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On a sunny Saturday in September 1946, Judge Walter C. Lindley issued one of the strangest antitrust rulings in U.S. history. Before a crowded courtroom in the post office in Danville, Illinois, Lindley declared that George L. Hartford, 81; John A. Hartford, 74; their company, the Great Atlantic & Pacific Tea Company; and other company executives had conspired to violate the Sherman Antitrust Act. The fact that the secretive Hartford brothers, two of the wealthiest men in America, were deemed criminals was startling, but their crime was truly remarkable. Rather than being guilty of keeping prices artificially high, the Hartfords were found to have done the opposite. They and their company, Lindley declared, had acted illegally in restraint of trade by using A&P's size and market power to keep prices artificially low.

Lindley, a Republican named to the federal bench in 1921 by President Warren G. Harding, the great friend of business, acknowledged that "To buy, sell and distribute…one and three-quarter billions dollars worth of food annually, at a profit of one and one-half cents on each dollar, is an achievement one may well be proud of." Yet this achievement, he decided, ran afoul of the Sherman Antitrust Act by making it hard for smaller firms to compete with A&P. "The Sherman Act," he ruled, "was intended to secure equality of opportunity." Equality of opportunity could not be secured if big firms were allowed to drive small ones out of business.

U.S. v New York Great Atlantic & Pacific[2] was the climax of decades of effort to cripple chain stores in order to protect mom-and-pop retailers and the companies that supplied them. The principal target was A&P, which was by far the largest retailer in the world. The struggle had less to do with the economics of the grocery trade than with competing visions of society, one favoring the rationalism of cold corporate efficiency as a way to increase wealth and raise living standards, the other harking back to a society of autonomous farmers, craftsmen, and merchants in which personal independence was the source of opportunity and prosperity.

The traditional vision had salience, because selling food was an activity of enormous economic importance up through the Second World War. The first nationwide survey, in 1929, found 585,980 food stores—one for every 51 families. These mom-and-pop stores obtained their supplies from 13,618 wholesale distributors of groceries in 1929, or one for every 43 food retailers. This wholesale network distributed the products of nearly 60,000 canneries, mills, slaughterhouses, and factories, employing an average of 15 workers apiece. Every town of any consequence had its grocers, its food brokers and wholesalers, its bottling plants and flour mills to provide a tax base, jobs, and a cadre of civic leaders. On the eve of the Great Depression, food retailers, wholesalers, and processors together engaged one out of every 18 non-farm workers in

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[2] 67 F. Supp. 626 (E.D. Ill., September 21, 1946).

the entire country—more than apparel and textile factories, iron and steel plants, coal mines, or even railroads.

This complex distribution system was extremely inefficient. A shipment of peaches might pass through a dozen different hands from the time the fruit was picked in Georgia until it reached a grocery story in Wisconsin. Each of the many brokers along the way extracted a commission for his services, and the cost of those commissions was eventually paid by American shoppers. As a result, food was hugely expensive, relative to wages. The average working-class family in the 1920s devoted one-third of its budget to groceries, more than it spent on housing. By integrating vertically, internalizing distribution, and leveraging its size to demand price cuts from suppliers, A&P could price its goods an average of 10 to 15 percent below those at the typical independent store. So the battle was joined between those who thought producers and distributors were entitled to a profit and those for whom the consumer interest counted most.

The first stirrings of conflict over chain retailing arose just after the turn of the twentieth century, as chain grocery and cigar stores began to take root in Eastern cities. In 1903, the National Association of Retail Grocers, which had around 15,000 members, considered whether the law should prohibit manufacturers from giving large retailers the same volume discounts received by wholesalers. Two years later, a group of wholesalers threatened to boycott manufacturers that sold directly to large retailers without using wholesale distributors. The economic thinking behind such efforts was captured by *American Grocer*, a trade journal, which asserted, "It is the bounden duty of the manufacturers to protect the retailers' profits," as if the interests of manufacturers and retailers were one and the same.

Resale price maintenance quickly emerged as the most practical means of protecting small retailers and the wholesalers that served them. If manufacturers could set the prices at which wholesalers could sell their products to retailers and retailers could sell them to customers, then large retailers would have no advantage over small ones. In 1909, the Kellogg Toasted Corn Flake Company established just such a policy. Kellogg declared that it would sell its cereal to wholesalers for $2.50 per case of thirty-six boxes, less a 2 percent cash discount. Wholesalers had to agree to charge retailers $2.80 per case, and retailers were obligated to sell the cornflakes at ten cents per box, or $3.60 per case. "The one-case price is exactly the same as the 1,000-case price," a Kellogg official declared. Kellogg's policies, though, meant that consumers were required to pay a 47 percent mark-up over the price at the factory gate, simply to cover distributors' costs and profits. A series of Supreme Court rulings upended such policies. In *Dr. Miles Medical Co.*, a 1911 case, the court finally held explicitly that resale price maintenance violated antitrust law.[3]

It was in 1912 that chain retailing first became a significant political issue in the United States. Woodrow Wilson, the victor in that year's presidential election, was a longtime critic of big business, and he campaigned on the theme of reining in corporate power. Price discrimination, he contended, amounted to unfair competition; if manufacturers would charge identical prices to all buyers, Wilson said, "then you have free America, and I for my part am willing to stop there and see who has the best brains." Backing the new president's stance was one of the nation's best-known consumer advocates, Louis Brandeis. Then a Boston attorney, Brandeis told Congress, "The consumer's gain from price-cutting is only sporadic and

[3] *Dr. Miles Medical Co. v. John D. Park and Sons*, 220 U.S. 373 (April 3, 1911).

temporary." If manufacturers were forced to sell their products at a discount, Brandeis said, then they would have to lower the quality, leaving consumers unable to obtain high-quality goods.

After more than a year of debate, Congress enacted the Clayton Antitrust Act in 1914, outlawing resale price maintenance if the effect "may be to substantially lessen competition or tend to create a monopoly." A&P, already the nation's largest grocery chain, soon tested the new law. The Cream of Wheat Company, purveyor of a popular breakfast cereal, agreed to supply A&P directly, without wholesalers and their costly commissions, but insisted that A&P retail the cereal for at least 14 cents a package so as not to underprice Cream of Wheat Company's smaller customers. When A&P put Cream of Wheat cereal on sale for 12 cents, the manufacturer cut off supplies. A&P filed a civil antitrust suit, claiming that Cream of Wheat was a monopoly, but a federal court found that it was A&P that was acting like a monopolist, using low prices to drive other grocers out of business so it could raise prices later.[4] In the eyes of the law, low-price retailing had become a highly suspect business.

The anti-chain fervor receded during World War I, as reducing waste in food distribution became a national priority. The two brothers who controlled A&P, George L. and John A. Hartford, had introduced a low-price format called the Economy Store in 1912; the concept was wildly successful during the war, and by 1920 A&P had 4,588 stores and was the largest retailer in the world. But in the 1920s, as many small towns and rural areas struggled despite the country's general prosperity, the anti-chain campaign reemerged stronger than ever. In 1922, Missouri wholesalers and retailers formed the Association Opposed to Branch Stores and urged the state legislature to tax chain stores out of existence.

A&P's explosive growth only fueled the fire. Even as they opened new stores at a rapid rate, the Hartfords embraced vertical integration, buying bakeries, salmon canneries, condensed milk plants, and the like, and learning to organize orders from stores to keep the factories running at full capacity. By 1929, when it became the first retailer ever to sell $1 billion of merchandise in a single year, A&P owned nearly 16,000 grocery stores, 70 factories, and more than 100 warehouses. It was the country's largest coffee importer, the largest butter buyer, and the second-largest baker. Its sales were more than twice those of any other retailer. Its growth was based entirely on volume. At a time when most retailers worried about the profit margin on each item they sold, the Hartfords focused on their long-term return on investment. They understood that if their company kept its costs down and its prices low, more shoppers would come through its doors, producing more profit than if it kept prices high.

In 1927, four states—Georgia, Maryland, North Carolina, and South Carolina—enacted taxes on chain stores. These early taxes were invalidated in the courts, but in 1931 the Supreme Court, including Justice Louis Brandeis, upheld a specific form of tax, based on the number of stores owned by a single company.[5] The court determined that chain stores were a different type of business from independently owned stores and could be taxed differently. The ruling was an open invitation to tax the chains, and the states responded eagerly. By the mid-1930s, 29 of the 48 states had taxes on chain stores, some of them so high as to capture half of the profits of an average chain grocery store.

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[4] *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 F. 569.

[5] *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527 (May 18, 1931); *Great Atlantic & Pacific Tea Co. v. Maxwell*, 284 U.S. 575 (October 26, 1931).

More anti-chain measures followed. Under the New Deal's National Industrial Recovery Act of 1933, industry groups were convened to write codes to govern hundreds of sectors. These privately written codes had the force of federal law. The food and grocery code mandated a minimum 6 percent mark-up over wholesale price on each individual item in a grocery store, so stores with low operating costs could not pass the savings through to customers. Such common practices as two-for-the-price-of-one sales and grand opening sales at new stores were suddenly illegal. Although the NIRA was declared unconstitutional in 1935, many states enacted laws in a similar vein. Prices that were legal in one state might be unlawfully low in an adjoining state. Some states required chains to have uniform prices in all stores within the state: A&P was threatened with prosecution for selling three packets of coffee for 49 cents in Kansas City, Kansas but for 53 cents in Topeka, Kansas.

An even more severe blow against the grocery chains came in 1936, when Congress amended antitrust law with the Robinson-Patman Act. That law was intended to force manufacturers to sell to mom-and-pop stores at the same prices as large chains; volume discounts were allowable only if a manufacturer could demonstrate, in each case, that the unit cost of filling the large order was lower than the cost of filling the small order. A manufacturer offering advertising allowances to retailers had to make them available to all on a proportionate basis; if a chain grocer ordering 10,000 cases received a $1,000 allowance, a store ordering 10 cases was entitled to $1.

Members of Congress, as well as President Franklin Roosevelt, were quite clear that such provisions would raise the cost of groceries for the average family. They approved them nonetheless. As Hatton Sumners, the chairman of the House Judiciary Committee, explained in a private letter, the law was needed to maintain social peace after seven years of depression. If Congress failed to help small businessmen, demagogues might demand that the government take over big companies. "I believe I can read with some degree of accuracy the signs of the times. These things give to me the deepest concern," Sumners wrote.

Economists have spent decades debating the economic effects of the Robinson-Patman Act. The financial effects, however, are beyond dispute. The average publicly traded grocery-store company lost 58 percent of its stock market value between June 11, 1935, when the bill was introduced in the House of Representatives, and December 1937, even as the Dow Jones Industrial Average rose 8 percent. Chain supermarkets were forced to raise prices, and as their price advantage declined, their share of food sales plummeted.

Against this background, Thurman Arnold, Roosevelt's antitrust chief, launched a nationwide investigation of restraint of trade in the food sector in 1940. It was this investigation that resulted in the criminal antitrust convictions of George L. and John Hartford, their company, and many of their executives in 1946.

The allegations that led to those convictions make strange reading today, for they contain almost nothing by way of economic analysis. When a government lawyer said in court that the world's largest retailer was "a gigantic blood sucker," he was not accusing it of sucking the blood of shoppers at all. The government did not contend that A&P's national grocery market share of 12 to 14 percent had allowed it to drive up the average consumer price of food, and it presented no evidence at all about food prices in local markets where A&P had larger shares of grocery sales, in some cases exceeding 20 percent.

What bothered the prosecutors, and Judge Lindley, were business practices that seemed to them to violate norms of fairness. One was vertical integration. A&P, prosecutors claimed, enjoyed such rich profits from manufacturing that it could operate its stores with negligible profit, giving it an unfair advantage over smaller grocers that were not vertically integrated. Another alleged unfairness was A&P's insistence that suppliers pay it advertising allowances as well as the sales commissions otherwise paid to wholesalers. Small stores could not receive such payments, giving A&P a supposedly unfair advantage; the court was not impressed that A&P lowered suppliers' costs by its nationwide marketing reach and by purchasing directly in large volume rather than through wholesalers who charged commissions.

A&P's use of its manufacturing capabilities as leverage to negotiate favorable prices from outside suppliers was a particular sore point. As the prosecutors depicted the economy, a producer would set the price for each item in order to obtain the total profit it desired. If it cut prices in favor of A&P, it would have to raise forced shoppers at competing stores to pay excessively high prices to subsidize shoppers at A&P. The trial exhibits and testimony, though, offer no enlightenment as to how those suppliers were able to command above-market prices from other retailers—or why, if they were, they could not have commanded those prices regardless of the prices paid by A&P. Testimony from food manufacturers that A&P was cheaper for them to serve because it ordered in large, predictable volumes and made payment from a single invoice sent to its headquarters was disregarded by the judge. Economists were not asked to take the stand in Judge Lindley's court, and no rigorous evaluation of competitive conditions in the retail food industry was presented at trial.

The criminal convictions of A&P and its executives were upheld by the U.S. Court of Appeals, and led to fines.[6] No sooner were the appeals complete than the U.S. government, now in the administration of Harry Truman, filed a civil antitrust suit seeking to dismember the company. The government asked that A&P be required to divest all its manufacturing plants and its produce broking subsidiary, and that the retail operation be broken into seven separate chains. Only in 1953, after the inauguration of Dwight Eisenhower as president, did the Department of Justice abandon its efforts. For the first time since the 1920s, A&P could grow without Washington watching over its every move.

The three-decade crusade against chain stores, anachronistic as it may appear in retrospect, was a stunning success. It preserved vast numbers of independent grocery stores, and the wholesalers who supplied them, far longer than economics alone would have dictated. As late as 1948, the U.S. Census counted 504,439 food stores, and the government was encouraging returning war veterans to start new ones by offering low-cost loans. In the ensuing decade, the store count dropped nearly one third, despite robust population growth.

Ironically, A&P was unable to take advantage of the trend. Following the Hartford brothers' deaths in the 1950s, the company entered a downward spiral from which it could not recover. Incapable of adapting to the changes sweeping the retail sector, A&P, the world's largest retailer as late as 1962, sold off its food plants and its coffee business and retreated from one local market after another. In December 2010, having abandoned everything but its supermarkets in and around New York, A&P filed for protection in federal bankruptcy court.

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[6] *U.S. v. New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 88 (7th Cir., February 24, 1949.