1933 exposed the way in which Van Patten and other Farm Bureau officials had put on similar campaigns on behalf of lumber interests, the asphalt industry and the electric power industry, all at a handsome profit to themselves. Sherrill feared that exposure of the "Farm To Market News" would prove a "fatal boomerang" for the chain stores. See, House Special Committee on Investigation of the American Retail Federation, Hearings, 74th Cong., June 5, 1935 - March 17, 1936, vol. I pp. 46-59, 72-3; vol. II pp. 34-5; vol. III pp. 10-11; vol. IV pp. 50-58. (Henceforth cited as Patman Cttee. Hearings.)

This attempt to influence the farmers had not got very far. And so, Patman informed the House, "quoting what I know is bound to have happened", Morrill had told his fellow chain conspirators,

"We have got to use another plan. We failed to fool the consumers and the public when we came out into the open and said we were chain stores in 1928 to 1932. We had to disband. We then tried to fool the farmers, using their friends as a front, but we could not fool them, so we had to disband. Now, then, we have got to get the small retail merchants together, and see if we cannot use them as a front....." 3

Patman remained incurably addicted to this explanation of the origins of the American Retail Federation, even though it scarcely accorded with the evidence brought out by the committee.⁴ Certainly, there had been a general tendency, since 1931, for the chains to move away from the old style lecture tours, radio addresses and other attempts to woo public opinion which had been used to counteract trade-at-home propaganda. But this shift had nothing in particular to do with A.H. Morrill and the Kroger Grocery & Baking Co. It was, rather, a natural and general response to the changing nature of the anti-chain threat. Following the Supreme Court's decision in the Indiana chain tax case, the chains were forced to resort to hard lobbying to resist the immediate legislative assault. The battleground having moved from Main street to the lobbies, chain store men were inclined to believe, rightly or wrongly, that all their efforts would

3. Congressional Record, vol. 79, 74th Cong. 1st Sess., p. 8994. This concocted quotation comes amid Patman's most comprehensive review of his "Kroger-front" theory, at pp. 8992-5.

4. The committee's majority report (H.R.Rep.2373, 74th Cong. 2d Sess.), which was signed by Patman, represented something of a retreat. However, this did not make any difference to the accounts given by Patman of the committee's findings in dozens of subsequent public addresses.

be best concentrated on this activity. As for the dissolution of the NCSA in 1933, Morrill was vague as to exactly why this had happened, suggesting only that it followed the failure to develop a "consistent plan" because the different chains "just did not think along the same lines". Exactly what this meant, Morrill failed to explain.⁵ It seems that far from the abandonment of the NCSA having been a properly thought out response to conditions, and the prelude to a major development of "fronts" and other "underground" methods, it was a rash blunder. The splitting of the chains into separate trade associations for each principal line of business was eminently suited for dealing with NRA code authorities, but it merely disorganised the chains when it came to legislative attacks which affected them all. Mutual assistance was only kept going by the efforts of some of the more far-sighted chain executives and association officers. And although a switch of sorts had been made to "covert" methods in dealing with the anti-chain assault, it does not seem to have been made with any thoroughness or consistency. The "cornstalk brigade" scheme, far from being part of a grand strategy on A.H. Morrill's part, was apparently an isolated venture, into which Morrill had perhaps been led by the Farm Bureau men.⁶

The private correspondence of chain store men produced by the Patman committee makes it clear that they were, in the early months of 1935, painfully aware of their lack of a coherent strategy. Their thinking showed a realisation, if only a half-formed one, that the situation had become so dangerous that a much more complex approach was required, combining elements of the old style public relations work with hard lobbying, covert "front" operations and a calculated appeasement of independents by the development of areas of common interest. Undoubtedly, the ARF was

5. See the colloquy between Patman and Morrill at Patman Committee Hearings, vol. III, pp. 19-21.

6. Ibid., vol. I, pp. 72-3; vol. III, p. 11.

expected to play an important role in the evolution of this new approach, but it was not the chains in general or Kroger in particular which first set plans for the formation of the ARF in motion. Every witness asked by the Patman committee, including Kirstein himself, agreed that Louis Kirstein of Filene's department store in Boston had been the prime mover. Patman maintained that Kirstein, "whom I know to be a public-spirited gentleman", had been "imposed upon" and manipulated by the Kroger men, but Kirstein himself was eager to take full responsibility for everything done. Likewise, the earliest discussions of the Federation idea occurred between Kirstein and executives of various department store companies. Significantly, the first Kroger man to have been introduced to the discussions was Fred Lazarus, who was known in retailing circles not for his Kroger directorship, which he had acquired only in 1933, but as vice-president of the F & R Lazarus Co. department store in Columbus, Ohio. Lazarus himself regarded his Kroger connection as being purely a subsidiary interest. He was a director also of Bloomingdale Bros., the New York department store, as was Kirstein himself, but Patman failed to mention this, or the many other types of interrelationship which existed between the ARF's sponsors, so eager was he to build up the "Kroger front" theory. Similarly, A.H. Morrill came into the affairs of the emerging Federation, at the invitation of Kirstein, only at the same time as a number of other prominent chain store executives including Sewell Avery, George Gales, W.T. Grant and E.C. Sams.⁷ There can be little doubt that the initial impetus for the creation of the Federation was provided by the feeling of department store men that they were not enjoying their place in the sun in Washington alongside other industrial leaders and that New Deal legislation was being

7. Ibid., vol. I, pp. 15, 56, 102-6, 112-5, 124-9, 144-5, 167-72; vol. III, pp. 52-3.

framed without reference to their wishes. The introduction of the chain stores into the organisational process inevitably profoundly affected the political identity of the Federation, but it was implicit in the original idea that the Federation would seek to speak for retailing in general that it would become entangled in the conflict between chains and independents. This was not an involvement foisted upon Kirstein by the Kroger men, but an inescapable consequence of the original idea. The selection of Colonel Sherrill as ARF president merely made that entanglement explicit. Sherrill himself, far from having guided the planning of the Federation, apparently learned of its creation only a week or ten days before its public unveiling, and was a last-minute choice for the job. He was also a poor choice, because of his highly controversial background, and it may well be supposed that had Kroger really been the unseen guiding hand behind the Federation, it would have exercised its influence with more discretion. Indeed, the selection of Sherrill perhaps indicates that the sponsors, despite months of preliminary planning, had not clearly decided what they were trying to do. While their hope was to lure a large number of smaller independents into the new organisation in order to give it political weight and credibility, the selection of Sherrill showed an unwillingness to trust in that approach sufficiently to let the key executive post go to anyone but an experienced chain store lobbyist. Thus the ARF fell between two stools.⁸

While Patman evidently was persuaded that he had stumbled upon an important truth in unravelling the Kroger connection, the primary purpose in giving it so much emphasis was undoubtedly tactical. It followed on from the naming of John Hartford, the A & P president, in the original Cochran resolution. Cochran had quickly established that the A & P was in

8. Ibid., vol. I, pp. 12, 129-30; vol. III, p. 44. The only reason suggested for the decision to appoint Sherrill was that he was not known in Washington as being either a Democrat or a Republican.

fact in no way involved with the founding of the ARF and, he told the House, "passed this word to Patman and he promised to see that it was brought out in the investigation". It would have indeed been extraordinary had the A & P, which declined to join even a bona fide trade association like the FGCSA, been implicated in such a risky venture as the ARF, and testimony before the committee revealed that Hartford had rejected overtures by the sponsors with polite firmness.⁹ The A & P connection was, in short, a horse that would not run for Patman, and the undoubted active involvement of Kroger, the No. 2 grocery chain, provided an obvious alternative. The "Kroger front" theory conveniently opened the way to a wide-ranging investigation into the special discounts received by the big grocery chains, which in turn provided propaganda for the advancement of the Robinson-Patman bill. It also opened the way for a full-scale exposure of the lobbying operations conducted by the chains in opposition to chain store tax legislation, operations in which Colonel Sherrill, as chairman of the public relations committee of the FGCSA, was a leading figure. The fact that Kirstein and other department store men were actually the initial sponsors of the ARF was of no practical use to Patman. There was no great struggle in progress between the independents and the department stores, whatever their differences over trade questions such as price-fixing. Patman himself had a high regard for Kirstein, who was well-known as a friend of the New Deal.

Patman was right in believing that the thinking of the ARF's sponsors had proceeded on different levels. The sponsors gave rather unsatisfactory accounts of their motives. They were unanimous in their assertion that the new organisation was intended to function as a "clearing house" for the collection and dissemination of information of use to all retailers and to

9. Congressional Record, vol. 80, 74th Cong. 2d. Sess. p. 8104; Patman Ctte. Hearings, vol. I, pp. 160-1.

conduct research for the benefit of the members. They were also agreed that, as Sherrill expressed it, "the organization would not take a position on any matter relating to any particular class of retailers as against other classes", chain store taxes and price maintenance being two of those matters.¹⁰ Where the founders did seem to differ was on the question of how far the ARF would seek to extend its influence as the "unified voice" for retailing. Kirstein quite unashamedly described an intention for the Federation to loom large in Washington politics, representing retailers' interests in dealings with the administration, in the evolution of the social security programme and other questions which would not divide retailers. Morrill and Sherrill, in contrast, more acutely aware that to certain elements among the small merchants there was no such thing as an issue which did not divide retailers, denied having any ambitions to act as a Washington lobby. Indeed, Sherrill was so profuse in his denials about virtually every possible activity mentioned that the committee was left wondering why it was that he was to get \$135,000 for a three year contract to do nothing.¹¹

The claim that a "research" body was all that was intended was patently absurd, for it was contradicted by the initial announcement that the ARF was to be a "unified voice" for retailing and by the actual structure of the organisation.¹² Had the sponsors wished solely to set up a neutral research body, they could have done so without provoking the least controversy. A research body would have had no need to claim to speak for national retail associations in order to do its job.

10. Ibid., vol. I, pp. 13-14, 159; vol. III, p. 32.

11. Ibid., vol. I, pp. 11, 15, 115, 158; vol. III, pp. 32-3; vol. IV pp. 78, 84, 92-3.

12. The sponsors tried to suggest that the original press release had been mishandled, but in fact considerable effort had gone into preparing drafts of the release, and all these drafts made the central "unified voice" claim. See, ibid., vol. III, p. 45ff.

The intended function of the Federation may best be judged from the character of the state retail councils from which its sponsors had derived their example, and which they intended to foster in states where such bodies were not yet in existence. The most highly-developed such organisation was the Ohio Council of Retail Merchants, which enjoyed the support of chain and department stores as well as that of a wide range of independent retail associations, although distrusted by more militant elements such as the grocers. Its position had proved strong enough to withstand the rise of anti-chain sentiment in the late 1920's and early 1930's and, as Fred Lazarus explained to the Patman committee, "it happens that in the Ohio Council where we have been operating for fifteen years we have never had...any conflict between large and small merchants or between chain and independent".¹³ The Council served to suffocate anti-chain legislative proposals under a blanket of retail consensus and cooperation and its efforts had much to do with the persistent defeat of chain tax bills in the Ohio legislature.¹⁴ The Council's relations with Kroger were intimate. Sherrill was a member of its board of directors and it was George Sheridan, the Council's executive-director, who made the first suggestion that Sherrill might make a good president for the ARF. Documents taken from the files of A.H. Morrill by the Patman committee also revealed that Kroger invested heavily in the Council, Sheridan having received \$15,000 in 1933 from Morrill's "discretionary fund" for "public relations work, legislative and otherwise".¹⁵

13. Ibid., vol. III, p. 38.

14. In 1935, the state retail grocers' and meat dealers' associations held the Council and the state chamber of commerce primarily responsible for the defeat of its chain tax bill. (Grocers' Association News, Columbus, Ohio, November 1935). Ohio never had a chain tax. For Sheridan, see also p.162..

15. Patman Ctte. Hearings, vol. I, p. 129; vol. III, pp. 4-7, 46, 53.

Only a little less influential was the Associated Retailers of Indiana, another well-established state association comprising both chain and independent merchants. The executive-secretary of the Indiana group, L.F. Shuttleworth, was also the recipient of funds from the Kroger "discretionary fund" and letters produced by the Patman committee showed how, in 1934, Shuttleworth had come to an arrangement with Sherrill, John Logan (the executive vice-president of the FGCSA) and R.W. Lyons (chain store lobbyist) to assist in the repeal of the Indiana chain store tax and graduated income tax. The idea was to bring about the substitution of a flat rate sales tax. It seems that the chain store men found Shuttleworth not quite as "whole-hearted" as they had hoped, because of the contrary views of a large section of his membership, and Lyons and Logan threatened to withdraw their "financial and moral support" from the association.¹⁶ Despite this upset, matters were smoothed over and Sherrill and Shuttleworth engaged in an agreeable correspondence until the time that Patman seized Sherrill's files. In these letters, Shuttleworth suggested that he could help to alleviate the chain tax problem by setting up a scheme to contact Midwestern farmers and Sherrill replied - this after he had taken up his "neutral" position as head of the ARF - that he should like very much to "take this matter up with you personally and in detail...As soon as we get our organization well under way, I will then take up with you the matter of aiding...and feel sure that I will be able to help you very much..."¹⁷ Shuttleworth subsequently took office as the first Secretary-Treasurer of the ARF.¹⁸

16. Ibid., vol. II, p. 42; vol. III, p. 2; vol. IV, pp. 85-7.

17. Ibid., vol. I, pp. 95-6.

18. Business Week, December 21, 1935, p. 21.

Such correspondence illustrated the brutally pragmatic approach Sherrill had towards cooperating with organisations of independents. Sherrill's intention was to promote the interests of his paymasters, not some vague altruistic idea of the "common good" of retailers, and his abrupt assumption of the position of ARF president had not changed that.¹⁹ Nevertheless, organisations like the Ohio Council and the Associated Retailers of Indiana were not, as Patman seemed to suppose, mere puppets manipulated by the chains. On the contrary it was the element of genuine independence and their broad membership which made them so useful to the chains even if, as the experience with Shuttleworth demonstrated, this could also prove a source of difficulty. Had such organisations existed in all the states, it cannot be doubted that the chains would have faced a more manageable legislative problem; unfortunately for the chains most states had no comparable influential and well-entrenched bodies. While state retailers' associations had sprung up in numerous states in the previous few years, usually with the initial purpose of opposing sales tax legislation, these associations were dominated by the department stores and were rarely recognised as possessing any qualifications to speak for the "little fellows" on controversial issues.

The national organisational plan of the ARF also bore a strong resemblance to the model provided by the state councils. Confronted by pressing problems, the sponsors of the ARF had neither the time nor the patience to wait and see if the existing Retailers' National Council might possibly evolve into a strong and unified organisation. In view of the loose nature of the Council, such a possibility was considered remote in any case.²⁰ Instead, they tried to force the pace by setting up an entirely

19. For other relevant correspondence, see Patman Ctte. Hearings, vol. I, pp. 94-5, 102-6; vol. IV, p. 88.

20. Ibid., vol. I, p. 155.

new, architect-designed, organisation of their own. The articles of incorporation were made extremely attractive to the "little fellow", in essence providing that the individual sponsoring companies would pay for it while the state and national associations were enabled to hold the balance of voting power on the board of trustees. At the same time, precautions were taken to ensure that while the organisation was made as broad-based as possible it did not let in too many disruptive elements. A majority of the existing national retail associations - certainly a majority of those in the Retailers' National Council - were chain or department store controlled, or traditionally disinclined to engage in political conflict with the big retailers. At the state level, where the main conflicts between chains and independents had occurred hitherto, it was expressly provided that only associations deemed to be representative of retailing in general - like the Ohio Council of Retail Merchants - would be admitted to membership. Single-line groups, such as state grocers' associations, were ineligible.²¹

The ARF's troubles stemmed from the fact that it came into the world full-grown. Had it started modestly, as a quiet and unassuming "research" body, and then gradually extended its activities by providing a facility for consultation amongst retailers, it would not have attracted the attentions of a special House investigating committee. But then, of course, any hopes of creating a "unified voice" for retailing would necessarily have been deferred for years, until the coming of a time of less mutual strife amongst retailers. The problems of 1935 were too urgent for the ARF's sponsors to have waited that long.

21. Ibid., vol. I, pp. 21, 90-91.

v. Subversion and Lobbying.

Patman was able to discover little about the ARF to justify the extreme language of the Cochran resolution; in particular, there was nothing to demonstrate clearly that it was a "superlobby, designed for the purpose of intimidating and influencing Members of Congress through direct and subversive lobbying activities..." In an attempt to rectify this deficiency, as well as to contribute to the growth of anti-chain sentiment in Congress, Patman produced considerable quantities of material illustrative of the subversive tactics used by chain store men, in Washington and in the states, in the course of their legislative battles with the independents. Patman's aim was to create a case against the ARF by a process of "guilt by association". His two principal victims in this attempt were Robert W. Lyons and John A. Logan, the "ringleaders" in the coordination of chain store lobbying activities, both of whom had their files seized by the committee.¹

R.W. Lyons was himself apparently not directly involved in the formation of the ARF, but six of the fourteen chain companies for which he conducted political work had been named in the original press release as sponsors of the Federation.² In earlier years, as executive vice-president of the NCSA, Lyons had been a highly visible and often quoted spokesman for the chain stores, but since the dissolution of the NCSA in 1933 he had slipped into the shadows. His correspondence convinced Patman that the chains had indeed gone "underground", for Lyons had entirely abandoned the old speaking-tour, debate-handbook and press release style of the NCSA and relied instead on lobbying methods. Lyons' every effort seemed to be to

1. Patman's "guilt by association" technique led Congressman Donald H. McLean to threaten to resign from the committee at one point, and to increasing dissatisfaction and protest from other committee members. However, Patman brushed aside opposition.

2. Patman Ctte. Hearings, vol. II, pp. 62-3. The six were the J.C. Penney Co., S.H. Kress & Co., Walgreen Drug Co., Melville Shoe Corp., W.T. Grant Co., S.S. Kresge Co.

establish a system of "contact" politics, with a spokesman for the chain store interest in both Houses of every state legislature as his goal.³

Lyons was particularly keen to hire, in a "confidential capacity", attorneys or former legislators who were believed to be close to Governors or otherwise influential around State Capitols.⁴ Although nothing was

3. Ibid., vol. II, p. 107; vol. IV, pp. 19-20.

4. Ibid., vol. I, pp. 394-7; vol. II, pp. 113-8, 127; vol. IV, pp. 106, 120-1. The publicity given to Lyons' correspondence had immediate consequences in Patman's home state where, in early 1935, a chain tax bill had been lost despite the support of Governor James V. Allred. During the session, Governor Allred had departed to Washington on business and Lyons' contact in Texas, former State Senator George C. Purl, decided that the best way to eliminate the chain tax bill was to encourage the "speedy passage of a series of bills tightening collection of existing taxes"; this was done, Purl writing to Lyons of his "good 'finesse' to get all these bills up at one time" while Allred was out of the state, and mentioning also how he had taken Senators out to lunch, three at a time. Lyons thought it had been a "nice achievement". This correspondence became the subject of an investigation by a committee of the Texas Senate. In testimony given to this committee, Lieutenant-Governor Woodul maintained that Purl had had nothing to do with the passage of the "tax-tightening" bills, and Purl himself explained that in his letters to Lyons he had just done "a lot of bragging". However, as one pro-chain tax Senator put it, "Maybe you were doing a little bragging, but you certainly wrote a parable". Governor Allred had campaigned on a platform charging that members of the Senate were unduly influenced by the "vested interests", and the Lyons-Purl correspondence, although inconclusive, lent colour to the charge. Shortly after the Senate committee's hearing, another chain tax bill, already passed by the House, came up before the Senate. This time Governor Allred did not depart for Washington, but sat at the presiding officer's desk, "to attempt to put his eye on us", complained one Senator, "as if he thought we needed watching". Nervous opponents of the bill "ducked out to avoid a quorum" as the crucial votes approached but were "rounded up" by serjeants-at-arms, though "one senator in a theater escaped the searching eye of a senate officer by wearing a woman's hat and fur". The bill's supporters were then able to produce both a quorum and a narrow majority, and Texas got its first (and last) chain tax law. The top rate of \$750 on each store in excess of 50 made this the highest graduated license tax ever passed. (Houston Post, October 1, 4, 5, 11, 1935).

uncovered to contradict Lyons' statement that he had never paid a retainer to a sitting legislator, this evidence of his probity did him little good for when Patman spoke about Lyons he spared him nothing, giving vent to an evident personal animus - Lyons was the most recalcitrant of witnesses before the committee - as well as to political hostility. In Lyons, Patman thought he had found the arch-superlobbyist, a model type of chain store corruptionist.⁵ Most pertinently to the ARF, Patman was able to show that Lyons had given financial support to one "false front" organisation, the Wisconsin Progressive Distributors and had also, through his agent W. Lee Smith, set up another, the Progressive Merchants of California. Of this latter group, Lyons had boasted that "this organization has been under the absolute control and direction of Mr. Smith, although its nominal officers and directors have been local merchants of recognized standing". This boast, and a description of the successful and shrouded activities of the Progressive Merchants, were found by Patman in a letter written to Paul B. Scarff, a director of the S.H. Kress & Co., one of the companies responsible for the ARF. Patman found in these "fronts" financed by Lyons an indication of the way in which the ARF was intended to function in those states where pre-existing bodies like the Ohio Council of Retail Merchants were unavailable.⁶

Lyons worked closely on legislative questions of mutual concern with John Logan, the executive vice-president of the food chain association, both men having their offices in Washington. Colonel Sherrill was the chairman of the FGCSA public relations committee immediately before taking up the post of ARF president; the FGCSA executive committee had also voted

5. In a typical speech to independents, Patman called Lyons a "trickster and fixer" who did not practice law but hired people with influence. (Interstate Grocer, November 9, 1935).

6. Patman Ctte. Hearings, vol. II, pp. 123-4, 131-2.

to join the ARF even before it was officially unveiled and was, Patman explained to the House in an effort to justify the seizure of Logan's files, "working hand-in-glove" with the Federation. Patman was able to inform the House of a letter in Logan's files which showed how he and Sherrill had discussed the possibility of hiring one Fraser Edwards, who had been "working almost day and night" with Patman on his bonus bill, so as to use Edwards' presumed influence with the Congressman" in guiding the investigation to insure the inclusion of such information as may be beneficial".⁷

Patman's researches into Logan's files produced plentiful evidence of the use of "canned" editorials, form letters to be sent to politicians in the handwriting of private citizens, and of efforts to bring pressure to bear on newspapers and other interests to oppose chain store taxation. Most of this material was tame, though cumulatively it helped to build up the "superlobby" idea.⁸ There was, however, one golden nugget, the case of John Barr and the "National Anti-Chain Store League".

John Barr was an out-of-work publicity man who, in January 1935, had taken a job with the newly-forming National Anti-Chain Store League which was being promoted, with headquarters in Washington, by one Leon Ackerman. Ackerman had no previous background in the anti-chain store movement. After a few weeks, Barr contacted Logan with an offer of information about his employer, and he was subsequently retained by Logan, with the approval of

7. Congressional Record, vol. 79 pp. 11573-4; Patman Ctte. Hearings, vol. I, p. 389. Logan admitted to the committee (vol. I, p. 190) that some of the smaller chains in the FGCSA were "apprehensive about the federation" because it seemed to be dominated by large concerns.

8. Of particular interest were Logan's plans for letter-writing programmes. Managers were required to provide those customers known to be of a friendly disposition with form letters, to be rewritten in their own words on stationery without letterheads and posted at the company's expense. Similar letters, with subtly different themes, were provided for manufacturers, stockholders, chain store clerks etc. to send. This was the practice which had attracted so much condemnation to the utilities' lobbyists. For drafts of letters, see Patman Ctte. Hearings, vol. I, p. 355 ff.

the executive committee of the FGCSA, at \$50 per week, to supply inside reports on the activities of the League. This cloak-and-dagger operation was conducted within the confines of the National Press Building, where the chain store association had its offices on the 8th floor and the anti-chain association was encamped on the 11th. Logan also sent one of his staff, B.D. Silliman, to a job interview with W.K. Mitchell, the vice-president of the League. Silliman was offered the position of Iowa state manager and told that he could expect to recruit 6,000 merchants at \$10 each, with \$200 per week as his commission. Silliman declined to accept this enticing offer, however.⁹

Logan testified before the Patman Committee that his involvement in the affairs of the League arose from information given to him by Barr that Ackerman was negotiating with two Germans, Dr. George Barthelmy, the Washington representative of a Cologne newspaper, and Kurt Sells of the Wolfe Press Agency. Barr's information was that the Germans intended to finance the League and use its proposed tabloid journal for the dissemination of Nazi propaganda. Barr himself told the committee that Barthelmy had promised \$30,000, the sum to be secured by stock issued by Ackerman. Barr and Logan represented their motives as having been purely patriotic and unrelated to the League's anti-chain activities, Logan stating that he had intended to take the whole story before a House committee investigating un-American activities as soon as the financial transaction between Ackerman and Barthelmy was completed and the anti-chain journal published. As his files had been taken by the Patman committee before this point was reached, he had done nothing.¹⁰

9. Patman Ctte. Hearings, vol. I, pp. 191-3, 199-200, 211, 215-6, 238-41, 247-8, 400-407.

10. Ibid., vol. I, pp. 193-4, 198, 200-202, 213, 239-40, 249; vol. II, p. 2.

Congressman Bloom advised Logan that he would not be misled by "the Nazi herring that you are always drawing across the trail". As Patman pointed out to the chain store man, "For your information, I will say that in all this correspondence that has been delivered to the committee there are no reports on Nazi propaganda".¹¹ On the contrary, Barr's reports were concerned entirely with Ackerman's apparent success in launching his anti-chain organisation. These reports showed Ackerman "determined to put this proposition over" and financing himself by the sale of waterfront property; he had offices opening in Raleigh and Philadelphia and state managers appointed for ten states; Rowland Jones, the Washington representative of the National Association of Retail Druggists, was planning to bring that association into the League and take 49% of the stock. Likewise, Ackerman was hard at work on Capitol Hill lobbying for the Bankhead-Huddleston price discrimination bill and establishing contacts with prominent figures. Senator Huey Long and General Hugh Johnson had called on him to ask for data; even Colonel Sherrill had been in touch, to explain the purposes of the American Retail Federation. Ackerman had also asked Barr to talk with Cochran about the ARF investigation, "but I have refused, as I have no desire to make an ass of myself by being called as a witness in this investigation".¹²

Barr did not act solely as an observer. He discouraged Ackerman from developing his political contacts, and when told by Ackerman to prepare copy for newspaper advertisements his plan was to make it "so strong no paper will touch it".¹³ Barr was Logan's Trojan Horse within the League. On April 10, according to a minute made by Logan, the executive committee

11. Ibid., vol. I, pp. 202-3, 222.

12. Ibid., vol. I, pp. 219-223.

13. Ibid., vol. I, pp. 220-223.

of the FGCSA approved the appropriation of "necessary funds for the purpose of buying stock preparatory to taking such action as appeared necessary, advisable, and expedient to enable the association properly to protect the rights and interests of its members". The inspiration for this extraordinary decision was apparently provided by Barr, for in a letter to Logan, dated May 21, he asked

"Inasmuch as he is now actually operating, don't you think it advisable to do as I suggested some time ago and have this thing shut down by having someone buy three or four shares of stock and then after a short time charge him (i.e. Ackerman) with mismanagement, misapplication of funds, and ask for a temporary injunction". 14

An effort was meanwhile underway to find out something damaging about Ackerman. A letter of May 8 from Logan to F.H. Massmann, president of the National Tea Co., referred to inquiries which had revealed a past "shady in some respects", though nothing "sufficiently incriminating to make a major case". Barr had also set a private detective to the same task and had learned of a previous involvement of Ackerman in the promotion of a fraudulent tobacco plantation. Barr's belief was that Ackerman was just a "racketeer".¹⁵

Barr and Logan provided neatly interlocking accounts of the Nazi connection, but even R.W. Lyons seemed disinclined to believe them. Lyons testified that he had declined a suggestion by Logan that he should join him in a "counter-activity" to oppose the Anti-Chain Store League, and that the mention of the Nazi connection had "amused me, I will say to you very frankly, because I did not take it seriously". His "inference" had been that Logan was really concerned about the anti-chain side of the League's activities and, under questioning, Lyons admitted that he was unsure whether Logan had ever mentioned the Nazi aspect to him at all.¹⁶ Logan's claim

14. Ibid., vol. I, pp. 196, 224-226. Logan told the committee that no stock was actually purchased.

15. Ibid., vol. I, pp. 242, 245; vol. II, p. 46.

16. Ibid., vol. II, pp. 95, 137-9.

that Barr's written reports contained no mention of Nazi propaganda because that area was only discussed orally, owing to its sensitivity, met with a frosty reception from the committee. Looking at the story more broadly, Congressman Dockweiler could see no reason to have feared a Nazi involvement with the League, "because the Nazi philosophy is entrenched capitalism; and nazi-ism would have no place in the kind of organization that would be against a chain store". Congressman Boileau suggested there was an inconsistency, in that Ackerman was Jewish, to which Logan could only reply that "I thought of that, too, quite frequently, but my interest was, as I stated, from the Nazi angle".¹⁷

It may be taken for granted that Logan's principal interest really was from "the chain store angle". It was obviously deeply troubling to him that a man like Ackerman, possessing no anti-chain background and only the skills of a promoter, could so easily have established contacts in political Washington. Nevertheless, the Nazi connection was not pure invention. Two of Barr's letters to Logan referred to Barthelmy and Sells, one of them stating that negotiations had been delayed because of Barthelmy's ill-health. While these letters did not mention Nazi propoganda, it is difficult to see what other interest the Germans could have had in the League.¹⁸ Logan's statement that Sells and Barthelmy were known to the State Department which "was eager to obtain information which would indicate that they were engaged in destructive Nazi propoganda" was not

17. Ibid., vol. I, pp. 203, 208-10; vol. II, p. 46.

18. Logan also provided the committee with an affidavit from W.K. Mitchell, the vice-president of the National Anti-Chain Store League, which referred to the interest of Barthelmy and Sells in purchasing stock. Patman Ctte. Hearings, vol. I, pp. 194, 198, 203, 208, 213.

disputed, and Barthelmy's name had in fact been mentioned in the course of hearings held in 1934 by the House committee investigating Nazi propaganda activities. These hearings had thrown up examples of similar Nazi involvements to that alleged by Barr and Logan. Whether or not the financing of the Anti-Chain Store League was a well-advised project, it would not have been out of line with similar German-backed schemes at the time.¹⁹ Contemptuous though Patman professed to be of Logan's story, he did not take up his challenge to put Ackerman, Sells and Barthelmy on the witness stand. Instead he preferred not to put at risk the image he created of Ackerman as a martyr who had mortgaged his home and sold his property to help the independent merchant, only to be betrayed by his trusted assistant. Patman had exactly the information he required, and he did not tempt providence by seeking more. As he solemnly informed the House, Logan and the executive committee of the food chain association had been found guilty of the lowest "snooping, stealing, treachery, and bribery".²⁰

It was really the evidence about the Anti-Chain Store League, the "cornstalk brigade" project, Lyons' "false fronts" and a number of other miscellaneous escapades of the chain store men which fixed the image of the American Retail Federation. In speeches before Congress and in rousing addresses up and down the country Patman, and those who took their cue from him, merged these separate incidents into a general indictment of the "chain store crowd". And such incidents did demonstrate an important truth. They showed just how acute the struggle between chains and independents had become. Set against this background, the bland protestations of the sponsors of the ARF sounded hollow and unreal. The sponsors of the ARF

19. Ibid., vol. I, p. 202; House Special Committee on Un-American Activities, Hearings, 73rd Cong., 2nd Sess., esp. p. 716 (Nov. 30, 1934).

20. Patman Ctte. Hearings, vol. I, pp. 207, 209, 227. Congressional Record, July 22, 1935, vol. 79, p. 11574.

asked the Patman committee to believe that they intended the Federation to remain neutral on chain store taxation, even though the Supreme Court decision in the West Virginia case and developments like the Florida Recovery Act threatened the very existence of chain store companies. Likewise the Federation was supposedly precluded from taking a position on the Bankhead-Huddleston bill, which struck at the basis of chain and department store buying methods. Clearly it was a preposterous assertion, and it was undermined by the evidence of Sherrill's files and, less tangibly, by the general tenor of his replies to the committee's questions. It may be that a few of the department store men, notably Kirstein, had not thought out fully the implications of the creation of the ARF for the struggle between chains and independents, but this cannot conceivably have been true of the chain store men. What is perhaps most significant is that the sponsors felt obliged to be so evasive about their intentions. They were, after all, seeking only to ensure their own survival. There was no idea that the ARF should lobby for special legislation to drive independent stores out of business, and in normal times it would no doubt have been thought quite natural that an organisation should, as a matter of basic principle, object to any piece of legislation designed to destroy a section of its own membership. The cowed and evasive manner of the chain store men arose from a sense that they were in the dock. It seemed to be perfectly acceptable on Capitol Hill that independents could set up organisations like the Anti-Chain Store League, storm state legislatures and bombard politicians with demands to tax the chains out of existence. In contrast, purely defensive measures by the chain stores were vilified as "superlobbying" and a political outrage. Even those members of the Patman committee who were relatively sympathetic to the chain store side seemed reluctant to agree that the chains had a right to respond in kind, arguing only that they had not exceeded the bounds of propriety.

The American Retail Federation continued in existence, in form but not in substance. Its sponsors were necessarily obliged to abandon all claims that it could be a "unified voice" for retailing and, carrying out to the letter the prescription written for it before the Patman committee, the Federation eschewed any engagement in issues upon which retailers were divided. Because virtually all the great issues to the trade over the next few years - price maintenance, chain taxation, unfair practice laws - were of a divisive nature, the Federation inevitably lapsed into impotence and obscurity. Sherrill himself resigned as president in 1937, and was replaced by David R. Craig, an academic with a blameless reputation. Only in 1939 did the Federation show renewed signs of life and give a hint of a revival of the original political purpose behind it.²¹

The destruction of the Federation as a real political force had serious consequences. G.M. Lebar, in an article written before the Congressional furore over the announcement of the Federation and warning of the "havoc" that would be produced by enactment of the Bankhead-Huddleston bill, advised that "it is not to be expected that public opinion would crystallise itself against such a proposition without the leadership of just such an organization as the new American Retail Federation".²² This prediction proved correct, with the Robinson-Patman bill substituting for Bankhead-Huddleston. Had it not been for the Patman committee, the ARF might well have drawn in a number of the more conservative national retail associations, as well as state retailers' associations. In such circumstances, it would undoubtedly have proved an appreciable obstacle to passage of the Robinson-Patman bill. Instead, the bill's trade

21. See below, p. 414.

22. Chain Store Age, May 1935.

supporters went virtually unchallenged in their claim that they spoke for all independent merchants. Furthermore, the proceedings of the Patman committee helped to cement the anti-chain coalition. The three national retail associations whose protests had brought about the Congressional investigation were brought into alliance with the United States Wholesale Grocers' Association in support of the Robinson-Patman bill. And presiding over all was the suddenly arisen presence of Patman himself, for whose spectacular emergence as their national leader the anti-chain forces could only give praises to the founders of the American Retail Federation.

vi. The Robinson-Patman Bill

The Robinson-Patman Bill, as originally introduced, made four basic changes to Section 2 of the Clayton act. 2 (a) revised its general prohibition against price discrimination in such a way as to make it both more stringent and more capable of enforcement; 2 (b) and (c) added entirely new, separate and explicit restrictions on brokerage commissions and advertising allowances; and 2 (d) provided a method for the assessment of damages in private suits. Section 2 (d) disappeared from the bill during passage without ever becoming a focus of controversy.¹

2 (a), like the old Section 2 of the Clayton Act which it was designed to replace, first prohibited discrimination in price and then stated under what conditions such discrimination could be lawfully made.²

1. Congressional Record, Vol. 79, pp. 9077-8. (H.R. 8442).

2. Sec. 2 (a) of H.R. 8442, as originally introduced, read: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price or terms of sale between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, and where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing

(The word "discrimination" as used in the Clayton Act simply meant "difference" and did not imply an unwarranted difference). The old Section 2 only prohibited discrimination where it had an effect to "substantially lessen competition or tend to create a monopoly in any line of commerce", thus necessitating a laborious and difficult attempt to show the effect of a single discrimination in price upon the general competitive situation in an entire industry. While the sort of discrimination which was of real economic consequence was obviously likely to have such an effect, the burden of demonstrating it was inherently so onerous that it had discouraged enforcement of the Section. The bill drafted by Teegarden dealt with this difficulty by striking out the requirement of a demonstrable effect on competition. Thus all difference in price was made illegal except that allowed by the provisos, which were in turn substantially rewritten.

The proviso allowing a seller to select his customers, "in bona fide transactions and not in restraint of trade" was left unaltered. In other words, if a manufacturer did not care to sell to all his customers on the equal terms required by the law, he had the option of refusing to deal with any class of them, provided that such a refusal did not involve what the courts considered to be a restraint of trade. This residual freedom was of some importance in view of the tight restrictions drawn elsewhere in the bill, though it was a limited freedom. In general terms, it was of more use to the small manufacturers, because the big manufacturer of a nationally-advertised brand for which there was

2. (cont'd)... herein contained shall prevent differentials in prices as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture; nor differentials which made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade". For the old Section 2, see p.38, Note 13, above.

a widespread consumer demand (i.e. a manufacturer enjoying a degree of monopolistic power in the market) could scarcely refuse to deal with all independent wholesalers or retailers without stumbling into the minefield of restraint of trade.

The other proviso of the old Section 2, permitting "discrimination... on account of differences in the grade, quality or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition...", was profoundly modified. The new 2 (a) eliminated the "good faith" defence, thus making it impossible for a seller to escape with the plea that somebody else's wrong had put him in the right. This change, like that removing the requirement of a showing of an effect on competition, was intended to isolate the dealings of the individual seller from those of his competitors, thus simplifying enormously the task of the enforcement agency. It was also intended to obviate the possibility that a large buyer might bring pressure to bear on a number of competing sellers, in discreet or indirect ways which the FTC might not be able to detect, to set in motion a spiral of downward changes in price to that particular buyer's advantage, all of these changes being made, from the point of view of each seller, "in good faith" to meet the competition of the other sellers.

The main feature of the proposed 2 (a) was the elimination of the distinction between those lawful differentials making "only due allowance" for differences in cost of selling and transportation and those made "on account of" differences in grade, quality or quantity. All differentials were brought under the control of the "only due allowance" formula. As commodities genuinely differing in grade or quality were obviously different things, and therefore incapable of being the subject of price discrimination, in effect this change was only really concerned with quantity differentials. The FTC, in the Final Report of the chain store

inquiry, had laid particular stress on the need for the existing permission for differentials "on account of" quantity to be changed to "only due allowance", arguing that unless this were done the courts would likely interpret the phrase "on account of" to mean that any degree of discrimination could be justified simply by a small increase in the quantity purchased.³ Although the Clayton Act had been on the statute books for more than two decades, precisely that question had never yet been tested by the FTC in the courts. Some critics maintained that this argument was nothing more than the Commission making excuses for its own sloth and that the courts would, on the contrary, interpret the phrase in the light of the rest of the section so as to permit "only due allowance" for differences in quantity.⁴ The Commission was itself, at the time of the Final Report, preparing for the first real test of the quantity proviso, and in March 1936 issued a cease and desist order against the Goodyear Tire & Rubber Co. which relied on an "only due allowance" interpretation. Obviously, the Commission could not have been right in both cases, and the order was perhaps little more than a speculative exercise.⁵ In the event, when the courts finally decided the issue they stuck closely to the literal meaning of the proviso and found that Goodyear was under no obligation to make "only due allowance" for its cost savings on sales of "Allstate" private brand tyres to Sears. While the attitude of the courts was to some extent influenced by the fact that Congress had in the interim altered the proviso, by means of the Robinson-Patman law,

3. Final Report, p. 97.

4. See Charles F. Phillips, "The Robinson-Patman Anti-Price Discrimination Law and The Chain Store", Harvard Business Rev. vol. 15 (1936) pp. 69-72. Many chain executives advanced this argument, for obvious reasons.

5. 22 FTC 232 (1936). For this order, see above p. 51-52, n.27.

precisely because it believed the old Section 2 had not required an "only due allowance" limitation, (the case was tried under the old Section 2), there cannot be much doubt that the same decision would have been reached even without that complication. The judicial ruling in the Goodyear case was, indeed, a powerful retrospective vindication in this respect for both the Robinson-Patman bill and the Final Report. If the old Section 2 was incapable of stopping the massive sort of discrimination involved in the Goodyear case, which the FTC had found had driven "thousands" of small tyre dealers out of business, it was clearly incapable of stopping virtually anything.⁶

It was the wish of the sponsors of the Robinson-Patman bill to see a most restrictive definition of allowable costs adopted by the Congress, so that each purchaser would be entitled only to the most tightly defined savings arising directly from the specific purchase under consideration.⁷ What is more, the concept of "only due allowance" was itself more unfavourable to the chains than was perhaps apparent at first sight, for it worked only one way round. The seller could not exceed due allowance for his cost savings, but he was under no obligation to make any such due allowance. He was perfectly free to make no differentials of any kind and sell at the same unit price to all his customers. A large buyer might consider himself the victim of unfair discrimination if he received no recognition for the economies afforded to the seller by being able to handle one big order, but in the sense in which the Clayton act defined

6. Goodyear Tire & Rubber Co. v. FTC, 101 Fed. (2nd), 620. (1939).
Cert. Denied, 308 U.S. 557.

7. For example, Teegarden insisted that a chain would have to pay a proportionate share towards the maintenance of a manufacturer's sales force even if this were used only to contact the independent trade. House Judiciary Committee, Hearings..To Amend The Clayton Act, 74th Congress, 1935-6, p. 34 (Henceforth cited as HJC, Hearings).

discrimination he was merely being given equal treatment. Chain store buyers in practice confronted sellers with a wide spectrum of policies, ranging from those who sold at the same unit price to all on any reasonably sized order, to those who bent over backwards to curry favour with the chains by giving them all manner of special concessions in an effort to build volume or to establish a long-term buying connection. Somewhere in between were a large number of sellers who made an approximate attempt to make "only due allowance", subject to the vagaries of their cost accounting methods, the need to maintain fairly simple discount schedules, and the pressure of trade custom. The "only due allowance" formula of the Robinson-Patman bill not only required the seller to be very careful and cautious in what he conceded by way of "only due allowance", it attacked the favour-currying sellers, leaving only the middle and the unsatisfactory portions of the spectrum for the chain buyers to deal with.

The "only due allowance" formula was nonetheless relatively generous to the chains. It contrasted sharply, for example, with the Bankhead-Huddleston bill, much favoured in the early part of 1935, which had flatly prohibited all quantity differentials, allowing only a functional differential for the benefit of wholesalers. As a result, only a few weeks after the Patman bill was first introduced, H.B. Teegarden, "acting at the request of Mr. Patman, and in response to the apparent wish of certain sections of the Congress", offered to the House Judiciary Committee a major amendment to the bill, imposing a carload lot limitation on maximum quantity discounts. As justification for this radical step, Teegarden cited the precedent provided by the Interstate Commerce Commission which had for nearly half a century forbidden railroads to extend lower unit freight rates on shipments of more than one carload, regardless of the considerable cost savings which

could be made in handling entire trainloads.⁸ The principle upon which the ICC had based this blanket prohibition was that differences in cost to the carrier had to be disregarded above the carload limit, because greater differentials would "be to the prejudice of the small shipper and the public."⁹ Advocates of such a limitation in the field covered by Section 2 of the Clayton act argued that the growth of the chain stores had introduced the same disease of rebating into retail distribution as had once disfigured the railroad industry. They were arguing, in effect, that a vital public interest was involved in sustaining small buyers and so warding off a potential monopoly, and that in such circumstances more had to be considered than the position of the manufacturer who sold to the chains.

Teegarden himself never seemed entirely committed to the demand for the carload lot limitation. In the grocery trade many leading manufacturers already based their maximum quantity discounts on the carload lot: it was advertising allowances and brokerage commissions which were the more important grievance to USWGA.¹⁰ At the same time, the carload lot idea implied a massive dislocation to a wide range of heavy industries, such as

8. HJC, Hearings, pp. 24, 257-8.

9. Anaconda Copper Mining Co. v. Chicago & Erie R.R., 19 ICC 592 (1910).

10. Thus, for example, spokesmen for the General Foods Corp. and Standard Brands, Inc., the two largest contributors to the A & P's special discounts and allowances headquarters account, stated that on most of their products they based their quantity discounts on giving the lowest price on a carload lot. As a result, they had more wholesale than chain store accounts receiving the maximum quantity discount. There were some exceptions however: Standard Brands extended a maximum quantity discount of 10% on its yeast for which only the A & P and Kroger qualified, and the A & P was similarly the only concern to get the maximum quantity discount of 7½% on salt from General Foods. (Patman Cttee. Hearings, vol. III, p. 76, vol. IV p. 29).

the coal industry, whose practices were not an issue in the fight with the chain stores. To Teegarden's obvious alarm, the new provision brought forth immediate forceful protests from these industries and from the powerful National Association of Manufacturers, thus giving the chains some hope that they might be able to unite all business behind them in opposition to the bill.¹¹ But despite Teegarden's hesitancy, Patman and many supporters of the bill were keen to make a fight for a quantity limit because the quantity differential was the key to the lower buying prices of many types of chains, notably those in the general merchandise field, which made relatively little use of brokerage and advertising allowances. Implicit in the independents' advocacy of the carload lot limitation was a recognition that where big chains placed orders on a scale sufficient to keep a whole factory in production for months at a time innumerable economies of scale became possible which could be reflected under an "only due allowance" formula. It was this fact of business life which had enabled chains like Penney, Woolworth and Montgomery Ward to build up excellent relations with many of their suppliers, who themselves had grown fat on "cost plus" arrangements with these chains even while selling to them at prices which would have been unprofitable had they been trying to deal through a multitude of small jobbers. The FTC's case against Goodyear, for example, was not that it sold tyres to Sears at a lower price than it sold to other dealers, but that it sold to Sears at a price which produced for Goodyear a lower rate of profit: Goodyear had nevertheless found the Sears deal profitable and satisfactory, and the FTC did not dispute that it was entitled to have given Sears a very much lower price than it gave to the

11. HJC, Hearings, pp. 236-9, 257-8.

independents on an "only due allowance" basis.¹² In demanding that sellers should no longer be able to contract on the basis of the buyer taking a huge quantity - in the Goodyear case, millions of tyres - but only on the basis of what could be fitted into a single railroad car, Patman was calling for the end of the whole system of mass purchasing by general merchandise chains.¹³

The quantity limit idea actually quickly developed into a bargaining point: it was an advanced position from which the bill's sponsors hoped to stage a gradual retreat which would nonetheless leave them occupying a position, when the bill became law, which was further forward than the "only due allowance" demand of the original draft. Patman was particularly

12. Comparing the price at which Goodyear sold tyres to Sears with that at which it sold to its own dealers, after appropriate adjustment to take account of cash discounts, dealer and trade-in allowances, bonuses, freight on sales and replacement losses, the FTC computed a gross discrimination in favour of Sears of between 29 and 40% on the different grades of tyres. After making "due allowance" for Goodyear's extra costs in selling to its own dealers, the FTC found a remaining net discrimination of between 11% and 22%. In other words, the difference between these figures for the gross and the net discrimination was what the FTC thought that Sears was entitled to under a due allowance formula. At that, the Commission had rejected various arguable cost savings arising from the stability obtained from such a big long-term order, as "too speculative, intangible and remote to justify, or to be reasonably related to, the price discrimination". (See Miller, Unfair Competition pp. 136-8).

13. Except, of course, that there was the loophole that a manufacturer who sold only to a chain store could make any price he wished. Variety and department store chains already had many such exclusive dealing arrangements, and could presumably have extended them. And because chains and independents sold less identical, and directly competing, brands in the general merchandise field than they did in the grocery trade, there was a large area of purchasing to which the bill had no applicability. Chains also had the option of extending their own manufacturing operations if they felt they were being compelled to pay manufacturers more than was necessary in order to subsidise their sales to the independent trade. Even the full-blooded rigour of the carload lot limit could not have automatically reduced the likes of Sears and Woolworth to helplessness when it came to finding cheap ways to put goods on their shelves.

keen that, if a uniform carload lot were not to be adopted, the FTC should be given the authority to fix top limits whenever there was a risk of monopoly. His intention was that this power should be used frequently and very restrictively, not just in rare cases of exceptional disparity. It was, he asserted, "a question of fixing a quantity unit, so that, whenever small independents and small groups get together and they can buy that unit, they are entitled to the same price and terms as the larger corporate chain that may buy 100,000 units".¹⁴ It was this idea, with its implication that the FTC would become the overseer of business rather than, as it had been for most of its history, just a friendly guardian, which provoked the most extensive business opposition to the bill. Many industries with no interest one way or the other whether the chains were allowed to keep their buying advantages showed concern about this entering wedge for governmental control. This concern led the National Association of Manufacturers to condemn the bill as one of the five measures most disruptive of the President's announced "breathing spell" for business which followed the New Deal.¹⁵ It is, indeed, surprising that industry as a whole was not more energetic than it actually was in opposition to the bill. It seemed at times that the bill's reputation as an anti-chain measure had blinded both other business and Congress to the impact it would or could have in a far wider field.

Section 2 (a) also provided for another form of deviation from price uniformity. Differentials were to be permitted to purchasers "depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture". While this proviso had to be read in the light of the general purpose of the Act, it did not require such functional differentials to be automatically limited by any

14. HJC, Hearings, p. 394.

15. New York Times, March 1, 1936.

criterion of "due allowance" for cost savings. In other words, a manufacturer could, if he felt so inclined, give a wholesaler a special wholesale discount which he did not extend to a retail customer, even though the retailer might be buying in the same quantity.

There was no especially radical intent behind this so-called "classification clause".¹⁶ On the contrary, it merely guaranteed a common business practice which had been protected by the courts by a sympathetic reading of the old Section 2.¹⁷ While this reading had worked to the disadvantage of certain retailers, on certain of their purchases, it had enabled manufacturers to maintain a degree of stability in their distributive arrangements. With few exceptions, manufacturers had classified integrated chains which performed their own wholesaling so as to receive wholesale discounts.

Despite this, chain store men from the first claimed that the classification clause was a crafty device to entrench the wholesaler at the expense of retailers, retail cooperatives and chain stores.¹⁸ Their

16. This is not the impression conveyed by J.C. Palamountain who (in The Politics of Distribution, p. 204) states of the original draft that it was designed to have the effect of "preventing mass distributors from receiving a wholesaler's discount even though they performed the wholesaling function". This interpretation is central to Palamountain's argument that in the course of passage the bill was profoundly modified under the influence of "middle groups" (The classification clause not being found in the final Robinson-Patman law). Actually, few independents laid any particular stress on the classification clause.

17. Mennen Co. v. FTC, 288 Fed. 774; National Biscuit Co. v. FTC, 299 Fed. 733. See above, p.47, for discussion of these cases. The Senate Judiciary Committee report stated that "Although not specifically so provided, the present Section 2 of the Clayton Act also permits these differentials, since it places no limits...upon any differentials not affecting general competition. Since added restrictions are imposed in these respects, a separate clause safeguarding differentials as between different classes of purchasers becomes necessary. Such differentials, so long as equal treatment is required within the class, do not give rise to the competitive evils at which the bill is aimed, while to suppress them would produce an unwarranted disturbance of existing habits of trade". (S. Rept. 1502, 74th Cong., 2nd Sess., Feb 3, 1936). The bill's sponsors wanted to be quite sure that the wholesaler would not be prevented from buying small quantities at jobber prices.

18. H.B. Teegarden, who had written the bill, dismissed the claim that the clause would oblige manufacturers to give a lower price to wholesalers than they gave to chain stores or other buyers as "a remarkable piece of juggling" (HJC, Hearings, pp. 206-7).

protests became especially loud after the bill emerged from the House Judiciary committee with the classification clause rewritten in such a way as to explain the type of classification which would be allowable:

"That nothing herein contained shall prevent or require differentials as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers or to consumers, or for use in further manufacture; for the purpose of such classification of customers as wholesalers or jobbers, or retailers the character of the selling of the purchaser and not the buying shall determine the classification, and any purchaser who, directly or indirectly, though a subsidiary or affiliated concern or broker, does both a wholesale and retail business shall, irrespective of quantity purchased, be classified (1) as a wholesaler on purchases for sale to retail dealers only, not owned or controlled, directly or indirectly, by the purchaser; and (2) as a retailer on purchases for sale to consumers". 19

In the Mennen case the court had done no more than this, finding that retailers buying cooperatively were not by right eligible to a wholesale discount because "whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying, but the character of his selling, which marks him as a wholesaler..."²⁰ However, actual trade practice in the years since had been that wholesale discounts were commonly granted to any retailer or group of retailers who satisfied the criteria established by each manufacturer. In effect, business practicalities, and buying strength, determined the granting of functional discounts without any reference to what the courts may have said. This practice was continued under the NRA regulation. Thus, in the grocery codes, functional discounts were permitted by code authorities provided the functions were performed. It was never questioned that chains, corporate and voluntary, and the properly constituted type of retail cooperative with its own warehousing were fully entitled to wholesale

19. H.R. Rept. 2287, 74th Cong. 2nd Sess., pp. 1-2. This revision never appeared in the Senate version of the bill.

20. Mennen Co. v. FTC, 288 Fed. 774, 782.

discounts where such were made.²¹ By bringing in an explicit definition of the basis upon which classifications could be made, the House Judiciary Committee cast a dark shadow over all these well-established trade customs. It also threatened to remove the right to establish his own classifications - provided they were not in restraint of trade - from the manufacturer with whom it had traditionally belonged.

At this rewriting a great howl went up from the opponents of the bill. They claimed that it would force manufacturers to sell to wholesalers at a lower price than they sold to any of their other customers, whether chains, cooperatives or individual retailers. The wholesaler, they maintained, was about to be reinstated in his old nineteenth century position of untrammelled sovereignty over distributive channels to the detriment of every other distributor. This argument was used to considerable effect to stir up certain manufacturers and cooperatives against the bill.²² Actually, even this rewritten classification clause was no real threat to the big chain store companies. It in no way required the manufacturer to grant functional discounts, only restricted the character of such discounts if he chose to make them.²³ Manufacturers already had a perfect right to sell to wholesalers at a lower price than they sold to the big chains, but they did not show much eagerness to exercise that right. Nothing in the bill really made it more likely that they would suddenly change their policies in that respect, because chain store buying strength would still exert itself on the seller. If the manufacturer had a right to refuse to sell, the chain

21. Modern Merchant & Grocery World, July 21, 1934. For an attack on classification provisions in some NRA codes allowing chain stores to obtain maximum discounts, but denying them to small merchants buying in the same quantity, see Irving Fox of NRDGA in Senate Finance Committee, Hearings... (On) Investigation of the National Recovery Administration, 74th Cong. 1st Sess., at p. 1886 ff.

22. Senate Judiciary Committee, Hearings On S.4171 - Price Discrimination 74th Cong., 2nd Sess., pp.41-3, 45, 90, 110. (Henceforth cited as SJC, Hearings).

23. "The bill neither requires nor compels the granting of discriminations or differentials of any sort, and the words "or require" are especially inserted...to make that clear". (H.R. Rept. 2287, p. 10).

equally had a right to refuse to buy and to take its business to a more amenable supplier.²⁴ The classification clause was not, however, such an empty gesture in terms of the buying position of small retail and consumer cooperatives and individual retailers. Their position was far more delicate. Manufacturers already walked a tightrope if they chose to deal with these marginal buyers on a roughly similar basis to their chain and wholesale accounts. If most wholesalers had long since accepted it as inevitable that the chains were going to get wholesale prices, they were not so reconciled to the inevitability of manufacturers giving equal terms to these miscellaneous small fry. Enactment of the classification clause in the form approved by the House Judiciary committee would undoubtedly have provided the wholesalers with a perfect opportunity to hamstring the small fry. Although the Cooperative Food Distributors of America, the federation of retail grocery cooperatives, seems to have been little troubled by the classification clause, the much more precariously established farm and consumer cooperatives - which many in the trade considered "illegitimate" - were vocally hostile, and the chains egged them on with enthusiasm.

Most of the subtleties in the Robinson-Patman bill were found in Section 2 (a). Clauses (b) and (c) were far more straightforward, attacking specific practices rather than elucidating general principles. 2 (b) flatly prohibited the payment of brokerage commissions to buyers or their agents. 2 (c) prohibited the extension of advertising allowances, or similar service payments to buyers except when available "on proportionally equal terms to

24. For a recognition of this by G.M. Lebhar, in the relative privacy of the chains' own journal, see Chain Store Age, May 1936, Grocery Edn. p.77. Lebhar thought the only possibility that chains would be denied wholesale discounts would be in those lines where chains were still weak. It is interesting also to speculate as to what might have happened had the big chains actually been denied wholesale prices. Numbers of specialist wholesalers would presumably have blossomed forth, selling direct to the chains at cut-rate margins on large volumes and adding little to chain costs beyond the maintenance of an extra office and the salary of the obliging wholesaler. There must be a suspicion that, with these cut-raters scrambling for chain business, some chains might well have found a way to reduce the costs of their wholesaling functions, which over the years had inevitably tended to ossify and carried a permanent burden of overhead expense.

all other customers competing in the distribution of such products or commodities". The drastic nature of 2(b) was obvious on its face; but 2 (c) was not much less repressive in purpose. The belief of the bill's sponsors was that the requirement that advertising allowances must be available on "proportionally equal terms" to all customers would sharply reduce, if not end altogether, such allowances, for few manufacturers would be willing or able to make such concessions to every small jobber or retailer who demanded them. The concept of "proportionally equal terms" was quite different from that of "only due allowance". Many customers - especially wholesalers - simply could not provide the service, in terms of display and promotion, which the integrated chain could give to the manufacturer, and would therefore have had no entitlement to a "due allowance" reduction. The "proportionally equal terms" provision was designed to compel the manufacturer to extend similar allowances to all customers buying in similar quantities, and claiming to be able to extend the same service, even though the manufacturer well knew that the real value of the service given varied markedly. The bill's backers disguised this fundamentally different approach under a cover of vague talk about advertising allowances having been used as "rebates".

The brokerage and advertising allowance clauses essentially embodied the programme fought for by the United States Wholesale Grocers' Association, the National Food Brokers' Association and the more militant retail grocery associations during the period of the NRA. Behind them lay the fundamentalist philosophy that the old ways of distribution had been the best and that all deviations therefrom were to be condemned. The brokerage clause, which quickly became the centre of the storm over the bill in the grocery trade, most clearly encapsulated that philosophy. The "evil" which it attacked was vertical integration. The fundamentalists had seen a group of retailers, the chain stores, become combined wholesalers

and retailers, and so eliminate the wholesaler from their scheme of things; they were not prepared to see the broker be eliminated also. Whether or not brokerage agencies controlled by buyers actually suited the needs of both buyers and sellers was deemed irrelevant, and so no question of "due allowance" arose. Of course, the bill struck not only at the corporate chains. Its target was all who mimicked the chain store methods and that included, most prominently, the big grocery voluntary chains which since their appearance in the late 1920's had thrived on brokerage commissions and their ability to collect advertising allowances which the unaffiliated wholesaler, who had no control over the merchandising of his retail customers, was denied.²⁵

The fundamentalist group had made strides towards the imposition of their programme under the NRA. Their militancy ensured that the NRA administrators conceded more protection to the small buyers in the food and grocery codes than was granted to distributors in most other lines. The master code for grocery manufacturers required a regime of "open prices", with all prices to be available on published price lists and advertising allowances specified in separate written contracts available for inspection by competitors. The payment of brokerage commissions to buyers was prohibited. On paper, this was a hard regime for the chains, though scarcely comparable to that sought through the Robinson-Patman bill. The problem for the fundamentalists lay in enforcement. Although some sub-codes were adopted quickly, the master code itself was held up by a determined and stealthy resistance from those whom it sought to curb, and did not take effect until October 1, 1934, by which time the initial authority of the NRA had decayed. In addition, some of the sub-codes for different branches of the food industry were notably weaker. As happened

25. See above, pp.18-19, n.19; p.47, n.22.

with all NRA rules which did not have overwhelming trade support, the restrictions on brokerage and allowances were simply ignored by many. The NRA code authority itself admitted the problem for, ironically, the very USWGA convention which saw the first unwrapping of what became the Robinson-Patman bill, heard Armin Riley, the Divisional Administrator, confess the failures of enforcement and promise, in particular, that "early administrative action" would be taken to enforce the brokerage provisions as soon as Congress had decided to renew the life of the NRA.²⁶ The Patman committee produced evidence of how the A & P had encouraged packers to ignore their codes and give it the customary brokerage commissions: A & P buyers threatened the too-scrupulous packer by warning that they would simply take their business elsewhere, and they also eased the way by agreeing to have brokerage concessions renamed as advertising allowances or quantity discounts so as to avoid detection. Although the A & P did lose some of its allowances under the NRA, it generally managed to maintain a good supply of the "gravy", and there is no reason to suppose that other big buyers did not do the same.²⁷ The findings of the Patman committee showed clearly enough the futility of the idea fostered by many moderate factions in the grocery trade at the end of the NRA that what was needed was a trade practice conference or some scheme of self-regulation. It was a natural and unalterable instinct of all buyers that they would get what they could from sellers, consistent with maintaining reliable supply, unless the law prevented them, and was enforced to prevent them.

26. Modern Merchant & Grocery World, September 21, 1934; Interstate Grocer, September 29, 1934; May 25, 1935.

27. Patman Cttee. Hearings, vol. I, pp. 447-52; A & P headquarters allowances were \$8.57 m. in 1932, \$7.7m in 1933, \$6.59m in 1934 and \$7.90m in 1935. Brokerage receipts of field buying offices fell off from a record high of \$2.20m in 1933 to \$1.33m in 1934, recovering to \$1.75m in 1935. (Adelman, A & P: A Study in Price-Cost Behavior and Public Policy, p. 225).

Large sections of the independent trade collected something by way of brokerage or allowances. The bill was so stringent that many wholesalers, even smaller wholesalers in the United States Wholesale Grocers' Association, stood to lose something. What the bill's sponsors promised was that the big corporate chains would lose much more, thus making the sacrifice amply worthwhile. Thus Patman urged that while "under the present system" voluntary chains were to be "commended and encouraged", they could not "continue to exist indefinitely" by getting minor versions of chain rebates. Patman thought that once the unaffiliated independents were "squeezed out", the corporate chains would "take over those 100,000 voluntary units or destroy them". Likewise, J.H. McLaurin denied that he had any animosity towards the voluntary chains, pointing out that some wholesalers in such groups were members of his own association, though admittedly not many. What the voluntaries brought by way of improved merchandising, assistance to retailers and advertising was to be commended, he argued, but their allowances were "nothing" compared to what the corporate chains got.²⁸

This was not the view taken by the voluntary chains. The National Voluntary Groups Institute, which spoke for the overhead organisations of the elite voluntaries such as the IGA and the Red & White, was fiercely hostile to nearly every phase of the bill, but especially to the brokerage and advertising allowance provisions. Equally, the National-American Wholesale Grocers' Association whose policies were heavily influenced by the voluntaries, and whose antagonism was sharpened by its bitter rivalry with the United States association, spared no effort to ridicule the bill as unconstitutional and disruptive. The lists of special discounts and allowances presented to the Patman committee certainly indicated that the

28. HJC, Hearings, pp. 11, 43-45, 391.

overhead organisations collected relatively small amounts of "gravy" when compared with what was ladled out by manufacturers to the big corporate chains.²⁹ However, these figures were somewhat misleading. The affiliated wholesalers in the voluntaries themselves collected advertising allowances and quantity discounts, and although no estimates were available as to the amount of these allowances, they were certainly more considerable than the equivalent sums collected by corporate chain branch offices and warehouses, voluntary chain buying being much more decentralised. Furthermore, special allowances played a more vital role in the running of voluntary chains. Nearly all the income of the headquarters operations of the Red & White Corp. and the IGA was derived from brokerage commissions, paid mainly on private brands, and the Robinson-Patman bill proposed to do away with such commissions entirely. At the very least, the bill implied a total revamping of the methods of the voluntaries. In contrast, the corporate chains had existed for decades (and had achieved most of their growth) without brokerage commissions. Probably only the A & P among the corporate chains was as heavily committed to the collection of brokerage as a basic part of its operating method as were the big voluntaries. Executives of voluntaries and cooperatives were satisfied that they got most of the allowances extended to the corporate chains, and they were certainly not anxious to bring about a condition of tight regulation by the FTC just because of the few things which they did not get. Over the past few years it had been the voluntary chain method, not the corporate chains, which had shown the strongest growth, and any

29. In 1934, the A & P collected \$8,105,000 in headquarters special discounts and allowances, whereas the Independent Grocers Alliance, the leading voluntary, received only \$639,736 through the Chicago overhead organisation. (Patman Cttee. Hearings, vol. I, pp. 465-70; vol. IV, pp. 299-336). The figures for other corporate and cooperative chains showed a similar imbalance.

remaining discrimination in favour of the corporate chains seemed likely to be eroded by natural business evolution. Thus the bill not only divided chains against independents, it divided the smaller, unaffiliated wholesale grocers and retailers against the big voluntary chains. This division might well have become a factor of more importance than it did had it not been for the rather diffuse sense of identity of many of the grocers enrolled in the big voluntaries. Pulled one way by the economic logic expounded by the executives of the overhead headquarters they nevertheless felt an equally strong pull exerted by their contact with trade associations and other retailers and wholesalers. Most of these voluntary chain retailers in any case bought from a variety of sources, and were far from being coordinated cogs in great machines. Militant leaders like McLaurin and Schulte cultivated these self-determining independents with the argument that, in the long run, only the big Wall street chains would gain from a continued free for all. For this reason not much real rank-and-file opposition to the bill developed in the voluntaries and cooperatives.

Estimates of the likely consequences of the bill for the corporate chains varied quite widely. J.H. McLaurin claimed that the success of the chains was "the result of the ability of these large purchasers to demand and receive...these concessions...that enable them to own the manufacturer's product at a net price which represents a difference of from 5 to 15 per cent", a claim made also by Patman. It was similarly George Schulte's contention that the chains "must have rebates and concessions to exist and without them they are doomed".³⁰ At root, this assertion was ideological, rather than a judgement based on economic fact. Fundamentalists like McLaurin and Schulte, who were unreconciled to the

30. HJC, Hearings, p. 30; Interstate Merchant, January 11, 1936.

"legitimacy" of the chain store system, shared a deep and even unconscious reluctance to concede that much of the chains' success had arisen from nothing more sinister or "illegitimate" than good merchandising and advertising, and selling large volumes at modest margins, methods which were open to independents also, especially when they acted cooperatively. Likewise, to Patman, the importance of "rebates" was not so much a question of arithmetic as an article of faith. To a Southern neopopulist, saturated in the tradition that the great Northern monopolies had been fostered by biased freight rates and commercial conspiracy, it was only natural to suppose that the chains had grown in a similar way. While occasionally genuflecting to the notion - which underlay the "only due allowance" formula - that manufacturers were coerced by the chains into giving "rebates", Patman in his heart really seemed inclined to the view that there was a conspiracy between some of the manufacturers and the chains, presided over by Wall street, to destroy the independents altogether. Exactly why or how thousands of competing manufacturers could have systematically set out to deny the independents the prices to which they were entitled, was never explained by the Congressman.³¹

Chain store men themselves offered only the most impressionistic suggestions to the politicians as to what the bill would involve in terms of costs and prices. Their favourite estimate was that chain retail prices would rise by 10% or \$750m, but as these were the figures they were fond of using in opposing chain taxes they clearly had no

31. For Patman's diverse utterances on this issue, see HJC, Hearings pp. 7-8, 12, 194, 440. The Congressman was not exceptional in this respect, for independents had for years expressed themselves in contradictory fashion as to whether manufacturers were the victims or the instigators of "unfair rebates".

basis in any rational calculation.³² Indeed, chain store men often contradicted themselves. Thus Charles Adams, the treasurer of the First National Stores, on the one hand told the House Judiciary Committee that buying advantages were no longer of any relevance, and that what mattered was "the atmosphere of your store", yet on the other hand asserted that the bill would be the equivalent of an extra sales tax on food of from 8% to 15%.³³ This strain of self-contradiction ran through the testimony of most other chain store men. The bill was ruinous and would rob the consumer, they maintained, and yet it would backfire on its sponsors because the chains would make exclusive arrangements with manufacturers, thus putting themselves beyond the reach of the law, or

32. New York Times, March 23, April 5, 1936. Numerous leading chains were required by the Patman committee to submit their "preferred lists" of special discounts and allowances, and these lists were cited by some as evidence that chain buying advantages were actually rather insignificant. In fact, these lists were no proper guide to chain advantages or to the likely impact of the Robinson-Patman bill. In general, they comprised only specific allowances arranged with manufacturers of national brands by chains' headquarters buying offices. Omitted were details of private brands, quantity discounts shown on the face of invoices and allowances or free goods obtained by warehouses or store managers from local or national manufacturers. Chain store buying strength was exerted at every level, every day, and was not reducible to the dimensions of the Patman committee lists. Chain store men themselves had no definite idea of what their aggregate buying advantage might be. An A & P buyer from headquarters, for instance, told the Patman committee that headquarters knew nothing about the deductions made on the face of the invoice for the local buyers. (Hearings, vol. I, p. 442). Likewise, A.H. Morrill of Kroger explained that he could not tell to what extent his company's representatives were able to make favourable deals at the local level: "They make a deal right there. The deal goes into the cost of the goods. It does not even appear on the books". (Hearings, vol. III, p. 14). Since no man in a sprawling company with hundreds of points of purchase, making thousands of transactions daily, could estimate the extent of the aggregate reduction from some notional "standard" price, it was obviously impossible to assess the relative advantage over any other buyer, whose arrangements were private. There was, of course, a certain security in this for the chains, for it implied the existence of plentiful opportunities to escape the provisions of even the tightest law on the greater number of their transactions.

33. HJC, Hearings, pp. 96-105, 114.

would insist on receiving "due allowance" discounts which had previously gone unclaimed. Even making "due allowance" for a large element of hyperbole and evasion, chain store men were clearly genuinely uncertain as to the potential menace of the bill. Even supposing it could be enacted in its full vigour, which few seriously expected, many questions remained. How would the FTC and the courts define allowable costs? What would be the standard for quantity limits? Would the brokerage clause be held constitutional? Would the FTC be equally as severe in curbing unjustified allowances to independent wholesalers and voluntary chains? How would manufacturers apply the classification clause? As the history of the old Section 2 had shown, there was many a slip between putting a law on the statute books and giving it a practical everyday vitality and meaning.

vii. The Victory of the "Ishmaelites".

Despite the political impetus lent to it by the activities of the Patman committee, some of the opponents of the Robinson-Patman bill proved obstinately reluctant to accept that it had a real chance of enactment. What was the United States Wholesale Grocers' Association after all, they reasoned, but an assortment of Southern rebels who seemed to have set themselves the futile task of trying to turn the clock back on modern methods of distribution? And who was Wright Patman but a Southern rebel-rouser, scarcely the sort of man the Congress would allow to prescribe for the regulation of business? To Edgar Watkins, the counsel of the National-American Wholesale Grocers' Association, those responsible for the bill were just disruptive "pests", "economic Ishmaelites incapable of a social attitude" whose wild demands were holding back the chances

for harmonious trade advancement.¹ In February, 1936, O.M. Kile, the Washington representative of the Mail Order Association, could lament to the House Judiciary Committee that "We proceeded on the assumption, for quite a while, that, naturally, in the course of your deliberations, you would see that you could not set up an ironclad strait jacket for business..." Only at this late stage was he finally convinced that there was a "serious intent" in Congress.²

The truth was that the prescription for the regulation of business was no longer being written merely by those with economic muscle: political strength had become a factor in the equation, and it was the "economic Ishmaelites" who had the political strength. With the price discrimination issue under the glare of Congressional scrutiny, it was not possible for the "big boys" to cobble together something behind the scenes, as had so often happened in the days of the trade practice conferences and the NRA codes, so as to keep the "Ishmaelites" quiet while leaving things fundamentally unchanged. In an attempt to restore the status quo, and to keep political demagoguery out of business, NAWGA and AGMA, in the autumn of 1935, floated a "National Food and Grocery Conference Committee", and this attracted the cooperation of the FGCSA, the voluntary chains' association, the CFDA and the conservative officers of the NARG. The idea was to find a way out by producing a compromise legislative package upon which they could unite, thus isolating USWGA and the NFBA.³ However, in the super-charged atmosphere, the committee was not allowed the peace and quiet it needed to bring its deliberations to

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1. Wholesale Grocer News, November 1935; Genesis, chap. 16, v.11-12.
 2. HJC, Hearings, p. 384.
 3. Interstate Grocer, October 5, 1935.

fruition. With Patman leading the way, the tone of trade politics became noticeably more acerbic. Patman accused NAWGA's officers of being subsidised financially by the FGCSA, styling them "innocent-looking turncoats for Wall street". In response, NAWGA's officers bitterly satirised Patman's pretensions to speak with authority upon the problems of the independent grocers and warned of the "cruel disillusionment" and "internal strife" that would be the only result of heeding his siren call.⁴ The NAWGA officers might well have expected, as the representatives of the larger of the two national wholesale grocery associations, to have enjoyed some considerable influence upon Congress in its consideration of a bill advanced as being in the interests of the independent grocery trade; actually, with Patman dominating the situation, they were expelled to the fringes of the debate. The "preferred lists" of discounts made public by the Patman committee likewise weakened the position of AGMA, for most of its leading members featured prominently in these lists, making it rather difficult for AGMA to adopt its traditional posture of patriarchal disinterestedness in the feuds between the distributors.

As the Robinson-Patman bill gained political momentum, serious splits began to appear in the ranks of the Conference Committee. Although the NARG was represented on it, and some of its officers clearly yearned to be back under the protective wing of NAWGA and AGMA, a 1935 convention resolution favouring the Patman bill, and rank-and-file pressure, made it impossible for the officers to do more than sit in as observers. Some of the rank and file of NAWGA, less preoccupied than the officers with the

4. Interstate Merchant, March 21, 1936; Wholesale Grocer News, December 1935. Patman's bribery charges were based on nothing more substantial than the fact that the FGCSA took the NAWGA legislative news service, at \$1,500 per annum, and letters taken from John Logan's files which revealed him in a friendly correspondence with NAWGA Secretary, M.L. Toulme. The letters actually showed that while Toulme was personally opposed to chain taxation, he was unwilling to deviate from the official NAWGA line of neutrality on the subject, some of the association's membership actively supporting such taxes. See HJC, Hearings, pp. 231-4.

feud with McLaurin's association, were anxious that a golden opportunity to secure remedial legislation should not be wasted; the officers were also put in a difficult position when both House and Senate Judiciary committees rejected their contention that the key provisions of the Robinson-Patman bill were unconstitutional, for it was this argument which they had used to avoid coming straight out for or against the substance of parts of the bill, such as the brokerage clause, upon which their membership was divided against itself. Even some of the grocery manufacturers were less than keen to frustrate altogether a bill which, if appropriately amended, might enable them to exercise the whip hand over their customers.⁵ Potentially, the Conference Committee approach was the most dangerous to the bill's prospects, for it offered the prospect of a moderate alternative. In reality, it proved a total failure. Its members played a leading role in the initial opposition to the bill (except the NARG), but they gradually fell into disarray, and such amendments as were eventually made of which they could approve were not readily identifiable as the fruits of their labour. Ultimately, the CFDA agreed to back the Robinson-Patman bill, even though the much disliked brokerage clause had not been shed, and AGMA toned down its opposition as its members prepared to meet a new and uncertain era.

The involvement of the FGCSA on the Conference Committee was an indication of just how well aware were grocery chain executives of the need to act as "insiders", cultivating the more moderate factions among

5. Paul Fishback, NFBA Secretary, claimed that many manufacturers favoured the bill but did not dare to say so openly because of the fear of "reprisals" by their customers: they had, he stated, "asked us to carry the fight for them because they dared not "stick their necks out"!" (HJC, Hearings, p. 65). Manufacturers had, of course, little to lose from the "only due allowance" and brokerage provisions, but they were much opposed to any extension of FTC control over their practices.

the independents. The associations representing other types of chains, which had in the past not suffered so badly as the grocery chains from anti-chain attacks, showed a less realistic sense of political occasion and proved unwilling to concede that there was any need for a change in the existing law. Naturally, this made it difficult for them to influence Congressmen, who mostly thought that something had to be done and wished only to know precisely what that something should be. It also gave them no leverage, for they had nothing on show to tempt those leaders of independent trade associations who were unhappy with the Robinson-Patman bill, which had rather been foisted on them by an odd series of political events. With the ARF effectively destroyed, and with the chains not prepared to go half-way, most trade association executives who were not whole-heartedly in favour of the Robinson-Patman bill simply remained silent. The chains found themselves very much alone in Washington. They were, declared Senator Marvel M. Logan of Kentucky, who steered the bill on the Senate floor, "the most powerful lobby...I ever knew".⁶ Active they may have been, but powerful they no longer were. The doings of the Patman committee, the discontent in the country, the fact that it was election year, all worked against the chains. When at last they accepted that another strategy was needed, they threw themselves with ill-prepared suddenness behind a weaker alternative bill offered by Senators Borah and Van Nuys. By this tactic, the non-grocery chains did succeed in uniting their forces with the Grocery Conference Committee opponents of Robinson-Patman, and in stirring up a certain amount of farm and consumer sympathy for their cause. The tactic failed, however, because Borah and Van Nuys were not prepared to be lured into acting as "front men" to a scheme to sink Robinson-Patman.

6. New York Times, February 16, 1936.

The active campaign in Congress for the Robinson-Patman bill was relatively short lived, especially when the complexity and importance of the measure are considered. The ball started to roll when the Senate Judiciary Committee reported favourably on February 3; on April 30 the Senate passed a heavily amended version, without a record vote; on May 28 the House approved a largely intact version by the margin of 290 votes to 16; both Houses then quickly passed a revised final version worked out by conference, and the bill was on Roosevelt's desk for signing on June 19. The final version was in some respects weaker than the original bill, but it did nonetheless represent a stunning political triumph for those so recently disparaged as "Ishmaelites". What is more, the weaknesses of the final version were due more to the oversights and tactical compromises which inevitably occurred in the course of a highly-pressured and rapid legislative passage than they were to a conscious repudiation by Congress of any of the bill's anti-chain content. Few independents - whether rank-and-file or association executives - had much grasp of the detail of the bill, either from the legal or economic point of view, and much of the contemporary trade discussion was muddled or mistaken. So many self-serving "interpretations" of the bill were in currency simultaneously that the trade had every reason to feel confused. What the bill's supporters knew was that they supported the Robinson-Patman bill, and they supported it because it was known as an anti-chain store bill and it came from an authentically anti-chain source. For this reason, such weakening amendments as were made to the bill did not greatly impinge on the awareness of independents, and they did not feel that they had suffered any reverse. The unequivocal conclusion drawn from the enactment of the Robinson-Patman law was that Congress was "for" the independents and "against" the chains.

The legislative campaign was the first occasion on which any large number of independent merchants in different lines had combined their resources to demand federal action against the chains. The pressure exerted far exceeded anything ever produced on behalf of the Capper-Kelly bill. The USWGA received the active support of many wholesale and retail associations, notably the big national associations of retail grocers, meat dealers, druggists and hardware men. Plenty of support also came from the "boys back home". By this time, practically all Congressmen were covered by the NARD's "contact committees" of independent businessmen who relied on establishing personal contact with the legislators when they were in their home districts. This was a grass-roots lobbying network which made the chains' lobbying methods seem positively inflexible and naive. While Congress was in session, trade associations funnelled a good supply of petitions and resolutions to Washington to keep up the pressure.

Trade support for the bill found expression in an "Independents' Day" rally in Washington on March 4, just as the vital push was getting under way in Congress. Fifteen hundred wholesalers, brokers and retailers assembled in Constitution Hall, where they heard speeches by Senators Borah, Robinson, and Tydings and by Congressmen Patman and Boileau. The speakers well represented the political appeal of the bill, for they covered a spectrum of opinion almost as wide as that found in Congress as a whole, ranging from the implacably anti-New Deal toryism of Millard Tydings to the Wisconsin Progressivism of Boileau, the latter being, as the New York Times commented, "loudly applauded for his attack on 'business' in general and chain stores in particular".⁷ A gathering of 1500 merchants hardly represented the news sensation of the day - especially as the

7. Ibid., March 5, 1936.

newspapers, generally hostile to the bill, gave only modest coverage - but the independents nevertheless made their presence felt where it counted, breaking up into groups to meet the Senators and Congressmen from their home states. A party of twenty, headed by J.A.O. Preus, the public relations counsel of the NARD and a former Governor of Minnesota - one of a remarkable trio of anti-chain Minnesota Governors⁸ - also visited the White House, emerging in a satisfied mood. A hostile Business Week magazine declared that "Whatever the President said to the delegates who visited him, he is not personally interested in this legislation and it will have to progress under its own steam".⁹ However, the bill's supporters did not require active Presidential involvement, only the appearance of benign neutrality. Roosevelt was reported to have told the delegation that with Senator Robinson, the majority leader, having attached his name to the bill, they had no need of further assistance.¹⁰ It was a correct assessment, the bill rapidly making progress. Business Week was soon reduced to a petulant complaint that "the delegates had obviously done some good spade-work somewhere - probably in Jim Farley's office", claiming that "dark hints of campaign contributions and guarantees to rally votes at the polls are being passed around the trade". In fact, the bill enjoyed broad bi-partisan support, and was never an administration measure in any strict sense. Roosevelt himself seems to have known little

8. Preus was Republican Governor, 1921-25; Theodore Christianson, Republican, was Governor 1925-31, U.S. Congressman 1933-37 and then, in quick succession, NARG Secretary-Manager, NARD public relations counsel and president of the Freedom of Opportunity Foundation, a group associated with Patman; Floyd Olson, Farmer-Labor Governor 1931-6, enacted a heavy chain tax and was widely known as a friend of the independent merchants.

9. Business Week, March 7, 1936, p. 9.

10. Interstate Merchant, March 21, 1936.

about the bill and was perhaps in the same position as many of the Democrat Senators: he took it on trust, because such a reliable middle-of-the-road party wheelhorse as Joe Robinson was sponsoring it.¹¹

The bill was strongly backed by all the anti-chain militants who in the past had so often found themselves at loggerheads with the staid national trade associations. George Schulte's advice to his readers was that "We have come to the crossroads....if the chains defeat this bill through lack of action on the part of independents, the latter will have to take the road to the left while the chains will go to the right...The opportunity is here; seize it now and crush the chains as they would crush you if they got the chance". Schulte's response to the creation of the American Retail Federation had been to set in motion plans for a counter-organisation, to unite all independent business, and early in 1936 this took form under the name of "Independence, Inc." While Schulte's ambition for the new organisation was boundless - he hoped it would come to rival the American Farm Bureau Federation and the American Federation of Labor - its initial purpose was to campaign for the Robinson-Patman bill.¹²

The inaugural convention of Independence, Inc., held in St. Louis on March 1, was the greatest gathering of anti-chain forces ever assembled. At least two thousand attended, these coming from all over the Midwest and representing 80 lines of business.¹³ The character of the convention demonstrated the huge advances made since the Shreveport meeting of Henderson's Merchant Minute Men in 1930, the only precedent. Henderson's

11. Business Week, March 21, 1936, p. 9. See Roosevelt's letter to Robinson, May 4, in F.D.R. His Personal Letters, 1928-45, ed. Elliott Roosevelt, N.Y. 1970 reprinting, pp. 586-7. Farley was, of course, Democratic National Chairman.

12. Interstate Merchant, February 15, March 21, 1936. The change of name from Interstate Grocer to Interstate Merchant was intended to symbolise this attempt to unite all independents.

13. St. Louis Post-Dispatch, March 2, 1936.

convention had proved to be little more than an anti-chain revival meeting because there were then no definite political objectives. This time, the anti-chain forces were meeting to lend their weight to a bill which was already making good progress on Capitol Hill. Furthermore, with the emergence of Patman the future seemed to promise a series of major engagements which the independents had every chance of winning. Patman told the convention that his present bill would be only the first step, and that he planned to introduce a bill to divorce manufacturing from retailing so as to knock out a tier from the vertically-integrated chains. More promisingly still, his references to the prohibition of chain banking contained in the constitution of Texas gave a clear hint of Patman's ultimate, though as yet undefined and tentative, plans for the final solution of the chain store problem. Similarly, many of those present at the convention could point to their own huge contributions to the mounting difficulties of the chains, such as John Cunningham, at whose prompting, Senator Brookhart had introduced the resolution which ultimately led to the Final Report, and the large delegations representing groups such as the Iowa Independent Businessmen's Association and the Colorado Civic Association. These were battle-scarred veterans of the cause.¹⁴

The highlight of the convention was an address by Father Charles E. Coughlin, speaking over a relay from Detroit as part of his regular Sunday radio sermon which was carried by radio stations over much of the country. In his address, Coughlin invited his millions of listeners to "come with me in spirit" to St. Louis where were assembled "brave Americans gifted with the fortitude to organize and fight to the death, if necessary, against monopolistic tendencies" which were dragging the country towards communism.

14. Interstate Merchant, March 7, 1936.

Coughlin explained that the success of the chain stores was "largely predicated upon the secret rebates by manufacturers and upon the long hours of their employees" and, outlining the Robinson-Patman bill, declared that his army of followers in the National Union for Social Justice was "vitally interested" in the work of Independence, Inc. Coughlin warned that "the day of destruction is at hand for the independent merchant, unless farmer and laborer, veteran of the World War and professional man cooperate to save America and its independent merchants from being swallowed by the Wall street of monopoly".¹⁵

Schulte had gone to considerable trouble to secure Coughlin's endorsement, negotiations for him to speak having been carried on for months. Few any longer believed that Coughlin was a spokesman for, or influence upon, President Roosevelt: two years of blowing hot and cold about the New Deal had put paid to that popular delusion of 1933.¹⁶ But all sensible politicians took some account of what Coughlin was saying.

15. New York Times, March 2, 1936; Interstate Merchant, March 7, 1936.

16. Schulte, who was an unwaivering supporter of Roosevelt, clearly still thought of Coughlin as basically pro-New Deal. C.J. Tull suggests that Coughlin's "open, irrevocable break" with the administration came on November 17, 1935, when he told his radio audience that the principles of the New Deal and of Social Justice were "unalterably opposed". Yet, two weeks later, Coughlin declared that he wished only to "perfect" the New Deal - a statement attributed by Tull to an "extremely confused state of mind" - and on January 8, 1936, he visited the White House for a lengthy private conversation with the President. Coughlin was also insistent at this time that the NUSJ was a "lobby", not an incipient third party. The bills actively supported by Coughlin in 1935 - the Frazier-Lemke farm mortgage bill, the Wagner Labor Relations bill, the Wheeler holding company "death sentence", the Nye Munitions bill, the Patman bonus and the Nye-Sweeney bill to restore to Congress the sole right to coin money - were the staples of the programme of Midwestern progressivism. Whether or not Coughlin's later career, when he was regarded by many as America's No. 1 anti-Semite, fascist and friend of the dictators, represented a natural progression from his earlier career or was totally discontinuous to it, is too complex a question to answer here. The point is that, whatever continuities may be found in retrospect, Coughlin's predominant image among the American people in early 1936 was not that of a Hitler in clerical garb but that of the popular conscience of the New Deal. This image collapsed suddenly in the summer of 1936 when Coughlin turned violently against Roosevelt, and pushed forward William Lemke as a third party Presidential candidate. (See, Charles J. Tull, Father Coughlin and the New Deal, Syracuse, 1965, pp. 93, 102-5).

About one-third of the American people "listened regularly" to the priest's broadcasts in 1936, and his National Union for Social Justice, which claimed several million adherents, probably actually had as many as one million members. Furthermore, much of Coughlin's following was found in those states where the anti-chain movement had never put down very healthy roots. There were 8,945 units of the National Union in January, 1936 in New York alone, and New England and the industrial areas of the Midwest were other Coughlin strongholds. In Coughlin, Schulte saw the means to spread the anti-chain message to the whole American people.¹⁷

Coughlin had never previously committed himself on the chain store issue, despite many impassioned appeals from independent merchants that he should.¹⁸ Perhaps the cautious priest had feared to become identified with any movement that might be seen as likely to raise the price of food to the poor. Presumably the dramatic anti-chain triumphs of 1935 had shown him that the independent merchants were now a force to be harnessed.¹⁹ Coughlin's address to the convention of Independence, Inc. itself evoked some favourable comment among his sympathisers and his newly-founded newspaper, Social Justice, which first appeared on March 13, 1936, then

17. Gary T. Marx, The Social Basis of the Support of a Depression Era Extremist: Father Coughlin (unpublished M.A. thesis, Univ. of California, Berkeley, 1962), p. 57; David H. Bennett, Demagogues in the Depression: American Radicals and the Union Party, 1932-6, New Brunswick, N.J., 1969, pp. 71-2; New York Times, January 6, 1936.

18. But he had made occasional critical references to the chains, which had troubled John Logan. See Patman Cttee. Hearings, vol. II, pp. 46-47.

19. Unfortunately, none of Coughlin's biographers has mentioned his anti-chain connection.

followed up with anti-chain cartoons and features.²⁰ But despite this support, it cannot be said that Coughlin threw all his energies into the Congressional battle for Robinson-Patman. His current obsession was the Frazier-Lemke bill to refinance farm mortgages. Had the priest identified more strongly with the Robinson-Patman bill instead, he might not have experienced that catastrophic disillusion with Congress and the administration which resulted from the defeat of the Frazier-Lemke bill, and he would not have been able to drag his followers into the third party fiasco of the summer of 1936 on the pretext that the existing state of affairs on Capitol Hill and in the White House was ruinous to the common man. President Roosevelt signed the Robinson-Patman bill into law on June 19, the very day on which Coughlin announced to a nationwide radio audience that he was backing William Lemke as his third party candidate for the Presidency. The priest had pledged his National Union to back the Robinson-Patman bill and had declared its solidarity with the independent merchants; yet no recognition was given by his newspaper to Roosevelt's signing of the bill or the fact that, on this issue, Congress had indeed sided with the "common man".²¹

20. Social Justice, March 27, April 17, 1936. The Pittsburgh Catholic commented on Coughlin's broadcast that "...it will probably never be known how extensive was the harm done when the chain stores taught the public to disregard neighborliness, even friendship, to save an apparent few pennies ...Who shall say how much of our present social and economic disorder can be traced to this victory of ruthless greed over the decent instincts, the common sense, the native shrewdness of the American people?...Social justice and chain ethics cannot be reconciled". (Pittsburgh Catholic, March 5, 1936). A Jesuit priest in Ohio was inspired to send the issue of The Interstate Merchant containing Father Coughlin's speech to Hilaire Belloc, also recommending to Schulte that he read Belloc's book The Servile State.

21. Coughlin told his followers (Social Justice, May 29, 1936) that "With the defeat of the Frazier-Lemke bill the last straw has fallen upon our weakened backs. The last hope for financial reform under the New Deal has vanished". He claimed that those Congressmen who had voted for the bill had been left "in the wilderness". The third party bid destroyed the priest's relationship with Schulte and Patman, both of whom were strongly pro-Roosevelt, thus abruptly ending the prospect of an exciting triple alliance. Schulte's newspaper did not, in fact, so much as mention the Lemke candidacy.

There was much talk in the early months of 1936 that the future of American democracy was in the hands of just such "little fellows" as the independent merchants. Extreme new doctrines of discontent flourished, their exponents seeking to lure the "little fellows" away from the old Democracy and Republicanism. Even the communist New Masses was solicitous for the fate of the independent small storekeepers, "shoved ruthlessly to the wall by ... the alarming growth of chain stores in every field". The New Masses called on the storekeepers to abandon their "exceptionalist illusions" and to unite in a "massive People's Front", warning that the "petty-bourgeois groups are caught between the anvil of reaction and the hammer of revolution. Either way they are confronted by one supreme challenge: the challenge to organize ... The middle classes cannot organize independently for a "third world". Eventually, they must throw their strength and allegiance on one or other side of the balance".²² This was not just the view from Moscow. Many Congressmen worried about the boarded-up stores in their home districts and wondered what might happen if they did not act to cement the social order upon which the nation's political institutions had been erected. Congressman John Martin of Colorado, a strong supporter of the Patman bill, reminded the House of "the model town of Pullman, built and owned by one man. It had everything but liberty. It resulted in an explosion which shook the country for a season. There is a question how much interest a man has in a community in which he owns nothing..."²³ Hatton Summers, a Texas Democrat who chaired the House Judiciary Committee's hearings on the Patman bill, sombrely observed that the bill

22. New Masses, February 11, 1936.

23. Congressional Record, vol. 80, p. 8132.

"in my humble opinion, is in the interest of private property. In days gone by private property was secure behind the line of defense held by smaller men in business and industry. Whenever there was a red agitation, these little fellows gathered about them their schoolmates, their friends, and their kin folk established the line of defense...But under this drift the numbers of those defenders of private property is continuing to be reduced...Human beings do not fight for a boarding house as they fight for their firesides...We have been going along here dreaming that conditions which obtain in other sections of the world and in other ages of the world have by some mysterious sort of process been excluded from us. That is a foolish dream. It may prove to be a fatal dream". 24

When compared to such wild and disruptive ideas as the Share-the-Wealth scheme of the followers of the late Huey Long or the Townsend "revolving money" pensions plan, the Robinson-Patman bill could seem a very modest sort of proposal. There was something reassuringly traditional about the idea that the calamities of the time might be met through an amendment to the antitrust laws. Whatever might be said about the Robinson-Patman bill, it had no taint of alien doctrine. Even those who had bitterly attacked the NRA as the road to dictatorship could not so convincingly raise this complaint against the bill, for although its provisions were to some extent modelled on the NRA grocery codes, the enforcement of the act was not left to theory-testing brain trusters but was placed in the hands of private litigants and the FTC, subject to the courts. What is more, Congress itself was saying exactly what should go into this new "code", not some uncontrolled, Presidentially-appointed code authority. The western Progressives who had been so critical of the NRA were all very much in favour of this way of acting through alterations in the antitrust laws. Although much was heard from big business to the effect that the FTC would become the new NRA if the bill were enacted, this view was accorded little respect in Congress. Equally, Congressional

24. Ibid., p. 8109.

debate reveals no sense that the legislators in any way thought of the bill's supporters as "Ishmaelites"; on the contrary, they accepted them as the true representatives of the nation's backbone of Main street small businessmen.

The bill's opponents placed their main hopes of salvation in the Senate rather than the House. A poll of Senators in the summer of 1935 suggested that 26 were opposed to the Robinson bill, including most of the leading conservatives; a story in early March, 1936 claimed that only 30 Senators favoured the bill, though a majority were said to be in favour of some sort of legislation.²⁵ However, when the issue was put to the test, the predicted opposition failed to take shape. A number of Senators tried to weaken the bill by amendment or secure special exemptions for certain of their constituents such as automobile manufacturers and extractive industries, but only Warren Austin, a Vermont Republican, could be said to have made a full-scale attack on the bill as a whole from the Senate floor. A highly favourable report from the Senate Judiciary Committee, and the fact that the FTC, acting in response to a Senate resolution, had itself recommended legislation, helped to ease the bill's progress. Even more importantly, Senator Robinson's sponsorship of the measure gave it an aura of respectability and eased many doubts. Several influential conservative Southern Democrats were initially reported as inclined to oppose the bill, but they deferred to the majority leader when the time came to make up their minds.

The biggest threat to the Robinson bill came when its opponents, acting as of one mind, abruptly declared themselves in favour of an

25. Interstate Grocer, August 31, 1935; Business Week, March 7, 1936, p. 9.

alternative bill introduced by Senators Borah of Idaho and Van Nuys of Indiana.²⁶ In part, they were motivated by the consideration that this alternative bill was not, according to general understanding, anything like as restrictive. Taken almost word for word from a recent Canadian statute, it seemed to be riddled with loopholes, even though, being a criminal measure, it contained somewhat alarming references to large fines and jail sentences for violators. In particular, while it prohibited a seller from granting different prices to different purchasers of like quantities, it did not require a "due allowance" limitation to be placed on differentials extended in respect of differing quantities. It also lacked a brokerage clause, any type of quantity limit for maximum discounts, or provision for the FTC to assist in its enforcement. Only in its prohibition against the making of sales at "unreasonably low prices" to destroy competition or eliminate a competitor did it propose anything of substance which was not found in the Robinson-Patman bill, and it was in any case the custom of chain store men to deny strenuously that they ever engaged in such competitor-destroying price cutting.

The principal reason for the tide of support for the Borah-Van Nuys bill was, however, not this weakness of its provisions, but the opportunity it provided to create political confusion and to try to hold up the Robinson bill's progress. There was always the possibility that if action could be deferred for the session, changing political and economic conditions might prevent any bill being enacted at all. With this optimistic thought in mind, at Senate hearings in late March nearly all those who had previously been active in opposition to the Robinson-Patman

26. S. 4171, 74th Cong., 2nd Sess., Introduced February 24, 1936. This bill was never offered in the House.

bill, including the officers of the Limited Price Variety Stores' Association, the Mail Order Association, and all the organisations represented on the National Food and Grocery Conference Committee, except the NARG, announced their support for the Borah-Van Nuys alternative. Only the NRDGA, whose counsel Irving Fox could not bring himself to express approval for a bill which imposed criminal penalties on the perpetrators of price discrimination, remained incorrigibly opposed to any legislation.²⁷ Representatives of the chain store interests eagerly portrayed the Borah-Van Nuys bill as being "legislation in keeping with the system on which we have built", and flattered Borah and Van Nuys for their moderation and intelligence.²⁸

This ploy fell flat, because Borah and Van Nuys were unwilling to assist it. At the hearings, Borah revealed himself as increasingly unhappy at every plaudit which came his way from the chain store men; he had offered the bill in good faith, sincerely believing it to be just as valuable to the small independents as the Robinson bill, not least because it excluded the discretionary element vested in the FTC by the Robinson bill. Borah had no confidence in the FTC's willingness or capacity to enforce an anti-discrimination statute, and he wanted the whole subject brought within the provisions of the criminal law. Anxious that his bill should not be used as a chain store stalking-horse, Borah subsequently readily agreed, as did Van Nuys, to a suggestion by Senator Robinson that it could be added to the Robinson bill as an amendment. Borah agreed that there would be no "incongruity" in tacking his criminal bill onto

27. Fox observed sarcastically that "The Emperor Diocletian, in about 300 B.C. (sic) issued a proclamation against price discrimination, but he knew a way to make the punishment fit the crime - any violator was promptly executed - but we all know what happened to Rome". (SJC Hearings, p. 61).

28. SJC, Hearings, p. 22.

the civil measure, because "there are certain practices so obviously improper and unjust that they ought to be prohibited by specific provision of law, and that indulging in them ought to constitute a crime. There are things like the granting of quantity discounts which are difficult to cover by a specific provision of law and make the violation punishable..."²⁹

On this theory, the Senate passed a garbled version of the Robinson bill, laden down with some incongruous special interest amendments and the Borah-Van Nuys bill, in the hope that the difficulties would be tidied up by Conference with the House. The Conference Committee ultimately, as must have been expected, got rid of the special interest amendments, but kept in the Borah-Van Nuys amendment, apparently on the principle that it could do no harm to the rest of the bill, and might do some good in its own right, if only through the deterrent effect of criminal prosecutions.³⁰

The Robinson-Patman law incorporated, unaltered, the text of the Borah-Van Nuys bill. Thus the only consequence of the major ploy to sink the Robinson bill was that its opponents were obliged to accept two anti-discrimination laws, fused together, where there might otherwise have been only one.

The Senate gave a rather casual consideration to the Robinson-Patman bill. In contrast, and contrary to expectations, the House gave it a rather more critical scrutiny, passing its version of the bill (which was rather close to the original bill) some weeks later and after more debate. The bill was steered by an 85 man caucus, with John A. Martin of Colorado as secretary and Patman himself acting as chairman. Although well organised, and representative of both parties, the caucus demonstrated a

29. Congressional Record, vol. 80, pp. 6276-7, 6284, 6346-9.

30. H.R. Rept. No. 2951, 74th Cong., 2nd Sess., p. 8.

pronounced geographical imbalance, only five of its members coming from the heavily populated Northeastern states.³¹ Active opposition showed a similar geographical imbalance, most of it coming from three New York Democrats, a fact of which the bill's supporters did not hesitate to make use when suggesting that Wall street interests might be prompting their opponents. Emanuel Celler, the leader of this opposition, kept up a continuous attack on the bill, describing it as an attempt to revive the worst of the NRA price-fixing without any compensatory protection for labour or consumers and as likely to create "derangement of business" at a time when the country was just beginning to recover from depression. He forecast that the attempt to enforce the unenforceable - the Sears, Roebuck catalogue alone, he noted, contained 48,000 items, the costs of manufacture, sale and delivery for which would have to be laboriously investigated - would mean that "informers would abound everywhere" and that "thousands of experts" would have to be taken on by the FTC, which would degenerate into a "tyrant over industry, a price-fixing tyranny". Celler maintained that the bill was nothing but an attempt to "make equals of unequals" by preserving inefficiency and throttling competition.³²

Many of the points made by Celler were worthy of consideration. It was not, however, the content of his arguments but the contrast with his past record which provoked the most trade comment. In 1932, Celler had introduced the first chain tax bill to come before the House, and since then had represented the National Association of Retail Meat Dealers as their attorney in drawing up the NRA codes which he now so vigorously condemned. For the time being, Celler was able to protect himself against

31. Congressional Record, vol. 80, p. 5714.

32. Ibid., pp. 5976-8, 6364-7, 8107-9, 8116-21; H.R. Rept. No. 2287, 74th Cong., 2nd Sess., Part II. (Minority Report).

trade criticism with his record, and indeed argued that his basic attitude towards the chains had not changed.³³ In fact, his assaults on Robinson-Patman marked a watershed. Henceforth, Celler would be the most active Congressional opponent of the independents' programme, making perhaps the most emphatic about-face of any major figure connected with the anti-chain movement.

An apparent lack of consistency did not help Celler's case, and neither did his lack of any obvious constituency. The Congressman claimed to represent the dominant viewpoint of economists, and that he did. But economists controlled few votes and their corporate record over the past decade had been so lamentable that many Congressmen were disinclined to take the slightest notice of what they had to say. For this reason, Celler made his main appeal in the guise of a protector of the farmers, a much more influential section of society. He pointed to the range of objections to the bill made by a group of six big farm organisations, including the American Farm Bureau Federation, the National Grange and the National Cooperative Council. His advice was that "If you gentlemen from the farming communities want to disregard the emphatic protests leveled against this bill by those important organizations, you are welcome to do so. You may take your political futures in your hands by doing so; but I warn you, gentlemen".³⁴

Celler's warnings made little impression on the farm state Congressmen. Not one of them joined the New Yorkers in their attacks on the bill, and many of them were among its most energetic supporters. Congressmen were, nonetheless, sufficiently alert to the farmers' wishes to allow them to exert some influence over the final form of the bill.

33. Butchers' Advocate, April 15, 1936 p. 18; Congressional Record, vol. 80, p. 5977.

34. Congressional Record, vol. 80, pp. 8107, 8116-9.

Farm protest was principally responsible for the bill's managers striking out an anti-basing point provision which had been inserted into the House version of the bill by the Judiciary Committee.³⁵ The loss of this provision was not a significant setback to the bill's sponsors, many of whom, including Teegarden and Patman, thought the provision an undesirable or unnecessary complication, but the same could not be said of the elimination of the classification clause. While some retailer groups (notably the NRHA) had voiced their disquiet about the possible implications of the classification clause, it was the hostility of the farm cooperatives which finally induced the bill's managers to strike it out. Although the bill's protagonists in the House, including Patman, seemed none too distressed at the loss of the clause, it clearly reduced the potential usefulness of the bill to the wholesalers.³⁶ As well as forcing these basic changes, the farmers influenced the managers to make a number of "interpretations" of various provisions of the bill designed to reassure them, and to influence future judicial construction of obscure passages of the statute.³⁷ Beyond these concessions the managers would not go. Patman maintained that the principal objections of direct concern to the farmers had been met by the elimination of the anti-basing point and classification

35. The anti-basing point provision would have prevented manufacturers from absorbing or averaging out freight costs in such a way as to sell at a uniform price to all buyers regardless of location. Teegarden strongly opposed its inclusion by the House Judiciary Committee (it never appeared in the Senate bill) as an irrelevance to the purpose of the bill, which was to curb price discrimination in the same markets. Although some of the bill's supporters would have liked it kept in, most agreed with Patman that the provision "is not directly related to what we are trying to do...so it was all right to cut that out". (Congressional Record, vol. 80, p. 8113). Basing point systems had always been considered legal under Section 2, on the ground that there was no relationship of competition between buyers in different markets.

36. H.R. Rept. No. 2287, Pt. II, pp. 25-26; Congressional Record, vol. 80, pp. 8113-4, 8122-3.

37. Most of these interpretations boiled down to reassurances that the farmers would be able to make price changes to dispose of perishable goods and would be able to vary their prices as between different cities and sections. (Congressional Record, vol. 80, pp. 8114, 8229-31).

clauses, or had arisen from a misunderstanding of the remaining provisions, a theme heard also from other of the bill's supporters. Other suggestions were that the farm groups had been "unduly aroused and promoted to a state of excitement" by other, less public, opponents of the bill, and that the farm leaders were out of touch with sentiment back home. Farm state Congressmen felt that they knew best on this particular issue. As Jack Nichols of Oklahoma advised the three New Yorkers, "Listen boys, let us worry about our farmers. We think we know what is good for them. We live there with them. We have grown up with them and if they are not healthy we are not healthy".³⁸ These Congressmen seemed content to work on the time-honoured assumption that what was bad for Wall street must be good for the farmers and that any strengthening of the antitrust laws was all to the good of the South, the West and the common people generally. They were willing to modify the bill insofar as it specifically endangered the interests of the farmers as cooperative sellers and buyers, but they did not recognise that the farmers might also have a legitimate general grievance as private consumers. It was a well-worn cliché of antitrust oratory that if big business did not actually charge high prices at the present time it was only because it was trying to drive out its competitors, and that particular argument was reiterated constantly. As Patman put it,

"because a corporate chain is bribing or baiting their customers with real low prices while their competitors are being destroyed does not mean that the consumers will continue to get those prices after competition is destroyed; it means that the sky will be the limit on prices...It just happens that the independent merchants are victim No. 1. Farmers and wage earners will be victim No. 2, and the consumers of the country will be victim No. 3".

38. Congressional Record, vol. 80, pp. 8108, 8110, 8113, 8124, 8127, 8135-6. In January, 1936, the annual convention of the National Cooperative Council "unanimously and unequivocally endorsed the Robinson-Patman bill", but its leaders subsequently reversed the Council's position, principally because of the classification and anti-basing point provisions. The Council nonetheless still wanted a ban on the payment of dummy brokerage and for the FTC to have the power to fix maximum discounts. (HJC, Hearings, p.383; SJC, Hearings, pp. 17-19).

Patman's belief was that there was such a thing as a "fair price" which would give everyone a chance; in previous years something had been done to help the farmers, and now it was the turn of the independent merchants.³⁹

While the bill's supporters in the House did from time to time make statements that its enactment would actually lead to lower prices, in truth most of them seemed not to care very much whether price rises occurred or not. After several years of protectionist measures on behalf of farmers, manufacturers, workers and the unemployed, and with inflationist sentiment still strong, the thought that the bill might lead to price rises in a few instances, or take some of the "rugged individualism" out of buying methods, was scarcely such as to inhibit the average Congressman. Patman himself, although capable of claiming that the bill would save consumers "billions" of dollars, more commonly defended it in terms of his frankly inflationary "fair price" doctrine. As he explained to the House,

"The people of America today owe \$250,000,000,000. How are they going to pay these debts?...If you reduce wages 50 percent and reduce prices 50 percent you double the debt burden...the only way that America will ever recover is by good wages and good prices, the lowest possible price to the consumer, consistent with a living wage to the farmer and the wage earner, together with a fair cost for distribution. Any other price is destructive and will not build up this country...the bill...enforces the Golden Rule in business. It is the adoption of the policy of live and let live". 40

The defeat of the Frazier-Lemke farm mortgage bill, by the comfortable margin of 235 votes to 142, in the House on May 13 was widely hailed as a "big victory for conservative economics", and as a repudiation of Father Coughlin and a sign that the inflationist sentiment which had dominated

39. Congressional Record, vol. 80, p. 8115.

40. Ibid., pp. 7660, 8114.

in Congress since 1932 was on the wane.⁴¹ The prediction of O.M. Kile, the Washington representative of the Mail Order Association, in February, 1936 that "...we have reached the climax on public hysteria. I think the inflation situation is just about at a climax and that it will be the turning point on all these problems", was half right.⁴² In 1936 the "public hysteria" of the mid-thirties did indeed reach its climax and burn itself out. However, if Patman and those of his persuasion were no longer strong enough to secure approval for a huge flood of paper money to help the farmers and prime the pump some more, that weakening could not save the chains from the Robinson-Patman bill. Its supposed inflationary character was less certain and less blatant than that of the Frazier-Lemke bill. What is more, its mild protectionism was designed to assist a different section of the population, a section which had, unlike the farmers, been rather neglected in the New Deal programmes. The core of active support for the Frazier-Lemke and Robinson-Patman bills came from Congressmen representing districts west of the Mississippi, with nearly two-thirds (56) of the 85 man Patman bill caucus, including Patman, voting for Frazier-Lemke. However, whereas Congressmen from Eastern and industrial states voted very heavily against the Frazier-Lemke bill, they were quite prepared to cast their votes in favour of Robinson-Patman. Only 16 Congressmen voted against the latter bill. Unlike Frazier-Lemke, it could not be seen as an attempt to hand out a special privilege to a section of the population concentrated in the South and West at the expense of the industrial states.

41. New York Times, May 17, 1936. Congressional Record, vol. 80, p.7229; The Frazier-Lemke bill provided for the Federal government to issue \$36b of paper money in order to purchase all outstanding farm mortgages, with the farmers to liquidate them gradually on very easy terms.

42. HJC, Hearings, p. 389.

Most of those who led the campaign in Congress on behalf of the Robinson-Patman bill also supported the Patman "death sentence" chain tax bill introduced in 1938. The trade organisations active in backing the two bills were also the same. In many ways, the campaign for the Robinson-Patman bill may be viewed as a dress rehearsal for the later "death sentence" bill, and had the latter bill been offered instead in 1936 it would no doubt have gathered much the same active following as got behind Robinson-Patman. There is every reason to suppose that the "death sentence" bill would have gone much further, had it been introduced in the exceptionally favourable circumstances of 1935 or 1936, than it ultimately did. That is not to say, however, that a "death sentence", or any other chain tax bill, could have been pushed through Congress in 1935-6. Although generally discussed as an anti-chain store bill, the Robinson-Patman measure differed in some important respects from a "death sentence", or even a more modest, chain tax bill. A few Congressmen explicitly argued, as did Dirksen of Illinois, that the anti-chain tag was "unfortunate" because the chain store "is, after all, intrinsically a legitimate institution...I believe I can go along with this bill and still not subscribe to the idea that this is an anti-chain-store bill, because I believe that is a wrong approach". Dirksen believed the bill would encourage the independents by giving them some legitimate protection, but he hoped that that encouragement would be to "shake off the defeatist philosophy and get into the business battle with renewed vigor and vim" rather than to demand inequitable curbs on their competitors.⁴³ The sponsors of the bill repeatedly emphasised, somewhat disingenuously, that they were seeking to do no more than to bring up to date, and breathe life into, a piece of legislation which had been on the statute books for

43. Congressional Record, vol. 80, pp. 8133-4.

more than twenty years. As long as the chains played fair, they suggested, they would have no problems under the act, and all businessmen, not just the chains, were restrained by it. On this basis, many Congressmen who would not have dreamed of supporting anything so nakedly anti-chain as a chain tax bill were quite willing to accept the advisability of curbing the abuse of buying power. They were able to make the distinction between the Robinson-Patman bill and a chain tax bill which was the distinction at the heart of all antitrust legislation: that it is the exercise of the power which is the inevitable attribute of size, not "mere size" itself, which is the offence.

viii. The Robinson-Patman Law and its Enforcement

The Robinson-Patman law incorporated, in rewritten but basically unaltered form, the brokerage and advertising allowance clauses which had been at the heart of the original bill drawn up by H.B. Teegarden. The only modification which carried any potential dangers, from the point of view of the bill's supporters, was the inclusion in the brokerage clause of a somewhat awkward expression "except for services rendered", although the Congressional intent behind this was only to safeguard the position of the bona fide independent food broker, and not to provide a buyer with any opportunity to justify his brokerage receipts in terms of cost savings afforded to the seller.¹

Much more changed was the general prohibition against price discrimination, what had been the Section 2(a) of the original bill. This was recast and heavily revised. The central "only due allowance" formula

1. H.R. Rept. No. 2287 pp. 14-15; H.R. Rept. No. 2951, p.7. For the text of law, see Appendix, pp. 457-9.

was left intact, but so many contradictory statements were made in the course of debate and in Congressional reports as to just how this formula should be applied to specific business circumstances that it was rather put at the mercy of the FTC and the courts. As well as the "only due allowance" formula, the new Section 2(a) empowered the FTC to "fix and establish quantity limits...as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce..."

The principle upon which this quantity limit was adopted was that although a "blanket limitation" such as the carload lot idea favoured by Patman was "at present unwarranted", the public would be "but paying a willing price for its freedom from monopoly control" in forbidding discounts available only to a few buyers of "overshadowing size". The great weakness of the provision - just how great a weakness it might prove was not suspected by the law's sponsors - was the element of discretion vested in the FTC.²

The introduction of any form of quantity limit represented a tightening of the original bill. However, in two important ways, the general prohibition against price discrimination had some of its teeth drawn. In the first place, a requirement was inserted that there had to be an injury to competition or a competitor for a discrimination to be unlawful. The language adopted very carefully avoided the pitfall of old Section 2, which had required the showing of an injury to competition in general, providing for the much less rigorous test of an injury to an individual customer - an entirely new feature in antitrust law. The idea behind this new, much broader test, was to catch all discriminations of

2. H.R. Rept. No. 2951, p. 6; S. Rept. No. 1502, p. 6.

economic significance while exempting the purely trivial examples of price discrimination inevitable in the normal course of business which, theoretically, would have been made illegal by the original Robinson-Patman bill.³ No opponent of the chain stores could have reasonably objected to this purpose, but the fact remained that any qualification to a general principle in this tricky area of law gave opportunities for clever lawyers to pick holes and it also introduced an element of uncertainty and difficulty into the task of making a case which inevitably reduced the enthusiasm of the FTC and private litigants.

The second example of tooth-drawing was the inclusion of a form of words reminiscent of the old Section 2 proviso allowing price discrimination made "in good faith to meet competition". To Patman, the old proviso was a "weasel phrase" of the sort which had always enabled the Supreme Court to "read around" the antitrust laws; likewise to Senator Logan, it had been the "chief defect" of the old Section 2. The inclusion of anything resembling it was extremely distasteful to the bill's sponsors.⁴ To the lawyers of the House and Senate Judiciary committees, however, it seemed essential to have some sort of proviso which would protect the individual who found himself the victim of an unscrupulous attack by a competitor and wished to retaliate by cutting his own prices. After a conflict between the House and Senate versions of the bill developed, the Conference Committee ultimately hit upon the form of words found in the Act, which, they hoped, would protect such victims and yet not provide an all-purpose escape hole for business to evade the Act. To emphasize this hope, the Conferees segregated the new "good faith" proviso from the other provisos, putting it in 2 (b) where it followed on from a requirement placing the

3. S. Rept. No. 1502, p. 5.

4. Congressional Record, vol. 80, pp. 6281, 8231; Interstate Merchant, March 21, 1936.

burden of proof upon the person charged to rebut a prima facie case made against him. As Rep. Utterback explained, in presenting the Conference Committee report to the House,

" This does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural...If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product". 5

Patman and mystified independents accepted this explanation of the clause, deferring to the eminent lawyers of the Conference. The simple question which it skirted was whether or not the plea of having made a discrimination "in good faith to meet an equally low price of a competitor" was or was not a defence. If it was, then Utterback's tortuous construction was meaningless; if it was not, then its introduction into evidence could serve no useful purpose to the person charged. Although the question took fifteen years to reach the U.S. Supreme Court, it was eventually answered with a decision that meeting a competitor's price in good faith was indeed a complete defence for a discrimination that would otherwise be violative of 2 (a).⁶ While numerous awkward problems remained for the businessman - including the construction of the term "in good faith" and the distinction between meeting and beating the price of a competitor - the effect of the Supreme Court's ruling was little short of a reinstatement of the old "good faith to meet competition" proviso. The confused form of words allowed to creep into the Robinson-Patman Act on the "good faith" question was just one of the many hairline cracks in the legislation, disregarded or noticed hurriedly and then passed over amid the press of events in

5. H.R. Rept. No. 2951, p. 7; Congressional Record, vol. 80, p. 9418.

6. Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

1936, which eventually developed into enormous gaping holes which threatened to bring down the entire structure.⁷

A final difficulty in the general prohibition of price discrimination concerned the status of functional differentials. Reasonable classifications for the making of trade differentials had been permitted by the courts under the old Section 2. Nothing in the amended Section 2 necessarily ended that permission. Nevertheless, the very fact that the Robinson-Patman bill had originally carried a classification clause and this had been lost during passage, did raise a question about the status of such differentials. Wholesalers argued that trade differentials were not in jeopardy because they did not "tend to create a monopoly" or "injure, destroy or prevent competition" as wholesalers competed with each other, not with retailers. While this was the logic of the Mennen decision, it was not always an economic fact, and the reduction of the old requirement of a general effect on competition to an injury to a competitor made a judicial reversal of the Mennen case possible. The real safety net for trade differentials was that Congress had clearly not intended, in getting rid of the classification clause, to abolish all trade differentials, but only to make sure that the bill did not become a weapon to deny the extension of such differentials to certain weaker customers, notably the farmer cooperative buying groups. The clause had been chopped out of the bill by its managers at the request of these groups without adequate thought as to what other interpretation of its elimination might be made by an artificial construction of the legislative history.⁸ Fortunately for the wholesalers, no general attack developed on trade differentials, manufacturers being left free to classify their

7. The proviso naturally made it immensely difficult to deal with market-wide discriminatory practices, since each seller could protect himself by pointing to the discriminatory prices of his competitors. See, Harvard Law Rev., vol. 90 (1977), pp. 1476-99, "Meeting Competition Under the Robinson-Patman Act".

8. New York Times, June 26, 1936; Harvard Law Review, vol. 50 (1936), pp. 112-113.

customers, as they had always done in the past, according to their estimate of their functional capacities. Insofar as conventional trade differentials were based, albeit loosely, on the notion of making an allowance for the performance of the necessary distributive functions of breaking bulk and contacting and supplying retailers, such differentials were not inconsistent with the broad thrust of Section 2. Chain store companies had, of course, little reason to protest about the practice, as long as they received all the functional discounts which their own absorption of functions had earned. Nevertheless, wholesalers were put under rather more pressure than hitherto to justify their trade differentials in terms of real cost savings to the seller, when compared with his costs of selling direct to retailers, and the position of those cooperative and marginal buyers who had sometimes been obstructed from claiming such discounts was considerably strengthened. Manufacturers still were considered to have the option, however, of refusing point blank to sell to retailers on any terms, and this was a solution much recommended to them by the wholesalers.⁹

The final point of major interest in the new law was Section 2 (f), the so-called "buyer's liability", which made it unlawful "knowingly to induce or receive a discrimination in price which is prohibited by this Section..." The phrase was a legacy of a separate bill, drawn up by Charles Wesley Dunn, the general counsel of the grocery manufacturers' association, and introduced by Senator Copeland. It was willingly accepted by the Robinson-Patman bill's managers for, as Senator Logan explained, "the seller is not the one who is guilty of these practices; it is the buyer. The seller suffers at the hands of the buyer..."¹⁰ Whether the view was taken

9. Wright Patman, Complete Guide to the Robinson-Patman Act, Englewood Cliffs, N.J. 1963, pp. 23-30.

10. Congressional Record, vol. 80, p. 3114. 2 (a) also made liable the buyer who "knowingly" received the benefit of an illegal discrimination. The old Section 2 had placed no liability on the recipient, thus giving chains and other big buyers a free hand to press for all they could get.

that chains obtained discriminatory prices by collusion with, or by coercion of, manufacturers, this provision to make the buyer equally punishable with the seller was clearly a strengthening amendment. The predominant Congressional viewpoint seemed to be that, as Congressman Utterback put it, the provision would help the manufacturer to abide by the law by making it "easier for him to resist the demand for sacrificial price cuts coming from chain buyer customers..."¹¹

11. Congressional Record, vol. 80, p. 9419. The Borah-Van Nuys amendment was also incorporated in the Act as Section 3. The relationship between it and the rest of the Act was extremely ambiguous, but it was generally regarded as a separate statute, with its own prohibitions and penalties, not as an amendment to the Clayton act. Patman, it may be noted, assumed that the Robinson-Patman law would be fully applicable to all discriminatory practices occurring within the borders of one state, at least where interstate chains were concerned, on the ground that they affected interstate commerce. However, to plug any gaps, he recommended the enactment of parallel legislation by the states. In 1937, Idaho, Oregon and Utah passed unfair practice laws incorporating, with appropriate minor adjustments, the provisions of the federal law, but little general movement developed to enact such "state Robinson-Patman" laws. Numerous states put in their unfair practice laws language similar to that of the model California 1935 Unfair Practices Act prohibiting the "secret payment or allowance of rebates, refunds, commissions or unearned discounts...or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition..." As all leading chain store spokesmen consistently denounced "secret rebates" by this time, they obviously could find little to object to in such language. The late 1930's unfair practice laws in fact continued the old antitrust tradition of trying to prevent locality price discrimination (varying prices between different localities in order to drive out competitors) rather than attempting to tackle discriminatory prices at the buying end, which were seen as a federal matter. To the trade, the main purpose of all this state legislation was to enable it to prevent loss leader merchandising, and there was a natural reluctance to attempt to burden the legislation with provisions to which the chains might strenuously object, thus jeopardising the successful implementation of the anti-loss leader features. The states in any case lacked bodies similar to the Federal Trade Commission which could have enforced "state Robinson-Patman" laws. In all, by early 1941, 25 states had anti-price discrimination laws (the majority of them combining sales-below-cost provisions) of which only three were modelled on Robinson-Patman, the rest being directed primarily against locality price discrimination. (See, Grether, Price Control Under Fair Trade Legislation, pp. 403-67; G.J. Feldman, "Legislative Opposition to Chain Stores and its Minimization", Law and Contemporary Problems, vol. 8 (1941) pp. 334-47, at pp. 340-1).

What, then, was the overall character of the new law, and how far was it capable of fulfilling its anti-chain purpose? Nathan Isaacs, Professor of Law in the Harvard Graduate School of Business Administration, argued that it would force consumers to pay toll to the wholesalers who were the modern counterpart of the Medieval forestallers, engrossers and regraters, and that, despite the formal similarity of language with the rest of the Clayton act, "since it stops competition at the level where it is most effective in American business...it amounts to a repeal of the anti-trust policy in a very important part of American business". Likewise, James A. McLaughlin, the Professor of Law in the Harvard Law School, thought that the Act "represents a raid by selfish interests attempting to uphold obsolescent and inefficient methods of distribution against the chief contribution of the current generation toward making the purchasing power of the masses effective. Its proponents align themselves with those short sighted agitators who from time to time have opposed the introduction of labor saving machinery".¹² These basic themes have tended to be repeated endlessly, if less stridently, through the succeeding decades in academic discussion of the law.¹³

12. SJC, Hearings, P.30; E.P. Learned & Nathan Isaacs, "The Robinson-Patman Law: Some Assumptions and Expectations", Harvard Business Review, vol. 15 (1937) pp. 137-55, at p.139; J.A. McLaughlin, "The Courts and the Robinson-Patman Act: Possibilities of Strict Construction", Law & Contemporary Problems, vol. 4 (1937), pp. 410-19, at p.413.

13. See, for example, D.T. Armentano, The Myths of Antitrust, New Rochelle, 1972, pp. 164-97. M.A. Adelman's A&P: A Study in Price-Cost Behavior and Public Policy is much the most interesting elucidation of the theory that the Act enforces a regime which discriminates against the low-cost distributor, because it is based on the actual business operations of one chain store company. For a contrary estimate, J.C. Palamountain, The Politics of Distribution, pp. 228-34, who asserts that "What had begun as an attempt to hobble chains by making it difficult for them to receive anything more than normal retailers' discounts ended as a law which was relatively sound in terms of equity and economic efficiency". This interpretation (followed, for example, by Ellis W. Hawley, in The New Deal and the Problem of Monopoly, pp. 253-4) is difficult to comprehend except on the assumption that the classification clause was the fundamental feature of the original bill, its removal having therefore transformed the character of the bill.

Judgments made about the Robinson-Patman Act in the 1940's, 1950's and later may perhaps tell us more about the prevailing political and economic assumptions of those periods than about the character of the law passed by Congress in 1936. Congress created an instrument in 1936, an instrument which was modified by use, and some of whose purposes were not compatible with the expectations and desires of later periods. Equally, the judgments made by Harvard professors in the mid-1930's may not have been relevant to the actual conditions for which Congress felt impelled to legislate. Democratic bodies do not usually, and cannot be expected to, legislate to bring into being or preserve abstract conditions such as "free competition": they legislate to assist or punish certain identifiable interests within society. Of course, the quantity limit provision, the brokerage clause, even perhaps the "only due allowance" formula, implied some restriction on the working through of the processes of free competition. They were enacted to assist independent distributors rather than to prevent anti-competitive practices. However, this was true of the Sherman, Clayton and Federal Trade Commission acts to no less a degree. Congress acted on those occasions to come to the aid of those who considered themselves to be the victims of the trusts, not because it wished to preserve "competition" per se. Equally, however much the Robinson-Patman law was to prove out of temper with later fashions in economic thinking, it was in line with much else at the time of its enactment. Granted that protective legislation for each major group in society was the order of the day, it is difficult to see why or how Congress could have reasonably denied some protection for hard-pressed independent merchants, especially as for them the problems of depression had been increased by the emergence of the chain stores. To that extent,

the Robinson-Patman law may be seen as a natural product of the New Deal "broker state".¹⁴

At the same time, any judgment based on the simple view that the Act was anti-competitive, a repeal of antitrust policy and a victory for Luddites is clearly a parody of its real nature. Patman, McLaurin and many others of the Act's sponsors were indeed out to wreck the machinery of chain store distribution. But, as they would soon accept, the sledgehammer they had persuaded Congress to throw into the works was a very lightweight one, capable of delivering merely a glancing blow. Their acceptance of that fact was seen two years later, when they came back to Congress asking for more, this time with the chain store "death sentence" bill. The bill Teegarden had drawn up in 1935 was in many ways a fair and balanced measure. In particular, it did not seek to deny the chains "due allowance" for the manufacturer's cost savings, and even the quantity limit idea which worked in subsequently was not out of harmony with the long-standing convention established in a related field by the ICC. In its final shape, the Act did indeed deny the chains the right to exercise their buying power to its full extent, but it also permitted them to enjoy some considerable advantages arising from their size.

Neither can the character of legislation be judged without reference to the degree to which it is capable of enforcement. Several Congressmen in 1936 expressed concern that the big buyers would find a way to evade its provisions, much as business had in the past circumvented large areas of the antitrust laws. A whole section of the Act, the Borah-Van Nuys amendment, was witness to the fear that the FTC would not be capable of

14. Edgar Watkins, the counsel of the National-American Wholesale Grocers' Association, sarcastically suggested that the Act was the New Deal's way of taking care of the lawyers, rather than of wholesalers and retailers. It must be admitted that the lawyers have often proved its main beneficiaries. (Interstate Merchant, June 27, 1936).

breathing life into a civil statute. Inasmuch as the new law was bound to be leaky, it was altogether natural that Congress should have chosen to make it a fairly capacious container at the start. Just how leaky a container it indeed proved to be may be seen from the subsequent record of enforcement. The quantity limit provision, for instance, remained totally unused. Patman had expected the FTC to fix a quantity limit wherever there was a risk of monopoly, and as it was his view that, although not all business was monopolistic, "in the lines of business in which corporate chains are engaged there is already a monopoly in many of the favorite areas in this country", he clearly expected such limits to be used on a wide scale.¹⁵ Instead, the FTC did not issue a quantity limit rule in any industry until 1951, only to then have its rule held arbitrary and invalid by the Court of Appeals for the District of Columbia Circuit after the most protracted litigation.¹⁶ While some notable quantity discounts, calculated to give exceptionally favourable treatment to just one or a few buyers, were suspended because of the Act (including the Goodyear-Sears contract), Congressional intent, never mind Patman's hopes, was never given effect in respect of the quantity limit. Similarly, the criminal provisions of the Borah-Van Nuys amendment went unused. While this might have been expected, in view of the rather uncertain status of the amendment in relationship to the Act as a whole and the unwillingness of the Department of Justice, which alone had the power to enforce the criminal amendment, to interfere in the FTC's step by step application of

15. He also expected the limits to be given low ceilings, such as carload lots. Congressional Record, vol. 80, pp. 7660-1, 8112, 8115.

16. FTC v. B.F. Goodrich Co. 242 Fed. (2nd) 31 (1957). The Commission did not appeal to the Supreme Court.

the Act, it was nonetheless disappointing to independents.¹⁷ In the early days, there was excited talk about the possibility of chain store men being obliged to "cool their heels" in federal penitentiaries, but nothing of this sort occurred. Chain store men in practice faced nothing more frightening than a civil suit for triple damages, at the worst, and as few private litigants appeared in the early years (most victims of discrimination preferring to forward their complaints to the FTC for it to take the risks of action) even that was something of an idle deterrent. Generally speaking, the only consequence for a violator of the Act was a cease and desist order.

This was, indeed, a major weakness of the Act. It forbade buyers to do certain things, but it did not punish them if they failed to obey. A cease and desist order amounted to nothing more than an order to stop a practice which was illegal: that being so, there was little incentive for a buyer to stop that practice unless he was so ordered. No particular excess of immorality or cupidity was needed to motivate chain, or any other buyers, to get round the law.¹⁸ They could persuade themselves that, all estimate of a seller's costs being necessarily speculative, they were not really getting more than "due allowance". They could comfort themselves with the thought that the "evil" practice in which they were engaged was considered a vital part of a competitive economy by many eminent lawyers and economists. They could also reason that, as violation was commonplace, they could achieve nothing by their abstinence from sin but the decline of their company and the loss of their own jobs. Those

17. Not until 1948 did the Department of Justice bring a case involving the Borah-Van Nuys amendment. (Corwin D. Edwards, The Price Discrimination Law, Washington D.C., 1959, p. 682).

18. It naturally influenced the reception of the new law that most of the major legislation pertaining to business in the previous few years had been ruled unconstitutional by the U.S. Supreme Court, a circumstance which encouraged the idea that "politically-motivated" or "unsound" laws were optional and not absolutely binding. This reinforced the tradition that the enforcement of the antitrust laws was a matter for negotiation and tactical manoeuvres rather than a question of black-and-white prohibitions.

from whom they bought naturally had some similar motives to be casual in their interpretation of the law. Congress had acted on the assumption that ogre-like chain store buyers were extorting unfair concessions from manufacturers; that being so, the manufacturer who actually felt it to be to his advantage to cultivate a particular buyer could reason to himself that it was legitimate for him to decline the protection of Congress.

The Act never had a consensus of business opinion behind it, a fact which of itself encouraged evasion. Worse, the enforcement of the law, being necessarily piecemeal and directed against individuals was manifestly arbitrary. A businessman against whom an order was entered looked about him and saw that his competitors were carrying on as before, and he naturally saw no good reason why he should be discriminated against. This problem was seen particularly clearly in relation to the brokerage clause which, as the simplest of the Act's provisions, attracted the most energetic early enforcement by the FTC. Only the phrase "except for services rendered" raised any likely difficulty, for although Congressional intent in respect of this expression had been clear enough, some lawyers felt that the courts might ignore the intent and construe the clause so that a buyer would be able to receive brokerage if he was able to prove that he had rendered some service to the seller. However, in a series of emphatic judgments the courts soon decided that the expression only protected the bona fide broker, not a buyer or his agent, and that the brokerage clause was an absolute prohibition against buyers, directly or indirectly, receiving either brokerage commissions or payments made in lieu of brokerage. Between 1938 and 1940, this clear-cut interpretation was reiterated by no less than five Circuit Courts of Appeal, with the

U.S. Supreme Court also refusing to consider an appeal.¹⁹ And yet, despite this, many buyers were still collecting brokerage years later and making only the thinnest attempts to conceal the fact. This was not because the FTC had lost interest in the brokerage clause: on the contrary, the Commission applied it with great frequency because, being relatively straightforward and firmly established, it was a good "bread-and-butter" provision to "make statistics" in order to show that the Commission was doing its job.²⁰ The problem was that each violator, pleading some subtle difference in his particular case, could drag the Commission through the whole cumbersome process of preliminary investigation, complaint, hearings on the complaint, order to cease and desist and review by Circuit Court of Appeal.²¹ At the end of all this, he faced nothing more frightening than a confirmation of the order to cease and desist.²²

19. Biddle Purchasing Co. v. FTC, 96 Fed. (2nd) 687 (C.C.A., 2nd 1938); Oliver Bros. Inc. v. FTC, 102 Fed. (2nd) 763 (C.C.A., 4th, 1939); Great A & P Tea Co. v. FTC, 106 Fed. (2nd) 667 (C.C.A., 3rd, 1939); Webb-Crawford Co. v. FTC, 109 Fed. (2nd) 268 (C.C.A., 5th, 1940); Quality Bakers of America v. FTC, 114 Fed. (2nd) 393 (C.C.A., 1st, 1940). The U.S. Supreme Court declined to review a brokerage clause case until 1966, when it decided in the sense in which the clause had been interpreted hitherto by the lower courts.

20. Edwards, The Price Discrimination Law, pp. 69-72; Alan Stone, Economic Regulation and the Public Interest: The Federal Trade Commission in Theory and Practice, Ithaca and London, 1977, p. 116.

21. For pointed judicial comment on the way the FTC added to this by its own long-winded and over-elaborate procedures and arguments, see the opinion in Modern Marketing Service Inc. v. FTC, 149 Fed. (2nd) 970 (C.C.A., 7th, 1945). Modern Marketing was the dummy brokerage agency set up by the Red & White voluntary after enactment of the Robinson-Patman law. The IGA, meanwhile, was not finally forbidden to collect brokerage until 1953. (IGA Distributing Co. v. FTC, 203 Fed. (2nd) 941). Obviously, this length delay in enforcement was a great help to the big voluntaries in preparing ways of financing their operations differently. (See, Edwards, The Price Discrimination Law, pp. 123-130).

22. Writing in 1959, Corwin Edwards noted (op.cit. p. 79) that "Comment from attorneys indicates that until recently some clients were unconcerned about orders because they thought there was little chance of a check on their compliance". Adelman (A & P: A Study in Price-Cost Behavior and Public Policy, pp. 182-193) describes the numerous stratagems used by the A & P to get round the brokerage clause and other parts of the Act even after it had had a cease and desist order against it upheld by the Courts.

The difficulties experienced in putting the brokerage clause into effect were as nothing when compared with those caused by the more ambiguous parts of the law. In particular, each case involving the "only due allowance" formula was, quite genuinely, unique, the range of cost savings available from each transaction being peculiar to it. Had business as a whole been willing to accept and adhere to rough guidelines about "only due allowance" effective enforcement of the law against a recalcitrant few might have been possible; but business was not so obliging. The law was conceived amid controversy and condemned by most of those whom it was designed to regulate. As the enforcement of the law evolved, the leading cases were reviewed by economic and legal journals not so much from the standpoint of whether or not the law had been broken as from that of whether or not the law was an ass. Much of the comment on the law came to take the line that it was the privilege, perhaps even the duty, of any rational businessman who favoured efficiency, competition and lower prices, to do his utmost to wriggle his way around its provisions. Thus, although its opponents could never muster sufficient support to secure repeal of the law they did succeed in undermining its moral authority. The pattern became established that the enforcement of the law was influenced primarily not by the extent of its violation but by the general political climate in Washington at the time. In that respect, the record with Robinson-Patman was to prove rather similar to the precedent set in the implementation of the Sherman and Clayton laws. Like them, it has suffered from the argument that it came into being as a product of exceptional political and economic circumstances at the time of its enactment - which of course, it did - and that "times are different now".²³

23. See, Richard A. Posner, The Robinson-Patman Act, Washington D.C., 1973, esp. p. 31.

In so far as the conditions of 1936 have never recurred, it was perhaps inevitable that the Robinson-Patman law would never be enforced in quite the way its sponsors hoped - just as it was inevitable that much of the enforcement would take place in fields unrelated to chain store distribution as the origins of the law as an anti-chain measure were largely forgotten. Independent retailers and wholesalers have continued to support the Robinson-Patman law, but there has never been any repetition of the fervour which brought it into being in 1936. Only by fighting out the battles of 1935 and 1936 again and again could independents have brought Robinson-Patman enforcement into line with their original hopes, or amended it to be more effective, and the fact that in later years they lacked the energy, the desperation or the political opportunity of 1936 itself influenced the decay of the law.

Opponents of the Robinson-Patman bill in 1936 warned that it would allow the FTC to become, in Emanuel Celler's words, a "tyrant over industry". Influenced by the recent experience with the NRA, they feared that the FTC would be transformed from the cautious, conservative and rather unobtrusive body which it had been for most of its history, into a great all-powerful machine for state interference in private business, like the NRA in ambition and reach but with the added strength of knowing that the laws it imposed were constitutional. Actually, the FTC showed no ambition to become the new NRA, even if that had been any longer politically acceptable. It operated more vigorously in the late 1930's than had hitherto been its wont, but it did not seek to dispense the rapid, arbitrary, rough-and-ready justice or injustice meted out by the NRA during the New Deal emergency period. In fact, although the law's supporters were slow to realise it, it was not the FTC or even the courts which progressively took control of the application of the new law, but

the manufacturers. It is not surprising to find that AGMA, which prominently opposed the enactment of the law, quickly changed its tune once it was on the statute books.²⁴ The manufacturer was placed in a better position to fend off demands for extra discounts by claiming that he dared not exceed "only due allowance" and he could remind his overbearing customers that, thanks to the "buyer's liability" clause, it was no longer just the seller who could not find himself in conflict with the law. There were, of course, limits to this: a big buyer still remained a desirable customer, worthy of some consideration, and buyers had their own weapons, including the ultimate sanctions of threatening to take their business elsewhere or to set up as manufacturers in their own right. Nevertheless, the overall tendency of the law was to reinforce the bargaining position of the manufacturer. To a considerable extent, he was free to make more or less than "due allowance" according to his own estimate of what that "due allowance" should be and his own judgment as to the desirability of favouring certain distributors, without his customers knowing for sure exactly what he was doing. With billions of buying transactions going on in business as a whole each year, the FTC could obviously investigate only an infinitesimal number of all the cases of possible price discrimination and was, in effect, at the mercy of the goodwill of those whom it pretended to regulate. Critics have often noted

24. A survey of its members by AGMA soon after enactment found that the larger manufacturers were more inclined to favour the new law than were the smaller. To a small seller, who could not otherwise compel shelf space for his product, the ability to offer a big buyer a startlingly good private deal could be of vital assistance. As a matter of fact, big chains like the A & P were constantly being made such offers, most of which had to be refused because of the difficulty of trying to push a new brand in competition with well-established rivals. In contrast, the big producer of a nationally-advertised brand knew that the chain had to have his product or would find it difficult to substitute for it; for him it was not a question of making a sale, but of a negotiation, within narrow limits, about the terms on which that sale should be made. (Interstate Merchant, December 5, 1936).

the Commission's habit of summarily rejecting quite plausible attributions of manufacturers' cost savings under the "due allowance" formula and have inferred from this that manufacturers were consequently constrained to be very conservative in their estimates of the cost savings provided to them in selling to chain and other large buyers. However, the formal complaints made by the FTC were so few, in relation to the volume of business transactions, that the attitude it took to cost savings in these few cases was more or less of an irrelevance.²⁵ It may well be that manufacturers did often adopt a conservative approach to the "only due allowance" formula, but if so, it was because it suited them not to give more in allowances to the big buyers than could possibly be avoided.

Congress enacted the Robinson-Patman law primarily to help small distributors, but it did so on the assumption that manufacturers were usually coerced into giving excessive discounts by overmighty big buyers. Inasmuch as there was any validity to this belief, the law did work against the big buyers because it strengthened the position of sellers in resisting their demands. However, this belief was relevant to only a small amount of discrimination. Quite apart from any question of sinister collusion - something which Patman often seemed to suspect - manufacturers quite simply had found that many of the discounts and allowances which it was their wont to extend to chain and other buyers served a useful purpose. It was, after all, not manufacturers, but small wholesalers and retailers who had demanded a drastic change in the existing law. Manufacturers effectively adopted a "rule of reason" which was framed in terms of their

25. Edwards states (The Price Discrimination Law, p. 66) that by the end of 1957 the FTC had issued a total of 311 cease and desist orders under the Act. Many of these were in industries and in respect of practices unrelated to chain store distribution.

own self-interest, not that of the small distributors, and the FTC had little choice but to acquiesce in this. The advertising allowance provisions, for example, which the law's sponsors had hoped would virtually end this form of special concession, were commonly applied by manufacturers in the sense of "only due allowance".²⁶ Contracts to provide advertising, display or promotional services became more specific, as the manufacturers naturally desired, thus reducing the abuse of such allowances to make straight price reductions, but manufacturers interpreted proportional availability so as to deny such allowances to some of their customers. Many vital questions, such as the applicability of the law to private brands, where these were generally of "like grade and quality" but distinguished by different labels and consumer acceptability from competing national brands distributed by the same manufacturer, remained in a sort of twilight zone. Even when the courts ruled on a principle, the law often actually took effect only in respect of the individuals immediately involved in the litigation, with the rest of industry remaining unmoved.²⁷

By no means all the weaknesses which gradually appeared in the structure of the Robinson-Patman law can be ascribed to poor draftsmanship by its sponsors or to the haste with which it was passed. No antitrust legislation had ever produced the results predicted or hoped for at the time of enactment. As John Martin of Colorado, the secretary of the Patman bill caucus, expressed it, "The big fellow always gets by...He was only in swaddling clothes when the Sherman antitrust law was enacted...now he 'bestrides this narrow world like a Colossus'. All the antitrust laws

26. Not until 1959 did this practice come to the U.S. Supreme Court, which then ruled that the requirement of "proportionally equal terms" stood independently of any differences in selling costs and did not necessitate a showing of competitive injury. (FTC v. Simplicity Pattern Co., 360 U.S.55).

27. The U.S. Supreme Court did not consider the applicability of the law to private brands of "like grade and quality" until FTC v. Borden Co. 383 U.S. 637 (1966). Even after this, no general attack was made on the extension of lower prices on private brands.

down to now have only succeeded in making bigger if not better trusts. Maybe some day we shall emerge. Maybe now we see only through a glass darkly".²⁸ All legislation in this field tended to be a shot in the dark and many Congressmen made it apparent in 1936 that they realised that their aim might be far from unerring in its accuracy. The only sort of law that could have stripped the chains of their buying advantages altogether would have been one requiring a uniform one-price policy, perhaps with a maximum discount based on the average purchase per order of a small wholesaler, with this backed up by draconian penalties, and with manufacturers prohibited from entering into exclusive arrangements with any purchaser or group of purchasers. Whether such a piece of legislation could ever have been put through Congress is another question, for many legislators would no doubt have concurred with the opinion of Senator Logan, who steered the Robinson bill through the Senate, that "none but the narrowly selfish and grasping would ask for a system of equality that would give every customer the same price regardless of the differing costs of serving them".²⁹ It is doubtful whether Patman saw things quite like that, but he and others of the bill's supporters were to some extent enmeshed in a web of their own spinning. They made much of the argument that the chains were growing fat on unearned rebates and that a formula restricting them to "only due allowance" was required to prevent this abuse. However, the quantity limit idea was so obviously incompatible with this theory, that they were only able to press it with some diffidence. The bill's managers never stood their ground on the quantity limit and said exactly how it was intended to work, and how often it was to be applied. The consequence was that, although it was incorporated into the text of the law, the FTC disregarded it as being incompatible with the general spirit of "only due allowance".

28. Congressional Record, vol. 80, p. 8131.

29. Ibid., vol. 80 p. 6257.

While the Robinson-Patman law was to prove generally ineffective as an anti-chain measure in the long term, many of its weaknesses only became fully apparent over a period of years. In the first months after its enactment many manufacturers, especially in those trades whose maladjustments had prompted the agitation for the bill, ostentatiously tore up contracts for advertising allowances and clamped heavy restrictions on other discounts, often indeed taking the chance for an enthusiastic if short-lived revenge against their more irksome customers. After one year, the FTC confidently reported that "hundreds of business men or their attorneys have called at the Commission's offices and discussed the application of the new law...in some instances, entire industries have, pursuant to such conferences, revised general practices which appeared to be in conflict with the law".³⁰ Although the Act's supporters were well aware that many of the changes were probably only cosmetic and that the fundamental nature of the relationships between buyers and sellers had not been changed, there did seem to be at least some real alteration in business conduct. Quite apart from this informal effect, the early history of the new law in the Courts was almost entirely conducive to optimism. Opinions varied, but the United States Wholesale Grocers' Association, the body which had sponsored the original bill, in 1939 still felt happy enough about the rate at which progress was being made to vote thanks to the FTC for its "unremitting efforts to enforce the several provisions of the Act".³¹ Ironically, much of the criticism from the independent trade in these early years stemmed not from the belief that the law was having no effect on the chains but from the disgusted realisation by wholesalers

30. FTC, Annual Report for 1937, p. 8.

31. Interstate Merchant, April 29, 1939; though contrast the accusation that enforcement had been "half-hearted and cursory in the extreme" in NARD Journal, March 21, 1940.

and retailers that their own discounts were no less affected by its provisions. Voluntary chain sources were particularly scathing in their charges that while the cooperative buying efforts of independents were being curtailed, simply because they were necessarily open and vulnerable, the subterfuges of furtive chain store companies were going unchecked. Such criticisms were not allayed by the unfortunate circumstance that some of the most effective enforcement was directed against brokerage concerns like the Biddle Purchasing Co. which provided a buying service for many thousands of small jobbers. To those who found their own allowances being taken away, the argument that the big chains were being affected even more was not necessarily much of a consolation, especially as there was no proof that this was actually so.³²

In retrospect, the weaknesses of the Robinson-Patman law as an anti-chain measure stand out in sharp relief simply because it proved to be the one substantial legacy of the period of anti-chain ferment. However, to the enemies of the chains in the late 1930's the law's weaknesses seemed of only secondary importance, because for them it was not their final testament but just one preliminary statement of intent. Even while campaigning for the Robinson-Patman bill, Patman was laying plans for a Federal law to divorce manufacturing from retailing as well as egging on

32. Voluntary & Cooperative Groups Magazine, April 1937; "Voice of the Trade", Hardware Retailer, January 1937. Adelman (op.cit. p.225) estimates the A & P's total allowances (headquarters allowances, profits of field brokerage offices and local allowances) fell from \$11.22m in 1935 to \$4.70m in 1937 and \$4.31m in 1938, recovering only to \$7.63m by 1940. However, the immense success of its supermarket opening programme rather served to cancel out any adverse effects from these losses. The widespread withdrawal of allowances in the early years may actually have done more harm to the small retailer cooperative buying groups than to the big chains, dozens of these groups folding up. (Modern Merchant & Grocery World, April 29, 1939). These injuries to the independent sector undoubtedly encouraged a considerable reserve about Patman and his ideas in many quarters and embarrassed even his most earnest supporters.

the state legislatures to pass anti-chain measures, and only a year elapsed between the time of enactment of the Robinson-Patman law and his announcement of a definite intention to confine the chains to purely intrastate operations. Had Congress passed the other legislation which Patman desired, the shortcomings of the Robinson-Patman law when it came to curbing the big chains would no longer have been of relevance, for those chains would have been put out of existence. Where he miscalculated - or, rather, was betrayed by the sands of time - was that the peculiar political circumstances of 1935-6 would never recur. The first great step on the road to the destruction of the chain stores by Congress actually proved to be the last.

PART 5. The Defeat of the Anti-Chain Store Movement, 1936-1940.

i. "The Battle of the Century".

In the years before 1935 the chains won some of their tax battles and lost others; the general trend was against them, but none of their defeats could be seen as decisive and conclusive. The law-making of 1935 brought the chains face to face with an entirely new and grim prospect. Either they would have to reverse the chain tax movement or it would destroy them. The United States Supreme Court's decisions in the West Virginia and Kentucky cases indicated that while some specific forms of anti-chain legislation might yet be held invalid, in general the courts would no longer act to help them. They would have to save themselves.

The California chain tax law of 1935, while far from being the most oppressive of that year's crop of anti-chain statutes, was in some respects the most depressing for chain store men.¹ California had hitherto been a relatively tranquil state, no chain tax bill ever having commanded considerable trade support or been brought out of committee. A scattered band of zealots, such as R.P. Craton, the editor and publisher of The Independent Crusader, W.H. Cameron, shirt manufacturer and author of Our Juggernaut, and Milton Gair, a retail clothier and anti-chain polemicist, had led a vain struggle to stir up the merchants to the heights of passion seen elsewhere. The organized trade in California, traditionally most interested in price maintenance, in which activity it led the nation, had tended to look upon chain tax bills as a waste of time, especially as the legislature was considered well under the thumb of chain store lobbyists. Even at the beginning of the 1935 legislative session, the California

1. Laws of California, 1935, chap. 849. The maximum rate was \$500 on each store in excess of nine.

Retail Grocers' and Merchants' Association, which quickly became the organising force behind the chain tax fight, still had no position for or against chain taxation. The officers were nervous lest the chains found some way to put the voluntary chains, a major element in the association, under any chain tax. Only the exceptionally favourable political conditions that year, with the legislature abnormally receptive to anything to help the "little fellows" against Wall street, and with the rank-and-file of merchants aroused by the example provided by other states following the Supreme Court decision in the West Virginia case, finally led the association to abandon all restraint.²

In Iowa and Florida, where the heaviest taxes of 1935 were imposed, the chains turned to the courts for relief, probably with little real optimism. In California, they had the alternative option of forcing a popular referendum, and this was the course taken. The California statute in any case contained absolutely nothing likely to secure a reversal from the courts, being an orthodox graduated license tax. By September, 1935, the chains had collected sufficient signatures to have the tax submitted to a popular vote, which left more than a year to prepare to defeat it (the tax went on the ballot in the November, 1936 general election as Proposition 22). Safeway, which with 1,336 stores in California was by far the largest chain in the state, assumed the leadership of the chain store side, and all the important chains in each line buried any differences they may have had to coordinate their efforts through the California Chain Stores Association. The Association hired a public relations firm, Lord and Thomas, in the hope of bringing to its campaign that edge of professionalism which the previous amateurish and rather directionless

2. R.P. Craton, A Nation Chained, Los Angeles, Calif. 1936, p. 4; California Retail Grocers' Advocate, February 1, 22, 1935.

efforts made by the chains themselves had always lacked. At last, the chains as a body had agreed to fund the sort of campaign which only a few had previously been willing to admit was necessary. In response, the independent associations in California formed the Anti-Monopoly League in August 1935, and called upon all independents, both in and out of California to render assistance. Although some anti-chain leaders in other states were apprehensive about appearing to become committed to the idea that the California battle was crucial to the future of the whole anti-chain movement, California never having been an anti-chain stronghold, none could deny the importance of the referendum. Small contributions to the Anti-Monopoly League came from trade associations all over the country. Most notably, California's struggle brought the National Association of Retail Grocers to assist a chain tax campaign for the first time, full support being pledged following a tumultuous demonstration from the floor at the June, 1936 convention. The battles of smaller Midwestern or Southern associations could be ignored, but California, the linchpin of the National, could not be denied.³ The previous referenda on chain store taxes, in Portland, Oregon in 1932 and in Colorado in 1934, both of which the chains had lost, were generally regarded as mere skirmishes. The California referendum, in view of the size of the state-only New York and Pennsylvania had more chain stores - and, more importantly, its reputation for setting trends, made it seem likely that a third defeat would open the floodgates for chain taxation elsewhere. No wonder Congressman Patman called it "the battle of the century".⁴

3. California Retail Grocers' Advocate, July 3, 1936.

4. Ibid., January 10, 24, 1936.

The initial fight for the chain tax in the legislature, and then the long drawn-out campaign for popular approval, were considerably influenced by the general political temper of the state in the mid-1930's. The chains faced some peculiar, and awkward, political circumstances in California. The state was, as Lord & Thomas reported, "a stronghold for all sorts of political doctrines based on discontent".⁵ The depression came late to the Golden state, but when it did it unleashed great waves of frenzied agitation, for nowhere did the cruel paradox of "want in the midst of plenty" take on sharper definition. Large sections of the population, especially the expropriated, disillusioned or fearful middle classes, eagerly espoused bizarre creeds which promised an immediate and easy restoration of prosperity. There were more Huey Long "Share Our Wealth" clubs in California than in any state outside the South, but most of her discontented citizens preferred the home-grown faiths.

The Los Angeles-based Utopian Society promised retirement at forty five and a standard of living defined as "opulence for all" in the Land of Utopia, where all America's productive capacity would run at a perpetual full output for the common good. Members of the Society were initiated by witnessing, as "pilgrims", a series of "Cycle Rituals", which illustrated in parable form the mode of transition from capitalism to Utopia; they emerged, as "hermits", with a knowledge of the secret rituals and a duty to convert others. The Utopians expected society to change "by acclamation" once all had witnessed the Cycles, though they were also prepared for takeover by emergency decree of the property of those few greedy owners of productive capacity who failed to see the light.⁶

5. Lebhar, Chain Stores In America, 1963, p. 241.

6. Hanson Hathaway, The Utopians Are Coming, Hollywood, Calif., 1934, esp. pp. 13-14, 24-34; New Republic, "Utopia Incorporated", July 18, 1934 pp. 255-9.

Inspired by rumours that President Roosevelt was himself the "greatest Utopian of them all", and only awaiting the call of his people, as many as 600,000 had joined the Utopian Society by the end of 1934, most of them in Southern California.⁷ More influential still, and entwined with the Utopian Society, was the End Poverty in California movement led by the novelist and social reformer Upton Sinclair. On a platform of setting the unemployed to work in production-for-use "land colonies", or in factories taken over by the state, Sinclair captured the Democratic nomination for Governor in the summer of 1934. Despite the opposition of the Democratic party machinery in both California and Washington and a ruthless red-smear campaign by virtually the entire daily press, Sinclair made a strong showing against the incumbent Republican Governor Frank Merriam in the November elections, receiving twice as many votes as any previous Democratic candidate for Governor of California. And although Sinclair lost, a bloc of 24 Assemblymen were elected to Sacramento on the EPIC ticket, and they, with others of sympathetic persuasion, were able to open the door in the 1935 legislature to much liberal and progressive legislation previously considered politically impossible.⁸

The chains and the independent merchants were inevitably sucked into this turmoil. The philosophy of the Utopian Society was one of technocratic super-efficiency and of a vaguely socialist form of economic control; nevertheless, independents detected in its aspirations and underlying emotion something which was on the side of the "little fellow" and against the oppressive cupidity of capitalistic corporations like the.

7. The Unofficial Observer (John F. Carter) American Messiahs, N.Y. 1935, p. 64; Newton Van Dalsem, History of the Utopian Society of America, Los Angeles, 1942, p. 16.

8. Pacific Historical Review, vol. XXVII, 1958, pp. 127-47, "The Epic Campaign of 1934" by Charles E. Larsen.

chain stores. Several dozen druggists took a page in the Society's newspaper to make a pathetic plea in a long and rambling poem, "The Lament of the Independent Merchant", which called upon the idealism of the Utopians:

" We have no quarrel with the petty, mean,
Tight-fisted persons who are wont to rave
About the weekly dollar that they gain;
It is their right.
But you, who are the generous, the keen,
Outnumber these immensely; you can pave
Our path with healthy business; kill the chain
In all your might! "

The chains were prepared to answer in kind. Big business associations condemned the Utopian Society as a communistic and subversive menace, but Safeway Stores, the chain which had been put together by Wall street bankers in the capitalist heyday just a few years earlier, was prepared to advertise heavily in the Utopian newspaper. "The Story of Safeway", declared one such advertisement, "while it is a story of business, is nevertheless a story of human service...Safeway, in fact, may be likened to a great co-operative movement in which the farmer, the dairyman, the manufacturer and the consumer are common partners".⁹

It was the independents who gained most from the upsurge of these movements, and especially from EPIC. Upton Sinclair was himself inclined to answer questions about the future of the independent merchant in an EPIC California with an assertion that he was in any case doomed to a slow extinction as the profit system underwent a process of remorseless self-abolishment. Sinclair argued that once the cooperative colonies were set up, the small business man "will see it, and he will notice retail stores in the state system and the need for managers and people to work in these stores, and if he wants to come in and take a salary, and have

9. Utopian News, March 18, 1935.

security...all right. Or he can stay outside; it is up to him".¹⁰

Fundamentally, Upton Sinclair was really only interested in the creation of the primitive-socialist commune which could be isolated from the corruptions and decay of capitalist society; his thinking about what would happen in the world outside was loose and incoherent. The EPIC movement could not be contained within the intellectual mould made for it by Sinclair, however. Several hundred thousand Californians responded in 1934 to his message that prosperity could be restored, but they did not thereby all become believers in the socialist commune. On the one hand, as a mass political movement, EPIC needed to appeal to a wide cross-section of the huge Californian middle class. Especially in the run-up to the November, 1934 elections, it made much of the idea that if the unemployed were "off the backs" of the taxpayers (a favourite expression of Epic News), and producing wealth in the land colonies and cooperative factories, then the whole of the state's economy would enjoy the surge of newly-released purchasing power. In the vision of the EPIC future presented on the eve of the elections, the independent merchants had not been extinguished, or turned into cooperative managers, but were enjoying better profits than ever.¹¹ On the other hand, expediency apart, the liberal, populist and progressive sentiments stirred by EPIC were such as made quite natural a disposition both to attack the Wall street chains and to come to the aid of the small merchant. Upton Sinclair may have thought the battle between chains and independents an irrelevance, but thousands who joined EPIC did not. When rumours were circulated that Gray's Dairy

10. Upton Sinclair's Epic News, June 18, 1934.

11. Ibid., October 29, 1934.

Farms, a business described as being "100% Utopian, 100% Epic", was connected with a chain grocery company, the owner angrily advertised that anyone discovered spreading such a dire slander would be "prosecuted to the full extent of the law".¹² Incurably rotten the profit system may have been, but EPIC-ites were evidently believed to consider some parts more rotten than others. Epic News itself carried plentiful advertising by small businesses, but declined to accept the copy of large corporations. At a local level, EPIC clubs often provided an opportunity for customers to band together and arrange with independent merchants to grant them discounts, in return for guaranteed purchases: cooperation of a sort, of course, but not quite that of the socialist commune.¹³ The EPIC Assemblymen "helped wonderfully", in the opinion of one of the bill's most important backers, in securing enactment of the chain tax, and Epic News itself hailed passage as a "victory" for the movement.¹⁴ Quite apart from their direct contribution, the election of the EPIC politicians itself heavily influenced the attitudes of the legislature as a whole, for it showed the other politicians that they would have to accept many things hitherto considered unacceptable if they were to avoid another election like that of November, 1934.

This indirect influence was seen especially in the Senate, where there were only two EPIC legislators. For a time, the Senate Committee on Revenue and Taxation, a body of men of, for the most part, decidedly conservative instincts, seemed set to kill the chain tax bill. Leaders of the independent merchants took advantage of the political climate to try to persuade it otherwise, using a mixture of blandishments and threats. The president of the California Retail Grocers' Association

12. Ibid., December 31, 1934.

13. Ibid., December 24, 1934.

14. Craton, A Nation Chained, p. 6; National Epic News, June 24, 1935.

advised the committee against affording comfort to those who spread doctrines of "chaos and confusion": "It is up to us as good conservative citizens to realize that some thought must be given to an equalization of conditions and opportunities, or I hesitate to think what the ultimate result may be". When prompt action failed to come, his association's journal adopted a more menacing tone. The Assembly, it declared, had proved itself responsive to the "common people", but the Senate was obviously controlled by the corporations: because of this, the independents had "already started their campaign in various parts of the state to clean up this situation once and for all and they may not have the patience to wait until election time to do so. It has brought all independent business together for one stand cementing an alliance that will result in many changes beneficial to the great majority of people in this state".¹⁵ As happened in several other states in 1935, independents maintained a constant presence at the Capitol and eventually, after threats to initiate a referendum petition to impose a truly crippling chain tax, forced the bill through the Senate. The final obstacle faced by the independents was Governor Merriam, who was known to be disposed to veto the bill. Hearings held by Merriam to clarify his mind resulted in "the greatest mass demonstration yet witnessed in these venerable halls" with two thousand people, mostly independents but with a sprinkling of chain store employees opposing the bill, crowding in to the Assembly chamber. Twice during an uproarious hearing Merriam threatened to clear the galleries. Obviously impressed by what he had seen, the Governor duly signed the bill, while reminding the chains of their constitutional right to submit the matter to a referendum.¹⁶

15. California Retail Grocers' Advocate, April 12, May 24, 1935.

16. Los Angeles Times, July 12, 1935; Lebhar, Chain Stores in America, p. 240.

The peak of radical discontent was reached in California in the latter half of 1934. From that point, the people gradually drifted back to "normalcy", leaving only a core of die-hards to keep alive the movements which had once created such a stir. Without doubt, this trend worked to the advantage of the chains during the year-long referendum campaign. The more extravagant the movement, the more rapid was its demise. The Utopian Society disappeared almost without trace in 1936 and EPIC crumbled away, leaving only a rump of devoted advocates of the cooperative commonwealth. No longer appealing or responding to the demands of a mass following, this rump was free to indulge in a more puristic, and more aggressively socialist, interpretation of the meaning of EPIC. The movement was, in a sense, restored by the people to its founder Upton Sinclair and his true ideological disciples. Sheridan Downey, who as Sinclair's running mate in 1934 had actually polled more votes than his leader and was a liberal of more flexible and conventional disposition, declared his support for the Anti-Monopoly League, regarding its struggle as being "for the preservation of democracy and decency in American life".¹⁷ But this was not the view taken by most remaining EPIC leaders. As early as September, 1935, an inflamed editorial in Epic News warned against "entangling alliances" with "plausible gentlemen" representing groups such as "neighborhood grocers' leagues" or "independent oil operators" who offered to make "common cause" against big business. These were simply "little capitalists" and "EPIC is not interested in pulling any particular capitalist's chestnuts out of the fire for him. WE LOATHE THE WHOLE DAMNABLE SYSTEM".¹⁸ In the approach to the referendum, the newspaper

17. California Retail Grocers' Advocate, October 25, 1935.

18. National Epic News, September 23, 1935.

advocated a "No" vote, thus reversing the 1935 position. Reasons cited included the opinion of Norman Thomas, the Socialist Party leader, that chain store taxes were "stupid", and the similar view of the left wing magazine The New Republic; the alleged opposition of the California Retail Grocers' Association to union labour; that prices would rise, and that the "most monopolistic chains" such as filling stations and banks were not included. But the fundamental argument was that further concentration of wealth "would make socialization easier, as there would ultimately be only a few owners in each line of production and distribution of wealth, which could then readily be taken over by the State". A doctrine so contrary to the traditions of American liberalism inevitably drew some protest and, to mollify its critics, Epic News added its belief that it was not really the "little fellow" but the "big wholesalers" who wanted the tax, asserting that only 480 independent merchants had contributed to the Anti-Monopoly League whereas thousands of dollars had poured in from big wholesalers in other states.¹⁹ This was not just a charge made by Epic News. The obvious source of the facts, and some of the arguments, it used was a skilfully produced booklet, The Fifty Thousand Per Cent Chain Store Tax, published by the California Chain Stores Association, the main thrust of which was that the independent retailers were being manipulated as a "popular front" by the "cunning forces back of this tax", the "grasping wholesalers and brokers".²⁰ In earlier years, the chains had often showed an arrogant refusal to accept that the public might be inclined to side with the independent merchants on grounds of sympathy or ideology, even though they patronized chain stores for their

19. National Epic News, October 5, 12, 19, 1936.

20. California Chain Stores Association, Inc. The Fifty Thousand Per Cent Chain Store Tax, Los Angeles, 1936, p.i, 55-58.

low prices. Men like R.W. Lyons and G.M. Lebhar had commonly been close to despair in their efforts to impress on some chain executives that their political troubles were not just the result of the schemings of a few self-seeking politicians currying favour with the independent merchants, but had a solid basis in popular prejudices. By 1936, most chain store men had learned their lesson. Far from attacking the independent merchants who had descended on Sacramento to back the chain tax, the California Chain Stores' Association tried instead to persuade the public that relations between chains and most independents were perfectly satisfactory, and that trouble was caused only by the machinations of various middlemen, especially those who were not even based in California or were themselves "big business".

In terms of votes, the 1936 position of Epic News was probably of little significance. What mattered was that there was no longer a great mass movement, with hundreds of thousands of followers, to be mobilised behind the tax. Had the referendum been taken in November, 1934, the spirit of discontent at the time would almost certainly have resulted in a crushing defeat for the chains, with the EPIC supporters voting for the tax. By 1936, the only movement of real weight in California was that led by Dr. Francis E. Townsend, who advocated \$200 per month pensions for all at 60, these to be paid for by a 2% "transactions tax" on every business transaction. According to the Townsendites, the scheme would be non-inflatory because the pension money, the spending of which was compulsory, would stimulate a colossal economic boom. There were in 1936, the peak year, about 2.2 million members of Townsend clubs, with by far the greatest concentration in California, Townsend's home state, where membership extended well beyond the ranks of the prospective pensioners. Economically

more fantastic than EPIC, the Townsend movement tended to be politically far more conservative, a fact exploited by Governor Merriam, who professed to believe in the plan himself.²¹

Although some independent merchants in California were members of Townsend clubs, owing to pressure from their customers and to a disposition to hope against hope that its "revolving money" economics might work, the Townsend Plan was loaded with danger for them. As Congressman Boileau, Patman and others pointed out, the transactions tax was nothing more than a pyramided sales tax, which would be paid only once by the integrated chain which carried on its own manufacturing and wholesaling functions, but would have to be paid at each stage of the independent wholesaler-retailer system.²² This was a no doubt unanticipated consequence of the transactions tax, and the Townsendites did make some attempt to rectify the anomaly, though there were always so many different versions of the "true" Plan in existence at any one time that it is impossible to say that the problem was ever really solved. The transactions tax was in any case just a giant sales tax, which would have posed stupefying difficulties for the hapless retailer, especially as the fanatical Townsendites were quite convinced that he would not find it necessary to pass it on to his customers, but would be able to absorb it in the manner of a commission paid for the creation of an extra volume of business.²³

21. Richard L. Neuberger and Kelly Loe, An Army of the Aged, Caldwell, Idaho, 1936, p. 62; Abraham Holtzman, The Townsend Movement: A Political Study, N.Y. 1975, p. 49.

22. An Army of the Aged, pp. 70-71, 103.

23. During its first year of existence, until late 1934, the Townsend Plan explicitly called for a federal retail sales tax sufficient to produce \$24 billion for the "prosperity pensions". As total U.S. retail sales were only \$25.7 billion in 1933, the Plan clearly implied a sales tax approaching 100%. Finding themselves in an increasingly uncomfortable position, because they dared not spell out a size of the sales tax to the growing army of converts, the Townsend leadership invented the notorious "transactions tax"

Regardless of their opinion of the economics of the Townsend Plan, chain store men were well aware of the political influence of the Townsendites. The chains in California "displayed pictures of Doctor Townsend and cooperated in many ways with Townsend clubs" in an effort to ingratiate themselves.²⁴ Safeway was by far the biggest advertiser in the Townsend newspaper, which had a huge circulation, and as the referendum drew near the advertising by it and the A & P in the California editions of the Townsend National Weekly took on such proportions that the number of pages had to be increased. (There was, in contrast, little chain advertising at the time in the eastern edition, circulating in states

23. (cont'd). ... to be levied on every business transaction. The new calculation was that a 2% tax on an alleged \$1,200 billion of transactions would produce the \$24 billion needed to pay the \$200 per month pensions, and the theory was that the revitalising effects of the pensions would create new wealth and therefore be non-inflationary. Why, in that case, the pension was not made even bigger and given to everyone, was never explained. Much of the appeal of the transactions tax in fact lay in its pseudo-precision: anything more or less, the Townsendites claimed, would have been futile or disastrous. Appearing before the Senate Finance Committee in 1935, Townsend was forced to admit that the transactions tax would favour the chain stores; following this, a revised version of the bill was introduced in the House which made internal transactions of integrated companies also liable. The provisions of subsequent bills and statements of the Plan varied on this point, but in 1939, appearing before a House Committee, Dr. Townsend "dismissed the middleman and the small businessman as not worth preserving". Congressional supporters of the Townsend Plan, many of whom favoured bills designed to assist independent merchants, were more inclined to see the dangers of the transactions tax than were the Townsend leaders themselves. (See, Holtzman, The Townsend Movement, pp. 38-9, 96-8, 114. Willis Owen Making Money For The Merchant, Chicago, 1937, was the official explanation of the plan for merchants, advocating the tax as a commission on sales).

24. Luther Whiteman and Samuel L. Lewis, Glory Roads: The Psychological State of California, N.Y. 1936, pp. 77, 94. The hard-pressed utilities companies were often said to have worked with the Townsend movement in the Pacific Northwest for a similar reason.

where the chains had no tax problem and Townsends were few and uninfluential). Vendors of patent medicines for the elderly were the only other considerable advertisers in the Townsend newspaper. Although the Townsendite leadership took no open position on the referendum, their silence was itself worth a lot to the chains. Dr. Townsend alone could quite possibly have swung the result of the referendum, for his followers were noted for their blind obedience to "The Founder". Possibly the degree of chain store identification with the movement also convinced some that the chains were thereby "approved".

The basic themes of the chain store campaign were simple: the tax was a scheme dreamed up by grasping middlemen; the consumers would pay it - the slogan was "22 Is A Tax On You!"; chains were fair competitors and in any case "have just about grown to their full stature in relation to independent business". As was by this time a habit, the chains put the price rises that would follow a "Yes" vote at 10%. The handbook published by the Chain Stores' Association asserted that the tax would "positively drive thousands of chain stores out of business", especially small neighborhood food stores. The result would be higher property taxes on other taxpayers, and that outside investors would avoid the state as a bad risk. Every effort was made to counter the favourite anti-Wall street arguments of the Anti-Monopoly League by emphasising the local character of the chains. Managers and clerks were encouraged to intensify their "community integration" work, and statistics were published showing how long employees had lived in the same communities, how many of them owned homes, voted and went to church. A favourite image in chain store advertising was the soulful face of "Grandma" See, an 82 year old widow who, at the age of 65, had begun a candy business, which had since

grown to 30 stores. "Do You Want To Put Me Out Of Business?" pleaded Grandma See in newspaper advertisements. The Anti-Monopoly League, which bitterly resented this pushing forward of the local chains, had ample cause to regret that the tax schedule was such that the maximum license was imposed as early as the tenth store, with the result that no opportunity existed to try to split off the small chains from the large. Virtually every lodge, club, union local and other gathering was reached by the hordes of speakers laid on the Chain Stores Association: one speaker began his day with a Negro janitors' meeting at 4 a.m. Propaganda was also distributed through an elaborate network of "fronts" such as the "Consumers' Protective League", the "Property Owners' Association" and the "Associated Housewives League". With most of the press on their side, the chains were assured of ample publicity for every anti-tax resolution passed by any group of Californian citizens.²⁵

Particular attention was given to the farmers. Traditionally considered good friends of the chains, except for a few populistically inclined malcontents, the farmers had shown an increasing dissatisfaction with them during the past few years of depression. Egged on by commission men selling to the independent trade, some farmers had come to blame the chains - especially their commission houses, such as ACCO - for low farm prices. The November, 1935 convention of the California State Grange voted to endorse "legislation to curb expansion and to regulate existing chain stores in California" on the ground that "mass buying as practiced by chain stores is a menace to the farmer". Frank

25. The Fifty Thousand Per Cent Chain Store Tax, pp. 8-14, 25, 67-8, 73; Printers' Ink, November 19, 1936, "Business Goes To The Polls", The Nation, "How To Swing An Election", December 11, 1937, pp. 638-640; Nation's Business, "The Retail War On Main Street," October 1936, pp. 20-22, 96-8; California Retail Grocers' Advocate, October 9, 1936.

Abernathy, president of the Farmers' Union of San Jose, was a director of the Anti-Monopoly League.²⁶

In the first few months of the referendum campaign, Lord & Thomas interviewed four thousand farmers in "the search for mistakes". Then, in the Spring of 1936, the chains were presented with an opportunity to show their goodwill when California's peach growers were threatened by a glut of their crop. With impressive efficiency and unity (even the A & P, so often uncooperative in its relations with other chains joined in) the nation's grocery chains took up the surplus crop, at a profitable price to the farmers, and sold it off amid a fanfare of advertising. Following this display, John Logan arranged a conference in New York between the executives of chain grocery companies and farm leaders to thrash out their grievances. The meeting was chaired by C.C. Teague, vice-president of the National Cooperative Council, who was also the president of the California Fruit Growers' Exchange, and it was an open secret that the purpose of the meeting was to negotiate a deal which would secure farm support in the California referendum. The result was a "Statement of Policy" in which the chains announced that they would no longer use farm products as loss leaders, a practice which the farmers believed, perhaps wrongly, worked back to force down prices to the producer, and that they would no longer demand brokerage or other special concessions from farmers. The chains also promised to put on further special drives to assist farmers faced by crop surpluses, and in the period before election day Nature provided the chains with the opportunity to assist Californian producers of beef, dried fruits and avocados in this way.²⁷ Intense chain advertising in the state pledged that these

26. California Retail Grocers' Advocate, November 22, December 6, 1935.

27. Lebhar, Chain Stores In America, pp. 247, 320-5; Advertising & Selling, February 11, 1937, "Inside Story of California Chain Tax War", pp. 53-4; Chain Store Age May 1936, "Nation's Chains Unite In Drive To Move Surplus Peach Crop".

special drives would be continued and expanded after the referendum, while reminding growers that the grocery chains each year bought \$230 million of farm products in California, \$89 million more than their total sales of all foodstuffs in the state. While not all farmers were impressed by this demonstration of affection - the State Grange declined to overturn its 1935 endorsement of anti-chain legislation - the general impression, including in the Anti-Monopoly League, was that this farm strategy was a resounding success. This was confirmed on election day when small rural counties with a dominant farm vote proved the most heavily opposed to the chain tax.²⁸

It was a fundamental policy of the chains that the small retailers, as such, should not be attacked during the campaign, and that the fire should be directed instead against "middlemen" and the Anti-Monopoly League.²⁹ Safeway Stores emphasised the anti-middleman theme by intensifying its efforts to wholesale to independent retailers, setting up the "Food Buyers' Association", a form of voluntary chain supplied from the Western States Grocery Co., the Safeway wholesale division. Hundreds of grocers in California were recruited to participate in this scheme, apparently finding Safeway a satisfactory and even-handed wholesaler. Naturally, this struck terror into existing voluntary chains and cooperatives, and to some extent confused and demoralised the advocates of the chain tax. Safeway's strategy appears to have been part of a broader national programme to combat chain taxation, for in the early months of 1936 several prominent grocery chain executives, including

28. Sacramento Union, October 28, 1936, "Our Pledge to California Farmers", by L.A. Warren, Safeway president; Transactions of the Commonwealth Club of California, vol. XXXI No. 4, October 13, 1936, pp. 161-194, "A Chain Store Tax - Yes And No", p. 186.

29. Lebharr, Chain Stores In America, pp. 245-6.

John Hartford of the A & P, suggested that they would retaliate against wholesalers who pressed for chain taxes, and avoid paying such taxes, by converting to limited voluntary chain operation, if necessary selling or leasing the stores to managers. While militant opponents of the chains dismissed the threat to sell the stores to managers as pure bluff, the suggestion that the chains might make a major attempt to set themselves up as wholesalers in their own right did alarm some wholesalers. It strengthened the hand of those - such as the leaders of the National-American Wholesale Grocers' Association - who had for some time been advising that the chain tax might become a monster which wholesalers could not control.³⁰

The chains were in the fight by this time with their gloves off. Quite ruthless methods were used to discredit the Anti-Monopoly League, and such passions were aroused during the campaign that there was an attempt at arson at the League's Los Angeles offices. Allegations given big press coverage, especially in the Hearst newspapers, that the League's chief fund-raiser was working on a 40% commission, did little to inspire the confidence of independent merchants. The League's money-raising was also hampered by the parallel activity of various unauthorised promoters who siphoned off resources and created a feeling of disillusionment and suspicion amongst the merchants. Squabbles between the different trade groups sponsoring the League, rivalries between different parts of the state, especially Los Angeles and San Francisco, and an undercurrent of

30. Business Week, Jan. 11, 1936, p. 9, March 7, 1936 p. 10; Interstate Grocer Jan. 11, 1936; New York Times Jan. 12, 1936; California Retail Grocers' Advocate June 19, 1936. Following Hartford's threat, T.B. Terry, the president of the National-American Wholesale Grocers' Association, reminded its annual convention that "at no time have we, as an association, contributed to bringing about this situation...We realized that competition like the fabled hydra is many-headed and will grow new heads as necessity arises. The retail head may be cut off, but an even more terrifying head appears labeled "Wholesale"..." Terry warned that if advocates of chain taxation tried to move on to tax cooperating wholesalers and retailers, the only result would be to stimulate the spread of consumers' cooperatives, which the politicians would be unwilling to legislate against. (Modern Merchant & Grocery World, January 25, 1936).

fear that too aggressive a campaign might lead to a public backlash, all weakened the fighting strength of the organisation.³¹ At the same time, many of the more conservative merchants were reluctant to let the chain tax issue stand in the way of fulfilling their dreams of thorough trade regulation, under the state's generous fair trading laws. While Safeway led the offensive against the chain tax, it also gave every assistance to the grocery associations to set up enforcement machinery to make the 1935 Unfair Practices Act effective. Other chains proved similarly cooperative. For about a year, the grocery trade used mainly "educational" methods to restrain price-cutters, but during 1936 the enforcement bureaus demonstrated an increasing willingness to use the courts, which in turn handed down a series of favourable decisions. Similarly, drug chains and independents were by this time working well together, albeit informally, to spread resale price maintenance. Thanks to California's early start, its fair trade law with the crucial "non-signer" clause having been enacted in 1933, before any other state, drug trade price maintenance was far advanced. By July, 1936 well over two thousand drug store items were price-maintained in California, and at an average margin, including discounts and allowances, of 35.84%, which was more than the NARD's historic demand for 33.1/3%.³² Some progress with price maintenance was also being made in other lines by this time. While nothing in these price-fixing developments disbarred independents from pursuing aggressive anti-chain policies, this progress did take some of the wind out of the sails of the Anti-Monopoly League. Preoccupied with

31. California Retail Grocers' Advocate, March 27, June 19, August 14, 28, September 4, 11, October 30, 1936; Western Tobacconist, November 1936, "Vote "Yes" on 22". The Anti-Monopoly League explained the 40% commission as including money for the provision of extra radio time, speakers, offices, etc.

32. Grether Price Control Under Fair Trade Legislation, p. 102, and see above pp.61-62, 70-71.

the laborious job of setting up a complicated structure of price maintenance, in which it helped to have the cooperation of the chains, the trade associations, at the very least, had less time and energy to devote to the chain tax. The 1935 tax law was passed thanks to a sudden welling up of enthusiasm, much of which arose from the broader political climate in the state. Confronted by the much more drawn-out and intrinsically less rousing task of defending the tax in a referendum, independents tended to lose interest or return to their long-standing price-fixing preoccupations. They, like California as a whole, were settling down by the latter part of 1936.

According to figures filed with the State Treasurer, the Anti-Monopoly League collected a total fighting fund of \$77,477. This compared with the \$1,137,876 spent by the California Chain Stores Association. The difference in the amount of money spent by the two sides became most apparent in the closing weeks of the campaign when, just as the chain publicity was building to a crescendo, the Anti-Monopoly League was obliged to reduce some of its activities. One casualty was the regular broadcasting by the "Corner Store Philosopher" who "in a kindly drawl" told listeners of the harm done by chains to their communities: Lord & Thomas considered this the most effective of the ploys used by the Anti-Monopoly League, and were delighted when it went off the air. As the battle drew to a close, State Senator Chris N. Jespersen, the managing director of the Anti-Monopoly League, complained that ninety per cent of his time had been spent in trying to arouse the independent merchants themselves. He was, he confessed, "awfully, awfully tired of it". Only in San Francisco, where the trade associations were strong, did the pro-tax campaign really come alive in the final stages, that

city witnessing repeated marches and demonstrations, and every grocer's truck carrying pro-tax slogans.³³

On election day itself, the chain campaign reached its climax, with stores closing for the day and thousands of employees laying on free transport to the polls for their sympathisers. In all, 1,067,443 votes were cast in favour of Proposition 22 and 1,339,778 against. Of the state's 58 counties only one, San Francisco, voted in favour of the tax.³⁴

Without doubt, the chains had won the referendum by the intensity of their efforts. Chain taxes had previously been considered to be a matter of only mild interest to the public as a whole, but more votes were cast, for and against, on Proposition 22 than on any other issue on the ballot that year, save only the vote for President of the United States. The total vote for Proposition 22 would have been enough to secure victory in ordinary circumstances, but the chain store side had gone one better. Polls taken by Lord & Thomas some time before election day which showed a majority in favour of the tax may perhaps be discounted as coming from a source with a vested interest in magnifying the impact of its own efforts; however, a poll taken by the American Institute of Public Opinion in different sections of the country in August, 1936, indicates a greater opposition to chain taxation on the Pacific Coast than elsewhere, a circumstance attributed by the Institute to the growing influence of the chains' referendum campaign.³⁵

33. Interstate Merchant, December 26, 1936; Lebhar, Chain Stores in America, pp. 251-2; California Retail Grocers' Advocate, October 23, November 6, 1936.

34. Lebhar, Chain Stores in America, p. 250. The independents won quite comfortably in San Francisco, by 132,687 votes to 99,208 (San Francisco Chronicle, November 4, 1936).

35. The American Institute of Public Opinion survey asked "Are You In Favor of Legislation Requiring Chain Stores In Your State To Pay Special Taxes?" The proportions answering "Yes" were: 61%, Pacific; 65%, Mountain; 67%, New England and 70%, Southern and Central States. The

The referendum was virtually the death knell for militant anti-chain activity in California. Although there was much talk at first about "taking the chains to a third round" in 1937 and of "revenge" against some who had made themselves particularly obnoxious in siding with the chains, including the Hearst press and the State chamber of commerce, not very much developed from this. California trade associations continued to give support to harrassment of chains at the federal level, but in their own state they were more inclined to follow a "gentlemen's agreement" under which chains and independents refrained from attacking each other. Most trades found compensation for the defeat in an ever-expanding application of the state's fair trade and unfair practice laws. In the history of relations between chains and independents in California, the years 1935 and 1936 stand out in isolation as a time of unique strife, much as the mid-1930's were a period of exceptional political instability in the state.

Independents elsewhere, in looking at the result of the referendum, took some consolation in the thought that California was in some respects different. Its people were, as George Schulte put it, "not loyal" because so many of them were recent settlers. San Francisco, the old city of established neighbourhood loyalties had voted for the tax. Nevertheless, even Schulte had to concede that the chains had won a "big victory".³⁶

35. (cont'd)... polling organisation attributed the Pacific Coast figure to the influence of the chains' referendum campaign. A statewide poll taken for the chains in California in August showed 42% of the people in favour of the tax, 28% against and 30% undecided; earlier test polls indicated that few knew much about the tax, and that those who did favoured "taxing the chains out of the state". (Beckmann and Nolen, The Chain Store Problem: A Critical Analysis, p. 242; Chain Store Age, December 1936; New York Times, November 15, 1936).

36. Interstate Merchant, November 7, 1936. See also E.T. Grether, "Market Factors Limiting Chain Store Growth" in Harvard Business Review, vol. 10, April 1932, pp. 323-31, a discussion of why, in 1929, according to the Census, the single store grocer still enjoyed 63.4% of the grocery

Chain store men were naturally elated. The result was, Wheeler Sammons of the Institute of Distribution asserted, a "warning to pressure groups of middlemen and politically minded retailers that against their organized minority stands the heretofore unorganized majority of the consumer". The result would, Sammons believed, "give the legislators the information they have wanted, but which has never heretofore been available to them". The New York Times agreed, suggesting that the politicians "should ask themselves whether they have not been deceived by the agitation of organizations representing small storekeepers into believing that the opposition to chain stores is much wider than it really is". The New York Times even thought that the vote should encourage revision or repeal of the recently-enacted "ill-advised Robinson-Patman Act".³⁷

36. (cont'd) ... business in San Francisco, whereas over the bay in Oakland his share was only 33.2%. Grether suggested (and was guided in this by trade opinion) that: (1) San Franciscans required more service because of hilly topography which discouraged cash and carry; (2) a more stable population, with neighborhood loyalties; (3) greater racial and ethnic mixture, with well-entrenched specialist independents catering to their own people; (4) San Francisco was an "organization" city, with strong trade associations which had long forcefully spoken up for the virtues of patronising the independent merchant, and had also provided the basis for the development of cooperative advertising and buying groups. In Oakland the grocers were relatively disorganised and fewer of them were members of voluntaries or cooperatives. Grether considered the grocery chains to be well-established in San Francisco only in middle-class apartment house districts with floating populations. This general pattern, it may be noted, was repeated in other trades also.

37. New York Times, November 5, 6, 1936.

ii. Chain Tax Laws of 1937

Following the United States Supreme Court's invalidation of the 1930 Kentucky graduated sales tax, in the Stewart case, the other four surviving graduated sales taxes from pre-1935 were struck down in state courts or repealed.¹ Independents were able to accept the loss of this small group of tax laws with equanimity, as casualties of the period of experimentation. They were much less happy, however, with decisions handed down by the Florida Supreme Court and a Federal District Court in Iowa which ruled unconstitutional the graduated sales features of the two 1935 "double-barrelled" laws, on the authority of the Stewart decision.² These decisions seemed to ignore the obvious fact that the Iowa and Florida laws, unlike that under consideration in the Stewart case, were aimed only at chain stores, and anti-chain campaigners had every hope of a reversal of the Iowa decision, which was appealed to the U.S. Supreme Court.

In the event, on November 9, 1936, less than a week after the California referendum vote, the Supreme Court affirmed the decision of the lower court, by a margin of 6 to 2.³ As there was no opinion, it is difficult to understand exactly why the Court decided the case the way it did. In the Stewart case, Justice Roberts, speaking for the Court,

1. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550; Safeway Stores v. Vigil, 57 Pac. (2nd) 287 (Supreme Court of New Mexico); Great Atlantic & Pacific Tea Co. v. Harvey, 177 Atl. 423 (Supreme Court of Vermont); Schuster & Co. v. Henry, 261 N.W. 20 (Supreme Court of Wisconsin). Minnesota repealed its graduated sales tax in 1937 in anticipation of an unfavourable ruling in the courts, and replaced it with a graduated license tax.

2. State Ex.Rel.Lane Drug Stores v. Simpson, 166 So. 227 and State Ex.Rel. Adams v. Lee, 166 So. 249 (Supreme Court of Florida); Great Atlantic & Pacific Tea Co. v. Valentine, 12 Fed. Supp. 760 (District Ct. S.D. of Iowa, November 19, 1935).

3. Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S.32.

had emphasised that the objection was that the statute "ignores the form of organization and the method of conducting business" in that the tax applied to all retail sales, without being based on a separate classification of chain stores. The Iowa Law had been framed specifically to meet that objection, the tax being imposed only on sales of stores in excess of one.⁴ Thus it was not a general retail sales tax but a true chain tax, calculated not by number of stores alone, but by volume as well. As the number of stores was arguably a less reliable indicator of the advantages inherent in chain store operation than the volume of business which those stores produced, the statute seemed to accord well enough with the criteria previously established by the Court. The opinion of the District Court so ineffectually skated over this point that it was incongruous that the Supreme Court proceeded to affirm its decision without any explanation.⁵ Having admitted the right of states to tax chain stores out of existence in the West Virginia case, the Court was proving exceedingly picky about the exact method that could be adopted.

The Court's position appears less awkward when its actual flesh and blood divisions are considered. Brandeis and Cardozo dissented from the decision in the Iowa case, thus maintaining their record of voting in favour of the constitutionality of every chain tax law brought before the Court. Van Devanter, Sutherland, McReynolds and Butler were equally consistent in their opposition to each new extension of the chain tax. Justice Stone was indisposed and did not sit on the case. Only Roberts and Hughes, therefore, the two "swinglers", had taken a contradictory position as between the "power to destroy" West Virginia case and the

4. See above, pp. 213-214.

5. 12 Fed. Supp. 760, 765.

pernickety Iowa decision. Once again, a chain tax case was a microcosm of the Court's dilemma on many social and economic issues in the New Deal period: its decisions lacked an absolutely clear guiding philosophy, and for that reason lacked conviction and credibility, because not nine men but two were making up its mind. Nine learned men may require profound and weighty reasons to move and act in concert, but two men, burdened with other concerns, and perhaps deciding an individual case by a quick rule of thumb, may be swayed by lighter causes.

Chain store men were well enough aware of this not to rush to premature conclusions that the Court had begun to retreat on the chain tax issue. Their caution was amply justified when, six months later, the Court handed down the last of its important chain tax decisions, finding constitutional Huey Long's 1934 law taxing chain stores in Louisiana according to the number of stores operated by the chain anywhere.⁶ This time Hughes and Roberts voted with the liberals Brandeis and Cardozo to produce a 4 to 3 majority. (Neither Stone nor Van Devanter took part in the decision: had they done so, the vote would presumably have been 5 to 4). The opinion, written by the "moderate" Roberts, added little of substance, perhaps, to the previous decisions of the Court, but in spirit it seemed to indicate an acceptance by the majority of the sort of arguments expounded in the past only by Brandeis. Roberts explicitly related the right to impose chain taxation to the police power of the state, in the exercise of which "the state may forbid, as inimical to

6. Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (May 17, 1937). Roberts argued that "if the competitive advantages of a chain increase with the number of its component links, it is hard to see how these advantages cease at the state boundary".

the public welfare, the prosecution of a particular business or regulate the business in such manner as to abate evils deemed to arise from its pursuit". The state, it appeared, no longer was obliged to put the chain stores out of business by indirection, with its eyes shut, under the pretence of raising revenue: it could say that the chain stores were an evil and dispose of them under its police power.⁷ In the space of but four years, therefore, the majority had travelled practically the whole distance, at least in respect of graduated license taxation, marked out for it by Brandeis in his one man dissent in the Florida chain tax case. While the Louisiana decision can be seen as a natural next step for the Court, there was perhaps some significance in the fact that it was made right in the middle of the famous "switch in time that saved nine" by which the Court wrecked Roosevelt's plans to "pack" it with his own appointees. In a sequence of decisions in the Spring of 1937 Justice Roberts sided with the liberals to produce 5 to 4 majorities for New Deal legislation, effectively reversing some recent decisions of the Court. The full-blooded quality of Roberts' opinion in the Louisiana case might suggest that it was influenced by his new liberal mood. Then, on May 18, one day after the Louisiana decision was given, the conservative Justice Van Devanter announced his resignation from the bench. Van Devanter's resignation helped to ease the constitutional crisis, but it did not help the chains. They lost a reliable opponent of anti-chain legislation and saw him replaced by Justice Hugo Black, who was not only on the liberal wing but had also, when U.S. Senator from Alabama, delivered himself of attacks on the economic concentration and destruction of opportunity caused by the

7. Ibid., p. 426.

chain stores. The slight flicker of hope kept alive for chain store men over the years by the thought that all the key Supreme Court decisions had gone against them by only one vote was finally extinguished.⁸

One week after the Supreme Court's ruling on the "double-barrelled" Iowa law, and less than a fortnight after the California referendum, the South Dakota license tax of 1935 was also lost in the courts, on a technicality. This had been, along with the 1935 Texas statute, the heaviest graduated license tax ever adopted.⁹ Thus, in a short period of disaster in late 1936, the independents saw nearly all their chain tax prizes of the great year of 1935 snatched away from them. As the 1936 legislative sessions had produced little of consequence - it being an 'off' year for many state legislatures¹⁰ - the independents were really back where they had been immediately after the Supreme Court's decision in the West Virginia case in early 1935, but with the important difference that the chains were now fully active in defending themselves and had proved (in the California referendum) that they had plenty of friends.

There were many temptations for the independents not to rejoin the chain tax battle in 1937. In December, 1936, the U.S. Supreme Court approved the Illinois and California fair trade laws, thus opening the way to the enactment of similar legislation everywhere. About the same time, the National Food and Grocery Conference Committee, after months of dithering, finally produced a model unfair sales bill for the trade in the

8. Leuchtenburg, Franklin D. Roosevelt and the New Deal, pp. 236-7; Congressional Record, Vol. 72, January 8, 1930.

9. Barnsdall Refining Corp. v. Welsh, 269, N.W. 853 (Supreme Court of South Dakota, November 16, 1936). The House Journal indicated that the bill had not in fact received the necessary 2/3 majority. The legislature enacted a replacement chain tax in 1937, but with a top rate of only \$250, compared to the \$750 maximum of the 1935 tax.

10. Kentucky and Mississippi enacted graduated license taxes, the top rate being \$300 in both cases.

several states to copy or use as a basis for their own bills. The widely-publicised success of the California trade, especially the grocery trade, in setting up enforcement bureaus to operate the 1935 Unfair Practices Act stirred great interest, as did the benevolent attitude assumed by the courts. 1937 proved to be the peak year in the spread of trade regulation laws, with 28 states enacting fair trade laws and 12 unfair sales or unfair practice laws. The chains were not happy with some of the provisions worked into a few of the unfair practice laws, but in general they offered no resistance to the construction of this immense edifice of trade regulation. Even the department stores, so vocal in Washington in their opposition to resale price maintenance, were rather half-hearted in opposing fair trade laws in most of the states. With, at most, only fitful criticism coming from any other important interest groups, the trade had an easy time of it in most states in pushing through these laws. Such experience compared favourably in the minds of many with the brutal and hazardous struggles involved in forcing through chain tax laws.

No less important was the return of prosperity. In 1937, most independent merchants found business better and competitive conditions more relaxed than at any time since the depression began. What is more, the figures published by the Department of Commerce and the reports of the 1935 Census of Distribution, which began to appear towards the close of 1936, made it clear that the onrush of the chains at the expense of the independent sector had come to a halt. Indeed, in the grocery and drug lines, the source of much of the militant anti-chain activity, the independents had actually clawed back some of the ground lost in the early 1930's. The "chain store menace", in the sense in which it had been understood in the 1920's, was no more. The militants argued that the time

was ripe to close in for the kill, while the independents were strong politically and before the chains had a chance to stage a recovery, but inevitably some of the old urgency had gone out of the rhetoric. The anti-chain movement was a movement of attack, an anti-chain offensive, but much of the emotion on which it thrived was generated by the purely defensive desire of independents to save themselves and their way of life from extinction. As soon as it seemed possible that that desire might be satisfied without the enemy being utterly destroyed, many merchants became attracted to the idea that the trade would do best to seek an accommodation with the chains. The anti-chain movement had a political momentum which would keep it going for two or three years more, but in 1937 there began to appear the first definite signs of a withering away of anti-chain militancy at grass-roots level and of a cooling of the political temperature.

Root and branch fundamentalism was nevertheless still strong enough among the independent merchants of Florida in 1937 for them to turn the Florida Recovery Act into the most vigorously contested issue in that year's legislature, as it had been in 1935. The compromise "double-barrelled" chain store tax won by the Better Business Association in 1935 was mutilated by the Florida Supreme Court with the result that all that was left was the graduated license feature and a uniform sales tax of one-half of one per cent on all retailers.¹¹ The programme of the

11. See the cases cited at note 2, above. Robert H. Givens, the author of the Recovery Act, called the mutilation "a construction which was unquestionably well founded in good law" and insisted that such disasters were the inevitable consequence of all compromises with evil, such as chain taxation or Robinson-Patman. For Givens, it was the Recovery Act or nothing. (Outlawry of Chain Stores, pp. 58-62). The Florida Supreme Court got round a provision in the 1935 law requiring the doubling of the license fee rates in the event of the graduated sales tax feature being invalidated, by leaving intact the bottom rate (0.5%) of the sales tax. The Court did not so much rule on the validity of the law before it, as rewrite it.

Recovery Act supporters in Tallahassee, led by Senator Henry Tillman, was to press hard for adoption of the Recovery Act but, as a safety net, also to offer bills to replace the mutilated 1935 law with a stiff graduated license tax modelled on the Louisiana principle. Tillman also introduced an unfair sales bill which provided for a compulsory mark up of cost plus 6%.

As in 1935, the House passed the Recovery Act, with provisions for a popular referendum at the next general election and that the Act should take immediate effect if the Supreme Court held the referendum requirement unconstitutional. Once again, the Senate proved the stumbling block. In 1935 it had crippled the Recovery Act with amendments, and then left it to die in conference committee, but this time the Senate grasped the nettle and voted the measure down, adopting a motion made by Senator S.L. Holland to postpone consideration indefinitely, albeit by the narrow margin of 18 votes to 16. In the course of the debate preceding the critical vote, Senator S.L. Holland, the main foe of the Recovery Act as in 1935, made much of the apparently waning powers of the Better Business Association. He advised his apprehensive fellow Senators that the Association had made the most intense efforts to defeat him at the 1936 elections, but had failed, and that it was "as impotent politically as is a blind, dumb and deaf person". He pointed out that the Association had been unable to produce "the army" of supporters with which it had besieged Tallahassee in 1935, and also noted that the same measure had been rejected by the legislatures in neighbouring Georgia and South Carolina. At the same time, Holland was able to demonstrate that he was no enemy of the independent merchant. He had introduced, in cooperation with Senator Fred Touchton, himself a leading supporter of the Recovery Act, a fair trade bill and a bill to repeal the much disliked flat rate sales tax which was the legacy

of the mutilated 1935 chain tax law. Holland argued that the merchants were no longer in favour of the Recovery Act, and would be taken care of by his bills, whereas the enactment of the Recovery Act would have disastrous consequences for consumers and for farmers, whose produce would be boycotted by the chains in retaliation.¹²

After the Senate vote on the Recovery Act, Tillman announced that he had no plans to resuscitate it. It was, in fact, the end for that particular piece of fundamentalist anti-chain legislation. Tillman's chain tax and unfair sales bills also failed of enactment, the latter being voted down by the Senate partly as a gesture of disapproval not for the bill itself but for the inconvenience and pressure to which Tillman had subjected it over the Recovery Act. In contrast, although Senator Holland failed to secure the repeal of the flat rate sales tax, largely because the Governor wished to see that source of revenue maintained, he was able to steer his fair trade bill to victory. Thus, after three years of agitation, the Better Business Association had been able finally to produce nothing but a moderate (\$400 top rate) graduated license tax and a flat rate sales tax which was an irritating burden on all merchants. It was Senator Holland, its main enemy, who could claim to have done most for the merchants, by turning Florida into a resale price maintenance state. Just as in California, anti-chain militancy had ultimately proved futile, whereas the more measured and moderate course of trade consensus and fair practice legislation had produced definite gains.¹³

While the spread of trade practice laws in 1937 was rapid, the chain tax movement faltered. Eight states enacted chain tax laws, but the general level of taxation adopted was very modest. Although their right to

12. Florida Times-Union, May 5, 6, 14, 18, 27, 1937.

13. Ibid., May 5, 14, 18, 25, 27, June 5, 1937.

tax the chains out of existence had been confirmed by the U.S. Supreme Court, the state legislatures were clearly reluctant to exercise it. Two states, Georgia and Minnesota, incorporated in their statutes special provisions to tax branches of mail order houses at much higher rates than other chain stores.¹⁴ Tennessee also experimented with a new type of tax, in which the fee was assessed according to the floor space occupied by chain stores, although the license imposed - \$3 on each 100 square feet, or major fraction thereof, of each store in excess of one - was a slight burden to most types of chains. Otherwise, the states kept closely to the well-tried pattern of the graduated license tax, with none of them adopting a maximum per store rate above \$500.¹⁵

This highest rate was imposed in Pennsylvania, whose chain tax was undoubtedly the most important enacted in 1937, because of the size of the state and because it was an Eastern state.¹⁶ The circumstances surrounding passage of the so-called Store and Theatre Tax Act were somewhat unusual. Although many small merchants sent their endorsements of the bill to the legislators, it received little organised trade backing and there was certainly no "march on Harrisburg" or other such manifestation of coordinated zeal. Indeed, there was much less trade activity than there had been in

14. Georgia (Laws, 1936, No. 355) required a \$200 maximum fee on each chain store in excess of 40, but a maximum of \$10,000 on each mail order store in excess of 4; Minnesota (Laws of 1937, chp. 93), required a maximum fee on ordinary chain stores of \$350, on each in excess of 150, but the maximum rate for stores operated by mail order companies was \$1,200 on each in excess of 10. Of minor interest is a variation in the 1937 Montana law (Laws of 1937, chap. 199) whereby chain filling stations and lumber yards were taxed at lower rates than chain stores, rather than being exempted altogether as was the case in many other states.

15. Tennessee, Laws of 1937, chap. 108.

16. Pennsylvania, Laws of 1937, Pub. Act 344. The top rate of \$500 was imposed only on stores in excess of 500, with the result that only the A & P and the American Stores Co. had any stores liable at the maximum rate.

favour of an unsuccessful chain tax bill in 1935. The powerful and conservative Pennsylvania Retail Grocers' Association actually opposed the bill, as it had consistently opposed chain taxation. The Association was motivated partly by fears that the politicians would, once given a precedent for taxing retailers, prove insatiable and seek to tax independent merchants at ever higher rates, and partly by a concern, for which there was no justification, that the state would try to bring voluntary chains under the provisions of a chain tax law. But the crux of the Association's objection was the argument that "the most sinister, destructive and dastardly threat to the individual merchant today" was not the chain store but the price-wrecking supermarkets, many of which were individually-owned. Relations with the big chains like the A & P and American Stores were generally good and, especially in the Philadelphia area where the Food Distributors' Association had brought together chains and independents, much was already being done to restrain price-cutting wars, even without the legal sanction of an unfair sales law. What the grocery association wanted was an Unfair Sales Act, which the legislature obligingly gave it in 1937. The druggists, and other interested trades, also had the opportunities provided by the state's 1936 fair trade act to distract them.¹⁷ In contrast to this generally lukewarm attitude of the independents to the chain tax, the chains fought frantically hard and succeeded in mobilising a certain amount of organised opposition to the bill, especially from farmers.¹⁸

17. Pennsylvania Grocer, February 1937 pp. 14, 28; June 1937 pp. 4-5; Harrisburg Patriot, February 27, 1935.

18. But the Pennsylvania State Grange, as part of a programme of liberal-progressive policies, favoured the chain tax. (Pennsylvania Grange News, February 1937, p. 5).

Enactment was in fact due almost entirely to the personal efforts of Governor George Earle. The Governor considered a chain tax to be an integral part of his "Little New Deal" for Pennsylvania, as a means of getting back from the chains "a small part of what has been trickily evaded in the past" and because it "protects the little fellow, and if our system of democracy is to continue we must have a great many small capitalists - not just a few big ones". Earle had first tried to put a chain tax bill through the legislature in 1935, his first year in office, but had failed because of the intransigence of the Republican-controlled Senate. The 1936 elections gave the Democrats a majority in both House and Senate, thus clearing the way for the "Little New Deal". Nevertheless, Earle still had to fight for the chain tax bill: when it faltered in the Senate he made it a piece of "must" legislation and demanded party loyalty. As a result, the Senate passed the bill on party lines, by 33 votes to 14, with only one Democrat voting against and two Republicans voting for.¹⁹

The grocery chains reacted dramatically to the tax threat. A few days before Governor Earle signed the bill, the A & P and the American Stores Co. abruptly closed 150 stores in Philadelphia. Spokesmen for the companies stated that the stores closed were those which made insufficient profit to pay the new tax, and that the closures were final and would be followed by hundreds more. As a representative of the American Stores Co. put it, "We have removed the goods and fixtures, locked the stores up and returned the keys to the owners in the hope they may be able to find some new tenants".²⁰ In 1926, back in the golden years when the chains ruled

19. Modern Merchant & Grocery World, April 10, 1937; Harrisburg Patriot May 13, 25, June 2, 1937; Pittsburgh Press, May 11, 1937; New Republic August 18, 1937, pp. 38-40, 'Pennsylvania Under Earle' by Bruce Bliven. Bliven approved of Earle's "baby Wagner" labour relations law, his unemployment compensation law and his legislation protecting civil liberties and regulating public utilities, but he did not care for the chain tax.

20. Time Magazine, "Chainsters' Tussle", June 14, 1937 p. 70; New York Times, June 2, 3, 1937.

the roost, his company had made an average profit per store of \$4,890; by 1937, after a decade of steady decline, that figure had fallen to only \$692. Weighed down by labour troubles and social security taxes and harrassed by the competition of voluntary chains and the new supermarkets, the American Stores Co. regarded the imposition of the \$500 chain tax - which Governor Earle had claimed could easily be taken from the bloated profits of the chains - as the last straw. Its response was to accelerate the weeding out of hundreds of the old-fashioned, long-established little stores which it had planted throughout the Commonwealth, and to concentrate on larger stores, especially supermarkets. For the A & P the course adopted was essentially the same.²¹ Up to a point, the fears that the Pennsylvania Retail Grocers' Association had advanced about the chain tax were confirmed, for the tax did encourage the trend to supermarket operation. The major chains did not use their still small number of supermarkets for price wars, however, for they had too many remaining small and uneconomic units of their own left as hostages of their competitors. Neither had they any wish to engage in impossible battles with the powerful and efficient voluntaries and cooperatives which were now more than capable of striking back. As the independent grocery trade had not sponsored the bill, relations remained good, although the prevention of loss leader price-cutting received a serious setback in 1939 when the courts invalidated the 1937 Unfair Sales Act and a new Governor, Arthur H. James, a conservative Republican, vetoed a substitute bill.²²

21. Modern Merchant & Grocery World, April 10, 1937; March 5, 1938; February 18, 1939.

22. Pennsylvania Grocer, July 1939, p. 4, 18-21; November 1939, pp. 4-6. The chain tax was ruled unconstitutional by the State Supreme Court in 1939. See below, p. 407-408.

Passage of the Pennsylvania tax law demonstrated to chain store men that they were by no means out of the woods. It stimulated a flurry of activity among independents in several northeastern states, including New York and New Jersey, who nurtured ambitions of achieving a similar breakthrough. It also proved that, in these times of political flux, no state, no section of the country could be considered entirely immune from the anti-chain virus.²³ This quickly became a consideration of importance when Wright Patman introduced his federal chain tax bill, for it suggested that it might not be totally beyond the realms of possibility, given the right configuration of political and economic conditions, for the Texan to cobble together enough votes from the industrial states to add to his more solid support from the South and rural Midwest to drive some sort of bill through the House of Representatives.

iii. The Patman "Death Sentence" Bill

During the course of the campaign for the Robinson-Patman bill, Patman made it clear that his ultimate goal was to break up the "interstate" chains and confine their operations to the boundaries of one state. However, twenty months elapsed between Roosevelt signing the Robinson-Patman bill into law and the introduction of the Patman "death sentence" measure.

There were three basic reasons for this hiatus. The first was that in 1937 Patman was sidetracked by his alternative project, to which he had committed himself during 1936, to divorce manufacturing from retailing. His original idea of bringing about a total divorce between the two functions

23. A small compensation for the chains came in Maine, which repealed its modest 1933 chain tax law, apparently following an understanding between the Maine Development Commission, the A & P and First National Stores that the chains would promote the sale of Maine potatoes in return for repeal. ACCO handled most Aroostook county potatoes, even those sold to independent grocers, and the legislature was persuaded by the argument that this promise of promotion was worth more than the \$43,000 which was all the revenue produced by the chain tax. (Interstate Merchant, May 1, 1937).

actually had to be abandoned, because it provoked so much criticism from the thousands of small concerns around the country which did a certain amount of manufacturing or retailing incident to their main business. Consequently, early in 1937, Patman introduced a bill which sought to prevent manufacturers from selling at retail only where "the effect...may be substantially to lessen competition between such manufacturer and his customers..." In this watered down form the bill was of primary interest only to tyre dealers - Patman enjoyed a close relationship with the officers of the NAITD - who were customers of big tyre companies like Goodyear and Firestone which also ran their own retail chains. This bill received hearings in the winter of 1937-8, but generally it failed to create much excitement and no action was taken on it.¹

The second cause of delay was that the Miller-Tydings bill, to free resale price maintenance contracts from the threat of the Sherman law, held the "inside track" for legislation on behalf of the independent merchant in Congress in 1937. This bill had been held back in 1936 in order to assist the passage of the Robinson-Patman bill, and it automatically came to the top of the agenda in the following year. Fair trade fever was at its height in 1937, and the flood of state laws in the early months of the year, in the aftermath of the U.S. Supreme Court decision in December, 1936 upholding the California and Illinois fair trade statutes, made the Miller-Tydings bill a doubly urgent matter. Patman himself identified prominently with the bill, even though he had previously been critical of resale price maintenance and all devices, such as the FTC's trade practice conference proceedings, which could be used as a cloak for price-fixing. His new position was that Congress should pass the Miller-Tydings bill regardless of its own opinion

1. H.R.4722, 75th Cong., 1st Sess.; Interstate Merchant, January 16, December 11, 1937.

on the merits of fair trade, because it was purely an enabling measure which would permit the states to give effect to their own policy on the question.² This relaxed view of legislative responsibility was widely shared in both House and Senate and the bill commanded fairly general acceptance, only Emanuel Celler staging an assertive, full-blooded opposition. However, the hostility of Roosevelt made for a rather difficult legislative passage, the bill ultimately being enacted only through the dubious method of attaching it as a rider to the District of Columbia appropriations bill, which Roosevelt had no option but to sign. Until the Miller-Tydings bill became law, there was no real opening for any other major piece of legislation on behalf of the independent merchant. Significantly, Patman's first definite statement that he intended to introduce a federal chain tax bill was made simultaneously with the successful conclusion of the Miller-Tydings campaign in the middle of August 1937.³

The third obstacle in the way of quick action was that neither Patman nor anyone else had a concrete legislative proposal prepared which could accomplish the "death sentence" objective. The most obvious approach was a federal chain tax, which could be modelled on the graduated license taxes approved by the U.S. Supreme Court. In June, 1937, Martin Dies, Patman's colleague from Texas, offered a bill in the House seeking a graduated license tax for the District of Columbia. This was the first chain tax bill offered on Capitol Hill since Emanuel Celler's unsuccessful measure in 1932, and it

2. House Judiciary Ctte., "Hearings On...Resale Price Maintenance", 75th Cong., 1st Sess., January 27-9, 1937, pp. 20-22. Patman effectively took control of the price maintenance forces in the House even though, in defending the Robinson-Patman bill in 1935, (HJC, Hearings, p. 14) he had contrasted its purposes with the old Capper-Kelly bill which "gave the thriftless and the lazy the same benefits as the fellow who was industrious and energetic".

3. Interstate Merchant, August 21, 1937.

was seemingly an attempt to test the waters for a federal chain tax. If so, it was a successful test, for although the bill was not strongly pressed in the Senate, where it was lost in committee, it was adopted by the House by 131 votes to 53 with the minimum of discussion.⁴ In August, Patman indicated his intention to introduce a federal chain tax measure, but then he suddenly switched round to the view that the best strategy would be to offer an amendment to the Clayton act which would specifically confine retailing businesses to the boundaries of a single state. Despite the obvious incompatibility of such an amendment with the general character of the Clayton act and with the antitrust law doctrine that "mere size is no offense", numerous Congressmen assisted Patman in drafting a bill, and a final draft was reported as being ready at the beginning of 1938.⁵ Then, in a further abrupt reversal, a chain tax bill was substituted. Patman later stated that the change had been made because the Clayton act amendment would probably have been considered unconstitutional, and because "we did not want them (the chains) to be broken up like the Standard Oil and then put together under one common management or holding company". Another possible reason for the change was the thought that the composition of the House Ways and Means committee, to which a chain tax bill would be referred, was such as to make it likely to prove relatively sympathetic. Whatever the reasons behind these fluctuations in strategy, the fact remains that it was not until the very last minute that Patman finally decided on the form his "death sentence" bill should take.⁶

4. Congressional Record, vol. 81, pp. 5936, 5983 (June 17-18, 1937); Interstate Merchant, July 10, 31, 1937.

5. Interstate Merchant, October 2, 1937, January 8, 1938.

6. Congressional Record, vol. 84, pp. 345-7; House Ways & Means Cttee., subctte. Hearings on H.R.1...An excise Tax On Retail Stores, 76th Cong., 3rd Sess., 1940, p. 115; Business Week, February 5, 1938, p. 18.

H.R.9464, introduced on February 14, 1938, was basically a graduated license tax, but with the graduation ascending to dizzy heights never attained in any state law. The schedule had two components. The first was a graduated license, on the Louisiana principle, which rose from a minimum of \$50 on the 10th store to \$1,000 on each store in excess of 500 anywhere in the United States. The "death sentence" component to the schedule was a multiplier provision whereby the total tax was to be multiplied by the number of states, including the District of Columbia, in which the chain had its stores. Thus a chain like the F.W. Woolworth Co., operating in every state, would be liable to a tax of \$49,000 on each of its stores in excess of 500. Entirely exempt from any payment were chains of less than 10 stores, or with a gross annual business of less than \$250,000; wholesale chains; facilities, such as cafeterias, maintained by common carriers; branch offices maintained by newspapers for taking advertisements or distributing their papers; filling station chains which did not sell tyres and tubes, and voluntary chains. Two years were allowed before the tax was to take full effect, so that, as Patman explained, chain store owners could "straighten out their affairs".⁷

Patman argued that the Robinson-Patman law was not enough, because it "does not prohibit interstate chains from diverting net profits from stores in one town to sustain the ruthless selling at below cost by chain stores in another town until independents are driven out of business from town to town". His new bill would, he claimed, curb the "interstate desperadoes" by serving to "substantially restrict retail distribution to the boundaries of one state". Patman emphasized repeatedly that there was no intention to hurt the local chains which kept their profits at home, and that the

7. H.R. 9464 was re-introduced as H.R.1 in 1939 and 1940.

real weight of the tax would fall on about 20 big interstate chains. As an example, he suggested that the A & P would be reduced from its existing sprawling, bloated condition to a modest 500 stores, all in one state. (He presumably meant New York). It would then be up to that state to decide whether or not it wished to allow a chain of that size to survive within its own borders;⁸ In fact, H.R.9464 was totally unsuited to the task of confining chains within one state, though it was undoubtedly capable of delivering a "death sentence" to some chains. The difficulty with it was that, as with all graduated license taxation, the burden fell disproportionately on those chains with large numbers of small and unprofitable stores, notably the grocery chains. The levels of tax were quite clearly sufficient to wreck the A & P, and perhaps to restrict it to the scale of operation forecast by Patman. However, Sears, Roebuck, the chain with the second largest sales volume, could actually have met the tax, had it been collected in 1938, from its net profits, and still have been left with a considerable surplus. Even within the same lines of business, the construction of the tax schedule was such that chains faced a widely varying burden regardless of their volume of sales or ability to pay. Thus while Sears, Roebuck could have escaped anything worse than a heavy raid on its profits, J.C. Penney, merely because it transacted its business through a large number of modest small town stores rather than through full-scale department stores in large and medium-sized cities, faced a ruinous exaction. Similar-sized chains in the same line, such as Kinney and Endicott-Johnson, faced dramatically different tax bills, owing to nothing more than the accident of the geographical location of the stores. All the disparities and inequities long familiar from state chain taxation were, thanks to the astronomical rates and the multiplier provision, inflated to grotesque proportions. The disparities inherent in the schedule

8. Congressional Record, vol. 83, pp. 1534-5, 1955-8, 1986-7; Daniel Bloomfield, ed., Chain Stores and Legislation, (The Reference Shelf, vol. 12 no. 7, N.Y. 1939), pp. 335-6.

made no difference to the solidarity of the chains in opposing the bill, but they did make a nonsense of Patman's often-repeated theme that the purpose of the tax was to confine retail businesses to the boundaries of the single state.⁹

9. Impact of H.R. 9464 on selected leading chains (1938 figures).

Company	Type	No. of Stores	No. of States	1938 Net Earnings \$	H.R. 9464 Annual Tax. \$
A & P ^{*1}	Grocery	12,000	40	9,119,114	471,620,000
Endicott-Johnson ^{*2}	Shoe	401	4	857,191	805,600
Firestone ^{*2}	Auto Accessories	664	49	5,258,041	22,270,500
First National Stores	Grocery	2,350	7	2,705,191	14,983,500
Goodyear ^{*2}	Auto Accessories	626	41	6,012,423	17,076,500
W.T. Grant	Variety	491	38	2,766,424	10,731,200
G.R. Kinney	Shoe	328	37	151,503	5,420,500
S.S. Kresge ^{*3}	Variety	679	27	8,997,051	12,676,500
Kroger	Grocery	3,992	19	3,741,569	71,867,500
Liggett ^{*2}	Drug	552	36	518,432	12,330,000
Melville	Shoe	639	40	1,484,061	17,180,000
Montgomery Ward ^{*4}	Gen.Merch.	575	46	19,644,956	16,813,000
Newberry	Variety	476	45	1,792,741	12,100,500
J.C. Penney	Gen.Merch.	1,541	48	13,739,160	63,912,000
Safeway ^{*3}	Grocery	2,873	22	4,206,781	58,597,000
Sears, Roebuck ^{*4}	Gen.Merch.	492	46	23,354,364	13,031,800
United Cigar-Whelan Stores ^{*5}	Cigar and Drug	614	36	686,531 *6	14,562,000
Woolworth ^{*7}	Variety	1,864	49	28,584,944	81,070,500

*1. Estimated U.S. Stores; earnings for U.S. and Canadian stores combined.

2. Earnings of parent company; separate figures not available for retail stores.

3. Combined earnings for U.S. and Canadian stores.

4. Includes mail order earnings.

5. Including sales to independently-owned agency stores.

6. Deficit.

7. Combined earnings U.S., Canadian and Cuban stores.

(Source: Institute of Distribution, "Keep Market Street Open", Appendix B, In House Ways & Means Ctte., subctte., Hearings on H.R.1..An Excise Tax On Retail Stores 76th Cong., 3rd Sess., 1940, p. 652).

This somewhat hit-or-miss "death sentence" was no private whim of Patman's. Dozens of Congressmen were consulted during its preparation, and Patman claimed, when the bill was first introduced, that 150 Congressmen had already signified their approval. H.R.9464 was officially co-sponsored by 75 Congressmen, including Patman, from 33 states.¹⁰ In the following months, the trade coalition which had spearheaded the Robinson-Patman drive in 1936 was reassembled, support for the "death sentence" coming from the NARG, NARD, NRHA, NAITD and the United States Wholesale Grocers' Association, as well as from the Independent Bankers' Association, an organisation of small town bankers opposed to branch banking. This was a strong alliance. At its centre stood the NARG, the largest trade association in the country and which claimed to have added 20,000 new members in the 12 months to June, 1938, and the NARD, which was widely considered in the wake of its fair trade successes to be "the Nation's most powerful trade association today".¹¹ After Robinson-Patman and Miller-Tydings, no one could any longer dismiss this alliance as a collection of "Ishmaelites".

The inveterate enemies of the chains eagerly welcomed the bill as likely to produce the climactic struggle with their foes. It would mean, warned J.H. McLaurin, "war in deadearnest". George Schulte was of the opinion that the chains would "sink or swim on its defeat. Likewise the independent retailers, wholesalers and manufacturers, especially of the local type, will survive or become victims of chain store monopoly".¹² But just how solid was the trade support for the bill? Much depended on the political weight of the NARD and the NARG, but the position of these two

10. New York Times, February 15, 1938. For the names of the co-sponsors, see Appendix IX, p. 460.

11. Business Week, August 28, 1937, p. 42.

12. Wholesale Grocer News, June 1938; Interstate Merchant, March 12, 1938.

associations was not without its ambiguities. Although the 1938 NARG convention gave Patman a rapturous reception, by no means all of the officers, the men who actually regulated the association's activities between conventions, were so keen to remain tied to his demagogic style of leadership. Retiring president Charles E. Smith openly expressed the apprehensions of the more conservative element within the association at the 1938 convention, warning, in a speech containing long passages taken from that delivered by E.S. Berthiaume, NARG president at the time of the Henderson agitation, that "no group can conduct both a war and a constructive program at the same time, and with the same forces..." In 1930, the conservatives had favoured the alternative course of the trade practice conference: in 1938, their preferred strategy was an intensified effort to secure enactment of the National Food and Grocery Conference Committee state unfair sales bill, which had been approved by the National Association of Food Chains. In the early months of 1938 the attractiveness of this strategy was seriously reduced by the price wars - the worst since 1932 - which spread through the grocery trade as a consequence of the savage recession, lasting from the September of 1937 to the early summer of 1938, which abruptly interrupted the nation's gradual but orderly recovery from the depression. As was usual, independents blamed the chains for the price-cutting, especially the A & P which was busily opening cut-price warehouse stores and supermarkets in many cities and adopting an ambivalent attitude towards anti-loss leader legislation. Had the chains really been tamed, or were they about to begin a return to the worst of the price wars and ruthless methods of the 1920's? Many grocers agreed with Roger S. Flournoy, the secretary of the Texas R.G.A., that the chains had just been "playin' a little possum until they were ready. And then they cut loose...If the chains had been satisfied, maybe it wouldn't have

been necessary for Congressman Patman to push his new national chain store bill. But they weren't and the new law has to come". To Schulte, the reckless chain price-cutting was convincing proof of the old adage that "He whom the gods would destroy they first make mad". It remained a distinct possibility, however, that once the worst of the recession and the price-cutting which it had produced was over the more conciliatory atmosphere of 1937 would be reestablished, and a more conservative attitude prevail within the NARG.¹³

The situation within the NARD was somewhat different. The zealotry of the leadership was unquestioned. It was the determination of the rank-and-file to lend effective support to the "death sentence" which was in doubt. By this time, the druggists had achieved fair trade legislation in nearly every state, and it remained only to capitalise on this long dreamed-about situation by securing a structure of maintained prices. In this task, the assistance of the chains was essential, as drug chain executives were well aware. The chains were, complained NARD executive-secretary John Dargavel, "sending emissaries into the ranks of the independent druggists...trying to sow the seed of the idea that a fight for this legislation will be detrimental to the Fair Trade movement...They are attempting to reach some of the leaders, some of the "key men" in the various states...offering them positions or other remuneration if they will use their best efforts to discourage support of this legislation... I do not like to admit it, but the chain emissaries have been successful in some instances..." The comparative absence of price-cutting in the drug trade during the recession thanks to fair trade was a potent reminder to druggists of what they had gained by cooperating with the chains.

13. Interstate Merchant, February 19, June 25, 1938; Modern Merchant & Grocery World, August 13, 1938; N.Y. Jnl. of Commerce, May 20, June 24, 1938.

Thus although only two state pharmaceutical associations, Rhode Island and New Jersey, actually repudiated the NARD executive's endorsement of the Patman bill during 1938, the retail drug trade noticeably failed to generate the fervour in favour of the "death sentence" which had enabled it to secure the fair trade acts.¹⁴

The underlying weakness of the trade support for the bill was that the rank-and-file panic about the chains was gradually ebbing away. The national associations, having won great triumphs in Washington in 1936 and 1937, naturally were inclined to try their luck for something more in 1938. There was, however, something increasingly formal, ritualistic, even affected about the attacks on the chains now made by independent leaders. There were in 1938 no great parades, rallies or other manifestations of rank-and-file enthusiasm for the Patman bill. Neither was it much of an encouragement to the co-sponsors of the "death sentence" that only 19 chain tax bills were offered in the state legislatures, with only one state, Mississippi, passing a chain tax statute, and that being merely a revision of its moderate 1936 law. Significantly, the circulation of George Schulte's newspaper, in the past always a reliable indicator of the anti-chain temperature, failed to show any increase in 1938, even though the "moment of truth" had supposedly arrived.

The trade coalition supporting the "death sentence" was actually much the same as that which had got behind the Robinson-Patman bill. There were nevertheless some vital and obvious differences between the two measures which could not fail to influence Congressional thinking. The Robinson-Patman bill had carried forward the recommendation made by the FTC to amend Section 2 of the Clayton act; in contrast, the FTC had explicitly rejected

14. Drug Trade News, April 11, June 6, 1938; NARD Journal, August 18, October 6, 1938.

the idea of a federal chain tax as likely to lead to higher prices.¹⁵ Similarly, the Robinson-Patman bill, while generally discussed as an anti-chain measure, was couched in the language of established antitrust law, and attacked only the abuses of size, not the right to operate a large business. The only recent remotely comparable precedent for the "death sentence" bill was the Wheeler-Rayburn utilities holding company measure, enacted in 1935. The holding companies, widely condemned for a wide range of abuses and as a parasitic excrescence on the power industry, had enjoyed little sympathy from public opinion, but the same could not be said of the chains, as the California referendum had shown. Even in the extraordinary political circumstances of the "Second Hundred Days", and with enormous administration pressure behind it, the utilities "death sentence" bill had had an extremely rough passage, and had only been enacted in considerably weakened form. Indeed, the struggle over the Wheeler-Rayburn bill had been one of the key events in the revival of a more conservative mood on Capitol Hill, a mood which was dominant in both Houses by 1938.¹⁶

It was, of course, alarming to chain store men that 75 Congressmen could be found to co-sponsor a "death sentence" bill. These 75 were, however, unrepresentative of opinion in the House as a whole. They came disproportionately from the liberal, populist and progressive end of the political spectrum, and only eight of them represented northeastern states.¹⁷

15. FTC, Chain Stores, Final Report, pp. 91-2.

16. Hawley, The New Deal and the Problem of Monopoly, pp. 329-337; James T. Patterson, Congressional Conservatism and the New Deal - The Growth of the Conservative Coalition in Congress 1933-39, 1967, pp. 40-41.

17. All eight from the northeastern states, four of whom came from Pennsylvania, were very much to the Congressional left. Seven of them were Democrats, the one Republican, James C. Oliver, being a liberal who had captured his party's nomination in rock-ribbed Maine in 1935 thanks to the unusual political circumstances of that year and the active and influential backing of Father Coughlin. (New York Times, March 13, 1935). In later years he sat as a Democrat. One of the eight from the northeast, Mrs. Caroline O'Day, a close friend of President Roosevelt, subsequently withdrew her support for the Patman bill, an event seen by some as an indication that Roosevelt looked upon the bill with disfavour. (Business Week, July 2, 1938 p.21).

A similar imbalance had been evident in the House Robinson-Patman caucus in 1936, but on that occasion the imbalance had mattered less. The earlier bill had enjoyed a general acceptance which the much more extreme "death sentence" obviously did not. More importantly, perhaps, the political mood had changed. The years of popular discontent which had thrown up such phenomena as Father Cox's hunger march, Huey Long's Share-Our-Wealth movement, Upton Sinclair's EPIC, the Townsend pension plan and Father Coughlin's National Union for Social Justice, were over. The rout of third party insurgency at the 1936 general election, when the Union Party candidate William Lemke polled only 882,479 votes in the entire country, ended fears that Father Coughlin, Huey Long's self-appointed successor G.L.K. Smith and Dr. Townsend could translate their immense popular following into an effective political force.¹⁸ Ironically, Roosevelt, who received the endorsement of every state except Maine and Vermont in the election, actually lost his hold over Congress in the wake of the election, for conservative legislators no longer feared that something worse might come about if they resisted the experimentation of the administration. During 1937 and 1938 Roosevelt attempted little that was new and radical, and was humiliatingly rebuffed by a now more conservative and self-confident Congress in those few major projects - such as packing the Supreme Court and the reorganisation of the executive branch of government - that he did undertake. This conservative trend in Congress not only discomfited the administration: it undermined the activities of all those within Congress of populist or progressive leanings who had thrived in the climate of upheaval and change created by the New Deal. The chain store issue was not one which fitted - as did, say, labour or welfare issues - into a straightforward pattern in

18. William Lemke was a member of the Robinson-Patman bill steering committee and one of the "death sentence" co-sponsors.

which liberals were normally on one side of the argument and conservatives on the other. Conservative Southern Democrats could sometimes be found hand-in-hand with Western Progressives and Republicans in their attacks on the Northern "octopus", just as many Eastern liberals, impressed by the modernism and efficiency of the chains, were often compelled to conclude that this was one area in which they had to take the same side of the argument as the most rock-ribbed Eastern Republican. Nevertheless, there was no doubt that the stronger were the liberal and radical currents in Congress, the better were the chances for anti-chain legislation.

The definite support for the bill in the House was known, but the attitude of the Senate remained an imponderable. The bill was not introduced in the Senate, and so no steering committee of co-sponsors was formed. Borah, who commanded the left-of-centre ground in the Senate, and whose support was perhaps vital, immediately declared that he "sympathized with the objective" of the new Patman bill.¹⁹ But other Senators who had in the past been vocal in their criticism of chain stores were generally rather guarded in their response, unwilling to commit themselves one way or the other before it was necessary. With the new conservative strength particularly evident in the Senate, it was from the first unclear that the Senate would prove amenable to a "death sentence" bill even if the House were to pass it.

Whether the "death sentence" was constitutionally acceptable was also open to question. Patman assumed that a federal chain tax would be held constitutional because of the freedom to tax the chains out of existence extended to the states by the Supreme Court in the West Virginia and Louisiana cases; and, as the Court had traditionally been more

19. New York Times, February 15, 1938.

indulgent towards federal taxing statutes anyway, it was not an unreasonable assumption.²⁰ Chain store men, who in the past had cried "unconstitutional" almost as a reflex action, were no longer willing to put any trust in the courts, and in fact accepted that they would have to beat the "death sentence" politically if they were to beat it at all. However, granted that the Brandeisian philosophy had triumphed in the Louisiana chain tax case, something of a paradox was involved in the assumption that the "death sentence" would be held constitutional. To Brandeis, it was an article of faith that, just as big business was bad, so too was big government: his belief was that the states, not the United States, should settle their own destinies. Whenever federal legislation designed to accomplish something of which Brandeis approved, but involving an imposition of a policy upon the states, had come before the Court, one or other of these articles of faith had had to be temporarily suspended. Not infrequently, as decisions on New Deal legislation had shown, Brandeis and the liberal wing of the Court as a whole had elevated the protection of the constitutional prerogatives of the sovereign states above any consideration of a possible general good to the United States arising from the imposition of a policy "from above" by the federal government. The states had enjoyed the right since the West Virginia decision of January, 1935 to tax the chains to "death sentence" levels, but only Iowa and Florida had made the attempt, and even they had given up after being

20. The main precedent was somewhat antique: Veazie Bank v. Fenno, 8 Wall. 533 (1869), where the Court upheld a 10% federal tax on state bank notes even though this was liable and intended to drive such notes out of circulation. More recent was McCray v. U.S. 195 U.S. 27 (1904), upholding a federal tax of 10% on coloured margarine even though this amounted to a prohibition on sale. These were not particularly satisfactory precedents for an attempt to destroy by federal taxation some of the largest business enterprises in America. See, George H. Brown, "A Note On The Federal Taxation of Chain Stores" in Jnl. of Business, vol. 13, January 1940, pp. 74-86, and Orme W. Phelps, "The Supreme Court and Regulatory Taxation" in Jnl. of Business, Vol. 14, April 1941, pp. 99-126.

frustrated at their first effort. That being so, how could the federal government legitimately come along and impose its own policy upon the states? There was not even any possibility of arguing that the federal government was assisting the individual states by acting in a field of interstate commerce which might be beyond their reach, for, as a result of the Louisiana decision, any state was free to single out the "interstate desperadoes" like the A & P and Woolworth for special punishment by taxing them more heavily than the local chains. It would seem that the "death sentence" could have provided an opportunity for the Supreme Court liberals and the conservatives who had never been reconciled to chain taxation anyway to join forces to reject an attempt to coerce the states.²¹

There could not be any real assurance in this line of reasoning, however. Much of the New Deal had consisted of an attempt by the federal government to impose uniform national policies in fields which had traditionally belonged to the states, and the Supreme Court had progressively abandoned its resistance to such coercion in the face of insupportable political pressure.²² In view of the fact that the Supreme Court had already shown itself as being favourably disposed towards the principle of chain taxation, there was no particular reason to suppose that it would suddenly pick up this issue to defy the Congress. Furthermore, the argument was

21. The Patman "death sentence" was also, it may be noted, discriminatory as between the several states. It was intended to drive the interstate chains back to the boundaries of a single state, and was obviously capable of forcing the A & P, Woolworth etc. to retreat to a few key states like New York and Pennsylvania where their main concentrations of stores already were, and where it would be possible to run large numbers of stores without falling foul of the multiplier provision by crossing too many state lines. Thus small states like North Dakota, Oregon and Arkansas which had never seen fit to enact state chain taxes would be arbitrarily deprived of the benefits of mass distribution.

22. Compare Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) with National Labor Relations Bd. v. Jones Laughlin Steel Corp., 301 U.S. 1, (1937).

essentially a circular one. It was obviously most unlikely that Congress would pass the "death sentence" unless anti-chain agitation revived to the level of the early and mid-thirties, or exceeded it, in which case numbers of the states would themselves likely be taking "death sentence" action against the chains simultaneously, thus reducing the force of the argument about the denial of states' rights. On the whole, the balance of probability favoured the presumption that if the chains lost the political argument they would also lose the legal one. Such had been the situation through the whole history of chain taxation, the courts not holding out when the political pressure became sufficiently intense. However, as the Supreme Court's rejection of the "double-barrelled" Iowa tax had shown, the chances of any variation in the taxing method being found acceptable were always difficult, indeed impossible, to assess with any degree of confidence. The constitutional problem was not the highest hurdle in the way of the "death sentence" bill, but it was just one more obstacle, each of which had to be cleared without stumbling, strewn along an already hazardous course.²³

23. Among the lesser possible objections to H.R. 9464 were: (1) the exemption of the first nine stores. In the 1920's, laws exempting small chains of four stores were held unconstitutional, though the Supreme Court had never passed on the question and might well have thought differently. (2) In the 1933 Florida chain tax case, Liggett v. Lee, the Supreme Court had ruled invalid a multiplier provision whereby the tax was increased if the chain operated in more than one county. However, the three liberals had dissented forcefully, and it was their philosophy in respect of chain taxation which had subsequently predominated. What is more, the majority in Liggett v. Lee had emphasized the arbitrariness of basing the multiplier on the county, a flimsy unit of political, administrative and economic identity. The same objection could not be advanced in respect of a tax multiplied by the number of states, for great slabs of the law relating to business were premised on there being fundamental distinctions between businesses acting across state lines and those which were purely intrastate. (3) What was the strongest political argument against H.R. 9464 - that it would confiscate business, cause economic dislocation and force up prices, was, of course, the least persuasive from the judicial point of view, though that is not to say it might not have influenced a close decision.

In retrospect, the Patman "death sentence" may seem a futile enterprise, doomed to failure if only because it was introduced at a time when the anti-chain movement was already in a state of terminal decay. But chain store men did not feel so sure at the time, especially in the early months of 1938 when the "Roosevelt recession" evoked nervous recollections of all that had gone on just two or three years earlier. Patman had made good on his menaces in the past, and no bill with 75 co-sponsors could be taken lightly. While these 75 were only a small proportion of the House of Representatives as a whole, the percentage of Congressmen sponsoring the bill was noticeably higher from those states where the independents were particularly active. Four of the five man Florida delegation in the House, for instance, were co-sponsors, thanks no doubt to the influence of the Better Business Association. Equally, the list of co-sponsors was far from being a reliable guide to the full strength of Congressional interest. Only two Missouri Congressmen were co-sponsors, but Schulte was able, by the October, to name seven of the 13 man House delegation who had made definite statements that they would vote for the bill.²⁴ Very few Senators and Congressmen went out of their way to attack the bill - once again, Emanuel Celler proved the most vocal defender of the chains - and chain store men were well aware that fence-sitters might topple over the wrong way if anti-chain agitation revived.

The enemies of the chains were also considerably excited for a time in early 1938 by an outbreak of antimonopoly oratory among members of the Roosevelt administration. When the Republicans eagerly took revenge for the epithet "the Hoover depression" by labelling the vicious 1937-8 recession "the Roosevelt depression", prominent administration figures like Harold Ickes and Assistant Attorney-General Robert H. Jackson hit

24. Interstate Merchant, October 22, 1938.

back by blaming the recession on the monopolistic tactics of big business. Roosevelt had always had a weakness for the old Brandeis-Josephus Daniels-Samuel Untermyer school of antimonopoly liberalism, and in giving a free hand to these attacks he inspired hopes that he might look with favour on the "death sentence". Patman claimed unequivocally that his bill was giving expression to the President's wishes, a claim which he attempted to prove by stringing together various, mostly irrelevant, quotes from Roosevelt speeches. While Patman's scissors-and-paste method of constructing his thesis was incapable of convincing anyone, anti-chain zealots wondered whether the administration might not decide to slaughter a few scapegoats to ease public concern about the recession.²⁵ Old Brain Trusters like Donald Richberg and Raymond Moley forcefully condemned the "death sentence", which was obviously a contradiction of everything they had attempted in the days of the NRA.²⁶ Yet even in 1933, when the Brain Trust approach was at its zenith, Roosevelt had unleashed tirades against big business and its evil ways of which the most eager trust-buster might have been proud. In early 1938, the antimonopolists were seemingly more influential in the President's counsels than at any time previously and those who advocated planning by government in concert with big business were out in the cold.²⁷

25. Hawley, The New Deal and the Problem of Monopoly, pp. 390-5; Interstate Merchant, December 18, 1937; January 8, February 19, 1938. Samuel Untermyer, famed for his work as counsel for the Pujo committee's "Money Trust" investigation of 1912, was at this time acting as general counsel for the "Empire State Independent Retailers and Wholesalers Association", which campaigned for a chain tax bill at Albany in 1938. (New York Times, July 12, 1937).

26. Bloomfield, ed., Chain Stores and Legislation, pp. 110-5; Newsweek, September 5, 1938.

27. It should not be supposed, however, that there was a simple, clear-cut division between "planners" and "antitrusters" on the chain store question. In the House, Maury Maverick of Texas led a small group of left-wing planners, the "mavericks", which argued for a programme of planned "production for use", using machinery similar to the NRA and AAA, but to achieve full output rather than restricted production, and with government, labour and consumers to play a major part in the planning, rather than leaving business to regulate itself. Three of this group (Maverick himself, Robert G. Allen of Pennsylvania and Jerry J. O'Connell of Montana) were co-sponsors of H.R. 9464, and a fourth, Henry G. Teigan of Minnesota, an active advocate of the bill. (Hawley, The New Deal and

As well as firing salvos at big business, the administration seemed to be interested in cultivating small business sentiment. Commerce Secretary Daniel Roper summoned representatives of the nation's small business men to a convention in Washington in early February, one thousand "little fellows" attending. According to critics, the delegates were "hand-picked" from among those known or thought to be sympathetic to the New Deal; if that was so, it lent added point to the fact that the small business conference voted support for the "death sentence" bill.²⁸ In the wake of the conference, small business organisations sprang up all over the country, most of them basing their main appeal on being either for or

27. (cont'd)... the Problem of Monopoly pp. 182-3: Congressional Record vol. 83, pp. 2305-7). Similarly, the Minnesota Farmer-Labor party had tended to drift away from the old style trust-busting idea during the New Deal period, favouring instead the extension of social control over key aspects of the economy so as to facilitate "production for use". But the party supported chain taxation and fair trade laws, as being in keeping with its philosophy of decentralising and keeping in local hands those parts of the economy, such as farming and retailing, which were seen as being the natural province of the independent "little fellow". This support for the independent merchants was also combined, somewhat awkwardly, with the advocacy of consumer cooperatives, of which Minnesota had more than any other state. Four of the five Farmer-Labor party delegation in the House were co-sponsors of H.R. 9464 (the fifth being Henry G. Teigan) and the 1938 convention of the party subsequently endorsed the bill. (Congressional Record, vol. 83, pp. 2305-7; The Progressive, April 9, 1938). In the spring of 1934, the party, then at the high point of left-wing fervour, had gone dangerously close to the brink of disaster in adopting a platform calling for the "complete reorganization of our social structure into a cooperative commonwealth": the consequent defection by farmers and small businessmen had led to nervous back-tracking by party leaders, who emphasised that there was no intention for the state to take over retail businesses. The damage was repaired sufficiently for Governor Olson to secure reelection in the November, 1934 elections, but the Farmer-Labor party lost its control of the House. This blunder was not repeated. (See, Donald R. McCoy, Angry Voices: Left-of-Center Politics in the New Deal Era, Lawrence, Kans., 1958, pp. 53-58; Congressional Record, vol. 79, pp. 13526-8; George H. Mayer, The Political Career of Floyd B. Olson, St. Paul, 1951, pp. 165-83, 250-1, 257, 270).

28. New York Times, February 3, 4, 1938; NARD Journal February 17, 1938. The "hand-picked" conference actually adopted a number of resolutions very hostile to New Deal legislation, especially that relating to labour questions.

against Roosevelt. These were not anti-chain organisations, or even primarily groups of independent merchants, but several of them, especially those of the pro-Roosevelt faction, did endorse the Patman bill.²⁹ With the administration apparently eager to divide small business off from the "economic Royalists", and with many of the administration's friends in small business favouring the Patman bill, the risk for the chains was apparent for all to see, even if it was really just a mirage. Actually, the wooing of small business by the administration did little to advance the battle against the chains. On Roosevelt's initiative, Congress voted funds in the Spring of 1938 for a full-scale investigation of the nation's economic problems by the so-called Temporary National Economic Committee; Patman urged that the Committee should investigate the "feudalistic chain system", but it in fact gave the chain store question the minimum attention compatible with the objective of conducting a thorough economic review. With the end of the "Roosevelt depression" in the summer of 1938, the administration's wooing of small business, though not abandoned, rather cooled off. When this happened, the optimistic forecasts of Patman that the administration would look upon his bill with favour were seen as thoroughly fallacious.³⁰

The balance of probability from the first appearance of the Patman "death sentence" bill favoured the view that it had little chance of enactment. Nevertheless, it remained a distinct possibility that something would come of it: perhaps a weaker federal chain tax or a stirring up of

29. Business Week, September 24, 1938, pp. 28-9; Interstate Merchant, February 12, March 26, April 16, 1938. Groups opposing the chains included "Small Business of America", Columbus, O., led by James G. Daly, editor of the Sample Case, organ of the UCT; the Little Business Men's League, Chicago; Freedom of Opportunity Foundation, Berne, Ind., and George Schulte's Independence, Inc., which had failed to develop in the way its founder had hoped in 1936; its 1936 inaugural convention had attracted 2,000 to hear addresses by Patman and Coughlin, but the 1938 convention was a quiet affair, in a hotel.

30. Hawley, The New Deal and the Problem of Monopoly, pp. 410-9.

anti-chain sentiment which might have serious consequences in some of the states, or even legislation of an entirely different character. Chain propaganda had, in the aftermath of the California referendum, become somewhat boastful about how public opinion was now on the side of the chains, but the position was really still quite delicate. Just how delicate, was seen in the November, 1938 general election, when the people of Colorado voted to retain the chain tax law put on the statute books by popular referendum in 1934. The pro-tax plurality was more than doubled, despite a lavish public relations campaign by the chains, modelled on that used in California two years earlier, which allegedly cost the chains \$7.52 for every vote they actually got. There were, admittedly, some sound reasons for chain store men not to draw too dire a conclusion from the Colorado result, as they were the first to point out. Colorado was a small western state, with strong home state loyalties; the pro-tax federation, the Colorado Civic Association, was exceptionally well-organised and had been in the field for five years; the revenue from the chain tax went directly to finance the state old age pensions scheme, which the majority of the voters were anxious to see retained. And, of course, the fact that the people had favoured a relatively mild chain tax (top rate of \$300 on each store in excess of 24) provided no conclusive evidence as to what attitudes would be to a "death sentence" tax, particularly one imposed by Washington. The Colorado Civic Association emphasised in its propaganda that the tax would not force any chain stores out of business, only make them pay their rightful share of the tax burden which was supposedly falling disproportionately on the independents. Nevertheless, a chain tax was a chain tax, and the chains in Colorado, as was their custom, had fought their campaign on predictions of disastrous consequences for wages,

employment and prices, predictions which would have been more appropriate to a discussion of a "death sentence". Clearly, the people had either disbelieved the chain store propoganda, or they had refused to be influenced by it. Whichever was the reason, chain store men had no cause for complacency.³¹

iv. 1939: The Swing of the Pendulum

Having given the "death sentence" a fairly successful launch in 1938, Patman reintroduced his bill in 1939 as H.R.1 with some hope of action at this second time of asking. But H.R.1 made no progress whatsoever. Few speeches were made in its favour in Congress, and the bill languished unattended in the House Ways and Means Committee. All Patman achieved in 1939 was a promise from House leaders that his bill would be granted hearings in 1940.¹

The 1938 elections produced a pronounced swing to the right in the country as a whole, with adverse consequences for the "death sentence" bill. A heavy toll was taken of the co-sponsors, 32 of the original 75 not returning to the House in 1939. Because of a ruling against the

31. Time Magazine, "Colorado No", November 21, 1938: Colorado Chain Stores Assn. The Colorado Store License Law, Denver, 1938; Interstate Merchant, November 19, 1938; New York Times, November 10, 1938. Some weeks later, the people of Columbus, Ga., voted by 1,708 to 1,470 in favour of a municipal tax ordinance (top rate of \$1,200 per store). (Interstate Merchant, January 28, 1939). A survey by the American Press Association of editors of small town newspapers in 28 states found that "a majority of their readers oppose legislation which might put the chain stores out of business or which would tend to increase prices in chain stores" but that "a majority of opinion might be swung from one side to the other by a strong presentation of either side". This survey may be treated with some reserve, as it was made "for the information of groups which are...considering using advertising space... to educate the public on the chain versus independent controversy..." (New York Times, November 25, 1938).

1. New York Times, July 2, 1939.

practice by the Speaker, Patman introduced H.R.1 alone, without co-sponsors: he claimed still to have the support of 150 Congressmen, but there was little evidence of it. Patman himself did most of the speech-making in favour of the bill, and no movement developed to compel action from the House Ways and Means Committee. Indeed, during 1939, Congress ceased to continue on the New Deal road and, responding to the mood in the country, actually began to undo some of the things that it had done during the depression. Radical and disruptive legislation was definitely out so far as the majority of the legislators were concerned, and even the most zealous advocates of the "death sentence" had to admit that the times were not propitious. The tremendous business upturn in the latter months of 1938, an upturn which continued through 1939, only served to encourage the idea of a return to "normalcy". The economic and political climate could never again be quite what it had been back in 1929, but it was the nearest thing to it since the depression began.²

The courts also showed an inclination to reassess some of the things that had happened in the strenuous years of the depression and New Deal. Since the 1931 decision in the Indiana case, the state courts had obediently followed the line on chain store taxation laid down by the U.S. Supreme Court. A few decisions had arguably gone against the spirit of the Supreme Court's rulings, but none had gone against their letter; any contrary traditions in the interpretation of state constitutions had been routinely brushed aside so as to ensure harmony. In 1939 this harmony was shattered by a series of decisions in state courts.

The first of this series was handed down on March 21, when the Kentucky Supreme Court invalidated a perfectly ordinary graduated license tax. The crux of the decision was a bald assertion that in the 5 to 4

2. Interstate Merchant, January 7, April 22, 1939; Leuchtenburg, Franklin D. Roosevelt and the New Deal, pp. 270-4.

vote by the Supreme Court in the Indiana case the minority had been right. The Kentucky court held that the differences between chains and independents described in the Indiana case - abundant capital, superior management, lower operating costs, greater efficiency in purchasing, buying for cash, warehousing and cheaper advertising - were differences which could also be found between individual independent merchants. "It is obvious that the differences relied on as a basis for the classification, are not peculiar to a group of stores under unified management or ownership...A classification of a business, based on differences in number only, is without substance and does not have a reasonable relation to the object of the taxing act, which is to raise revenue".³

While this finding was a direct negation of the rulings of the U.S. Supreme Court, the Kentucky Supreme Court was careful to throw up some camouflage in the form of ample references to the limitations on license taxation supposedly required by the state constitution. Three months later, the Pennsylvania Supreme Court adopted the same line of attack, perhaps less surprisingly, for that ultra-conservative body had traditionally interpreted the uniform taxation clause of the state constitution so as to preclude any form of graduated taxation whatsoever.⁴ When the Pennsylvania tax was enacted, at the height of Governor Earle's "Little New Deal" in 1937, the Attorney-General had confidently predicted that there would be no trouble with the courts, presumably in the belief

3. Great Atlantic & Pacific Tea Co. v. Kentucky Tax Commission, 128 S.W. (2d) 581.

4. American Stores Co. v. Boardman, 6 Atl. (2d) 826. The relevant provision of the state constitution declared that "All taxes shall be uniform, upon the same class of subjects..." This was a typical sort of uniform taxation provision found in most state constitutions, including many states with chain taxes. A decision supposedly based on the state constitution was, of course, invulnerable to appeal to the federal courts, which partly explains the tactic adopted by the Kentucky and Pennsylvania Supreme Courts.

that they would feel obliged to adapt to the new spirit of reform abroad in the state. But by 1939 conditions were very different. Earle had been voted out of office in 1938 and replaced by a conservative Republican, Arthur H. James, who was elected on a platform of getting rid of "discriminatory" taxes and so bringing business back to Pennsylvania. The state Supreme Court might well have struck down the chain tax even at the high tide of the "Little New Deal" but the political change made its action a near-certainty.⁵

While no informed observer could have misunderstood the thrust of the decisions handed down by these two state Supreme Courts, it was left to a judge in Richmond County Superior Court in Georgia to come right out and say, without evasive references to state constitutions, that he disagreed with the U.S. Supreme Court. Judge Hardeman did so, he declared, with "embarrassment and hesitancy" because he was prepared to "yield to no man in my respect and regard for the United States Supreme Court". He felt, however, that the tax levied by the city of Augusta on its chain stores went far beyond being a tax for revenue purposes, and yet could not be justified as an exercise of the police power. "Police powers are not intended to be exercised in support of or against this theory or that theory in the realm of political economy". This had not been the view taken by the U.S. Supreme Court in the Louisiana decision, but Judge Hardeman was unwilling to be hemmed in by such a consideration. Naturally, chain store men were elated. Split decisions of the U.S. Supreme Court were no longer, it seemed, sufficient to keep even Superior Court judges in line on the chain store issue.⁶

5. Harrisburg Patriot, May 21, 1937; New Republic, May 6, 1940 pp. 599-601, "Pennsylvania After The New Deal".

6. City Council of Augusta v. Southern Grocery Stores Inc., 7 S.E. (2d) 181. The Judge might have based his objection to the tax on the lesser powers of the municipality, as opposed to the state, but he did not. Contrast, Great Atlantic & Pacific Tea Co. v. City of Columbus, 6 S.E. (2d) 320. The U.S. Supreme Court had never ruled on a municipal chain tax ordinance so any conflict with it could have been avoided.

Also in 1939 came decisions in the Supreme Courts of Colorado and North Carolina which were given widespread publicity as meaning that the chain tax noose was being drawn around the necks of the voluntary chains.⁷ In fact neither case directly related to voluntary chain operation, the Colorado case concerning the status of independently-owned but tightly controlled agencies of the Gamble-Skogmo auto supplies chain, and that in North Carolina relating to a "family" of department stores in which there was some common identity of ownership. The decisions, especially that in the Colorado case, were arguably more strictly comparable to those in which courts required oil companies to pay chain taxes on filling stations operated under various types of leasing arrangements which created an appearance of individual ownership and yet kept effective control in the hands of the oil companies.⁸ Nevertheless, the two decisions taken together did provoke a genuine unease inasmuch as the courts looked to evidence of common management, centralised advertising and purchasing and other features also found in bona fide voluntary chains to infer an identity of interest. Just where would the line be drawn? As one observer succinctly put it, although the Colorado and North Carolina cases "by no means settle the position of the voluntary chains, they do present a thread which, unwound for another year or two, may prove disconcerting to the voluntaries".⁹

7. Newsweek, June 12, 1939, "Blow at voluntaries; they're liable to chain tax, Colorado Supreme Court rules"; Business Week, June 3, 1939 p. 14; Belk Bros. v. Maxwell, 200 S.E. 915; Bedford v. Gamble-Skogmo Inc., 91 Pac. (2d) 475.

8. Mid-Western Petroleum Corp. v. State Board, 187 N.E.882 (1933); Gulf Refining Co. v. Fox, 297 U.S. 381 (1936); Maxwell v. Shell Eastern Petroleum Products, Inc., 90 Fed. (2d) 39 (C.C.A., 4th, 1937); Standard Oil Co. v. Texas 142 S.W. (2d) 519 (1940); Standard Oil Co. v. State Board, 99 Pac. (2d) 229 (1940). The U.S. Supreme Court decision in the Gulf Refining Co. v. Fox case effectively put an end to blustering by executives of other types of chains, especially in the grocery field, that they would evade chain taxes by leasing stores to managers.

9. M.W. Lee, 'Recent Trends in Chain Store Tax Legislation', Journal of Business, vol. 13 (1940); pp. 253-74, p. 266.

Whether the U.S. Supreme Court would allow the discriminatory taxation of bona fide voluntary chains was another question. The tenor of the Court's opinions in the past actually made it unlikely, though this point was not given much attention in the aftermath of the Gamble-Skogmo and Belk cases.¹⁰ Furthermore, as the states had not hitherto, as a matter of policy, sought to bring the voluntaries under their chain tax laws, there was no reason, except desire for revenue, which would suddenly make them do so at this late stage in the chain tax movement. The Gamble-Skogmo and Belk cases were nonetheless a godsend to the corporate chains. For years they had tried to bring the voluntaries over into their camp in the chain tax battle, often stealthily having cleverly worded amendments offered to chain tax bills in the hope that the voluntaries would panic at the thought that they might be trapped by the ambiguous language.¹¹ But, although pursued with unflagging dedication, this tactic had never worked particularly well simply because the voluntary chains had never once in fact been compelled to pay a chain tax. Thus while executives of voluntary and cooperative groups had shown some

10. In the Indiana chain tax case in 1931, Justice Roberts, speaking for the Court, casually dismissed any comparison of the methods of voluntary chains with those of corporate chains with the observation that a "series of independent units cannot, in the nature of things, be as efficiently and successfully integrated as a chain under single ownership and management". This loose theory encouraged chain attorneys in the 1933 Florida chain tax case to attempt to prove otherwise and to show that "there is no essential difference between the two methods of conducting a business". But Justice Roberts brushed this aside with the emphatic declaration that "the difference between an integrated and a voluntary chain is fundamental". This doctrine indicated that what really counted with the Court was not any presumed advantage in operating method, which would have been open to empirical review in each case, but the form of ownership. Thus it seemingly conferred an absolute immunity on the bona fide voluntary chain even if it actually copied many of the methods of the corporate chains and proved more successful than them. On the other hand, no legislative intent to tax the voluntaries had been involved in these cases, and it is not unthinkable to suppose that the Court might have chosen to respect such an intent had it existed.

11. The Patman committee hearings produced evidence of this. See, in particular, vol. I, p. 377; Vol. II, p. 40.

distaste for such political assaults on their competitors - a survey of 500 of these executives in 1935 revealed that 86% of them opposed chain taxation - their attitudes had not always been shared by the rank-and-file wholesalers and retailers in the voluntaries. The result had been that NAWGA and the National Voluntary Groups Institute had tried to straddle the issue, and to say as little about it as possible. However, the Belk and Gamble-Skogmo cases, combined with a fear that Patman would not be happy until he and his fundamentalist friends had consigned anything remotely resembling a chain to oblivion, and turned the clock back fifty years, encouraged a more assertive attitude. Prominent figures in the voluntary and cooperative field made increasingly sharp attacks on Patman and questioned his assurances that he would or could ensure that the voluntaries were not brought under his "death sentence". Discreet behind-the-scenes warnings were given to the NARG not to fight too hard for the bill; popular magazines and newspapers, as well as the trade press, carried stories "leaking" allegations about Patman's real intentions and suggesting that more and more opposition was developing towards him in the grocery trade. These allegations did their work well, as rumour and suspicion soured the trade politics surrounding the Patman bill.¹²

Gratified as chain store men were by these developments, they did not neglect to take action of their own to throttle the bill. In the autumn of 1938 the chains launched a counter-offensive which soon threw their enemies into disarray. For the first time, the A & P joined in the battle, announcing its intention so to do in a somewhat pompous "Statement of Public Policy" which appeared in nearly every newspaper in the country. The A & P placed its campaign in the hands of Carl Byoir & Associates,

12. New York Times, June 21, 1938; January 6, 1939; Voluntary & Cooperative Groups Magazine, July 1935, February 1938; Interstate Merchant, August 26, September 2, 9, 1939. Modern Merchant & Grocery World, February 25, 1939.

public relations counsellors, and assumed the position of leadership which it had for so long shirked. Theories abounded as to why the A & P had chosen this moment to join the fray, but there was an immediate general expectation that, having crossed the Rubicon, this great empire of a chain would act with the utmost forcefulness.¹³

13. As late as 1935, John Hartford had declared publicly that "If the people of the United States like our stores so little that they are willing to tax us out of business, that is their privilege. We will shut up shop. We have not spent, nor will we spend, a single penny to fight chain store taxation". While this declaration was not entirely accurate - the A & P had consistently opposed chain taxation through the courts and many of its local officials had helped other chains in their political activities - it did reveal an attitude unique among leading chain executives. Behind it lay the reluctance of the Hartford brothers to become entangled with other chains and their unwillingness to accept that they had many and powerful enemies. They were, Fortune magazine thought, "two bewildered, elderly gentlemen caught between forces that they neither understand nor know how to combat", living in the past, and unwilling to seem to be begging for public sympathy at this late stage in their lives. Even in 1938, George, the brother less in touch with the world outside, was apparently reluctant to mount a public relations campaign. The belated decision to alter course had several causes. (1) The old method of doing nothing had clearly failed. Supercilious remarks about shutting up shop reflected a deep conviction that such a thing would never be necessary. However, the Supreme Court's "right to tax to destroy" decisions, especially the May, 1937 Louisiana decision, which raised the possibility that states might preserve their local chains while crippling the A & P, shook that faith. (2) Patman's success in building support for the "death sentence" in early 1938, and his past victory with the Robinson-Patman bill. (3) Enactment of an anti-supermarket ordinance by Camden, N.J. in April 1938 taxing supermarkets \$10,000, with extra fees on each concession. This was followed by anti-supermarket ordinances in Atlantic City and New Brunswick, and posed a new threat to the A & P's programme of massive supermarket openings. Such ordinances would perhaps have spread to other states in time had they not been decisively condemned by the New Jersey Supreme Court in February, 1939. (4) John Hartford's belief that A & P employees were becoming, as Carl Byoir testified in the A & P trial in 1945, "almost ashamed to work for chain stores" because of the constant attacks on the morality of chain methods. Patman particularly singled out the A & P in this respect, referring at every opportunity to a series of prosecutions in Washington D.C. in late 1935 in which A & P managers were fined for giving short weights on chickens. (The A & P later charged that Patman himself had instigated these cases, through the Superintendent of Weights and Measures for the District of Columbia, who happened to have come originally from Patman's own Congressional district). Patman used these cases to support his belief that the A & P, through its inventory system, effectively compelled its employees to cheat the consumer. Following these prosecutions, John Hartford personally signed letters sent out to all 45,000 store employees warning them that anyone giving short weight would be dismissed. Such attacks on the company's reputation, as well as the programme of closing smaller stores, had demoralising effects on some of the A & P managers, and it was this internal problem of the A & P which was perhaps the major single factor in deciding on an image-building public relations programme. (Carl Byoir & Associates, Current Trends in Chain Store Taxation, 1939, pp. 19-23; New

Patman's reaction to the A & P's "Statement of Public Policy" was to welcome it as a chance to put the issue to the test of public opinion. "The fight is coming out into the open", he declared. "I hope it remains in the open. I abhor and detest false fronts and deceitful propaganda. Let us hope the day of cornstalk brigades, fake consumer groups and other false fronts is gone". He would, he announced, "ask no quarter - just a fair fight".¹⁴ In fact, all that had been seen before by way of "false front" methods paled into insignificance before the tactics now employed. Carl Byoir & Associates were particularly active, disposing of apparently limitless resources and acting as puppet masters on an epic scale. Perhaps the most ambitious of Byoir's projects was the "National Consumers' Tax Committee", nominally headed by a Mrs. Kenneth C. Frazier, which set up women's groups to study "discriminatory taxation" in thousands of cities, often with locally prominent clubwomen becoming involved. The A & P openly made a donation to Mrs. Frazier, but the fact that the whole project was masterminded by Carl Byoir was kept well hidden. Many of these study groups existed only on paper, or were just made up of wives of chain store managers, but those that were active kept up a steady flow of resolutions for publication in home town newspapers, thus helping towards the manufacture of a synthetic public opinion against the Patman bill. With the "fronts" traced back to other chain sources, and including the 24 state units of the reviving American Retail Federation, George Schulte estimated towards the close of 1938 that there were 57 varieties of "fronts" in existence.¹⁵

13. (cont'd)...York Times, September 15, 16, 18, 1938; Fortune, April 1938 "A & P Goes to the Wars"; N.Y. Jnl. of Commerce, April 5, 1935; Congressional Record, vol. 81, pp. 5912-3; Interstate Merchant, June 1, 1940; September 8, 22, 1945; November 3, 1945).

14. Interstate Merchant, October 15, 1938.

15. The Annalist, April 11, 1940, pp. 518-9; Propaganda Analysis, vol. II, December 1, 1938, "The A & P Campaign"; NARD Journal, September 15, 1938; Interstate Merchant, December 3, 1938; July 21, 28; November 3, 1945; Congressional Record, 79th Cong., 1st Sess., vol. 91, pp. A3960-2.

This proliferation of "false fronts" did not provoke the sort of outcry in Congress which had greeted the formation of the American Retail Federation. Indeed, the ARF itself was back in business, and establishing itself in Washington in a way that bewildered the militant opponents of the chains, to whom its name was still anathema. The ARF still only had seven national retail trade associations in its ranks, all of them being basically chain, voluntary chain or department store organisations, yet it was reported as being "tacitly accepted" in Washington as "the representative of the vast 80% of business men engaged in retail trade". In May, 1939, the Federation brought off a major coup, staging a "Retailers' National Forum" to enable retailers to meet the politicians: dozens of Congressmen attended the event as did Commerce Secretary Harry Hopkins, Agriculture Secretary Henry Wallace, and President Roosevelt himself. Executives of chain and department stores were there in droves, as well as some "little fellows" of the "safer" type. The irony of the situation was that Roosevelt's decision to address the Forum - his speech was a rousing defence of the administration's spending programme and had nothing to do with the chain store problem - was generally interpreted by the press as being an attempt to appeal to "little business" over the heads of big business, for he had rejected the opportunity to attend the convention of the bitterly anti-New Deal U.S. Chamber of Commerce. Anti-chain groups were appalled by the whole affair, for the big retail associations which were truly representative of "little business" - the NARD, the NARG and NRHA - had all refused their invitations to the Retailers' National Forum. To Schulte it was "the biggest hoax ever pulled on government officials"; the NARD Journal could only conclude that Roosevelt did not know the background of the Federation and had been lured

into attending by his friend Louis Kirstein, in whose Boston department store the President's son John was working, "and for that reason one million independent retailers will be inclined to charity".¹⁶ The truth seemed to be that the administration and many Congressmen were quite prepared to forget about the origin of the ARF and the attendant uproar - even if they remembered it - and to deal with the organisation that seemed well established, non-partisan and to have in its ranks wide sections of large and middle-sized retailing. Washington was tired of the more fanatical type of "little fellows" whom it had indulged in the over-excited atmosphere of the mid-thirties; it had less and less time for those whose principal interest seemed to be to get legislation to cripple their competitors. Some weeks after the Retailers' National Forum the anti-chain forces held their own forum to let the trade meet the politicians, with a boat trip down the Potomac followed by a picnic at Fort Washington. The meeting was sponsored by the NARG, NARD, NRHA, NARMD and NAITD - the true voice of little retailing - yet it attracted only about 20 Congressmen, not one administration leader and little press attention. The militants were now out in the cold.¹⁷

Back in 1935 and 1936, many Congressmen had acted almost as if they believed that the battles between independents and chains were the latest variation in the age old struggle between Good and Evil. But by 1939 a considerable reaction had occurred. The enactment of Robinson-Patman and Miller-Tydings meant that the militant independents could no longer be looked on as quite the oppressed underdogs they had seemed in 1935. The NARD, in particular, was by 1939 under a close and hostile scrutiny from

16. Business Week, May 27, 1939, p. 14; Interstate Merchant, May 20, 27, 1939; NARD Journal, June 1, 1939.

17. Business Week, July 8, pp. 28-9, July 22, p. 32, 1939; Interstate Merchant, July 1, 22, 1939.

sections of the press, the FTC, some Congressmen and the Department of Justice, as critics demanded to know how it was that this one association had almost alone succeeded in rewriting the antitrust laws so as to permit its members to enjoy the benefits of price maintenance. The growing reserve in Congress was seen in its failure to follow up on the Miller-Tydings law by enacting fair trade legislation for the District of Columbia. And it was seen also in the greater consideration accorded to those like Emanuel Celler, who argued that the independents were no better than their chain opponents when it came to the morality of their lobbying methods.

Patman's enemies seized their opportunity to tarnish his reputation when, in the winter of 1938-9, a sensational scandal engulfed McKesson & Robbins, the nation's leading wholesale drug concern. This scandal, surely one of the strangest in American business history, reached its climax with the discovery that McKesson and Robbins president F. Donald Coster, who committed suicide, was in fact one Philip Musica, a swindler who had disappeared on release from prison and then, with a new identity, entered the drug business. In 1926, Coster had bought McKesson and Robbins and then, showing great business acumen, built it up through a series of mergers to the point where it enjoyed 30% of the U.S. wholesale drug trade. With the help of his two brothers, each having a different assumed name, Coster perpetrated a massive fraud through the conduct of a "crude drugs department" whose millions of dollars of supposed assets were entirely fictitious. Of all this, Patman was entirely ignorant: his only definite connection with McKesson and Robbins was that he had conducted a lecture tour on the Robinson-Patman law in 1936 for which the company had paid the major slice of his expenses. But from this slender thread artful propagandists spun an elaborate web of innuendo, and newspaper columnists and Congressional cloakroom gossip circulated the rumours. Had Patman received \$18,000 and a car from McKesson, and if so why? What discussions had he had with Coster

in connection with the passage of the Robinson-Patman or Miller-Tydings laws? Had he met Coster in a New York hotel room the previous autumn to discuss the "death sentence" bill? Did Patman know of any money paid by McKesson and Robbins to retail drug associations to assist their fair trade campaigns? The Chicago Tribune, a bitter foe of Patman, demanded his "firing" from Congress; chain lobbyists asked that there should now be a Congressional investigation of the lobbying methods of their opponents. In a passionate hour-long speech in his own defence on the floor of the House Patman angrily rejected the charges, or rumours, being manufactured against him. He had received money from McKesson and Robbins, he admitted, but as payment for a lecture tour of the type made by many Congressmen, and it had in any case left him out of pocket; he had never had any other business or political transactions with Coster or his company, and though he had met Coster, "lots of men have". Coster, Patman stated, had actually been discovered to have contributed to organisations opposed to the "death sentence" bill. Patman warned his fellow Congressmen that a \$100 million lobby was out to destroy him and that "it would not surprise me if this method of attack and lobbying, backed by such enormous sums of money, continues that eventually some of the enthusiastic supporters of the opposition will actually resort to kidnaping and murder in order to silence those who oppose them". His fellow legislators seemed reasonably satisfied that Patman was indeed the victim of the sort of smear campaign which had been turned against many another Congressman who had got "out of line" on one issue or another. Nevertheless, the publicity given to the rumours contributed to a vague sense of unease - for can there be smoke without fire? - and further discouraged action on the "death sentence" bill.

Business Week concluded that the "adroit publicity" used by chain publicists

to tie in Patman to the McKesson scandal had played a "good part" in the "sidetracking" of the bill for the year.¹⁸

Patman's friends rushed to his defence over the McKesson and Robbins affair, testifying to his good character and elevated motives. The NARD Journal thought the circulation given to the innuendoes proved the press to be a "fascist dictatorship" and warned that the struggle for the "death sentence" bill would now become "a big fight; a dirty fight; a fight to the end". Less militant independents agreed with this prediction, but they were much less eager to become embroiled in such a fight. Once they had benefitted from the image of being downtrodden "little fellows", but now a conspiracy theory was being erected to suggest that all they had achieved had been masterminded by backstage manipulators like F. Donald Coster. At the same time, the attempt to grasp the forbidden fruit of the destruction by political means of business competitors was reducing their trade associations to the level of pariahs in the eyes of the broader business community. Was it now not time to settle back - to enjoy the benefits of such legislation as had been achieved, to seek a more cooperative relationship with the chains and to take advantage of the improving economic conditions generally? Might Patman prove not to be the Moses of the independent merchants, but their Pied Piper? Keen though the NARD leadership was on the "fight to the end", many of the rank-and-file had tired of the conflict. There was, admitted Rowland Jones, the association's Washington representative, a "defeatist frame of mind on the part of many NARD members, a feeling that we have embarked upon a crusade that is impossible of final success". The "death sentence" bill, which in 1938 had

18. Drug Trade News, December 19, 1938; Business Week, December 24, 1938 pp. 30-31, July 8, 1939 p. 29; New York Times, January 25, 1939; NARD Journal, January 5, 19, 1939; Congressional Record, 76 Cong., 1st Sess., January 24, 1939.

been the association's "No. 1 legislative objective" had to be downgraded during 1939 to one of three major objectives, the most important of which emerged as being the defence of the fair trade laws.¹⁹ Similarly, although the NARG remained formally committed to the bill by virtue of a resolution adopted at the 1938 convention, a resolution intended to reassert that commitment somehow failed to arrive on the floor at the 1939 convention. This failure was widely, and rightly, regarded as having been an "oblique denial" of the Patman bill. The association also elected to its board the president of the Massachusetts association, who was an unabashed opponent of Patman and an advocate of close collaboration with the chains.²⁰ Even more confused and awkward was the position of the NRHA. Although the 1938 convention had endorsed the bill, a direct poll of the membership subsequently found that only 1,948 were willing to support the measure, with 8,678 unwilling, 486 non-committal and 1,927 not heard from. As a consequence, the board, although anxious to maintain faith with Patman and the other national associations, felt obliged reluctantly to withdraw association backing for the bill. At the 1939 convention, Patman supporters staged the "hardest fought parliamentary battle in the recent history of the Association", but obtained nothing better than the setting up of a committee to make a "complete study" of the chains with a view to finding a method of controlling them. The committee saved the face of the NRHA board by quickly determining that the way to control the chains was by nothing less than "every possible means", thus allowing the board to

19. NARD Journal, January 5, October 19, November 16, 1939.

20. Business Week, July 8, 1939, p. 30; New York Times, June 23, 1939.

reinstate support for the Patman bill in time for secretary Rivers Peterson to make an appearance at the Congressional hearings on the bill in 1940.²¹

The protagonists of the Patman bill were also inconvenienced by the findings of the new opinion poll industry, for the polls showed that while a sizeable section of public opinion believed in some sort of discriminatory legislation there was only a small constituency for the view that the chains should be sentenced to death. Thus a nationwide Fortune survey in February, 1939 found that although 43.6% of those questioned favoured taxing chains more heavily than independents, only 6.3% believed that they should be legislated or taxed out of existence. Similarly, an Opinion Research Corp. poll conducted for Sears, Roebuck found that only one-sixth of respondents subscribed to the view that "chain stores should be driven out of business entirely", though 45% believed that they should be subjected to taxes not levied on other stores. Whether or not public opinion had shifted sharply since the mid-thirties as chain store men suggested - the California referendum was often cited as the "turning point" - the lesson seemed obvious that although the voters might favour the milder type of chain tax approved in the Colorado referendum, there was no great groundswell in favour of a "death sentence". On this occasion, the views of the "silent majority", as translated by the pollsters, seemed to accord with the attitude expressed by most organised sections of society.²²

21. Hardware Retailer, August 1939, pp. 48, 51, February 1940, p. 6.

22. Fortune surveys showed that 43.6% of those questioned favoured some degree of chain taxation in February, 1939; 48.7% had done so in January, 1937. Fortune's 1939 conclusion - assisted by a misleading comparison of the figures for the two surveys - was that the "sands have suddenly shifted from under the feet of the Honorable Wright Patman". The earliest systematic poll on the chain tax issue was taken by the American Institute of Public Opinion in August, 1936, when 69% of those with opinions favoured special taxes on chains: the equivalent figure was 63% in June, 1937 and 65% in January, 1938, with no later studies made. Another survey by the

v . The Hearings on H.R.1.

The long-awaited hearings on the Patman "death sentence" bill were held before a seven man subcommittee of the House Ways and Means Committee in the Spring of 1940. There was by this time no widespread demand in Congress for action on the bill; the hearings were, as chairman John McCormack of Massachusetts rather pointedly commented to Patman, "granted for you personally".¹ Although the members of the McCormack committee sat through the weeks of laborious and frequently repetitious or unenlightening testimony with considerable patience, regularly informing witnesses that they were listening with open minds, there was never much doubt that the committee was likely to make a recommendation unfavourable to the bill. On June 17th, 1940, it duly decided, by 4 votes to 3, to advise that no further action be taken either on H.R.1 as originally introduced or as revised by an amendment to "freeze" the chains which had been offered by Patman at the start of the hearings. It was the opinion of the McCormack committee that if any regulation of the chains were to be undertaken by Congress it should not be accomplished through the use of a federal tax. Not just the seven members of the committee took this view.

22. (Cont'd)... same organisation in May 1937 found that 30% of those asked were in favour of prohibiting all chain stores in their home states. Professor Paul D. Converse, who studied attitudes in Champaign-Urbana in 1931 and then again in 1937, considered that there was a similar division of opinion among consumers generally, but that feeling was somewhat less intense in 1937 and that the number definitely opposed to chains had declined. It was this decline of aggressively anti-chain sentiment which was, of course, the undoing of the anti-chain movement, not any change of mind on the part of the passive "silent majority". (Fortune, January 1937, p. 154; February 1939, pp. 88, 91; New York Times, November 22, 1939; Hadley Cantril, Public Opinion, 1935-1946, Princeton, N.J. 1951, pp. 95-6; Paul D. Converse, "Prices and Services of Chain and Independent Stores in Champaign-Urbana, 1937" in Journal of Marketing, vol. II (1938), pp. 193-200. See also, Louis Bader, "Consumers and Chain Store Taxation" in Journal of Retailing, December 1939, pp. 115-119).

1. House Ways and Means Committee, Hearings Before a Subcommittee on H.R.1: A Bill Providing for an Excise Tax on Retail Stores, 76th Cong., 3rd Sess., March 17-May 16, 1940, p. 143. (Henceforth cited as McCormack Cttee., Hearings).

So lopsided was the balance of testimony in favour of the chains at the hearings that it finally convinced all but the most diehard advocates of the "death sentence" that it was a political impossibility. No move developed in the House to countermand the recommendation of the committee and although Patman reintroduced his bill as H.R.1 in 1941 he did so more as a last gesture of defiance than as a serious legislative proposal. If any particular occasion may be seen as marking the end of the political threat to the existence of the chains, then the H.R.1 hearings were surely it.²

For the militant opponents of the chain stores the hearings were a kind of swan song in which they brought together every statistic, argument and appeal to the emotions which they had used up and down the country over the past decade and a half. Most of the burden for the anti-chain side was carried by Wright Patman and George Schulte, who was introduced to the committee by Patman with the generous tribute that "I believe...if there is one expert in this country on matters...affecting this vital problem, he is the expert".³ The other major contributions to the conduct of the

2. The 4 Democrats on the committee (McCormack, John Boehne of Indiana, Richard M. Duncan of Missouri and John D. Dingell of Michigan) outvoted the 3 Republicans (Frank Crowther of New York, Harold Knutson of Minnesota and Roy Woodruff of Michigan). Dingell had actually been one of the co-sponsors of the original "death sentence" bill. The Republican members had shown no sympathy for the bill during the hearings and it seems that they took the easy way out by putting the onus for suffocating it onto the Democrat majority. As the committee had received letters from acting Secretary of Commerce Edward J. Noble and Secretary of Agriculture Henry Wallace condemning the bill in no uncertain terms, the Democrats must have assumed that the administration expected them to "do their duty" in this way. Patman himself continued to profess a complete assurance that his bill would "carry out the will of the President", though no one else believed it. (McCormack Ctte., Hearings, p. 74, 356-7, 2255-7; Interstate Merchant, June 22, 29, 1940; Lebhar, Chain Stores In America, pp. 292-3).

3. McCormack Ctte., Hearings, p. 71.

hearings were made by Rivers Peterson, J.H. McLaurin and Theodore Christianson, who appeared in the double role of president of the Freedom of Opportunity Foundation, the umbrella organisation set up to coordinate the anti-chain forces behind the bill, and public relations counsel of the NARD. The National Association of Retail Grocers made only a half-hearted attempt to help the cause, president G. Vander Hooning making a distinctly low-key presentation in favour of the bill, and the failure of the voluntary chains to endorse the bill did not go unnoticed by the committee. Two other national trade associations, the Motor and Equipment Wholesalers' Association and the National Association of Independent Tire Dealers, also indicated their approval for the measure to the committee. The only organisations other than independent business alliances and retail and wholesale trade associations communicating their support were the Independent Bankers' Association and the Louisiana Farmers' Protective Association. A few of the bill's Congressional supporters also made personal appearances at the hearings but most of them seemed to have had second thoughts about the desirability of going ahead with something so drastic as the full "death sentence".

On a simple head count, the chains swamped their opponents. Even on the very first day of the hearings, which was given over to Patman's launching of the anti-chain case, only 25 of the 250 present were on the anti-chain side. As the hearings progressed, the chains had a seemingly inexhaustible supply of witnesses on hand, many of these being not merely opposed to H.R.1 but gushingly enthusiastic about the chains. The chain store men themselves were able to remain in the wings much of the time while a procession of farm leaders, manufacturers, labour leaders, consumer advocates, spokesmen for real estate interests, academics and others paraded through the committee room. It was Patman's complaint that all these pro-chain witnesses had been assembled by the "best financed

lobby in the "history of the world" whereas his side, lacking similar resources, had been able to offer only a "po' boy" campaign. There was an element of truth in the charge. The A & P alone spent tens of thousands of dollars to bring witnesses to Washington, Carl Byoir's agency entertaining them in lavish style once they were there as well as assisting in drawing up some of their statements.⁴ Nevertheless, the anti-chain forces could have made their point simply by filing letters and resolutions received from sympathetic organisations: the real problem was that hardly any such endorsements of H.R.1 were available. Even the commitment of the rank-and-file of the trade associations backing the bill was open to question. In the past, there had never been a shortage of funds to finance anti-chain offensives. In 1930 W.K. Henderson had collected sums running into the hundreds of thousands of dollars, and in 1936 the California Anti-Monopoly League, although fractured by internal strife and limited in scope to one state, had raised nearly \$80,000. The Freedom of Opportunity Foundation, in contrast, notwithstanding the nominal sponsorship of all the groups supporting the Patman bill and the fact that it was seeking the final solution to the interstate chain store problem, proved unable to attract any such rich endowments. The president of the Foundation, Theodore Christianson, informed the McCormack Committee that reports of a \$2m lobbying fund had embarrassed him because his board might wonder "what I had done with the money". The actual amount raised was, he added, "approximately one-fifth of 1 percent of the amount stated".⁵

4. Congressional Record, vol. 86, p. 1946; vol. 91 pp. A3960-2; Interstate Merchant, March 23, 1940.

5. McCormack Cttee., Hearings, p. 188.

In the hearings on the Robinson-Patman bill held before the House Judiciary committee in 1935, Patman had demonstrated the strength of his position by opening his attack with a call to amend the bill under consideration so as to make it more fiercely anti-chain. This time, he indicated the weakness of his cause by offering a series of amendments to weaken H.R.1. Its rates, he proposed, should be cut by half and chains of 50 or less stores exempted altogether where all the stores were located in one state or within a 100 mile radius of the principal place of business. Most significantly, he proposed that the multiplier provision should not take effect for seven years provided that the chain did not open any extra stores, or change the location of any existing stores, in that time. Formally, this was just a prolongation of the period of "purgatory", originally fixed at two years, which chain store men were to have to put their affairs in order. However, much of the actual discussion of the amendment worked around the idea of "freezing" the chains at their existing, or some other, level. This idea seemed to stir some slight interest among the members of the committee, who asked each witness about it, but the bill's sponsors, perhaps because the "freezing" idea only evolved during the course of the hearings, were both confused and confusing when they tried to explain what exactly it was that they wanted. Patman himself cited the case of a 1933 Swiss law as a parallel: "that is, one to freeze the large retail chain concerns and not permit them to expand any further or even enlarge their present locations"; yet at other times, he seemed to look upon the "freezing" stage merely as a temporary phase to precede dissolution after seven years. A further difficulty was that the "freezing" idea, insofar as it represented an alternative to the chain tax approach, was clearly not the business of the House Ways and Means Committee. For this reason, the Patman bill's supporters based virtually

all their remarks on the need for H.R.1 as originally introduced, making vague references to the "freezing" idea only by way of afterthoughts and asides. Consequently, any tactical advantage derived from this indication that the anti-chain forces were willing to accept something less drastic than H.R.1 was entirely dissipated and the hearings largely proceeded as if it was a case of all or nothing, with no room for a middle way. The merits of destroying, not "freezing", the interstate chains remained the crux of the debate.⁶

It proved to be a feature of the hearings that members of the committee repeatedly indicated their belief that the matters being brought to their attention were really more appropriate to the consideration of the Judiciary committee or Interstate Commerce committee. In 1935-6, Patman and his allies had been able to hammer home the argument that certain specific abuses needed to be remedied by making wide-ranging reference to the evils of chain store methods in general. Such was the natural order for legislative action - a broad indictment being focussed to one point of action. In 1940, the order was reversed. The enemies of the chains demanded a universal "death sentence" tax, yet most of the

6. Ibid., pp. 5-6, 148, 202, 213-4, 264, 422, 478. Patman offered another, singularly misconceived, amendment to include filling stations under the bill. He argued that their original exemption had been a "very close question" and that he had since "talked to members who helped me to draw up this bill and it seems to be the unanimous opinion that since they have been evading the Social Security Act, and using the lease system as a loophole - and it is a monopoly; we all know that...And so we just decided to put them in". This so-called "unanimous opinion" was seen to be a piece of self-delusion on Patman's part. Nearly all the Congressmen who appeared at the hearings, including those who were otherwise sympathetic to the bill, did so specifically to oppose this inclusion of filling stations. The recurrent themes of the objectors were that filling stations were not chain stores, that they provided invaluable service facilities for the motorist in country areas with few accessory stores and that they were already subject to special petroleum taxes. Only 5 of the 20 chain tax states taxed filling station chains, and in only 3 of the remainder was the exemption confined to stations exclusively selling petroleum products. The majority of states allowed the sale of varying proportions of accessories, tyres, cigarettes, cold drinks etc. without taxing the stations as stores. (Ibid., pp. 94, 489-94, 1557, 1764-5, 1778-80, 1799-1804, 1807, 1836-8, 1841-3).

arguments which they advanced in favour of this indiscriminate instrument of destruction hinged on the theory that the chains had violated a number of canons of good behaviour all of which were covered, individually, by existing laws, many of these laws having been enacted at the behest of the independent merchants precisely to deal with the chain store problem. The supporters of H.R.1 were reduced to demeaning the value of legislation they themselves had sponsored. "We thought when you passed the Robinson-Patman Act you had our problem answered", admitted Rivers Peterson. But experience had shown, he maintained, that the Act could not work properly in the hardware trade "because the methods of evasion are too devious; tangible evidence of violations too difficult to secure - and the processes of the law too slow". The NRHA was willing to cover dealers' costs in bringing criminal prosecutions, but the individual dealer was reluctant to take such a step "for fear of what would happen to his business" as a result of retaliatory action by the chains. Members of the committee seemed to think, however, that Peterson would do better to take his grievances straight to the FTC or Department of Justice or seek extra appropriations for these agencies to do their job properly.⁷ J.H. McLaurin and G. Vander Hooning based much of their case on the depredations of the A & P, particularly its violations of the Robinson-Patman law. The irony was, as the committee could scarcely fail to notice, that great slabs of their evidence came from the record of proceedings before the FTC, as clear an indication as could have been given that there was another way to deal with these problems. All the talk of how the big chains were building themselves into monstrous monopolies fell rather flat. A few years earlier,

7. Ibid., pp. 461-5, 478-9.

when the antitrust laws were effectively suspended, Congressmen might have been persuaded that some such unusual action as H.R.1 was the only method of protecting those whom the failure to enforce the antitrust laws had left exposed. But in 1940 antitrust prosecution was undergoing a revival under the energetic direction of Thurman Arnold, the head of the Antitrust Division of the Department of Justice. Major cases were underway at the time of the hearings against giant concerns such as General Motors and the Aluminum Co. of America. And, as the firm enforcement of the brokerage clause of the Robinson-Patman law against the A & P had shown, the Federal Trade Commission was also prepared to be more adventurous in tackling big corporations and had shrugged off its traditional disposition to do no more than police the petty misdemeanours of small business.⁸ The truth was, as became blindingly obvious as the hearings progressed, all the abuses and oppressions of size of which the supporters of H.R.1 complained amounted only to an argument for the better application of existing laws. Far from sitting back and allowing the recital of details of unfair brokerages, short weights, advertising allowances, low wages, tax evasion and price variation between cities to swell into a resonating crescendo, the McCormack committee picked out each charge in turn and subjected it to sceptical and frequently dismissive inquiry. With all these real or alleged abuses dismissed from the argument about the need for H.R.1, the bill's supporters were left naked but for their belief that, whatever the efficiencies of the chains, the interest of the nation lay in keeping control of distribution in local hands. It was a belief with which every member of the committee evidently had some sympathy, but it was equally not the sort of thing for

8. Ibid., pp. 347-351, 359-85. The Department of Justice initiated its antitrust case against the A & P, picking up many of the points made by McLaurin and Vander Hooning, in 1942.

which they thought it was desirable for Congress to legislate. It was after all the case that if any state wished to extend a blanket protection for local chains and independent merchants against interstate chains, it had the answer in its own hands.⁹

Patman devoted much of his time to an assault on Northern domination of the national economy and the "octopus tentacles of monopoly" which spread out from Wall street. He was, he informed the committee, "diligently directing my effort and attention to curing the North of monopolistic evils that threaten the complete and final ruin of many southern and western sections and which will result in great injury to the North". Supporting his arguments with plentiful quotations from the Pujo committee and Walter Prescott Webb's recent denunciation of "Northern corporate feudalism", Divided We Stand, Patman offered the committee an assortment of elaborate charts, statistics and "wheels of wealth" which revealed the extensive interlocking directorates between a number of big New York banks and nearly all the leading interstate chains. There was, the Texan was convinced, a "conspiracy to get control of the retail distribution of this country" between these banks. Unfortunately, the committee seemed none too impressed by this reasoning. "You dragged that old Wall street bugaboo out", complained Frank Crowther of New York, "and walked it up and down before us". All Patman's charts told the committee was what it knew already: that New York was the nation's financial capital. Patman's "wheel of wealth" showing the interlocking between 24 leading banks and 100 major corporations served only to demonstrate that the whole economy was organised on similar lines and that the interstate chain store industry was in respect

9. Only 3 states had enacted laws on the Louisiana principle: Louisiana itself (1934), South Dakota (1939) and Kentucky (1940).

of its ownership and control no different from railroads, manufacturing, insurance and other major forms of enterprise. While Patman made it abundantly clear that he opposed concentration of economic wealth and control in all its forms, that was not the question at issue with H.R.1. The question was why the chain store industry should uniquely be singled out for this form of destructive taxation, and to that the Wall street connection of itself provided no answer whatsoever. Patman had no evidence, as he was forced to concede, that the "money masters" had involved themselves directly in the operating methods of the chains or worked to coordinate the policies of the various chains in which they had an interest. Even if he had possessed such evidence, it would naturally have been a matter for the Department of Justice or the FTC rather than the Ways and Means committee.¹⁰

Patman laid even more stress on the injustices served upon the farmers by the chain stores. Indeed, the tenor of his remarks was at times such that he almost seemed to be advocating H.R.1 principally as a farm relief bill. With the aid of miscellaneous statistics, Patman argued that the chains had forced down the prices received by the farmers for their produce and had been responsible for the long-term fall in the proportion of the consumer's dollar paid for farm products actually reaching the farmers. He estimated that the farmers would have earned \$3 billion extra in 1939 had it not been for the chains, and that this money circulating through the economy would have increased aggregate national income by \$15-\$20 billion.¹¹ Whether or not there was any validity to this argument,

10. McCormack Cttee., Hearings, pp. 48-70, 94-5, 131. Patman also argued (pp. 14-17) that the interstate chains had ruined the small town banks by draining the wealth to New York. He noted that 1921-33, the period of rapid chain store growth, the number of commercial banks in the United States had fallen from 30,748 to 14,565. However, as he was himself obliged to concede, "very few banks have failed since 1933" - a clear indication that the problem had been with the banking system itself, prior to the creation of the FDIC.

11. Ibid., pp. 29-46.

the emphasis placed upon it by Patman was entirely self-defeating simply because the farm organisations did not believe it, and their representatives attended the hearings in droves to tell the committee so. Speaker after speaker praised the producer-consumer campaigns which the chains had been staging since 1936 to take care of crop surpluses and also emphasized the benefits which the chains had brought to farmers as consumers. Such abuses as had occurred in the past could and should, they considered, be dealt with under existing laws. Only one small farmers' group, the Louisiana Farmers' Protective Association, endorsed H.R.1 and the right of this organisation to speak for the Louisiana strawberry growers whom it claimed to represent was hotly disputed by a rival body of shippers and growers whose leader declared that the two things the growers needed most were good weather and chain store cooperation.¹² The vocal and nearly unanimous opposition of the farm groups can scarcely have taken Patman by surprise in view of the past record of the farmers on the chain store issue and the many resolutions passed at farm conventions in opposition to the "death sentence" during 1938 and 1939. His insistence on laying so much weight on the value of his bill to the farmers represented a victory of his neopopulist ideology over his grasp of political and economic realities. The chains, aware that Congress always had the interests of the farmers close to its heart, had carefully prepared to ensure that many of their number attended the hearings: Patman simply set himself up as a sitting target.

12. Ibid., pp. 397-401, 710-2, 1399-1407. The Farmers' Protective Association had forced the A & P, Kroger and Safeway off the auction in 1938 when they refused to go along with its demand that they should not sell strawberries as loss leaders, regardless of market conditions, the Protective Association believing that this loss leader selling forced down the price to the grower. According to the president of the rival Growers' and Shippers' Union, the Protective Association's leader, James H. Morrison, an attorney, was "a radical with political ambitions" who had been operating a "shakedown" backed up by threats of violence and had stirred up shiftless elements among the casual growers who "expect too much for what they do". Whatever impression the committee formed of Morrison, he was clearly not a typical farm leader. Morrison himself claimed that "There are many farmers...that would like to testify, but wouldn't dare to do so because the chain stores handle a certain percentage of their crop, and if they did, naturally they would suffer retaliation from the chain stores". There may have been something, if not much, to this claim.

Patman promised that labour would benefit greatly from his bill. He predicted that one million would find employment as travelling salesmen alone if the interstate chain system did not exist and solemnly calculated that at least seven or eight million people were "unemployed today because of this vicious system that is forcing concentration of wealth and power into the hands of a few men".¹³ This view was broadly shared by the United Commercial Travelers, the business organisation which acted as a fraternal society for 100,000 salesmen representing manufacturers and wholesalers. A flatly opposite attitude was taken by the trade unions in the field, however. Traditionally, the Retail Clerks' International Protective Association and the Amalgamated Meat Cutters and Butcher Workmen, the principal unions in the retail trade, had tried to steer clear of any involvement in the political feuds between chains and independents, having members in both types of stores, some of whom identified strongly with the interests of their employers in such disputes. But H.R.1 was so drastic that these unions felt obliged to take a clear position on it. The bill would, complained Matthew Speedie, the vice-president of the RCIPA, "compel many of our members to look for jobs in that section of the distribution industry which generally pays lower wages, works its employees longer hours, and does not, generally speaking, assume certain of the major social responsibilities which organised labor and government both believe business must assume". Speedie argued that the greatest problem for the efficient and reputable independent merchant was not the chain store but the "surplus competition" created by "mama-papa" stores, run from front rooms using family labour, which stayed open late at nights and on Sundays and then frantically slashed prices when they got

13. Ibid., p. 24.

into trouble. Such stores Speedie wished to see regulated by some sort of licensing system.¹⁴ Pat Gorman, the president of the meat cutters' union, made a very forceful attack on the Patman bill at the hearings. Thanks to Section 7 (a) of the National Industrial Recovery Act and the National Labor Relations Act which superseded it, as well as the generally pro-union climate of the New Deal, his union had been able to make rapid advances into the chain grocery field in the previous few years, with a slight majority of the Amalgamated's retail membership coming from the chains for the first time in 1940. Even the A & P, long considered the greatest single obstacle to the union's progress in the chain sector, had fallen into line, with 6,300 of its 9,400 meat cutters in the Amalgamated by the time of the hearings and Gorman confidently predicting that the remainder would be recruited "within another year". Over the past two years, the A & P top management, as part of their public relations campaign had actually bent over backwards to accommodate the unions, in the process reversing 70 years of company history, bewildering many of the lower level executives and managers and giving the unions a foothold in the nation's leading chain which had implication for labour relations in the chain store industry as a whole and which the unions could not possibly have achieved so easily, if at all, by their own efforts.¹⁵

14. Ibid., pp. 1105-11, 1841-3.

15. The A & P's anti-union posture was becoming uncomfortable by 1938 because of the spread of unionisation to its major competitors, the National Labor Relations Act and the daunting prospect of an eventual CIO invasion of the industry. The company already had contracts with AFL unions in some cities. Nevertheless, the principal cause of the dramatic 1938 policy shift was the desire to find allies to defeat the Patman bill, the initial contacts between the company and AFL leaders being explicitly based on the idea of an "exchange". This was public knowledge at the time. Remarkably, union leaders like Gorman found themselves negotiating with Carl Byoir, rather than an A & P executive, surely an indication of the company's lack of preparedness to deal with unions and of the extraordinary influence the desire to defeat the Patman bill had in shaping company policies. There cannot be much doubt that the AFL unions got the better of this "exchange": their influence was of little significance, if any, in defeating the bill, but they gained an easy way into the nation's No. 1 chain company - sometimes

For the Amalgamated and the RCIPA, the process of "organizing the employer" was working miracles: on the edge of total organisational collapse in 1933, they were now surging ahead. By "organizing the employer" a stroke of the pen could bring in hundreds or thousands of new members, including recruits in those areas, such as the South, where it had never been possible to establish a position in the independent sector. In their euphoria, union leaders seemed quite prepared to antagonise those among the independent merchants who supported the Patman bill and had also respected the rights of their employees through the many years in which the chains had fought the unions tooth and nail. Pat Gorman's energetic campaigning against the Patman bill, as well as irritating some of the Amalgamated's own membership, came as a bitter blow to the National Association of Retail Meat Dealers, which in 1937 had negotiated a favourable agreement with Gorman and expected that he would at least respect the tradition of neutrality in regard to the chain tax battle.¹⁶ The assiduous efforts of the A & P to cultivate the AFL also disgusted some trades unionists. In a series of hot-tempered attacks through the medium

15. (Cont'd)... against the wishes of the employees themselves. In later years, the strength of the unions in the A & P and the major grocery chains generally, and the higher wages and restrictive practices which this involved, proved a distinct liability in competing with independents and local chain supermarkets (McCormack Ctte., Hearings, pp. 1060-7; David Brody, The Butcher Workmen: A Study of Unionization, Camb., Mass., 1964, pp. 137-41, 148-51; New York Times, September 17, 1938; Herbert R. Northrup et al., Restrictive Labor Practices in the Supermarket Industry, Philadelphia, 1967, pp. 43-64).

16. The Amalgamated-NARMD agreement required that the union side abandon its recruitment of one-man proprietors, who were to transfer to dealer associations, while the NARMD recognised the Amalgamated as sole bargaining agent. The agreement was not very successful in practice. A sizeable minority in some Amalgamated locals - 40% in the labour stronghold of Seattle - were non-employing meat dealers, and the locals would not let them go; equally, the NARMD could not bind its own members. (Brody, The Butcher Workmen, pp. 139-41, 144-5; Butchers' Advocate, April 24, 1940, p. 11; Butcher Workman, March 1, 1940, p. 1).

of his union's journal and at the 1939 AFL convention, Harry Bates, the president of the Bricklayers, Masons and Plasterers, accused certain AFL officials of working hand in glove with chain lobbyists to influence conventions of state federations of labour to pass resolutions opposing H.R.1. Bates portrayed a condition of sordid intrigue in which the AFL was being taken advantage of by Carl Byoir and Chester Wright, who was both Byoir's Washington representative and public relations adviser to a number of AFL international unions as well as running the International Labor News Service. All this was going on, Bates complained, at the same time as the A & P was on the unfair list of the New York Building Trades Council and as the chains were continuing to force thousands of independent merchants out of business by their "nefarious conduct" and then replacing them with stores which needed less labour. Any gains handed over by way of union recognition could not be relied upon, Bates warned, because they had not been earned by proper trade union organisation and would likely be withdrawn once the immediate political problem was over for the chains. Although his demand that the 1939 convention should go "squarely on record" in favour of H.R.1 met with no real support, the heated exchanges between him and those who had been negotiating with the A & P did seem to make an adverse impression on some of the delegates and made it impossible for the AFL itself to take any positive position against the Patman bill. However, as the point of view represented by Bates was not communicated to the McCormack committee, it was Gorman and Speedie and others of their persuasion who were left with a free hand to speak for organised labour.¹⁷

17. American Federation of Labor, Proceedings of Annual Convention, 1939, pp. 463-79; Bricklayer, Mason & Plasterer, February, p.19, April, pp. 70-71, September pp. 147-9, October pp. 163-5, December, pp. 202-3, 1939; April 1941 p. 57; December 1942, p. 205. There was little CIO activity in the chain store field, except in New York. One CIO union, the United Rubber Workers of America, voted support for the Patman bill at its 1938 convention, though after little discussion and with no apparent consequences. (United Rubber Worker, October 1938, p.2).

Far from Capitol Hill, on the other side of the Atlantic, events unfolded which put the last nail in the coffin made for the Patman bill. During the two months taken up by the hearings, Hitler invaded Norway and Denmark and then swept through the Low Countries and into France. Congress at once turned anxious attention to the state of America's defences and the raising of money to improve them, an activity in which the Ways and Means Committee was, of course, centrally involved. While all the ordinary business of Congressional life did not come to a halt because of the international situation, Hitler's invasions made it quite certain there would be no time available for such a contentious and unessential matter as the Patman bill to be given consideration. Aware that their great effort had now come too late, the bill's sponsors were reluctantly compelled to accept the inevitability of yet another delay, with no real prospect that it would ever be resurrected.¹⁸

They nonetheless did make some attempt to interest the McCormack committee in the idea that just such legislation as the Patman bill, when set in the context of the broad sweep of history and the rise and fall of nations, did have some relevance to the world crisis and the nation's defences. In an affecting address, Rowland Jones, the Washington representative of the NARD, harked back to the years immediately before the last world war. Then, he wistfully recalled, in the small cities and towns in which most people lived

"every man who was honest and willing to work had an equal opportunity in which to carve himself a real place in the life of the community...Few millionaires were to be found in these small towns and cities, but...these small, self-contained economic units always took care of their own... Poverty in its true sense was unknown. It was in those days, in such small towns and small cities, that we saw attained the nearest thing to Utopia that any of us now living will ever see again".

18. NARD Journal, June 6, 20, 1940; Interstate Merchant, June 8, 1940.

But then a cloud had covered the sky. "At the beginning of the 1920's we, as a Nation, began to be admirers and even worshippers of bigness in business. Efficiency became a fetish, Main street became "chain" street". Capitalism began to devour the little fellow in business who had been "the strongest and the most potent defender of our democratic system of government and with it, capitalism". Now, Jones continued,

"Every member of this committee, I am sure, looks with foreboding upon the decline of democratic governments and ideas in the other hemisphere of the world. Few will dispute that capitalistic democracy is on trial. We have seen the German people, equally as intelligent and equally as literate as ours...fall under the yoke of a man on horseback...Gentlemen of the committee, a nation of clerks, a nation of cogs in great corporate wheels, a nation where the individual citizen is dependent for his livelihood upon absentee ownership, is not the foundation upon which the American way can long continue". 19

A few years earlier, such an appeal might have moved just such a representative group of Congressmen as the McCormack committee. Then, the threat from the enemies of the "American way" had been ideological, a danger that large sections of the population would succumb to the lure of demagoguery and dictatorship as a solution to the nation's ills. Washington had responded to the danger with the New Deal and a programme of domestic economic relief. But by 1940, times had moved on. The economy was in good measure restored to health, the grip of "regular" politics had been reestablished and the New Deal's critics, many of whom had quaked with apprehension in the early 1930's, were now inclined to argue that there had never really been any sort of crisis at all to justify the "excesses" of the Roosevelt administration. The new threat to the "American way" was not ideological, but military. With Germany spilling across western Europe, Hitler and Stalin partitioning the lands that lay

19. McCormack Ctte., Hearings, pp. 418-9.

between them and Japan menacing the Pacific, the prospect was of the victory of totalitarianism through conquest. This was a threat which could not be met by vain attempts to restore the domestic values, culture and social order of a previous generation: it could only be met by a superior armament and industrial efficiency. To an extent which had surprised many, the independent sector in distribution had adapted to the chain store challenge and had justified itself by the stern tests of the market. A wide range of legislation had also been enacted to provide some measure of cushioning against the most severe buffetings of change. H.R.1, however, went far beyond being an addition to such cushioning. It sought the destruction of a large element of the most efficient part of the nation's distributive machinery and also implied such a relaxation of competitive pressure on other distributors that some of the improvements made by the independent sector might be thrown into reverse. All the evidence brought before the committee indicated that hundreds of thousands of forward-looking independent merchants - including many of the members of the trade associations sponsoring H.R.1 - were not only surviving but were positively thriving in spite of chain store competition. The very associations like the NARD and the NARG whose representatives loudly complained of the impossibility of survival if the chains continued to wreak havoc had more members than at any time in their history. What is more, as the committee was perhaps surprised to learn, these members were in practice often engaged in collaborative work with the chains to police price-cutting, store opening hours and other matters of mutual interest. In such circumstances, there seemed no good cause for Congress to whip itself up into a frenzy over the fate of the independent merchant.

It was perhaps Benjamin Marsh, the executive secretary of the People's Lobby, who put the hearings in the clearest perspective. "Of course, you are going to kill this bill", he unceremoniously informed the committee.

"It would save a lot of carfare if it had been announced in advance... whether we like it or not, I think we have got to face the fact that it is not the meek, but it is the efficient who are going to inherit the earth, including all the six continents. And they are learning about that over in Europe just now".²⁰ During the depression, the idea of anti-chain legislation as a socially justifiable make-work project for inefficient marginal retailers had had some appeal. Patman and those of his persuasion had commanded sympathy when they argued that a regime of "fair" competition - with "fair", that is high, prices - was what the deflated economy needed. Patman still enthusiastically promulgated this theory, arguing that H.R.1 would create millions of jobs and allow farm prices to rise, thus stimulating huge increases in national income as this liberated spending power circulated through the economy.²¹ But such talk now chilled the souls of most politicians. They recalled the first world war and reasoned that the coming problems facing the nation, even if it kept out of the new war itself, were likely to be those of labour shortages and inflation. Patman's rhetoric was several years out of date. Congress was no more likely to pass H.R.1 on the basis of the sort of economic scenario he so eagerly described than it was to demand a return to the days when the unemployed on New Deal make-work projects like the FERA, CWA and PWA spent their days sweeping up leaves or were instructed not to use labour-saving machinery so as to let the work take longer.

20. Ibid., pp. 1515-6.

21. Ibid., p. 91.

Epilogue

Shortly after the conclusion of the McCormack committee hearings, and with the whole country alarmed by the spectacle of Hitler's triumphant conquests of one country after another in Europe, Patman announced from the floor of the House that he had "startling news ... facts which are of grave concern to our Nation". There was reason to believe, he declared, that "the entire United States Army mobilization plans are in the hands of Adolf Hitler" and that the man responsible was none other than Carl Byoir, "the same man who rode Hitler's first Nazi Trojan Horse into the United States". This charge was based on the fact that in 1933, while a lieutenant colonel in the Intelligence Division of the U.S. Army reserves, Byoir had entered into a contract with the German government to do public relations work for the German railroads, a role which had been, according to Patman, a mere front for the dissemination of Nazi propaganda and the organization of fifth columnists. Over a period of several months Patman energetically returned again and again to these allegations, even though the FBI, the Department of Justice and the Dies Un-American activities committee were all apparently satisfied with Byoir's conduct. No informed person could have been unmindful of the way in which Byoir had so adeptly organized the powerful coalition which had defeated the Patman "death sentence" bill and Patman's attacks, which were protected by Congressional immunity, looked suspiciously like a particularly unpleasant case of pique.¹

These attacks on Byoir as an alleged Nazi agent got nowhere, but they did testify to the evident intention among the anti-chain forces to take some sort of revenge on the A & P for its prominent role in defeating the "death

1. Congressional Record vol. 86, 76 Cong., 3rd Sess., May 27, June 4, June 11, August 22, September 23, 1940.

sentence" bill. Having broken cover the A & P had made itself vulnerable. Calls came from all sides - even from some known to be opposed to general anti-chain legislation - that something should be done about the A & P. In 1942 those calls were answered when the Department of Justice began the opening round of more than a decade of litigation against the A & P, for the government's case against the company was based not only on its business practices but on the political operations conducted for it by Carl Byoir. In 1945, shortly after Roosevelt's death, the story also broke that in 1939 John Hartford had "loaned" \$200,000 - only \$4,000 of which was ever repaid - to the late President's son, Elliott. Every indication was that Roosevelt himself not only countenanced but initiated this loan and some Republicans and others could see in the arrangement nothing but evidence of an intent on Hartford's support to buy administration opposition to the "death sentence" bill and of a willingness on Roosevelt's part to capitalise on Hartford's political difficulties. On this occasion, however, Patman, as a good Democrat, remained silent.²

When it is considered that the A & P's campaign against the "death sentence" bill was probably unnecessary anyway - for by 1940 no such bill stood a chance - it may seem that the Hartfords' decision to come out of the shadows in 1938 was a terrible mistake. By the terms of the 1954 consent decree the structure of the company - except for ACCO - remained intact, but this followed years of embarrassment and humiliation during which even George Schulte occasionally felt a twinge of sympathy for the two elderly brothers.³ The A & P's difficult experiences should not, however, obscure the fact that for the chains as a whole the period of bitter conflict with the independents came to a very definite end in 1940. Two states, Florida and Utah, enacted

2. New York Times, October 2, 1945; Congressional Record, vol. 91, 79th Cong., 1st Sess., pp. A1115-6; John T. Flynn, The Roosevelt Myth, N.Y., 1956, rev. edn. pp.271-3.

3. Interstate Merchant, October 5, 1946.

chain tax laws in 1941, but the people of Utah voted down the tax the following year and no more states enacted such legislation.⁴ Thenceforth a number of chain tax bills were introduced in various states each year but without ever again becoming part of a concerted legislative attack. Patman remained an inexhaustible source of anti-chain bills in Congress, including tax bills and bills to divorce retailing from manufacturing, but these measures no longer stirred any interest even among independents. By 1940, owing to court action, only fairly modest chain taxes were in effect, but even these declined into insignificance as inflation and a booming economy made sums of a few hundred dollars seem the pettiest of petty cash. If chain store taxes had any effect on the scale of chain store operations before 1940 - and any such effect was undoubtedly very limited - they ceased to have any after 1940.⁵ Some states repealed their tax laws over the years, and in others they remained as a minor revenue raising device devoid of any aspect of political controversy. The chains fought hard against every chain tax, however modest, in the 1930's simply because they wished to arrest the development of lethal chain taxes, but once that threat evaporated the modest chain tax laws that remained ceased to be worthy of opposition.

4. Business Week, November 14, 1942, pp.72-5.

5. The most considerable alleged consequence of chain store taxation was the so-called "Iowa plan", adopted in Iowa after enactment of that state's crippling 1935 chain tax, whereby oil companies shifted from direct operation of filling stations to leasing agreements with independents. However, this process had begun before the Iowa tax and it became a national trend even though only a handful of states imposed chain taxes on filling stations. The real motivation behind the "Iowa plan" was that the companies escaped social security taxes, problems with unions etc. and found that the independents worked harder than they had as managers. Short-term leases and control of supply of the product enabled the companies to keep a tight grip on these nominal independents. (See, Business Week, April 25, 1936, p.9; TNEC Hearings, Part 15, p.8699).

The anti-chain forces came close to crippling the chains in the mid-1930's, in two or three states at least, and it may be that they could have come closer. Had Patman introduced a "death sentence" chain tax bill in Congress in 1935 instead of the Robinson-Patman bill events might well have turned out very differently. It is hardly conceivable that Congress would have passed such a bill, even in the political conditions of 1935 and 1936, but the attention such a bill would have produced might well have proved the trigger for several states to have followed Iowa and Florida along the road to really drastic anti-chain legislation. Perhaps, too, a vigorous struggle in Congress might have swayed the courts in Florida and Iowa into approving the 1935 chain tax laws of those states. Instead, no state ever put into effect a thorough experiment in the regulation of chain stores by discriminatory taxation and the opportunity to find out what that experiment would produce was lost.

Whether the anti-chain forces could actually have held on for long to any gains they might have made is another matter. Certainly, some states seemingly prospered and had no less happy citizens even though they absolutely forbade chain banking; equally, public opinion surveys uniformly showed that there was a very general public sympathy for the idea that the chains should be held in check in some way even if this sympathy sometimes broke down when it came to facing the question of exactly what method of restriction should be used. Opponents of chain store legislation occasionally asserted that such restriction was incompatible both with a free economy and with a democratic form of government - sometimes, indeed, drawing ominous parallels with the situation in Europe where curbs on chain stores were often associated with fascist ideologies which explicitly appealed to the ideal of turning the

clock back on capitalistic concentration - but such claims were mere fanciful rhetoric.⁶ It may be that in practice a considerable experiment in breaking up the chains would have been undertaken only had the social and economic dislocation and those who fed upon it - the Coughlins and the Longs - become yet more powerful and more disturbing than they did; but it cannot reasonably be contended that drastic anti-chain legislation would have been fundamentally incompatible with the traditional American system. Certainly Justice Brandeis, as zealous a defender as any of the democratic ideal, did not believe so. A fascist form of government would no more have been needed to bring about the breaking up of chain stores than it had been to destroy the breweries and saloons in the days of Prohibition.

Nevertheless, public estimation of what is or is not a desirable application of the regulatory powers of government does vary, and vary dramatically, from period to period even within an approximately identical framework of political and sociological values. New Deal economic regulation perhaps helped to shore up the social and political structure in the 1930's but much of that regulation was widely considered to be damaging and inappropriate in the post-war United States. In economic life, the trend in the 1940's, and more especially in the 1950's, was steadily towards a competitive laissez-faire and away from the protectionism fostered during the depression years. This trend weakened the Robinson-Patman Act - though the Act's status as an extension of the antitrust laws ensured that it was not altogether put aside - and progressively made the use of resale price maintenance more and more difficult. And, of course, these price control laws merely defined the limits of competition: they did not obliterate a whole class of competitors. In all, it is difficult to imagine that any sort of "death sentence" chain

6. See, for instance, the comments of Daniel Bloomfield in McCormack Committee, Hearings, pp.849-850.

store taxation could have lasted for many years. Even in those European countries which put drastic curbs on the opening of chain stores in the 1930's the universal tendency in the post-war world was towards a breakdown of all forms of licensing control and the introduction of free competition.⁷

The attitude of the trade itself underwent great changes after 1940, and those changes occurred rapidly. The trade associations which had supported the Patman "death sentence" bill between 1938-1940 were quick to pull back from their exposed and untenable position under cover of the need for responsible policies fostering business and national unity during the war; rank-and-file, meanwhile, virtually abandoned discussion of the old 'chain store menace' as they enjoyed excellent conditions in the booming wartime economy. With goods relatively scarce and consumers prosperous price-cutting became almost unknown, and in such circumstances independents found themselves doing appreciably better than the chains. The principal political activity of trade associations during the war proved to be not demanding restrictions on competitors but ensuring satisfactory treatment from government agencies like the Office of Price Administration (OPA);⁸ indeed, the American Retail Federation at last found a role for itself in furthering this contact with government, with the result that the national retail associations which had once fought it so hard came to give it their support.⁹ After the war relations between chains and independents did not always remain so harmonious but there was no return to the animosities of the 1930's, which were by then regarded as ancient history. It became generally accepted that the overall framework of trade regulation

7. The post-war changes in European regulation may be studied in detail in Public Policy Toward Retailing: An International Symposium, J.J. Boddewyn and S.C. Hollander, eds., Lexington, Mass., 1972.

8. The boom conditions created by the war were reflected in the fact that OPA price controls set "ceilings" rather than, as had been the case under the NRA, "floors" for retail prices.

9. Lebhar, Chain Stores in America, pp. 204-5.

could not be further altered in an anti-chain manner and that the fundamental legitimacy of chain store operation was no longer a matter for political controversy.

Trade association executives simply adapted their policies to circumstances: their basic function remained the same even if the issues changed. But for others who had led the anti-chain movement it was not so easy to find a place. The style of agitation favoured by W.K. Henderson was a thing of the past even in the late 1930's when the anti-chain battle was still intense. Henderson could make no sense of the New Deal, its "half-baked theorists" and its alphabetical agencies, and he saw the solution to the nation's problems as residing in currency inflation and "throttling" the monopolies with the antitrust laws. In 1937, he attempted a comeback, broadcasting over the powerful radio station operated by Dr. John "Goat Gland" Brinkley, noted quack and several times candidate for Governor of Kansas, over the border in Mexico, but his return produced little response from the merchants. The baton of leadership had passed by then to the more sophisticated leaders who operated in the milieu of Washington politics which Henderson so ostentatiously despised. Henderson became paralysed in 1939, and died in 1945. In his late years, it was reported at the time of his death, he often reiterated, "I was right you know. I was right about those chain stores..."¹⁰

George Schulte had no real role left once the battle with the chains had come to an end. During the war Patman became chairman of the House Small Business Committee, and he took on Schulte as his assistant, partly because he realised that Schulte was scarcely making a living from his paper and mostly as a reward for his long years of hard campaigning. "Johnny at the rat hole"

10. 'If I Were President', Plain Talk Magazine, November 1935; Shreveport Times, May 29, 1945.

was Patman's name for Schulte, and the admiration was mutual. While Schulte worked in Washington his daughter helped to bring out the Interstate Merchant from St. Louis, but in 1949 Schulte died and the paper folded.¹¹ Patman, of course, had a long career in the House - the fourth longest in Congressional history at the time of his death in 1976 - still ahead of him, and as chairman of the Small Business and other committees he was able to do much towards the provision of positive assistance to independent business by the federal government. Yet it would be difficult to judge Patman's career as anything but a failure when considered in terms of his own goals and vision of America. He remained to the end an unashamed "unreconstructed populist", stubbornly bringing back the same proposals to smite the "big interests" and Wall Street year after year to no avail. After his great triumphs of the 1930's came only a long drawn-out anti-climax in the very different environment of post-war America.¹² In a way, Patman's later career served as a mirror to the destiny of all those independent merchants who had so militantly fought the chains in the depression years. They survived, even prospered, in so far as they were able to prove themselves by the standards of business efficiency and competitiveness required in the post-war world, but this economic survival was accompanied by a gradual withering away of many of the values with which the whole concept of the "independent merchant on Main street" was loaded in earlier times. The anti-chain store movement was based on more than a desire to ensure the economic survival of the independent merchant. At least some of its fire came from a belief that the independent merchant and the chain store represented entirely different ways of ordering society and that ultimately one or the other system of values would have to prevail. It was an exaggerated belief born of the stresses of the time, no doubt, but it remains true that

11. I am grateful to Mr. George J. Schulte Jr. for this information.

12. Studs Terkel, Hard Times, London, 1970 pp.282-6; New York Times (obituary), March 8, 1976.

many of the values and attitudes associated with the opposition to the chain stores in the 1930's would seem strange and curiously anachronistic to most independent retailers, and to most other Americans, today. In the fullest sense, the world which the opponents of the chain stores sought to save in the 1920's and 1930's has gone forever.

Appendix Table I

Estimated Number of Stores Operated by Chains of 4 or more stores in 26 lines of business*1900-1929.

<u>Year</u>	<u>Stores</u>	<u>Year</u>	<u>Stores</u>	<u>Year</u>	<u>Stores</u>
1900	3,300	1911	10,600	1921	39,400
1901	3,800	1912	11,900	1922	46,500
1902	4,100	1913	13,400	1923	54,000
1903	4,600	1914	15,800	1924	61,200
1904	5,400	1915	19,500	1925	70,900
1905	6,100	1916	24,000	1926	77,100
1906	6,500	1917	28,100	1927	82,900
1907	7,100	1918	29,200	1928	87,800
1908	7,900	1919	32,200	1929	95,386
1909	8,800	1920	36,100		
1910	9,900				

* The 26 lines comprise all types of food, drug, tobacco, variety, apparel, dry goods, department store, general merchandise, furniture, musical instrument and hardware chains. The figure for 1929 was calculated by the FTC from Census returns.

(Source: FTC, Chain Store Inquiry, Growth and Development of Chain Stores, pp. 66-67).

Appendix Table II

Expansion of some major chains after World War I. (Source: Appendix Tables in Lebar, Chain Stores in America, 1963 edn).

<u>Stores</u>	1919	1921	1923	1925	1927	1929	1933	1940
Great A & P Tea Co.	4,224	5,217	9,303	14,034	15,671	15,418	15,131	7,230
Kroger	-	947	1,641	2,559	3,564	5,575	4,400	3,727
Safeway ¹	-	-	193	330	840	2,340	3,306	2,671
American Stores	1,175	1,274	1,474	1,792	2,133	2,644	2,882	2,157
First National ²	-	-	-	-	1,681	2,002	2,705	2,137
F.W. Woolworth Co.	1,081	1,137	1,260	1,423	1,581	1,825	1,941	2,027
S.S. Kresge Co.	174	200	234	306	435	597	720	743
W.T. Grant Co.	33	45	60	77	157	279	457	492
Walgreen Co.	-	29	41	87	170	397	474	489
Sears, Roebuck ³	-	-	-	8	27	324	403	596
Montgomery Ward ⁴	-	-	-	-	36	532	488	648

1. Safeway Stores Inc. formed by merger, 1928; earlier figures for principal parent company.
2. Formed by merger, 1925.
3. Opened first retail stores in 1925.
4. Opened first retail stores in 1926.

Appendix Table II (cont'd)

Sales (millions of dollars)

<u>Stores</u>	1919	1921	1923	1925	1927	1929	1933	1940
Great A & P Tea Co.	195	202	303	440	761	1,054	820	1,116
Kroger	-	45	74	116	161	287	206	260
Safeway	-	-	9	13	70	214	220	399
American Stores	76	86	95	109	121	143	109	125
First National	-	-	-	-	59	76	101	131
F.W. Woolworth Co.	120	148	193	239	273	303	251	336
S.S. Kresge Co.	43	56	82	106	134	156	126	159
W.T. Grant Co.	8	13	21	30	44	66	78	112
Walgreen Co.	-	3	4	9	21	47	46	74
Sears, Roebuck ⁵	-	-	-	11/200	39/249	168/415	160/273	480/704
Montgomery Ward ⁶	-	-	-	-	187	267	188	516

5. First figure represents store sales only; second figure, store and catalogue sales combined.

6. Combined catalogue and store sales.

Appendix Table IIIChains and Independent Stores, 1929, 1933, 1935

	<u>Stores</u>		
	1929	1933	1935
Total*	1,543,158	1,526,119	1,653,961
Chains**	148,037	141,676	127,482
Independents	1,375,509	1,349,356	1,474,149

	<u>Sales (add 000)</u>		
	1929	1933	1935
Total*	49,114,653	25,037,225	33,161,276
Chains**	9,834,846	6,372,554	7,550,186
Independents	38,081,504	17,846,332	24,246,112

% of Total Sales, 1929, 1933, 1935

	1929	1933	1935
Independents	77.5	71.3	73.1
Chains	20.0	25.4	22.8
Local Chains	6.7	-	3.1
Sectional & National	12.6	-	19.3
Manufacturer- controlled	0.7	-	0.4

* includes other types.

** 4 or more stores.

(Source: 1935 Census of Business, Retail Distribution, Vol. IV, pp.6-7).

Appendix Table IV
Chain and Independent Stores, Summary, 1929, 1935, 1939¹

Type of Operation	Number of Stores				Sales (add 000)				Percent of Total Sales			
	1929	1935	1939	1929	1935	1939	1929	1935	1939			
Total - all types	1,543,158	1,587,718	1,770,355	\$49,114,653	\$32,791,212	\$42,041,790	100.0	100.0	100.0			
Independents	1,380,607	1,435,054	1,624,665	38,124,439	24,020,134	31,409,859	77.6	73.3	74.7			
Single Store	1,310,695	1,354,196	1,521,145	33,741,478	21,271,744	27,417,200	68.7	64.9	65.2			
Multimit	64,814	53,732	77,845	4,340,026	2,601,869	3,752,509	8.8	7.9	8.9			
Market & roadside stands	4,502	23,423	18,014	18,614	97,144	103,162	(2)	.3	.3			
Leased depts. - independent	596	3,703	7,661	24,321	49,377	136,988	.1	.2	.3			
Chains	151,712	131,430	123,195	9,964,547	7,653,416	9,105,825	20.3	23.3	21.7			
Local chains	52,465	17,957	25,455	3,293,890	1,023,577	1,581,386	6.7	3.1	3.8			
Sectional or national chains	92,141	107,572	82,049	6,151,337	6,401,754	6,771,009	12.6	19.5	16.1			
Manufacturer controlled chains	3,431	1,925	10,123	389,618	114,977	583,062	.7	.4	1.4			
Leased-department chains	3,675	3,976	5,568	129,702	113,108	170,368	.3	.3	.4			
Other types	10,839	21,234	22,495	1,025,667	1,117,662	1,526,106	2.1	3.4	3.6			
Utility-operated stores	4,053	3,936	4,836	163,371	123,242	151,539	.3	.4	.4			
Direct selling (house-to-house)	1,661	6,349	5,199	93,961	125,316	153,397	.2	.4	.4			
Commissaries or company stores	1,347	1,888	2,007	115,583	113,126	148,248	.3	.3	.3			
Farmer & consumer coop'tive stores	1,709	1,801	3,698	116,995	119,827	224,375	.2	.3	.5			
State liquor stores	-	2,080	2,618	-	163,381	249,430	-	.5	.6			
Mail-order houses	271	378	434	515,237	420,027	537,413	1.0	1.3	1.3			
Other types of operation	1,798	4,802	3,703	20,520	52,743	61,704	.1	.2	.1			

1. Figures for 1935 and 1929 adjusted between types as grouped for 1939. Figures for 1935 revised to exclude service garages classified that year as Retail but included in the Service Census in 1939; data to revise 1929 figures not available.

2. Less than one-tenth of 1 percent.

(Source, 1939 Census of Business, Retail Trade, Vol. I, Part I, Table 3F, p.69)

Appendix Table VChain Store Sales as % of Total Retail Sales, by Kinds of BusinessChains of 4 or More Stores

Year	All Trades	Food Group	Apparel Group	Drug Stores	Variety Stores
1929	21.48	31.68	28.22	18.46	82.85
1933	26.99	38.28	30.51	25.04	91.15
1935	24.51	34.87	28.53	25.70	90.78
1936	23.37	34.20	29.43	24.98	89.66
1937	22.36	32.65	29.76	24.75	88.43
1938	23.31	32.69	30.45	25.57	87.56
1939	22.76	32.85	30.40	25.59	86.79
1940	22.38	33.42	31.12	25.96	86.47
1948	21.43	33.99	29.89	22.70	84.76

(Source: Department of Commerce, Survey of Current Business)

Appendix Table VIChains of More than 100 Stores, 1939

Type	No. of Chains	No. of Stores	Sales in \$ (add 000)	% of total chain sales for that type
Food	40	33,539	2,279,005	66.8
Department Stores	4	3,209	(x)	(x)
Variety	12	4,583	776,433	91.4
Apparel	23	4,491	259,850	26.0
Furniture/Radio/ Household	4	1,209	61,413	15.6
Automotive	5	2,598	166,540	44.6
Filling Stations	12	3,865	111,988	38.1
Lumber/Building	3	521	18,362	5.3
Hardware	1	121	(x)	(x)
Eating Places	8	1,141	59,644	20.4
Drug Stores	4	1,234	152,946	40.3
Liquor Stores	8	1,832	175,482	68.4
All Others	7	2,678	109,324	19.5
Total	131	61,021	5,630,692	55.7

(x) = Not Available.

(Source: 1939 Census of Business, Retail Trade, Vol. I. Pt.I. Table 20, pp. 179-182).

Appendix VII

State Anti-Chain Store Tax Legislation. (Source: Institute of Distribution, Retailer's Manual of Laws and Regulations, ed. Gladys M. Kiernan, numerous editions).

<u>Year</u>	<u>Bills Introduced</u>	<u>Laws Enacted</u> —	<u>States</u>
1923	1	-	
1924	1	-	
1925	2	-	
1926	1	-	
1927	13	3	Georgia, Maryland, North Carolina.
1928	4	1	South Carolina
1929	62	3	Georgia, Indiana, North Carolina.
1930	80	3	Kentucky, Mississippi, South Carolina.
1931	175	3	Alabama, Arizona, Florida.
1932	125	2	Louisiana, Wisconsin.
1933	225	13	Florida, Idaho, Indiana, Maine, Maryland, Michigan, Minnesota, Montana, New Mexico, North Carolina, Vermont, West Virginia, Wisconsin
1934	40	4	Colorado, Kentucky, Louisiana, New Mexico
1935	163	9	Alabama, California, Florida, Iowa, Michigan, North Carolina, South Dakota, Texas, Wisconsin.
1936	27	2	Kentucky, Mississippi.
1937	97	8	Georgia, Minnesota, Montana, North Carolina, Pennsylvania, South Dakota, Tennessee, Wisconsin.
1938	19	1	Mississippi.
1939	99	4	Montana, North Carolina, South Dakota, Tennessee.
1940	10	2	Kentucky, Mississippi.
1941	45	2	Florida, Utah.

West Virginia raised the rates of its 1933 tax in 1957 (subsequently repealing the law altogether in 1970). Apart from this, no state enacted a chain tax law after 1941, although a few bills were introduced each year except 1952 until the mid-1960's.

Appendix VIIIThe Robinson-Patman Act, amending Section 2 of the Clayton Act.Public No. 692, 74th Cong.; U.S.C.A. Title 15 Sec. 13The General Prohibition:

Sec. 2(a). That it shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers of commodities of like grade and quality ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited

to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination...the burden of rebutting the prima-facie case...shall be upon the person charged...Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

The Brokerage Clause

(c) That it shall be unlawful...to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Advertising Allowances etc.

(d) That it shall be unlawful...to pay or contract for the payment of anything of value to or for the benefit of a customer...as compensation or in consideration for any services or facilities furnished by or through such customer...unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful... to discriminate in favor of one purchaser...by...furnishing...services or facilities...upon terms not accorded to all purchasers on proportionally equal terms.

Buyer's Liability

(f) That it shall be unlawful...knowingly to induce or receive a discrimination in price which is prohibited by this section.

A separate Section 2 exempted actions pending under the old 1914 Section 2. Section 3, the Borah-Van Nuys amendment:

"It shall be unlawful for any person...to be a party to, or assist in, any transaction...which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor...or, to sell...goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both".

Section 4 irrelevantly restated the rights of cooperative associations.

Appendix IXThe Co-Sponsors of H.R. 9464, 75th Cong., the Patman "death sentence" bill.

An asterisk indicates that the Congressman did not return to Congress in 1939.

The figure beside the name of each state indicates the size of its delegation to the House of Representatives as of February, 1938.

ALABAMA (9)

Luther Patrick

ARKANSAS (6)William B. Cravens
Wade H. KitchensCALIFORNIA (19)John S. McGroarty*
Byron N. Scott*CONNECTICUT (6)

William M. Citron*

FLORIDA (5)Millard F. Caldwell
Robert A. Green
J. Hardin Peterson
J. Mark Wilcox*IDAHO (2)

Compton I. White

ILLINOIS (27)Lewis L. Boyer*
Frank W. Fries
Adolph J. SabathINDIANA (12)James I. Farley*
Finly H. Gray*
William T. SchulteIOWA (9)Fred C. Gilchrist
Vincent F. Harrington
Otha D. Wearin*KANSAS (7)John M. Houston
Edward W. Patterson*LOUISIANA (8)

A. Leonard Allen

MAINE (3)

James C. Oliver

MICHIGAN (17)John D. Dingell
Albert J. Engel
George G. Sadowski*MINNESOTA (9)John T. Bernard*
Richard T. Buckler
Dewey W. Johnson*
Paul J. Kvale*MISSISSIPPI (7)Ross A. Collins
William M. ColmerMISSOURI (13)John C. Cochran
Orville ZimmermanMONTANA (2)

Jerry J. O'Connell*

NEBRASKA (5)

Charles G. Binderup*

NEW YORK (45)James J. Lanzetta*
Mrs. Caroline O'DayNORTH CAROLINA (11)

Zebulon Weaver

NORTH DAKOTA (2)

William Lemke

OHIO (23)Herbert S. Bigelow*
Michael J. Kirwan
Frank C. Kniffin*
Martin L. SweeneyOKLAHOMA (9)Sam C. Massingale
Will Rogers
Gomer Smith*PENNSYLVANIA (33)Robert G. Allen
Charles N. Crosby*
Ira W. Drew*
Matthew A. DunnSOUTH CAROLINA (6)

Allard H. Gasque*

SOUTH DAKOTA (2)

Fred H. Hildebrandt*

TENNESSEE (9)

Richard M. Atkinson*

TEXAS (21)Martin Dies
Maury Maverick*
William D. McFarlane*
Wright Patman
Nat Patton
William R. Poage
Morgan G. Sanders*
Albert ThomasUTAH (2)

J.W. Robinson

VIRGINIA (9)

John W. Flannagan

WASHINGTON (6)

John M. Coffee
 Knute Hill
 Charles H. Leavy
 Martin F. Smith

WEST VIRGINIA (6)

Robert L. Ramsay*

WISCONSIN (10)

Gerald J. Boileau*
 Raymond J. Cannon*
 Bernard J. Gehrman
 George J. Schneider*
 Gardner R. Withrow*

There were no co-sponsors from the following states: Arizona (1), Colorado (4), Georgia (10), Kentucky (9), Maryland (6), Massachusetts (15), Nevada (1), New Hampshire (2), New Jersey (13), New Mexico (1), Oregon (3), Rhode Island (2), Vermont (1), Wyoming (1).

The list of co-sponsors is as reported in NARD Journal February 17, 1938, containing one name more (Allen -La), than Business Week, December 31, 1938 p.34.

Bibliography

(i) Other Bibliographies

Extremely valuable is

Library of Congress, Legislative Reference Service, Small Business Bibliography, 1941. As well as a wide range of materials bearing on the position of small business in general, this bibliography contains an Appendix 'Chain Store References, 1920-1939' listing 1,139 items. At this, the bibliography has many striking omissions and overlooks much trade literature.

Useful supplementary bibliographies include:

Debaters' Information Bureau, Bibliography on the Chain Store Question (1930), very thorough to its date.

Ezra Christian Buehler, ed. A Debate Handbook on the Chain Store Question, (1930), pp. 7 - 21.

Institute of Distribution, Telling the Chain Store Story: A Bibliography on Chain Stores as of October 1, 1938, N.Y., 1938.

(ii) Books, Pamphlets, Dissertations

Adelman, Morris A., A & P: A Study in Price-Cost Behavior and Public Policy, Cambridge, Mass., 1959.

Armentano, Dominick, T., The Myths of Antitrust, New Rochelle, 1972.

Asher, Louis E. and Heal, Edith, Send No Money, Chicago, 1942.

Atherton, Lewis E., Main Street on the Middle Border, Bloomington, 1954.

Barger, Harold, Distribution's Place in the American Economy Since 1869, Princeton, 1955.

Barnett, Harold R., Man Management in Chain Stores, N.Y., 1931.

" " " Chain Store Methods Exposed, Los Angeles, 1936.

Baxter, William J., Chain Store Distribution and Management, N.Y., 1928.

Beasley, Norman, Main Street Merchant, N.Y., 1948.

Beckman, Theodore N. and Nolen, Herman C., The Chain Store Problem: A Critical Analysis, N.Y. and London, 1938.

Bennett, David H., Demagogues in the Depression: American Radicals and the Union Party, 1932-6, New Brunswick, 1969.

Bernstein, Irving, The Lean Years: A History of the American Worker, 1920-33, 1966 edn.

Bingham, Alfred M., Insurgent America: Revolt of the Middle Classes, N.Y., 1935.

Bjorklund, Einer and Palmer, James, A Study of the Prices of Chain and Independent Grocers in Chicago (Univ. of Chicago, Studies in Business Administration, Vol. I, No. 4, 1930).

Blaisdell, Thomas C., The Federal Trade Commission, N.Y., 1932

- Bloomfield, Daniel, Trends in Retail Distribution, N.Y., 1930.
- " " 'Chain Stores', New York, 1931 (Reference Shelf, Vol. 7, No. 7).
- " " 'Sales Taxes; general and retail', N.Y., 1934 (The Reference Shelf, Vol. 9, No. 5).
- " " 'Chain Stores and Legislation', N.Y., 1939 (The Reference Shelf, Vol. 12, No. 7).
- Blythe, LeGette, William Henry Belk, Merchant of the South, Chapel Hill, 1958 edn.
- Boddewyn, Jean J. and Hollander, Stanley C., eds., Public Policy Toward Retailing: An International Symposium, Lexington, Mass., 1972.
- Borsodi, Ralph, The Distribution Age, N.Y., 1927.
- Brandeis, Louis D., The Curse of Bigness, N.Y., 1934.
- Brody, David, The Butcher Workmen: A Study of Unionization, Cambridge, Mass., 1964.
- Buck, Solon Justus, The Granger Movement, Lincoln, Nebraska, 1963 edn.
- Buehler, Ezra C., A Debate Hand book on the Chain Store Question, Lawrence, Kans., 1930.
- Bunzel, John H., The American Small Businessman, N.Y., 1962.
- Burns, Arthur R., The Decline of Competition, N.Y., 1936.
- Burr, Walter, Small Towns: An Estimate of Their Trade and Culture, N.Y., 1929.
- Byoir, Carl & Associates, Inc.,
(for the Great Atlantic & Pacific Tea Co.) Current Trends in Chain Store Taxation, N.Y. 1939..
- " " " " What Consumers of America did to Defeat the Patman Bill, and Why, N.Y., 1941.
- " " " " What Farmers of America Did to Defeat the Patman Bill, and Why, N.Y., 1941.
- " " " " What Manufacturers of America Did to Defeat the Patman Bill, and Why, N.Y., 1941.
- " " " " What Organized Labor did to Defeat the Patman Bill, and Why, N.Y., 1941.
- " " " " What Real Estate Owners of America Did to Defeat the Patman Bill, and Why, N.Y., 1941.
- California Chain Stores Assn., Inc., The Fifty Thousand Per Cent Chain Store Tax, Los Angeles, 1936.
- Cameron, W.H., Our Juggernaut, 1932.
- Cantril, Hadley, ed., Public Opinion, 1935-1946, Princeton, 1951.
- Carter, John F., (The Unofficial Observer) American Messiahs, N.Y., 1935.
- Caslow, Winfield H., The Sob-squad, a novel, Grand Rapids, 1928.

- Cassady, Ralph and Jones, Wylie L., The Changing Competitive Structure in the Wholesale Grocery Trade: A Case Study of the Los Angeles Market, 1920-46, Berkeley, 1949.
- Clark, Thomas D., Pills, Petticoats and Plows: The Southern Country Store, Norman, 1964.
- Cochran, Louis, Hallelujah, Mississippi! N.Y., 1955.
- Cohn, David L., The Good Old Days, N.Y., 1940.
- Colorado Chain Stores Association, The Colorado Store License Law, Denver, 1938.
- Converse, Paul D., 'Business Mortality of Illinois Retail Stores from 1925 to 1930', (Univ. of Illinois, Bureau of Business Research, Bulletin No. 41).
- Corey, Lewis, The Crisis of the Middle Class, N.Y., 1935.
- Cover, John H. et al., 'The Problems of Small Business' (TNEC Monograph, No.17).
- Creanage, Henry, The Guilds of America, N.Y., 1934.
- Dallas, Helen, Chain Stores, Pro and Con, N.Y., 1940.
- Daniels, Roger, The Bonus March, Westport, Conn., 1971.
- Daughters, Charles G., The New Competition and the Independent Retail Merchant, Fort Wayne, 1929.
- " " Wells of Discontent, N.Y., and Chicago, 1937.
- Davidson, Craig, Voluntary Chain Stores and How to Run Them, N.Y. and London, 1930.
- Davis, Thomas Carroll, Chain Stores vs. Farm Problem, Baltimore, 1933.
- Dommissie, Gerrit A., Regulation of Retail Trade Competition, N.Y., 1939.
- Edwards, Corwin D., Maintaining Competition, N.Y., 1949.
- " " The Price Discrimination Law, Washington, 1959.
- Emmet, Boris and Jeuck, John E., Catalogues and Counters: A History of Sears, Roebuck and Company, Chicago, 1965^{edn.}
- Ernst, Morris L., Too Big, Boston, 1940.
- Fainsod, Merle, et al., Government and the American Economy, N.Y., 3rd edn., 1959.
- Filene, Edward A., Next Steps Forward in Retailing, N.Y. and London, 1937.
- Flowers, Montaville, America Chained; A Discussion of 'What's Wrong with the Chain Store' Pasadena, 1931.
- Flynn, John T., The Roosevelt Myth, N.Y., 1956, rev. edn.
- Freedom of Opportunity Legion, The Community vs. Absentee Control, Berne, Ind., 1938.
- Fryberger, Harrison E., The Abolition of Poverty, N.Y., 1931.
- Fulop, Christina, Competition for Consumers: A Study of the Changing Channels of Distribution, London, 1964.

- Galbraith, John K., American Capitalism: The Concept of Countervailing Power, Boston, 1952.
- Gaskill, Nelson B., The Regulation of Competition, N.Y., 1936.
- Gellately, Robert, The Politics of Economic Despair: Shopkeepers and German Politics, 1890-1914, London, 1974.
- Gillespie, George B., The People Demand a Square Deal and the Forgotten Man, Boston, 1937.
- Givens, Robert H., Outlawry of Chain Stores, Tampa, 1936.
- Grant, William T., The Basis of Chain Store Success, N.Y., 1928.
- Grether, Ewald T., Price Control Under Fair Trade Legislation, N.Y., 1939.
- Groves, Harold M., Financing Government, N.Y., 1939.
- Grunberger, Richard, A Social History of the Third Reich, London, 1971.
- Hall, Margaret et al., Distribution in Great Britain and North America, N.Y., 1961.
- Hamilton, Walton and Till, Irene, 'Antitrust in Action' (TNEC Monograph No. 16).
- Hanna, Hilton E., and Belsky, Joseph, Picket and the Pen - The 'Pat' Gorman Story, N.Y., 1960.
- Hardy, Frederick K., 'The Special Taxation of Chain Stores', unpub. Ph.D. thesis, Univ. of Wisconsin, 1934.
- Haring, Chester E., The Manufacturer and His Outlets, N.Y., 1936, 2nd edn.
- Hathaway, Hanson, The Utopians are Coming, Hollywood, 1934.
- Hayward, Walter S. and White, Percival, Chain Stores: Their Management and Operation, N.Y., 1928 edn.
- Hawley, Ellis W., The New Deal and the Problem of Monopoly, Princeton, 1966, paperback edn.
- Hoadley, Ruth L., 'The Chain Store, with Special Reference to Iowa' (Iowa State Univ., Studies in Business, No. 9, 1930).
- Hoffman, A.C., 'Large-Scale Organization in the Food Industries' (TNEC Monograph No. 35).
- Hollander, Stanley C., Restraints Upon Retail Competition, East Lansing, 1965.
- Holtzman, Abraham, The Townsend Movement: A Political Study, N.Y., 1975.
- Hoyt, Edwin P., That Wonderful A & P! N.Y., 1969.
- Huff, Sidney H., Chain Store Tyranny and the Independent Grocer's Dilemma, Pittsfield, Mass., 1934.
- Illinois University, Bureau of Business Research, Bulletin No. 19, April 1928, 'The Automobile and the Village Merchant'.
- Institute of Distribution, What Manufacturers Should Know About the New Robinson-Patman Act, N.Y., 1936.
- " " Is the Chain Store Driving the Independent Merchant Out of Business? N.Y., 1938.
- " " Why Independent Merchants Fail, N.Y., 1938.

- Institute of Distribution, Chain Stores in the Law Courts, (compiled by E.W. Simms; reproduced from typewritten copy, N.Y., 1939).
- " " Keep Market Street Open, N.Y., 1940.
- " " The Case of the Small Merchant Grown Larger, N.Y., 1940.
- Jefferys, James B., Retail Trading in Britain, 1850-1950, Cambridge, 1954.
- " " and Knee, Derek, Retailing in Europe: Present Structure and Future Trends, London, 1962.
- Johnson, Hugh S., The Blue Eagle from Egg to Earth, N.Y., 1935.
- Kaplan, Abraham D.H., Small Business: Its Place and Its Problems, N.Y., 1948.
- Kercher, Leonard C. et. al., Consumers' Cooperatives in the North Central States, (ed. Roland S. Vaile), Minneapolis, 1941.
- Lazo, Hector, Retailer Cooperatives - How to Run Them, N.Y., 1937.
- " " Controlled Competition - Corporate Chains, Cartels and Cooperatives, Washington, 1939.
- " " and Bletz, M.H., Who Gets Your Food Dollar? N.Y., 1938.
- Lebhar, Godfrey M., The Chain Store: Boon or Bane?, London and N.Y., 1932.
- " " How to Meet Unfair Charges Against Chain Stores, N.Y., 2nd edn., 1936.
- " " Chain Stores in America, N.Y., 1963, 3rd edn.
- Lebovics, Herman, Social Conservatism and the Middle Classes in Germany, 1914-1933, Princeton, 1969.
- Lee, Maurice W., 'Anti-Chain Store Tax Legislation' (Univ. of Chicago, Studies in Business Administration, Vol. 9, No. 4, 1939).
- Leuchtenburg, William E., Franklin D. Roosevelt and the New Deal, 1932-1940, N.Y., 1963 edn.
- Lynd, Robert S. and Lynd, Helen M., Middletown in Transition, N.Y., 1937.
- Lyon, Leverett S. et. al., The National Recovery Administration: An Analysis and Appraisal, Washington, 1935.
- Mack, Ruth P., Controlling Retailers: A Study of Cooperation and Control in the Retail Trade, with Special Reference to the NRA, N.Y., 1936 (1968 reprint).
- Mahoney, Tom and Stone, Leonard, The Great Merchants: America's Foremost Retail Institutions and the People who Made Them Great, N.Y., rev. edn., 1974.
- Marx, Gary T., The Social Basis of the Support of a Depression Era Extremist: Father Coughlin, unpub. M.A. Univ. of Calif., Berkeley, 1962.
- Mason, Alpheus T., Brandeis: A Free Man's Life, N.Y., 1956.
- Mayer, George H., The Political Career of Floyd B. Olson, St. Paul, 1951.
- McCoy, Donald R., Angry Voices: Left-of-Center Politics in the New Deal Era Lawrence, Kansas, 1958.
- Merwin, Samuel, Rise and Fight Again, N.Y., 1935.
- Milburn, George, Catalogue; a novel, N.Y., 1936.
- Miller, John P., Unfair Competition, Cambridge, Mass., 1941.

- National Assn. of Food Chains, An Economic Landmark Recorded; a five year record of organized cooperation between producers and food chain stores, Washington, 1941.
- National Chain Stores Assn., Addresses Before the Annual Convention, 1929-30
 " " " " The Chain Store Industry under the National Recovery Act, N.Y., 1933.
- Neuberger, Richard L. and Loe, Kelley, An Army of the Aged, Caldwell, Idaho, 1936
- Nichols, John P., The Chain Store Tells its Story, N.Y., 1940.
- Northrup, Herbert R. et. al., Restrictive Labor Practices in the Supermarket Industry, Philadelphia, 1967.
- Nystrom, Paul H., The Economics of Retailing (2 vols), N.Y., 1930 edn.
 " " The Fallacies of Anti-Chain Taxation, N.Y., 1938.
- Owen, Willis, Making Money for the Merchant, Chicago, 1937.
- Palamountain, Joseph C., The Politics of Distribution, Cambridge, Mass., 1955.
- Palmer, James L., What About Chain Stores?, N.Y., 1929.
- Patman, Wright, Complete Guide to the Robinson-Patman Act, Englewood Cliffs, N.J., 1963.
- Patterson, James T., Congressional Conservatism and the New Deal - The Growth of the Conservative Coalition in Congress, 1933-39, Louisville, 1967.
 " " The New Deal and the States, Princeton, 1969.
- Pelz, Victor H., The Voluntary Chain, N.Y., 1930 (pub. American Institute of Food Distribution).
- Penney, James C., Fifty Years with the Golden Rule, N.Y., 1950.
- Posner, Richard A., The Robinson-Patman Act, Washington, 1973
- President's Conference on Unemployment, Recent Economic Changes in the United States, (2 vols), N.Y., 1929.
- President's Research Committee on Social Trends, Recent Social Trends in the United States, (2 vols), N.Y., 1934.
- Roos, Charles F., N.R.A. Economic Planning, Bloomington, 1937 (N.Y. 1971 reprint).
- Roosevelt, Elliott, ed., FDR. His Personal Letters, 1928-45, N.Y., 1970 reprint.
- Rost, O. Fred, Distribution Today, N.Y., 1933.
- Rowe, Frederick M., Price Discrimination under the Robinson-Patman Act, Boston, 1962.
- Ryant, Carl G., 'The Unbroken Chain: Opposition to Chain Stores During the Great Depression' (unpub. M.A. thesis, University of Wisconsin, Madison, 1965).
- Sams, Earl C., The Relation Between Chain Stores and Local Chambers of Commerce, N.Y., 1928.
 " " What is the Chain Store's Responsibility to its Community?, N.Y., 1929.
 " " The Chain Store's Place in American Life, N.Y., 1940.
- Schoenbaum, David, Hitler's Social Revolution: Class and Status in Nazi Germany, 1933-1939, London, 1967.
- Schweitzer, Arthur, Big Business in the Third Reich, London, 1964.

- Seligman, Edwin R.A. and Love, Robert A., Price Cutting and Price Maintenance, N.Y., and London, 1932.
- Shinner, Ernest G., The Forgotten Man, Chicago, 1933.
- Shoup, Carl, The Sales Tax in the American States, N.Y., 1934.
- Somerville, John, Chain Store Debate Manual, N.Y., 1930.
- Sprague, Jesse R., The Making of a Merchant, N.Y. and London, 1928.
- " " The Middleman, N.Y., 1929.
- " " High Pressure: What it is Doing to my Town and my Neighbors, N.Y., 1938.
- Stocking, George W. and Watkins, Myron W., Monopoly and Free Enterprise, N.Y., 1951.
- Stone, Alan, Economic Regulation and the Public Interest: The Federal Trade Commission in Theory and Practice, Ithaca and London, 1977.
- Sullivan, Thomas J., Merchants and Manufacturers on Trial; a complete survey of the illegitimate methods employed by the retail catalogue house system. Chicago, 1914.
- Taggart, Herbert F., 'Minimum Prices Under the NRA', Ann Arbor, (Michigan Business Studies, Vol. 7, No. 3).
- " " 'Cost Justification' (Michigan Business Studies, Vol. 14, No. 3).
- Thomas, Norman, Human Exploitation in the United States, N.Y., 1934.
- Tindall, George B., The Emergence of the New South, 1913-1945, Baton Rouge, 1967.
- Tull, Charles J., Father Coughlin and the New Deal, Syracuse, 1965.
- Twentieth Century Fund, Does Distribution Cost Too Much?, N.Y., 1939.
- United States Wholesale Grocers' Association, But Does the A & P Tell All? Washington, 1938.
- Vaile, Roland S., 'Grocery Retailing with Special Reference to the Effects of Competition' (Univ. of Minnesota, Studies in Economics and Business, No. 1, 1932).
- Van Dalsem, Newton, History of the Utopian Society of America, Chicago, 1942.
- Walker, James B., Chain Stores and the Business Depression, N.Y., 1931
- Warbasse, James P., Cooperative Democracy, N.Y., 1936, 3rd edn.
- Webb, Walter Prescott, Divided We Stand: The Crisis of a Frontierless Democracy, N.Y., 1937.
- Werne, Benjamin, ed., Business and the Robinson-Patman Law: A Symposium, N.Y., 1939.
- White, William Allen, Forty Years on Main Street, N.Y., 1937.
- Whiteman, Luther and Lewis, Samuel L., Glory Roads; The Psychological State of California, N.Y., 1936.
- Wilcox, Clair, 'Competition and Monopoly in American Industry' (TNEC Monograph, No. 21).
- Winkler, John K., Five and Ten: The Fabulous Life of F.W. Woolworth, 1940, reprint, Freeport, 1970.
- Wood, Charles Wesley, The Passing of Normalcy, N.Y., 1929.

- Woodward, Comer Vann, Origins of the New South, 1877-1913, Baton Rouge, La., 1966.
- Yamey, Basil S. (ed.), Resale Price Maintenance, London, 1966.
- Zimmerman, Max M., The Challenge of Chain Store Distribution, N.Y. and London, 1931.
- " " The Supermarket: A Revolution in Distribution, N.Y., 1955.
- Zorn, Burton A. and Feldman, George, Business Under the New Price Laws, N.Y., 1937.

(iii) U.S. Government

a) Major Congressional Hearings

- House Special Committee, Hearings on Investigation of the Lobbying Activities of the American Retail Federation, 74th Cong., June 5, 1935 - March 17, 1936.
- House Judiciary Committee, Hearings on H.R.8442, H.R.4994, H.R.5062, To Amend the Clayton Act, 74th Cong., 1st Sess., July 10 - 19, 1935.
- " " " Subcommittee, Hearings on H.R.4995, H.R.8442, and H.R.10486, To Amend the Clayton Act, 74th Cong., 2nd Sess., February 3 - 7, 1936.
- Senate Judiciary Committee, Subcommittee, Hearings On S.4171 - Price Discrimination, 74th Cong., 2nd Sess., March 24-25, 1936.
- " " " Subcommittee, Hearings on Resale Price Maintenance, 74th Cong., 2nd Sess., March 13, 1936.
- House Judiciary Committee, Subcommittee, Hearings on H.R.1611, Resale Price Maintenance, 74th Cong., 1st Sess., January 27, 29, 1937.
- Senate Judiciary Committee, Subcommittee, Hearings on S.100, Resale Price Maintenance, 75th Cong., 1st Sess., March 4, 1937.
- House Committee on Ways and Means, Subcommittee, Hearings on H.R.1, A Bill Providing for an Excise Tax on Retail Stores, 76 Cong., 3rd Sess., March 17 - May 16, 1940.

b) Federal Trade Commission

- Report on Resale Price Maintenance, 2 parts, 1929-31.
- Report on Resale Price Maintenance, 1945.
- Agricultural Income Inquiry, 3 vols., 1938.

Reports of the Chain Store Inquiry

- 72nd Cong., 1st Sess., Sen.Doc., No. 12, Cooperative Grocery Chains.
- " " " No. 29, Wholesale Business of Retail Chains.
- " " " No. 30, Sources of Chain Store Merchandise.
- " " " No. 31, Scope of the Chain Store Inquiry.
- " " " No. 51, Chain Store Leaders and Loss Leaders.
- " " " No. 82, Drug and Hardware Cooperative Chains.
- " " " No.100, Growth and Development of Chain Stores.

- 72nd Cong., 2nd Sess., Sen.Doc., No.142, Chain Store Private Brands.
- " " " No.153, Short Weighing and Over Weighing in Chain and Independent Grocery Stores.
- " " " No.156, Size of Stores of Retail Chains.
- " " " No.170, Quality of Canned Vegetables and Fruits.
- " " " No.178, Gross Profit and Average Sales per Store of Retail Chains.
- 73rd Cong., 1st Sess., Sen.Doc., No. 13, Chain Store Manufacturing.
- " " " No. 62, Prices and Margins .. Washington - Grocery.
- " " " No. 69, Prices and Margins .. Memphis, grocery.
- 73rd Cong., 2nd Sess., Sen.Doc., No. 40, Sales, Costs and Profits of Retail Chains.
- " " " No. 81, Prices and Margins .. Detroit, grocery.
- " " " No. 82, Chain Store Wages.
- " " " No. 84, Chain Store Advertising.
- " " " No. 85, Chain Store Price Policies.
- " " " No. 86, Special Discounts and Allowances - Tobacco Trade.
- " " " No. 87, Invested Capital and Rate of Return of Retail Chains.
- " " " No. 88, Prices and Margins .. Cincinnati, Grocery.
- " " " No. 89, Special Discounts and Allowances - Grocery trade.
- " " " No. 91, Service Features in Chain Stores.
- " " " No. 93, The Chain Store in the Small Town.
- " " " No. 94, Special Discounts and Allowances - drug trade.
- " " " No. 95, Prices and Margins .. Cincinnati - drug.
- " " " No. 96, Prices and Margins .. Detroit - drug.
- " " " No. 97, Prices and Margins .. Memphis - drug.
- " " " No. 98, Prices and Margins .. Washington-drug.
- " " " No. 99, Miscellaneous Financial Results of Retail Chains.
- " " " No.130, State Distribution of Chain Stores.
- 74th Cong., 1st Sess., Sen.Doc. No. 4, Final Report.

c) Miscellaneous

Congressional Digest, Vol. 9, August 1930, pp. 193-224, 'Congress and the Chain Stores'.

Department of Commerce, Domestic Commerce Series,

No. 5, 'The Commercial and Industrial Organizations of the United States' (1931)

No. 19, 'Commercial Survey of the Southeast'.

No. 54, 'Causes of Business Failures and Bankruptcies of Individuals in New Jersey, 1929-30'.

No. 100, 'Small Scale Retailing' (1938).

National Recovery Administration,

Codes of Fair Competition (1933-).

Division of Review, Work Materials, No. 35 and No. 57.

TNEC Monographs are listed under author in Part 2 of the bibliography.

iv) Indexed Periodicals

Hundreds of useful articles may be found in periodicals which were indexed for the years 1927-1940 in one or more of the following standard indexes.

1. American Economic Association, Index of Economic Journals.
2. Industrial Arts Index.
3. Reader's Guide to Periodical Literature.
4. American Association of Law Libraries, Index to Legal Periodicals.

These indexes provide a comprehensive guide to the occasional relevant article in a wide range of periodical literature as well as to the frequent articles found in Advertising and Selling, Business Week, Harvard Business Review, Journal of Business, Journal of Marketing, Nation's Business, Printers' Ink and Sales Management.

In general, periodicals cited in the footnotes above are indexed in one or more of these four standard works unless the periodical appears in Part 5 of this bibliography.

v) Unindexed Journals, Trade Journals, Business Newspapers, etc.

American Federationist, 1929-40.

Boot and Shoe Recorder, 1929-32.

Bricklayer, Mason and Plasterer, 1938-42.

Butcher Workman, 1939-40.

Butchers' Advocate, 1929-1940.

California Retail Grocers' Advocate, 1930-37.

Chain Store Age, 1925-1940.

Chain Store Progress, 1929-31.

Chain Store Review, 1928-32.

Colorado Grocer, 1936-39.

Commercial Bulletin and Apparel Gazette, 1930-1.

Cooperative Merchandiser, 1936-40.

Drug Trade News, 1938-40.

Facts and Figures, 1929-32.

Grocers' Association News, Columbus, Ohio, 1932-6.

Grocers' Commercial Bulletin, 1928-41.

Hardware Retailer, 1928-40.

Interstate Grocer, (Interstate Merchant), 1921-1949.

International Molders' Jnl, 1930.

Iowa Food Dealer, 1932-40.

Modern Merchant and Grocery World, 1927-40.

NARD Journal, 1928-40.

National Grocers' Bulletin, 1925-41.

National Retail Clothier, 1930, 1935.

New England Grocer & Tradesman, 1929-41 (New England Grocery and Market Magazine, 1932-).

New Jersey Grocer, 1936-41.

New York Jnl. of Commerce, 1929-1940⁺

New York Retail Grocers' Advocate, 1929-35.

New York State Retail Meat Dealers' Assn., Bulletin, 1933-38.

Pennsylvania Grocer, 1932-40.

Pennsylvania Meat Dealer, 1935-7.

Plain Talk (Magazine) 1930-6.

Progressive Grocer, 1929-41.

Retail Clerks' International Advocate, 1928-33.

Retail Grocers' Advocate (San Francisco), 1930 (became California Retail Grocers' Advocate).

Retail Ledger, 1930-36.

Sample Case, 1930-8.

Tires, 1937-40.

Tobacco Leaf, 1930-31, 1935-6.

United Rubber Worker, 1938-9.

Voluntary Chain Magazine (Voluntary & Cooperative Groups Magazine), 1931-41.

Western Tobacconist, 1933-37.

Wholesale Grocer News, 1929-39.

+ Partial coverage only.

vi) Newspapers of General Circulation.*

American Progress, 1933-36.

Boston Daily Globe, 1932.

Colorado Springs Gazette, 1934, 1938.

Detroit Free Press, 1931, 1933.

Detroit News, 1931, 1933.

Epic News (Upton Sinclair's Epic News; National Epic News), 1933-36.

Florida Times-Union, 1935, 1937.

Harrisburg Patriot, 1935, 1937.

Houston Post, 1935.

Los Angeles Times, 1935.

Louisiana Progress, 1930-32 (became American Progress).

Louisville Courier-Journal, 1930.
Minnesota Union Advocate, 1930.
New Masses, 1936.
New Orleans Times-Picayune, 1930, 1934.
New York Times, 1927-1940.
Oregon Daily Journal (Portland), 1932.

Pittsburgh Catholic, 1936.
Pittsburgh Press, 1937.
Progressive (Madison, Wis.), 1930-8.
Sacramento Union, 1936.

St. Louis Post Dispatch, 1936.
San Francisco Chronicle, 1935, 1936.
Social Justice (Royal Oak, Mich.), 1936.
Tulsa Daily World, 1930.
Utopian News, 1934-36.

* The New York Times is - with minor irrelevant exceptions - the only indexed newspaper for this period, and was consulted extensively. In many other cases, the newspapers cited were used to follow the proceedings of the state legislature during the relevant part of the year or years cited.

vii) Unobtainable Anti-Chain Newspapers.

The following is a list of anti-chain newspapers which proved untraceable despite quite extensive inquiries to libraries, state historical societies and trade organisations and appeals through the letters columns of many newspapers. It seems impossible that such materials could have disappeared altogether, and this list may assist the inquiries of any interested person, as well as providing a record of this form of anti-chain agitation. Some of these 'newspapers' probably appeared for only a few issues and amounted to little more than pamphlets, but others were apparently quite long-lasting and regular newspapers or magazines.

American Independent ... Shreveport, pub. KWKH ... 1930-? (Ref. N.Y. Journal of Commerce, April 12, 1930).

Anti-Chain World ... pub. Texas Anti-Chain Assn, 1930 (Ref. Sales Management, April 5, 1930).

Break the Chains Weekly ... pub. Break the Chains Assn., Minneapolis, 1930 (Ref. Sales Management, April 5, 1930).

Chain Store Menace ... Birmingham, Ala., 1930-? (Ref. Business Week, April 9, 1930, p.24).

Chained ... Dallas, Texas, 1930-? (Ref. Business Week, April 9, 1930, p.24).

- East St. Louis Free Press, 1930 (Ref. Interstate Grocer, February 8, 1930).
- Food Buyer's Guide ... monthly, pub. Kansas City R.G.A. (Ref. Interstate Grocer, December 1, 1928).
- Forward America ... ed. and pub. by Ed. Wimmer, Covington, Ky. Began 1932 as The Voice of Progress; in 1938 described as 8 page union label newspaper distributed free to 100,000 homes. (NARD Jnl., December 1, 1938; May 18, 1939).
- The Friendly Dollar ... pub. Wichita Independent Business Men's Assn. (Ref. Interstate Merchant, October 21, 1939; Lby. of Congress, 'Small Business Bibliography').
- Hello World; the truth about the chain store menace, ... Louisville, Ky. 1930 (National Union Catalog. This item is no longer to be found at Cleveland Public Library).
- Home Defender ... St. Louis, 1930-2 (reprints from Interstate Grocer, for wide distribution).
- The Home Defense ... Long Beach, Calif. ... 1930-? (Ref. Hardware Retailer, November 1930).
- Home-Owned News ... San Francisco ... pub. Home-Owned Businesses of California Inc. (Ref. Business Week, February 19, 1938).
- Independent Business ... monthly, pub. Iowa Independent Business Men's Assn., Des Moines (Ref. Business Week, September 24, 1938, p.29; Lby. of Congress, Small Business Bibliography).
- Independent Crusader ... ed. and pub. Roy P. Craton, Los Angeles, Calif. 1930-5? (Ref. Craton, A Nation Chained).
- Independent Retailer ... Washington D.C. ... 1930-? (Ref. N.Y. Journal of Commerce, May 3, 1930).
- Kalamazoo Booster ... 1930-? ... (Ref. Interstate Grocer, August 9, 1930).
- Omaha Journal of Progress ... 1930-? ... (Ref. Sales Management, April 5, 1930).
- The Politician ... St. Louis, monthly ... 1930-? (Ref. Interstate Grocer, February 1, 1930).
- Town and Rural Booster ... Berlin, Pa. (Ref. Insterstate Grocer, November 3, 1928).
- Truth ... Decatur, Ga. ... monthly, 1930-? (Ref. Business Week, April 9, 1930, p.24).