The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940

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The rapid expansion of chain stores during the 1920s and 30s, especially the Great Atlantic and Pacific Tea Company (A&P), excited significant popular opposition. Chain store opponents, including Justice Louis Brandeis, argued that the chains were undermining the small, independent retailer and destroying America's small towns, and that the concentration of economic capital in large corporate entities threatened democratic citizenship. These localist and decentralist arguments were taken seriously by state legislatures, many of which adopted anti-chain store tax laws, and by Congress, which adopted amendments to the federal antitrust laws. This Article revives these arguments in order to describe a progressive, localist constitutionalism that has been lost since the late New Deal. The Article also uses the legal history of the anti-chain store movement to gain perspective on current debates about globalization and the anti-big-box store movements of today.
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INTRODUCTION

In 1930, the nation’s high school and college debate teams argued the proposition: “Resolved: that chain stores are detrimental to the best interests of the American public.”¹

That same year, The Nation ran a four-part series entitled Chains Versus Independents,² and The New Republic followed with a three-part series asking Chain Stores: Menace or Promise?³ Chain stores were in the American consciousness, and for good reason. Led by the Great Atlantic and Pacific Tea Company (known throughout the country then and

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since as A&P), chain groceries, drug stores, cigar shops, gas stations, and variety stores revolutionized retailing in the first quarter of the twentieth century. During the 1920s, chains increased their share of overall national retail sales from 4% to 20%, and their total share of grocery sales to 40%. By 1930, A&P was the fifth largest industrial corporation in the United States, and was running more stores than any other chain store company had or has since.

The chain store revolution came quickly, as did the movement to contain them. Between 1920 and 1940, a loose confederation of independent merchant associations, local merchants, anti-monopolists, agrarians, populists, and progressives sought to stem the chain expansion. By 1929, associations in over 400 cities and towns had formed to fight the chains. That same year, Indiana passed the first graduated tax on chain stores, which was upheld by the Supreme Court two years later in *State Board of Tax Commissioners v. Jackson.*\(^7\) *Jackson* opened the door to state legislative activity, and between 1931 and 1937, 26 states enacted chain tax laws.\(^8\) National anti-chain legislation in the form of the Robinson-Patman Act\(^9\) – the “Magna Charta” of small business\(^10\) – capped a period of legislative ferment.


\(^7\) Lebhar, supra note 1, at 142.

\(^8\) Lebhar, supra note 1, at 142.

Nevertheless, the chains won. Despite significant popular engagement and legislative successes, the anti-chain store movement failed almost completely to stop the chains. The story that has sometimes been told is one of inevitability: the anti-chain store movement, writes Richard Tedlow, was a “voice of the past crying out to the present,”11 “a rearguard action,” writes Daniel Boorstin, in defense of “a dying past of the general store, the village post office, the one-room schoolhouse and the friendly corner drug-store.”12 Certainly, the anti-chain store movement was animated by nostalgia for an age of smaller-scale distribution, an age that by the late 1920s was rapidly falling away in the face of “bigness.” But the debate over bigness in retailing, like the debate over bigness in production, was still robust in 1930. The rise of national distribution networks was not taken as a given but rather was resisted quite strongly, and by a range of actors across the political spectrum. These included progressives like Louis Brandeis and Robert LaFollette, populists like Huey Long and New Dealers like Hugo Black; union members, agrarians and farmers, the Ku Klux Klan, and African-American leaders.13 The economic and social arguments made by anti-chain advocates had to be taken seriously by well-meaning people, and the legislative advances to protect the independent retailer were real.

In the 1920s and 1930s, chain store opponents made arguments in favor of the decentralization of economic power that were embraced by many Americans. Rooted in the anti-monopoly ideology of the Progressive Era, the anti-chain store movement

11 TEDLOW, supra note 5, at 214.
articulated an account of local economic self-sufficiency in the service of political liberty, economic independence, and local community. For anti-chain advocates like Louis Brandeis, the problem with the chains, as with all large-scale, centralized economic enterprises, was that they undercut local producers and retailers; what Brandeis called the “Curse of Bigness” undermined local political and economic independence, thus destroying the capacity of individuals to achieve self-mastery and the capacity of communities to achieve self-government.

Localist arguments thus took center stage in the chain store debates. Indeed, at bottom, the anti-chain store movement sought to translate local efforts to keep chain stores “out” and local dollars “in” into a national economic program. For a while, it seemed as if this was a possibility. The late-New Deal consensus that the primary problem with monopoly is that it raises prices -- that large-scale distribution networks should be judged in terms of their effects on consumers -- had yet to solidify into our current antitrust regime. The post-war legal and political regime – with an antitrust doctrine focused on consumer protection and a Commerce Clause doctrine explicitly focused on preventing discrimination against out-of-state goods – was not yet firmly in place. It was still possible in the 1930s to imagine and advocate local power to regulate local economic circumstances in pursuit of an ideal of citizenship and economic self-sufficiency, even if that regulation led to higher prices.

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The anti-chain store movement thus captures a transitional moment in American history.\textsuperscript{15} Certainly there is a story of social dislocation, the shift from rural to urban, local to national; the decline of informal social groups and the ascendance of large, bureaucratic formal organizations. But the anti-chain store movement reflects more than resistance to the impersonal social forces of corporate capitalism; it represents a shift in salient political theories. Anti-chain agitation crossed traditional ideological lines, joining Democrats, Republicans, progressives, and populists. It pitted towns against cities; rural against urban; the South and West against the Northeast; the local retailer against the national consumer. And it was arguably the last time that there was a serious effort to offer an account of the relationship between economic decentralization and liberty.

This Article revives and reconstructs the arguments against the chains in part to articulate the form of localism that those advocating economic decentralization were proposing. The nature of the state underwent a dramatic shift during the 1930s; the Depression and Roosevelt’s New Deal ushered in a revolutionary change in the nation’s social, political, and economic fabric. But the centralized, bureaucratic social-welfare state that emerged at the end of the 1930s and more fully in the post-war period did not come fully formed. Instead, it was one of many possible alternative political visions competing for space well into the 1930s.

The anti-chain store movement offers a window into one such alternative. While those who attacked the chains were often motivated by economic self-interest, the rhetoric of local self-sufficiency that they employed resonated deeply with many

\textsuperscript{15} See generally ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 60–64 (1995); SANDEL, supra note 4, at 227–43.
Americans. Anti-chain store agitation represented more than a rearguard action; in its purest form, anti-chain store advocates argued on behalf of an aggressive regulatory state, the purpose of which was to distribute widely economic and political power in the service of an economically-based citizenship. The movement suggested the possibility that the state could exercise power in the service of decentralization, not inevitably in the service of centralization, and that government could make as its aim an ideal of democratic citizenship and not just a policy of social welfare. The anti-chain store movement urged federal and state interference into the workings of the national market in order to preserve local economic and political independence, not to supersede it. And it insisted that the government act to ensure both the prosperity of the nation as a whole and the prosperity of the particular communities in that nation.

Echoes of this form of economic localism can be heard today (though quite faintly) in neighborhoods’ resistance to an incoming Barnes & Noble, Starbucks, or a new big box store. Questions have recently been raised specifically about the economic effects of the latter, and particularly of Wal-Mart, with present-day anti-chain advocates arguing that Wal-Mart’s quest for low prices has resulted in wage stagnation, labor abuses, bankrupt suppliers and competitors, destroyed downtown businesses, and urban sprawl. Local efforts to constrain the expansion of big-box retailing have attracted the attention of the national media. Indeed, there are striking parallels between past resistance to the chains and current resistance to the big box stores: a recent BusinessWeek cover story asked “Is Wal-Mart Too Powerful?”16 – the same question asked about A&P by national newsweeklies in the 1920s and 1930s.

An examination of anti-chain store agitation provides historical traction to the debates over big box stores in our own time. These debates are a manifestation of the larger dilemmas of localism and globalism; the tension between transnational markets and local economic welfare. Large-scale shifts in employment, manufacturing base, retail innovation, and demographics have generated anxiety about the nature of corporate capitalism and its relationship to democracy. What is the relevance of democratic self-government in the context of the new global commercial reality? To what extent can regions, states, nations, or local communities control their economic destinies? These questions were faced by Americans confronted with a market of national scope in the 20s and 30s; they are amplified today as we confront a global one.

This Article tells the legal history of the chains and the anti-chain store movement in roughly chronological order, beginning with the boom in chain store expansion in the late 1920s, and ending with America’s entrance into the Second World War in 1941. This story has been overlooked by legal historians—the chain store cases have been relegated to footnotes (if mentioned at all), and the relationship between anti-chain legislation, *Lochner*-era jurisprudence, and New Deal liberalism has gone unremarked. 17 Moreover, the localist ideology that animated the movement and its articulation on the Supreme Court by Justice Brandeis has received little attention in the legal literature. 18

Three characteristics of that localist ideology should be of interest to historians as well as to constitutional theorists. First, localist ideology was characterized by a close

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17 I have not located any sustained treatment of the chain store cases in their jurisprudential context. The most thorough treatment of the anti-chain store movement generally is LEBHAR, supra note 1, which appeared in its Third Edition in 1963. It was authored by the Editor-in-Chief of *Chain Store Age*, a trade publication that first appeared in the 1920s, and is currently published by Lebhar-Friedman Inc.

18 Brandeis biographers have discussed Brandeis’s decentralist ideology, though they have not placed it in the context of the anti-chain store movement. *See, e.g.*, STEPHEN W. BASKERVILLE, OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS (1994); PHILIPPA STRUM, LOUIS D. BRANDEIS (1984).
connection between political and economic decentralization. Our current constitutional discourse’s preoccupation with federalism reflects a concern with concentrated, centralized public power, but it is not accompanied by an equivalent concern with concentrated, centralized private power. In contrast, the decentralists of the early twentieth century feared the concentration of economic power as much as they feared the concentration of political power. Second, the version of localist ideology offered by Brandeis and other progressives coupled decentralization and a reformist politics. Political decentralization has often been associated with limited government and been resisted by those who believe that only a strong federal government has the ability to protect minorities and the economically disadvantaged. One purpose of this Article is to revive the connection between decentralization and progressive politics. And third, localist ideology, as it was reflected in the anti-chain store movement, tended to be the province of small businessmen, local politicians, and others who have been viewed both then and now as parochial and anti-modern by establishment elites. Cosmopolitan opinion-makers have historically been suspicious of those actors who wield power in small places or disdainful of “naïve” efforts to protect local economies from the expansion of global markets. This Article does not seek to gloss the anti-liberal aspects of the anti-chain store movement—in fact, it highlights the historical ambiguities that dog the localist ideology. It does, however, reject the easy cosmopolitanism of those who believe that decentralization is necessarily politically or economically conservative.

The Article is divided into six Parts. Parts I and II describe the characteristics of the chain backlash, the jurisprudential context in which early anti-chain legislation was assessed, and their shared grounding in an earlier antimonopoly tradition. Anti-chain
store legislation and the classical jurisprudence of the *Lochner* Court had similar origins – a suspicion of economic privilege and skepticism of monopoly power. These impulses, however, pulled in opposite directions. The independent retailers sought legislative protection from what they perceived of as the chains’ unfair monopoly power, while classical jurisprudence viewed anti-chain legislation as an extension of legislative protection to a particular class of merchants – an unequal intervention into the market that smacked of monopoly itself.

Part II concludes with a discussion of the Court’s 1931 *Jackson* decision. In upholding an Indiana chain store tax, *Jackson* seemed to signal a move away from the classical *Lochner* paradigm. Those on the political left who thought that *Jackson* augured a turn toward a more deferential standard for review of federal and state regulatory legislation were disappointed, however, and no one was more disappointed than Justice Louis Brandeis. Brandeis, the core of the progressive wing of the Court since his appointment in 1916, was a vociferous defender of the local retailer and producer, a proponent of anti-chain store taxes and other legislation designed to protect the small dealer.

Part III uses Brandeis’s dissent in *Ligget v. Lee* – in which the Court struck down a Florida chain store tax only two years after *Jackson* – to explicate his localist jurisprudence. Historians often dismiss Brandeis’s preference for small-scale political and economic units as nostalgic or naïve, a remnant of Jeffersonian idealism. Looking at the anti-chain store movement through a post-New Deal lens, they see Brandeis as part of a reactionary movement of small businessmen pursuing a strategy of local economic

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protectionism.\textsuperscript{20} I suggest a more complex portrait of the anti-chain store movement, one that sees in its strands of anti-corporatism a more fully fleshed-out economic and political theory. Part III argues that Brandeis’s progressive political economy represents a lost alternative to the liberalism of the late New Deal. That form of liberalism ultimately rejected the kind of decentralization of political and economic power that Brandeis favored.

Part IV describes the congressional response to the chains, namely the Robinson-Patman Act of 1936 and the Miller-Tydings Act of 1937, which amended the federal antitrust laws to give small retailers increased protection. These acts represented the high-water mark of the anti-chain store movement, and the most visible eruptions of localist and producerist ideology. They also signalled the beginning of its rapid decline. Part V argues that at the very moment that Congress was adopting legislation to protect the small dealer, the consumer was moving into the center of government policy as an important interest group and consumption was moving to the center of government policy as a theory of economic recovery. The defense of the small retailer became increasingly untenable as his welfare came into conflict with the consumer’s. Moreover, consumption was accompanied by a more inclusive New Deal politics: women and African-Americans came to play a role in national consumption communities that they could not in a producerist economic order associated with “small dealers and worthy men.”\textsuperscript{21}

Part VI considers the implications of this consumption-oriented political-economic culture for our time. This Part briefly discusses the work of the political philosopher Michael Sandel, who has favorably invoked the anti-chain store movement in

\textsuperscript{20} See, e.g., McCraw, supra note 19.
\textsuperscript{21} United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 323 (1897).
his communitarian critique of political liberalism. Sandel’s portrait of the anti-chain store movement is clearly romanticized. It fails to recognize the role that economically-interested groups played in pursuing protectionist legislation, and it does not acknowledge the exclusionary politics that often accompanied the anti-chain store movement’s appeal to the virtues of the small proprietor. His larger argument, however—that the concentration of economic power in large-scale corporations has undermined the citizenry’s capacity to self-govern—is one that continues to demand attention. The present concern over out-sourcing and off-shoring—often articulated as a more general anxiety about “globalization” – is a function of the continued inability of those offering accounts of democratic legitimacy to come to terms with the concentration of economic power in large-scale corporations. As was A&P before it, Wal-Mart has become a symbol of the loss of community self-determination and democratic control. Whether such losses are actual or imagined, any account of constitutional self-government must explain and contend with that anxiety.

I. THE CHAIN STORE MENACE

A. THE RISE OF CHAIN RETAILING

The history of chain retailing begins in the nineteenth century. A&P was founded in New York in 1859; Woolworth’s began in 1879; J.C. Penny started in 1902; and Liggett Co. opened in 1907. But the real growth of chains came in the period after World War I. The post-war period, and particularly the 1920s, witnessed the dramatic expansion of chain store operations, with an increase over the decade from 30,000 to

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22 Harper, supra note 4, at 408; LEBHAR, supra note 1, at 15.
150,000 stores.\textsuperscript{23} The chains, moreover, were expanding outside the densely populated cities of the Northeast and into the small towns and rural communities of the South and West. Whereas Main Street had formerly been the province of the small independent merchant, by the mid-1920s that was no longer the case, as the rapid growth that would lead to the chains taking in more than 25\% of the nation’s retail trade by 1933 was well underway.\textsuperscript{24} Chain store retailing had invaded all merchandizing, including drugs, shoes, cigars, tires, groceries, cars, restaurants, dime stores, household appliances and radios.\textsuperscript{25} The bull market of the 1920s encouraged consolidation and expansion; financing for chain store expansion was readily available from Wall Street.\textsuperscript{26} Between 1912 and 1915, A&P opened an average of one new store every three days, and by 1925—the first year that the trade publication \textit{Chain Store Age} appeared—it was operating 14,000 stores.\textsuperscript{27} J.C. Penny expanded from 312 stores in 1920 to 1452 stores in 1930.\textsuperscript{28}

The “chain store menace”\textsuperscript{29} was only fully realized in the 1920s. To be sure, earlier opposition to mail order outfits and department stores – the vanguards of late-nineteenth and early-twentieth century retailing – had not been insignificant. Rural shopkeepers had particularly felt threatened by Sears Roebuck and Montgomery Ward; they had organized boycotts and catalog burnings, and had urged their customers to “trade at home.”\textsuperscript{30} Department stores, too, had excited opposition at the turn of the

\textsuperscript{23} Sparks, \textit{supra} note 13, at 20.
\textsuperscript{24} \textsc{Joseph Cornwall Palamountain}, \textit{The Politics of Distribution} 159–60 (1955).
\textsuperscript{25} Harper, \textit{supra} note 4, at 408–11 & n.4; Bean, \textit{supra} note 10, at 25–26; LEBHAR, \textit{supra} note 1, at 55; BECKMAN & NOLAN, \textit{supra} note 6, at 27–28. \textit{See also Walter Prescott Webb, Divided We Stand: The Crisis of a Frontierless Democracy} 87 (1937) (arguing that chain stores were draining the life and character out of small towns).
\textsuperscript{26} Harper, \textit{supra} note 4, at 408–09; Sparks, \textit{supra} note 13, at 20.
\textsuperscript{27} BOORSTIN, \textit{supra} note 12, at 110; LEBHAR, \textit{supra} note 1, at 31–33.
\textsuperscript{28} LEBHAR, \textit{supra} note 1, at 17.
\textsuperscript{29} Harper, \textit{supra} note 4, at 407.
\textsuperscript{30} Bean, \textit{supra} note 10, at 24; Harper, \textit{supra} note 4, at 409.
century; some municipalities adopted anti-department store laws that forbade the mixing of goods on the same premises.\textsuperscript{31} Catalog sales, however, were a fraction of chain store sales in the 1920s, and department stores had not yet expanded beyond the major cities. The chains therefore posed a threat to the small shopkeeper on a different scale, in part because they were aggressively expanding out of cities and competing head-to-head with local store owners. The local independent, who had retained control of Main Street despite the rise of department stores and catalog merchants, was now threatened by a huge competitor right down the street.\textsuperscript{32}

The challenge of the chains to the independent merchant was obvious. Outside the largest cities, retailing at the turn of the century was relatively primitive. Independent merchants stocked mostly local goods, rarely advertised, and often lost money, even in those rural communities in which they had little competition. The “average retail grocer was happy if he could go through the year with sufficient credit to weather the holiday season. He would then settle up with Mr. Wholesale Credit Man, get an extension for another year. He lived out of his store, drew no specific salary, never knew how much or how little he had drawn for his family expense. He lived close and hard.”\textsuperscript{33}

Chains not only brought lower prices to the retail trade, but also a wider array of standardized goods, attractive in-store displays, mass marketing, and inventory command and control. Chain groceries in the 1920s and 1930s had not yet evolved into the modern supermarket (though they soon would). At this time, a single chain grocery store was still a comparatively small operation that shelved many of its goods behind a counter.

\textsuperscript{31} See, e.g., Chicago v. Netcher, 55 N.E. 707, 707 (Ill. 1899). See supra text accompanying notes __.
\textsuperscript{32} Harper, supra note 4, at 408-411; BEAN, supra note 10, at 23–26.
Nevertheless, the chains had mastered a number of modern inventory and selling
techniques that were beyond the average owner-manager, who had little expertise in site
selection, store design, or advertising, not to mention basic inventory management,
accounting or employee relations. "Few of the 300,000 independent grocers were able to
match the resources possessed by the chain experts to meet these needs."34 Chains had
the advantages of Frederick Taylor’s *Principles of Scientific Management*35 – the
efficiency bible of the Progressive Era – as well as the benefits of economies of scale,
which meant the cost per store of expert administration was negligible.36

Moreover, chains had made conscious decisions to eliminate delivery and credit
in most of their stores.37 Traditionally, the Main Street grocery or sundries store provided
numerous services to its customers, serving as bank, community center, and civic arena.
Credit was particularly important in a rural economy where cash-flow depended on the
vicissitudes of the local harvest, and delivery was not optional in a world that had not yet
completed its reliance on the automobile. By the early 1920s, however, as the rural
economy gave way to an increasingly urbanized one, retailing relied less on services like
delivery or credit than on price and selection. The cash-and-carry revolution meant that
the savings could be passed on in the form of lower prices.38

34 TEDLOW, supra note 5, at 203.
35 FREDERICK TAYLOR, THE PRINCIPLE OF SCIENTIFIC MANAGEMENT (1911). Preoccupied with eliminating
wasted labor, Taylor prescribed putting into place carefully dictated methods for every possible task a
worker might encounter. By instituting these ideally efficient routines, a company could effectively replace
workers’ judgment with “science.” Taylor’s ideal was therefore one of vastly strengthened management,
coupled with very much weakened individual autonomy at the lower levels. See John Fabian Witt, *Speedy
36 TEDLOW, supra note 5, at 203; BECKMAN & NOLEN, supra note 6, at 42–61.
37 TEDLOW, supra note 5, at 203–04.
38 Sparks, supra note 13, 12–16; TEDLOW, supra note 5, at 191, 203–04; BOORSTIN, supra note 12, at 109–
10; AYERS, supra note 33, at 83–; LEBHAR, supra note 1, at 9; PALAMOUNTAIN, supra note 24, at 60–62.
Low prices were aided by the ever-shrinking distance between field and shelf, manufacturer and retailer. The grocer of the early twentieth century purchased his goods through a network of wholesalers and distributors that operated through regional and local “wholesale men” – jobbers and salesmen. During the 1920s, the chains relied less and less on wholesalers, in many cases receiving produce direct to their own warehouses and eliminating the wholesale mark-up altogether. They also integrated beyond wholesaling to manufacturing, owning and operating canneries, bakeries, and coffee plantations. Combined with the chains’ price power in the wholesale market, this vertical integration made it difficult for the independent to compete. As a result, life for the independent was often “poor, nasty, brutish, and short,” with average sales per unit far below chain stores.

B. The Chain Backlash

For many, the chains represented modernism in distribution. Scientific management was hailed by chain proponents as bringing the benefits of economies of scale and standardization to mass distribution, as an inevitable progression in the new age of mass production and consumption. Even at the time, the cosmopolitan opinion-makers of the metropolitan Northeast often viewed the anti-chain movement as a peculiarly backward, mostly southern, and mostly small-town phenomenon. “A new battle on evolution is raging in the South,” Harry Schacter of The Nation wrote in 1930, five years after the famous Scopes Monkey trial. “This time the issue is not religious but

39 Ayers, supra note 33, at 85.
40 Tedlow, supra note 5, at 209–10.
41 Id. at 211–13.
42 Palamountain, supra note 24, at 11.
43 Tedlow, supra note 5, at 199.
44 Sparks, supra note 13, at 22-24; Harper, supra note 4, 411-412.
economic. . . . The battle is between the small retailer, taking the fundamentalist position, against the chain store, an exponent of modernism in distribution."45

Certainly, the anti-chain store movement did have a regional appeal, finding its most ready recruits in the less urbanized South and West among farmers, small shopkeepers, and the petit bourgeoisie that had been satirized in Main Street, Sinclair Lewis’s biting 1920 novel about small town life.46 “Chain-baiting” rabble-rousers and politicians capitalized on regional animosities, playing on the long-standing southern fear of corporate invasion by big business interests controlled by financiers in the north.47 The anti-chain store movement was, in the words of one critic, “a queer mixture of unquestioned sincerity and the best of motives on one hand and the more arrant, and even blatant, demagogy on the other.”48

Consider the crusading radio personality W.K. Henderson, who urged Americans to “Wake up!” in their fight against the chains. “We can whip the whole cock-eyed world when we are right . . . I’ll be your leader. I’ll whip the 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.”49 Henderson, a wealthy middle-aged owner of a large prosperous family business in Shreveport, Louisiana, owned the radio station KWKH, whose signal reached throughout the South and West. His anti-chain broadcasts – often peppered with the most sensational language ever heard on radio – began in 1929. By 1930, his radio station had been voted the most popular station in the South.50 Henderson established a national

46 SINCLAIR LEWIS, MAIN STREET (1920).
47 BEAN, supra note 10, at 28; Ryant, supra note 1, at 219–22; PALAMOUNTAIN, supra note 24, at 163.
48 Henderson’s Merchants’ Minute Men Challenge the Chains, PRINTERS INK, Feb. 20, 1930, at 3.
49 Harper, supra note 4, at 414 (quoting a Henderson radio broadcast).
50 Id.
anti-chain organization, the “Merchants’ Minute Men” and in two years raised over $370,000 from over 35,000 Minute Men gathered in associations in 400 towns.\textsuperscript{51}

Politicians from the region were frequent guests on Henderson’s program. Huey Long, Governor of Louisiana and a close personal friend, appeared a number of times on Henderson’s program and made the attack on the chains a centerpiece of his 1930 Senate election campaign. Other politicians made the trip to Shreveport as well, including Governors Flem Sampson of Kentucky and Phil La Follette from Wisconsin, and Representative Clyde Kelly of Pennsylvania, Senator Morris Sheppard from Texas, and Attorney General C.A. Sorenson of Nebraska.\textsuperscript{52} Henderson effectively employed the rhetoric of invasion and class warfare: the chain store was a foreign menace, “coming into your town and taking your money and sending it out to a bunch of crooked, no account loafers in Wall Street.”\textsuperscript{53}

Imitators followed, like Winfield Caslow, the “Main Street Crusader” in Grand Rapids, Michigan, who authored the only anti-chain store novel and took to the airwaves in 1930 to challenge chain store activities across the Midwest;\textsuperscript{54} “Fighting” Bob Duncan, editor of Portland, Oregon’s\textit{ Duncan’s Trade Register}, which charged that Oregon was “ruled by a contemptible oligarchy of Wall Street Magnates;”\textsuperscript{55} and Montaville Flowers, from Pasadena, California, a national anti-chain broadcaster who wrote the anti-chain

\textsuperscript{51} Id. at 417.
\textsuperscript{52} Id. at 414; Sparks, supra note 13, at 48–51.
\textsuperscript{53} \textit{Chains Face First Real Fight As South’s Politicians Seize Issue}, THE BUSINESS WEEK, March 5, 1930, at 21–22.
\textsuperscript{54} Paul Hollister, “All Quiet on the Western Front” – Except for a Slight Anti-Chain Disturbance in the Ether ’Round About “Furniture Town”, 14 ADVERTISING & SELLING 17, [jump cite] (1930); Sparks, supra note 13, at 57; Harper, supra note 4, at 416.
Independent merchants throughout the country lent local support by creating “better business associations” and “home defense leagues” and organizing “buy at home” campaigns. By 1930, there were at least twelve anti-chain store radio stations, and twenty-four anti-chain store newspapers.

The anti-chain movement relied on a populist outpouring that was decidedly opportunistic—the Depression had generated significant anger against corporate power. But as the sheer number of chain store debating manuals of the 1930s suggests, many Americans were deeply ambivalent about the success of scientific management and the centralization of political and economic power, both because of the social changes this centralization had wrought, and because of the threat the efficiency revolution posed to democratic values. Anti-chain animosity found root in two traditions: the progressive anti-monopoly tradition that dated to the rise of big manufacturing concerns in the 1870s and 1880s, and the agrarian tradition that coalesced in the South and West in the 1920s and 1930s.

The first tradition, American antimonopoly, was an “understanding of economics and politics in terms of graft, monopoly, privilege, and invisible government” that had deep roots in the American political culture. The Jacksonian-era attacks on privilege and concentrations of wealth, the trust busting of Theodore Roosevelt, the populist and progressive movements to redistribute wealth and reform government, had

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56 Sparks, supra note 13, at 55.
59 Godfrey M. Lebhar points out that a 1940 bibliography listed seven debate manuals on the chain store question. LEBHAR, supra note 1, at 157–58.
60 See, e.g., AYERS, supra note 33, at 249–82.
as commonalities a concern with monopoly. The chief target of the antimonopolist sentiment was the large corporate trusts, but as Robert Wiebe has pointed out, “[a]lthough antimonopoly occasionally singled out a definite enemy – some large corporation, a specific banking practice, a particular form of landholding – it usually served as a general method of comprehending the threats to local autonomy.”

The changing social order presented a host of challenges: industrialization, urbanization, labor strife, “devouring monopolies,” and immigrant influx. “The most significant characteristic shared by these many anxieties was the desire for community self-determination, and antimonopoly was its most common means of expression.”

As Standard Oil was the symbol of the evils of big business in the 1870s, A&P became the symbol of corporate giantism, “the octopus” of the 1920s. The rhetoric stayed relatively constant, however. Monopoly undermined individual independence, denying workers control over their economic fate and making it impossible for individuals to start their own businesses. It led to the demise of the small producer, and threatened the economic and political independence of the local community. The chains, like the trusts before them, squeezed out competition, held down wages, took money out of the community, converted independent tradesmen into clerks, and concentrated wealth in a few hands. As then-Alabama Senator (and future Supreme Court Justice) Hugo Black declared on the floor of Congress in 1930:

Chain groceries, chain dry-goods stores, chain clothing stores, here today and merged tomorrow—grow in size and power. We are rapidly becoming a nation of

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62 Id. at 123–24. See also BRINKLEY, supra note 15, at 58-61.
64 Id. at 52.
a few business masters and many clerks and servants. The local man and merchant is passing and his community loses his contribution to local affairs as an independent thinker and executive. A few of these useful citizens, thus supplanted, become clerks of the great chain machines, at inadequate salaries, while many enter the growing ranks of the unemployed. A wild craze for efficiency in production, sale and distribution has swept over the land, increasing the number of unemployed, building up a caste system, dangerous to any government.67

Southerners were particularly attuned to arguments couched in the rhetoric of economic servitude.68 Anti-monopoly sentiments thus resonated with the second tradition that fueled the chain backlash: agrarianism. As Edward Shapiro observes, “agrarians” -- and others who called themselves “decentralists” or “distributists” -- attacked monopoly as destructive of regional character and local self-sufficiency.69 The decentralists emphasized the pervasiveness of the conflict between rural and urban America, and argued that large-scale industrialization was leading to the concentration of property and political power into fewer hands, the dispossession of the propertied middle class of shopkeepers and small manufacturers, and the destruction of rural independence.70 In their classic manifesto, I’ll Take My Stand, published in 1930, the southern Agrarians warned that the South was becoming an economic colony of the Northeast.71

The historian Walter Prescott Webb, teaching at the University of Texas, specifically attacked the chains on this score in his 1937 book, Divided We Stand, The

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67 72 CONG. REC. 1239–40 (1930), quoted in LEBHAR, supra note 1, at 159–60.
68 The southern perception that the North dominated the economies of the South existed in various forms from well before the Civil War, though the irony of former-slave-holding southerners complaining of northern economic enslavement seemed to be lost on those employing the rhetoric.
70 Id.
71 I’LL TAKE MY STAND; THE SOUTH AND THE AGRARIAN TRADITION, BY TWELVE SOUTHERNERS [JUMP CITE] (1930). The southern Agrarians were a group of young men who developed an intellectual movement that sought to chart a new economic and cultural course for the South during the 1930s. Prominent among them were Robert Penn Warren, Allen Tate, John Crowe Ransom, and Donald Davidson. See generally PAUL CONKIN, THE SOUTHERN AGRARIANS ( ).
Crisis of a Frontierless Democracy.72 In a chapter entitled “Everywhere in Chains” Webb wrote of the changes wrought by the chain invasion. “As I look out on the business sections of . . . towns I see people everywhere in chains. Wherever I turn in the South and the West I find people busily engaged in paying tribute to someone in the North.”73 The chains, Webb argued, break the spirit of their employees, destroy the independent merchant, and enervate the local community:

[M]uch of the business of the South and the West is in chains, and . . . more each year is going into bondage in the North. I may add that business in the North is going into the hands of the ‘chains’ too. The farmers, laborers, and small merchants are there caught in the same net as are their fellows in the South and the West, but with the difference being that they reap some advantage by being near the barons of business, parts of the humming machines.74

The anti-chain store movement thus found a receptive audience in places like Shreveport, Louisiana and Austin, Texas, among those who believed the chains were undermining a kind of mythic regional independence. The suspicion of corporate invasion and the impulse to economic protectionism were not, however, restricted to “chain-baiting” populists or agrarians in the South. States throughout the country considered or adopted chain store taxes in the 1930s. Wisconsin and Minnesota Progressives made the chains a major issue in their 1930 gubernatorial campaigns,75 arguing that if unchecked, chain stores would drain the states of their wealth, relegating them to colonies of eastern interests. In Grand Rapids, Michigan, locals were boycotting chain milk and chain milliners, and independents were putting up “Homeowned” signs in

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72 Webb, Divided We Stand (1973).
73 Id. at 87.
74 Id. at 131.
75 Sparks, supra note 13, at 135–46.
their windows.\textsuperscript{76} In 1931, Portland, Oregon passed the first municipal tax on chain stores in the nation, followed by similar municipal taxes in numerous other cities.\textsuperscript{77}

Unsurprisingly perhaps, local boosterism was at the heart of the anti-chain store movement. What mattered to local merchants attempting to carve out a space in the new commercial order was competition at the neighborhood level. Becky Nicolaides’s descriptions of the appeals of local businessmen to “buy at home” in South Gate, a working class suburb of Los Angeles, are representative.\textsuperscript{78} “The businessmen of Home Gardens are the backbone of the community,” declared community leaders in their appeals to civic mindedness and community loyalty during the 1920s and 1930s: “Home trading is the most vital element in community welfare and progress. Buy at home!”\textsuperscript{79} “South Gate’s merchants came to define community as commerce, the upright citizen as a loyal customer, and civic duty as patronage of local shops.”\textsuperscript{80} Independent merchants throughout the country invoked the rhetoric of citizenship. Chains “destroy[] community life by refusing to assume the duties and burdens of local citizenship,” declared Wright Patman, the congressional leader of the anti-chain movement.\textsuperscript{81} As one anti-chain cartoon lambasting a fat cat chain store stated: “You didn’t help build our roads. You didn’t help build our schools. You wouldn’t credit me when I was sick and out of a job.”\textsuperscript{82} “The chain store is in the town,” one author complained in a 1929 Harper’s Magazine article, “but not of the town.”\textsuperscript{83}

\textsuperscript{76} Hollister, supra note 54, at 74.
\textsuperscript{77} Other cities included Milwaukee, Knoxville, Louisville, Phoenix, Cleveland, Columbus, Savannah, Durham, and Columbia. See Horowitz, supra note 55, at 359, 363.
\textsuperscript{78} Nicolaides, My Blue Heaven, supra note 57, at 125–33.
\textsuperscript{79} Id. at 128 (quoting an editorial that appeared in the South Gate Press on Nov. 30, 1928).
\textsuperscript{80} Id. at 125.
\textsuperscript{81} Wright Patman, Absentee Ownership, in Vital Speeches of the Day, 69, 72 (1938).
\textsuperscript{82} Bean, supra note 10, at 29. The cartoon was originally printed in an anti-chain journal called Truth. Id.
The historians’ “rearguard” story reflects the views of the cosmopolitan northeasterners who embraced the chains as the harbinger of the new economic order. But that story is too simplistic, both in its view of the inevitability of the chain form of distribution and its emphasis on the backwardness of chain opponents. In the 1920s and 1930s, a wide range of groups and individuals opposed the chains. Unions worried about wage pressures; farmers were concerned about chain monopolies for commodities; wholesalers felt threatened as retailers increasingly integrated vertically; African Americans feared that chains would undercut black merchants and leave the black community at the mercy of white-owned chains; and the Ku Klux Klan criticized chains for taking over small-town markets and sending money out of the South.\textsuperscript{84} Antimonopoly progressives, like LaFollette, and populists, like Huey Long, agreed in their objection to chains. Of course, so did the independent merchants, represented most prominently by the National Association of Retail Grocers and the National Association of Retail Druggists.\textsuperscript{85}

II.
ANTI-CHAIN STORE LEGISLATION IN THE STATES

Chain opponents conceived the threat of chain expansion in both political and economic terms. Certainly, the independents had economic motives; their efforts to protect their livelihoods were, at base, about self-interest and survival. But the anxiety over chains spilled into the communities in which the independents traded, and it reflected a wider unease with the pace of economic change and the effects of that change on the characteristics of local communities.

\textsuperscript{84} Sparks, \textit{supra} note 13, at 29–30; Lebhar, \textit{supra} note 1, at 118–24.

\textsuperscript{85} See, e.g., Sparks, \textit{supra} note 13, at 31.
Independents responded to the chain store threat first by organizing against them; they called for boycotts of wholesalers and manufacturers who sold to chains or gave them sales concessions. When these indirect boycotts failed, they urged consumers to avoid the chains, and turned to local and state legislatures for protection. In 1922, the National Association of Retail Grocers urged legal limitations on the number of chains that could be present in any one community. In 1923, the Missouri legislature debated the first chain store tax. By 1927, 15 states had considered anti-chain legislation, primarily in the form of chain store taxes.

Two events catalyzed the state legislative response to chain stores. The first was the stock market crash of 1929 and the onset of the Depression. Independent merchants, already under financial pressure, became increasingly stressed as the economic crisis of the 1930s unfolded. The Depression favored the chain store’s emphasis on low prices; any residual customer loyalty to the local independent merchant was offset by consumers’ own economic difficulties. Moreover, chain store legislation, particularly in the form of chain store taxes, was attractive to state legislatures seeking new sources of revenue during fiscal hard times. And finally, chains were ripe targets for Depression-era anger; many argued that the chains had contributed to the economic crisis by demanding price concessions from wholesalers, manufacturers, and farmers, by undercutting the independent merchant and those who relied on him for employment, and by contributing to the stock market speculation of the late 1920s.

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86 PALAMOUNTAIN, supra note 24, at 160.
87 TEDLOW, supra note 5, at 218.
88 Id. at 218; PALAMOUNTAIN, supra note 24, at 161.
89 Ryant, supra note 1, at 208; Harper, supra note 4, at 423; Sparks, supra note 13, at 47; PALAMOUNTAIN, supra note 24, at 160.
90 PALAMOUNTAIN, supra note 24, at 162; TEDLOW, supra note 5, at 218.
91 Harper, supra note 4, at 415–16. Justice Brandeis’s argument in his Ligget dissent is representative:

http://law.bepress.com/uvalwps/uva_publiclaw/art21
The second event that led to a state legislative rush to pass anti-chain legislation was the Supreme Court’s 1931 decision in *State Board of Tax Commissioners v. Jackson*, which held 5-4 that an Indiana chain store tax was constitutional. Following *Jackson*, states and localities increasingly adopted chain store taxes. In 1933, 225 anti-chain bills were introduced in forty-two state legislatures, and between 1931 and 1937, twenty-six states enacted chain tax laws, as did a significant number of cities. “Wherever a little band of lawmakers are [sic] gathered together in the sacred name of legislation,” one commentator observed, “you may be sure that they are putting their heads together and thinking up things they can do to the chain stores.” Most chain store taxes were of the type upheld by the Court in *Jackson*: graduated license fees that were levied on all stores in the state, or on every store in excess of a certain number owned by the same corporation in the state. The Indiana statute required an annual license fee of three dollars for one store; ten dollars for each additional store up to five stores; fifteen dollars for each additional store between five and ten stores; twenty dollars for each additional store between ten and twenty; and twenty-five dollars per store for every store beyond twenty. A number of states adopted graduated gross receipts taxes or a combination of

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Other writers have shown that, coincident with the growth of these giant corporations there has occurred a marked concentration of individual wealth; and that the resulting disparity in incomes is a major cause of the existing depression . . . There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered.  

*TEDLOW*, *supra* note 5, at 218.  
*Flynn*, *supra* note 3, at 223; *also quoted in TEDLOW*, *supra* note 5, at 218; *PALAMOUNT*, *supra* note 24, at 162.  
*Jackson*, 283 U.S. at 541.
graduated license fees and gross receipts taxes.\textsuperscript{96} Louisiana adopted a graduated chain store tax that counted out of state as well as in state stores, and taxed accordingly.\textsuperscript{97}

A. CHAIN STORE LEGISLATION AND LOCHNER-ERA JURISPRUDENCE

The Court’s decision in \textit{Jackson} came as something of a surprise. Prior to \textit{Jackson}, state courts had routinely struck down chain store legislation, or its forerunner, anti-department store legislation, using the traditional tools of classical jurisprudence. These decisions embraced two themes of \textit{Lochnerian} jurisprudence: the right to pursue a calling on terms of equality with others, and the suspicion of class or “special” legislation.\textsuperscript{98} The former was grounded in the background natural law rights of property and contract and could be traced to Justice Field’s later-vindicated dissent in the \textit{Slaughterhouse Cases}.\textsuperscript{99} The latter had its origins in the Jacksonian skepticism of...

\textsuperscript{96} Gross receipt taxes were adopted in Kentucky, Vermont, New Mexico, and South Dakota, while combinations of license fees and gross receipt taxes were adopted in Wisconsin, Minnesota, and Florida. E.W. Simms, \textit{Again—Chain Stores and the Courts}, 26 VA. L. REV. 151, 158 (1939-1940). State courts would strike down gross receipt taxes, however, after the Supreme Court did so in Stewart Dry Goods v. Lewis, 294 U.S. 550, 565-66 (1935). \textit{See infra} text accompanying notes \textsuperscript{____}.

\textsuperscript{97} \textit{See} Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U.S. 412, 418 (1937). \textit{See infra} text accompanying notes \textsuperscript{____}.

\textsuperscript{98} Scholars continue to debate the principles that animated the Supreme Court’s \textit{Lochner}-era jurisprudence. Until recently, the dominant historiography viewed the Court’s jurisprudence as a product of a reactionary judiciary acting in the service of corporate interests that were hostile to economic regulation and worker protection. Recent revisionist scholarship, however, views the era’s jurisprudence in less ideological terms. A number of historians now argue that the decisions of the \textit{Lochner} Court are better understood as reflecting a judicial concern with legislative efforts to favor particular classes over others. \textit{See}, e.g., \textbf{Howard Gillman}, \textit{The Constitution Besieged [Jump Cite]} (1993); \textit{see also} \textbf{BARRY CUSHMAN}, \textit{Rethinking the New Deal Court [Jump Cite]} (1998); \textbf{G. Edward White}, \textit{The Constitution and the New Deal [Jump Cite]} (2000). However, that emerging consensus has also been subject to challenge. \textit{See} David Bernstein, \textit{Lochner Revisionism Revised}, 92 GEO. L. J. 1, 31-51 (2003) (arguing that \textit{Lochnerian} jurisprudence was grounded in fundamental rights); Robert Post, \textit{Defending the Lifeworld: Substantive Due Process in the Taft Court Era}, 78 B.U. L. REV. 1489, 1505-1529 (1998) (arguing that the Court’s jurisprudence reflected an attempt to protect normal, ordinary life from bureaucratic intervention).

legislative favoritism \(^{100}\) – the same antimonopoly tradition that animated chain store opponents.

For classical jurists, the rights of property and contract established the baseline against which legislative interference in the market was assessed. \(^{101}\) Protection of these rights required courts to be wary of legislative grants of authority or protections that favored certain groups. In its formative period, classical jurisprudence was concerned in part with equality; legislative interference with the market was dangerous because it often favored social and economic insiders and gave them unfair advantages over others. \(^{102}\) Government regulation constituted an interference with the “natural” competitive operations of the market; it was assumed that monopoly power could only be exercised through government grant. \(^{103}\) Judicial oversight to ensure that legislation was actually in the public interest was thus necessary to protect the fundamental right of all free persons to enter into markets or participate in particular avocations on an equal basis. When courts spoke of the right to property and contract, the rights sounded in the Due Process Clause. When they spoke of special privilege, they invoked both the Due Process Clause and the Equal Protection Clause. The panoply of constitutional protections – the fundamental rights of contract, of property, and of equal protection – formed a bulwark against arbitrary government action. Specific state constitutional provisions that banned

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\(^{100}\) See GILLMAN, supra note 98, at 35 (1993).

\(^{101}\) One has to be extraordinarily careful about ascribing a single animating principle to the Court’s \textit{Lochner}-era jurisprudence. At least according to the conventional periodization, the \textit{Lochner} era spanned almost forty years during which twenty-six Justices served on the Court. See Bernstein, supra note 98, at 10. Nevertheless, the argument that follows is influenced by the interpretations of the \textit{Lochner} Court offered by GILLMAN, supra note 98, and others, see WHITE, supra note 98 [jump cite]; CUSHMAN, supra note 98 [jump cite].

\(^{102}\) See GILLMAN, supra note 98, at 54–55.

\(^{103}\) See \textit{id}. at 55–60 (discussing, in part, the works of Thomas Cooley, the leading theorist in this school of thought).
“special legislation” or the granting of monopolies, or that required taxes to be uniformly administered, served the same purpose. 104

At the turn of the century, anti-department store legislation fell to this jurisprudence. In Chicago v. Netcher, an 1899 case, the Illinois Supreme Court considered a set of anti-department store ordinances that prohibited the sale of food and liquor on the same premises as dry goods, clothing and other sundries. 105 Deploying the tropes of classical jurisprudence, the court struck down the ordinance as a violation of due process. Invoking the fundamental right to own property and the concomitant right to sell and barter that property, the court held that the right to pursue an “honest calling or avocation” was subject “only to such restrictions as may be necessary for the protection of public health, morals, safety and welfare.” 106 The ordinances, the court stated, were not a proper exercise of the police power because “public health and public comfort are in no way affected by selling [ ] different kinds of merchandise . . . in different departments of the same building.” 107 Instead, the ordinances constituted an “attempt to deny a property right to a particular class in the community where all the other members of the community are left to enjoy it.” 108 The ordinances “arbitrarily discriminate” against certain kinds of owners, “without any basis or ground for the discrimination,” and

104 *Id.*. See also HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW [jump cite] (1991) (exploring the relationship between classicist thought and American law from the nineteenth century onward).
106 *Id.* at 708. “Liberty,” as the *Netcher* court declared, includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. The State . . . may in the proper exercise of the police power impose restrictions and regulations, but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from any one, all such callings or pursuits as are innocent in themselves and not injurious to the public.
107 *Id.* at 708–09.
therefore grant “special privileges” to the “favored persons” who benefit from the restrictions. 109

Improper favoritism was also the reason that the Missouri Supreme Court struck down a similar law in 1900. 110 The Missouri statute empowered cities of 50,000 inhabitants or more to impose a license fee on merchants employing more than fifteen persons who sold more than one class of merchandize or goods, as those classes were defined in the statute. 111 The statute, the court declared, “is truly classification run wild”:

It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and reasonable a classification for the purpose in view, as the classification made by this act. 112

Again, the court invoked the right to pursue an honest calling on equal terms as others and the right to buy and sell as others may. “‘Due process of law,’” the court declared, “is denied, when any particular person of a class or of the community are singled out for the imposition of restraints or burdens not imposed upon and to be borne by all the class, or of the community at large.” 113 The special treatment of only those merchandisers who sold multiple classes of goods and had fifteen or more employees in cities over 50,000 inhabitants had no reasonable basis, but rather constituted an “arbitrary selection of persons and corporations.” 114

Over twenty-five years later, anti-chain store legislation appeared against this jurisprudential backdrop. In 1928, a state court considered the constitutionality of a

109 Id. at 709.
110 The State ex rel. Wyatt v. Ashbrook, 55 S.W. 627, 632 (Mo. 1900).
111 Id. at 628–29.
112 Id. at 632.
113 Id. at 632.
114 Id.
Maryland act that sought to limit the number of chain stores in Allegheny county owned or operated by one person. The circuit court struck the statute down on Fourteenth Amendment grounds. The court’s theory of fundamental rights and limits on government’s interference with private enterprise echoed the earlier anti-department store cases. Indeed, the doctrine had remained remarkably stable from the turn of the century. The circuit court recited the usual principles: the enjoyment of a fundamental right to “employment on terms of equality with all others in similar circumstances;” the requirement that legislative interference with private enterprise be in the public interest, and that “the means [be] reasonably necessary for the accomplishment of the [public] purpose;” the rejection of classifications in “the domain of trade or commerce” that “discriminate against some one by declaring that particular classes” are exempt from general laws; the limitation of the legislative power to that which can be “reasonably referable” to “public order, security, health and morals.”

The court also added a dollop of laissez-faire economic theory – “Freedom of trade without interference on the part of the state always develops competition and this will protect the consumer against the danger of monopoly” – and it recognized the realities and promises of modern corporate capitalism. Chain stores, stated the circuit court judge, have “perhaps become essential for the efficient distribution of merchandise to the general public . . . . Many of them are in the hands of great corporations whose stock is for sale on the stock exchanges and the curbs of great cities, and in the hands of a

117 Id. at 14 (quoting Powell v. Pennsylvania, 127 U.S. 678, 684 (1888)).
118 Id. at 13 (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).
119 Id. at 15 (quoting Connolly v. Union Sewer Pipe Co. 184 U.S. 540, 563 (1902)).
120 Id. at 17.
121 Id. at 20.
large number of our people who have invested therein their savings and share in their profits.”  

Other efforts to tax the chains also fell to state court decisions; these decisions recited principles and policies very similar to the ones that the Maryland court of appeals found convincing. For example, in *City of Danville v. Quaker Maid, Inc.*, the Kentucky Court of Appeals struck down a city licensing ordinance that distinguished between regular service grocery stores and cash-and-carry and self-service stores. Stating that “the only difference between the business of the appellee and that of the ordinary grocery is that appellee extends credit to no one and makes no deliveries,” the court held that “this difference in this detail of conducting the business affords no reasonable ground for classifying appellee on a basis for taxation purposes different from that of the ordinary grocery store.”

In *Great Atlantic & Pacific Tea Co. v. Doughton*, the North Carolina Supreme Court struck down a license tax on each chain store with more than six stores, holding that the classification of chains for tax purposes was “clearly arbitrary” and failed to reflect a “real and substantial difference” between chains and other stores.

In *Doughton*, the court held that the tax violated the Equal Protection Clause of the Fourteenth Amendment.

These cases were consistent with the overall thrust of the Supreme Court’s turn-of-the-century jurisprudence, which, starting in the late 1800s and proceeding through the first part of the twentieth century, was directed towards keeping the avenues of national
commercial activity open to legitimate business.\textsuperscript{127} Beginning in the 1870s, the Court curbed state protectionist impulses by adopting a “‘free-trade’ construction of the dormant commerce clause.”\textsuperscript{128} National producers and marketers, like the I.M. Singer Company, a maker of sewing machines, successfully sought relief from discriminatory taxes on out-of-state goods, and from discriminatory state license taxes for those selling out-of-state goods.\textsuperscript{129} As Charles McCurdy observes, these cases established an important proposition: “the right of American businessmen, even without congressional license, to engage in interstate transactions on terms of equality with local merchants and manufacturers.”\textsuperscript{130}

Later judicial decisions continued this nationalizing trend by establishing that corporations were persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{131} The Court also employed preemption doctrine to strike down state laws that interfered with a “uniform law of interstate commerce,”\textsuperscript{132} and it restructured federal procedural and jurisdictional law to enlarge the reach of the federal district courts over economic policy and the creation of a nation-wide commercial common law.\textsuperscript{133}

By the late 1920s, the Court was skeptical of state attempts to restrict large-scale, cross-border corporate enterprises, either through the regulation of the scale of the

\begin{footnotesize}
\begin{enumerate}
\item WIEBE, supra note 63 at 81.
\item \textit{Id.} at 637–43.
\item \textit{Id.} at 643.
\item \textit{Santa Clara Co. v. South Pacific R. Co.}, 118 U.S. 394, 396 (1886).
\item PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION [need book information], at 41.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
enterprise or the form of the business organization. The justifications for this limitation on state regulation were the individual rights of property and the requirements of equal protection. The Court’s view of the national marketplace was that it was populated by individual rights-bearers, operating on roughly equal terms with one another. Thus, “substantive due process,” the most highly visible of the court’s laissez-faire jurisprudential doctrines, was an effort to protect the independent economic actor, the freely contracting individual operating within the sphere of private contractual and propertied relations.

Three cases decided by the Court in 1928 are particularly relevant. The first two, *Quaker City Cab Co. v. Pennsylvania*¹³⁵ and *Louisville Gas & Electric Co. v Coleman*,¹³⁶ represented attempts by states to regulate large-scale enterprises by differentiating them from small-scale ones, either by making distinctions between the type of ownership structure or by addressing the size of the business venture. In *Quaker City*, the Court struck down a gross receipts tax that applied to corporations engaged in the taxicab business, but not to partnerships or individuals engaged in the same business.¹³⁷ Rejecting the state’s contention that there were “real and substantial” differences between businesses carried on in the corporate form and businesses carried on by natural persons, the Court held that the statute violated the Equal Protection Clause.¹³⁸ Consistent with its approach to corporate status, the Court concluded that

> [t]he character of the owner is the sole fact on which the distinction and discrimination are meant to depend. The tax is imposed merely because

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¹³⁴ As G. Edward White has observed, the phrase “substantive due process” was never used by the *Lochner* Court, but was invented later by those critical of its jurisprudence. *See* WHITE, supra note 98, at 245.
¹³⁵ 277 U.S. 389 (1928).
¹³⁶ 277 U.S. 32 (1928).
¹³⁷ *Quaker City*, 277 U.S. at 389.
¹³⁸ Id. at 402.
the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed.  

That same year, in *Louisville Gas*, the state made a distinction between mortgages that matured in less than five years and those that matured in greater than five years, imposing a recording tax on the latter that was not applied to the former. The tax was designed to distinguish between small-scale and large-scale loans, effectively taxing the latter (which were of longer term) more. The Court found a violation of equal protection, holding that the classification was arbitrary.

The third case illustrates both the creativity of state legislatures and the difficulty they had in designing restrictions on chain stores that would fall within the state’s police power. In *Liggett v. Baldridge*, the Court struck down a Pennsylvania statute that required all owners of drug stores to be registered pharmacists, including those owners of stock in corporations operating drug stores in Pennsylvania. The statute targeted the chain stores. Liggett, the largest chain drug store in the country, was publicly traded; there was no way it could be “owned” by registered pharmacists. Pennsylvania justified the regulation on the grounds of public health and safety. Absentee ownership of drug stores threatened the public health, Pennsylvania argued, because absentee owners were unfamiliar with the details of operating a pharmacy and would fail to exercise sufficient oversight over pharmacy operations. And local managers, with less stake in the company, would feel less responsibility to the local public.

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139 *Id.*
141 278 U.S. 105 (1928).
142 *Id.* at 113.
143 *Id.* at 111–12.
The Court was not convinced. Stating that Pennsylvania cannot, “under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them,” the Court held that there was no evidence that public health was threatened by the mere ownership structure of a pharmacy. Corporations, asserted the Court, are “persons’ within the meaning of the due process and equal protection clauses of the Fourteenth Amendment” and enjoy “property rights guaranteed by the Constitution.” The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Clearly concerned that a contrary ruling would open the door to the elimination of chain drug stores, the Court observed:

It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or threatened, some evidence of it ought to be forthcoming. None has been produced, and so far as we are informed . . . none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance.

B. **THE JACKSON DECISION**

Jackson thus arrived on the heels of a series of decisions that struck down tax regimes that regulated private business based on its ownership structure or method of

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144 *Id.* at 113 (quoting Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924)).
145 *Id.* at 111–12.
146 *Id.* at 111–12.
147 *Id.* at 113–14.
doing business. Lawyers and commentators were hard pressed to defend Indiana’s graduated chain store tax in light of Baldridge, Louisville Electric, and Quaker City. In all three cases, corporate petitioners had successfully challenged state taxing classifications on equal protection grounds, and in all three cases, the progressive wing of the Court – Brandeis and Holmes, sometimes accompanied by Stone and Sanford – was in dissent. Though the Court certainly upheld numerous local and state regulations that did not trench on inter-state commerce, or that concerned those enterprises “affected with a public interest,” in the 1920s and 1930s, it continued to strike down a significant number of state economic regulations.

Therefore, when its graduated chain store tax was challenged in Jackson, the Indiana legislature carried the burden of showing that the tax made a legitimate distinction between taxpayers and that the tax differential furthered a public purpose. The three-judge district court easily found that it did not. In striking down the statute, the panel invoked the “reasonable relationship” requirement contained in Quaker City, Louisville Gas, and Baldridge, and found the chain store tax wanting:

The theory of the defendants is that the owners and operators of more than one store do not have the same general interest in the community, do not encourage their employees to maintain permanent homes in the locality where their stores are situated, leave none of their money in such community, buy their goods at a lower price, and, in general, do not have the welfare of the community in which they operate at heart. They are, therefore, not as valuable to the general welfare of the community as the person who owns and operates a single store in such community, and therefore belong to a different class, for occupational tax purposes, than the owner and operator of a single store. . . . While that may be true

148 Brandeis joined Holmes’ dissent in Baldridge, 278 U.S. at 114–15 (Holmes, J., dissenting). Brandeis, Sanford, and Stone jointed Holmes’ dissent in Louisville Electric, 277 U.S. at 41–42 (Holmes, J., dissenting), while Holmes and Stone joined Brandeis’s dissent in that same case. Id. at 42–54 (Brandeis, J., dissenting). In Quaker City, Justice Holmes filed a dissent, 277 U.S. at 403 (Holmes, J., dissenting), and concurred with Justice Brandeis’s dissent, id. at 403–12 (Brandeis, J., dissenting). Justice Stone also filed a short dissent, Id. at 412.

149 See, e.g., Cushman, Formalism and Realism, supra note 128, at 1117 & n.131 (listing cases).

150 See, e.g., id. (listing cases).
so far as some owners of more than one store is concerned, yet that is not the universal rule, and is not sufficient, within itself, to sustain the classification contained within the Act in question.\textsuperscript{151}

The Supreme Court reversed.\textsuperscript{152} The majority, however, did not adopt the appellants’ contention that chains failed to contribute to the general welfare. Instead, in an opinion by Justice Roberts, the Court accepted the state’s argument that chains were sufficiently different from other kinds of stores to warrant specialized tax treatment.

“The power of taxation,” Roberts wrote, “is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation” as long as that difference is “founded upon a reasonable distinction.”\textsuperscript{153} Chain stores, the Court observed, have many advantages over independently owned units, including “quantity buying,” “buying for cash and obtaining the advantage of a cash discount,” “skill in buying,” “warehousing of goods and distributing from a single warehouse,” “superior management and method,” and “standardization of store managements, sales policies, and goods sold.”\textsuperscript{154} These advantages, concluded the Court, have made the chain form of organization immensely popular—they may also constitute a basis for government action:

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 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.\textsuperscript{155}

\textsuperscript{151} Jackson v. State Bd. of Tax Comm’rs, 38 F.2d 652, 658 (S.D. Ind. 1930).
\textsuperscript{152} State Bd. of Tax Comm’rs v. Jackson, 283 U.S. 527, 534 (1931).
\textsuperscript{153} \textit{Id.} at 537.
\textsuperscript{154} \textit{Id.} at 534–35.
\textsuperscript{155} \textit{Id.} at 537–38.
Justice Sutherland’s dissent—joined by Justices Van Devanter, McReynolds, and Butler—was pointed. Sutherland had authored Baldridge and Louisville Electric and had joined in Quaker City Cab. With the additions of Hughes and Roberts to the Court (both of whom were appointed by President Hoover in 1930), the Four Horsemen’s majority appeared to be turning into a minority. Sutherland may have been most surprised by Jackson’s author—before joining the Court, Owen Roberts had represented the Quaker City Cab Company and the Liggett Company in their successful challenges to the Pennsylvania statutes struck down in those cases.

Sutherland recognized that it was difficult to state precisely “or categorically the distinction between such statutes as fall within, and such as fall without, the ban of the Constitution.” But this uncertainty counseled “caution”; “lest, by doing so, we pass into the forbidden territory which lies wholly beyond the verge.” The Indiana chain store tax made a distinction between stores based solely on their ownership structure—the question for Sutherland was whether there was a legitimate difference between a series of stores under unified management and one store under unified management. The existence of department stores or voluntary cooperatives, both of which fell outside the tax, indicated that there was none. “The advantages attributed to the chain store lie not in

157 Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 390 (1928); Liggett v. Baldridge, 278 U.S. 103, 106 (1928). See also Comment, Taxation Directed Against the Chain Store, 40 YALE L.J. 431, 436 n.36 (1930–1931) (observing that Roberts had represented the Liggett Company in prior litigation and predicting (incorrectly) that Roberts would vote to strike down a chain store tax should such a tax come before the Court).
158 Jackson, 283 U.S. at 550 (Sutherland, J., dissenting).
159 Id. at 551.
the fact that it is one of a number of stores under the same management, supervision, or ownership, but in the fact that it is one of the parts of a large business.”

The singling out of chain stores was thus arbitrary, Justice Sutherland argued, because all the distinctions attributable to the chain store method of doing business were also attributable to other kinds of large stores: “Classification, to be legitimate, must rest upon some ground of difference having a reasonable and just relation to the object of the legislation. All persons similarly circumstanced must be treated alike.”

Sutherland recognized that the Court’s prior “decisions have depended not only upon the varying facts which constituted the background . . . but also, to some extent, upon the point of view of the court of judges who have been called upon to deal with the question.” But the Court in *Quaker City* had been fairly clear that the ownership structure of the firm was not a relevant criteria in legislative determinations. Thus, the switch from a clear majority against chain store legislation to a majority willing to uphold it was viewed by some as a sub silentio overruling of *Quaker City Cab*.

Indeed, *Jackson* was initially hailed by some opponents of the *Lochner* Court as a victory for Brandeis and Holmes, a sign that Hughes and Roberts would join the progressives in upholding state and New Deal regulatory legislation. It turned out that these predictions were wrong. While Hughes and Roberts did not share the Four Horsemen’s commitment to a rigorous substantive due process, they did continue to assert judicial primacy in policing legislative categories for reasonableness in a way that

160 Id. at 547–48.
161 Id. at 544.
162 Id. at 550.
sometimes led them to side with the Court’s progressives and other times join with the conservatives.\textsuperscript{164} And the Court’s dramatic rejection of New Deal legislation was still in its (and the country’s) future. As for chain store taxes, after \textit{Jackson}, the Court continued to subject state anti-chain store legislation to searching review and had little trouble striking down laws that departed even marginally from the Indiana tax. The Court addressed five more state chain store tax cases between 1931 and 1937, and its record was decidedly mixed.\textsuperscript{165} \textit{Jackson}, it turned out, did not signal the kind of dramatic shift favored by liberals and progressives, but rather the beginning of a process of realignment that did not fully come to fruition until sometime after 1937.\textsuperscript{166}

\textit{Jackson} did not signal a wholesale shift in the Court’s approach to government regulation of the national economy, but it did raise a fundamental question about the nature of liberalism and its changing valence in the late 1920s and early 1930s. As the economic crisis deepened and Roosevelt’s New Deal response unfolded, the old political alignments of left and right had less explanatory power. This shifting ground was reflected in an Indiana Law Journal comment, which asked whether \textit{Jackson} was a “liberal” decision.\textsuperscript{167} The author’s answer was ambivalent:

Looked at from the standpoint of giving the states a free hand, it looks liberal, but looked at from the standpoint of the individual taxpayer, it looks very illiberal and

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\item[164] The conventional history asserts that this vacillation was a product of jurisprudential inconsistency. \textit{See} Cushman, \textit{Lost Fidelities}, \textit{supra} note 156, at 95-98. Cushman, however, has argued that Hughes and Roberts were attempting to develop a middle road between the old \textit{Lochner} framework and a new jurisprudence of deference. \textit{See id.} at 141–44.
\item[165] \textit{See infra} text accompanying notes – –
\item[166] There are ample scholarly debates about both the timing and the factors that led to the Court’s adoption of a jurisprudence favorable to New Deal economic legislation. The conventional history, with its emphasis on Roosevelt’s court packing plan and the “switch in time,” has been challenged by a number of scholars. \textit{See, e.g.,} Cushman, \textit{supra}; \textit{White}, \textit{supra} note 98, with Bruce Ackerman, \textit{We the People: Foundations} (1993); \textit{Bruce Ackerman, We the People: Transformations} (2000). For a summary of recent debates, \textit{see generally} Laura Kalman, \textit{Law, Politics and the New Deals}, 108 \textit{Yale L.J.} 2165 (1999).
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conservative. From the latter standpoint it looks like a reactionary decision for the benefit of the individual merchants operating unit stores. It is doubtful whether or not the decision will save the consuming public in taxation as much as it will lose them in the extra costs which will be imposed upon them; but if the social interest in the political institution of the state is more important than the social interest in economic and social progress, probably this decision is a wise decision, and can be called a liberal decision.168

The tension between Jackson’s procedural liberalism and its substantive illiberalism struck some as troubling. Progress was pointing in two different directions – one jurisprudential and one economic. “Thus, although the proponents of the chain stores painted their picture as the march of progress, with improved distribution of the products of farm and factory, and the increase of purchasing power of the masses,” noted another commentator, “yet the so-called liberal or progressive side of the Court authorized a brake upon that progress.”169

The Depression brought this tension to the fore. In the early 1930s, many New Dealers were pressing to stabilize industry through centralized organization. The National Industrial Recovery Act – the New Deals’ most dramatic (and ultimately ill-fated) experiment with centralized industrial planning – was adopted by Congress in 1933.170 The next year, in an article in the New Republic, the economic historian and New Dealer Charles Beard pointed out the contradiction between the “liberals’” embrace of the Jackson decision and their “flirting with the idea of planning for business as a way out of the crisis” of the Great Depression.171 “How can anyone,” asked Beard, “expect to ‘stabilize industry’ and ‘plan production’ without considering the methods and machinery by which goods are distributed, without providing economic institutions for obtaining

168 Id. at 187.
169 Simms, supra note 96, at 152.
171 Beard, supra note 163, at 19.
from the merchant on the very frontiers of distribution the data for continuous forecasting in various lines, without guaranteeing stability and rationalization in retail management?’”\textsuperscript{172} The chains eliminate the waste of middlemen and warehousing, providing a direct contact between the consumer and the manufacturer. “They introduce the blessed word ‘stabilization’ into the troubled retail business and, what is more important, the practice of stabilization by careful management.”\textsuperscript{173} In contrast, the retail business dominated by independents is unstable, anarchic, poorly managed, and “strewn with wrecks.”\textsuperscript{174} The “question for ‘liberal’ economists to consider,” said Beard, is whether they could allow the destruction of large-scale retail operations through punitive taxation while seeking the stabilization and rationalization of the economy as a whole.\textsuperscript{175}

Beard’s “liberals” could embrace \textit{Jackson} as a sign that the Hughes Court was going to treat legislative economic reform efforts with increased deference, something that progressive and liberal jurists had been urging for some time. But one could see in the anti-chain store tax policies a dangerous irrationality. In terms of classical jurisprudence, the anti-chain store taxes constituted special interest legislation which protected one class of economic actors – the independents – from having to compete on equal terms with another class – the chains.\textsuperscript{176} In terms of New Deal economic theory,
anti-chain store taxes constituted local economic protectionism and entrenched inefficiency and waste. Chain store opponents argued that the chains fostered monopoly and undermined free enterprise, but their remedy seemed illiberal in an age when large-scale retailing brought efficiencies to the market.

The ambivalence, if not outright hostility, with which some New Dealers approached state anti-chain store policies thus suggests the tension between a changing New Deal political economy and the anti-monopoly progressivism that came before it.\(^\text{177}\) The anti-chain store movement emerged at the very moment the country was forced to rethink the premises of an old political-economic order; indeed it gained sustenance from the crisis that precipitated that rethinking. Ultimately, the relationship between government and economy, state and markets, would be resolved in favor of a significantly expanded regulatory and social welfare state. In the early 1930s, however, the choices for policymakers were more diffuse.

Roosevelt’s New Deal was remaking the constitutional order; the nature of liberalism was up for grabs. Some New Dealers advocated centralized planning on a national scale to regularize national markets. Others supported the “vaguely corporatist concept of business ‘associationalism’”,\(^\text{178}\) – a form of intra-industry cooperation and cartelization intended to stabilize the economy. Still other participants in the early New Deal, deeply embedded in the progressive anti-monopoly tradition, advocated breaking up the large corporate conglomerates and decentralizing economic power.\(^\text{179}\) To the extent that the New Deal would eventually embrace nationalization and large-scale

\[^{177}\text{For a discussion of why significant numbers of progressive thinkers turned against the New Deal in the 1930s, see generally OTIS GRAHAM, THE OLD PROGRESSIVES AND THE NEW DEAL (1967).}\]

\[^{178}\text{BRINKLEY, supra note 15, at 5.}\]

\[^{179}\text{See id. at 4–6.}\]
accommodation of corporate enterprise, this last decentralizing strand fell outside its confines. *Jackson* thus represented the beginnings of a shift in judicial attitudes towards acceptance of state regulation of the market, but in support of a progressive project—economic deconcentration—that was ultimately rejected by the New Dealers.

III.

**BRANDEIS’S PROGRESSIVE LOCALISM**

Of the figures on the Supreme Court’s progressive wing, Justice Louis Brandeis was the most persistent and prominent voice for this decentralist approach. Brandeis consistently supported regulatory legislation meant to deconcentrate economic power by protecting small dealers from large-scale, inter-state corporate competition. In addition to chain store taxes, Brandeis advocated “fair trade” legislation, which would legalize price fixing to prevent small dealers from being undercut by large retailers.\(^{180}\) Deeply influenced by the ideology of antimonopolism, Brandeis was skeptical of bigness of all kinds; he advocated a democratic, producerist economy, but one protected by significant state and local regulation of the market. *Jackson* was therefore a substantive as well as a jurisprudential victory for Brandeis.

But while Brandeis’s jurisprudential victory – broadly understood as judicial deference to state economic regulation – reflects the current constitutional consensus, his substantive program has often been viewed as wrong-headed. Brandeis’s program of economic decentralization seems to fit uncomfortably with his advocacy of scientific

\(^{180}\) Fair trade advocates supported legalization of retail price maintenance agreements (RPMs), which allowed manufacturers to set a minimum resale price for their products. These agreements prevented the large discounters from selling products below cost or on small margins. As the “People’s Attorney,” Brandeis represented many of the small retailers and businesses that were the anti-chain store movement’s natural constituency. *See* Philippa Strum, *supra* note 18, at 74–93, 114–31.

http://law.bepress.com/uvalwps/uva_publiclaw/art21
management and social reform.\(^{181}\) Indeed, Brandeis’s support for an overall program of local economic protectionism has led some to describe him as an example of the general muddle-mindedness of progressive thought.\(^ {182}\) As viewed through a post-New Deal lens, Brandeis’s localism appears to be at best naïve or at worst reactionary.

Brandeis’s embrace of the small-dealer, however, was entirely consistent with his political economy, which was concerned with bigness, not price competition. This model was based in a mixture of republican ideology and progressive policy, and it focused most prominently on the problems of scale. The “Curse of Bigness”—the title of a 1934 collection of Brandeis’s writings\(^ {183}\)—was that it undermined local political and economic independence, thus destroying the capacity of individuals to achieve self-mastery and the capacity of communities to achieve self-government. Brandeis’s political economy was characterized both by the wide dispersal of economic power and the public control of private economic power—he embraced both economic and political decentralization. In this way, Brandeis’s substantive program and his jurisprudential one were linked by a common commitment to local democratic decision-making – both projects were infused by his aversion to the exercise of centralized power.

A. **BRANDEISIAN LOCALISM**

This “Brandeisian localism”—to use E.E. Steiner’s phrase\(^ {184}\)—derived from a progressive’s faith in state and local democratic capacities. An early supporter of Senator

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\(^{181}\) Brandeis was a leading progressive, a proponent of scientific management and government reform, and the inventor of the Brandeis brief, which brought contemporary social science to bear on the law. He was also a driving force behind many of the most significant pre-New Deal social reform efforts, including workers compensation, unemployment insurance, minimum-wage and maximum-hours laws, the progressive income tax, and collective bargaining. *See Strum, supra* note 18 at 74–93, 114–31 (1984).


\(^{184}\) Steiner, *A Progressive Creed*, at 2 [need article information].
LaFollette’s 1912 presidential bid and a founding member of the National Progressive Republican League, Brandeis embraced two elements of LaFollette’s “Wisconsin Idea”: the idea of states and localities as laboratories for social experimentation, and the use of taxation as an instrument of social policy. The progressive income tax, worker’s compensation laws, and anti-chain store taxes all fit comfortably within a worldview that understood the exercise of local power that adjusted distributions of wealth and power in society as salutary, and that saw federal interference – particularly by courts – as destructive intermeddling.

After LaFollette dropped out of the presidential race, Brandeis became a confidant of Woodrow Wilson’s, and helped formulate Wilson’s alternative to Roosevelt’s “New Nationalism” in 1912. The New Nationalists captured the Progressive Party with their plan to regulate the large corporations rather than attempt to dismantle them. In contrast, Wilson and the Democrats’ “New Freedom” — “which emphasized antitrust measures and state regulations as an alternative to the expansion of national administrative power” — proposed to attack the large corporations and restore local political and economic liberty. Taking his cue from Brandeis, Wilson understood the problem of big business in democratic terms. In language that could have been drawn directly from the *Curse of Bigness*, Wilson articulated an account of deconcentrated economic power based in local self-determination:

> In all that I may have to do in public affairs in the United States I am going to think of towns . . . of the old American pattern, that own and

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185 Strum, supra note 18, at 145, 153.
186 Steiner, supra note 184, at 19–22.
187 Strum, supra note 18, at 158, 196–223.
189 *Id.*
operate their own industries . . . My thought is going to be bent upon the
multiplication of towns of that kind and the prevention of the
concentration of industry in this country in such a fashion and upon such a
scale that towns that own themselves will be impossible. 190

The deconcentration of economic power was a component of preserving the democratic
and economic independence of the local community. “If America discourages the
locality, the community, the self-contained town, she will kill the nation.” 191

The importance of the exercise of local power to a certain strain of progressive
reformer was not the appeal of agrarian Jeffersonianism or abstract federalism, but rather
its service as a site of reformist innovation. State experiments in progressive governance
(and later in the “little New Deals” of the early 1930s) were expansionary and
redistributionist – they were relatively ambitious attempts to remake the economic order.
In the classical period, reformers had attempted to cabin state and local legislatures by
enforcing a strict distinction between private and public spheres; 192 fearing the corruption
of government by private wealth, these reformers intended to prevent the government
from advancing private ends. Legislation was identified with special privilege; the public
interest had to be protected from public/private collusion.

Brandeis and other progressives of his ilk had more faith in democracy. Instead
of relying on courts to police a rigid line between appropriate and inappropriate
legislative action, certain progressive-era reformers sought to expand the realm of
government itself, so that it was not operating in conjunction with private enterprise at
all. For progressive municipal reformers like Frederic Howe, “home rule” meant
expanding the ability of municipalities to pursue social ends, freed from dependence on

SANDEL, supra note 4, at 216.
191 Id.
192 See CUSHMAN, supra note 98, at 48–52.
private businessmen and private capital. Howe, an intimate of LaFollette and Brandeis, argued for expanded city taxing power to enable the city to raise revenue, which it would use to carry out social improvements. More importantly, he advocated city ownership of public utilities, street cars, bathhouses and other public (and some more traditionally private) services. Government would be expansionist; it would be empowered and enabled to act in the public interest across a wide swath of formerly private activities. And, consistent with the classical opposition to special privileges, Howe advocated restrictions on city power to grant long-term franchises to private businessmen for these services, a move meant (in the words of the Minnesota Voters League) to “divorce a necessary public function from the sordid motives of private interest.”

This notion of experimental government – activist, engaged, regulatory – was quite foreign to a constitutional culture that saw government as a threat to republican values rather than as a means for ensuring those values. For Brandeis, the distinction between local and national was not a mechanism to reduce government “interference” in the private sphere, to protect individual rights of property or contract, or to ensure the dignity of the states. Instead, Brandeis perceived an “insistent demand for political and social invention,” observing in 1914 that

the best conceived plans for the amelioration of our conditions will require for success laborious development of details, careful adjustment to local conditions, and great watchfulness for years after their introduction. We must encourage such social and political inventions, though we feel sure

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193 Frederic C. Howe, The City: The Hope of Democracy 303 (1905); Steiner, supra note 184, at 19–21.
194 Steiner, supra note 184, at 19; David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255, 2313 (2003).
195 Barron, supra note 195, at 2315–16.
the successes will be few and the failures many. Most of these inventions can be applied only with the sanction and aid of government. 197

This language of experimentation and government activism was a constant theme for progressive thinkers. Brandeis’s experimentalist rhetoric echoes Howe’s language in The City, the Hope of Democracy, written in 1905, proclaiming that “every city will be an experiment station, offering new experiences to the world.” 198 In that book, Howe described his ambitions for an aggressive regulatory municipal government. Later, in 1912, Howe described Wisconsin as “a state-wide laboratory in which popular government is being tested in its reaction on people, on the distribution of wealth, on social well-being.” 199 Brandeis’s oft-quoted justification for federalism – “that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country” 200 – which appears in his New State Ice dissent in 1932, was simply a restatement of a progressive creed.

Federalism was of a piece with Brandeis’s political economy; it was a mechanism for expanding government power in an age when government power was being limited by individualist judicial doctrines. In this way, the progressive and liberal commitment to federalism was instrumental: Brandeis and his progressive allies had seen their most cherished public-policy programs – often adopted in progressive states – struck down by hostile federal courts on dormant commerce clause or due process grounds. And they had seen the federal courts ignore state laws that assisted plaintiffs and privilege a general

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197 Brandeis, Introduction to A. BARTON, LAFOLLETTE’S WINNING OF WISCONSIN, 1894-1904 (unpaginated) (1922), quoted in Steiner, supra note 184, at 21.
198 Howe, supra note 193, at 303.
199 Frederic C. Howe, Wisconsin: An Experiment in Democracy vii–ix (1912), quoted in Steiner, supra note 184, at 20.
common law of contracts and torts that favored large corporate interests.\textsuperscript{201} Efforts to redistribute economic power were often thwarted by the \textit{Lochner} court, substantively and procedurally.\textsuperscript{202}

Federalism, however, also served as a mechanism for ensuring the decentralization of political power. Although Brandeis supported federal initiatives that created regulatory schemes and bureaucracies,\textsuperscript{203} he was also apt to strike down laws that overstepped. For that reason, he was skeptical of New Deal measures that created large-scale, regulatory bureaucracies, and he joined a unanimous Court in striking down the National Industrial Recovery Act in 1935, the centerpiece of Roosevelt’s first New Deal.\textsuperscript{204} “This is the end of this business of centralization,” Brandeis famously told Thomas Corcoran, an aid to Roosevelt,

and I want you to go back and tell the President that we’re not going to let this government centralize everything. . . .As for your young men, you call them together and tell them to get out of Washington – tell them to go home, back to the states. That is where they must do their work.\textsuperscript{205}

That Brandeis came down squarely on the side of the petit bourgeoisie in defense of a program of local economic protectionism, then, was a direct consequence of his localist political economy. Bigness of any kind was democracy’s enemy, and the threat of the big corporations was that they would require large-scale government regulation.

\textsuperscript{201} Purcell, supra note 132, at 14–15, 51–52, 64–67.
\textsuperscript{202} Id. at 19–20, 40–46.
\textsuperscript{203} Id. at 70, 146 (discussing Brandeis’s support of the Sherman and Clayton Acts); Strum, supra note 18, at 151–52, 345–49.
\textsuperscript{204} A.L.A. Schecter Poultry Corp. v. U.S., 295 U.S. 495, 547–51 (1935); Strum, supra note 18, at 349–50. Brandeis earlier had joined the Court in striking down a federal tax on child labor. Child Labor Tax Case, 259 U.S. 20, 43–44 (1922) (holding that the tax act must be reasonably related to the collection of the tax, not to the achievement of some other purpose). Cf. Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (Holmes, J. dissenting) (arguing that Court should uphold a law prohibiting the movement in interstate commerce of certain items if produced by child labor, Justice Brandeis concurring in the opinion).
\textsuperscript{205} Strum, supra note 18, at 352. For a discussion of Brandeis’s hostility to the federalizing thrust of the New Deal, see Baskerville, supra note 18, at 305, 319.
The problem, from Brandeis’s point of view, was excessive private power, which would in turn require excessive government regulation. The danger of bigness in business was not only that it destroyed the local small-holder, making him a slave to a corporate giant, but also that it necessitated the large-scale bureaucratic state. The rise of big business, he feared, would lead to the rise of large government bureaucracies to regulate that business—hence the National Industrial Recovery Act.

This fear was not uncommon. As one law review commentator argued, as chain corporations grew in size, the “government will be compelled to intercede and control and regulate . . . and if the government must assume control and regulation . . . it will take upon itself a socialist state.”206 Brandeis shared a staple of localist, republican ideology: the intuition that large-scale organizations and institutions were ungovernable and undemocratic, and that giant institutions – corporate or political – “threatened the personal independence and accountability upon which participatory democratic citizenship depended.”207

B. LIGGETT V. LEE

The archetypal version of this argument can be found in Brandeis’s dissent in Liggett v. Lee.208 Decided in 1933, Liggett was the second challenge to anti-chain store taxes that the Supreme Court heard during that decade and the second challenge to state anti-chain store legislation brought by the Liggett Corporation, which had successfully attacked the Pennsylvania pharmacist statute struck down in the 1928 Baldridge case. To make certain that the Court understood the practical implications of chain store taxation,

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207 Freyer, supra note 156, at 285.
208 288 U.S. 517, 541 (1933) (Brandeis, J., dissenting).
Liggett Company’s brief quoted Charles Beard’s *New Republic* article at length, and attached the full text of the article as an appendix.209

The Florida chain store tax challenged in *Liggett* was similar to the Indiana tax upheld in *Jackson* two years earlier in all respects except one: Under the Florida tax, the license fee per additional store increased materially if the stores were located in different counties.210 That distinction, it turned out, made all the difference. Roberts, joined by Hughes and the other dissenters in *Jackson*, wrote the majority opinion affirming that a state could make a distinction between chain and non-chain stores for purposes of taxation, but striking down Florida’s geographical discrimination as unreasonable.211

The Court’s opinion has all the hallmarks of the period’s dominant jurisprudence. That jurisprudence took the baseline right of pursuing a calling on equality with others as a given and assumed that the Court needed to protect that right from state legislatures who were apt to grant unequal advantages to one or another player in the economic market. The Court accepted that there were relevant differences between chain stores and other kinds of stores – it had said as much in *Jackson* – but it could not fathom the purpose of discriminating between chains that existed only in one or a few counties, and chains that were spread widely across the state. The random jurisdictional line was not a distinction that could countenance differential treatment of otherwise similarly situated actors. “The appellees suggest,” wrote Roberts,

that an owner reaps greater advantage by the establishment of a new store in a county not previously occupied. This may be conceded. It is evident, however, that the mere spatial relation between the store and the county line cannot, in and of itself, affect the value of the privilege enjoyed.212

209 Beard, *supra* note 163.
210 *Liggett*, 288 U.S. at 533.
211 *Id.* at 533–36.
212 *Id.* at 534.
There was “no foundation in reason or in any fact of business experience,” the Court held, for treating chain stores that crossed county lines differently from chain stores that did not. The statute therefore constituted a violation of due process and equal protection.213

As would be expected, Brandeis argued that *Jackson* controlled. His almost forty-page dissent, however, did not simply recite the shibboleths of stare decisis or judicial deference. Instead, Brandeis marshalled social science research in support of Florida’s decision to tax the chains, and explained at great length why the state had inherent power to do so. While his dissent is often cited as a paean to civic republican values, it is less a tribute to the independent small-holder—that is, it is that—than an assertion of plenary state power over the private business corporation. The *Liggett* case offered Brandeis the opportunity to assert a conception of public regulatory control over the private corporation that had been controversial since *Dartmouth College v. Woodard*, a conception that was deeply embedded in classical ideology and jurisprudence.

Brandeis had articulated a summary version of this argument five years earlier. Dissenting in *Quaker City Cab Co. v. Pennsylvania*, Brandeis sought to defend a Pennsylvania state tax that had differentiated between corporate and non-corporate providers of taxicab services. There he wrote:

> In Pennsylvania the practice of imposing heavier burdens upon corporations dates from a time when there, as elsewhere in America, the fear of growing corporate power was common. The present heavier imposition may be a survival of an early

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213 *Id.*

214 17 U.S. (4 Wheat.) 518 (1819). *Dartmouth College* is credited with limiting the power of the states to adjust the rights and duties of recipients of state-granted charters, and has been celebrated by some for establishing a principle of non-interference that opened the door to the development of the modern business corporation. *See infra* text accompanying notes. 215

215 Discussed above at *supra* text accompanying notes 135-38.
effort to discourage the resort to that form of organization. The apprehension is now less common. But there are still intelligent, informed, just-minded, and civilized persons who believe that the rapidly growing aggregation of capital through corporations constitutes an insidious menace to the liberty of the citizen; that it tends to increase the subjection of labor to capital; that, because of the guidance and control necessarily exercised by great corporations upon those engaged in business, individual initiative is being impaired and creative power will be lessened; that the absorption of capital by corporations, and their perpetual life, may bring evils similar to those which attended mortmain; that the evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured; and that the process of absorption should be retarded.216

Brandeis’s Liggett dissent expanded on his Quaker City Cab dissent. He began with the baseline presumption that corporations were creatures of the states, and subject to state regulation for their intrastate conduct. “Whether the corporate privilege shall be granted or withheld is always a matter of state policy,” argued Brandeis. “A state which freely granted the corporate privilege for intrastate commerce may change its policy. It may conclude, in the light of experience, that the grant of the privilege of intrastate commerce is harmful to the community, and may decide not to grant the privilege in the future.”217 Indeed, throughout the 1800s and well into the 1900s, Brandeis pointed out, the states had adopted limitations on the size, life-span, and purposes of corporations, had imposed constitutional requirements limiting legislative grants of corporate charters, and otherwise regulated corporations for public purposes. Though 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

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217 Liggett, 288 U.S. at 545, 546.
as if these evils were the inescapable price of civilized life,” Brandeis argued, “throughout the greater part of our history a different view prevailed.”

General incorporation statutes, Brandeis further noted, were one mechanism for containing the abuses inherent in the grant of special charters. While many viewed these statutes as a means for ensuring “equality of opportunity” by permitting anyone to adopt the corporate form without recourse to the state legislature, the statutes had worked the opposite result. The states began competing for corporate charters, adopting low-cost and lax incorporation laws in an effort to prevent the exit of capital and control to neighboring states, thus precipitating a race to the bottom. If a state desired to end that race by charging more for the privilege of operating in the corporate form, or by limiting the form or mode of operation of state-chartered corporations for intrastate conduct, it was the state’s prerogative. “As this privilege is one which a state may withhold or grant, it may charge such compensation as it pleases,” Brandeis wrote. “Nothing in the Federal Constitution requires that the competition demanded for the privilege should be reasonable.”

Brandeis argued that the state had the authority to tax the chains out of existence if the state deemed that the chain form of corporate organization was a threat to public welfare. The threat was not the corporate form per se, but the corporate form in the service of bigness: “Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution – an institution which has brought such concentration of economic power that so-called

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218 Id. at 548.
219 See id. at 559 ("The race was one not of diligence but of laxity.").
220 Id. at 569.
private corporations are sometimes able to dominate the state.”221 “Businesses,” argued Brandeis,

may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints on trade. If the state should conclude that bigness in retail merchandizing 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.222

As Brandeis acknowledged, his anti-corporatism was not new; Jacksonian, and later, progressive-era jurisprudence was dominated by the fear of corporate power. Indeed, the founders of nineteenth century laissez-faire jurisprudence were as afraid of corporate power as they were of state power; that is why they sought to enforce strict limits on state regulatory interference in the market. Thomas Cooley, arguably the leading constitutional scholar of the mid-1800s, railed against the corporation throughout his lifetime.223 In the 1871 revision of his Constitutional Limitations, he excoriated the Marshall Court’s contract clause jurisprudence:

Under the protection of the decision in the Dartmouth College Case the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country and upon the legislation of the country than the states to which they owed their corporate existence.224

Cooley’s concern was that corrupt legislatures would grant special privileges and charters to legislative favorites; the prohibition on special legislation together with the rights of property and contract would form the bulwark against corporate favoritism.

General incorporation statutes were the primary response to this concern—a Jacksonian

221 Id. at 565.
222 Ligget, 288 U.S. at 574.
223 GILLMAN, supra note 98, at 55–60; HOVENKAMP, supra note 104, at 28–32.
224 Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 335 (2d ed., 1871), quoted in HOVENKAMP, supra note 104, at 29. See also Forbath, Caste, Class, and Equal Citizenship, at 39–40 [need full article info].
invention meant to democratize private enterprise and eliminate the ability of legislatures to grant special privileges. But, Brandeis argued, state corporation law was a failure; the general incorporation acts had not retarded, but instead had accelerated the concentration of capital – had created the “Frankenstein monster”\textsuperscript{225} that was the giant corporation.

Indeed, Christopher Tiedeman, another nineteenth century contributor to the development of laissez-faire constitutionalism, argued that the states should return to making “incorporation a special prerogative of the state.”\textsuperscript{226} By the turn of the century, Tiedeman “had concluded that general incorporation statutes themselves trenched on the ‘constitutional guarantee of equality,’ because they constituted state action essential to the very existence of the equality-destroying concentrations of wealth and power all across the economic landscape.”\textsuperscript{227} The call for a reinvigoration of state incorporation law was taken up by Brandeis. Other progressives agreed that state corporation law had failed to control the large corporations; they advocated eliminating state corporation law altogether and replacing it with a national corporation statute. Brandeis did not advocate eliminating state corporation laws, but he did want to give states much greater power in dictating terms to recipients of the corporate privilege; this included the power to tax them for the privilege of operating under the corporate form.

Brandeis’s argument in \textit{Liggett} that states had the authority to engage in confiscatory taxation was thus animated by his fear of private concentrations of capital; his regulatory program served his substantive goals of economic and political

\textsuperscript{225} \textit{Liggett}, 288 U.S. at 567.
\textsuperscript{227} Forbath, \textit{Caste, Class, and Equal Citizenship}, supra, at 42. See also, HOVENKAMP, supra note 104, at 263.
decentralization. Citing to numerous social science studies that showed a steadily increasing concentration of wealth, he observed:

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; the true prosperity of our past came not from big business but through the courage, the energy, and the resourcefulness of small men.228

The independents, Brandeis noted, could not survive long against the giant chains. For this reason, it was appropriate for anti-chain store legislation to preserve competition by handicapping the chains with higher license fees.229 Or maybe the people of Florida had a “broader and deeper” purpose:

They may have believed that the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that it is sapping the resources, the vigor and the hope of the smaller cities and towns.230

The invocation of “the smaller cities and towns” reflected Brandeis’s faith in local democracy. Scholars often invoke Jefferson in describing Brandeis’s republicanism,231 but it may be more accurate to invoke Tocqueville. Some decentralist intellectuals did seek a return to a Jeffersonian agrarian past by dispersing the population, depopulating the cities, and eliminating large-scale industry altogether.232 Brandeis, in contrast, fully recognized the import of the economic and social revolution wrought by industrialization. He did not seek a return to an agrarian society. Instead, he embraced industrialization

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230 Id. at 568–69.
232 See Edward S. Shapiro, Decentralist Intellectuals and the New Deal, supra [jump cite].
while encouraging management and labor to adopt modern management practices in the service of industrial democracy.\(^{233}\) Brandeis was concerned with preserving democratic energy; his republicanism is therefore less consistent with Jefferson’s propertied individualism than with Tocqueville’s celebration of the vigor of small-scale collective action. \textit{Liggett} celebrates the small-holder, but imagines him in a particular place: residing in the small and medium-sized cities and towns in which American participatory democracy could flourish.

**C. The Debate Over Bigness and the Hughes Court**

This human-scaled democracy required the deconcentration of economic power, which in turn required aggressive state interference into economic markets. Brandeis’s dissent offers an account of an aggressive, regulatory state arrayed against bigness. The \textit{Liggett} majority, however, did not engage Brandeis in the debate over bigness. While Brandeis employed the anti-corporation rhetoric of Cooley and Tiedeman, the majority invoked the ban on special legislation. The Hughes Court continued to insist that government remain neutral as between similarly situated economic actors, though it was becoming increasingly difficult to determine when the government had a good reason to draw the lines where it did, or, indeed, the appropriate criteria to assess government line-drawing at all. Using at times the language of due process, at other times equal protection, the early 1930s Supreme Court struck down local and state barriers to entry into the marketplace. But the individual-rights model in their heads—the right to pursue a lawful calling on terms of equality with others—had become detached from the political economy of the small-holder from which it had first sprung. It was an

\(^{233}\) Strum, \textit{supra} note 18, at 181–82; Steiner, \textit{supra} note 184, at 19; Bashevkin, \textit{supra} note 18, at 290–93 (1994).
anachronism in a world in which the licensing schemes or punitive taxes were targeting large-scale corporate entities. Indeed, the rhetoric of equality was slowly turning against them: The independents were now in the position, as one defender of chain store taxes wrote in 1929, to demand “equal opportunity to participate in their desired field of endeavor.”

Through the middle of the 1930s, the Court continued to apply a classification approach that vindicated some, but not other, state chain store legislation, confirming one clever Yale Law student’s comment that the “taxing of chain stores is a lesson in the use of devices.” In 1935, two years after striking down a portion of the Florida chain store tax in Liggett, the Court upheld, over the Four Horsemen’s dissent, a chain store tax as applied to filling stations in West Virginia. The question for the majority in Fox v. Standard Oil was whether chain operations were distinct from other kinds of operations; citing Jackson and Liggett, Justice Cardozo argued that they were. Cardozo went further, however, and declared that “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.” Referring to prior cases in which the Court had permitted states to eliminate disfavored enterprises through confiscatory taxation, Cardozo stated that West Virginia “may make the tax so heavy as to discourage the multiplication of the units to the extent believed to be inordinate.”

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234 Harrington, supra note 206, at 502.
235 Comment, Taxation Directed Against the Chain Store, supra note 157, at 440.
237 Id.
238 Id.; see also “Supreme Court Declares Valid Big Chain Levy; Five to Four Decision Follows New Deal Thought in West Virginia Case,” THE WALL ST. J., January 15, 1935, at 1.
239 Id.
That same year, however, the Court struck down Kentucky’s graduated gross receipts tax, which increased taxes based on the gross sales of the retailer. In 1936, the Court struck down Iowa’s gross receipts tax as well. In the Kentucky case, *Stewart Dry Goods v. Lewis*, Justice Roberts reversed the three-judge panel that had upheld the tax, reasoning that the tax was arbitrary because it taxed gross sales instead of profits. Because sales “do not bear a constant relation” to net profits, the operation of the statute “is unjustifiably unequal, whimsical and arbitrary, as much so would be a tax on tangible personal property, say cattle, stepped up in rate as each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned.” Unlike the chain store taxes upheld by the Court in *Jackson* and *Fox*, the gross receipts tax was an improper classification because it “ignores the form of organization or the method of conducting business” – the very criteria that had doomed legislative categories prior to the *Jackson* decision.

Cardozo, in dissent this time, pointed out how states were being whipsawed by the Court’s shifting jurisprudence. He observed that the Kentucky legislature had considered adopting a specific chain store tax, but had adopted its gross receipts tax because *Jackson* had yet to be decided and the state feared that any tax that distinguished chain stores from other kinds of stores would be held invalid under the Court’s pre-1931 jurisprudence. The purpose of the two kinds of taxes was the same, however. Cardozo argued that capacity to pay was often related to the volume of business, that the large

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243 294 U.S. at 557.
244 Id. at 557.
245 294 U.S. at 566 (Cardozo, J., dissenting).
chains often had advantages over smaller competitors, and therefore a graduated tax
based on sales was “a sincere and rational endeavor to adapt the burdens of taxation to
the teaching of economics and the demands of social justice.”246

Finally, in 1937, the Court upheld Louisiana’s punitive chain store tax, which
taxed the chains according to their total number of stores nationally, not simply the
number of stores in the state.247 Roberts wrote for the Court, citing Jackson and Fox as
precedent. The dissenters continued to argue that Jackson was wrongly decided and
urged that Stewart Dry Goods controlled.

The Court thus vacillated on chain store taxes throughout the 1930s. The Court’s
progressive wing was quite willing to give states a free hand to tax larger stores more
than smaller ones, and the 1932 Hoover appointees, Hughes and Roberts, sided with the
progressives about half the time. Meanwhile, the Four Horsemen -- Van Devanter,
McReynolds, Butler, and Sutherland -- continued to resist altogether, arguing that
Jackson was wrongly decided. The chain store tax cases were thus a microcosm of the
emerging debates about the role of the Court in the new economic order. The Court’s
ambivalence reflected its larger struggle with the transition to a large-scale, national
economic and regulatory regime. The center of the Court seemed not to know how to
respond to the new economic order, while the old Lochner holdouts appeared to believe
that the new economic order did not exist.

Brandeis, in contrast, rejected the new national economic order on the basis of a
localist political economy that had animated the jurisprudence of antimonopolism in the

246 294 U.S. at 566 (Cardozo, J., dissenting).
247 Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 426-430 (1937). Roberts again wrote for
the majority. Van Devanter and Stone did not participate in the case, and Sutherland wrote in dissent for
himself. Grosjean is discussed in more detail below. See infra text accompanying notes ____.
first place. For Brandeis, the problem of monopoly was not simply economic. Monopoly did not just mean undue pricing power in the market for goods or services, but also connoted undue economic influence to the detriment of democratic values. Monopoly was a statement about political economy, not simply a statement about economic policy. Large-scale corporate enterprise was a threat to the nation’s political economy regardless of the market’s relative competitiveness. Thus, Brandeis was willing to permit legislatures to adopt different rules for big entities than for small ones.

This type of economic discrimination could not be assimilated into a classical jurisprudential doctrine based in free contract, a doctrine that assumed the equality of all economic players and therefore had to reject as impermissible favoritism state efforts to reallocate economic power. Nor, however, could it be assimilated into a New Deal economic doctrine that was based on the realities of large-scale enterprise and macroeconomics. Brandeis’s *Liggett* dissent made little sense in the classical world of *Lochner*; it would make even less sense to the late New Dealers.

IV.
THE CONGRESSIONAL RESPONSE TO THE CHAINS

While the Supreme Court dithered over chain store taxes during the mid-1930s, members of Congress were aggressively pushing to amend the antitrust laws to protect the small dealer. The chain stores reignited the controversy over the most significant challenge to American political economy in the post-bellum era: the problem of the trusts. Though Congress adopted the Sherman Antitrust Act in 1890, the trust problem continued to predominate into the Progressive Era and reemerged during the New Deal. Whether to regulate big business through antitrust was itself a recurring question;
whether the purpose of the antitrust laws was to protect small dealers or consumers was another.

The Congress that adopted the Sherman Act itself had differing conceptions of the legislation’s goals: Some believed that the purpose of antitrust laws was to protect the consumer from powerful combinations that would raise prices, while others sought to protect producers from powerful combinations that would undermine American civic and economic independence.248 Though the trusts often reduced prices for consumers, proponents of the Sherman Act charged that large combinations nonetheless “destroyed legitimate competition” – that is, they destroyed the small dealer.249 As Senator Henry Teller observed, “I do not believe that the great object in life is to make everything cheap.”250

The goal of protecting the small dealer while simultaneously aiding consumers, who benefited from the efficiencies brought by large-scale producers, generated ongoing tensions in antitrust doctrine. Large-scale corporate enterprise was both embraced and loathed, and state and federal policies pulled in different directions. By the turn of the century, states had adopted their own antitrust regimes, but they also passed corporation laws that fostered consolidation by loosening the restrictions on the use of holding companies.251 These state policies, combined with early interpretations of the Sherman Act, actually facilitated the great surge of mergers that occurred at the turn of the

248 This is, of course, a greatly simplified statement of often conflicting ideological and economic positions. See generally RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA 15 (1996). My purpose here is merely to note that both producerist and consumerist orientations co-existed at the birth of antitrust. The history of the Sherman Act is complex, and interpretations of congressional intent abound. For a subtle treatment, see id. at passim.
249 21 CONG. REC. 2561 (1890) (statement of Rep. Mason), quoted in id.
250 20 CONG. REC. 1889 (1889), quoted in id.
century. Moreover, the Department of Justice tended to enforce the Sherman Act against loose associations of small companies, not the huge integrated firms, because “the rudimentary methods of horizontal price fixing, market division, boycotting, and the like, were easy to detect and prosecute.”

Early Supreme Court decisions reflected these tensions, sometimes limiting the reach of the Sherman Act in regulating admittedly large-scale enterprises, and other times invoking the small dealer in striking down collusive agreements. It was sometimes difficult to know where the independents’ interests lay, however. In the *Trans-Missouri Freight Association* decision, for example, the Court held that price fixing agreements were illegal regardless of their reasonableness. Writing for the majority, Justice Peckham struck down an agreement among railroads to fix rates, concluding that competition was necessary to ensure the survival of “small dealers and worthy men.”

Private agreements to fix prices were pernicious because large conglomerates could set prices that would drive the small producer out of business, thus turning the “the independent businessman, the head of his establishment, small though it might be, into a mere servant or agent of a corporation.”

The problem, however, was that price fixing, at least in loose agreements, often performed exactly the opposite function, assisting the small retailer by ensuring a minimum base price that could not be undercut by the large corporations. Throughout the 1900s, the Supreme Court effectively forbade most vertical and virtually all

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252 *Id.*
253 *Id.* at 115.
254 *See, e.g.,* United States v. E.C. Knight Co., 156 U.S. 1, 15-18 (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between “commerce” and “manufacture”).
256 *Trans-Missouri*, 166 U.S. at 323.
257 *Id.* at 324.
horizontal price fixing. The Court’s 1911 decision in the *Dr. Miles*\(^{258}\) case doomed resale price maintenance agreements, making it illegal for manufacturers to set a minimum resale price for goods sold in interstate commerce, and effectively opening the door to cost-cutting chains. *Dr. Miles* was a significant setback for the “small dealers and worthy men” whom Justice Peckham seemed to believe that he was trying to protect.\(^{259}\)

In 1912, Woodrow Wilson proposed more rigorous antitrust legislation as part of his “New Freedom” agenda, and two years later, Congress adopted the Clayton Act\(^{260}\) and the Federal Trade Commission (FTC) Act.\(^{261}\) The Clayton Act and the FTC Act were in part intended to deconcentrate economic power. The legislation, Wilson urged, was necessary “to make men in a small way of business as free to succeed as men in a big way.”\(^{262}\) But antitrust enforcement under the FTC tended toward disarray. The FTC lacked strong leadership, was unable to form a coherent policy on how to address “unfair methods of competition,” and became mired in procedural delays.\(^{263}\) In the post-war period, associationalism, a model of “enlightened cooperation” among large firms that was supported by then-Secretary of Commerce Herbert Hoover, became the dominant model of economic regulation.\(^{264}\)

In 1920, the Court declared, in *United States Steel*, that “[t]he law does not make mere size an offense,”\(^{265}\) reiterating a position that it had taken as early as 1895 in the

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\(^{258}\) *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

\(^{259}\) See FREYER, supra note 251, at 24–25. See also id. at 157–58, 191–92 (discussing Brandeis’s disapproval of the *Dr. Miles* decision).


\(^{262}\) Woodrow Wilson, Address to Congress, Jan. 20, 1914, quoted in BEAN, supra note 10, at 1.

\(^{263}\) MCCRAW, supra note 19, at 126–28.

\(^{264}\) Id. at 148–49.

\(^{265}\) *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920).
By the end of the twenties, intraindustry cooperation was clearly permissible, and the FTC’s old progressive supporters were turning into its most severe critics—a clear signal had been sent that the FTC “was not to be taken seriously.” Moreover, antitrust legislation seemed to have done “more to restore the reputation of big business than to increase the market share of small business.” On the eve of the Depression, the anti-trust laws appeared to ratify the place of big business in the commercial order, though the language of decentralization continued to be used by the Supreme Court.

A. THE ROBINSON-PATMAN ACT

It was against this background that Congress again considered significant changes to the antitrust laws in the 1930s. It did so in direct response to independents’ concerns about the chain store menace. The roots of this legislative action can be traced to 1928, when Senator Smith Brookhart of Iowa introduced a resolution in the U.S. Senate directing the Federal Trade Commission to “undertake an inquiry into the chain store system of marketing and distribution” in order to determine if any antitrust laws had been violated and to recommend congressional action to regulate the chains. The resolution came at the behest of independents, who had been accusing the chains of monopolistic

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267 McCraw, supra note 19, at 152.
268 Bean, supra note 10, at 21.
269 For a summary of cases, see, e.g., David Millon, The Sherman Act and the Balance of Power, 61 S. CAL. L. REV. 1219, 1223 (1988). A contemporary example is Ford Motor Co. v. United States, 405 U.S. 562, 577-78 (1972). See also United States v. Von’s Grocery Co., 384 U.S. 270, 274 (1966) (“From this country’s beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few.”) A number of scholars recognize that supporting small business was a major goal of the antitrust laws, and therefore suggest that courts still ought to take small business interests into account. See, e.g., Robert Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65, 101–05, 120–21 (1982); Eleanor M. Fox, The Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1150–54 (1981); Pitofsky, The Political Content of Antitrust, 127 U. PA. L. REV. 1051, 1058-60 (1979).
270 S. Res. 224, 70th Cong., 69 CONG. REC. 7857 (1928), reprinted in LEBHAR, supra note 1, at 163–65.
and unfair business practices for a number of years. The chains were accused of short-weighting, \(^{271}\) using loss leaders, \(^{272}\) and – most importantly – demanding excessive discounts and allowances from wholesalers and receiving bulk discounts from manufacturers. The FTC was ordered to determine if “the chain store movement has tended to create a monopoly . . . in the distribution of any commodity either locally or nationally;” whether chains had been involved in “unfair methods of competition” in restraint of trade; to what extent the price savings offered by chains were a function of efficient business practices or of quantity discounts; and whether those quantity discounts violated the Federal Trade Commission Act or the Clayton Act. \(^{273}\)

The Senate-ordered FTC investigation took six years, with findings issued in preliminary reports throughout the 1930s. \(^{274}\) In addition, an FTC investigation into chain dominance of the tire industry began in 1933 and ran concurrently with the broader investigation. \(^{275}\) By 1935, then, the machinery of the federal bureaucracy was being employed against the chains. In June and July of that year, Congressman Wright Patman, a Democrat from Texas, began house hearings into chain buying practices. \(^{276}\)

\(^{271}\) See LEBHAR, supra note 1, at 216. Short-weighting is the practice of telling customers they are being given a certain weight of product, only to give them less. See generally 79 AM. JUR. 2D Weights and Measures § 41 (2004).

\(^{272}\) See BECKMAN & NOLEN, supra note 6, at 217–18. A loss leader is a good sold at a very low price, intended to draw customers into the store, where they will then buy more profitable items. See BLACK’S LAW DICTIONARY 965 (8th ed. 2004).

\(^{273}\) S. Res. 224, supra note 270, at 164–65.

\(^{274}\) Id. at 165.

\(^{275}\) BEAN, supra note 10, at 31–32. Independent retailers had long dominated tire retailing, but in 1926, Sears signed an exclusive distribution agreement with Goodyear for Allstate tires. Montgomery Ward followed with its own contract with B.F. Goodrich. By the early 1930’s, the two retailers had captured almost twenty percent of the retail market. Responding to the complaints of the National Association of Independent Tire Dealers, the FTC investigated the Sears-Goodyear contract and found that the average independent paid 26 percent more for its tires than did Sears, a discriminatory price advantage that the independents charged was a violation of the antitrust acts. Id. In 1936, the FTC ordered the cancellation of the contract, though that order was reversed on appeal. Id.

\(^{276}\) Id. at 33; BURTON A. ZORN & GEORGE J. FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 51 (1937). Patman, who eventually served in the House for twenty-four terms, was a New Dealer and a supporter of legislation aimed at protecting the economic rights of workers and small businesses; he eventually went on
The Patman hearings began as an investigation into the American Retail Federation (ARF), an organization of the major chain retail outlets in the country, on the grounds that it was a big business “superlobby” with anti-competitive designs. The House Resolution establishing the Committee portended badly for the chains. The Resolution stated that the “American Retail Federation is organized for the purpose of increasing the profits of big business, through lobbying tactics, designed to prevent small business from securing competitive opportunities equal to those enjoyed by corporations representing vast aggregations of capital.” It further declared that the ARF represented “the greatest aggregation of rich and powerful department stores and chain stores of American ever brought together for 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 the nation,” and that it was “inimical to the welfare of the citizens of the United States to permit the organization and functioning of such a superlobby, designed for the purpose of intimidating and influencing Members of Congress through direct and subversive lobbying activities.” Soon the hearings were expanded beyond an investigation of the ARF, and into an investigation of chain buying practices generally. Patman’s hearings received national attention, and catalyzed the federal legislative response to the chain menace.
The result of both the FTC investigation and the Patman hearings was the Robinson-Patman Act, which Congress adopted in 1936. Robinson-Patman began as “an expression of wholesalers’ goals.” The original bill, as commentators have often pointed out, was drafted by counsel for the United States Wholesale Grocer’s Association, and its main purpose and ultimate effect was to constrain the power of the chains to exact price concessions from their suppliers, a goal shared by wholesalers and the independents.

The Act adopted by Congress, however, was more modest than the original draft and had as much in common with the FTC’s recommendations as with the wholesalers’ goals. Though the FTC investigation did not find that the chains had engaged in the kinds of systematic abuses charged by the independents, it did recommend some alterations to the antitrust laws. The FTC had long argued that the chain stores’ price-related buying advantages were already covered by Section 2 of the Clayton Act, which made it unlawful for sellers of goods “to discriminate in price between different purchasers . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce.” Courts, however, had typically read the Clayton Act’s prohibition of discriminatory pricing as intended to protect only sellers who were in competition with large suppliers like Standard Oil, which often sold to one region at very low prices in order to drive competing sellers out of the

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283 Id. See also, e.g., ZORN & FELDMAN, supra note 276, at 51.

284 See PALAMOUNTAIN, supra note 24, at 197.

285 Id. See also, e.g., ZORN & FELDMAN, supra note 276, at 51.

market – so-called “predatory pricing.” Even after the Supreme Court in *Van Camp v. American Can Co.* \(^{287}\) determined that Section 2 could be read broadly to protect buyers from unfair pricing, the FTC rarely prosecuted cases in that vein, fearing continued judicial resistance in the form of restrictive readings of the reasonableness provisions of the Act. \(^{288}\)

The Robinson-Patman Act amended Section 2 to make clear that the Clayton Act applied to buyers and distributors. Manufacturers could still grant functional quantity discounts to chain stores and wholesalers, but those allowances had to be cost justified under a reasonableness standard, and manufacturers were prohibited from making discriminatory brokerage fees or side-payments to large buyers. \(^{289}\)

There was no question that the purpose of the Act was to protect the small retailer. Supporters believed that the Act would limit the “unfair” discounts that suppliers and manufacturers had provided the chain stores or force suppliers to offer those same discounts to the independents. Their hope was that the law would eliminate the chain buying advantage, thus giving independents the ability to compete on a “level playing field.” \(^{290}\) The chains, stated George Sadowski, a Democrat from Michigan, “insist on concessions, allowances, and rebates that enable them to compete with the independent merchants. This, I say, is unfair competition.” \(^{291}\) The Robinson-Patman Act, stated John Miller, an Arkansas Democrat, “is based upon the simple American ideals of equal

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\(^{287}\) 278 U.S. 245 (1929).


\(^{290}\) BEAN, *supra* note 10, at 17. A number of states had statutes on the books at the time prohibiting either sales below cost or price discrimination or both. George J. Feldman, *Legislative Opposition to Chain Stores and Its Minimization*, 8 *Law & Contemp. Probs.* 334, 340–41 (1941).

opportunity and fair play.”292 The independent merchant, according to Representative Edward Patterson, Democrat from Kansas, is being “crucified upon the cross of unfair competition.”293

B. THE MILLER-TYDINGS ACT

The Robinson-Patman Act was passed overwhelmingly in the House and Senate.294 Legislators then turned to the other significant piece of anti-chain legislation making its way through Congress in 1936, the Miller-Tydings Act. Miller-Tydings was meant to overrule the Supreme Court’s decision in Dr. Miles, where the Court read the Sherman Act to outlaw retail price maintenance agreements in interstate commerce.295 The main proponents of the Act were manufacturers and independent retailers. Manufacturers supported retail price maintenance because they worried that price cutting affected consumers’ perceptions of quality, cheapened their brand and reduced sales in the long-term. Manufacturers may also have been concerned that discount houses would undermine the local full-service merchant by free-riding on his promotional materials and before-sale customer service.296

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294 WRIGHT PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 10 (1963).
295 See TAN 252-53 [?]
296 Minimum resale price maintenance is, in economic and antitrust parlance, a vertical intrabrand restraint. There is no question that manufacturers often impose such restraints on their retail dealers, but economists have often been puzzled as to why they would do so. Why not simply charge a set price at the factory gate and allow distributors to resell at any price to consumers? Lester Telser answered this question with the “free rider” theory in his article Why Should Manufacturers Want Fair Trade?, 3 J. L. & Econ. 86 (1960). The debate continues, and other scholars have offered different explanations. See generally, e.g., Alan Meese, Property Rights and Intrabrand Restraints, 89 CORNELL L. REV. 553 (2004). Until recently, antitrust scholars (and the courts) were hostile to intrabrand restraints. Current scholarship, however, argues that these restraints can be pro-competitive. See id.
Retail price maintenance was also obviously attractive to small retailers, because it meant that there was a baseline price at which they could not be undersold.\(^{297}\) Independents had long railed against the chains’ “predatory pricing” practices, especially their use of loss leaders, and they had successfully campaigned for state “fair trade” legislation that would permit retail price maintenance. In 1931, California passed the first fair trade law, permitting the enforcement of RPMs.\(^{298}\) Other states followed with similar legislation, particularly after the Supreme Court upheld in-state fair trade laws in *Old Dearborn Distributing Co. v. Segram Distillers*.\(^{299}\) By the late 1930s, over 42 states had legalized RPM.\(^{300}\) Many states also adopted legislation prohibiting retailers from using loss leaders.\(^{301}\)

But *Dr. Miles* still made price fixing in interstate commerce per se illegal under the Sherman Act.\(^{302}\) Manufacturers and independents had sought fair trade legalization in Congress throughout the 1920s and 1930s, but as states began to adopt their own fair trade laws, the proponents of RPM turned to obtaining a federal exemption from the antitrust acts. Miller-Tydings was that exception, justified, as was Robinson-Patman, as a mechanism for “leveling the playing field.”

The rhetoric of fairness and competition on equal terms was accompanied by a moral rhetoric. What concerned anti-chain advocates was the insecurity and instability brought about by “ruinous competition,” a concept deeply embedded in a producerist economic order. Ruinous competition was based in the theory that, in the words of the


\(^{298}\) BEAN, *supra* note 10, at 71.

\(^{299}\) 299 U.S. 183, 192-198 (1936).

\(^{300}\) BEAN, *supra* note 10, at 71; S. CHESTERFIELD OPPENHEIM, UNFAIR TRADE PRACTICES 901–02 (1950).


\(^{302}\) KINTNER, 1 LEGISLATIVE HISTORY, *supra* note 291, at 462.
New York Court of Appeals, “competition may be carried to such an extent as to
accomplish the financial ruin of those engaged therein, and thus result in a derangement
of the business, an inconvenience to consumers, and in public harm.” Ruinous
competition had been invoked in the 1830s to justify monopoly grants for public goods
like bridges; it came into further use by defendants accused of forming illegal cartels or
fixing prices in the 1870s; it had an active existence in the 1890s and early 1900s in
preventing localities from erecting utilities that would compete with pre-existing private
ones; and it spilled over into the antitrust debates of the early 1900s and into the 1920s.
In the 1932 case, New State Ice Co. – the case famous for its defense of federalism –
Brandeis invoked ruinous competition to defend a grant of monopoly protection to a local
ice producer. As Herbert Hovenkamp observes, “It is little appreciated how deeply the
notion that competition can sometimes be ‘ruinous’ or contrary to the interests of both
business firms and society, is embedded in American law.”

The anti-chain store movement borrowed liberally from the doctrine and rhetoric
of ruinous competition, asserting (correctly) that the chains’ price power was destroying
the independent merchant, upending traditional distribution networks, and (perhaps
incorrectly) leading to public harm. The “fair trade” movement asserted that in certain
cases price fixing should be permitted as a means of preventing ruinous competition;
sometimes the existence of cartels or monopolies could rationalize business and prevent
injuries to producers and consumers.

304 Hovenkamp, supra note 104, at 313–18.
306 Id. at 292 (Brandeis, J., dissenting).
307 Hovenkamp, supra note 104, at 313. Even today, the NCAA and major professional sports leagues
invoke ruinous competition as a defense to antitrust charges. See, e.g., Marc Schwartz, Start-Up Sports
Leagues: Why These Leagues Are Entitled to Use the Ruinous Competition Defense to Justify
By legalizing retail price maintenance agreements, Miller-Tydings was intended
to prevent the use of loss-leaders and other below-cost selling devices that resulted in
ruinous competition. The small producer, argued the Act’s proponents, should receive a
“fair price” or a “just profit” for his merchandise. As one congressional proponent
declared: “The grocer, the hardware dealer, the jeweler, the pharmacist were to be found
shoulder to shoulder with the doctor, the lawyer, the clergymen in their efforts to upbuild
and uplift. These men constituted the woof and fabric of our national life.” Price
cutting was “the surest means of killing off the small rival, the independent
businessman,” and price maintenance was a means of bringing “back a common decency
to the market place.” Proponents also argued that the legislation would help the
consumer, who would no longer be “gypped by the predatory cut-rater,” and suckered by
loss leaders.

Indeed, both Robinson-Patman and Miller-Tydings were seen by their proponents
as strengthening the anti-trust laws, not weakening them. Justice Brandeis is again
emblematic. Brandeis had long railed against the interpretation of the Clayton Act that
necessitated Robinson-Patman. He also fought for “fair trade” in the states, and
repeatedly sought the legislative relief that Miller-Tydings provided from the Court’s
decision in Dr. Miles. There was no doubt in anyone’s mind that both pieces of
legislation would raise prices for consumers; the very purpose of the acts was to negate
the chains’ bulk-buying advantage. Indeed, President Roosevelt, following the

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308 81 CONG. REC. A874 (1937), reprinted in 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST
LAWS AND RELATED STATUTES, PT. 1, supra note 291, at 500.
309 Millard E. Tydings, speech, Feb. 3, 1938, quoted in BEAN, supra note 10, at 73. See also, id. at 67–71.
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311 BRANDEIS, supra note 183, at 125–28; BEAN, supra note 10 at 69.
recommendation of the FTC, opposed Miller-Tydings because he was concerned that manufacturers and dealers would collude to raise prices, thus “resulting in bitter resentment on the part of the consuming public, especially in a period of rising prices.” 312 For proponents, however, the purpose of the anti-trust laws was to ensure the existence of numerous small dealers providing multiple retailing outlets, not to protect consumers by encouraging price competition among a few large-scale conglomerates.

C. THE IDEOLOGY AND REALITY OF ANTI-CHAIN STORE LEGISLATION

Both Robinson-Patman and Miller-Tydings were passed overwhelmingly in the Senate and the House. 313 The fact that Congress adopted significant alterations of the antitrust laws that were acknowledged to result in higher prices for consumers may be testament to the political power of the independents and wholesalers. Such power could not have operated, however, except within a set of background assumptions about the political economy that were still quite powerful into the late 1930s. The effectiveness of the rhetoric of equality and fairness that was deployed on behalf of the small dealer, the widespread belief that the chains were playing unfairly, and the popularity of the anti-chain cause illustrate the pervasiveness and attractiveness of a localist, producerist ideology.

The popularity of that ideology, however, did not translate directly into economic gains on the part of the independents. Despite the rhetoric, Robinson-Patman and Miller-Tydings had less effect on chain retailing than their proponents would have liked. The independents had clearly overstated the role that wholesaler price discounts played in

312 KINTNER, 1 LEGISLATIVE HISTORY, supra note 291, at 461, 478.
313 PATMAN, supra note 294, at 10; BEAN, supra note 10, at 74-75. While Congress offered little resistance to Miller-Tydings, President Roosevelt objected strongly, so the bill was pushed through as a rider on an unrelated District of Columbia revenue act. Id.; KINTNER, 1 LEGISLATIVE HISTORY, supra note 291, at 463-464.
advantaging the chains; the chains’ lower margins, their ability to integrate vertically and sell their own brands, and their ability to buy directly from manufacturers were much more significant factors in maintaining the chains’ price advantage.\textsuperscript{314} Moreover, consistent with its enforcement attitude generally, the FTC was not inclined to take an aggressive attitude towards big business, and made it clear in the late 1930s that it would act cautiously against large corporations.\textsuperscript{315} Indeed, in some respects Robinson-Patman tended to hurt the independents rather than help them, as it sometimes barred them from joining voluntary purchasing collectives in order to receive price discounts.\textsuperscript{316} Miller-Tydings also had little direct effect: It permitted retail price maintenance agreements, but it did not require them.\textsuperscript{317}

State anti-chain store taxes and state fair trade laws—which targeted the chain pricing advantage more directly—also had limited effects. In part, this was because of the ambivalence of legislatures, which had, in most cases, taken a moderate position against the chains. Though a few states sought to expel the chains entirely with truly confiscatory taxes, most did not. State fair trade laws were difficult to police and depended in large part on manufacturers’ willingness to enforce price maintenance agreements; “sales-below-cost” statutes were also difficult to enforce. While anti-chain store rhetoric “implied that chains posed a . . . fatal assault on American civilization,”

\textsuperscript{315} BEAN, \textit{supra} note 10, at 40.
\textsuperscript{316} BEAN, \textit{supra} note 10; at 40; TEDLOW, \textit{supra} note 5, 223. The FTC also continued its practice of enforcing antitrust legislation by prosecuting small firms. See BEAN, at 41.
\textsuperscript{317} Resale price maintenance was rarely used in the grocery business, for instance.

Congress, dissatisfied with state fair trade laws, repealed Miller-Tydings in 1975, bringing vertical price restraints again within the rule of Dr. Miles. See SULLIVAN & HOVENKAMP, ANTITRUST LAW, POLICY & PROCEDURE 428 (1999). Since 1977, the Department of Justice has refused to enforce the Robinson-Patman Act, \textit{see id.} at 925–26, leaving enforcement to the FTC. Private parties continue to bring actions under the Robinson-Patman Act, but not with significant frequency. A recent lawsuit brought by independent music retailers against music distributors and Best Buy, Circuit City, and Wal-Mart, has gained some media attention, as have recent lawsuits by independent dealers against Barnes & Noble and Toys R Us.
legislative remedies tended merely to raise marginal tax rates, and regulate only the most “obnoxious” chain purchasing practices.318 In this way, the laws reflected the desires of the consuming public, who, though sympathetic to the plight of the independents, welcomed the chains’ improved service, efficiency, quality, choice, and low prices.319 Legislatures were responsive to the independents’ desire for a “level playing field,” but they did not seek to destroy the chains.

The gap between the rhetoric of the anti-chain movement and the relatively mild effects of its legislative victories reflected the political limitations of the attack on bigness. Americans had been ambivalent about bigness since the rise of the giant corporations in the 1800s. Small business may have been the “backbone of democracy,”320 but the myth of the self-made man that pervaded the ideology of propertied individualism also applied to the self-made robber barons, and later, the great trust-makers, powerful industrialists, and chain store impresarios. Wiebe observes of an earlier period that “The nation of small towns and big enterprise was the America of popular fancy; song and stories romanticized it, orators honored it, and faith in the sovereign public was predicated on it.”321 The two impulses – admiration for large-scale,

318 Sparks, supra note 13, at 314. The Baltimore Sun commented on the dissonance between anti-chain rhetoric and legislative action in an editorial discussing Governor Ritchie’s efforts to pass a chain store tax in Maryland, which set taxes of $5 to $150 per store, depending on the number of stores, and was passed in 1933. Stating that the Governor made “star-spangled” arguments about the importance of the independent businessman, the Sun wrote:

We do not propose to say that such independent merchants are not the backbone of American business, nor to assert that their welfare is not important. What we say is that if the Governor’s argument is a good one, then a tax ranging from $5 to $150 per store in a chain is absurdly inadequate. If the Governor’s argument is really true and the national welfare is threatened by their existence, then he ought to wipe out the chain stores entirely and have done with it.

Baltimore Sun, April 21, 1933, at 29.


320 BEAN, supra note 10, at 2.

321 WIEBE, supra note 63, at 9.
individual enterprise and a commitment to localism and the small dealer – existed simultaneously. In the second decade of the century, President Wilson himself seemed ambivalent about bigness. Even before the war, Wilson had begun distancing himself from his decentralizing (and anti-corporate) rhetoric of 1912\textsuperscript{322} -- sometimes stating that he was only against “bigness that comes by monopoly.”\textsuperscript{323} Brandeis observed later that, though he believed that “the real curse was bigness rather than monopoly . . . Mr. Wilson (and others wise politically) made the attack on lines of monopoly—because Americans hated monopoly and loved bigness.”\textsuperscript{324}

Progressivism itself contained the seeds of ambivalence. The “organization men” of the progressive middle class both admired and feared the great machines.\textsuperscript{325} Scientific management had produced the large-scale industrial and retailing enterprises – and had made it possible to govern massive distribution networks.\textsuperscript{326} The Depression seemed like a pause on the fast climb to the modern economy, but it did not dissuade those who believed that they could engineer their way out of it. The Depression only accelerated the tendency to look for technological solutions, inviting state involvement in the rationalization of these new distribution networks. As Charles Beard’s contemporaneous critique of \textit{Jackson} illustrates, the planners sought even more rationalization, efficiency, and modernism in the operation of the economy during the New Deal. Size and efficiency mattered as much to the enterprises as it did to the regulators.

\textsuperscript{322} \textsc{Freyer}, \textit{supra} note 251, at 167.
\textsuperscript{323} \textsc{25 The Papers of Woodrow Wilson} 368 (Arthur S. Link, ed., 1978), \textit{quoted in} McCraw, \textit{supra} note 19, at 112.
\textsuperscript{324} \textsc{The Family Letters of Louis D. Brandeis} 368 (Melvin I. Urofsky & David W. Levy, eds., 1971–1978), \textit{quoted in} McCraw, \textit{supra} note 19, at 112.
\textsuperscript{325} \textsc{See} David M. Kennedy, \textit{Overview: The Progressive Era}, \textit{37 Historian} 453, \[jump cite\] (1975); \textsc{Wiebe, supra} note 63, at 165.
\textsuperscript{326} \textsc{See} \textit{Wiebe, supra} note 63, at 170; Forbath, \textit{Caste, Class, and Equal Citizenship, supra}, at 51,53.
Thus, while the anti-chain store movement had significant success in generating a popular outpouring that could be turned into legislation in Congress, the movement also faced Americans’ long-standing ambivalence toward bigness, and a more recent New Deal-vintage embrace of large-scale planning. The anti-chain store movement’s appeal to citizenship values, to economic independence, and democratic values was real and it generated legislative successes. Nevertheless, the actual economic consequences of chain store legislation were mixed into the late 1930s.

V.
THE RISE OF THE CONSUMER

Robinson-Patman and Miller-Tydings were manifestations—albeit imperfect ones—of the producerist economic order that had existed in various forms prior to the New Deal. Both acts favored producers and wholesalers over consumers. “How will the consumer fare under this bill?” asked Representative Emanuel Celler, Democrat from New York, and chief opponent of the Robinson-Patman Act. “He will fare illy [sic] indeed. Under this bill the housewife will soon find out where the shoe pinches. Unfortunately, housewives and consumers generally are not organized. Their voice is not articulate.” Consumers, Celler argued, “who should be the main object of our care” will be “made the goat.”

Celler was right about Congress’s sympathies, but the tide was turning. By the late 1930s, an entirely new economic order was forming. Beard’s 1933 New Republic critique hinted at this development: the coalescing of the political economy of

328 Id.; FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 21 (1962). See also, 80 CONG. REC. 8102 at 8107 (1936), 4 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS, supra note 291, at 3256.

http://law.bepress.com/uvalwps/uva_publiclaw/art21
consumption, accompanied by the rise of the consumer as a new political actor. The consumer favored the chains; her emergence as a political and social force brought her into conflict with the small dealers and worthy men.

A. The Consumers’ Republic

Historians have pointed to the 1930s as the origins of the “Consumers’ Republic,” to use the title of Lizabeth Cohen’s recent book. According to Cohen, the first signs of a developing proto-consumer movement began in the Progressive Era. Consumer-oriented reforms, like the Pure Food and Drug Act and the Meat Inspection Act, and anti-trust legislation like the Clayton Act and the FTC Act, were elements of a package of social reforms intended to protect the public, broadly conceived, from the excesses of industrial capitalism. Middle-class reform organizations, like the National Consumers’ League, sought, by encouraging “ethical consumption,” to pressure employers to improve working conditions and wages for women and children. And working class and immigrant groups, represented primarily by women, were often successful in boycotting merchants when costs of living – for meat, or rent – were too high, or wages were too low.

In the 1930s, this proto movement began to coalesce into an identifiable interest group, and as a force in economic theory and planning. “I believe,” commented Roosevelt in 1932, “we are at the threshold of a fundamental change in popular economic thought . . . in the future we are going to think less about the producer and more about the

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329 LIZABETH COHEN, A CONSUMERS’ REPUBLIC 18 (2003) [hereinafter COHEN, A CONSUMERS’ REPUBLIC].
330 Id. at 21.
331 Id. at 22.
332 Id. at 22–23.
 './law.bepress.com/uvalwps/uva_publiclaw/art21

consumer."  Cohen argues that two conceptions of the consumer emerged during the New Deal: the “citizen consumer” and the “purchaser consumer”. The citizen consumer was incorporated into New Deal programs as a voice for industry reform and consumer protection – as a countervailing force to the power of big business corporations. Born of the progressive movement, the citizen consumer sought rights and representation within the new regulatory state, and was accompanied by grass-roots consumer activism intended to influence production and retailing standards. The purchaser consumer, in contrast, was a conception of the consumer as an instrument of economic recovery. Especially in the late New Deal, policy-makers increasingly viewed the economy through a Keynesian lens. Keynesianism supported the New Deal notion that the Depression was a result of underconsumption and that increasing consumer purchasing power was the key to recovery. The purchaser consumer was the mass consumer, saving America by buying.

The shift from a producerist conception of the citizen to a consumerist conception of the citizen thus had two valences, both of which were ultimately hostile to the small dealers. The citizen consumer shared in the reformist objectives of the progressives and New Dealers, but the public interest that the nascent consumer movement sought to represent was defined by purchasers, not producers. And consumers favored standardization, regulation, and nationalization in the pursuit of price, quality, and access. Nevertheless, the independents sought to capitalize on this conception of the responsible

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333 Franklin D. Roosevelt, Address at Oglethorpe University, May 22, 1932, quoted in id. at 24.
334 COHEN, A CONSUMERS' REPUBLIC, supra note 329, at 18.
335 Id. at 8, 19, 21–22, 28.
336 Id. at 54–56.
consumer when it urged her to “buy at home.” 337 Local businesses appealed to the patriotism of the purchaser, struggling to appropriate the language of citizenship in their marketing battles against the chains.

Those appeals rarely worked in the short term, and certainly failed over the longer term. Indeed, by the late New Deal the citizen consumer had been eclipsed by the purchaser consumer, at least in terms of depression-era public policy. This shift is often identified with the appointment of Thurman Arnold as the head of Roosevelt’s Antitrust Division in 1938. 338 Arnold revived a moribund division and aggressively pursued antitrust prosecutions, but he was not concerned with bigness. During his tenure at the Justice Department, the purpose of competition policy became consumer welfare, and consumer welfare was synonymous with price competition. 339 As Rudolph Peritz observes, the late New Deal was characterized by a “rhetorical shift from citizenry to universal consumerism, by an abandonment of the organized body politic for a unified body economic. In short, the later New Deal established the consumer as the unifying image for public discourse about political economy in America.” 340

Certainly, the late New Dealers tended to think more in terms of efficiency and consumer purchasing power as a means of economic recovery; the rhetoric of virtuous citizenry or the dangers of bigness had been excised. 341 But the change in antitrust philosophy was also accompanied by structural necessities of the New Deal. Reform became complicit with bigness. Those New Dealers seeking to rationalize the economy –

337 N ICOLAIDES , M Y B LUE H EAVEN , supra note 57 , at 128. See text accompanying notes __, supra.
338 B RINKLEY , supra note 15 , at 106–22; S ANDEL , supra note 4 , at 242; P ERTIZ , supra note 248 , at 158.
340 P ERTIZ , supra note 248 , at 6.
341 B RINKLEY , supra note 15 , at 62–64. B ut cf. id. at 58–61 (noting the few remaining strains of traditional anti-monopoly sentiment that remained in the late 1930s).
to stabilize production and prices – favored the large retailers, because they were able to absorb large supply and demand shocks, to move quickly to adjust price, and to remain solvent even in the face of economic downturn. The initial instinct of the New Deal was to organize the economy along its already large scale; the National Industrial Recovery Act and its National Recovery Administration sought to do just that, in cooperation with big business, not in opposition to it.

Consumption moved squarely into the center of government policy in more specific ways, however. In a little over five years, the consumer’s sales tax went from a novelty to a mainstay of state budgets. The sales tax on merchandize was a new mechanism for raising revenue in 1932. The concept of a consumption tax – “a tax designed to be shifted directly to the consumer rather than borne by the business itself,” in the words of a 1931 law review note – was so novel that it was called a Retailer’s Occupation Tax in Illinois. By 1938, however, the sales tax was supplying 14% of all states’ revenues, and was, in the words of a contemporaneous commentator, “the most spectacular and important revenue development in the field of state taxation during . . . the decade.” By 1941, 25 states had adopted the “Consumers Sales Tax,” which had been “political anathema” ten years before.

The sales tax was attractive to states because state constitutional provisions limiting \textit{ad valorem} property taxes or requiring uniformity of taxation did not apply to

\footnotesize{\begin{itemize}
\item \textsuperscript{342} Comment, \textit{Taxation Directed Against the Chain Store, supra} note 157, at 439.
\item \textsuperscript{344} Id. at 10.
\end{itemize}}

http://law.bepress.com/uvalwps/uva_publiclaw/art21
excise taxes.\textsuperscript{346} Moreover, the sales tax seemed to avoid the pitfalls of constitutional classification, since it was not paid by a particular seller, but rather by undifferentiated consumers. And while it began as an effort to attack the chains, the sales tax soon became a reason to embrace them. The chains simply generated more revenue than independents. In Illinois, 80\% of the tax was collected from only 14\% of the retailers, a fact attributed to the “presence of mail order houses and many chains in this state.”\textsuperscript{347}

Moreover, because sales tax was collected at the point of sale, retailers and state departments of finance essentially became partners in tax collection.\textsuperscript{348} The chains had the record-keeping expertise and capacity to collect sales taxes accurately and efficiently. The independents, in contrast, had difficulty merely keeping up with the book-keeping and accounting requirements mandated by state revenue officials. More importantly, the independents had little capacity to “shift” the tax to their customers, as they were already competing with the chains’ lower prices.\textsuperscript{349} States soon became complicit in encouraging the kind of consumption that would benefit both them and the large retailers.

The chains also provided other benefits to state and federal bureaucracies wrestling with the effects of depression. As historians have shown, state- and federal-level relief programs required administrative determinations at all levels of the retailing process.\textsuperscript{350} “The state and its representatives were . . . present in almost every phase of retail food selling,” with relief officials exerting tight control over which grocers would be contracted for providing in-kind relief, establishing budgets for relief clients, and

\textsuperscript{346} Comment, Taxation Directed Against the Chain Store, supra note 157, at 438.
\textsuperscript{348} Id. at 11–13, 15–16.
\textsuperscript{349} Id. at 13, 30.
\textsuperscript{350} Id. at 14–15; LIZABETH COHEN, MAKING A NEW DEAL 235–47 (1990) [hereinafter COHEN, MAKING A NEW DEAL].
determining the form of distribution of relief, whether in the form of vouchers, cash, or in-kind. Relief officials favored the grocery chains, because their prices tended to be lower, but also because – as in the collection of sales tax – the chains provided the expertise, uniformity, organization, and rationalization required of large-scale bureaucratic social-welfare programs. This was also the case in administering the National Recovery Act during its short life. Large firms were more likely to comply with the elaborate codes on pricing and employment conditions generated by the National Recovery Administration (and later during the war by the Office of Price Administration).  

State bureaucratization—record keeping, form-filing—favored centralized bureaucracies: in the grocery business, public and private centralization and bureaucratization were having feedback effects, encouraging additional centralization and bureaucratization.

The national chains provided a useful instrument for the expanding regulatory state – both federal and state governments were intimately involved in the politics and economics of consumption. Moreover, the rapid development of standardized goods sold in standardized stores brought about a national uniformity – a common American experience – that had previously only been wrought by great national events. National consumption communities, as Daniel Boorstin observes, “were quick; they were nonideological; they were democratic; they were public, and vague, and rapidly shifting. Consumption communities produced more consumption communities. They were

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352 Id. at 15, 31–33; PERITZ, supra note 248, at 126.
factitious, malleable, and as easily made as they were evanescent. Never before had so many men been united by so many things.”

Indeed, those previously left out of the producerist economy, namely blacks and women, who were definitionally barred from a citizenship of “small dealers and worthy men,” were brought into the national economic marketplace through consumption. Chain stores, for example, appealed to blacks in 1920s and 1930s Chicago. Blacks distrusted the local independent grocer and felt that “packaged goods protected them against unscrupulous storekeepers or clerks.” In urban settings, the independent grocer was often ethnic – Jewish, Greek, Italian, Polish – and the act of buying and selling was intertwined with cultural and ethnic relationships. The grocery-buying experience was “enmeshed in personal interactions and shaped by never-ending negotiation,” a negotiation that often excluded or alienated blacks. Moreover, while the independents were often family run, chains could be pressured to hire black employees; the pursuit of social reform through consumption represented a melding of citizen and consumer values. Access to chain stores and standardized goods freed blacks from fraught relationships with the white and ethnic community via consumerist anonymity, and allowed them to exercise the political power of the purse.

Women also benefited from the new consumption communities, as they became the object of increasing attention both from retailers and policy-makers. Indeed, women were central players in a newly developing “consumer movement.”

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353 BOORSTIN, supra note 12, at 90.
357 Cohen, supra note 354, at 23.
358 Id. at 23.
Progressive Era, the National Consumer’s League demanded graded canned goods and standardized sizes with clearly marked labels. Later, in the 1930s, women not only generated significant grassroots support for boycotts against high prices – a practice begun in the earlier part of the century – they also began to demand government intervention to protect consumers from a whole range of unsatisfactory distribution and marketing practices. The American Home Economics Association, the National League of Women Shoppers, the Consumers National Federation, and other groups aggressively sought to define consumers as an important constituency of the New Deal. And as consumption became increasingly important to national policy-makers, women became increasingly more important players in those debates.

Moreover, women were the retailers’ central constituency, and they were demanding a level of attention, service and quality that they had not required before. In a marketplace in which they were the most important customers, women (at least middle- and upper-class women) gained both economic and political power. By 1941, the consumer was envisioned as the standard housewife, and it was to her that both retailers and the state had to appeal as a practical matter:

The average housewife has a two-cell mind on the chain store question. She may swallow a good deal of anti-chain propaganda as an academic matter, but she will continue to buy her groceries at the chain store because of its lower prices. To date, she has been able to view the chain stores taxes with apathy, for she has yet to realize any substantial effects upon her buying habits. If the chains should begin to disappear from the community, however, theories would very likely be

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360 COHEN, A CONSUMERS’ REPUBLIC, supra note 329, at 32–35.
361 Id.
362 Id. at 39–40.
363 See id. at 56–59.
rejected in favor of the compelling requirements of the home budget, and a broad change in public feeling might well take place.\footnote{Feldman, supra note 290, at 342.}

Of course, the “average housewife” was in part a construct—created by the chain stores themselves through marketing and advertising, and reinforced through the consumerist policies of the late New Deal. Yet she was also an increasingly definable political interest that could be counted on to support the chains. The ambivalence about bigness emerged at the grassroots level in the debates about the chain stores, and at the individual level in household purchasing decisions. By the late 1930s and early 1940s, however, commentators were predicting that purchasing would win and the victory would belong to the “average” housewives of the nation.

\textbf{B. THE CONSUMER IN COURT AND CONGRESS}

As the consumer emerged as the dominant rhetorical image of the public interest, the localist arguments for the independents were losing their force. The Supreme Court, however, seemed oblivious to the shifting ground. In the 1937 \textit{Grosjean} case,\footnote{Great Atlantic and Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937).} the Court held, in what would be its final declaration on state chain store taxes, that Louisiana’s chain tax was constitutional. That tax, adopted in Huey Long’s home state, was one of the more punitive in the country because it taxed the chains according to their total number of stores nationally, not simply the number of stores in the state.\footnote{\textit{Id.} at 418.} The Louisiana tax thus favored both in-state independents and in-state chains over national chains, and A&P challenged the tax on both Equal Protection and Dormant Commerce Clause grounds, arguing that the corporation would be driven to extinction if other states were permitted to adopt similar taxes.
The Court, in an opinion by Justice Roberts, rejected A&P’s claims and upheld the tax. Roberts cited *Jackson* for the proposition that legislative classifications based on the mode or method of doing business were appropriate. Taking his cue from the state’s brief, he observed that there was ample “evidence bearing upon a variety of advantages enjoyed by large chains which are unavailable to smaller chains.”

One striking illustration is furnished by the uncontradicted proof that the Atlantic & Pacific Company received, in the year 1934, from its vendors, secret rebates, allowances, and brokerage fees amounting to $8,105,000 which were demanded by the company as a condition of purchasing from the vendors in question. The leverage which accomplished this was the enormous purchasing power of the company. The amount thus obtained equals $530 for each of the Atlantic & Pacific Company's stores or nearly the amount of the tax exacted by the statute.

Louisiana could adopt legislation that discriminated against out-of-state chains because the chains’ purchasing power inside Louisiana was a direct consequence of their national scale. “The policy Louisiana is free to adopt with respect to business activities of her own citizens,” argued Roberts, “she may apply to the citizens of other states who conduct the same business within her borders, and this irrespective of whether the evils requiring regulation arise solely from operations in Louisiana or are in part the result of extra-state transactions.”

“It is not a denial of due process,” he continued, “to adjust such license taxes . . . to meet the local evil resulting from business practices and superior economic power even though those advantages and that power are largely due to the fact that the taxpayer does business not only in Louisiana but in other states.”

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368 *Id.* at 421.
369 *Id.*
370 *Grosjean*, 301 U.S. at 427.
371 *Grosjean*, 301 U.S. at 427.
The dissenters argued that *Jackson* was wrongly decided, and invoked *Stewart Dry Goods*, in which Roberts wrote for the Court in striking down the Kentucky gross receipts tax a few years before. Indeed, *Grosjean* seemed to be a significant departure from both *Stewart Dry Goods* and *Liggett*, as least in effect. Recall that in *Liggett* the Court had rejected a tax that differentiated between chains that operated within one county and those that operated throughout the state. The Louisiana tax operated similarly, but on a national scale, and amounted to a tax on out-of-state activity – a fact that the appellants repeatedly pointed out. The implications were dramatic: One author, writing in the Wall Street Journal, observed that the Louisiana tax decision was “fraught with significance to all big business in America” because it permitted states to vary local taxes according to national scale and “put special curbs on bigness.” “It is in the political arena that this and other types of businesses that have grown big will have to fight to avoid extinction by tax burdens.”

The political arena was becoming much more amenable to the chains, however. *Grosjean* was decided when the states’ interest in chain store taxation was already waning. Indeed, the Court handed down *Grosjean* and Congress adopted Robinson-Patman and Miller-Tydings just around the time that state legislative activity began to

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372 Id. at 430-34.
373 See, e.g., *Chain Store Tax Based on Total of Units Upheld*, N.Y. TIMES, May 18, 1937, at 1 (noting that lawyers for A&P argued that the tax was an impermissible burden on interstate commerce and that they predicted that if the tax were upheld “the era of the national chain is over”). These arguments might have succeeded under modern Dormant Commerce Clause doctrine. In *Oklahoma Tax Commission v. Jefferson Lines*, the Court established that a facially neutral tax could survive only if “the imposition of a tax identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not already bear.” 514 U.S. 175, 185 (1995). If every state imposed taxes like Louisiana’s, a large chain like A&P would be overtaxed: Since every state would set its stores’ tax level according to the number of stores nationwide, A&P would pay the highest rate on every one of its stores, rather than getting a break on the first 500, as smaller, in-state companies would.
375 Id.
decline. Though the Colorado electorate decided not to repeal a state chain store tax in a 1938 referendum,\textsuperscript{376} four other states had repealed their chain store taxes, and Californians rejected a chain store tax proposal – Proposition 22 – by a large margin the year before.\textsuperscript{377} In terms of chain store legislation, the Court and Congress were both behind the curve. At about the time that the Court was becoming more deferential to state economic legislation, states were already reconsidering their own experiments with anti-chain store taxes.

The California referendum illustrates the emerging salience of consumer interests, and the ability of the chain stores to capitalize upon it. The chains reached out to their employees, to the producers and processors who benefited from chain store distribution networks, and, most directly, to their customers. They ran advertisements that warned that the “Powerful Wholesaler and Middleman” were in a conspiracy to generate “Higher Prices for Food.”\textsuperscript{378} They emphasized that “22 is a Tax on You” and urged consumers to “vote NO and keep prices low.”\textsuperscript{379} And they produced outreach campaigns in the guise of town meetings in order to promote the chains and prove that they were good citizens.\textsuperscript{380} In one month, opinion polls moved from 39 percent opposed to Proposition 22 to 54 percent opposed, and on election day, the bill was rejected by 64 percent.\textsuperscript{381} To one commentator writing in \textit{The Nation}, the credit for “swing[ing] [the] election” went to the Lord and Thomas Advertising Agency.\textsuperscript{382} The Agency, the \textit{Nation} author observed

\textsuperscript{376} Lebhar, supra note 1, at 253. Lebhar argues that the ballot that contained the referendum on chain stores also carried a popular ballot measure regarding an expensive pension plan, so the electorate was less likely to do away with any revenue-producing measure. \textit{Id.}

\textsuperscript{377} Sparks, supra note 13, at 28–86.

\textsuperscript{378} \textit{Id.} at 280.

\textsuperscript{379} \textit{Id.} at 281.


\textsuperscript{381} \textit{Id.}

\textsuperscript{382} \textit{Id.} at 638.
acerbically, produced an “astute piece of work” that should serve as “an object lesson to all political-minded people, and ought to be read carefully . . . by naïve radicals.” 383

In 1939, *Businessweek* could report that the chains believed that they had “reversed the trend against them,” and were encouraged by their “remarkable success . . . in sidestepping new state laws and in erasing others from the statute books.” 384 The article identified four reasons for the shift. First, “[i]ndependents aren’t howling for chain scalps the way they once did,” not because they “hate chains less,” but because they “fear legislation more.” 385 Voluntary and cooperative chains of independent retailers were big supporters of the Colorado chain store tax, but were “shocked when the state Supreme Court held liable to the tax a string of supposedly independent auto-supply stores.” 386 Second, the chains have been encouraged by the “growing consumer movement” and have delivered on consumer concerns for quality, prices, and better buying information. 387 Third, organized labor has stood beside the chains — “labor’s attitude is easy to explain: it can organize chains where it can’t independents.” 388 And “fourth, chains figure they can count on vastly increased farm support as a result of their merchandizing drives to move crop surpluses” — a move that was effective in obtaining farmer support in California. 389

In the remaining years of the 1930s, the chains had only to concentrate on one final hurdle—Congressman Patman’s proposed federal chain store tax, known as the “death sentence” tax bill because its undisguised purpose was to hobble the chains

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383 *Id.* Women, the agency found in polls taken after the vote, were more likely to be concerned about the “cost of living” then were men. Men were more likely to object to “monopoly in business.” *Id.* at 640.

384 *Plan New Anti-Chain Drive*, *Business Week*, July 8, 1939, at 29, 30.

385 *Id.*

386 *Id.*

387 *Id.*

388 *Id.*

389 *Id.*
completely by taxing them out of existence. Patman had realized that only punitive taxation could eliminate the chains, and he sought to do just that. The battle, Wright Patman declared, was against “corporate greed,” of which A&P’s owners, the brothers George and John Hartford, were the chief example. “If it is right for one pair of childless brothers to own ten percent of the retail grocery business in America,” Patman observed in a speech before the National Association of Retail Druggists that was broadcast nationwide in 1938,

> it is likewise right that ten pairs of childless brothers be permitted to own all the grocery business in America. The question is . . . Will the country’s interest be promoted in a better way by the million and half retail stores being owned by a million local citizens, or will the country be better off if these million and half retail stores are owned and controlled by a few childless brothers?  

Patman’s tax bill went further than anything that had previously been proposed. Like state chain store taxes, the federal tax increased with the number of outlets, but in this case, the tax was further multiplied by the number of states in which the chain operated. Patman had over seventy House co-sponsors for his tax bill in 1938, and he claimed to have the support of 150 Representatives. As late as 1939, it appeared that the House would adopt the bill. But by 1940, support had dissipated. The chains had become entrenched in their communities. They had learned that public relations mattered, and they had gone on a media blitz to convince local communities that the chains were good citizens. More importantly, they had lined up an impressive array of backers, turning some former opponents into supporters: farmers, who prospered from

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390 LEHRER, supra note 1, 256–93; BEAN, supra note 10, at 42.
391 Patman, Absentee Ownership, supra note 81, at 70.
392 LEHRER, supra note 1, at 256; Sparks, supra note 13, at 315.
393 See PALAMOUNTAIN, supra note 24, at 176-77.
394 See id.
chain store distribution networks; organized labor, whose membership increasingly depended on chain store employment; the growing consumer movement, in the form of Women’s Leagues, who benefited from lower prices; and a new set of local interests—realtors and other local boosters and pro-growthers – who benefited from chain expansion and looked favorably on outside, large-scale corporate investment in the local community.395

By the late 1930s, the interests of the small dealer and the interests of the consumer were diverging, in no small part because – as a result of more than eighty years of industrialization and corporatization – there were increasingly fewer Americans who were members of both groups. And as the federal government increasingly became a regulatory force, as Americans began to accept the capacity and desirability of government intervention, the nature of these groups as interest groups began to coalesce. The debate over bigness began to take the form of oppositions, of producers versus consumers, the first historically associated with “small dealers and worthy men,” and the second increasingly associated with the newly forming liberal consensus, a coalition of New Dealers, liberals, labor unionists, and other traditional outsiders that would be a significant part of the traditional liberal coalition in the coming years.

Meanwhile, the business at the heart of the chain store revolution – groceries – was undergoing another round of technological change. Starting in the mid-1930s, both the independents and the chains were increasingly being challenged by a new form of retailing known as the “supermarket.”396 The supermarket emphasized square footage as

396 See Deutsch, The Politics of Making Change, supra note 343, at 34–44; TEDLOW, supra note 5, at 183, 238–46.
opposed to number of outlets, a trend that had been accelerated by state chain store taxes, which taxed on the basis of unit. 397 Instead of inundating Main Streets and downtowns, the new supermarket developers built single units on relatively cheap land on the outskirts of the town, with ample parking. 398 Customers could select their own goods from displays set on shelves in large warehouse-like spaces, and use a new invention—the shopping cart—to take their purchases to their cars. The widespread availability of domestic refrigeration made bulk purchasing possible. All grocery chains, including A&P, would soon adopt this new form of retailing.

VI.
THE CHAIN STORE AGE AND THE REMNANTS OF THE PROGRESSIVE CONSTITUTION

By the 1940s, the age of the chain—and the supermarket—was ascendant. 399 Though A&P would be subject to a damaging antitrust lawsuit in the 1940s, 400 no new states adopted chain store taxes after 1941, and a few allowed theirs to lapse, or repealed them. Moreover, world events preempted parochial economic concerns. The debate over

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397 Deutsch, The Politics of Making Change, supra note 343, at 8; Feldman, supra note 290, at 345 (“Chain store taxes are, in part at least, responsible for the development of the supermarket.”). But see id. at 346 (noting taxes levied against supermarkets in several communities in New Jersey).


399 Anti-chain store legislation did lead some industries to reduce the amount of centralized control that home offices exercised over their dealers, thus ushering in a form of franchising. See Thomas S. Dicke, Franchising in America 106–08 (1992). The real boom in franchising, however, came after the war and in the 1950s. See id. Some have viewed franchising as a perfect marriage between large-scale industry and small-scale independence. One author has written:

There is a hunger which has arisen in this chainstore age, with its disappearing individual businessman and sense of personal involvement and security, which has resulted in an ambivalent urge to own one’s own business coupled with a fear of facing alone in a tough, complex world those who are manifestly stronger and more sophisticated. Franchising satisfied that hunger by offering a marriage between the independent dealer and a strong partner with proven management know-how, a national image, a presold market and other advantages of chainstore organization without its disadvantage to the outlet operator and the community.


the chains was superseded by the implementation of the wartime economy, which involved far more intrusive regulation of retailing than anything the anti-chain store movement had suggested.\footnote{See \textit{Cohen, A Consumers’ Republic}, supra note 329, at 64–67 (describing government intervention, particularly in the form of the Office of Price Administration); Deutsch, “Wild Animal Stores”, supra note 359, at 150–51 (describing the classification of businesses for the purpose of setting price ceilings).} By the end of the war, the ideology of economic citizenship that animated chain opponents had dissipated; post-war America was characterized by the full realization of the mass-consumption economy.

The New Deal shift to a consumption-oriented economic policy had effects on constitutional structure: Federalism and substantive due process became impediments to the efficient regulation of large-scale, cross-border national markets. The \textit{Lochner} Court’s view of economic legislation and federalism, which had operated to expand the reach of national markets at the turn of the century and into the early part of the twentieth century, was now a hindrance to those markets. The national economic crisis of the 1930s required a national response. Moreover, by the end of the New Deal, the constitutional dimensions of competition policy had been muted: progressive antimonopolism, which was concerned as much with concentrated power in the political market as with price power in the economic market, had moved off the stage. The consensus that emerged during the New Deal and that has continued with remarkable stability to the present day holds that competition policy is not a mechanism for creating citizens or ensuring democratic values. Competition policy (and for that matter, modern welfare economics) is primarily concerned with economic welfare. It has become detached from political economy.

Historians tend to adopt this consensus as their point of departure, and thus tend to view the anti-chain store movement through the consumer-dominated antitrust regime
that superseded it.\textsuperscript{402} And certainly from the position of the consumerist political economy that was emerging in the 1930s, the anti-chain store movement looked quite peculiar. Those who advocated the protection of the small dealer, however, were operating on different assumptions about the relationship of public to private power and the relationship of the state to private enterprise. Brandeis, for example, recognized that consumers would be injured by anti-chain store policies, but he feared the injury to citizens of the loss of the small dealers more. He did not trust that consumers could be adequate watchdogs of liberty.\textsuperscript{403} Criticism of Brandeis'\'s progressive moral economy only makes sense in a world in which consumer interests are paramount and where democratic values do not count as reasons for action -- in other words, in a world after liberalism has defined the proper purposes of economic regulation to be efficiency and consumer welfare, and in which citizenship no longer contains a component of economic self-sufficiency.

The constitutional culture in which that latter conception of citizenship could be a proper basis for public action was changing. As Edward Purcell observes, the "progressive constitution" that Brandeis championed was short-lived.\textsuperscript{404} Even as

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\textsuperscript{402} Ellis Hawley, for example, writes that the anti-chain store movement was "an anticompetitive program made possible through the use of competitive symbols." Ellis Hawley, \textit{The New Deal and the Problem of Monopoly} 274-274 (1966). Similarly, Thomas McCraw finds that "Brandeis' fixation on bigness as the essence of the problem doomed to superficiality both his diagnosis and his prescription." \textsc{McCraw}, \textit{supra} note 19, at 141. Brandeis'\'s preoccupation with bigness, McCraw argues, meant that he must argue against vertical integration and other innovations that enhanced productive efficiency and consumer welfare. It meant conversely that he must favor cartels and other loose horizontal combinations that protected individual businessmen against absorption into tight mergers but that also raised prices and lowered output. It meant that he must promote retail price fixing as a means of protecting individual wholesalers and retailers, even though consumers again suffered. It meant, finally, that he must become in significant measure not the "people's lawyer" but the spokesman of retail druggists, small shoe manufacturers, and other members of the petit bourgeoisie.

\textit{Id.; see also id. at 84, 94.}
\textsuperscript{403} \textit{See Strum}, \textit{supra} note 18 at 151 -52, 181-82, 192-93, 221.
\textsuperscript{404} \textsc{Purcell}, \textit{supra} note 132, at 3–4, 37–38.
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Brandeis was drafting his majority opinion in *Erie v. Tompkins*, the case that rejected the power of the federal judiciary to impose a general common law favorable to commercial interests upon the states, the centralizing force of the New Deal, particularly the growth of the executive, was far outpacing anything seen before. This executive represented “centralization, bureaucratization, and a new kind of urban liberalism sharply distinct from the older Progressivism.” By the late 1930s, the New Deal coalition was national in scope; it was made up of consumers, social reformers, organized labor, and ethnic and religious minorities in large industrial states and in the large cities. Opposition to the New Deal increasingly was associated with small-town America, states’ rights advocates, small businessmen, and “Protestant and nativist groups hostile to the ethnic and cultural changes that New Deal urban liberalism symbolized.” The anti-chain store movement fell on the reactionary side of these new political-cultural lines; the small business owner had become – in Richard Hofstadter’s words – “a parochial and archaic opponent of liberal ideas, a supporter of vigilante groups and of right-wing cranks.”

The small business owner’s association with the political right was not inevitable, however. The decentralist strand of the progressive movement that Brandeis represented fused a localist ideology with political and economic reform – a program that turned out to be more radical in many ways than the New Deal itself. As the commitment to

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405 Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); PURCELL, supra note 132, at 3, 51–52.
406 PURCELL, supra note 132, at 3–4, 134–35.
407 Id. at 38.
408 Id.
410 I do not want to overstate this claim. The anti-chain store movement was essentially conservative, and recent scholarship on Brandeis highlights the conservative elements of his legal practice and political philosophy. See generally Christopher Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV 859 (2001); Clyde Spillenger, *Elusive Advocates: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445 (1996). Nevertheless, Brandeis’s program of economic deconcentration and industrial
decentralization turned into opposition to the New Deal, however, the reformist valence
dissipated and the remnants of Brandeis’s progressive constitution were increasingly
associated with resistance to reform. 411 After the New Deal revolution, localist
arguments became the province of states’ righters. A rhetoric of defensive federalism
replaced the Brandeisian rhetoric of reformist localism.

A. Constitutional Discourse and Economic Decentralization

The current constitutional discourse of federalism reflects this post-New Deal
stand-off, with those hoping to stem the tide of centralization urging limits on invasive
federal power and those opposed arguing that only federal power is capable of advancing
the public good. The New Deal revolution seems to be at stake in every case in which
the Rehnquist Court contemplates restricting federal power. And though proponents of
state sovereignty and limited federal power sometimes invoke Brandeis, 412 their vision of
local control is importantly different from Brandeis’s. Brandeis’s federalism was based
in a theory of human capacity and scale. “Bigness” – political or economic – was
dangerous because individuals were incapable of governing large-scale institutions or
achieving self-mastery within them. In contrast, current-day proponents of federalism are
not particularly concerned about the psychological effects of “bigness” and rarely speak
in terms of human scale. State sovereignty operates as a formal check on federal power,
a means of limiting federal regulation even if the alternative regulatory agent is an

democracy sought to topple the foundations of large-scale economic practice that the New Deal eventually
took for granted. This argument is consistent with historians’ arguments that the New Deal was much less
radical than it was once thought. See, e.g., BRINKLEY, supra note 15, at ___.
411 See GRAHAM, supra note 177, at 8–30.
412 See, e.g., Charles Fried, Federalism—Why Should We Care?, 6 HARV. J.L. & PUB. POL’Y 1, [jump cite]
equally large-scale entity like the State of California.\textsuperscript{413} And current-day proponents of federalism do not couple arguments for political decentralization with arguments for economic decentralization. Indeed, the mantra of limited government tends to view government efforts at redistribution as mistaken and government interference into private markets as dangerous.

There are legal scholars who urge us to recover the reformist aspects of decentralization. A number of local government scholars, for example, have sought to reinvigorate local government as a constitutional ideal, and have borrowed ideas from the progressive municipal reformers, proposing that cities engage in commercial enterprises, own their own corporations, and reform the tax system to permit entrepreneurial government.\textsuperscript{414} At the same time, Charles Sabel and Michael Dorf have encouraged a “Constitution of Democratic Experimentalism,” in which decentralized government plays a significant role in generating innovative and testable policy programs, a “new form of government” that enables “citizens to utilize their local knowledge to fit solutions to their individual circumstances.”\textsuperscript{415}

But these proposals fail to speak in terms of economic deconcentration, and mostly ignore the connections between political and economic decentralization. Even those scholars who argue that local governments should have a role in economic innovation do not depart from some fundamental tenets of national economic policy. No one seriously contends, for example, that local or state governments should retrench on

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\item \textsuperscript{413} I have argued elsewhere that states are too large to achieve the goals of decentralization often articulated by proponents of federalism. See Richard Schragger, \textit{Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government}, 50 BUFF. L. REV. 393, 421–24 (2002).
\item \textsuperscript{414} See, e.g., Barron, supra note 195, at 2263–66. For further treatment of this subject, see generally Gerald E. Frug, \textit{City Services}, 73 N.Y.U. L. REV. 23 (1998); GERALD E. FRUG, \textit{CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS}.
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corporation law, nor do proponents of decentralization advocate local economic protectionism and a return to a non-free-trade interpretation of the Constitution’s Commerce Clause. This is not to say they should, but only that the current constitutional discourse of decentralization looks quite thin when one acknowledges that transnational corporations exercise significant economic power that is effectively beyond the competence of decentralized government. Political decentralization and experimentation, in any form, seems inadequate to generate a robust democratic practice if it does not generate some counterweight to the power exercised by large-scale corporate enterprises. Certainly state and local governments may govern in numerous areas of important policy concern, but to the extent that a decentralized politics is not accompanied by economic deconcentration, local self-government is, in Brandeisian terms, nearly impossible.

This is not to say that constitutional scholars have failed to recognize that large-scale economic arrangements have implications for individual political liberty and collective self-government. Contemporary proponents of the civic republican strand of legal and political theory in particular have made efforts to revive the constitutional dimensions of economic policy, to reestablish the links between political and economic liberty.416 Modern proponents of a social or economic citizenship rarely speak of the dangers of “bigness,” however. Instead, they tend to be attracted to that component of progressive political economy that urges a wider and more egalitarian distribution of property. They argue in favor of a constitutional guarantee or “right” to welfare or a

minimum subsistence, and counsel significant redistribution at the national level.\textsuperscript{417} While these arguments are couched in civic republican terms, they tend not to emphasize the “small dealers and worthy men” who were at the center of the anti-chain store movement. Indeed, their focus is on the poor, not the petit bourgeoisie. And while contemporary critics of consumerism and consumer culture often assert that the national preoccupation with consumption is destructive of democracy,\textsuperscript{418} those critics tend to be drawing more from a Marxist critique of materialism than from a Brandeisian celebration of the independent retailer.\textsuperscript{419} As a political matter, there seems to be little overlap between the anti-chain store movement, current welfare rights proposals, and leftist critiques of consumerism, though all have some roots in an ideal of economic citizenship.

Of contemporary thinkers, the political philosopher Michael Sandel (who also operates out of the civic republican tradition) has been the most outspoken in his admiration for the anti-chain store movement, and has come closest to advocating some form of economic constitutionalism.\textsuperscript{420} Sandel has characterized the ideological shift from producerist values to consumerist values as the loss of an economic citizenship, the replacement of a substantive republicanism with the anemic liberalism of the “procedural republic.”\textsuperscript{421} The rise of the consumer signaled the end of a discourse in which the economy was viewed through a moral lens, as contributing or failing to contribute to the virtues of citizens, as encouraging or discouraging moral corruption, as promoting or

\textsuperscript{417} See, e.g., cites supra note.
\textsuperscript{419} See, e.g., Ledewitz, supra note 418, at 400, 405, 442; see generally \textit{Jean Baudrillard, The Consumer Society: Myths and Structures} (1998).
\textsuperscript{420} \textit{Sandel, supra note 4}, at 227–31.
\textsuperscript{421} \textit{Id.} at 4, 224–25.
failing to promote democracy and political independence. The procedural republic, Sandel argues, fails to cultivate in its citizens “the qualities of character self-government requires,” privileging instead a damaging individualism that emphasizes rights assertions over communal decision-making. What has been lost are the important connections between citizenship and economic arrangements, and the “sense of community and civic engagement that liberty requires.”

Sandel’s project is controversial; his critique of liberalism has been challenged on the grounds that it underestimates the extent to which rights assertions have provided the vehicle for outsider groups to challenge entrenched subordination. Critics argue that liberalism has provided a framework for equality that is threatened by the resurgence of communal and local norms. Undoubtedly, Sandel romanticizes the small dealers and worthy men who were the chief constituents of the localist ideology. To those who tend to be skeptical of the exercise of local power because it has traditionally been used to exclude marginalized groups, Sandel’s politics of local “small-holders” will appear retrograde. And to those who believe that one cannot effectively protect local economies from the expansion of global markets without serious social-welfare losses, the protectionist economic policy that Sandel celebrates will appear naïve.

Nevertheless, Sandel has successfully identified a significant inadequacy of the procedural republic. As Mark Tushnet observes, “liberalism lacks the resources to deal with one important source of contemporary discontent: the concentration of economic

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423 SANDEL, supra note 4, at 6.
424 Id.
power in transnational corporations, which deprives United States citizens of important powers of self-governance.”

The procedural republic appears unable to offer an account of democratic legitimacy in an era of economic giantism. Americans increasingly feel that much of what is important to them – their livelihoods, the nature of their communities – is beyond their control. This loss of control seems to be a permanent feature of the late twentieth and early twenty-first centuries, and it has generated enormous anxiety. Indeed, the emerging anxiety over a set of issues that falls under the rubric of “globalization” has begun to enter the mainstream of political and social discourse.

B. Is Wal-Mart Too Big?

Consider Wal-Mart, which has been vilified in much the same way A&P was in the 1920s and 1930s. As A&P was before it, Wal-Mart is often invoked as the chief exhibit of the loss of local control and the dangers of amassed economic power. And, like A&P, Wal-Mart has generated both anxiety and ambivalence. Whether the nation has made the correct tradeoff between consumer sovereignty and individual and local economic self-sufficiency continues to be a source of uncertainty.

Wal-Mart is both an exemplar and exemplary. With over 3500 stores in the United States, Wal-Mart is the largest private employer in the world and is expanding at a significant rate, with plans to add 1000 more stores over the next five years. Wal-Mart is currently “the nation’s largest grocer, toy seller, and furniture retailer,” and sells

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427 Tushnet, supra note 426, at 1571.
428 Wal-Mart, 2004 Annual Report, 16, available at http://www.walmartstores.com/Files/annualreport_2004.pdf (on file with the Iowa Law Review). In the U.S., Wal-Mart has 1,478 discount stores, 1,471 Supercenters (the regular store plus a grocery section), 538 Sam’s Clubs, and 64 Neighborhood Markets. The company also has 1,355 international units. Id.
30% of the country’s hair-care products, 26% of its toothpaste, 30% of its disposable diapers, almost 20% of the nation’s CDs, videos, and DVDs, and an increasing percentage of the nation’s books. Wal-Mart has mastered the ability to obtain products cheaply; its worldwide supply chains are increasingly efficient and its market power permits it to demand dramatic price concessions from suppliers that it can then pass on to consumers. Wal-Mart’s emphasis on price cutting has led some economists to credit it with single-handedly holding down inflation over the last few years.

But Wal-Mart has also excited opposition and has come under withering criticism for its retailing practices, in terms sometimes similar to those applied to A&P in the first part of the twentieth century. Wal-Mart, argues critics, puts smaller competitors out of business and turns independent proprietors into sales clerks, destroying communities in the process. It squeezes suppliers, thus forcing manufacturing to migrate overseas where labor costs are cheaper; it contributes to sprawl and the homogenization of American life, thus destroying the unique character of local communities; it uses its market power to influence the content of the music, books, and magazines that are distributed; and it pays subsistence wages, thus driving many Americans into poverty. Unions have objected to Wal-Mart’s hardball anti-union tactics, and the federal government has opened investigations into Wal-Mart’s labor practices, including its uses of undocumented

430 Lohr, supra note 429; Bianco & Zellner, supra note 16, at 102.
434 How Big Can It Grow?, supra note 429, at 68; Kinzer, supra note 429.
immigrant labor and its failures to pay adequate overtime wages. Wal-Mart is also the target of the single largest workplace-bias lawsuit in history, brought on behalf of 1.6 million current and former female employees, who charge that Wal-Mart discriminated against women in hiring, promotion, and conditions of employment. And the National Trust for Historic Preservation, in response to Wal-Mart’s plans to “saturate the state” of Vermont with seven new superstores, recently declared the entire state to be one of the nation’s “Most Endangered Historic Places.” According to critics, Wal-Mart is representative of an economy that has become obsessed with price competition to the detriment of other values. The “Wal-Martization of America” bemoans the New York Times, is proceeding apace, as distance between supplier and retailer is contracting, as off-shore manufacturing and out-sourcing become commonplace, as low-wage service sector jobs become the norm, and as Americans increasingly depend upon a handful of retailers for their consumer needs.

Wal-Mart has become a lightning rod for a set of large-scale social and economic dislocations associated with the shift from a national to a global economy. Like A&P in the 1920s and 1930s, Wal-Mart is perceived as a threat to local autonomy – Wiebe’s description of progressivism’s origin in an anxiety over “community self determination” is apt here. And, as in the Progressive Era, that anxiety has reached the middle and professional classes, who are being challenged by the kinds of macro-economic forces

435 Editorial, The Wal-Martization of America, supra note 433; Lohr, supra note 429.
439 The Wal-Martization of America, supra note 433.
440 WIEBE, supra note 63, at 52.
that had formerly only affected the working class and the poor.\textsuperscript{441} The social dislocations caused by the instability of work, the mobility of capital, and rapid shifts in technology are beginning to be felt by more skilled workers.

It is notable that Wal-Mart, unlike the early chains, originated in the very kind of place – Bentonville, Arkansas – that would arguably have been a hotbed of anti-chain sentiment in the 1930s. Wal-Mart’s self-image is not that of a colonizing behemoth in league with northern financial interests, but rather of a provider of cheap consumer goods to those traditionally underserved communities and consumers that need them most. Sam Walton began his stores in the South, and “many southerners were grateful . . . for his willingness to serve the small, rural markets of the region that the other major retailers had disdained.”\textsuperscript{442} In a reversal from A&P’s trajectory, Wal-Mart has expanded out of South into the Northeast and California, and from rural communities to urban ones. Though small towns in the south are increasingly questioning the value of Wal-Mart to their communities,\textsuperscript{443} the leading edge of resistance is based in urbanized places, and in the Northeast. Indeed, those liberal, cosmopolitan opinion-making institutions of a previous era, which had viewed the anti-chain store backlash as backward and reactionary, are now leading the charge against the big box stores.\textsuperscript{444}

The socio-economic dynamics continue to be salient. Wal-Mart’s initial forays into urban areas have targeted lower-income minority communities, with mixed success.

\textsuperscript{441} See Tushnet, supra note 426, at 1590–93.
\textsuperscript{442} VANCE & SCOTT, WAL-MART, supra note 433, at 136.
\textsuperscript{443} Cf. id. at 137.
\textsuperscript{444} Tushnet, supra note 426, at 1571, 1599. Academics and public intellectuals of the political left have been particularly exercised about Wal-Mart’s labor practices. See, e.g., Wal-Mart: Template for 21\textsuperscript{st} Century Capitalism? (Nelson Lichtenstein, ed. Forthcoming 2005) (papers presented at a conference on Wal-Mart held at the University of California, Santa Barbara, April 12, 2004); BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001). For a recent review of literature critical of Wal-Mart, see Simon Head, Inside the Leviathan, New York Review of Books, Vol. 51, No. 20 (Dec. 16, 2004).
In what some saw as a test of Wal-Mart’s ability to break into the urban market in California, Inglewood, a working class suburb of Los Angeles with a roughly half black and half Latino population, recently rejected a ballot initiative that would have permitted the construction of a Wal-Mart Superstore in that community.\footnote{Sara Lin & Monte Morin, Voters in Inglewood Turn Away Wal-Mart, L.A. TIMES, Apr. 7, 2004, at A1.} Unions, church groups, and community organizers rallied the community against the project, with unions providing the most significant opposition. In contrast, Wal-Mart recently gained city council approval in Chicago, where it plans to build a Superstore in a working class South Chicago neighborhood on the remnants of a former Ryerson Tull Steel fabricating plant.\footnote{Kinzer, supra note 429.} The aldermen representing that neighborhood are strong supporters of the project because it will bring needed jobs to an area racked by violence, drug crime, and poverty.

As with the chains, the battle over Wal-Mart is fought at the local level. For poor and minority communities like those in South Chicago, Wal-Mart’s promise of jobs and low-priced goods is often quite attractive. Underserved and underemployed, minority communities in post-industrial cities have long sought attention from the large retailers, who have ignored the inner-city market until recently. As prices come down, those who are least well off gain increased access to consumer goods. Moreover, for cash-starved local governments, Wal-Mart is, in the words of Roosevelt Dorn, the mayor of Inglewood (who lost his bid to gain a Wal-Mart for his town), “a no-brainer”: “We’re talking about a new police station, a new community and cultural center, a new park in District 4, upgrades for every park, and recreation area in Inglewood.”\footnote{John M. Broder, Stymied by Politicians, Wal-Mart Turns to Voters, N.Y. TIMES, Apr. 5, 2004, at A14.} Even in wealthier communities, the lure of Wal-Mart is strong. Localities in competition for sales- or
property-tax revenue cannot afford to lose a large generator of tax base to neighboring localities; the loss of amenities and the rise in local property taxes often results in accelerated diminutions in local economic health. Inter-municipal competition for tax and job bases explains why Wal-Mart often receives significant incentives in the form of infrastructure subsidies, property tax breaks, and other state and local subsidies to relocate in particular towns or states.

There are ongoing debates about whether any particular local community has made a reasonable cost-benefit decision to accept or reject a proposed Wal-Mart or other large retail development. As did the chain opponents before them, contemporary opponents of the big box stores argue that absentee ownership takes money out of the community, turns former owners into clerks, and replaces full-time jobs with benefits with part-time jobs that provide few benefits. When Wal-Mart enters a community, it often has devastating economic effects on the local retailers, small businesses, and other chains that operate in that community. Whether overall social welfare is advanced by

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448 It is notable that community discussions about Wal-Mart and other big box stores are mediated through the municipal land-use power. Though its overt aim is the amelioration of more mundane problems such as traffic congestion, parking, and the like, land-use law serves as a proxy for the larger problem of economic autonomy. But land-use law is an extraordinarily limited and blunt tool. Municipalities can block projects if they do not comply with existing land-use regulations, and a number of municipalities have passed anti-big box store laws that restrict the square footage of retail establishments. But while localities can employ zoning ordinances to control entrance into their jurisdiction, that strategy requires generating tax revenue from other sources. More importantly, land-use law provides localities with almost no control over the flow of private capital out of the jurisdiction. Chicago has little ability to contest Wal-Mart’s decision to leave the South Side – which it may eventually make – regardless of the economic consequences of that exit for the city. And the corporation’s ability to exit exerts a much more substantial effect on local economic circumstances than does the localities’ limited control over entrance.

449 See Ortega, In Sam We Trust, supra note 433, at 287; Store Wars: When Wal-Mart Comes to Town [need full book info]. Critics claim that the current structure of fragmented local government permits Wal-Mart and other corporate actors to play one community off against another – threatening to build a store or locate a plant just across the border if the corporation’s preferred jurisdiction does not agree to the corporation’s demands. Critics further claim that this competition produces a race to the bottom in environmental, fiscal, regulatory, and tax policy, and that the proposed benefits of a new Wal-Mart tend not to outweigh the costs in lost local businesses, better paying jobs, and community cohesion.

450 See Ortega, In Sam We Trust, supra note 433, at 287; Vance & Scott, Wal-Mart, supra note 433, at 138–39, 149–150. See also Store Wars: When Wal-Mart Comes to Town, supra note 449.
Wal-Mart’s pursuit of cost efficiency, however, is a more difficult question to answer, and depends in large part upon one’s metric.

What is clear is that the constitutional dimensions of national economic policy have effectively disappeared. Antitrust doctrine, for example, has little to say about the exercise of concentrated economic power if consumers are not being injured. The current dominant theory of competition policy views Wal-Mart’s retailing prowess as a predictable and beneficial consequence of competitive pressure toward an ideal of perfect competition. On this account, the rationalization of the distribution system has produced unalloyed benefits (in the form of lower prices) for the purchasing consumer.451 As Harry First has observed, “[w]hen a Wal-Mart comes in and people desert downtown because they like the selection and low prices, it’s hard for people in the antitrust community to say we should not let them do that.”452 To the extent that there is a national debate about the Wal-Martization of the economy, it is debate over macro-economic policies that will stem the losses of American jobs with decent wages. What is notable about this debate is its limitations: The attack on bigness that animated the anti-chain store movement is mostly absent, as is the movement’s grounding in a theory of economic citizenship and participatory democracy.

Indeed, the anti-chain store movement and its commitment to the local as a site of economic self-sufficiency look somewhat quaint today. There seems to be little real political energy for challenging the nationalization and globalization of markets, the incessant mobility of labor and capital. Economic localism is now a battle fought between nationalists and globalists, ambivalent protectionists and rabid free traders, with

451 See Bianco & Zellner, supra note 16, at 103–04; Lohr, supra note 429; Brinkley, supra note 15, at 62–64.
452 Quoted in Bianco & Zellner, supra note 16, at 104.
most mainstream political actors supporting some version of free trade.\textsuperscript{453} At the state-
and local-government level, the questions are much more domesticated: How can we
adjust the distributions of goods and services spatially? How do we maintain the delivery
of public services in the face of budget shortfalls and declining populations? What form
of regionalism can help ameliorate the dislocations caused by global capitalism?

Contrast these questions with those asked by the progressive decentralists.
Brandeis and other decentralists of the 1920s and 1930s advocated a national and
constitutional framework that privileged the political economy of smaller units. This
localist political economy did not merely seek to domesticate economic dislocations
through redistributivist, social welfarist economic policies. It was also concerned with
the totalitarian tendencies of large-scale economic and political units. On this account,
Wal-Mart represents not only an economic challenge, but a constitutional one as well.
This does not mean that one should reject Wal-Mart or oppose the Wal-Martization of the
economy. It does mean, however, that if one takes seriously the constitutional
dimensions of economic policy, one may understand social welfare in different terms.

Those who worry about the increasing hegemony of market forces over political
ones do not appear able to articulate their concerns within the current confines of
liberalism. The anti-chain store movement reminds us that a counter-rhetoric that
appealed to the values of citizenship and self-governance is available. For chain
opponents, A&P was a step in a historical progression towards wage-slavery,

\textsuperscript{453} All but the fringes of both major political parties consistently favor free trade. For instance, President
George W. Bush explained to an Iowa audience that “[t]he temptation is to say, Well, you know, we better
shut her down, we better have economic isolationism. That would be bad for Iowa. [Imports give
consumers] more choices, and when you have more choices as a consumer, you’re going to get better
quality at better price.” David E. Sanger, \textit{Bush Tells Iowa Crowd What He Learned From Sept. 11}, N.Y.
\textit{Times}, July 21, 2004, at A16. Some have described Democratic presidential hopeful John Kerry’s platform
as protectionist, but he too voted in favor of the North American Free Trade Agreement (NAFTA). \textit{See,
concentrated wealth, and oligopoly. For those who embraced the new retailing order, A&P was the harbinger of ever-increasing technological prowess, material prosperity, and economic efficiency. While Wal-Mart’s contribution to these two possible futures is speculative, its current economic impact is real. *Businessweek* recently reported that 13,000 supermarkets have closed since 1992, and that Wal-Mart is now the nation’s largest grocer, with a 19% market share.454

**CONCLUSION**

To those who opposed the chains in the 1920s and 1930s, the concentration of economic power in large corporate firms was foremost a threat to their economic livelihood. Populizers and politicians capitalized on local fears of economic colonization, which (though they turned out not to be entirely unfounded) served the purposes of particular economic constituencies. Nevertheless, the rhetoric of citizenship that chain store opponents deployed and their appeals to constitutional self-government were not entirely self-serving.

In the crisis of the 1930s, Americans still could conceive of economic concentration in constitutional terms: Arguments that the chains constituted a threat to democratic governance were taken seriously. Moreover, progressive decentralists were advocating a constitutional framework in which to pursue shared national values under conditions of empirical uncertainty. Those shared values—industrial democracy, economic independence, citizen participation—were national in scope, but their implementation as policy required the flexibility, attention to detail, and trial and error available only on a local scale. The task of constitutional government was to create an institutional setting in which democratic inventions toward common national goals could

454 Bianco & Zellner, *supra* note 16, ??.

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be tested. Federalism was not meant to ensure state or local “autonomy” as an end to itself, but rather to provide outlets for democratic experimentation in the service of these goals. And federalism was not separable from the economic circumstances that recommended it. It was not separable from the goal of deconcentrating economic wealth and thereby diffusing economic and political power in the service of an affirmative conception of civic public life.

This constitutional vision seemed viable, or at least arguable, into the late 1930s. Though the anti-chain store movement was motivated by the independent dealers’ economic self-interest, its localist political economy appealed to many Americans, who shared the independents’ ambivalence and anxiety about bigness. The chain stores represented the triumph of rationalized, scientific management; the chain was the very kind of organization that progressives believed would bring about gains in social welfare at the turn of the century. The chains, however, also reminded forward-looking reformers of the dislocations caused by specialization, rationalization, and large-scale enterprise, and of the impact on individual human agency and community welfare of an obsession with efficiency. As industry had done in the nineteenth and early part of the twentieth centuries, the chain stores were doing in the 1920s and 1930s. The chains embodied the fears of all those in the middle-class who were becoming parts of the whirring machine: the petit bourgeoisie who were struggling to find a place in the new commercial order.

In 1920, the new commercial and constitutional order had not yet fully taken hold. It was still possible to imagine and advocate local power as a means of regulating economic circumstances in pursuit of an ideal of local independence and economic citizenship. By World War II, however, the arguments against bigness in retailing had
become mostly moribund. Perhaps Americans were reconciled, in David Brinkley’s words, with “a world in which both the idea and reality of mass consumption were becoming central to American culture and the American economy.”455 Certainly, by the post-war period, the chain stores could declare victory, though perhaps not fully. The curse of bigness still shadows us today; it is reflected in popular anxiety over the pace and scale of economic change and in an often unarticulated yearning for local community, even as we continue to shop at the chains.

455 BRINKLEY, supra note 15, at 4.