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The Chain Store License Tax and the Fourteenth Amendment

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THE CHAIN STORE LICENSE TAX AND THE FOURTEENTH AMENDMENT

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In 1859, one George H. Hartford, conducting a hide and leather business in New York, added tea as a side line product of his store. This venture was so successful that in 1864 he organized the Great Atlantic & Pacific Tea Company. This marks the beginning of that vast net work of retailing outlets, now touching many, if not most of the basic necessities of life, which has become familiar as chain stores or chain store organizations.[1]

It is but natural that this radical change in the method of distribution of merchandise and in its control by a comparatively limited number, should have, over the course of the years, aroused antagonisms to the system and to a wide-spread and determined effort on the part of those most affected to prevent the further extension of this method of merchandising.[2] That the conflict of interests between the independent merchant and his allies, the wholesaler and the jobber (for these are most intimately affected by the chain development) on the one hand, and the chain store on the other, is assuming proportions, becomes evident when one notes the legislation introduced in the several states attempting to limit the operation of the chain store. The number, variety and language of the various bills introduced, offer some indication of the nature of the struggle being waged for the control of the retail outlets of the country; for in its final analysis, the legislation attempted and enacted but reflects a recognition of the struggle and the remedies proposed merely accentuate its existence.[3] And the pressure of these competing interests

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[1] HAYWARD AND WHITE, CHAIN STORE, 70 (1922). The extent to which this development has progressed and the importance which it has attained becomes obvious when an examination is made of some of the statistics of retailing available at this time. See *infra* note 32.

[2] See Castellini, *A Glimpse into the Future of the Produce Company,* address delivered at the Thirty-Sixth Annual Convention of the National League of Commission Merchants, Boston, Mass., 1927.

[3] Alabama House Bill No. 611, 1927—(the bill passed the House but was not reported out by the Senate Committee); Arkansas House Bill No. 383,

for recognition has resulted in a type of legislation designed to strengthen the economic position of the independent merchant by the imposition of burdens upon the chain store.

This legislation, aimed to reconcile the conflicting claims of the independent merchant and the chain has, generally speaking, taken two forms. One form provides for a license tax upon each unit in a chain, over a given number.[4] The other type of legislation simply limits the number of store units which may be operated under a unified or centralized control in any named territory.[5] It is needless to say that this legislation, threatened, anticipated and enacted, has been subjected to severe criticism from various quarters; quite naturally these laws have been attacked as impolitic and uneconomic.[6]

But what is more serious and important from our point of view, it was alleged, that these laws were invalid, as constituting unwarranted class legislation. It was alleged, therefore, under the Fourteenth Amendment, particularly the equal protection of laws, a state had no constitutional power to enact such laws.[7]

1927 (this Bill was not reported by the House Committee); Georgia amendment to House Bill No. 515, 1927 (passed by the Senate and approved by the Governor, August 25, 1927); Illinois Senate Bill No. 264, 1927 (defeated in the Committee); Iowa House Bill No. 169, 1927 (enacted by the House but defeated in the Senate Committee), Senate Bill No. 3551, 1927 (enacted by the Senate but not reported out by the House Committee); Kansas Senate Bill No. 21, 1927 (the Senate Committee refused to report it for action); Maryland House Bill No. 209, 1927 (the Committee refused to record it); House Bill No. 466, enacted as Chapter 544 Public Laws of 1927 (recently held unconstitutional by a lower court decision not reported); Michigan House Bill No. 244, 1927 (the legislation adjourned before action was taken); Mississippi House Bill No. 235 introduced in the special session of 1928 (text reprinted in 4 Chain Store Age, 57, December 28); North Carolina Public Laws 1927, Ch. 80, §162. Pennsylvania House Bill No. 817, 1927 (defeated in a vote before the house); Senate Bill No. 863, 1927 (killed in Committee); West Virginia House Bill No. 513, 1927 (not reported out by the Committee); Wisconsin joint resolution 56a, 1927 (resolution failed before the Committee); House Bill No. 584, 1927 (defeated in the Senate); House Bill No. 607, 1927 (passed by the legislature on June 28 and reported favorably by the Senate Finance Committee, but finally recalled and defeated there); Rhode Island, Senate Bill No. 25 (not presented to Senate for action) 1928; Kentucky, House Bill No. 596, 1928 (legislature adjourned without action).

[4] See *supra* note 3, Alabama, Arkansas, Georgia, Illinois, Iowa, Maryland, Michigan, Mississippi, North Carolina, Pennsylvania, West Virginia, Wisconsin, Rhode Island, Kentucky.

[5] See note 3 *supra*, Kansas and Maryland.

[6] NYSTROM, CHAIN STORES, 24 (Rev. Ed. April 1928); James L. Palmer, *Chain Stores*, 4 Chain Store Age 29, 30 (address—December, 1928).

[7] See 4 Chain Store Age 29 (December, 1928); Dunn, *The Grocery Trade Conference*, 4 Chain Store Age 36, 37 (November, 1928).

This constitutional question was presented in a case recently decided by the Supreme Court of North Carolina.[8] The Legislature of North Carolina had, by a statute enacted in 1927,[9] required that "any person, firm, corporation or association operating or maintaining within this state under the same general management, supervision or ownership, six or more stores, or mercantile establishments, shall pay a license tax of $50.00 for each such store, or mercantile establishment in the state for the privilege of operating or maintaining such stores, or mercantile establishments." The plaintiffs in the case last cited, a number of chain stores doing business in North Carolina, paid the license tax required by the statute, under protest, and then brought this action in the Superior Court of Wake County to recover the money so paid on the ground that the statute was invalid under Section 3, Article 5 of the constitution of North Carolina and under Section 1 of the Fourteenth Amendment of the Constitution of the United States. By consent, a trial of issues of fact was waived, the court heard the evidence and made findings of fact. The lower court found as facts, *inter alia,* that the stores operated by the plaintiffs did not increase fire hazards, did not endanger the health or morals of the communities in which they were established and did not require increased or additional police protection; substantially the lower court found that in practically every detail the plaintiffs were not in any different position than stores maintained and operated by other merchants doing a like or similar business who were not required to pay the license tax by the provisions of the statutes involved. Upon these facts the lower court held the statute unconstitutional on the ground that it was in violation of the constitutional provision with reference to uniformity of taxation found in the North Carolina constitution and upon the further ground that it violated the Fourteenth Amendment of the United States Constitution.

An appeal was taken from the judgment of the lower court and the Supreme Court affirmed the judgment upon the same two grounds, namely, that the statute violated the constitutional provisions of North Carolina with reference to the uniformity of taxation and that the statute provided for an unreasonable and arbitrary classifi-

[8] The Great Atlantic & Pacific Tea Company *et al* v. Doughton, 196 N. C. 145, 144 S. E. 701 (1928).
[9] Public Laws 1927, chapter 80, §162.

cation for tax purposes and was therefore void under the equal protection clause of the Fourteenth Amendment.

The interesting question presented by the case which forms the basis for this paper, is the effect of the equal protection clause of the Fourteenth Amendment upon statutes of this general type.[10] That clause does not lay down certain, definite and inflexible rules which, applied mechanically to legislation, will forthwith determine its validity. It affords simply a standard of constitutional conduct which serves as a guide to legislative discretion and effort. In the application of this standard the courts have acted upon principles which serve as methods by which regulatory legislation should be approached, rather than as yard sticks by which the validity of the law in question should be measured.[11]

It will thus be recalled that the courts have said that the equal protection clause does not require that all persons or businesses must be regulated alike. There may be a different legislative treatment prescribed for one form of commercial enterprise, that is not prescribed for another. What is required by the equal protection clause is that all persons similarly situated must be dealt with similarly. Where there is a real difference in the situation of persons they may be treated differently. There must be a substantial rational basis for a disparity of legislative treatment and this basis must have some relation to the purpose of the statute. (It being understood that the statute must be enacted to promote some recognized public purpose.)[12] The problem involved in the type of statute under discussion resolves itself to this then: Are these statutes enacted in

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[10] The question as to whether or not this statute enacts an unreasonable classification is, of course, involved in the objection that the statute violates the constitutional provision of North Carolina requiring uniformity of taxation. Though there may be some argument as to whether the doctrine of classification in the field of taxation is different from the doctrine as applied when dealing with the police power, for purposes of this paper, any such difference is immaterial.

The case itself, of course, presents several interesting questions in addition to the one we discuss, among them, the objection which might be raised as to the standard of six stores adopted by the statute and the objection based on the uncertainty of the expression "under the same general management, supervision or ownership." Whatever expert testimony there was available upon the trial was to the effect that a chain was normally defined as consisting of five or more store units. We propose, however, to discuss the broader question involved in this case.

[11] See generally, Mr. Justice Sutherland in Louisville Gas & Electric Company v. Coleman, 48 S. Ct. 423 (1928).

[12] See case cited in note 11 and cases cited therein. See also Quaker City Cab Company v. Pennsylvania, 48 S. Ct. 553, 72 L. Ed. 607 (1928).

the interest of a well recognized public purpose and is there any substantial rational difference between the chain store method of distribution and other methods of retail distribution, having some relation to the public purpose involved, which justifies a difference in legislative treatment between the chain store and other methods of retail merchandising?

There are one or two analogies in the decided cases which would seem to be particularly apposite. Indeed a problem very similar to the one presented by these statutes was involved in the so-called Anti-department Store Laws.[13] In the cases involving the validity of such laws[14] the courts have held that there was no reasonable basis for distinguishing between the department store as a method of retailing and other forms of retailing which would justify singling out the department store for regulation and licensing. Thus in *State v. Ashbrook*,[15] the court held the statute known as the "Anti-department Store Act" of Missouri[16] unconstitutional. This statute (a) divided all merchandise sold at retail into 73 classes and then rearranged these classes into 28 departments, (b) made it unlawful to sell merchandise in more than one group created without obtaining a license, to be issued by a board upon application and the payment of an additional fee and (c) provided that the statute apply only to cities having a population exceeding 50,000 and exempting all establishments except warehouses, etc., which did not employ more than 15 people. The power of license was delegated to a commissioner and board.

The court held the statute unconstitutional upon several grounds, among them, that there was an unconstitutional delegation of legislative power to a commissioner and that the tax provisions of the state constitution were violated; but the court held the statute invalid, independent of these other objections on the broad constitutional ground that, as unreasonable class legislation, it was violative of due process and equal protection of the laws under the state constitution. The court held that the statute could not be regarded as a

[13] See 48 L. R. A. 261 (1900).

[14] State *ex rel.* Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627 (1900); Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261 (1899). The latter case involved the validity of an anti-department store ordinance of the city of Chicago; the question raised by the case is the same as that raised by the statutes in the Ashbrook case.

[15] See *supra* note 14.

[16] Missouri Acts, 1899, p. 72.

police measure since it nowhere attempted to protect any public interest; the court said it could conjecture no suggestion as to why the selling of various classes of merchandise in one store under one unit of management was a thing of danger to the public welfare, any more than if each class were sold in different stores.[17] The conclusion of the court is that such statutes are invalid because not enacted for a proper legislative purpose, and because there is no reasonable basis for a difference in treatment between department stores and individual retailers.[18]

Quite recently, as a precursor to the avowed Anti-Chain Store legislation, the city of Danville, Kentucky, enacted a license ordinance imposing a higher license tax on cash and carry grocery stores than on other grocery stores. The Supreme Court of Kentucky held the statute unconstitutional as denying equal protection of the law.[19] In that case the proof showed that the business of the cash and carry grocery stores was in all respects the same as the business in other grocery stores except that no credit was given and no deliveries were made. The court held that this difference in the detail of conducting the grocery business afforded no reasonable ground for distinguishing between stores for taxation purposes.

These analogies would seem to indicate that there is no substantial basis to be found for distinguishing between the position of the chain store and the independent merchant, justifying a statute which attempts to regulate one and not the other. If the Supreme Court of the United States has refused to recognize any substantial distinction for license tax purposes between the corporate method of doing business and other forms of commercial enterprise,[20] there is

[17] "As said above, no reason has been given or suggested, and, to our minds, none can be conceived why the arbitrary selection of persons and corporations having, or exposing for sale, in the same store or building, under a unit of management, or superintendancy, at retail in the cities of the state having a population of 50,000 inhabitants, any articles of goods, wares or merchandise set out and named in section 1 of the Act in question of more than one of the several classifications or groups therein designated, when 15 or more persons are employed, was named or made, for imposition of the license fee provided in the Act, from which all other persons and merchants of the state are exempted. Such classification is wholly without reason or necessity. It is so arbitrary and unreasonable as to defy suggestion to the contrary." Per Robinson J. in State *ex rel.* Wyatt v. Ashbrook, *supra* 55 S. W. 627, 632, 48 L. R. A. at p. 272.

[18] See also City of Chicago v. Netcher *supra.*

[19] City of Danville v. Quaker-Maid, Inc., 211 Ky. 677, 278 S. W. 98 (1926).

[20] See Quaker City Cab Company v. Pennsylvania, *supra*; but compare Crescent Oil Company v. Miss., 257 U. S. 129, 42 S. Ct. 42 (1921) and Flint v. Stone Tracey Co., 220 U. S. 107, 31 S. Ct. 342 (1911).

little reason for believing that any difference between chain-store merchandising and other forms of retailing would be recognized.

And yet it is submitted that there may be an element in the economic situation presented by the chain-store development which may constitutionally justify the imposition of restrictions upon chain-store operation, not imposed upon the independent merchant.

Let us consider for a moment, openly and avowedly, the implications of this so-called anti-chain store legislation. Now it is arguable that these statutes are enacted to prevent monopolies, unfair competition and a myriad of other business sins. The position that this legislation tends to curb the danger of monopoly was taken by the Attorney General of North Carolina in the *Great Atlantic & Pacific Company et al v. Doughton, supra,* and was there presented in a learned and forceful argument. And it must be conceded, if the language and the decisions of the Supreme Court of the United States in recent years are to be given more than lip service,[21] that

[21] "If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of the possible abuses and it may be that the forbidden act does not differ in kind from those that are allowed." Per Holmes J. in Central Lumber Company v. South Dakota, 226 U. S. 157, 160 (1912); this case involved the validity of the statute of the state of South Dakota, which prohibits anyone from selling a commodity in one section of the state at a lower rate than in another section of the state, for the purpose of destroying the competition of any regular established dealer. "We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired." *Ibid* at 161.

By a similar process of reasoning applied to the North Carolina case, the language can be paraphrased thus "we must assume that the legislature of North Carolina considered that chain stores (or persons, etc., operating six or more retail stores under the same management, etc.) made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired."

In Crescent Oil Company v. Miss., *supra,* the court upheld the constitutionality of a Mississippi law prohibiting corporations from owning or operating cotton gins when such corporation is interested in the manufacture of cotton seed oil or cotton seed meal. The corporations argued that this statute provided unreasonable discrimination between corporations and individuals engaged in same business and that there was no essential difference in the business of operating oil mills and gins by individuals and the same business carried on by corporations. Without proof of it in the record, the case was argued upon the assumption that the statute was enacted in aid of the Anti-Trust laws of the state, under a belief on the part of the legislature that it was the practice of corporations operating oil mills and cotton gins to depress the price of ginning, regardless of cost, until local competition was suppressed and then to charge excessive prices for ginning. At page 137 Mr. Justice Clarke, speaking for the court, says " * * * but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent

this position should have been sufficient to sustain the constitutionality of the act. The language of the decisions cited in the note would indicate that if the legislature of North Carolina believed that chain stores had greater opportunity of indulging in practices which tended towards monopoly, such organizations could then be regulated as a class.[22] The truth is, however, that while these statutes may be enacted for the purpose of checking monopolistic tendencies, they are really enacted for the purpose of discouraging the continued development of the chain in order to protect the independent merchant;[23] and it would seem to us that if this kind of legislation be constitutionally justifiable, it should be justified, if at all, upon its real basis, i.e., the protection of the independent merchant as against the chain store.

It must be apparent at once that if this is the actual purpose of such laws the legislatures in passing them must be acting upon the assumption of two basic facts, (1) that the chain is eliminating and will ultimately eliminate the independent merchant as a class and, (2) that such a class is a necessary, desirable and vital factor in any community and therefore requires preservation.

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a practice conceived to be promotive of monopoly with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the 14th Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed."

[22] The same argument was made in Keystone Grocery & Tea Co. v. Huster (Circuit Court of Allegeny County, Maryland, April 21, 1928, not officially reported). This case involved the constitutionality of chapter 554 Acts of 1927 of the general assembly of Maryland, limiting the number of units which a chain might operate in Allegeny County to five and imposing a special chain store license tax of $500.00 per year. Here also this argument proved unavailing.

[23] See Milwaukee (Wis.) *Sentinel*, December 16, 1928, under title "Chain Store Tax Proposed by Senator." "A taxation law to protect neighborhood merchants from chain stores similar to the tariff wall erected by the federal government to protect domestic industry from foreign competition will be advocated at the coming session of the legislature by Senator Gettelman, Fifth District, he announced * * *. Some means must be found of equalizing the position of the individual merchants and the centrally operated chain stores which are threatening the neighborhood stores with extinction." See preamble joint resolution No. 56a, special session of the Wisconsin legislature 1927.

Illustrations (of the purpose of such statutes) can be multiplied from the preambles of various bills of this nature intoduced and from statements of various legislators who have introduced them. The language quoted simply puts the purpose boldly.

Our inquiry then must be whether or not the existence of these factual premises afford a constitutional justification for the enactment of the legislation under discussion and whether or not a legislative determination that these facts exist is conclusive upon the courts.[24] More concretely our inquiry must be whether the preservation of the independent merchant, as a class or a group of the state, is a proper public purpose in the interests of which the state may legislate, and whether the legislative determination that the chain store development presents a real threat to the existence of this class, so that the state may legislate to prevent its extinction, is binding upon the courts.

It is elementary that the Fourteenth Amendment does not prohibit the state, in the exercise of its police power, from regulating business to safeguard or promote the public health, safety, morals and general welfare; these are well recognized social needs (public purposes in the terminology of the cases). While the power to regulate in the interests of the general welfare is incapable of precise definition, it may safely be asserted that it includes power to legislate to promote the economic welfare of the community.[25] The power to regulate business to secure the economic welfare of the state, is simply the power to legislate to preserve the general security of the state, in its economic aspect.

It cannot reasonably be disputed that the maintenance of the continued existence of the state is a proper field for state action. Indeed, the power to regulate to safeguard the general security is clearly a phase of the power to maintain the existence of the state. We may go one step further and assert that it is a proper function of the state to maintain its continued existence, as a well-balanced and well-organized economic and political community.[26] It follows then that if the state regards a class of its community as an essential

[24] See FREUND, STANDARDS OF AMERICAN LEGISLATION (1917) 84 *et seq.*, particularly pp. 95-98.

[25] The decision of the Supreme Court in Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186 (1911) is a striking illustration; so also is Rast v. Van Deman & Lewis, 240 U. S. 342, 36 S. Ct. 370 (1915).

See Hughes J. in Chicago B. & Q. R. R. Co. v. McQuire, 219 U. S. 549, 568, 31 S. Ct. 259 (1910).

Many of the police power enactments are sustained on the theory that they promote the public health. The connection with the public health is very often illusory, however; many of these statutes are truly based on the economic needs of the community. See FREUND, *supra*, 103-104.

[26] This would seem to follow from the power to legislate to preserve economic welfare and security.

and vital factor to the maintenance of its economic security, it would then be regulating in the interests of a legitimate public purpose when it legislates to prevent the extinction of this class. To particularize, it follows that if the state regards the existence of the merchant class as essential to the maintenance of the economic security of the state, it is within its power when it acts to prevent the disappearance of this group.[27]

There are many who take the position that the chain store development will not wipe out the independent merchant class, but that it will drive only the inefficient from the field of competition.[28] There are others, however, who assert just as strongly that the chain store development will inevitably result in the elimination of the independent merchant as a class.[29]

There are those who will maintain that even though the chain store does eliminate the independent merchant, there is nothing so valuable to a community about the merchant as a class that he must needs be preserved.[30] On the other hand, some there are who urge

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[27] In Central States Lumber Company v. South Dakota, *supra,* it might well have been argued in support of the validity of the statute involved therein that a destruction of competition, and consequent economic evils in one portion of the state, might react upon other portions of the state, and therefore the statute was aimed to prevent economic disaster throughout the state generally. So here it might be argued that economic disaster to a group in the community might react upon other groups similarly, and therefore these statutes are enacted to prevent undesirable economic consequences to the entire state.

[28] *The Chain Store and the Public,* Godfrey M. Lebhar, Secretary, The National Chain Store Association, 4 Chain Store Age, 41, 42 (December, 1928); *There is No Monopoly in Selling,* Charles Walgreen, President, Walgreen Drug Company, 16 Nation's Business, 25 (October, 1928); *The Storekeepers' Chance,* Merle Thorpe, Editor the Nation's Business, Collier's, December 8, 1928 (citing Thomas N. Carver, Professor of Political Economy at Harvard and Frank Cunningham, President of Butler Bros. to the same effect); *Why Chain Stores Command Public Favor,* Hubert T. Parsons, President F. W. Woolworth Company, 4 Chain Store Age 21, 131 (January, 1928); *Chain Stores,* James L. Palmer, Professor of Marketing, School of Commerce, University of Chicago, 4 Chain Store Age 29 (December, 1928); NYSTROM, CHAIN STORES, 12 (Rev. Ed., April, 1928).

[29] *Farewell to the Shopkeeper,* George Soule, 54 New Republic 210 (April, 1928); *Tomorrow's Retailing—Will the Chain Store do it all?* J. T. A. Ely, 52 Magazine of Business 552 (November, 1928); William Whittam, 52 Dun's International Review 38 (1928).

[30] See Godfrey M. Lebhar, *The Chain Store and the Public, supra;* "the truth is, unfortunate as it may be, that the average independent merchant is not virile, not influential, not powerful, either socially or economically, and I will quote you official facts and figures to prove it." 4 Chain Store Age, 41 at 42 (December, 1928); Hubert T. Parsons, *Why Chain Stores Command Public Favor,* 4 Chain Store Age 131 (January, 1928). "But, assuming for the sake of argument that the development of the chain store method of retailing might ultimately wipe out the independent retailer entirely, who shall

that the merchant class has always been the sustaining factor of the progress and development of any community; that the ownership of a business carries with it the responsibility necessary for community consciousness so desirable in every political entity. They argue that a community without such a class, is lacking one of the essentials of a well-organized and healthy economic entity; the implication of this argument is that the elimination of such a group will lead to a "nation of clerks" which they deem uneconomic and undesirable.[31] The substance of the argument is that the merchant class is worth preserving for its social value.

An examination of opinions of students of the problem will disclose that there is a respectable difference of opinion as to whether or not the chain will eliminate the merchant as a factor in the retailing field. Such data as there is on the subject certainly indicates that the chains have been making tremendous inroads.[32] When it is con-

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say that would be an unmixed calamity.* * * By far the greater number of successful men in every line of industry and commerce are but 'employees' of the companies with which they are connected.* * *"

[31] "But the psychic objections may prove more obstinate. Another great class of independent persons engaged in private adventure will have become dependent employees, routinized and with no opportunity to advance except by appointment from higher-ups. We shall have socialized machinery, as we now have in many forms of production, without social control" (at p. 212)—George Soule, 54 New Republic, 210 (April, 1928).

"Taken as a class, the independent merchant is a virile, influential and powerful social group." From an article by Sam B. Moffett, President Moffett Grocery Company, Flint, Michigan, in the Christian Science Monitor, quoted in Lebhar, *supra,* at 42.

"The development and further exploitation of chain stores is apparently on the increase. They are both beneficial and menacing. Beneficial to the public due to giving better values and fresher merchandise than offered by the small dealer. Menacing because they put the small dealer out of business, who is then forced to become an employee instead of an employer." Ludwig Stein, President of Kuppenheimer Company, quoted by Merle Thorpe, *supra,* in Collier's Weekly for December 8, 1928, at p. 8.

"Let us determine whether it is better to have business management and responsibility in the hands of the many or in the grasp of the few; whether the greatest good for the greatest number is humanly possible where the powerful minority gains by its exploitation of the majority; whether economic autocracy is any less repugnant than political despotism; or whether the perfection of the system is preferable to the happiness of humanity." See address by Joseph J. Castellini, *supra* note 2.

This argument is clearly stated by one of its strongest opponents. "It is claimed, for one thing, that the replacement of the independent stores by the chain store will hurt the nation because 'it is desirable in a healthy society that a substantial percentage of the people should earn more than enough to cover the mere necessities of life,' and the preservation of the independent merchant is essential to maintain that condition." Lebhar, *supra,* at 42.

[32] NYSTROM, CHAIN STORES, *supra* at page 4 presents some figures which are indicative. He states that in 1923 he estimated that six per cent of the total retail trade of the country was done by chain stores; in 1926 8%; and at the

sidered that the chain store competition is superimposed upon the already existing competition of the department store, the mail order house and the house-to-house canvasser, the disappearance of the merchant becomes more than a mere possibility. While it is true that the evidence is not conclusive, the difference of opinion of recognized authorities on the question, and such data as there is available clearly indicates that the legislative assumption that the chain is displacing the merchant is not without a rational basis. A similar consideration of the assumption that the merchant class is an essential to a continued commonweal will at once disclose that such an opinion has some basis in fact and in reason.

It is submitted, that so long as these beliefs and opinions are not unreasonable or unfounded in fact, a legislature is not transgressing the constitutional commandments when it enacts legislation founded on such opinions.

The legislatures in enacting anti-chain store statutes were no doubt aware of these conflicting economic theories as to the effect of the chain store upon the merchant class and the desirability of the

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end of 1927 12%; in the meantime, i.e. during 1923-1927, the total retail trade of the country has increased from 15 to 20% of the 1923 total. It is evident that the chain store sales have increased 50% during the four year period, while total retail sales have increased but 15% to 20%.

George Soule, in the article in the New Republic, cited above, states that during the same period, chain sales have increased 50%; while the retail sales total increased 10% to 12%.

Nystrom states that chain stores do over 20% of the grocery business of the country; 20% of the drug business; 50% of the notion and novelty business; 75% of the men's shoe business.

A trial survey of retail business made by the Bureau of Census, Department of Commerce, in several large cities (see Soule and Nystrom, *supra*) indicates that the chains did between one-third and one-half of the retail business in these cities.

A pamphlet entitled "Department Leasing in Retail Stores," published by the Department of Commerce in 1925 (at pages 4-7), reports from a survey that merchandise departments in not less than 30% of the department stores of the country are sublet to outside concerns, usually to chain organizations known as "syndicates."

J. T. A. Ely, after a three months' extensive survey of the field, reports his findings in the article entitled "Tomorrow's Retailing—Will the Chain Store Do It All?" *supra.* He states that in 229 cities of more than 25,000 population, there are 130,000 grocery and delicatessen outlets; 20% of these outlets are chain branches; and these do over 30% of the total business. He states that in such municipalities as Cincinnati, the Boroughs of Manhattan, Bronx and Plainfield, New Jersey, the independent merchant has become a negligible factor.

For a graphic description of the displacement of the independent merchant by the chain in several communities see Sales Management, 13:129 (July 23, 1927), 14 *ibid* 134 (January 21, 1928).

continued existence of such a class.[33] As the pressure of these conflicting theories for legal recognition becomes more insistent, legislatures are compelled of necessity to adopt one, to the exclusion of the other. No doubt the picture of the previous experience of society with a bi-partite organization of the classes (the feudal system of the lord and serf and refinements of such a status) did not appeal to the legislatures as desirable, and they legislated to prevent its introduction; they adopted the economic theory which they deemed more conducive to the public welfare. The feeling aroused by the sight of the rapid expropriation of the field of merchandising by the chain store is of the same type, psychologically, as the fear of the growing power of the corporation and the consequent discouragement of individual initiative, so common fifty or seventy-five years ago, resulting in legislation designed to discourage the corporate form of enterprise.[34]

Now courts have repeatedly professed their inability to determine the truth[35] or the wisdom of the various economic and social

[33] "We must assume that when the statute in question was passed the legislature was aware of these opposing theories, and was compelled of necessity to choose between them." Harlan J. in Jacobson v. Mass., 197 U. S. 11, 30 (1904).

[34] In Quaker City Cab Company v. Pa., *supra,* Mr. Justice Brandeis, in discussing the practice of imposing heavier tax burdens upon corporations than upon other forms of enterprise, in his dissenting opinion, says:

"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 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 now 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." At 610.

If the words "Chain Store" were inserted in the place of the word "corporation" in the above quotation, the basis for the anti-chain store legislation could not be expressed more clearly.

[35] Indeed, the truth of the economic or social assumptions of legislation would seem to be immaterial so long as there is some basis of reason in them. "The possibility that the belief may be wrong and that science may yet show it to be wrong is not conclusive * * * In a free country where government is by the people through their chosen representative, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not." Jacobson v. Mass, *supra* at 35.

factors with which legislatures must deal, and have disclaimed either the desire or the power to review legislative determination based upon such data.[36] Judges have not hesitated to announce that they were unconcerned with the wisdom or policy, or the economics of legislation. It has become well settled in theory, at least, that unless the court can see that the legislature is palpably and unmistakably wrong and arbitrary in its determination, its declaration will be sustained.

In the light of the foregoing discussion it will readily be seen that there are sufficient materials in the language and the decisions of the Supreme Court of the United States to sustain the constitutionality of a chain store license tax statute.[37] Fundamentally, their purpose is the discouragement of the chain store method of doing business in order to attain the benefits, either real or simply conceived, of individual initiative and enterprise. The thesis of this paper has been that if the state desired to discourage the chain store type of business activity, due process and equal protection of the law does not prevent it.[38]

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[36] "Whether the enactment is wise or unwise, whether it is based on sound economics, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the legislature. And the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." Hughes, J., in C. B. & Q. R. R. Co. v. McQuire, 219 U. S. 549, 569 (1910).

"The court may think such views unsound but, obviously, the requirement that a classification must be reasonable does not imply that the policy embodied in the classification made by the legislature of a state, shall seem to this court a wise one." Brandeis, J., dissenting in Quaker City Cab Company v. Pa., *supra* at 613.

[37] "It is a matter of common knowledge that the 'chain store' system is a very large and important factor in the retailing of merchandise. It is by no means uncommon for a single great merchant, or a corporation to establish branch stores in nearly every city and town of considerable size throughout the land, and enter into very active competition with other merchants in their several lines; but, so far as we are aware, no court has undertaken to hold it competent for the municipality to put them under the bar or handicap them of a license not required by merchants generally." State v. Cater, 184, Iowa 667, 169 N. W. 43, 46 (1918).

The disastrous effect of the chain store development upon the independent merchant's store was not as apparent in 1918 as it is today, since the intensive expansion of the chain store has taken place since 1920. The considerations urged in this paper could not be demonstrated at the date of the case from which this quotation is taken as well as they could be today.

[38] Mr. Justice Holmes, in his dissent in Quaker City Cab Company v. Pa., *supra*, expresses this thought as does Mr. Justice Brandeis in his dissent.

"Furthermore, if the state desires to discourage this form of activity in corporate form and expressed its desire by a special tax, I think that there is nothing in the 14th Amendment to prevent it," at 609.

If the method of approach which the courts profess to employ in the consideration of regulatory legislation[39] be accorded its deserving effect, and if the well recognized presumption of the validity of legislation be conceded its proper position,[40] it is difficult to see why the type of statute under consideration offends the Fourteenth Amendment. We may agree, and we do not hesitate to do so, that such legislation is impolitic and ineffective in so far as it seeks to accomplish desirable economic results. We feel very clearly that this revolution in the process of distribution, known as the chain store, will have beneficial economic consequences akin to the revolution in the field of production, consequent upon the displacement of manual labor by the introduction of the machine process. It is entirely obvious to us that legislation designed to hamper the process of economic evolution would in the long run prove futile and unavailing. The Fourteenth Amendment, as we conceive it, however, constitutes a control, not on the legislative privilege of impolicy, but on the legislative right to be irrational.

[39] Though as Mr. Freund puts it, "the practice has not always been according to the profession." FREUND, STANDARDS OF AMERICAN LEGISLATION, 96 (1917).

[40] "Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt." Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496 (1878); Adkins v. Children's Hospital, 261 U. S., 525, 544, 67 L. Ed. 785, 790, 43 S. Ct. 394 (1922).