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Supermarket Use and Exclusive Clauses

Emanuel B. Halper

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* Special Professor of Law, Hofstra University School of Law; President, American Development Corp.; Author, GROUND LEASES AND ACQUISITION CONTRACTS (1989) and SHOPPING CENTER AND STORE LEASES (rev. ed. 2001). I happily share credit for this Article with my son and colleague, Dan Halper. Dan did a good deal of the research, wrote part of the text, and edited the final draft.
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I. WHY A SUPERMARKET USE CLAUSE, AND WHY A SUPERMARKET
   EXCLUSIVE CLAUSE?

   Taken together, use and exclusive clauses are the heart and soul of
   a shopping center supermarket lease. They function like a constitution
   for the retail activities that take place in a community-type\(^1\) or
   neighborhood-type\(^2\) shopping center.

   The use clause regulates the supermarket tenant’s business in the
   demised premises. It imposes limits on the merchandise the supermarket
   is allowed to sell, and it prohibits activities the landlord and the
   supermarket’s cotenants feel are inappropriate.

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1. Community-type shopping centers (anchored by at least one department store or category
   killer plus one supermarket) serve customers who need the services of both a department store or
   category killer and a supermarket, who prefer not to drive too far, and who want to get in and out of
   stores quickly. Community-type centers are usually much smaller than regional-type shopping
   centers.

2. Neighborhood-type shopping centers are usually anchored by a lone supermarket. They
   are smaller than community-type centers and usually consist of a single supermarket anchor and a
   group of small stores. Neighborhood shopping centers target a narrower geographical band than
   community shopping centers.
The exclusive clause is the antithesis of the use clause.\(^3\) It is the other side of the coin. While the use clause imposes limits on the supermarket’s activities within its premises, the exclusive clause imposes limits on the use of the shopping center’s other leaseable premises. Typical supermarket exclusive clauses prohibit significant competition for the consumer’s food dollar within the shopping center. They also prohibit other activities in the balance of the shopping center that might, in the opinion of the supermarket tenant, have an adverse impact on the supermarket’s sales volume. Thus, a supermarket tenant might ask its landlord to agree that the shopping center will not have a motion picture theater or a so-called adult bookstore. Supermarkets do not like motion picture theaters as cotenants because they believe that the theater patrons will occupy too many parking spaces. They do not like adult bookstores because they are offensive to many supermarket shoppers.

Experienced supermarket lease negotiators spend a great deal of time and effort negotiating use and exclusive clauses. Why? Supermarkets and shopping centers, particularly neighborhood-type shopping centers and community-type shopping centers, have a symbiotic relationship with each other, and they need rules to enhance the relationship. Well-drafted supermarket use and exclusive clauses can be the foundation for a mutually beneficial and very profitable relationship between a supermarket and a shopping center landlord. In contrast, a poorly drafted supermarket use or exclusive clause can be the foundation for grief, bitter litigation, and severe financial losses.

Supermarkets usually have a positive impact on community-type and neighborhood-type shopping centers. Most families need to buy food at least once a week, and most of them do that at supermarkets. When a supermarket is in a shopping center, consumers visit the shopping center to buy food; and when they do that, they are within strolling distance of the shopping center’s other stores. The opportunity to entice consumers within strolling distance makes the shopping center’s other stores desirable to other merchants, and enhances the landlord’s ability to profit from leasing them.

Conversely, shopping centers have a positive effect on supermarket prosperity. Supermarket customers need products and services offered

\(^3\) Exclusive clauses prohibit landlords from permitting excessive competition or obnoxious activities by other tenants of the shopping center. Among other things, supermarket tenants need exclusive clauses to avoid direct competition with another supermarket and specialty food stores in the same shopping center.
by other merchants, and they prefer shopping where they can satisfy all or most of their needs.

Use and exclusive clauses should be drafted with deference to the realistic needs of supermarket operators to cope with an ever-changing retail climate, as well as the needs of shopping center landlords to lease the other stores of the shopping center. A stringently drafted use clause can impose rigid standards on a supermarket operator that would impair its ability to compete with other supermarkets, and a loosely drafted use clause can endow a supermarket with enough power to overwhelm the shopping center's shop space tenants and category killers. A loosely drafted exclusive clause might not adequately protect a supermarket from direct competition within the confines of the shopping center, and a stringently drafted exclusive clause could exclude so many other tenants from the shopping center that the landlord would be unable to lease the shopping center's shop space stores.

A. Use and Exclusive Clauses as the Foundation for the Symbiotic Relationship Between Supermarkets and Shopping Centers

Among other things, well-conceived and well-drafted use and exclusive clauses govern what each store of a shopping center can sell, and they delineate merchandise category and marketing method boundaries among a shopping center's tenants. Delineating these boundaries reasonably and realistically benefits the entire shopping center community including the supermarket tenant, the landlord, the category killers, and the shop space tenants. Carefully drafted use and exclusive clauses help keep a shopping center interesting. They keep a shopping center interesting by preventing tenants from cloning each other's product lines and marketing methods.

Use and exclusive clauses also protect a shopping center's tenants against excessive direct competition from their cotenants. Shopping centers are compact commercial islands. They are separated from the rest of the world by the consumer's reluctance to return to his or her automobile before finishing a shopping expedition. A shopping center's geographical market is defined by the time potential customers are willing to spend getting there, and its opportunities to attract customers at any given time are limited. These opportunities are limited by the

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4. Category killers are merchants occupying very large blocks of space, some even larger than supermarkets. A category killer differs from other large nonfood stores because it concentrates on only a narrow group of merchandise categories. See infra Part IV.C.3 for discussion of how supermarkets and category killers relate to each other in the shopping center setting.
number of people in the geographic market and their shopping habits. Given these limits, many shopping center tenants need protection from excessive direct competition from their cotenants. Some shopping center tenants cannot tolerate any direct competition from cotenants, and others can tolerate direct competition from cotenants only to a limited extent. When a shopping center's geographic market is small, direct competition between two stores in the same shopping center selling the same kind of merchandise in approximately the same way can impair the ability of both stores to survive. When a shopping center's geographic market potential is large, two stores selling the same kind of merchandise in approximately the same way might thrive—even three similar stores might thrive. However, there is always a threshold beyond which the market will be saturated.

B. The Symbiotic Relationship of Shopping Centers and Supermarkets

1. Benefits Inuring to Shopping Center Landlords from Supermarket Tenancies

The modern supermarket is the place where modern people satisfy their ancient and primeval need to gather food. When human beings first walked on the Earth, the task of acquiring food was the foundation of human society, and the role of food acquisition has never diminished. Charles Darwin contended that the search for food is so basic to life that

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The number of humble-bees in any district depends in a great degree on the number of field-mice, which destroy their combs and nests; and Mr. H. Newman, who has long attended to the habits of humble-bees, believes that “more than two-thirds of them are thus destroyed all over England.”

....

....

Now the number of mice is largely dependent, as every one knows, on the number of cats; and Mr. Newman says, “Near villages and small towns I have found the nests of humble-bees more numerous than elsewhere, which I attribute to the number of cats that destroy the mice.”

....

Hence it is quite credible that the presence of a feline animal in large numbers in a district might determine, through the intervention first of mice and then of bees, the frequency of certain flowers in that district!

Id.
it drives the process of natural selection, the process that underlies evolution itself.

Our daily routines revolve around food. Some people prefer sleeping late to a proper breakfast, but the primeval need to eat remains with them. Most people think about breakfast as soon as they awaken. With or without breakfast, people yearn for the morning’s coffee break long before it is scheduled. Then comes lunch. Do not dare stand in the path of office or factory workers on their way to lunch. Lunch hour is followed by the afternoon coffee break. With the work day over, people want a snack to quell pre-supper hunger pangs. Supper fills you up until you get the munchies while you watch television. Finally, a perfect day ends with a bedtime snack.

If a supermarket is located in a shopping center, the need for food will bring at least one member of most American families to the shopping center every week. Like the swallows that return to Capistrano, food shoppers return relentlessly and predictably to their supermarkets of choice week after week and year after year. Food buying pilgrimages to shopping center supermarkets bring consumers close enough to be tempted by such other familiar shopping center tenants as department

6. Darwin continues:

The dependency of one organic being on another, as of a parasite on its prey, lies generally between beings remote in the scale of nature. This is often the case with those which may strictly be said to struggle with each other for existence, as in the case of locusts and grass-feeding quadrupeds.

But the struggle almost invariably will be most severe between the individuals of the same species, for they frequent the same districts, require the same food, and are exposed to the same dangers.

A corollary of the highest importance may be deduced from the foregoing remarks, namely, that the structure of every organic being is related, in the most essential yet often hidden manner, to that of all other organic beings, with which it comes into competition for food or residence, or from which it has to escape, or on which it preys.

This is obvious in the structure of the teeth and talons of the tiger; and in that of the legs and claws of the parasite which clings to the hair on the tiger’s body.

But in the beautifully plumed seed of the dandelion, and in the flattened and fringed legs of the water-beetle, the relation seems at first confined to the elements of air and water.

Yet the advantage of plumed seeds no doubt stands in the closest relation to the land being already thickly clothed by other plants; so that the seeds may be widely distributed and fall on unoccupied ground.

In the water-beetle, the structure of its legs, so well adapted for diving, allows it to compete with other aquatic insects, to hunt for its own prey, and to escape serving as prey to other animals.

Id. at 158-60.
stores, category killers, and shop space stores. They constantly stimulate
customer traffic for the shopping centers in which they conduct business,
and they function as catalysts for their cotenants.

Advertising is another reason why supermarkets are such desirable
tenants for community-type and neighborhood-type shopping centers. Supermarkets tend to advertise profusely in newspapers. Enticing food
shoppers with bargain prices and discount coupons, newspaper
advertising magnifies the supermarket’s power to draw customer traffic.
That gives department store, category killer, and shop space tenants
another reason to favor shopping centers with supermarket cotenants.
When a shopping center supermarket advertisement persuades
consumers to visit the supermarket, it also persuades them to visit the
shopping center. Once at the shopping center, the consumers drawn by
the supermarket advertising are within reach of the supermarket’s
cotenants. Alert cotenants find ways to court them.

In turn, the supermarket’s ability to attract consumers to the
shopping center, attracts other tenants to the shopping center. This
makes the supermarket an important building block of a shopping
center’s ability to attract a diverse, but harmonious, mix of tenants, a
crucial element of shopping center success. A diverse, but harmonious,
ranking of retail and service businesses is the foundation of a shopping
center’s ability to attract and keep a loyal customer base and to compete
with other shopping centers.

Supermarkets are more desirable cotenants for department store and
shop space merchants than other large store (or big box) operations. For
department store and category killer cotenants, supermarket newspaper
advertising supplements the beneficial effects of their own newspaper
advertising budgets. For shop space tenants that do not advertise in
newspapers, being near a supermarket might be as close as the tenant
can get to the benefits of newspaper advertising.

2. Landlord Concerns About Supermarket Tenancies

Despite the benefits they confer on their landlords and cotenants,
supermarkets can also cause difficult problems for them. Supermarkets
are potential competitors for every business conducted in community
and neighborhood shopping centers. They can be fierce competitors

7. Some supermarkets substitute hand-delivered flyers for newspaper advertisements, and
some supermarkets do not advertise in newspapers or flyers.
8. See, e.g., EDWARD C. HAMPE, JR. & MERLE WITTENBERG, THE LIFELINE OF AMERICA:
DEVELOPMENT OF THE FOOD INDUSTRY 345 (1964).
because they typically control large blocks of space, and they have major league buying power.

3. The Impact of Shopping Centers on Supermarket Prosperity

Supermarket executives do not sign shopping center leases because they love shopping center landlords or their cotenants. If shopping center facilities and cotenants did not offer a significant economic benefit to supermarket chains, they would not be interested in shopping center locations at all.

If shopping centers provided no advantage to supermarkets, supermarket tenants would limit themselves to freestanding buildings with adjacent parking areas. Business operations can be much simpler for a supermarket that conducts business from a freestanding building that does not share parking and other common facilities with other retailers. The store manager of a freestanding store need not cope with landlord complaints about noise from truck deliveries. Home office merchandise managers have fewer lease restrictions to cope with when the company leases a freestanding store. The company’s real estate and construction departments usually have greater rights to change a freestanding store’s appearance, make alterations to a freestanding store, and display signs on a freestanding store.

Despite these complications and many others, most supermarket executives I know prefer shopping center locations to freestanding locations. Why? Supermarkets prefer shopping center locations because they prefer the company of department stores, category killers, and small specialized shop space stores. My friends in supermarket real estate tell me that their companies’ sales per square foot tend to be higher in shopping centers.

Supermarkets do better in neighborhood-type shopping centers than they do in freestanding stores because some of the shop space stores bring additional traffic within arms’ reach of the supermarket premises. Shop space stores are attractive to supermarket customers. They provide products and services consumers cannot get in a supermarket, their sales techniques differ from supermarket sales techniques, and they make a shopping expedition more interesting. Even stores that do not draw additional business to the shopping center on their own help a supermarket draw additional business. Many supermarket shoppers prefer the convenience of combining a trip to a supermarket with lunch

9. See supra notes 1-4 and accompanying text (discussing the restrictions on supermarkets because of use and exclusive clauses).
or coffee with friends. Others need to repair shoes, get clothing dry cleaned, buy things from a merchant who will give them much more personal service than they can get in a supermarket, or buy things supermarkets do not carry at all. A luncheonette or shoe repair shop might not be a consumer’s principal destination on a shopping excursion by itself; however, combining a supermarket excursion with lunch or getting your shoes fixed is more attractive to many consumers than a supermarket excursion by itself.

Community-type shopping centers usually provide supermarkets with all the attractive features of neighborhood-type shopping centers plus at least one very significant added attraction, another anchor tenant. The other anchor tenant is often a discount or promotional type department store or other big box merchant that advertises often. The combined force of supermarket and department store advertising brings more business to both stores than either could get without the other’s support.

II. A BRIEF INTRODUCTION TO SUPERMARKET LEASE USE AND EXCLUSIVE CLAUSE PROPOSALS

This Part is a brief synopsis of popular supermarket use and exclusive clause restrictions. I will review the restrictions in detail and discuss the problems they might cause.

A. Supermarket Lease Use Clause Proposals

Without the restraint of a use clause restriction, a supermarket tenant might decide to discontinue the sale of food altogether and change the character of its store. As a result of this decision, the landlord might visit his or her shopping center one day and find an entirely different kind of store doing business from the store he or she expected would be a supermarket. This new kind of store might make more money or lose less money for the tenant, but it is not likely to bring nearly as many consumers to the shopping center as a supermarket, and it might compete eyeball to eyeball with one or more of the shopping center’s other tenants.

An artfully drafted use clause can protect the landlord against this wretched prospect, but a supermarket lease use clause that restricts the tenant’s use excessively is not necessarily in the landlord’s best interest. A use clause that imposes excessive restrictions on a supermarket tenant can stifle the tenant’s business operations. Stifling tenants is a self-destructive practice for a shopping center landlord because stifled
tenants tend to become insolvent tenants, and insolvent tenants are not the world’s best rent payers.

A supermarket tenant cannot afford to treat a use clause negotiation lightly. An overly restrictive use clause can have a materially adverse impact on a tenant’s ability to survive in an extremely competitive environment. Since it was established around 1930, the modern supermarket industry has traveled a long and circuitous road, and in the future, supermarket owners anticipate confronting many more twists and turns in the future. The supermarket business is complex and unpredictable. Although the essence of the business has not changed over the years, supermarket operators have changed the kinds of products they carry many times, and they have changed the way they conduct business many times. They have discontinued products and ways of selling products after concluding they would be better off without them. Later, they reintroduced the very products they discarded years before and reverted to sales practices they discontinued years before. New products and new practices are introduced with great flair and later discontinued with great relief. With this in mind, a supermarket tenant must be ready to make changes to meet the demands of the marketplace. Tenants that cannot meet the demands of the marketplace lose market share. If a supermarket tenant loses too much market share, its sales volume and profits will decline also. Consequently, lease negotiators representing supermarket tenants resist use clauses that might prevent the tenant from making changes in its business practices to cope with changes in the marketplace.

Community-type shopping center landlords and neighborhood-type shopping center landlords cannot afford to treat a use clause negotiation lightly either. An overly liberal use clause in a supermarket lease or a supermarket lease without a use clause can have a materially adverse impact on the shopping center’s ability to attract tenants and customers. With no use clause or only a slightly restrictive use clause to restrain it, a supermarket could do many things to impair a shopping center’s ability to compete with other shopping centers for the favor of the consumers and potential retail tenancies. Without a use clause to restrain it, a supermarket tenant could drastically change the scope of its business—perhaps even discontinue the sale of food altogether. It could compete directly with a department store or category killer tenant. It could overwhelm one or more shop space tenants. Most importantly, it could violate an exclusive clause in a cotenant’s lease.

Although eager for the benefits thrust on them by a supermarket cotenant, department store, other big box tenants, and shop space tenants
seek to avoid the potential harm to which they might be subjected by direct competition from a supermarket tenant. The principal way they do this is by negotiating for exclusive clause restrictions against direct competition from cotenants. Sophisticated landlords anticipate that other tenants will demand exclusive clause restrictions in leases to be negotiated after the supermarket lease is executed, and they try to reflect future exclusive clause restrictions in the supermarket’s use clause. As you may imagine, they are not always successful.

It is a bad idea for a shopping center landlord to agree to an overly liberal supermarket use clause or to execute a supermarket lease without a use clause. However, it is much worse for a shopping center landlord to agree to an exclusive clause in one tenant’s lease that prohibits a type of use anywhere else in the shopping center and then execute another lease allowing another tenant to use its premises for the prohibited use. A landlord who does that can find himself or herself in the uncomfortable position of defendant in two separate and irreconcilable lawsuits. When one tenant’s use clause permits it to do what the exclusive clause of another lease forbids, both tenants are potential plaintiffs for future lawsuits against the landlord. At least one of them will beat the landlord.

**B. Supermarket Lease Exclusive Clause Proposals**

Although most supermarkets and shopping center tenants are willing to curtail their own business activities to a degree by agreeing to use clause restrictions, they demand something in return. They want the landlord to curtail other tenants’ operations too, and they do this in exclusive clauses.

Supermarket executives have rigid views about the question whether a community-type or neighborhood-type shopping center should have more than one supermarket. They usually insist on barring a second supermarket from the shopping center, and they do so for valid reasons. Most community-type and neighborhood-type shopping centers are too small to support two supermarkets. This kind of cohabitation seldom works in a small shopping center. Leasing to more than one supermarket in the same shopping center can distort the delicate balance of the center’s tenant mix. Shopping centers tend to prosper by leasing space to many different kinds of tenants, and duplicating such an important type of tenancy works against that principle. You are bound to find a few shopping centers with twin supermarkets here and there, but you will not
find many. Supermarket executives usually cringe at the thought of a community-type shopping center with more than one supermarket.

C. Types of Use and Exclusive Clause Restrictions

1. Restrictions to and Against Supermarket Use

From the earliest days of the modern shopping center era, community-type and neighborhood-type shopping center landlords have had to walk on their tiptoes to reconcile the needs of their supermarket, department store, and shop space (small store) tenants. Supermarket tenants demand assurance against direct competition from department stores and shop space stores. Department store tenants and other big box tenants demand assurances from the landlord that the supermarket will not invade their turf. Shop space tenants demand assurances from the landlord that the supermarket will not overwhelm them by mimicking their principal product lines and marketing formats.

Landlords try to appease department store tenants, other big box tenants, and shop space tenants by limiting the use of the supermarket premises. In their effort to please everybody, landlords have been quite content to allow supermarket use restrictions to be vague. One of the most popular deliberately vague use clauses proposed by landlord negotiators limits the use of the supermarket premises to the conduct of a supermarket business or a supermarket. Some landlords have taken a little tougher line and have proposed limiting the use of the supermarket premises to a food supermarket as opposed to a supermarket.

Similarly, shopping center landlords seek to appease supermarket tenants with deliberately vague exclusive clauses restricting the extent to which the department store, category killers, and shop space stores can mimic supermarket operations. They look like deliberately vague use clauses turned upside down. For example, the exclusive clause might state the following: No part of the shopping center, other than the demised premises (the supermarket premises), may be used for the conduct of a supermarket business or as a supermarket. A slightly milder restriction would prohibit the use of any part of the shopping center other than the supermarket premises as a food supermarket rather than as a supermarket.

I do not see much difference between restricting a tenant's use to a food supermarket and restricting a tenant's use to a supermarket. Similarly, I see little difference between an exclusive clause restriction against a food supermarket and an exclusive clause against a...
supermarket. Consequently, I will treat restrictions against food supermarkets as if they are restrictions against supermarkets.

2. Use for Any Legal Purpose

The ideal use clause for a supermarket tenant restricts the tenant’s use of the demised premises merely for any legal purpose. Omitting the use clause entirely amounts to the same thing and works just as well for the tenant. With no use clause to restrict its activities, a tenant’s use is limited only by restraints established by law.

The ideal use clause from a supermarket tenant’s point of view can be destructive for a shopping center landlord. With the right to use the demised premises for any legal purposes or no use clause at all, the tenant would have the power to shift the use of its space from a supermarket purpose to any other legal purpose. The landlord would be powerless to stop the supermarket tenant from direct competition with its cotenants. For example, without the restraint of a use restriction, a supermarket tenant could convert all of its premises to a furniture store, department store, catalog store, or an office supply store. By the same token, without the restraint of a use restriction, a supermarket could convert part of its premises to a flower shop, shoe store, restaurant, or clothing store. If a supermarket tenant decides to shift the use of all or part of its premises in any of these ways, one or more cotenants would be forced to confront a new and unexpected competitor with enormous financial and marketing power. The cotenants might not survive the challenge.

3. Restrictions Against the Sale of Specific Products

Some supermarket use clauses are far more complex than limitations on the tenant’s use to a supermarket, to a food supermarket, or for any legal purpose. These use clauses prohibit the sale of specific nonfood products on the supermarket premises. Similarly some supermarket exclusive clauses are far more complex than restrictions against another supermarket in the shopping center. These exclusive clauses prohibit the sale of food for off-premises consumption in any part of the shopping center other than the supermarket.

Let’s look at use clauses that prohibit the sale of specific nonfood products in the supermarket premises. Some of them are vestiges of old turf wars between discount department stores and supermarkets. Others stem from the needs of some service-type tenants to have the exclusive rights to perform their services in the shopping center, and still others
stem from exclusive clauses in other tenants' leases that prohibit obnoxious products and activities from the shopping center.

Turf disputes between department stores and supermarkets date back to the early post-World War II period when the discount department store emerged as a significant retailing force. In their early days, some discount department stores incorporated in-store food departments within their premises. Some of these departments were operated by the department store owners themselves, and others were operated by outsiders pursuant to license agreements.

Regardless whether their in-store food departments were company-owned or licensed to outsiders, discount department store executives were concerned about the allocation of shelf space between products sold in the food department and products sold in the general merchandise departments. Like supermarket leases, department store food department license agreements included use clauses and exclusive clauses. The use clauses contained detailed restrictions against sales of general merchandise items by the in-house food departments. The exclusive clauses contained detailed restrictions against the sale of food by the general merchandise departments.\(^{10}\)

In the 1960s, many discount department stores that had experimented with freestanding stores and in-house food departments changed their ways. Disenchanted with the experiment, they closed down their in-house food departments and migrated to shopping centers with supermarket cotenants operating in separate buildings. This move inevitably led the discount department stores to demand restrictions limiting the sale of general merchandise items in supermarkets. These restrictions went as far as specifying the maximum amount of supermarket shelf space allocated to such general merchandise items as toys. Conversely, the supermarkets demanded restrictions limiting the sale of food for off-premises consumption in the department store.

Other specific landlord proposals for restrictions on supermarket products or activities were designed to protect fragile shop space tenants and avoid conflicts with exclusive clauses in cotenant leases. Examples are restrictions against using part of the supermarket for a coin-operated laundry or a dry-cleaning establishment; restrictions against use as a bank, skating rink, or motion picture theater; and restrictions against the sale of alcoholic beverages or firearms.

\(^{10}\) See infra Part V for more details on the relationship between discount department store operators and early food supermarket department licensees.
Despite the uncertainty caused by an exclusive clause prohibiting the use of any other store as a supermarket, a community-type or neighborhood-type shopping center landlord is lucky to emerge from a supermarket lease negotiation with nothing worse. Some supermarket tenants with massive bargaining power aim much higher. They propose a challenging exclusive clause that has the potential to cause a landlord far more heartburn than a restriction against the presence of another supermarket.\textsuperscript{11} This clause bans the sale of food and beverages for off-premises consumption from any other premises in the shopping center.

A restrictive covenant against the sale of food or beverages for off-premises consumption is very nice for the supermarket tenant, but it is a bitter pill for the landlord and the other tenants to swallow. It reaches far beyond the notion that a community or neighborhood shopping center should not contain more than one supermarket. It purports to regulate food and beverage sales of every other kind of tenant and has great potential for mischief. It can cripple a landlord’s effort to organize a vital and prosperous shopping center. It can also make it impossible for many other kinds of stores in the shopping center to function properly. A landlord who agrees to such a restriction without extensive qualification might cause himself, or herself, considerable and unnecessary problems.

III. USE CLAUSE RESTRICTIONS TO SUPERMARKET USE AND EXCLUSIVE CLAUSE RESTRICTIONS AGAINST SUPERMARKET USE

Getting a lease signed is the principal benefit of compromising a use or exclusive clause negotiation. Getting a lease signed is not a minor achievement. The execution of a supermarket lease usually adds millions of dollars to the fair market value of a community-type or neighborhood-type shopping center. It also usually results in substantially increased profits for a supermarket chain.

Is this benefit worth the potential problems that might arise when the parties compromise by adopting the word \textit{supermarket} as the standard for the restrictions? I think it is, but this compromise has a serious drawback. Supermarket and shopping center people are not necessarily on the same page when they talk about a supermarket. Like so many other political and business compromises, each camp believes what it wants to believe.

Some day, the parties might quarrel about what the use clause permits the supermarket to sell or what the exclusive clause prohibits

\textsuperscript{11} See \textit{infra} Part V.A.
other tenants from selling. With nothing more than the word \textit{supermarket} to serve as their guide, the language of the lease might be too vague to resolve the quarrel. Vague standards lead to controversies that can be settled only with lawsuits. Without clear instruction from the lease itself, the landlord, the tenant, or both parties might have no alternative but to ask a court for its interpretation.

If the parties quarrel with each other about what \textit{supermarket} means, they are likely to scurry around looking for a definition that has been generally accepted by industry-wide consensus, industry observers, or the general public. Finding an appropriate definition will not be easy. Although all supermarkets have some elements in common, they are now and have always been very different from each other. Supermarket industry organizations have defined \textit{supermarket}, but never in a way that makes complete sense to me. Industry observers have defined \textit{supermarket}, but their definitions differ widely.\footnote{See infra Part III.C.} However, I cannot swear that my definition or anybody else’s definition has been adopted or will be adopted by industry consensus. Despite their dependence on supermarkets for the food they put on their tables and the products with which they clean and maintain their households, for most people, supermarkets are meant for shopping and not for explanations. The general public does not care enough about supermarkets to even think about what they are or how they differ from other stores.

Potential controversies arising from a use clause restricting the use of a store to a supermarket or an exclusive clause prohibiting a store from being used as a supermarket can be avoided. They can be avoided by defining \textit{supermarket} in the lease. To avoid the expense and aggravation inherent in the litigation process, lease negotiators can provide an agreed interpretation of \textit{supermarket} themselves.

Unfortunately, the word \textit{supermarket} is not easy to define. Is it a store that \textit{principally} sells food and beverages? Is it a store that \textit{primarily} sells food and beverages? Is it a large food store? Since the word \textit{supermarket} entered our vocabulary in the 1930s, many kinds of food stores have called themselves supermarkets. They were different from each other in almost as many ways as they were similar to each other, and they still are different from each other in almost as many ways as they are similar. Although all supermarkets are large, some are considerably larger than others. A large proportion of the floor area of every supermarket is allocated to the sale of food and household products, but some supermarkets allocate a much greater proportion of
their sales floors to food and household products than others. Nonfood products are sold in every supermarket, but the percentage of a supermarket's floor area allocated to nonfood products varies considerably.

The supermarket industry was founded by mavericks who refused to conform to the practices of the conventional food markets of the 1920s and 1930s.13 Most of the industry's founders were too individualistic to rigidly conform to anybody else's business model—not even the business models of other industry founders.14 Early supermarkets came in all sizes and shapes.15 Their pricing strategies differed from each other considerably.16 Their product mix was dissimilar.17

To draft a sensible definition of any retail business, a lease negotiator needs to know a great deal about the business. Unfortunately, few shopping center landlords and supermarket tenants spend any time thinking about what a supermarket is or is not, and fewer shopping center landlords and supermarket tenants worry about defining the word supermarket precisely. Why? It is a challenging and time-consuming task. When defining a supermarket is on the table, the negotiators need to know what goes on in supermarkets and how to distinguish supermarkets from other kinds of retail stores. Despite the time and trouble it is bound to take to negotiate a mutually acceptable definition, shopping center supermarket lease negotiators should accept this challenge. It will help their clients in the long run.

The best path to a meaningful definition of supermarket is to review how the supermarket industry's founders and other supermarket pioneers did business; the economic conditions to which the birth and growth of the supermarket industry responded, and how latter day supermarket entrepreneurs improved on the founders' business models.

In its first phase, the supermarket system was a new and revolutionary system of food distribution based on a business model devised by the proprietors of two revolutionary stores that opened in the

13. See infra Part III.A.
15. See id. (noting that supermarkets opened in various states and ranged in size from 10,000 square feet to 50,000 square feet).
16. See id.
17. See id.
early 1930s. The new system was a radical departure from the late-nineteenth-century and early-twentieth-century food market models of tiny service grocery stores, service fruit and vegetable stores (also known as green grocers), and service butcher shops. The business model followed by service grocery stores, service fruit and vegetable stores, and service butcher shops was based on customer service, credit, home delivery, and prepackaged, brand-name products. The business model formulated by the supermarket industry’s founding fathers was based on self-service. They perceived credit as an abomination, and they discontinued home delivery services. In short, the new supermarket system of food distribution is the antithesis of the service food market system it displaced.

A. Origin and Development of the American Supermarket Industry

1. Birth and Early Growth of the Modern Supermarket

The modern supermarket, the place where most Americans do their food shopping in the affluence of the twenty-first century, was born in the misery of 1930. It was the first full year of the Great Depression, a calamitous period in which our national unemployment rate was as high as 20%. Given the vast concentration of wealth in the United States, the world’s great economic thinkers were bewildered by the Great Depression. Shouldn’t a nation so rich in human and natural resources be able to cope with an economic downturn no matter how severe? The 1929 stock market crash had ended a decade of splendor and a hitherto unimaginable capacity to generate wealth. Only a year after the stock market crash, America’s businesses were failing, and its banking system was near collapse.

American farmers were having a hard time in 1930. The United States was awash in a sea of cheap commodities looking for buyers in an
Farm product sales declined, and crops rotted in the field. Cattle and pigs were killed prematurely to save the cost of feeding them. Why should a farmer waste time harvesting vegetables if the prospect of selling them was so chancy?

American food processing companies and food wholesalers were having a hard time in 1930. Their warehouses were too full, and their cash registers were too empty.

American consumers were having a hard time in 1930. Consumer income plummeted. Most consumers had very little disposable income, and too many consumers had no income at all. In February, 2000 people were queuing up on bread lines in New York City, and the city of Milwaukee established a soup kitchen. The Federal Council of Churches proclaimed April 27 as “Unemployment Sunday.” By November, 6000 unemployed New Yorkers were buying apples on credit and reselling them on the sidewalks for five cents. Malnutrition and mental illness were on the rise. Although food prices declined by 17% that year, many people were hungry when they went to bed at night. Hunger marches massed in Washington to petition President Hoover for guaranteed employment at a minimum wage. The trend was downhill. Economic conditions were deteriorating. The average U.S. weekly wage fell to seventeen dollars between 1929 and 1932—a decrease of more than one-third.

29. See id.
30. See id.
31. See id.
32. See id.
33. See id.
35. See McAusland, supra note 27, at 7 (discussing how individuals either had their pay cut or were laid off without unemployment insurance).
37. See id.
38. See id. at 19.
39. See id. at 39.
42. See id.
43. See id.
Retail food merchants were having a hard time in 1930.\textsuperscript{44} Even in dismal circumstances, most people have some money, and people who have some money will spend it on food before they spend it on anything else. However, people who do not have much money cannot pay much—not even for food. They pinch their pennies. The predominant food markets of that era, service grocery stores, struggled in vain to adapt to the circumstances and find a way to make food affordable.\textsuperscript{45} They could not reduce their prices enough to match the decline in their customers’ earnings.\textsuperscript{46} They could not accomplish that task because their margins were too high, their operating expenses were too high, and their sales volume was too low.\textsuperscript{47} Service grocery margins were increasing in 1930 despite declining consumer demand and mounting inventories.\textsuperscript{48} These increases were on top of a long series of prior increases. Grocery store margins had been increasing for many years through good times and bad. Margins increased between 1919 and 1929, from 16.92\% to 20.65\%, but many of these increases could be rationalized.\textsuperscript{49} That eleven-year period included years of war and exuberant economic times. With a depression on, food market gross margins should have dropped in 1930, but they did not.\textsuperscript{50} Service grocery margins rose to 20.94\% that year\textsuperscript{51} despite declining consumer demand and mounting inventories.

Service grocery margins rose because service grocery operating expenses were high.\textsuperscript{52} Payroll expenses were huge when you consider the size of their stores (very small).\textsuperscript{53} They needed to employ a crew of retail clerks to wait on customers, and they needed a delivery staff to deliver orders directly to customers’ homes.\textsuperscript{54} Unlike modern day supermarket customers, service grocery customers did not wander through the store past endless shelves stacked with food and other merchandise and select what they wanted themselves.\textsuperscript{55} Customers did not retrieve the things

\begin{itemize}
\item \textsuperscript{44} See Zimmermann, supra note 14, at 1.
\item \textsuperscript{45} See id.
\item \textsuperscript{46} See id.
\item \textsuperscript{47} See id. at 14.
\item \textsuperscript{48} See id.
\item \textsuperscript{49} See id.
\item \textsuperscript{50} See id.
\item \textsuperscript{51} See id.
\item \textsuperscript{52} See id.
\item \textsuperscript{54} See William Greer et al., America the Bountiful: How the Supermarket Came to Main Street 12 (1986) (citing the remarks of supermarket industry leader Jack Logan).
\item \textsuperscript{55} See Chester H. Liebs, Main Street to Miracle Mile: American Roadside Architecture 117 (1985).
\end{itemize}
they wanted and place them in a shopping cart. Retail clerks did all or most of that for them. Retail clerks took customer orders, they gathered the merchandise, they bagged the merchandise, and they tallied the purchase price—often by hand. Service grocery store customers did not drive their food bundles home. Some customers bought only what they could carry and walked home with paper bags full of food in their arms. Other customers demanded that the service grocer provide home delivery service. Service grocery store customers did not always pay with currency or a bank-sponsored credit card. A very large percentage of them departed from the store with food and household products without parting with a dime. Service grocery storekeepers extended credit to their customers without the assistance of credit card companies, they kept track of their customers’ debts, and they hoped to collect them periodically. Numerous customers did not pay at all, and credit losses were a significant part of grocery store operating expenses in the 1930s as they had been for centuries.

Many independent service grocers went out of business in 1930, and others held on by the skin of their teeth. Service grocery chain stores did not have it easy either. Their sales declined considerably as a result of the severe economic downturn. To make things worse for service grocery chain stores, politicians were frustrated by their inability to cope with the economic crisis and looked for scapegoats. They pointed their fingers at service grocery chain store organizations and other chain store organizations.

Here was a paradox. From the farmer’s point of view, food prices had dropped precipitously. From the consumer’s point of view, food was so expensive that some people could avoid hunger only by eating

56. See id.
57. See id.
58. See id.
59. See id.
61. See LIEBS, supra note 55, at 118.
62. See PEAK & PEAK, supra note 18, at 10.
63. See id.
64. See id.
65. See id. at 50.
66. See id. at 9.
67. See id. at 10 fig.1.3.
68. See MCAUSLAND, supra note 27, at 15.
69. See id. (noting that laws were passed to ensure that supermarkets carried out their businesses fairly).
70. See GREER ET AL., supra note 54, at 29.
dog food. Their inability to reduce their prices enough would destroy many grocers, but it would also create opportunities for others. America needed merchants who could cope with Depression-based misery by creating a more efficient food distribution system that could lower prices, feed people with reduced incomes, and still turn a profit. It was only a matter of time before a visionary entrepreneur appeared on the scene.

In the midst of a nationwide economic crisis, a group of businessmen with improbable credentials conceived of a new and revolutionary type of food store. In time, it would be called the supermarket.

a. Michael Cullen, the Founding Father

Michael Cullen was an unlikely candidate to propose a workable solution to this monumental and bewilderingly complex problem. Although he had accumulated lots of experience and knowledge in food distribution by 1930, the food industry had granted him no recognition and few rewards. When he was eighteen years old in 1902, Michael began his food retailing career as a retail clerk for the Great Atlantic & Pacific Tea Company (the company we know today as A&P). He departed seventeen years later after working his way up the A&P ladder to become a divisional superintendent. When he left A&P, he joined the Mutual Grocery Company and became its general sales manager. After that, he worked for the Bracey-Swift stores in Illinois and Missouri.

By 1930, Cullen was no longer a young man, and he certainly was not a rich man. Despite twenty-eight years of hard work for food companies, he managed to get no farther from his native New Jersey than Herrin, Illinois where he was employed as an assistant branch
manager by the Kroger Grocery & Baking Co. Although he had little material prosperity to show for his years of service, he was confident that he had the right stuff. Subsequent developments proved that he did.

As he discharged the daily chores of a grocery store assistant manager, Cullen was thinking about the nation's economic crisis, how the food industry business was floundering, and how the industry might save itself by adapting to the new reality. He mused about the momentous changes in the food business during his twenty-eight-year career. In his lifetime, he saw incredible changes in the way people lived. Strange and new in 1902, automobiles had become an established and accepted transportation mode by 1930. The advent of electric refrigerators as routine kitchen appliances, at best a dream in 1902, was very real by 1930. He was a food industry employee when brand-named food packed in cans and bottles supplanted generic food scooped from barrels and boxes. He was a food industry employee when the service grocery store supplanted the general store as America's principal food retail outlet. His life had intersected with grocers who lost everything and grocers who amassed princely fortunes.

He mused about innovative techniques and more efficient facilities that had been devised by iconoclastic merchants who were determined to make food retailing more efficient with only partial success. Some of them experimented with much larger storerooms, and others formulated new techniques like cash and carry and self-service. Larger storerooms had taken root here and there, but they achieved only a lukewarm reception by the food industry. A&P adopted cash and carry in 1912 and hitched its star to that system, but most neighborhood grocers ignored it. After its introduction in 1916, self-service was adopted enthusiastically but only by a small minority of America's grocers.

Could Michael Cullen contrive a better way to sell food and lead the food industry out of its morass? It was a worthy goal. However,

82. See MAYO, supra note 53, at 140; ZIMMERMAN, supra note 14, at 31.
83. See ZIMMERMAN, supra note 14, at 31.
84. See MCAUSLAND, supra note 27, at 5.
85. See MAYO, supra note 53, at 93-94.
86. See MCAUSLAND, supra note 27, at 13.
87. See generally John Mugar, Preface to GREER ET AL., supra note 54.
88. See MCAUSLAND, supra note 27, at 5.
89. See id. I discuss cash and carry and self-service in greater detail below. See infra Parts III.B.4 and III.B.5.
90. See ZIMMERMAN, supra note 14, at 44 (noting that legislation was introduced to forbid selling food at or below cost).
91. See PEAK & PEAK, supra note 18, at 7.
92. See id. at 13.
given the food industry’s resistance to any kind of change, it was also a
difficult goal to achieve. Nevertheless, Cullen formulated a plan he
fervently believed would be a practical solution to the food retailer’s
problems. The plan’s centerpiece was a new kind of food store he
called a warehouse grocery. In his view, the warehouse grocery would
dramatically reduce grocery store operating costs and prices, and it would
dramatically increase grocery store sales volume.

Here’s how:

The new stores would be large—very large. Larger stores would
save money in many ways. The share of each consumer dollar allocated
to labor cost tends to be lower in a large store than in a small store.
Cullen postulated that clusters of large stores would generate much
higher sales volumes than a vast number of small stores. The sheer
mass of a large store’s inventory would attract many more customers.
The higher sales volumes would make large quantity discount
purchasing possible. Larger stores would also reduce warehousing
expenses. A larger grocery store can assume many functions of a
grocery warehouse, and it can do that advantageously. A small grocery
store cannot keep much in the store and depends on its wholesalers’
warehouses for restocking. Merchandise kept in a warehouse sits there
unprofitably until it is sold at wholesale prices to a retail store. A
larger food market can keep more merchandise in the store where it is
visible to consumers and available for immediate sale. The cost of
building one larger store per square foot is typically lower than the cost
of building a batch of smaller stores with the same aggregate floor
area. Consequently, a grocer with a larger store tends to pay less rent
per square foot than a grocer with a comparable smaller store. Larger
stores also make it possible for a food merchant to carry a broader range

93. See McAUSLAND, supra note 27, at 5.
94. See id.
95. See id.; see also MAYO, supra note 53, at 140.
96. See MAYO, supra note 53, at 140; ZIMMERMAN, supra note 14, at 32.
97. See id.
98. See id.
99. See ZIMMERMAN, supra note 14, at 35.
100. See id.
101. See MAYO, supra note 53, at 140.
102. See id.
103. See id.
104. See ZIMMERMAN, supra note 14, at 1.
105. See id.
106. See id.
107. See id.
of product categories, and Cullen figured he could use the extra space to the store’s advantage.  

Occupancy expenses would be cut drastically. Rent could be minimized by leasing space in less expensive areas that were nevertheless accessible by automobile. Frills would be eliminated. Never mind if the stores looked like “industrial age barns.” Skip the carpets and tile floor coverings, and save money. People will walk on concrete to save on groceries. Who needs beautiful counters and fixtures anyway? Unpainted pine counters will do the job just as well, and they cost much less. Why bother stacking cans and cartons neatly on attractive but expensive shelving? Empty boxes were certainly cheaper than conventional fixtures and could do the job well enough.

Operating expenses would be further reduced in other ways. Self-service would reduce the payroll. With a cash and carry policy, the stores would not extend credit, and home delivery service would be eliminated. Cash and carry would further reduce the payroll, and it would eliminate credit losses.

The cost of food would also be trimmed. Cullen would buy in very large quantities, and he would pay cash. He figured that the size of the store, the self-service and cash and carry techniques, the massive buying power, and the cheap rent would produce big cost savings. With big cost savings, the new store could cut its prices in a big way. He expected to persuade consumers to believe that shopping in his new stores would save between one and three dollars per shopping expedition. That was serious money when

108. See id.
109. See id.
110. See id. at 141.
111. LONGSTRETH, supra note 60, at 121.
112. See MAYO, supra note 53, at 141.
113. See ZIMMERMAN, supra note 14, at 1.
114. See HOYT, supra note 79, at 132.
115. See LONGSTRETH, supra note 60, at 121.
116. See PEAK & PEAK, supra note 18, at 7.
117. See MAYO, supra note 53, at 141.
119. See id.
120. See id.
121. See ZIMMERMAN, supra note 14, at 34. "I would convince the public that I would be able to save them from one to three dollars on their food bills. I would be the ‘miracle man’ of the grocery business. The public would not, and could not believe their eyes." Id. (quoting letter from Michael Cullen to the Vice President of the Kroger Grocery & Baking Co.).
wages were going downhill and one in five Americans was unemployed.\footnote{122}{McAUSLAND, supra note 27, at 6.}

The stores would carry a widely diverse range of merchandise—so widely diverse that he called it \textit{one-stop shopping}.\footnote{123}{Mayo, supra note 53, at 141.} Although the stores he ultimately operated would miss their one-stop shopping goal by far, they were to carry a much more diverse range of product categories than the typical service-oriented food markets of that era.\footnote{124}{McAUSLAND, supra note 27, at 5.} As the store’s proprietor, he would sell national brand groceries for its own account.\footnote{125}{Id.} Meat, produce, dairy, delicatessen, and household products would be carried also.\footnote{126}{Id.} However, these products would be sold by licensees who would sublet space in the stores from him.\footnote{127}{Id.}

Cullen’s basic premise was that these policies would engender an enthusiastic public reception, but even more was needed to achieve the unusually high sales volume to which he aspired.\footnote{128}{Id.} Despite their low rent district locations, he projected that the stores would draw plenty of customers because free parking would be available.\footnote{129}{Id.} That made sense. Although people did not have much money then, many of them owned automobiles.\footnote{130}{Id.} Free parking would extend each store’s geographic market.\footnote{131}{Id.} With free parking available, people would be glad to drive a few miles to get a food shopping bargain.\footnote{132}{Id.} Always thrifty conscious, Cullen did not expect to provide or pay for an adjacent parking lot.\footnote{133}{Id.} He figured that locating the stores away from business districts would put customers in a position to find free curbside parking spaces on their own.\footnote{134}{Id.} Sales volume would be maximized by keeping the stores open at night.\footnote{135}{Phillips, supra note 118, at 198.} Sales would also be stimulated by aggressive advertising campaigns.\footnote{136}{McAUSLAND, supra note 27, at 14.} His advertisements would concentrate on a low-price

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\item\footnote{122}{McAUSLAND, supra note 27, at 6.}
\item\footnote{123}{Mayo, supra note 53, at 141.}
\item\footnote{124}{McAUSLAND, supra note 27, at 5.}
\item\footnote{125}{Id.}
\item\footnote{126}{Id.}
\item\footnote{127}{Id.}
\item\footnote{128}{Id.}
\item\footnote{129}{Id.}
\item\footnote{130}{Id.}
\item\footnote{131}{Id.}
\item\footnote{132}{Id.}
\item\footnote{133}{Id.}
\item\footnote{134}{Id.}
\item\footnote{135}{Phillips, supra note 118, at 198. Service grocery stores tended not to do business at night in that era. McAUSLAND, supra note 14, at 58 (noting that most stores of that era closed at 6:30 p.m. while Dawson’s Trading Post closed at 9:00 p.m.).}
\item\footnote{136}{McAUSLAND, supra note 27, at 14.}
\end{enumerate}
policy and how shopping at Cullen's new kind of store would save consumers money—lots of money. In the hope of selling his employer, the Kroger Grocery & Baking Co., on the idea, Cullen submitted a proposal letter to John B. Bonham, Kroger's Vice President of retailing and Kroger President William H. Albers. The proposal outlined the most important aspects of his revolutionary plan. Fortunately for posterity, extensive excerpts from Cullen's proposal still exist. Its underlying theme was that very large stores with low overhead, a cash and carry policy, and a self-service policy would lead to very low prices without sacrificing profits. Low prices for 1000 basic food products would draw unprecedented hordes of people to very large and innovative stores with a self-service policy. Self-service would sharply reduce the need for store personnel, and it would also encourage impulse buying. Shoppers would be free to browse about, inspect the merchandise, and retrieve it from the shelves themselves. By the standards of that era, Cullen's new stores would not be merely large or even very large. As Cullen put it, they would be "monstrous in size." Monstrously sized stores with merchandise within easy reach of shoppers would further encourage impulse

137. See Phillips, supra note 118, at 197.
139. See id.
140. See id. at 32-35.
141. See McAusland, supra note 27, at 14.
"The one thought always uppermost in mind—How can I undersell the other fellow? How can I beat the other fellow? How can I make my company more money? The answer is very simple—by keeping my overhead down, and only by keeping this overhead down can I beat the other fellow."
Zimmerman, supra note 14, at 35 (quoting letter from Michael Cullen to the Vice President of the Kroger Grocery & Baking Co.).
142. "I want to sell 300 items at cost. I want to sell 200 items at 5% above cost. I want to sell 300 items at 15% above cost. I want to sell 300 items at 20% above cost." Id. at 33 (quoting letter from Michael Cullen to the Vice President of the Kroger Grocery & Baking Co.).
143. Zimmerman continues quoting Michael Cullen's letter:
"When I come out with a two page ad and advertise 300 items at cost and 200 items at practically cost, which would probably be all the advertising that I would ever have to do, the public, regardless of their present feeling towards Chain Stores, because in reality I would not be a Chain Store, would break my front doors down to get in. It would be a riot. I would have to call out the police and let the public in so many at a time. I would lead the public out of the high priced houses of bondage into the low prices of the house of the promised land."
Id. at 33-34 (quoting letter from Michael Cullen to the Vice President of the Kroger Grocery & Baking Co.).
144. See Peak & Peak, supra note 18, at 15.
145. See Zimmerman, supra note 14, at 40.
146. Singer, supra note 80, at 2 (quoting Cullen).
buying. After quenching their thirst for the low-cost items that attracted them to the store in the first place, affluent customers would see enticing displays of another 1000 items with very healthy markups. Temptation would be too much for many of them, and customers who could afford it would emerge from the store with much more than they planned to buy. The proposal advocated sub-prime locations, a few blocks away from the main drag. Leasing space a few blocks away from prime neighborhood shopping districts would accomplish more than saving big rent dollars. It would also provide an extra important dividend. Free curbside parking was available in sub-prime neighborhoods.

As he approached the end of his letter, Cullen pleaded with his reader: ""Before you throw this letter in the wastebasket, read it again and then wire me to come to Cincinnati, so I can tell you more about this plan, and what it will do for you and your company."

Then, he concluded with this question: ""What is your verdict?"" Alas, the verdict was negative. Bonham was not interested, and the letter never got to Albers.

147. See ZIMMERMAN, supra note 14, at 32.
148. See id. at 34.
149. ""Week days would be Saturdays—rainy days would be sunny days, and then when the great crowd of American people came to buy all those low priced and 5% items, I would have them surrounded with 15%, 20% and in some cases, 25% items. In other words, I could afford to sell a can of Milk at cost if I could sell a can of Peas and make 2¢, and so on all through the grocery line."

Id. at 34 (quoting letter from Michael Cullen to the Vice President of the Kroger Grocery & Baking Co.).
150. See id.
151. See id.
152. See id.
153. ""Again you may object to my locating two or three blocks from the business center of a big city. One great asset in being away from the business section is parking space. Another is, you can get generally the kind of store you want and on your own terms. The public will walk an extra block or two if they can save money, and one of our talking points would be, the reason we sell at wholesale prices are that we are out of the high rent district."

Id. at 34-35 (quoting letter from Michael Cullen to the Vice President of the Kroger Grocery & Baking Co.).
154. Id. (quoting letter from Michael Cullen to the Vice President of the Kroger Grocery & Baking Co.).
155. See id.
156. See Mathews, supra note 41, at 39.
Undaunted by Bonham’s verdict, Cullen traveled to Kroger’s headquarters in Cincinnati in a last ditch effort to meet Albers.\textsuperscript{157} Cullen reckoned that, if he could only meet with Albers personally, Albers would instinctively understand that Cullen’s proposal for a very large store with a low-cost and low-price structure would be the wave of the future.\textsuperscript{158} Despite his high hopes, Cullen did not get to see Albers.\textsuperscript{159} He was told, “Mr. Albers is too busy to talk to you.”\textsuperscript{160}

Even then Cullen did not give up. Believing in his business plan passionately, Cullen quit his Kroger job to try his luck with other potential backers.\textsuperscript{161} Quitting any job was a courageous act during the Great Depression. So many people were out of work and looking for a job—any job.

Cullen’s next move was to look for another affluent company to provide the financial muscle he needed to start a new business based on his proposal.\textsuperscript{162} First, he presented the proposal to A&P, but A&P rejected it also.\textsuperscript{163} Then, he approached Harry Socoloff, a Vice President of Sweet Life Foods Corp. of Brooklyn, New York and found a sympathetic ear at last.\textsuperscript{164} Socoloff was impressed.\textsuperscript{165} He was impressed enough to open his wallet, and the new venture was launched with Socoloff’s backing.\textsuperscript{166} Socoloff and Cullen formed a new corporation, King Kullen Grocery Co., to implement Cullen’s plan.\textsuperscript{167} They did not take a long time to get moving. The first store, appropriately called King Kullen, was launched on August 4, 1930 from a vacant garage at 171st Street and Jamaica Avenue in the Jamaica neighborhood of New York City’s Borough of Queens.\textsuperscript{168} The rent was cheap, and curbside parking was free and plentiful—just the way he dreamed it would be.\textsuperscript{169}

Now, Michael Cullen had the chance to prove his theories. Following his well-conceived plan, he advertised the new store

\textsuperscript{157.  See ZIMMERMAN, supra note 14, at 39, 110.}
\textsuperscript{158.  See id. at 39.}
\textsuperscript{159.  See id.}
\textsuperscript{160.  Id.}
\textsuperscript{161.  See GREER ET AL., supra note 54, at 154.}
\textsuperscript{162.  See MCAUSLAND, supra note 27, at 5.}
\textsuperscript{163.  See id.}
\textsuperscript{164.  See ZIMMERMAN, supra note 14, at 35.}
\textsuperscript{165.  See id.}
\textsuperscript{166.  See id.}
\textsuperscript{167.  See id.}
\textsuperscript{168.  See id.}
\textsuperscript{169.  See Arieh Goldman, Stages in the Development of the Supermarket, J. RETAILING, Winter 1975-76, at 49, 59; see also ZIMMERMAN, supra note 14, at 34-35.
aggressively.\textsuperscript{170} Although Cullen's advertisements were completely unorthodox, they were very effective.\textsuperscript{171} Using his favorite advertising medium, a four-page newspaper supplement, the ad copy trumpeted his very, very, very, very low-price policy.\textsuperscript{172} It emphasized that King Kullen customers would save money and plenty of it.\textsuperscript{173} It stressed the store's cleanliness and the availability of free parking.\textsuperscript{174}

Now that he was the boss and no longer inhibited by the restraints that come with being a corporate employee, Cullen's charismatic personality emerged. He was the king, King Kullen. The king of what? Perhaps the king of the grocers. How did Michael Cullen come to call the new business, King Kullen? Michael Cullen's wife, Nan Cullen, told this story in a June 1937 interview:

Our son Bobby, who has a great gift for drawing, was sitting by his table very eagerly engrossed in some sort of a drawing. His father asked him what he was drawing, and Bobby showed him his drawing.

It was a picture of a globe, and on top of it a man was seated—Bobby's idea of a man seated on top of the world. And across the bottom he had printed the title KING KULLEN. Actually, it was because Bobby thought Cullen was also spelt with a K. But the title struck Mike at once.\textsuperscript{175}

Cullen's advertisements queried, "\textit{King Kullen, the world's greatest price wrecker—how does he do it?}"\textsuperscript{176} The public did not know how he did it, and they might not have even known what he did. However, they were interested enough to come by and see what was going on.\textsuperscript{177} They came. They saw. And they bought.

As he predicted, customers traveled longer distances to King Kullen than any other grocer had the right to expect.\textsuperscript{178} When they finished shopping, they loaded their cars with enough food to last a week, and they returned a week later to do the same thing.\textsuperscript{179} Why should they come to King Kullen and load their cars? Food cost much less money at King Kullen than at neighborhood grocers.\textsuperscript{180} King Kullen

\begin{quote}

\textsuperscript{170} See ZIMMERMAN, \textit{supra} note 14, at 37.
\textsuperscript{171} See id.
\textsuperscript{172} See \textit{id.} at 38.
\textsuperscript{173} See \textit{id.}
\textsuperscript{174} See \textit{id.} at 37.
\textsuperscript{175} Singer, \textit{supra} note 80, at 6.
\textsuperscript{176} ZIMMERMAN, \textit{supra} note 14, at 37 (emphasis added).
\textsuperscript{177} See \textit{id.}
\textsuperscript{178} See LONGSTRETH, \textit{supra} note 60, at 122.
\textsuperscript{179} See ZIMMERMAN, \textit{supra} note 14, at 38.
\textsuperscript{180} See \textit{id.}
\end{quote}
charged only four cents for a can of Campbell's tomato soup that usually cost seven cents in neighborhood service grocery stores. Supranote 181 Drug items that sold for ten cents in the neighborhoods cost only nine cents at King Kullen. Supranote 182

Michael Cullen's euphoric theory yielded euphoric results. The first King Kullen was a big winner. Supranote 183 The store opening drew such a large crowd that police reserves were deployed to keep the bargain hunters in check. Supranote 184 Roped aisles were used to keep the throng in line as they waited for the chance to load their shopping baskets. Supranote 185 For its very first week, the store's volume was described as "phenomenal."

It was time to expand (aggressively). In only two years, seven more King Kullens opened for business. Supranote 187 Like the initial Jamaica store, the new stores were located close to densely populated residential neighborhoods but not right in them. Supranote 188 He promoted each new store assertively. Supranote 189 Each new market was saturated with razzle dazzle advertising featuring the Cullen philosophy and Michael Cullen himself. Supranote 190 Here's an excerpt:

"Who is King Kullen? . . .

. . . .

What kind of man is he?

. . . .

King Kullen is none other than Michael Joseph Cullen, born and brought up in Jersey. Been in the grocery business all my life. Been with some of the big chains for 20 years or more and finally decided to try it by myself because I want to test out my own theories of merchandising. . . . The grocery world was dumbfounded with my low prices. . . . Today, my sales run into the millions. The big interests call me the wildcat, the banks call me a miracle man. But who cares what

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181. See Charvat, supra note 130, at 19.
182. See id.
183. See Mathews, supra note 41, at 39.
184. See Singer, supra note 80, at 2.
185. See id. at 2-3.
186. Zimmerman, supra note 14, at 37.
187. See Mayo, supra note 53, at 141.
188. See id.
189. See id.
190. See Zimmerman, supra note 14, at 37.
they all say. It's you folks I want to please.... Are you with me.... What is your answer?"^{191}

Cullen's message was not entirely commercial. With evangelical fervor and a messianic tone, he attacked the service grocery chain store organizations as the tools of Wall Street who oppressed the poor.^{192} Given the state of the economy in the 1930s, this was a potent message. He refused to pull his punches and declared that the chain stores were nothing less than a "menace to the nation."^{193}

His competitors hated the ads, but consumers loved them and came to shop.^{194} In 1932, grocery department cash registers in the eight King Kullen stores rang to the tune of more than $6 million in sales in the aggregate.^{195} Although that is a paltry volume now, it was a remarkable achievement in the midst of the Great Depression with the flood of business failures it caused. The annual sales volume of neighborhood grocery stores of that era was $17,380.^{196} Not content with eight stores, an impressive sales volume, and an even more impressive reputation, Cullen opened another seven stores before his untimely death in 1936 at the age of fifty-two.^{197} Some say, perhaps with good reason, that he died of overwork.^{198}

His death was untimely for many more reasons than his age. He was the founder of a new industry and the trailblazer of a more efficient and more equitable system of food distribution.^{199} Consumers and merchants alike benefited from his vision. William Albers, former President of the Kroger Grocery & Baking Co., paid this tribute to Michael Cullen at the Supermarket Institute’s inaugural convention in 1937:

Ladies and gentleman, why are we here today? We are here simply because one man had a vision.

Yes, I know that California had large markets, had the advantages of climatic and other conditions, and I know there were large markets in practically every city in the country. However, I say there was only

^{191} Id. at 37-38 (quoting King Kullen’s opening advertisements).
^{192} See id. at 38.
^{193} King Kullen newspaper advertisement (n.d.), reprinted in GREER ET AL., supra note 54, at 150.
^{194} See ZINN, supra note 14, at 38.
^{195} See id. at 39.
^{196} See id. at 3.
^{197} See id. at 39.
^{198} See id.
^{199} See id. at 31.
one man who had the vision and the confidence to back up and build what is today, ladies and gentlemen, the Super Market Industry. 200

That one man was Michael Cullen. Nobody knows what Michael Cullen would have accomplished if he had not died young. However, we do know he accomplished more in his short lifetime than most people who live into their eighties.

b. Other Seeds of the Supermarket Movement

Although Michael ("King") Cullen was justifiably hailed as the founder of America's supermarket industry, some commentators contend that Cullen was not the first grocer to open a supermarket for business. 201 Even William Albers, who came to be an ardent Cullen admirer, pointed out that King Kullen might not have been the first supermarket. 202

Large food markets with adjacent parking lots available for customer use were doing business in California and Texas in the 1920s. 203 Lucius Flint reported that, in 1922, McDaniels Markets started a chain of supermarkets in California's San Gabriel Valley. 204 Max Zimmerman reported that supermarkets were doing business in the Los Angeles area as early as 1927. 205 Perhaps they included the markets identified by Lucius Flint as the 7500 square footer opened by Roberts Public Market in 1927, the 6000 square footer opened by W.H. Crawford in 1927, and the 15,000 square footer opened by Morris Weisstein in 1928. 206 Charles Phillips reported in a Harvard Business Review article that twenty-five supermarkets were doing business in Los Angeles in 1929. 207 Phillips also maintained that thirty-nine supermarkets were doing business in the Los Angeles area in 1930. 208 In his book, Supermarketing, 209 Frank Charvat agreed with Phillips that supermarkets had been established in Los Angeles before 1930 but disagreed as to their number. 210 He asserted that Ralph's Grocery Company, a prominent

202. See ZIMMERMAN, supra note 14, at 110.
203. See CHARVAT, supra note 130, at 15-16.
204. See Lucius S. Flint, The Los Angeles Super, CHAIN STORE AGE, June 1950, at J34, J34.
205. See M.M. Zimmerman, Super-Markets, PRINTER'S INK, July 9, 1936, at 7, 10.
206. See Flint, supra note 204, at J34.
207. See Phillips, supra note 118, at 193.
208. See id.
209. CHARVAT, supra note 130.
210. See id. at 15.
Los Angeles chain, had launched sixteen "large, well-developed supermarkets" by 1929\textsuperscript{211} and that Henke & Pillot, a prominent Houston, Texas grocery chain had become "a full-fledged supermarket" operation by 1929 (one year before the first King Kullen held its grand opening).\textsuperscript{212} I have no further information on the Los Angeles stores and wonder whether they really were supermarkets. As to the downtown Houston Henke & Pillot store, I do not know whether, and to what extent, the store was operated on a self-service basis.

Other supermarket-like operations were doing business in 1930.\textsuperscript{213} I do not know whether the other stores opened before or after the first King Kullen or whether their founders were influenced by Michael Cullen. I do know their stores followed many of the principles espoused by Michael Cullen. A Market Basket food market opened for business in a 7500 square foot storeroom in the Los Angeles area that year.\textsuperscript{214} Two large food stores called Canners Warehouse opened for business in Detroit.\textsuperscript{215} One was owned by Scott Black, an advertising executive.\textsuperscript{216} The other was owned by one of Black’s former colleagues named Ed Coe.\textsuperscript{217} Both stores succeeded for a while.\textsuperscript{218}

Regardless whether the first King Kullen was America’s first supermarket, it was Michael Cullen who codified most of the principles that were to become the supermarket industry’s theoretical foundation.\textsuperscript{219} It was Michael Cullen who demonstrated that the supermarket model was economically feasible.\textsuperscript{220} It was also Michael Cullen who gave this new method of food distribution a heavy dose of public exposure.\textsuperscript{221} King Kullen stores were living proof that supermarket sales per square foot could be exponentially greater than service grocery store sales per square foot. King Kullen stores were living proof that food prices could be dramatically lower in supermarkets than in service grocery stores.\textsuperscript{222} King Kullen stores were living proof that the supermarket business

\begin{itemize}
\item \textsuperscript{211} Id. On the other hand, Lucius Flint indicates that only two Ralph’s units had parking lots in 1929. See Flint, supra note 204, at J34.
\item \textsuperscript{212} See CHÁRVAT, supra note 130, at 17.
\item \textsuperscript{213} See, e.g., ZIMMERMAN, supra note 14, at 29 (discussing the rise and fall of “groceterias”).
\item \textsuperscript{214} See Flint, supra note 204, at J34.
\item \textsuperscript{215} See ZIMMERMAN, supra note 14, at 29.
\item \textsuperscript{216} See id.
\item \textsuperscript{217} See id.
\item \textsuperscript{218} See id.
\item \textsuperscript{219} See id. at 32-34.
\item \textsuperscript{220} See CHÁRVAT, supra note 130, at 18-19; MAYO, supra note 53, at 141.
\item \textsuperscript{221} See MAYO, supra note 53, at 141.
\item \textsuperscript{222} See CHÁRVAT, supra note 130, at 21.
\end{itemize}
could be profitable.\textsuperscript{223} The news traveled fast. It was good news for consumers.

It was not good news for grocery store chains or independent neighborhood service grocers.\textsuperscript{224} The food industry quickly discovered to its dismay that the early King Kullen stores were smash hits.\textsuperscript{225} Service grocers learned that one King Kullen store did as much business as 100 traditional grocery stores.\textsuperscript{226} As Cullen’s competitors lost customers, they realized that consumers were willing to bypass traditional neighborhood service grocery stores and travel long distances to buy food for less money at King Kullen.\textsuperscript{227} Competitors also learned that Michel Cullen was determined to build on his early triumphs and expand his new retail business rapidly.\textsuperscript{228} Soon consumers would have access to more King Kullens. Would the world’s greatest price wrecker become the world’s greatest grocery chain wrecker?

Michael Cullen’s well-publicized success did not irritate everybody in the food industry. Here and there, creative merchants who had big ideas of their own were intrigued by King Kullen.\textsuperscript{229} They were delighted to know that such things were possible—even in the midst of the Great Depression.\textsuperscript{230} If Michael Cullen could make his supermarket work, why couldn’t any grocer do it?

Launching a new supermarket or, for that matter, any new retail business is never easy. Even today, startup businesses usually have a hard time gathering investment capital. Think about trying to raise capital in the bleak economic climate of 1930. Few people had money to invest then, and not so many people were left with abundant cash resources after 1929’s monumental stock market crash. In addition to raising money, prospective storekeepers needed to lease space at a good location, acquire fixtures, hire employees, and purchase inventory.

Raising money, finding a good location, negotiating a lease, acquiring fixtures, hiring employees, and purchasing inventory were barriers, but they were not impenetrable barriers. Audacious Cullen disciples figured they could overcome these barriers despite (or maybe

\textsuperscript{223} See MAYO, supra note 53, at 141.

\textsuperscript{224} See CHARVAT, supra note 130, at 21.

\textsuperscript{225} See ZIMMERMAN, supra note 14, at 38-39.

\textsuperscript{226} See id. at 38.

\textsuperscript{227} See MAYO, supra note 53, at 144.

\textsuperscript{228} See TOM MAHONEY & LEONARD SLOANE, THE GREAT MERCHANTS 177 (rev. ed. 1974).

\textsuperscript{229} See ZIMMERMAN, supra note 14, at 54.

\textsuperscript{230} See id.
because of) the Great Depression. They could lease dilapidated vacant industrial buildings with good locations. Vacant industrial buildings were plentiful in a nation gripped by anxiety and 20% unemployment. They could substitute used and other cheap fixtures for the more expensive fixtures used by grocery store chains. Many retailers had thrown in the towel by 1930, and their creditors were happy to dispose of used fixtures lying around in abandoned storerooms. Cullen disciples could be picky when they hired retail clerks and other employees because so many people needed jobs then. Better yet, supermarkets needed fewer employees per square foot of selling space than traditional service grocery stores. Supermarket operators were able to buy plenty of distress merchandise. Manufacturers and wholesalers with bulging warehouses were glad to get rid of the stuff at huge discounts. Low overhead and frugal operating expenses combined to yield a low-cost structure. The supermarket's low-cost structure made it possible for a clever and energetic food merchant to make good money despite a low-price policy and a paltry investment in plant, equipment, and inventory. What was the toughest barrier? For most of them, the toughest barrier was raising the investment capital they needed. They managed to do that too.

A Denver grocer named Morris Miller was among the first. His Miller's Super Public Market began doing business in 1931 and instituted many of the policies Michael Cullen was advocating. Miller was comfortable with the self-service principle and had already used it to his advantage in his downtown Denver grocery stores. However, Miller's Super Public Market added important new Cullen-like policies to his downtown Denver grocery store model. It was bigger, it offered

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232. See Goldman, supra note 169, at 59.
233. See Charvat, supra note 130, at 20; McAusland, supra note 27, at 6.
234. See Goldman, supra note 169, at 59.
235. See id.
236. See Charvat, supra note 130, at 20.
237. See Mayo, supra note 53, at 145.
238. See Zimmerman, supra note 14, at 49-50.
239. See Mayo, supra note 53, at 140.
240. See id. at 141.
241. See Zimmerman, supra note 14, at 28.
242. See id.
243. See McAusland, supra note 27, at 20.
244. See id.
free parking, and it targeted a broad geographic area for prospective customers. 245

A few established independent grocers were bitten by the supermarket bug in 1932, and some regional grocery chains experimented at least partially with Michael Cullen’s business model. 246 Penn Fruit, a Pennsylvania-based grocery chain, launched a 16,000 square foot store in Philadelphia in 1932, but that store lacked parking facilities. 247 Nevertheless, Penn Fruit must have liked the results. It opened five more big stores in the next five years. 248 A California grocery chain called Alpha Beta opened two supermarkets in 1932 but did not call them supermarkets. 249 To the Alpha Beta folks, they were wholesale-retail markets. 250 Roberts, another California grocer opened an 8000 square foot market in 1932 in the Los Angeles area with an 8000 square foot parking lot. 251 It was classified as a supermarket by Lucius Flint. 252

Four other noteworthy supermarkets opened for business in 1932. September 24, 1932 was opening day for Portland, Oregon’s Columbia Markets. 253 Columbia Markets’ building was very large and modern by 1932 standards. 254 Thirteen thousand square feet of floor area fit within its four walls, and its customers had free parking privileges in a 4000 square foot parking lot. 255

Sylvan and Alfred Goldman, 256 who, in time, would become supermarket industry luminaries in their own right, opened a 7000 square foot unit in Oklahoma City in October of 1932. 257 Although the Goldmans’ new building was smaller than Columbia Markets’ building, they displayed their food marketing insight by providing a more generous parking lot than the parking lot provided by Columbia Markets. 258 The Goldmans’ 7000 square foot unit had a 14,000 square

245. See id.
246. See, e.g., ZIMMERMAN, supra note 14, at 55 (describing several supermarket openings in the 1930s).
247. See id. at 55-56.
248. See id. at 56.
249. See MCAUSLAND, supra note 27, at 21.
250. See id.
251. See Flint, supra note 204, at J34.
252. See id.
253. See ZIMMERMAN, supra note 14, at 60.
254. See id.
255. See id.
256. I have more to say about the Goldman brothers below. See infra text accompanying notes 1507-89.
257. See ZIMMERMAN, supra note 14, at 58.
258. See id.
foot parking lot. Ultimately, the Goldmans would add significant new elements to the supermarket business model and make an indelible mark on the food distribution industry.

Sam Seelig, who had sold 263 southern California service grocery stores to Safeway in 1925, reentered the fray in 1932 with a supermarket in Hollywood, California.

On December 8, 1932, a new chapter in supermarket history began when Robert Otis and Roy Dawson launched their new food market, the Big Bear, in Elizabeth, New Jersey.

c. Robert Otis and Roy Dawson, Food Merchant Mavericks

Robert Otis and Roy Dawson were captivated by the first King Kullen’s success. They too had earned their stripes in retailing with little recognition or reward by 1930 when the United States was mired in a depression and rewards were hard to come by. After years of working for general merchandise retailers like Sears, Roebuck & Company and food retailers, Otis and Dawson decided to start their own retail business. They followed Cullen’s footsteps and added a few tricks of their own.

To accomplish that goal, they needed financial backing from a powerful grocery store chain or a grocery wholesaler. Early on, Dawson took the same path as Cullen in the search for financial backing. He made a pilgrimage to Cincinnati to interest William Albers, President of the Kroger Grocery & Baking Co., in the new venture. Unlike Cullen, Dawson actually got to see Albers, but he could not convince Albers to provide backing for the new venture. Albers turned him down, a decision he was to regret in the years to come. Ultimately, Otis and Dawson approached American Home Grocers, a Hoboken, New Jersey wholesaler, and American Home

259. See id.
260. See id. at 59, 60.
261. See LONGSTRETH, supra note 60, at 115.
262. See id. at 122.
263. See ZIMMERMAN, supra note 14, at 38-39.
264. See id. at 39.
265. See LONGSTRETH, supra note 60, at 122.
266. See ZIMMERMAN, supra note 14, at 39.
267. See id. at 110.
268. See id.
269. See id.
270. See id.
Grocers liked the idea.\textsuperscript{271} Once again, a wholesale operation was willing to take a chance on backing a supermarket business.\textsuperscript{272} Otis, Dawson, and American Home Grocers joined forces and started business operations in 1932, which was a very difficult year in which to start any business.\textsuperscript{273} They launched Big Bear, the world’s second and New Jersey’s first supermarket.\textsuperscript{274}

Big Bear leased the Durant Motor Company’s 50,000 square foot vacant automobile factory in Elizabeth, Union County, New Jersey, and converted it for retail use.\textsuperscript{275} The store was not pretty when they leased it, and they did not do much to make it prettier than it was when they first saw it.\textsuperscript{276} From the outside the Big Bear premises looked like the dilapidated industrial building it was.\textsuperscript{277} The interior probably did not look any better than the exterior.\textsuperscript{278} It was described as having a “‘temporary bazaar-like appearance.’”\textsuperscript{279} Its ceilings were bare, its floors were crude, and its signs were gaudy.\textsuperscript{280} Big Bear fixtures were not any more impressive.\textsuperscript{281} Cheap pine tables were used extensively.\textsuperscript{282} No matter! The prices were low, and that is what counted.

Big Bear’s owners tried to imitate Michael Cullen’s one-stop shopping concept and improve on it.\textsuperscript{283} They combined groceries with a heavier dose of nonfood merchandise and food items seldom found in grocery stores of that era.\textsuperscript{284} They loaded the store with nonfood products and nontraditional food items in the belief that big crowds would be attracted by the prospect of buying groceries at very low prices but would not leave without also buying other items with higher markups.\textsuperscript{285} Using traditional groceries as loss leaders, Big Bear’s 15,000 square foot grocery department was surrounded by eleven other departments selling such diverse products as drugs, cosmetics, auto accessories, and paint.\textsuperscript{286}

\begin{thebibliography}{99}
\bibitem{271} See id. at 39.
\bibitem{272} See id.
\bibitem{274} See id.
\bibitem{275} See JEFFREY R. PRINCE, SUPER MARKET INST., THE FIRST FORTY YEARS 2 (1977);
\bibitem{276} See CHARVAT, supra note 14, at 39-40.
\bibitem{277} See id.
\bibitem{278} See id.
\bibitem{279} See id.
\bibitem{280} See id.
\bibitem{281} See id.
\bibitem{282} See id.
\bibitem{283} See id.
\bibitem{284} See id.
\bibitem{285} See ZIMMERMAN, supra note 14, at 40.
\bibitem{286} See CHARVAT, supra note 130, at 19; MAYO, supra note 53, at 141.
\end{thebibliography}
Michael Cullen, who believed free parking to be an essential ingredient of his food retailing revolution, believed thrift to be a still more important value. So, when he opened his first store, he did not go as far as buying or leasing a parking lot for the customers of his first store. Customers of the first King Kullen store depended on free curbside parking along public streets near the store. Otis and Dawson took the free parking principle one step farther than Cullen. Their customers did not need to cruise the public streets in search of curbside parking because Big Bear provided an ample and convenient customer parking lot.

Describing itself as a cut-rate self-service grocery store, Big Bear was a true believer in the low-price policy principle and a fierce price competitor. The low-price policy paid off handsomely. Its grand opening was reported to have shattered all records for attendance and sales volume. Its cash register tapes tallied $31,861.71 (really big money for 1932) in the first three days of store operations. According to one commentator, the Elizabeth store grossed almost $75,000 a week between its opening day on December 8, 1932 through May 13, 1933. Another commentator estimated Big Bear’s weekly volume at $100,000. In the early 1930s, $100,000 was a phenomenal weekly volume. That was approximately the aggregate volume of all the A&P stores in the Newark and Elizabeth area, and A&P was very well represented in that market. Despite the low prices, Big Bear’s carefully controlled cost structure and high sales volume resulted in very healthy profits. Net profit for the first year’s operations was $166,507.47.

287. See Zimmerman, supra note 14, at 38.
288. See Mayo, supra note 53, at 141.
289. See id.
290. See id.
291. See id.; Zimmerman, supra note 14, at 40.
292. See Mathews, supra note 41, at 39.
293. See Liebs, supra note 55, at 126.
294. See id.
295. See id.
296. See Zimmerman, supra note 14, at 40-41.
297. See id. at 42.
299. See id.
300. See id. (stating that a $100,000 sales volume per week “was equal to the total weekly volume of the 100 A&P stores in the surrounding Newark/Elizabeth area”).
301. See Zimmerman, supra note 14, at 43.
302. See id.
Like King Kullen, Big Bear attracted consumers willing to travel previously unimaginable distances for grocery shoppers. Some came from as far away as ten or more miles.

Although Otis and Dawson’s Big Bear quickly established a loyal following among consumers, it inflicted severe emotional distress on its competitors, the press, food processing company executives, and government officials. New Jersey’s grocers were so traumatized by the specter of aggressive price competition that they organized protest meetings all over that state where they vented their fury at what they perceived as sociopathic behavior (price-cutting). They demanded that wholesalers discontinue sales to Big Bear and other supermarket operators. They complained vociferously to the Associated Grocery Manufacturers of America, an organization of food processing companies. The Associated Grocery Manufacturers of America responded by condemning Big Bear’s distribution practices and drafting legislation to constrain loss-leader prices.

They looked for and got help from friendly state and local legislators. New Jersey State legislators friendly to the interests of service-oriented food markets introduced an Assembly bill to prohibit sales at or below cost and a State Senate resolution to investigate supermarkets. Local governments passed anti-Big Bear and anti-supermarket ordinances.

That was not all. The service grocers also pressured local newspapers to refuse to carry Big Bear ads. The newspapers succumbed to the pressure and stopped running Big Bear ads. Undaunted by the dirty tricks, Otis and Dawson retaliated by sidestepping the newspapers and substituting personally delivered handbills for newspaper advertising. Big Bear handbills, entitled “Bear Facts” were delivered to every home in a ten-mile radius from the

303. See id. at 42.
304. See Goldman, supra note 169, at 59.
305. See ZIMMERMAN, supra note 14, at 43-44.
306. See id. at 44.
307. See Phillips, supra note 118, at 190.
308. See ZIMMERMAN, supra note 14, at 44.
309. See GREER ET AL., supra note 54, at 152.
310. See ZIMMERMAN, supra note 14, at 44.
311. See id.
312. See CHARVAT, supra note 130, at 155.
313. See id.
314. See id.
315. See ZIMMERMAN, supra note 14, at 44.
store. The handbills featured messages every consumer likes to see. The first page shrieked, "more prices crushed." The centerfold was even more effective. It listed prices for featured items which were lower than ever. The Big Bear snarled back eloquently at his detractors on the back page.

"Now when the Big Bear store makes it possible for you to buy the things you need and want at lower prices, these bulls are deliberately attempting to deprive you of the benefits.

The bulls either can't or won't sell at lower prices. . . . The bulls don't want you to know about Big Bear's Lower Prices—and they are resorting to every trick they know how to prevent Big Bear from reaching you." 319

Consumers living in Big Bear's trading area were faced with a moral dilemma. The neighborhood merchants from whom they purchased food ever since they were children were in trouble. The neighborhood merchant's livelihood was threatened by a vigorous force in a life-or-death struggle. Neighborhood grocers knew their customers personally. They had extended credit to their customers when they could not pay, and they had done many favors for their customers. All right! Food costs more in neighborhood service grocery stores, but the storekeepers were old friends and good human beings. Should we consign them to the soup kitchen to shave a few dollars off the weekly food budget?

In an America humbled by the Great Depression, a great many people answered "yes" to this question. Consumers did not patronize neighborhood grocers and pay higher prices to make sure the grocers made a living. Neighborhood grocers were destined to lose the battle. Consumers had their own problems, and they usually chose lower prices over sympathy for neighborhood grocers. Supermarkets helped

316. See id.
317. Id.
318. See id.
319. Id. (quoting a 1933 Big Bear advertising circular).
320. See id. at 51.
321. See PEAK & PEAK, supra note 18, at 15.
322. See id.
323. See ZIMMERMAN, supra note 14, at 51.
324. See id.
325. See id.
326. See id.
consumers stretch their resources and survive the Great Depression, and the supermarkets prospered.\footnote{327}{See id. at 51-52.}

Big Bear prospered more after the controversies than before.\footnote{328}{See id. at 45.} Shortly after the controversies began, its weekly sales rose to more than $80,000 and then to more than $90,000.\footnote{329}{See id.} Big Bear management now had the courage to expand. Six more units were added in short order, and Big Bear became a chain store organization.\footnote{330}{See id. at 47.}

The controversy made headlines. Something strange, new, and wonderful happened at King Kullen and Big Bear. Cullen, Otis, and Dawson had released a powerful force that would radically change the way people would buy food for decades and perhaps even centuries.\footnote{331}{See id. at 54 (highlighting the vigorous growth of supermarkets after the opening of King Kullen and Big Bear).}

2. The Supermarket Movement Gathers Momentum

a. At First, Independents and Small Regional Chains Lead the Way

The news of Big Bear's price policies and its struggles thrust the supermarket before the public's eye.\footnote{332}{See id.} With the American economy limping and widespread unemployment lingering, consumers were trying hard to conserve food dollars.\footnote{333}{See id. at 45.} The birth of the supermarket was welcome news to them. This new kind of food market was a source of cheaper food and a tool for survival.\footnote{334}{See ZIMMERMAN, supra note 14, at 52.}

On the other hand, chain store executives, independent grocers, food manufacturers, and food wholesalers were puzzled, and many of them were frightened.\footnote{335}{See ZIMMERMAN, supra note 14, at 52.} Despite their blatant disregard of the conventional wisdom, Cullen, Otis, and Dawson were making money—lots of money.\footnote{336}{See id. at 43.} Worse, their competitors were losing market share quickly.\footnote{337}{See id. at 54.} Were Cullen, Otis, and Dawson fly-by-night operators who would fizzle in a short time? Maybe. On the other hand, maybe these troublemaking entrepreneurs from Long Island and New Jersey had
stumbled on a better way to sell food and were about to undermine the
service grocery store. It was time for food industry luminaries to
investigate the King Kullen and Big Bear business models and find out
what was going on. Curious food distribution moguls, national grocery
chain executives, food wholesalers, regional grocery chain operators,
and small time independent grocers made pilgrimages to King Kullen
and Big Bear stores from 1932 to 1937.338

The pilgrims returned with mixed reactions. A few visitors were
enthusiastic and began to hatch plans to start their own supermarkets.339
However, most of the visitors were naysayers and returned to their
headquarters with no interest in adjusting their business strategy to cope
with this new phenomenon.340 Some of them scoffed and concluded that
supermarketing was a fad.341 Others were impressed by this strange new
force but could not come to grips with it and prayed it would all go
away.342

Chain store organizations were worried, and they had good reason
to be worried. At first, the supermarket’s success took George Ludlum
Hartford and John Hartford, A&P’s headmen, by surprise.343 In the early
1930s, most A&P branches were little more than neighborhood service
grocery stores, albeit very well-merchandised neighborhood service
grocery stores.344 The year of 1930 brought the Hartfords both good news
and bad. The good news was that A&P branches were outdoing
neighborhood grocery stores.345 The bad news was that supermarkets
were outdoing the A&P branches by far.346 Despite King Kullen’s
aggressively low-price policy (or perhaps because of it), the sales
volume of each King Kullen store was about the same as any ten A&P
units in the same general marketing area.347 George Ludlum Hartford, the
more conservative of the two, figured that the new format was merely a
passing fancy.348 Disregard it, and it would go away. George Ludlum
Hartford disregarded it, but it did not go away.349

338. See Phillips, supra note 118, at 190.
339. See id.
340. See ZIMMERMAN, supra note 14, at 60.
341. See Phillips, supra note 118, at 195.
342. See id.
343. See ZIMMERMAN, supra note 14, at 49.
344. See HOYT, supra note 79, at 140.
345. See id. at 158.
346. See id.
347. See WALSH, supra note 298, at 47.
348. See id.
349. See id. at 48.
John Hartford, George’s brother and A&P’s guiding light, was one very worried grocer. John Hartford wondered whether King Kullen had leapfrogged A&P, but he could not bring himself to believe it. He comforted himself (at least temporarily) by assuming that King Kullen’s success was merely a fad and not the beginning of a revolution. He expected life to return to normal after the sizzle subsided. Nevertheless, John Hartford was more adventurous than his brother, and he decided to investigate. John dispatched a trusted executive named Tom Fitzgerald to Detroit to observe early supermarket activity there. Later, in 1934, A&P’s Central Western Division President led John Hartford on a tour of Detroit-area supermarket competitors. John also toured the King Kullen stores in New York and was amazed at what Michael Cullen had accomplished in such a short time. He commented on his reactions while testifying during an antitrust hearing in September of 1945:

“The first Super Market that came to my attention was in the Eastern Division. We did not take it seriously at first, but the competition was pretty aggressive. Independents got into it pretty fast and I went to Detroit and saw an old freight house converted into a Super Market. I talked to the personnel and made up my mind it was necessary for us to adopt that kind of operation. Later, we had a demonstration in Brooklyn of this—what this competition really meant to us. We had a competitor there by the name of King Kullen, and many independents who opened these stores very fast. We had a very profitable operation in Brooklyn: In a very short space of time, they forced the Brooklyn unit into deep red figures.”

Nevertheless, A&P took no concrete steps to develop its own supermarkets for many years after that.

To George Jenkins, who would later found the Florida-based Publix Supermarkets, the building in which Big Bear’s store was located was repulsive. The fixtures and the interior decor were also repulsive.

350. See HOYT, supra note 79, at 156.
351. See id.
352. See id.; WALSH, supra note 298, at 47.
353. See WALSH, supra note 298, at 47-48.
355. See CHARVAT, supra note 130, at 160.
356. See ZIMMERMANN, supra note 14, at 49.
357. Id. (quoting testimony of John Hartford, given during a federal antitrust case brought against A&P in 1942).
358. See id.
359. See WATTERS, supra note 201, at 58.
However, Jenkins admired Big Bear's self-service techniques, its low profit margins, its low prices, and (best of all) its big sales volume.\textsuperscript{360} He concluded early on that the supermarket was destined to provide cheaper food for the consuming public and handsome profits for its merchants.\textsuperscript{361} In time, Jenkins would establish his own supermarket chain and advance the supermarket cause with his own innovations.\textsuperscript{362} However, he was not ready for that step in the early 1930s.

Nevertheless, a modest but significant band of independent food merchants and small regional grocery store chains were ready for that step.\textsuperscript{363} Enthralled by the success of King Kullen and Big Bear, they set the stage for another round of supermarket openings between 1933 and 1941.\textsuperscript{364} Convinced that supermarkets were destined to supplant the service grocery and service-oriented food stores, they planned to inaugurate new supermarket businesses.\textsuperscript{365}

One way to go about it was to imitate the King and the Bear as much as they could. King Kullen and Big Bear had established reputations as consumer champions in the struggle against high prices.\textsuperscript{366} Their successful battles against entrenched grocery chains and politicians electrified consumers, and consumers came to identify royalty and wild beasts with aggressive food merchants with low food prices.\textsuperscript{367} King Kullen's royal-sounding name and Big Bear's huge wild-beast-oriented names conjured the image of huge food markets, much larger food markets than shoppers had ever seen before. King Kullen's royal image and Big Bear's mighty beast image also projected power, the power to bargain hard with food processing companies, the power to compete with the older service-oriented food chain stores, the power to lower prices, and the power to keep prices low.\textsuperscript{368} Many newcomers chose business names evoking these images too.\textsuperscript{369} They too would be kings, big chiefs, big beasts, and giants of all varieties.\textsuperscript{370} They figured that the public would trust them and buy their food, in part, because of their names.

\textsuperscript{360.} See id.  
\textsuperscript{361.} See id. at 59.  
\textsuperscript{362.} See id.  
\textsuperscript{363.} See CHARVAT, supra note 130, at 18.  
\textsuperscript{364.} See PEAK & PEAK, supra note 18, at 17.  
\textsuperscript{365.} See id.  
\textsuperscript{366.} See CHARVAT, supra note 130, at 21.  
\textsuperscript{367.} See MAYO, supra note 53, at 144.  
\textsuperscript{368.} See ZIMMERMAN, supra note 14, at 45.  
\textsuperscript{369.} See CHARVAT, supra note 130, at 19.  
\textsuperscript{370.} See id.
Accordingly, a batch of 1933 startups eagerly chose royal-sounding and mighty beast names, and other names evoking huge size and power. A Kingston, New York supermarket was named the Great Bull Market.\textsuperscript{371} A Providence, Rhode Island grocer named his new supermarket, Big Chief.\textsuperscript{372} A Newark, New Jersey merchant, Arthur Rosenberg, decided that there must be room for more than one king in the supermarket business.\textsuperscript{373} If Michael Cullen could be King Kullen, Arthur Rosenberg could be King Arthur.\textsuperscript{374} His first King Arthur supermarket was lodged in an approximately 10,000 square foot building in Newark.\textsuperscript{375} If two supermarket kings could coexist in 1933, why not two Big Bears? Another supermarket startup decided to call itself Big Bear and dedicated itself to fight the “demon of high prices” on behalf of America’s downtrodden food shoppers.\textsuperscript{376} This Big Bear found its den in Somerville, Massachusetts.\textsuperscript{377}

Armed with a business plan that closely resembled the Elizabeth, New Jersey Big Bear’s business model, Somerville’s Big Bear opened for business in May 1933.\textsuperscript{378} Although the Somerville store’s owners had no relationship with Robert Otis or Roy Dawson, they were not embarrassed about copying their business name.\textsuperscript{379} The resemblance of the Somerville Big Bear to the Elizabeth Big Bear was no coincidence. News of the Elizabeth Big Bear’s struggles had traveled north, and its reputation among consumers for price cutting traveled with it.\textsuperscript{380} The Somerville store’s management wanted to cash in on the Elizabeth store’s prestige.\textsuperscript{381} Thus, one Big Bear’s success led to two Big Bear supermarket operations with no connection to each other.

Dedicated to a low-price policy, a low operating cost structure, and cheap rent, the Somerville Big Bear’s owners imitated many of the Elizabeth Big Bear’s business methods too.\textsuperscript{382} They did not spend much money on equipment, and the grocery department functioned on a strict self-service and cash and carry basis.\textsuperscript{383} Big Bear customers selected the

\begin{itemize}
  \item \textsuperscript{371} See Phillips, supra note 118, at 193.
  \item \textsuperscript{372} See id.
  \item \textsuperscript{373} See ZIMMERMAN, supra note 14, at 55.
  \item \textsuperscript{374} See id.
  \item \textsuperscript{375} See id.
  \item \textsuperscript{376} See McAUSLAND, supra note 27, at 17.
  \item \textsuperscript{377} See Phillips, supra note 118, at 190.
  \item \textsuperscript{378} See id.
  \item \textsuperscript{379} See id.
  \item \textsuperscript{380} See HOYT, supra note 79, at 154.
  \item \textsuperscript{381} See id.
  \item \textsuperscript{382} See id.
  \item \textsuperscript{383} See Phillips, supra note 118, at 191.
\end{itemize}
groceries they wanted themselves. They carried their selections in a basket to a checkout counter, paid the freight, carried their bundles to their cars, and drove away.

The Somerville Big Bear’s owners liked Otis and Dawson’s loss leader policy too. After observing that the Elizabeth Big Bear’s low grocery prices attracted hordes of consumers who splurged on nonfood merchandise with higher markups, they decided to follow suit. Reportedly, the Somerville Big Bear’s grocery prices were 12.8% lower than the competition’s grocery prices. With most of their sales space dedicated to nonfood merchandise, they surrounded their grocery department with nonfoods. In addition to the grocery department, Somerville’s Big Bear had twenty-three departments. The other departments included a bakery, delicatessen, shoe repair shop, and a barber shop.

Most new supermarket entrepreneurs copied Cullen, Otis, and Dawson’s business methods but were not interested in royal-sounding or mighty beast names. William H. Albers was among them. He had succeeded Bernard H. Kroger as President of the Kroger Grocery & Baking Co. in 1928, and he had served in that capacity with much distinction. He was still Kroger’s President in 1930 when Michael Cullen offered his supermarket plan to Kroger.

Although Cullen’s plan never got to Albers in time for him to adopt it on Kroger’s behalf, the news of Cullen’s success with King Kullen must have caught Albers’ attention. In 1930, Albers left Kroger himself. Then, he started his own grocery company. Catching the supermarket bug in 1933, he opened several new markets that year in Cincinnati, Kroger’s home base. His store openings were greeted by Cincinnati’s traditional grocers with the same kind of antics the Big Bear

384. See id.
385. See HOYT, supra note 79, at 154.
386. See id. at 154-55.
387. See id.
388. See id. at 155.
389. See id. at 154.
390. See id.
391. See id.
392. See ZIMMERMAN, supra note 14, at 57.
393. See id.
395. See ZIMMERMAN, supra note 14, at 39.
396. See id.
397. See LAYCOCK, supra note 394, at 37.
398. See id.
399. See ZIMMERMAN, supra note 14, at 57.
had endured. Some rivals were so thrilled by the appearance of a formidable competitor with a low-price policy that they pelted its show windows with bricks.

Other noteworthy supermarket launches in 1933 included Food Fair Stores, Packard-Bamberger, Empire Market, Von's, and Carty Brothers. Food Fair Stores, a Philadelphia grocery store chain led by Louis Stein, George Friedland, and Samuel Friedland, opened its first supermarket for business in April of that year. That unit was called the Giant Quality Food Price Cutter. Located in Harrisburg, Pennsylvania, the store was lodged in an approximately 10,000 square foot converted garage. A second unit was opened later that year in Reading, Pennsylvania. Frank Packard's Packard-Bamberger supermarket business was situated on a ten-acre parcel in Hackensack, New Jersey. In an earlier life, its 40,000 square foot premises had been the main floor of a factory building. Schaffer Stores Co. was a small Schenectady, New York grocery chain. Schaffer had gained valuable experience gleaned from running self-service grocery stores since 1929. When it inaugurated its first supermarket in 1933, Schaffer extended the self-service principles, at least partially, to its meat and vegetable departments. Schaffer's first supermarket was called Empire Market. Was its name, Empire, an illusion to King Kullen's royal might, or was it intended to evoke its New York State (the Empire state) origins?

Charles Von Der Ahe, another southern California grocer, who had sold his service grocery chain to Safeway, returned to the retail food business in 1933. He opened an 8100 square foot unit for business in the Los Angeles area and provided a fifteen car parking lot for his customers. Another southern California grocery company called Carty Brothers cast

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400. See McAusland, supra note 27, at 19.
401. See id.
402. See Flint, supra note 204, at J34; see also Zimmerman, supra note 14, at 55-57.
403. See Zimmerman, supra note 14, at 55-57.
404. See Mathews, supra note 41, at 39.
405. See Zimmerman, supra note 14, at 55.
406. See Mathews, supra note 41, at 39.
407. See Zimmerman, supra note 14, at 55.
408. See id.
409. See id. at 56.
410. See id.
411. See id.
412. See id.
413. See id.
414. See Flint, supra note 204, at J34.
415. See id.
its lot with the supermarket movement with a 9500 square foot Los Angeles area store and a 18,750 square foot parking lot.416

U.S. industrial earnings improved a bit in 1934, and that affected the fortunes of consumers and food merchants alike.417 As industrial earnings improved, buying patterns shifted. Regardless whether the food products they craved were nutritionally beneficial or detrimental, Americans could afford to buy more red meat, fruit, green vegetables, and dairy products.418 Encouraged in part by increased food consumer confidence, supermarket expansion continued.419 By 1934, ninety-four supermarket businesses were doing business in twenty-four cities.420

Still another Big Bear enterprise (completely independent of the Elizabeth, New Jersey and Somerville, Massachusetts operations) started doing business that year in Columbus, Ohio.421 With the birth of the Columbus Big Bear, four bears were snarling all at once at high-priced service grocery stores and the Goldilocks of expensive porridge.422 Although none of them were joined by business or family ties, they were joined in spirit. The Columbus Big Bear owner, Wayne Brown, copied much more than a name from the merchants who made the Big Bear supermarkets in Elizabeth, New Jersey and Somerville, Massachusetts so prosperous.423 He adopted their basic principles too. Doing business from a monstrously large storeroom was one important Big Bear principle Brown adopted.424 His Columbus Big Bear premise was a 60,000 square foot building.425 Like its New Jersey and Massachusetts counterparts, this building had seen better days. It had already been a skating rink, ballroom, and riding academy.426 Food processing companies and its grocery store competitors were no kinder to the third Big Bear than they were to the first two.427 Its detractors did what they could to thwart the Columbus Big Bear, but this Big Bear kept selling food at low prices and attracting a loyal following.428

416. See id.
418. See ZaMMErman, supra note 14, at 144.
419. See MC AusL AND, supra note 27, at 39.
420. See id.
421. See id. at 19, 57.
422. See id. at 19.
423. See ZaMMErman, supra note 14, at 57.
424. See id.
425. See id.
426. See id.
427. See MC AusL AND, supra note 27, at 19.
428. See ZaMMErman, supra note 14, at 57-58.
Three other significant supermarket industry pioneers got their start in 1934.429 George Loft, who had already established his mercantile reputation by founding a candy store chain, tried his hand in the food market business.430 His supermarket chain was inaugurated with a new store in Mount Vernon, New York (just north of New York City).431 The Cifrino Brothers started a supermarket business in Dorchester, Massachusetts.432 The Cifrinos were not newcomers to the food business. They had been successful food merchants since World War I.433 Michael Cullen’s good friend, William Golub, joined the supermarket fraternity after a big push in the right direction from Cullen.434 Golub asked Cullen to comment on Golub’s service grocery stores and was surprised by Cullen’s answer.435 After reviewing Golub’s stores, Cullen spoke frankly and honestly, but not so politely. He told Golub that his service grocery store operations were like “‘[d]riving a hearse.’”436 Golub responded with a new kind of store he called a large self-service store.437 Dubbed the Public Service Center, it began doing business with the public in Green Island, New York in November 1932.438 Public Service Center sold a wide variety of food and off-premises merchandise.439 At the outset, only the grocery department was owned by Golub’s company, and all other departments were owned by concessionaires.440 Later, Golub’s company expanded its product lines to other food and nonfood lines.441

America was still plagued by the Great Depression in 1935 and 1936.442 They were years of continued misery for consumers and keen competition by food merchants for the consumer’s food dollar.443 Michael Cullen died in 1936, but the process he, Robert Otis, Roy Dawson, and other industry pioneers had ignited provided a ray of hope.444 The supermarket had already succeeded beyond any reasonable

429. See id. at 56, 66.
430. See id.
431. See id.
432. See id.
433. See id.
434. See id. at 66.
435. See id. at 67.
436. Id. (quoting Cullen).
437. See id.
438. See id.
439. See id.
440. See id.
441. See id.
442. See McAUSLAND, supra note 27, at 7.
443. See id. at 15.
444. See LONGSTRETH, supra note 60, at 122.
person's fondest expectation.\textsuperscript{445} America's food distribution system was on its way to a complete transformation.\textsuperscript{446}

Launching a new supermarket was a constructive response to the troubled times, and many regional grocery chains and independent grocers took the plunge.\textsuperscript{447} Despite the economic misery that pushed America's unemployment rate to 25\%, more than 1200 supermarkets had begun doing business in eighty-five cities.\textsuperscript{448} Los Angeles led the pack with 186 supermarkets.\textsuperscript{449} Eighty supermarkets were doing business in Detroit alone in 1936.\textsuperscript{450} New England and Southeast regional chains and independents that opened new supermarkets in 1935 and 1936 included the Winn & Lovett Grocery Company, United Public Markets, and Economy Grocery Stores.\textsuperscript{451} The Winn & Lovett Grocery Company's first two supermarkets opened for business in 1935 in Jacksonville, Florida.\textsuperscript{452} United Public Markets initiated a 20,000 square foot unit in Providence, Rhode Island in October, 1936.\textsuperscript{453}

A Boston area grocery company, known then as Economy Grocery Stores, opened its first supermarket, R.H. White Food Market, for business in Cambridge, Massachusetts that year.\textsuperscript{454} Economy Grocery Stores was Sidney Rabb's family's business, and he joined it after World War I.\textsuperscript{455} Although he first entered the supermarket arena in 1935, Rabb had planned his supermarket venture several years earlier.\textsuperscript{456} His plans were no secret, and they were ridiculed as \textit{Sidney's Folly}.\textsuperscript{457} Despite the jibes, he persisted. The R.H. White Food Market venture proved to be very successful,\textsuperscript{458} and its triumphs demonstrated that Sidney was no fool and \textit{Sidney's Folly} was no more of a folly than Seward's Folly. This store was destined to be the mother store of the northeast region's powerful Stop & Shop supermarket chain.\textsuperscript{459} An assertive and energetic grocer, Rabb forged Stop & Shop into a significant competitive force in

\textsuperscript{445} See \textit{Zimmerman}, supra note 14, at 20.
\textsuperscript{446} See id. at 70.
\textsuperscript{447} See \textit{Greer ET AL.}, supra note 54, at 154.
\textsuperscript{448} See \textit{Zimmerman}, supra note 14, at 54.
\textsuperscript{449} See Zimmerman, supra note 205, at 10.
\textsuperscript{450} See \textit{Zimmerman}, supra note 14, at 58.
\textsuperscript{451} See id. at 56-57, 62.
\textsuperscript{452} See id. at 62.
\textsuperscript{453} See id. at 57.
\textsuperscript{454} See id. at 56.
\textsuperscript{456} See id.
\textsuperscript{457} See \textit{Prince}, supra note 275, at 4.
\textsuperscript{458} See \textit{Zimmerman}, supra note 14, at 56.
\textsuperscript{459} See id.
the marketplace. His well-earned reputation as an innovator led Leo Kahn, the founder of rival supermarket chain, Purity Supermarkets, to proclaim that Rabb was a role model for up and coming supermarket operators.

In 1937 and 1938, supermarkets had become serious contenders for the American consumer’s food budget. The industry’s pioneers, primarily independent grocers and regional grocery chains, could justifiably conclude that their new way of selling food had become an established institution. They responded to their early successes by expanding their operations. Economy Grocery Stores (precursor of Stop & Shop) had opened nine supermarkets by then. Penn Fruit’s roster of supermarkets had grown to seven. Albers Supermarket had become a nine-store supermarket chain, and the Columbus, Ohio Big Bear had become a four-store supermarket chain. Sam Seelig’s new southern California chain had grown to three stores. Pittsburgh’s Streamline Markets was operating seven supermarkets and prospering. George Loft and Morris Miller expanded their chains with new and expensive buildings. Twenty supermarkets were open and doing business in Chicago alone that year. Belvedere Gardens Market, another huge modern facility, opened its doors to the public in Los Angeles in a 50,000 square foot storeroom.

In 1937, Roy Dawson, a singularly feisty independent grocer with an impressive record, set out to trump his earlier achievements. Widely known as a cofounder of the Elizabeth, New Jersey Big Bear, he had resigned from that company. Despite his resignation, Dawson was steadfast in his devotion to Big Bear principles. He reentered the supermarket business in Chicago with a new venture, Dawson’s Trading

460. See Stein, supra note 455.
461. See id.
462. See ZIMMERMAN, supra note 14, at 52.
463. See LONGSTRETH, supra note 60, at 121.
464. See ZIMMERMAN, supra note 14, at 54.
465. See id. at 56.
466. See id.
467. See id. at 57.
468. See LONGSTRETH, supra note 60, at 115.
469. See Phillips, supra note 118, at 195.
470. See ZIMMERMAN, supra note 14, at 121.
471. See id. at 58.
472. See id. at 122.
473. See id. at 58.
474. See id.
475. See id.
The formula he and his Big Bear colleagues applied so successfully in New Jersey only five years earlier was put to the test again in Mid-America. Store operating expenses were slimmed, prices were trimmed, and the storeroom was enormous.

Dawson's Trading Post kept operating expenses down with a low occupancy cost and innovative purchasing techniques. Occupancy cost was low in part because the building in which the Trading Post was located was an old industrial building that had once been a paper bag factory. He offset part of his occupancy cost by subletting space to concessionaires. He could do that because the storeroom had ample space available for subletting without curtailing the grocery department. Approximately thirty concessionaires paid rent for the privilege of selling their wares near Dawson's grocery department. Dawson's subtenants could make good money selling nonfood products to Trading Post shoppers because Dawson's grocery department sold its food products for a lot less money than the competition.

Roy Dawson curtailed the cost of his groceries by buying them by the carload, and he passed the savings onto his customers. The Trading Post sold ten pounds of sugar for sixty cents and three cans of tomatoes for nineteen cents. A seventeen-ounce can of cranberry sauce sold for 12.5¢, a pound of sugar for six cents, and a fourteen-ounce package of Quaker farina for seven cents. He did not keep his very low price policy a secret. Razzle dazzle advertising informed the world that Dawson's Trading Post hated high prices as much as it hated high operating expenses. He spent $120,000 a year (big bucks in 1937) on

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476. See id.
477. See id.
478. See id.
479. See id.
480. See McAUSLAND, supra note 27, at 20.
481. See ZIMMERMAN, supra note 14, at 58.
482. See id.
483. See id.
484. See id. at 59.
485. See id. at 58.
486. See id. at 59.
487. See id. These prices were much lower than prices charged by contemporary service grocery stores. See id. Clearly, they were bargains in the context of the 1930s. However, the degree to which they were bargains is considerably exaggerated when compared to contemporary prices for these products.
488. See id. at 58.
Much of this money was spent on a twelve-page circular which he distributed to 100,000 households.

Cheap prices were not all that Dawson offered. The Trading Post kept long hours. Unlike its competitors who turned off their lights at 6:30 p.m., Dawson's Trading Post stayed open until 9:00 p.m. Shoppers concerned about missing radio news and sports broadcasts were placated by news and sports announcements on the Trading Post's public address system.

The formula worked again. Just like the Elizabeth, New Jersey Big Bear, Dawson's Trading Post was a triumph. Consumers flocked to the site and loaded their cars with liquor, home furnishings, and menswear as well as cheap groceries. The Trading Post attracted between 40,000 and 50,000 Great Depression bruised price-conscious consumers weekly.

George Jenkins kept an eye on the supermarket movement through the 1930s as it was transformed from oddball to feared competitor. As the proprietor of a couple of small grocery stores in Winter Haven, Florida, Jenkins had admired many aspects of the King Kullen and Big Bear operations. He admired the supermarket movement so much that he attended the second convention of the Super Market Institute, the supermarket industry's first trade organization, in 1938. Although his application for membership was rejected because his food markets were not supermarkets, Jenkins learned much and made valuable contacts there. Nevertheless, he hesitated casting his lot with the new food retailing system. His enthusiasm for the supermarket movement was tempered by his distaste for ugly and dilapidated industrial buildings. Believing that his role was to do everything he could to make the shopping experience pleasant for his customers, Jenkins kept his little

489. See id.
490. See id.
491. See id.
492. See id.
493. See MCAUSLAND, supra note 27, at 20.
494. See Zimmerman, supra note 205, at 10.
495. See id.
496. See id.
497. See WATTERS, supra note 201, at 195.
498. See id. at 54.
499. See id. at 197.
500. See id.
501. See id. at 58.
502. See id.
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grocery stores attractive and meticulously clean. Shoppers appreciated his efforts, and they were not the only people who did. His employees also liked working in a well-kept storeroom. Remembering his first day as a meat cutter in Jenkins' first little twenty-seven foot by sixty-five foot grocery store in Winter Haven, Florida a long-term Jenkins colleague recalled many years later that he enjoyed his new working environment very much. He praised it as the prettiest store he had ever seen. With his faith that attractive surroundings and good housekeeping led to happy customers and good profits, George Jenkins was not ready for his own supermarket in the early 1930s when the supermarket was principally identified with makeshift fixtures and derelict buildings.

Early supermarket store designs of the early 1930s were ugly and disorganized by modern day standards. Abandoned industrial buildings provided a cheap rent solution for an industry based on keeping expenses down. Early supermarket shoppers were willing to tolerate shabby-looking store buildings and overcome annoying barriers. They maneuvered around industrial columns, and they hunted for goods stacked haphazardly throughout the store. Sometimes, goods were stacked so carelessly that they were almost impossible to find. To some supermarket pioneers, this was even seen as good marketing. They figured that shoppers would understand that the price slashing was due to huge cuts in overhead rather than huge cuts in the quality of the food. The notion that a supermarket business could succeed only with an extremely low occupancy cost made possible by the rock-bottom rental rates available only in derelict buildings was widely accepted in the early 1930s by most early supermarket industry pioneers and grocery chain store executives. However, that notion did not stand up to the test of time.

503. See id. at 54.
504. See id.
505. See id. at 54-55.
506. See id. at 55.
507. See id. at 44.
508. See id. at 58.
509. See ZIMMERMAN, supra note 14, at 19.
510. See id. at 55.
511. See id. at 19.
512. See id.
513. See id.
514. See id.
515. See id.
516. See id. at 34-35, 55.
It was food distribution efficiency that really enabled the supermarket to sell for less, and food distribution efficiency demanded better store design, better store layout, better store buildings, better trade fixtures, and better store operating equipment.\textsuperscript{517} With that principle in mind, some supermarket industry pioneers followed a completely different path from the early supermarket pioneers who preferred converting vacant warehouse and factory buildings to supermarkets.\textsuperscript{518} George Loft and the Cifrino Brothers had bucked the trend in 1934.\textsuperscript{519} Customers of Loft's first supermarket in Mount Vernon, New York shopped in a new and modern building designed for supermarket operations.\textsuperscript{520} The building from which the Cifrino Brothers Dorchester, Massachusetts supermarket operation did business was not only new, it was, from a 1934 vantage point, futuristic.\textsuperscript{521} Unlike almost every other 1934 retail establishment, the Cifrino Brothers' Dorchester, Massachusetts supermarket was air-conditioned.\textsuperscript{522}

1937 became a good year for Andrew Williams, a prominent California grocer when his Andrew Williams Super Market held a successful grand opening in Oakland, California.\textsuperscript{523} Williams did not slavishly imitate the Big Bear model.\textsuperscript{524} His storeroom was huge by 1930's standards, but at 30,000 square feet of floor area, it was not nearly as huge as the humongous Big Bear storerooms.\textsuperscript{525} Nevertheless, 30,000 square feet of floor area gave Williams ample room to serve both food and nonfood consumers in the context of the 1937 marketplace.\textsuperscript{526} This early supermarket sold health and beauty aids and prescription drugs.\textsuperscript{527} It also included a lunch room; an ice cream counter; a soda fountain; a flower shop; a newsstand; and a doughnut, popcorn, and nut department.\textsuperscript{528} Williams was not interested in old industrial buildings.\textsuperscript{529} His supermarket was housed in what was then considered an

\begin{footnotes}
517. See, e.g., id. at 55-57 (explaining the new store designs and modern layouts that began emerging in the supermarket industry).
518. See id. at 55.
519. See id. at 56.
520. See id.
521. See id.
522. See id.
523. See id. at 120.
524. See id.
525. See id. at 121.
526. See id.
527. See id.
528. See id.
529. See id.
\end{footnotes}
ultramodern facility. Used and outdated furniture, fixtures, and equipment had no place in the Williams Supermarket. Everything was new, high-quality, and up-to-date.

The notion that a supermarket business could succeed only by leasing derelict buildings had eroded by the late 1930s. By then, the early supermarket pioneers realized that they could afford to lease space in newly-constructed, modern, and well-designed buildings. Many of them had cleaned up their act by modernizing their operations. Even New Jersey’s Big Bear was modernized. Its new 1939 store was lodged in a spiffy, up-to-date, and professionally-designed building.

The late 1930s also saw much better store layouts. Freezer cases were designed for self-service for the first time. Produce was placed in large islands for maximum exposure to customers. The popularity of nonfood departments owned by independent or semi-independent concessionaires diminished, and company-owned nonfood departments replaced many of them. Cash registers and checkout counters were organized in a more formal way.

The time was ripe for George Jenkins to make his move as 1940 approached, and he started laying plans for his first supermarket. He wanted his first supermarket to be attractive, modern, clean, and efficient, but even that was not enough. What Jenkins had in mind was trying to design the “finest store in the world.” That was no easy task, and Jenkins described the effort this way: “We were sure the housewife wanted a pleasant atmosphere in which to shop, and we constantly sketched plans for the type of market we thought all the Mrs. Joneses would like.”

I cannot say whether Jenkins’ first supermarket was the finest store in the world. However, I can say that the store was very successful and

530. See id. at 120-21.
531. See id.
532. See id.
533. See id. at 126.
534. See id.
535. See id.
536. See id.
537. See McAUSLAND, supra note 27, at 15.
538. See ZIMMERMAN, supra note 14, at 118.
539. See MAYO, supra note 53, at 174-75.
540. See Goldman, supra note 169, at 60.
541. See MAYO, supra note 53, at 177.
542. See WATTERS, supra note 201, at 60.
543. See id.
544. Id.
545. Id. at 59.
that it became the mother store of the widely respected Southeast regional chain, Publix Supermarkets.546

If nothing else, the first Publix supermarket was designed for customer comfort.547 This air-conditioned structure was distinguished by such amenities as fluorescent lighting, customized dairy cases, frozen food cases, and a chilled water fountain.548 Supermarket customers take these things for granted now, but they were daring innovations before World War II.549

That was not all. The building's most innovative and unusual elements were its automatic doors.550 These doors opened as you approached, and they closed as you passed.551 Virtually all supermarkets use them now, but the first Publix Supermarket was also the first supermarket with automatic doors.552 These magical devices dazzled the public and convinced customers who lived far away to visit the store.553 They could not resist the magic doors. Some came to the store just to pass through them. They entered through the automatic doors, they exited from the automatic doors, they entered again, they exited again, and they bought nothing.554 Fortunately for Publix, the thrill seekers who bought nothing were in the minority.

The first Publix supermarket was designed for more than comfort.555 It was also designed to look good. Unlike customers of early supermarkets lodged in timeworn factory buildings and garages, Publix supermarket customers could see what was going on inside before entering the building through full-length windows.556 They entered the art deco building with white stucco exterior walls through a black, marbled entranceway.557 Interior walls were painted with pastel colors.558 One was green, another cream, and still another pink.559 The Winter Haven Herald proclaimed this store the "most beautiful and most

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546. See id.
547. See id. at 60, 64.
548. See id. at 60.
549. See id. at 61.
550. See id.
551. See id.
552. See id.
553. See id. at 61, 64.
554. See id. at 64.
555. See id. at 58-59.
556. See id. at 61.
557. See id.
558. See id.
559. See id.
modern grocery establishment in Florida, and one of the finest in the United States.\footnote{Id. at 64.}

Flush with success from the first stores, early supermarket pioneers tried a second store, then a third, and then more. They had become supermarket chains. Before Michael Cullen died in 1936, King Kullen had become a fifteen-store chain.\footnote{See Phillips, supra note 118, at 193.} Elizabeth’s Big Bear opened its fourteenth unit in 1939.\footnote{See id. at 126.} Food Fair had been impressed by the swift pace of the King Arthur chain’s expansion program.\footnote{See id. at 127.} King Arthur’s had grown to thirteen stores in only six years (a rapid pace for a small independent grocery company in the 1930s).\footnote{See id. at 55.} Its $5 million sales volume was enticing enough to Food Fair to induce it to swallow King Arthur in 1939.\footnote{See id. at 127.} In the Los Angeles area, Von’s had grown to twelve stores,\footnote{See LONGSTRETH, supra note 60, at 115.} and Ralph’s had grown to thirty-one stores by 1941.\footnote{See id. at 120.}

In its brief twelve-year history, this daring new form of food retailing had captured an approximately 20% market share of the nation with the world’s largest and most affluent marketplace.\footnote{See CHARVAT, supra note 130, at 29.} Surprisingly, the major grocery chains did not set the pace of this impressive growth record. Most supermarkets were still owned by Independents and small regional chains then.\footnote{See Phillips, supra note 118, at 194.} However, that was changing rapidly. The big grocery chains had begun to swallow their pride, they were entering the supermarket business, and they were doing their best to make up for lost time and lost opportunity.\footnote{See id. at 195.}

b. National Chains Enter the Supermarket Business

Despite the market share inroads made in the early 1930s by the independent grocers and regional grocery chains who established the supermarket industry, the national grocery chain store organizations were reluctant to get their feet wet.\footnote{See id. at 195.} Instead, as the supermarkets operated by the independent chains and regional chains became a potent force in the marketplace, the national chains were content to make their
service grocery stores work better and steal market share from each other.572

With the Great Depression continuing to inhibit consumer spending in 1935, national service grocery chain owners were very troubled by the supermarket’s continued success.573 They began to see their franchises slipping away. Without a drastic change in store size and store operations, the big national service grocery chains could not match supermarket prices on a long-term basis.574 Service grocery markups averaged 20%.575 The service grocery chains were unable to lower their markups because their operating expenses were not much lower than their markups.576 Safeway’s operating expenses were 18.5%, and Kroger’s operating expenses were 18.9%.577 Supermarkets could afford to limit their markups to approximately 12% because their operating expenses were much lower than those of the national service grocery chains.578 Moreover, the large store format made it possible for supermarket operators to reduce or even eliminate occupancy costs by subletting big blocks of space at handsome profits.579

After losing ground to the new supermarket companies for approximately five years, the big service grocery chain store organizations could no longer sit by and allow these upstarts to grab market share without a fight.580 The big service grocery chain owners realized at last that they were contending with a robust competitive force that would destroy them completely unless they came to grips with the new reality and devised a way to cope with it.581

A&P was still mulling it over in 1935.582 Surprisingly popular with consumers, the newfangled supermarkets’ achievements exceeded the Hartford brothers’ worst nightmares.583 The Tea Company584 had plenty

572. See id.
573. See id. at 195.
574. See id. at 196-97.
575. See ZIMMERMAN, supra note 14, at 14.
576. See Phillips, supra note 118, at 198.
577. See id.
578. See id.
579. See, e.g., HOYT, supra note 79, at 154 (noting that when the Durant Motor Company opened in 1932 in an abandoned factory, the rest of the building was leased to other individuals or businesses).
580. See Phillips, supra note 118, at 195.
581. See, e.g., HOYT, supra note 79, at 156 (discussing A&P’s concerns with the increase in supermarkets and the owner’s realization that something had to be done).
582. See id.
583. See id. at 156.
584. In its earliest phase, The Great Atlantic & Pacific Tea Company was not a grocery company. See id. at 150. It was in the tea wholesale and retail business. See id. In deference to its
to worry about during the previous few years. The world had changed for A&P. It was no longer the only national service grocery chain store organization that could keep its operating expenses down and maintain a low price policy. Its buyers were no longer the only food market representatives with enough financial clout to buy the fruit grown in an entire orchard. Other service grocery chains were rich enough to make massive bulk purchases too. Moreover, independent neighborhood grocers could join forces and make joint efforts to do the same thing. By imitating A&P’s volume buying techniques, rival service grocery chain store organizations and independent grocer cooperative buying organizations achieved comparable operating cost savings. As a result, they could afford to lower their prices to compete with A&P. Sensing vulnerability, other powerful national grocery chains challenged its numerous service grocery stores with renewed vigor. Kroger and Grand Union were bent on stealing market share from A&P with loss leader tactics. They would advertise delicious bargains on popular staples at prices below their wholesale cost. They compensated for the losses by enticing shoppers with higher priced merchandise once they entered the store.

A&P still was not ready to fight fire with fire in 1935. The Tea Company’s long-standing price policy had been to sell at a small profit and never at a loss, and its senior managers were bent on sticking to their principles. Although the Hartford brothers could not stand by idly and let others eat their lunches, they were not ready to jump into the supermarket business yet. Their response to aggressive competition from rival national grocery chains then was to institute an aggressive everyday low price policy at a select group of A&P stores. These A&P origins, A&P employees often referred to the company as the “Tea Company” over the years. Some of them still do.

585. See id. at 149, 156.
586. See id. at 149.
587. See id.
588. See id.
589. See id.
590. See id. at 149-50.
591. See id.
592. See id.
593. See id. at 141.
594. See id. at 157.
595. See id. at 154-55.
596. See id. at 157.
597. See id. at 141.
598. See id.
599. See id. at 157.
stores would sell everything at very low prices and razor-thin markups everyday. Promotional sales and weekend price reductions were out. The everyday low price was low, but it was not low enough. Supermarket prices were lower, and supermarkets were consistently increasing their share of the market.

Safeway Stores was beginning to realize that the service grocery store business was tottering, but in 1935 it too was still reluctant to plunge into the murky waters of supermarketing. Instead, Safeway tried to meet the supermarket challenge by opening larger combination service food stores and closing smaller service grocery stores. Seventy recently acquired Piggly Wiggly stores were among them. Combination stores were much larger than the typical service grocery stores of that era, and the merchandise mix of combination stores was broader than that of typical service grocery stores of that era. The additional space was used effectively by adding produce and meat departments. Although they were much larger than their predecessors, combination stores were no giants. A typical combination store occupied approximately 2500 square feet of floor area.

Kroger was more adventurous than A&P and Safeway in 1935. That year, it converted fifty service grocery stores to a format it called the new "supermarket style." However, only six of the converted stores had parking facilities.

Coming to grips with reality was not easy for the grocery industry's wounded giant, The Great Atlantic & Pacific Tea Company, and another year passed without meaningful change. Although things were still looking bleak for A&P in 1936, it was still reluctant to leap to a large store format. As a corporate entity, A&P was big—very big. On the other hand, its individual stores were small, and it was losing sales to its

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600. See id. at 158.
601. See id.
602. See id.
603. See ZIMMERMAN, supra note 14, at 62.
604. See id.
605. See id.
606. See CHARVAT, supra note 130, at 196.
607. See id. at 158.
608. See ZIMMERMAN, supra note 14, at 62.
609. See id.
610. See HOYT, supra note 79, at 157.
611. LAYCOCK, supra note 394, at 53.
612. See id.
613. See HOYT, supra note 79, at 158.
614. See id.
615. See WALSH, supra note 298, at 48.
Despite its successful experiment with a very large store that opened for business in Philadelphia in 1930, A&P's leadership was still determined to stick to the small store format.\(^6\) George Ludlum Hartford was convinced that A&P could serve more consumers and serve them better by sticking with small stores.\(^1\) As he saw it, larger stores could not be as close together as smaller stores. With clusters of small stores saturating a geographical market, A&P was represented everywhere.\(^2\) Larger stores could not be spaced so closely to each other. With much larger stores, significant gaps in consumer coverage might develop. He was afraid that some consumers, formerly served by a nearby A&P small store, might be lost as A&P customers because they would be too far away from an A&P supermarket.\(^3\) Moreover, George Ludlum Hartford was unwilling to accept the burdens that would inevitably accompany the benefits of big stores.\(^4\) He knew it would not be easy for A&P to start leasing big stores without abandoning some of its time honored leasing policies.\(^5\) In the early 1930s, A&P's traditional leasing policies put very little on the landlord's plate.\(^6\) For example, the term of a typical A&P lease was one year, and a typical A&P lease provided for nine options to extend the term from one year to the next. If it wanted to lease larger stores, the Tea Company would be forced to be much less stingy with its landlords.\(^7\)

George Ludlum Hartford's younger brother, John, surveyed the supermarket scene again, and he was not enthused about A&P's eroding market position.\(^8\) The new industry was flourishing and expanding. In only two years the total number of supermarkets in America had grown more than twelve-fold (from ninety-four in 1934 to 1200 in 1936).\(^9\) More painfully, John Hartford discovered that a supermarket operation had captured 9.5% of the Cincinnati market with only eight stores.\(^10\) A&P had fifty-six stores in that city then, but its market share trailed at only 7.7%.\(^11\) Results like that could no longer be ignored. The challenge

\(^{616}\) See id. at 49.
\(^{617}\) See HOYT, supra note 79, at 135.
\(^{618}\) See WALSH, supra note 298, at 48.
\(^{619}\) See id.
\(^{620}\) See id. at 49.
\(^{621}\) See id. at 48.
\(^{622}\) See id. at 44.
\(^{623}\) See id.
\(^{624}\) See id.
\(^{625}\) See HOYT, supra note 79, at 150.
\(^{626}\) See ZIMMERMAN, supra note 14, at 54.
\(^{627}\) See HOYT, supra note 79, at 158.
\(^{628}\) See id.
was simply too great. It was time for the Hartford brothers to reconsider their fundamental business principles.

After almost six years of permitting numerous upstarts to gain footholds, the Hartford brothers made a fateful decision. Realizing at last in 1936 that the service grocery store was doomed and that destiny belonged to the supermarket, they decided to take the plunge. They planned to start the ball rolling with 100 units, more than all supermarkets doing business in America only two years earlier. Brother John asked Michael Cullen to take charge of A&P's new supermarket division. Perhaps Michael Cullen would have jumped at such an opportunity if it had come his way ten years earlier. By then, it was too late for anyone to expect realistically to hire Michael Cullen.

Although opening 100 new supermarkets in a brief time frame was an ambitious task, the Hartford brothers exceeded that goal by far. They jumped in with both feet, and they experimented with many different kinds of supermarket formats. They did business from leased storerooms in buildings built to suit. They operated food departments in variety stores. They did business from the ground floors of warehouse buildings. By New Year's Day of 1938, A&P's supermarket program had more than doubled its original goal, and that was merely a prelude of things to come. In 1938, A&P's supermarket roster had mushroomed to approximately 1100. Fantastic!

The Hartford brothers understood that they would have to do more than build bigger stores to compete in this new environment. Supermarkets were big from the outset, but they meant much more than that to the consuming public. The public wanted much lower prices, and A&P was ready to give them what they wanted. Moreover, A&P was willing to spend big money on advertising to let shoppers know that they would save money in a big way by shopping at the new A&P

629. See id. at 159.
630. See id.
631. See ZIMMERMAN, supra note 14, at 110.
632. See id.
633. See HOYT, supra note 79, at 159-60.
634. See ZIMMERMAN, supra note 14, at 61.
635. See id.
636. See id.
637. See id.
638. See id.
639. See WALSH, supra note 298, at 49-50.
640. See ZIMMERMAN, supra note 14, at 122.
641. See id.
Detroit shoppers were enticed by A&P’s announcement that, on the average, they would save 29% of their annual food budgets by buying all their food at A&P supermarkets. Its principal competitor in Detroit, Packer’s, fought back with ads proclaiming that Packer’s shoppers could save even more.

A&P’s supermarket program was successful—very successful indeed. Each new A&P super store did as much business as ten A&P service grocery stores. The spurt in sales volume flowing from the new supermarket program justified closing a slew of old unprofitable stores. For this purpose, A&P’s old leasing policy came in handy after all. A one-year lease policy does not work well when you want to expand your store space quickly. On the other hand, lots of stores can be closed quickly and inexpensively if the remaining term of the leases for the stores is one year or less.

A&P’s rivals were moving too. They formulated their own supermarket plans, and they opened new stores swiftly too. In 1937, Kroger started a chain of Pay’N Takit supermarkets in Cincinnati to compete with its former CEO’s Albers Super Markets. It also opened an 8000 square foot supermarket in Fort Wayne, Indiana in 1938. Safeway closed many of its 3527 service grocery stores and replaced them with supermarkets. Acme Markets got its start in 1937 under the auspices of American Stores Company. Before the year ended, Acme was operating thirty-seven supermarkets in the Philadelphia area.

Although the big chains were at last ready to swim in relatively uncharted waters, they were still more cautious than they had to be in 1937. They might have been willing to do business from much bigger units than their existing stores, but they were not willing to build Big Bears or even medium-sized “bears.” Early on, the big national

642. See id.
643. See id.
644. See id.
645. See WALSH, supra note 298, at 50.
646. See id.
647. See id.
648. See id.
649. See ZIMMERMAN, supra note 14, at 61.
650. See CHARVAT, supra note 130, at 26.
651. See ZIMMERMAN, supra note 14, at 61.
652. See Mathews, supra note 41, at 39.
653. See ZIMMERMAN, supra note 14, at 62.
654. See id.
655. See id.
656. See id.
grocery chain versions of the supermarket usually ranged between 5000 and 10,000 square feet of floor area.\textsuperscript{657} H.C. Bohack was one exception.\textsuperscript{658} Far more daring than other big grocery chains that year, it opted for a much bigger store than other large grocery chain store organization when it launched a 40,000 square foot supermarket.\textsuperscript{659}

The big chains shed more of their inhibitions around 1940.\textsuperscript{660} Their first wave of smaller supermarkets taught them that bigger is better and that much bigger is much better. Ten thousand square foot self-service supermarkets were better than 2500 square foot service-oriented combination food stores which, in turn, were better, than 600 square foot service grocery stores.\textsuperscript{661} However, they learned quickly that even 10,000 square foot storerooms were too small for the fixtures and displays needed to move large quantities of food products.\textsuperscript{662} Moreover, 10,000 square foot store rooms did not provide enough space to carry a wide variety of nonfood merchandise, a merchandise category that promised higher markups and greater profits.\textsuperscript{663} Consequently, the chains came to adopt a larger prototype for their new stores.\textsuperscript{664}

c. The Supermarket Gains a Foothold

After 1935, the number of supermarkets proliferated rapidly.\textsuperscript{665} Americans could shop at approximately 1200 supermarkets in 1936.\textsuperscript{666} That number more than quadrupled before the end of 1938.\textsuperscript{667}

As the United States prepared to enter World War II in 1939 and 1940, the supermarket had become an entrenched institution.\textsuperscript{668} More than 6000 supermarkets were doing business in America.\textsuperscript{669}

\textsuperscript{657} See id.
\textsuperscript{658} See id. at 121.
\textsuperscript{659} See id.
\textsuperscript{660} See id. at 126.
\textsuperscript{661} See id.
\textsuperscript{662} See id.
\textsuperscript{663} See id.
\textsuperscript{664} See id.
\textsuperscript{665} See id. at 131 tbl.10.
\textsuperscript{666} See id.
\textsuperscript{667} See id; see also Charvat, supra note 130, at 26.
\textsuperscript{668} See Zimmerman, supra note 14, at 129.
\textsuperscript{669} See id. at 131 tbl.10.
B. Fundamental Food Retailing Concepts Underlying the Supermarket Movement

Most of the fundamental principles that would, in time, become the backbone of the supermarket industry were enunciated in Michael Cullen’s letter to William Albers, then the President of the Kroger Grocery & Baking Co. Although he was unable to convince Kroger to fund a joint venture based on the plan, Cullen persisted, found another backer, and proved that his theory worked.

Although Big Bear did not do business in exactly the same way as King Kullen, Big Bear and King Kullen were much more alike than they were different. Big Bear’s founders, Robert Otis and Roy Dawson, followed Cullen’s business practices for the most part, but they added their own twists. Then they demonstrated that, as refined by them, Cullen’s precepts worked better on a larger scale.

A second wave of supermarket pioneers adopted most of King Kullen’s and Big Bear’s business practices but not all of them. These supermarket industry pioneers were not conformists. They were self-reliant people who challenged a well-established food distribution system that was endowed with enormous political power in a wretched economic climate. People with the courage to challenge powerful institutions tend to be highly individualistic. Not only did they refuse to follow the establishment slavishly, they refused to follow each other slavishly. They adopted the King Kullen or Big Bear policies they preferred, they rejected what they did not like, and they improved the system.

Nevertheless, common threads bound the business practices of early supermarkets, and common threads bind the business practices of most contemporary supermarkets. These common threads include six fundamental food retailing concepts enunciated in Michael Cullen’s original plan. They also include improvements and refinements introduced by such subsequent supermarket industry pioneers as Robert Otis, Roy Dawson, Sidney Rabb, Alfred Goldman, Sylvan Goldman, and George Jenkins.

670. See id. at 31-35.
671. See id. at 35.
672. See id. at 39.
673. See id. at 54.
674. See CHARVAT, supra note 130, at 19.
675. See ZIMMERMAN, supra note 14, at 32.
The six fundamental food retailing concepts embodied in Michael Cullen’s plan were:
- low price policy and low-cost structure,
- large store size,
- diverse product mix,
- self-service,
- cash and carry, and
- availability of parking facilities.\textsuperscript{676}

None of the six fundamental retailing concepts in Michael Cullen’s plan were originated by him.\textsuperscript{677} Creative food merchants of earlier generations devised every one of them.\textsuperscript{678} The contribution of Michael Cullen was gathering these ideas, integrating them into a single workable business model, and validating the business model by establishing successful supermarkets.

The contribution of his disciples was to refine Cullen’s plan and add a \textit{seventh} and very important new fundamental retailing concept to the supermarket business model. The seventh fundamental food retailing concept was an efficient merchandise movement system to maximize the benefit of self-service.\textsuperscript{679}

These seven fundamental food retailing concepts provide the best guide for understanding the supermarket and how it might be defined. The question whether a retail store is or is not a supermarket depends on the degree to which the store’s business methods and facilities conform to these fundamental food retailing concepts. Let’s review each of these fundamental food retailing concepts in detail and explore their origins and development.

1. Price Policy and Cost Structure

When compared to most other forms of food markets, supermarkets have always been low-price competitors.\textsuperscript{680} Not only are their prices low, they are not ashamed to tell the world that their prices are low.\textsuperscript{681} Supermarkets advertise their price policies aggressively.\textsuperscript{682}

\textsuperscript{676} See id. at 32-35.
\textsuperscript{677} See id. at 31.
\textsuperscript{678} See generally id. at 16-30 (discussing the various supermarket openings and their contribution to the field).
\textsuperscript{679} See infra Part III.B.7.
\textsuperscript{680} See ZIMMERMAN, supra note 14, at 37-38.
\textsuperscript{681} See id.
\textsuperscript{682} See MAYO, supra note 53, at 144; ZIMMERMAN, supra note 14, at 37.
Although supermarket prices are low, the supermarket business can be very profitable.\footnote{See Charvat, supra note 130, at 120.} Efficient operations make supermarket profits possible despite their low-price policies.\footnote{See id.} They have massive buying power, and they keep their expenses down.\footnote{See id. at 101.} The profit on each product they sell may be tiny, but they sell so many products to so many people that their overall profits can be enormous.\footnote{See id. at 120.}

2. Store Size

a. Store Size as a Component of the Supermarket Business Model

A larger store was one of the pivotal components of the new distribution method introduced by the supermarket industry’s founders.\footnote{See Mayo, supra note 53, at 117.} They believed that larger stores would pave the way toward a new, more efficient, and more profitable food market format.\footnote{See id.}

Bigger stores were perceived to be better than smaller stores by supermarket industry pioneers for four principal reasons.\footnote{See id. at 134-44.}

A larger store stimulates sales volume in many ways. The increased space makes it possible for a supermarket to sell a broader range of food and household products than a service grocery store.\footnote{See id. at 141.} Larger stores also have room for nonfood products that food stores did not carry when the supermarket industry was born.\footnote{See id. at 134, 141.} Consumers appreciate the convenience of purchasing a broader range of products under a single roof, and the greater convenience stimulates sales volume.\footnote{See id. at 140.} Larger stores are big enough to assume part of what used to be considered the grocer’s warehousing function.\footnote{See id.} Shifting inventory from a food warehouse to a food market has a salutary effect on sales.\footnote{See id.} Merchandise that would have been sitting idly in a warehouse before the supermarket era now
sits in the store on a shelf in full view and within reach of the consumer. 695

A larger sales area reduces operating expenses in many ways. The larger sales volume that accompanies a larger sales area reduces unit costs. 696 Store operating expenses do not necessarily increase in proportion to higher sales. 697 Larger storerooms reduce the need for external warehouse space. 698 With more of the inventory in the store, supermarket warehousing expenses are disproportionately lower than service grocery store warehousing expenses. 699 Cost savings made possible by a larger sales area can also stimulate sales volume if the supermarket operator applies some or all of the cost savings to reduced markups. 700

A larger sales area reduces capital expenditures in many ways. The cost of building a larger store per square foot is usually cheaper than the cost of building a smaller store per square foot. 701 Building larger buildings was also proportionately cheaper in the 1930s as the supermarket supplanted the service grocery store as America’s principal food market. 702 One reason why the larger supermarkets were proportionately cheaper then was that the cost of a building’s exterior walls was a very big part of its total cost. 703 If a large food market could sell as much merchandise as ten little stores, a grocery chain would get at least as much benefit from the exterior walls of one large food market as it would have gotten from the exterior walls of the ten little stores it would have occupied otherwise. 704 The aggregate length and cost of the exterior walls of ten little stores were much greater than that of one large building’s exterior walls. 705 The difference in construction cost between a larger and smaller building translated to a lower rent per square foot for the larger building. 706 Sometimes, the cost savings were dramatic, and sometimes they were modest. Even a modest reduction in rental expenses favorably affected the food market proprietor’s cost and price
structure. Larger stores are more profitable than smaller stores. Their proportionally greater sales and their proportionally lower expenses add a great deal to the bottom line. Profits are also enhanced because the extra space can be allocated to products with higher markups. The industry’s founders maintained that the new type of food market not only had to be bigger than the largest grocery stores of the 1920s but much bigger. OK, you ask—much bigger than what? By current standards, even the largest grocery chain stores were tiny in 1920. As the 1920s began, the A&P store roster was largely composed of 600-square foot units. Safeway marched to the beat of the same drummer. As late as 1926, the typical Safeway grocery store contained approximately 1000 square feet of floor area. However, economic conditions were good in the 1920s, and chain store attitudes about store size began to change. Some chain grocery stores got larger. The larger stores were called combination stores, and they occupied approximately 2500 square feet of floor area.

Consequently, Michael Cullen’s plan to build food markets ranging in size from 5200 to 6400 square feet of floor area was viewed as daring by some and foolhardy by others. Similarly, Morris Miller’s 6250 square foot Miller’s Super Market in suburban Denver was considered a very big food market in 1931.

The courage displayed by Cullen and Miller in building food markets with more than 5000 square feet, would soon be surpassed by far. Robert Otis and Roy Dawson’s Elizabeth, New Jersey Big Bear was bigger than both combined and then some. The Otis and Dawson Big Bear started doing business in 1932 in a building containing 50,000 square feet of gross leaseable area. That was really big in 1932. Who would dare to build a bigger one, and when would someone try?

707. See id.
708. See id.
709. See id.
710. See id.
711. See id.
712. See id.
713. See id.
714. See SAFEWAY ANNUAL REPORT, supra note 40, at 4.
715. See Mayo, supra note 53, at 134.
716. See id.
717. See Zimmerman, supra note 14, at 62.
718. See Mayo, supra note 53, at 140.
719. See id. at 138.
720. See, e.g., id. at 141 (noting that Big Bear had stores as large as 50,000 square feet).
721. See id.
722. See id.
b. Large Food Market Configurations Before the Shopping Center Era

As I pointed out above, even Michael Cullen's plan for 5200 to 6000 square foot food markets was perceived as a daring experiment in 1930.\textsuperscript{737} It was a daring experiment because most of America's grocery stores were tiny in 1930.\textsuperscript{738} Grocery stores and their predecessors, general stores, had been tiny for most of the eighteenth and nineteenth centuries as well as the first three decades of the twentieth century.\textsuperscript{739} Eighteenth and nineteenth century urban general stores and grocery stores occupied around 600 square feet of floor area.\textsuperscript{740} They could have been larger than 600 square feet, but they were not. Typical nineteenth century commercial lots contained approximately 2500 square feet, and builders of that day built on almost the entire lot.\textsuperscript{741} However, commercial buildings were commonly divided to accommodate a strip of adjacent stores that were separated from each other by partition walls.\textsuperscript{742}

Late-nineteenth-century and early-twentieth-century grocers were happy with small stores.\textsuperscript{743} They believed that food markets should be small but ubiquitous.\textsuperscript{744} That proposition made sense before the automobile and the electric refrigerator changed America's food shopping habits.\textsuperscript{745} Without automobiles or electric refrigerators, most consumers walked to grocery stores.\textsuperscript{746} Consequently, they were not inclined to walk very far or buy very much on each food buying expedition.\textsuperscript{747} Service grocery chain store organizations figured they would be better off with stores located within reasonable walking distance of its geographic market.\textsuperscript{748} That policy required a huge number of small stores and, for the most part, ruled out large storerooms.\textsuperscript{749} Because of this policy, the chains opened new stores frenetically in the early decades of the twentieth century (some of them operated thousands

\begin{thebibliography}{9}
\bibitem{737} See \textsc{Mayo, supra} note 53, at 140.
\bibitem{738} See id.
\bibitem{739} See id.
\bibitem{740} See id.
\bibitem{741} See \textsc{Richard Longstreth, The Buildings of Main Street 17} (2000).
\bibitem{742} See id.
\bibitem{743} See \textsc{Mayo, supra} note 53, at 133.
\bibitem{744} See id.
\bibitem{745} See id.
\bibitem{746} See id. at 132-33.
\bibitem{747} See id. at 132.
\bibitem{748} See id. at 133.
\bibitem{749} See id.
\end{thebibliography}
The Somerville, Massachusetts Big Bear’s operators built an even bigger supermarket than the Elizabeth, New Jersey Big Bear. The Somerville Big Bear storeroom was located in an abandoned five-story factory building. The building conformed to the Otis and Dawson doctrine that this new type of food market needs a very big storeroom, but the Somerville store’s management wanted to work in a much larger space than the Elizabeth store. They figured that much bigger meant much better. The Somerville building contained approximately 150,000 square feet of gross leasable area—approximately triple the size of Elizabeth, New Jersey’s Big Bear. Even now, a 150,000 square foot supermarket seems gargantuan.

Only a few years later, Roy Dawson, one of the Elizabeth, New Jersey Big Bear founders, built a bigger supermarket than the Elizabeth, New Jersey Big Bear in Chicago. His Chicago area store, Dawson’s Trading Post, was housed in a huge building of which the ground floor alone contained 72,000 square foot of floor area. He provided parking for 1000 vehicles.

Neither Cullen’s original plan for 5200 to 6400 square foot stores nor Dawson’s gargantuan 72,000 square foot store was adopted as standard industry models. Supermarkets developed in the late 1930s were much larger than the units envisioned in Michael Cullen’s original plans and much smaller than Dawson’s Trading Post. Many of them were in the 5000 to 10,000 square foot neighborhood. They would get larger, much larger, in the years to come. Most industry pioneers preferred units that were larger than the ones Cullen originally planned and smaller than Dawson’s Trading Post. What unified the store size aspect of the supermarket movement was that all of these stores were cavernous when compared to the neighborhood grocery stores and the combination stores with which they competed at first.

723. See Phillips, supra note 118, at 190.
724. See id.
725. See id.
726. See id. at 190-91.
727. See id. at 190.
728. See id.
729. See ZIMMERMAN, supra note 14, at 58.
730. See McAUSLAND, supra note 27, at 20; ZIMMERMAN, supra note 14, at 58.
731. See McAUSLAND, supra note 27, at 20.
732. See ZIMMERMAN, supra note 14, at 62.
733. See id.
734. See id.
735. See id.
736. See id.
of stores), but the stores were very small.\footnote{750} By current standards, even the largest service grocery stores were tiny in 1930.\footnote{751}

As important as store size was to the supermarket movement, the supermarket industry’s founders did not originate the big food market concept.\footnote{752} Although very large food markets seemed to be new, daring, and modern experiments in the United States in the 1930s, they were not really new, daring, modern or experimental.\footnote{753} Very large food markets had been doing business for thousands of years.\footnote{754} They were well known in developed ancient societies, in eighth century Baghdad, in medieval Europe, and in early post-Revolutionary War America.\footnote{755}

Although most Americans of the 1920s bought food from little food markets occupying between 600 square feet of floor area and 2500 square feet of floor area, almost 2000 years ago, ancient Romans shopped for food at the Market of Trajan (among other large market buildings).\footnote{756} Some ancient Roman food markets including Trajan’s Market were lodged in huge buildings that offered the widest assortment of food imaginable in that era.\footnote{757} Lewis Mumford observed that Trajan’s Market “vies with any American supermarket today.”\footnote{758} It was approximately 100 feet high and provided space for 150 individual shops.\footnote{759} It sold many different kinds of food products including meat and fish.\footnote{760} Although the Ancient Romans did not know how to manufacture electric refrigerated cases to keep fish fresh, they had a simple common sense way to keep fish fresher than any freezer case. They kept them alive in a huge tank right in the market building.\footnote{761}

Some eighteenth, nineteenth and early-twentieth-century Americans shopped for food at large public markets.\footnote{762} Some of these food markets were owned by municipalities, and others were privately owned.\footnote{763}

\footnote{750. See Longstreth, supra note 60, at 105.}
\footnote{751. See id.}
\footnote{752. See Charvat, supra note 130, at 12.}
\footnote{753. See id.}
\footnote{754. See Lewis Mumford, The City in History: Its Origins, Its Transformations, and Its Prospects 72, 208 (1961).}
\footnote{755. See Arthur E. Goodwin, Markets: Public and Private 19 (1929).}
\footnote{757. See Mumford, supra note 754, at 72.}
\footnote{758. Id. at Graphic Section I, Plate 15.}
\footnote{760. See Mumford, supra note 754, at 72.}
\footnote{761. See Carcopino, supra note 759, at 123.}
\footnote{762. See generally Goodwin, supra note 755, at 19-34.}
\footnote{763. See id. at 28, 34.}
Municipally owned public markets were established long before the American Revolution.764 Boston developed one in 1658 and another in 1742.765 The 1742 market, Faneuil Hall, is still there for Bostonians and tourists to enjoy.766 Three public markets were doing business in Baltimore before the city was incorporated in 1797.767 The first New York City public market might have opened for business as early as 1656.768 New York's Catherine Market was established in 1766.769 Municipally owned public markets came in all sizes and varieties.770 They tended to be much larger than general stores and grocery stores, and some of them were as big as twentieth century supermarkets.771 For example, Mayor Quincy's Market opened in Boston in 1826 in a 27,750 square foot structure, and Northern Liberty Market was built on a 40,824 square foot pad in Washington, D.C. in 1875.772 Public markets sold a much broader range of food products than general stores and grocery stores did, and their prices tended to be cheaper.773 Eighteenth and nineteenth century Americans preferred buying produce at the public markets, but they did not buy all their food there.774 For many people, the public markets were far away from home, and daily trips to them were impractical.775 Although consumers were willing to travel to public markets for produce and meat, they tended to buy dry groceries from the more conveniently located neighborhood service grocery stores and general stores.776

Both municipalities and private sector developers were still building public markets in the twentieth century.777 In 1918, 174 large public markets were doing business in communities with more than 30,000 people.778 These market buildings were considerably larger than general stores, little service grocery stores, and combination stores.779

764. See id. at 22.
765. See id.
767. See GOODWIN, supra note 755, at 22.
768. See id.
769. See id.
770. See id. at 28-29.
771. See id. at 37.
772. See MAYO, supra note 53, at 8, 13.
773. See GOODWIN, supra note 755, at 21; MAYO, supra note 53, at 236.
774. See MAYO, supra note 53, at 19, 38.
775. See id. at 35.
776. See id.
778. See CHARVAT, supra note 130, at 12.
779. See MAYO, supra note 53, at 236.
The market buildings were leased to independent concessionaires who did business from stalls that were separated from each other only by aisle space.\textsuperscript{780} Municipally owned markets were governed by government officials or merchants’ committees.\textsuperscript{781} Likewise, some owners of privately owned food markets would coordinate advertising, promotions, and other joint business functions in their markets.\textsuperscript{782} Like contemporary shopping center tenants, public market tenants paid both minimum and percentage rent.\textsuperscript{783}

Many privately owned public markets sprouted in the Los Angeles area where automobile ownership outpaced most other American cities.\textsuperscript{784} A 32,000 square foot White Arcade opened for business in 1914 at Main Street and Pico Boulevard in Los Angeles.\textsuperscript{785} The Hollywood Public Market was big for its time when it opened for business in 1920 with 5000 square feet of floor area.\textsuperscript{786} The Beverly-Western Public Market, which started doing business in Los Angeles around 1921, was much bigger than the Hollywood Public Market.\textsuperscript{787} Although it was also much smaller than the White Arcade, its 15,000 square feet made it seem gigantic then.\textsuperscript{788}

San Francisco trumped the Los Angeles metropolitan area in this respect in 1922 when the Crystal Palace Market opened for business from a 68,000 square foot building.\textsuperscript{789} Although it was located in the downtown central business district with the advantage of San Francisco’s trolley-based public transportation system, Crystal Palace customers who preferred traveling there by automobile had free parking privileges at a facility accommodating 4350 cars.\textsuperscript{790} Almost everything sold from the Crystal Palace was sold by approximately 110 sublessees that conducted independent businesses in the premises.\textsuperscript{791} The store owners sold little;\textsuperscript{792} however, they imposed quality standards on the sublessees and coordinated advertising.\textsuperscript{793}

\begin{verbatim}
780. See id. at 3.
781. See id. at 3-4.
782. See Phillips, supra note 118, at 189.
783. See id.
784. See LONGSTRETH, supra note 60, at 122.
785. See id. at 12.
786. See id. at 12-13.
787. See id. at 13.
788. See id.
789. See CHARVAT, supra note 130, at 12.
790. See id. at 13.
791. See id.
792. See GOODWIN, supra note 755, at 31.
793. See Phillips, supra note 118, at 189.
\end{verbatim}
One year later, in 1923, a Los Angeles area project called Ye Market Place was planned to provide space for twenty-three independent food stores on a site in Glendale, California.\textsuperscript{794} According to the original plan, each unit would have matched the twenty-foot by thirty-foot dimensions of many early-twentieth-century chain grocery stores.\textsuperscript{795} However, that was not to be. The developer, C.L. Peckham, decided that the building should project the image of a single integrated store.\textsuperscript{796} Although he licensed the store’s departments to separate food merchants, the departments were not separated from each other by partitions.\textsuperscript{797} The store was operated under a single trade name, advertising was integrated, and opening and closing hours were uniform.\textsuperscript{798}

One year later, Newark, New Jersey’s fathers took a giant step forward with a vast building occupying the 74,750 square foot Centre Market.\textsuperscript{799} Shoppers could choose among 250 separate stalls on the market floor.\textsuperscript{800} The 60,000 square foot basement was used for storage,\textsuperscript{801} and an upper floor was used at least partially for automobile parking.\textsuperscript{802}

A smattering of larger grocery stores were introduced early in the twentieth century, and some of them were very large indeed.\textsuperscript{803} At the turn of the twentieth century, Henke & Pillot’s downtown Houston, Texas unit occupied approximately 50,000 square feet of floor area.\textsuperscript{804} Do not assume that a great many food markets of that day were that big. A 50,000 square foot food market that was not a public market would remain a rare exception rather than the rule for more than six decades.\textsuperscript{805} Nonetheless, combination stores gained in popularity as the years passed, and their popularity accelerated in the 1920s.\textsuperscript{806} Few combination stores had more than 2500 square feet of floor area, and many of them were smaller than that.\textsuperscript{807} In 1929, 115,000 combination stores were

\textsuperscript{794} See LONGSTRETH, supra note 60, at 33-34.
\textsuperscript{795} See id. at 36.
\textsuperscript{796} See id.
\textsuperscript{797} See id.
\textsuperscript{798} See id.
\textsuperscript{799} See MAYO, supra note 53, at 26.
\textsuperscript{800} See id. at 27.
\textsuperscript{801} See id. at 26-27.
\textsuperscript{802} See id. at 27.
\textsuperscript{803} See Carl W. Dipman, Merchandising Trends in the Food Trade, 3 J. MKTNG. 269, 271 (1939); see also LONGSTRETH, supra note 60, at 101.
\textsuperscript{804} See CHARVAT, supra note 130, at 17.
\textsuperscript{805} See, e.g., LONGSTRETH, supra note 60, at 105 (citing that A&P’s supermarkets were 6000 to 8000 square feet in size in the mid-1930s).
\textsuperscript{806} See Goldman, supra note 169, at 57.
\textsuperscript{807} See PEAK & PEAK, supra note 18, at 14.
doing business in the United States.\textsuperscript{808} By 1935, the number of combination stores had increased to 165,000.\textsuperscript{809} Although they clearly were not supermarkets, they were much bigger than grocery stores had been until then, but almost all of them were much smaller than King Kullen's mother store.\textsuperscript{810}

Although combination stores were first beginning to be popular in most of the United States in the 1920s, the large grocery store concept was well established in Los Angeles in the early 1920s.\textsuperscript{811} Neighborhood food markets in Los Angeles had grown to approximately 2500 square feet of floor area in the 1920s.\textsuperscript{812}

After 1920, the trend toward combination stores accelerated, and combination stores got larger too.\textsuperscript{813} By 1925, the average new food market opened by Sylvan and Alfred Goldman's Sun Grocery chain in Tulsa, Oklahoma contained 5000 square feet of floor area.\textsuperscript{814} Kroger was operating 5575 food markets in 1929, and their average size was less than 3000 square feet.\textsuperscript{815} Some combination store proprietors got the additional selling space they needed by leasing two or more adjoining stores of a multitenant building on a commercial block and removing the walls that separated them.\textsuperscript{816} Although A&P had continued its preference for little units modeled on its original 600 square foot \textit{economy stores}\textsuperscript{817} (of which I have more to say below) since 1912, its policies changed quickly after 1925.\textsuperscript{818} The Tea Company operated 15,000 mostly little stores in 1925, but, after that, it shifted into high gear.\textsuperscript{819} It concentrated on opening combination stores in the next seven years.\textsuperscript{820} A&P combination stores were much larger than the little A&P groceries but they were much smaller than an experimental A&P store that opened in Philadelphia in 1930.\textsuperscript{821} John Hartford traveled to the City of Brotherly Love that year to celebrate the opening of what was, by 1930 standards,
an exceptionally large A&P store.\textsuperscript{822} Occupying 22,500 square feet of gross leaseable area, the new store was a combination store and more.\textsuperscript{823} With its expansive sales floor, the new store could afford to experiment with new ideas like a soda fountain and lunch counter.\textsuperscript{824} By 1932, the total number of A&P stores had hardly grown at all, but the aggregate gross leaseable area of its stores had grown considerably.\textsuperscript{825} Forty-five hundred of its units were in the larger combination store category.\textsuperscript{826}

The grocery chains' shift to combination stores and other larger grocery stores was influenced by important social and economic trends.\textsuperscript{827} With some notable exceptions during the Great Depression and World War II, these trends continued throughout the twentieth century and stimulated the supermarket industry's expansion as well.\textsuperscript{828} These major trends included:

- the introduction and growth of the electric refrigerator;
- the growth of automobile ownership;
- massive advertising of brand named prepackaged food and household products;
- pressure for more shelf space from powerful food processing companies and household product manufacturers;
- new construction techniques that made large store construction less expensive per square foot than small store construction; and
- operating cost efficiency made possible by consolidating operations in larger stores.\textsuperscript{829}

The consumer's preference for larger stores was spurred in part by the introduction of electric refrigerators for the residential market.\textsuperscript{830} General Electric and Kelvinator were prominent among electric refrigeration pioneers.\textsuperscript{831} General Electric's early model, called the Audiffren machine, was introduced in 1911.\textsuperscript{832} Kelvinator's first refrigerator sale occurred in 1918.\textsuperscript{833} Electric refrigerator ownership

\textsuperscript{822} See id.
\textsuperscript{823} See id.
\textsuperscript{824} See id.
\textsuperscript{825} See LIEBS, supra note 55, at 124.
\textsuperscript{826} See id.
\textsuperscript{827} See PEAK & PEAK, supra note 18, at 10-11.
\textsuperscript{828} See MAYO, supra note 53, at 118.
\textsuperscript{829} See id.
\textsuperscript{830} See id.
\textsuperscript{831} See OSCAR EDWARD ANDERSON, JR., REFRIGERATION IN AMERICA: A HISTORY OF NEW TECHNOLOGY AND ITS IMPACT 195 (1953).
\textsuperscript{832} See id. at 195-96.
\textsuperscript{833} See id. at 195.
spread dramatically in the late 1920s. Despite the Great Depression, Americans purchased almost 800,000 refrigerators in 1930, and refrigerator sales continued at a healthy pace throughout the Great Depression. With electric refrigerators in their kitchens, consumers could store much more perishable food than they could in ice boxes. People who could store more food tend to buy more food and more varieties of food, and they tend to buy food less often.

Massive advertising by food processing companies and household product manufacturers whetted the consumer’s interest in new and interesting products. Consumers were more likely to find these products in combination stores and other big food stores than in small food stores. Larger stores carried many more merchandise categories and a greater depth of inventory in each category than a little grocery store could hope to carry. Smaller stores with abbreviated sales floors yielded much less shelf space than their larger competitors. With less shelf space, the smaller stores could not stock as many merchandise varieties, and they had a greater chance of being out of stock. A consumer who dropped in and left without finding a product he or she needed or wanted was forced to look elsewhere. When frustrated too often by a small grocery store’s limitations, a consumer often decided to shop elsewhere altogether. As a result of their popularity with consumers, combination stores tended to achieve higher sales per square foot and a much higher aggregate sales volume. The much higher aggregate sales volume made it possible for service grocery chain store organizations to save money by closing several smaller and less profitable stores every time it opened a big unit.

Food markets also got larger because of pressure from food processing companies and household products manufacturers. The

834. See CHARVAT, supra note 130, at 39 tbl.3-6.
835. See id.
836. See id.
837. See id. at 38.
838. See id.; MAYO, supra note 53, at 118.
839. See PEAK & PEAK, supra note 18, at 11-12.
840. See id. at 9.
841. See LIEBS, supra note 55, at 121-23.
842. See id. at 123.
843. See id.
844. See MAYO, supra note 53, at 117-18.
845. See LIEBS, supra note 55, at 124.
846. See MAYO, supra note 53, at 118.
food processing companies and household product manufacturers were very powerful. The large fish in the food processing and household product manufacturing sea had swallowed a great many small fish by the 1920s, and some of the large fish had become whales. Then, the whales swallowed the remaining large fish. When the whales paused from their feeding frenzy, they controlled a very wide range of brand-named products, and they quickly learned that they could increase their profits by getting merchants to buy a broader range of their brands. Growth opportunities for food processing companies and household products manufacturers depended largely on the growth of food market shelf space and how food markets allocated their shelf space among the processors and manufacturers. Shelf space in retail stores was and still is the life blood of food processors and food manufacturers. Food manufacturers, food processing companies, and household products manufacturers vied with each other for shelf space in food markets, and they prodded food market operators for more shelf space.

Larger stores made it possible for a general storekeeper or grocer to please the food processing companies and household products manufacturers, and pleasing them made good sense for the merchants. A smaller store did not have enough room to carry a broad range of merchandise categories or a sufficient depth of merchandise within the categories. Food manufacturers, food processing companies, and household product manufacturers made it much sweeter for food merchants willing to buy a broad range of products in large quantities—the broader and larger the order, the sweeter the deal. For this reason, a larger sales floor resulted in a cost advantage to the merchant.

Large food market construction expenditures and operating expenses were lower than construction expenditures and operating expenses for small grocery stores. In the 1920s, larger buildings were much more flexible than smaller buildings. Innovative construction techniques made it easier and cheaper to build larger commercial

847. See id. at 132.
848. See id. at 131.
849. See id. at 132.
850. See id. at 118.
851. See id.
852. See id.
853. See id.
854. See id.
855. See id. at 132.
856. See id. at 140.
857. See id. at 138.
buildings.\textsuperscript{858} Steel and concrete structural elements gained favor with commercial developers, and structural elements composed of wood lost favor.\textsuperscript{859} By using steel and concrete structural elements, grocery stores could be deeper, and their interior layouts would be restricted by fewer columns.\textsuperscript{860} More savings from larger stores came from cheaper insurance premiums per square foot, and labor cost efficiencies that resulted in lower payroll expenses.\textsuperscript{861}

3. Product Mix

a. Product Mix of Early Supermarkets

Early supermarket pioneers used their gigantic storerooms to carry a much broader product mix than traditional service grocery stores could hope to offer from their cramped storerooms.\textsuperscript{862} With their huge storerooms, supermarket pioneers did not feel bound by traditional grocery product line boundaries.\textsuperscript{863}

Although groceries were the predominant supermarket food category, most early supermarkets also included meat, dairy, bakery, and produce departments.\textsuperscript{864} Customers of such super stores as New York City’s King Kullen and Elizabeth, New Jersey’s Big Bear could pick from canned food, a refrigerated meat department, and an abundant supply of fresh produce.\textsuperscript{865} However, in the 1930s and 1940s, supermarket meat and produce departments tended not to be operated on a self-service basis,\textsuperscript{866} and many of them were not operated by the storekeepers themselves. Most were operated by independent contractors who leased concessions within the monster stores.\textsuperscript{867} Self-service policies were extended to meat, produce, and dairy departments during World War II.\textsuperscript{868} By the 1950s, self-service had become firmly established in meat and produce departments.\textsuperscript{869}

\textsuperscript{858} See id. at 136.
\textsuperscript{859} See id.
\textsuperscript{860} See id.
\textsuperscript{861} See id. at 140.
\textsuperscript{862} See Goldman, supra note 169, at 54 tbl.1.
\textsuperscript{863} See id.
\textsuperscript{864} See id.
\textsuperscript{865} See HAMPE & WITTENBERG, supra note 8, at 320-21.
\textsuperscript{866} See Goldman, supra note 169, at 59-60.
\textsuperscript{867} See id. at 60.
\textsuperscript{868} See ZIMMERMAN, supra note 14, at 134.
\textsuperscript{869} See Goldman, supra note 169, at 60.
The proportion of groceries, meat, and produce to total supermarket food sales varied widely. Groceries were reported to be almost 50% of the average gross sales in 1930s supermarkets. On the average, meat sales were reported to be almost 20% of total food sales, and produce was a little more than 14% of total food sales. On the other hand, many supermarkets of that day emphasized different departments from other supermarkets of that day. In some supermarkets, meat sales ran as high as 50% of gross sales, and in others produce sales ran as high as 25% of gross sales.

The supermarket pioneers carried such nonfood household products sold routinely by grocery stores of that era as toilet paper and soap. However, supermarkets did not limit their nonfood items to household products sold routinely by grocery stores. Proclaiming that they were offering the world a new concept called one-stop shopping, the supermarket pioneers did not flinch from carrying products formerly considered to be within the exclusive province of pharmacies, stationery stores, toy stores, furniture stores, or clothing stores.

A 1937 survey of 500 supermarkets revealed that 20% had drug departments and 25% had cosmetics departments. Only 30% of the Elizabeth, New Jersey Big Bear’s floor area was used for food sales. The rest was sublet to other merchants who sold such nonfood items as auto accessories, radios, and drugs. In addition to its food departments, the Somerville, Massachusetts Big Bear sold liquor, electric refrigerators, paint, clothing, and floor coverings among many other nonfood products. Other 1930s supermarkets, primarily markets with much smaller storerooms than the Somerville Big Bear’s mammoth storeroom, dedicated almost all of their shelf space to food and household products.

871. See id.
872. See id.
873. See id.
874. See id.
875. See Charvat, supra note 130, at 213.
876. See id. at 215.
877. See id.; Zimmerman, supra note 14, at 127.
878. See Zimmerman, supra note 14, at 127.
879. See Goldman, supra note 169, at 59.
880. See id.
881. See Phillips, supra note 118, at 191.
882. See id.
The proportion of the shelf space dedicated to nonfood items by most supermarkets increased during World War II. Supermarkets had a hard time finding enough food items to fill their shelves during the War. The government had mobilized America’s resources, and supplying the armed forces was the government’s first priority. So, supermarket operators adapted to the circumstances and filled their shelves with nonfood items that had seldom, if ever, been combined with grocery and household product lines before. Filling the shelves with nonfood items proved to be a big success. Customers liked the things they saw and bought them. By the 1950s, the idea of combining nonfood items with food and household products became an established element of the supermarket business model.

b. One-Stop Shopping Before the Shopping Center Era

The early supermarket operators did not originate the one-stop shopping concept. Public markets, a type of food marketing that had flourished for more than 2000 years, sought that goal too—especially insofar as food products were concerned. Already popular in America in the seventeenth century, some public markets of the pre-shopping center era, notably Philadelphia’s Reading Terminal, also had nonfood concessions.

Nonfood products were routinely offered by both country general stores and urban general stores. General stores were the principal source of groceries for the American family in seventeenth and eighteenth centuries and much of the nineteenth century, but they also sold anything else the storekeeper could buy at wholesale.

Who was the first private sector merchant with a large store to push the one-stop shopping concept? I do not know who deserves that honor, but I do know that Frank Munsey, a former publisher of a daily newspaper, the New York Sun, deserves at least some credit. In 1896,
Munsey launched the first Mohican outlet. His store offered a wide variety of both food and nonfood products. The Mohican’s experiment with one-stop shopping was a good idea, but it did not make a big stir. The world was not ready for this new sort of one-stop food shopping in 1896.

Although food sales predominated in San Francisco’s 68,000 square foot Crystal Palace, a significant part of the premises was allocated to nonfood sales. Without leaving the store, Crystal Palace customers could make themselves more presentable at a barber shop department or a beauty parlor department, and they could shop at a drugstore department and a jewelry department.

c. Traditional Grocery Store Product Mix Boundaries

In the waning decades of the nineteenth century most Americans bought food from specialized small-service-oriented food markets. This practice continued into the twentieth century, but it waned gradually after the early 1920s. Specialized food markets concentrated in one type, and sometimes two types, of food. A specialized food market might sell groceries, dairy, meat, produce, fish, baked goods, or candy. Few of these stores sold more than one of these product categories, and none of them had a monopoly on any product category. They competed with each other, and they competed with peddlers and merchants who sold from horse drawn wagons.

Supermarkets were not the first food markets to sell meat and produce as well as groceries. The food market product mix boundaries seen as traditional boundaries in the late nineteenth century were blurring as early as the turn of the twentieth century, and in some cases they had blurred materially before the supermarket burst on the retail

894. See ZIMMERMAN, supra note 14, at 21.
895. See id.
896. See id.
897. See id.
898. See Phillips, supra note 118, at 189.
899. See id.
900. See HAMPE & WITTENBERG, supra note 8, at 9.
901. See id. at 11, 14.
902. See id. at 9.
903. See id.
904. See id.
905. See LAYCOCK, supra note 394, at 28.
906. See id. (noting that B.H. Kroger pioneered selling both meat and groceries in one store).
Although most early-twentieth-century service grocers had no interest in selling meat and only a small interest in selling produce, Kroger was an exception. Despite the diminutive size of its stores at the turn of the twentieth century, Kroger was ready to tackle the meat business in 1904. It purchased Adam Nagel’s butcher shop chain in 1904 and began selling groceries and meat under one roof soon after that. Adding a meat department to a grocery was not easy in those days. Meat cutters and retail clerks were uncomfortable as members of a single team, but Kroger persisted and made the combination work.

Other service grocery companies crossed the traditional nineteenth century product line boundaries that separated grocers from butchers, green grocers, and bakers in the 1920s. They added departments that sold fresh meat, produce, and fresh baked goods. In some cases, each department was a separate business although all of them did business under one roof and the combination appeared to the general public as a unified retail store. In other cases, a single company owned and operated all three departments.

Service grocery stores that added meat and produce departments came to be known as combination stores. Some independents adopted the combination store format early in the 1920s. Many Los Angeles food markets were among them. Between 1920 and 1925, Sylvan and Alfred Goldman’s early venture in Tulsa, Oklahoma, Sun Groceries, gradually increased the size of its stores and added fresh meat and produce to their product mix. The movement gathered steam among service grocery chain store organizations including A&P in the late 1920s. By 1929, 191,876 grocery stores that did not sell meat and 115,549 combination food markets that did were included in America’s
roster of 585,980 food markets. Thus, more than 37% of all grocery stores and approximately 20% of all food markets in America sold groceries, meat, and produce in 1929, the year before the supermarket era began.

Do not assume that this was a linear trend. The pint-sized nineteenth century type service-oriented food market did not disappear in 1930. Although service-oriented food market specialization began declining in the early 1920s, tiny service-oriented food markets that concentrate on one or two major food categories continued to be a vital force in the American food distribution system through the 1950s. Despite an accelerated decline in the 1950s, the service-oriented food market is not extinct. Many little service grocery stores, fruit and vegetable stores, and butcher shops are still doing business today—especially in highly concentrated urban areas. The combination store did not disappear either. It flourished for a while in the 1930s as the service grocery store chains turned to them as a way, albeit an ill-conceived way, of competing with the supermarket. It declined when the service grocery chains finally realized that the supermarket was destined to dominate the food distribution system, but it never disappeared.

4. In-Store Service Policy: The Self-Service System

The self-service system was a key element of Michael Cullen’s proposal to the Kroger Company and also in Robert Otis and Roy Dawson’s business model. Now, it is firmly embedded in the theoretical foundation on which the supermarket industry rests. The self-service system serves two vital functions in the supermarket business model. It materially reduces a supermarket’s store operating expenses, and it materially increases a supermarket’s sales volume by bringing the supermarket customer closer to the merchandise.

Self-service reduces a supermarket’s store operating expenses by eliminating the need for retail clerks to fetch merchandise for the

922. See CHARVAT, supra note 130, at 189.
923. See id.
924. See HAMPE & WITTENBERG, supra note 8, at 316.
925. See PEAK & PEAK, supra note 18, at 24.
926. See id.
927. See id. at 17.
928. See id. at 18.
929. See MAYO, supra note 53, at 141.
930. See PEAK & PEAK, supra note 18, at 15.
931. See id.
In service grocery store and other service-oriented food markets, customers ordered most of the things they wanted from retail clerks. They waited on line for service. Then, they were served by retail clerks who fetched the groceries, bagged the food, calculated the total purchase price, collected the money, and arranged for delivery. In the supermarket, customers fetch most of the things they want themselves. By fetching merchandise themselves, customers do the retail clerk's job without being on the payroll but not without reward. The supermarket customer's reward for fetching is a presumably lower price and a chance to get closer to the things he or she buys.

Self-service also stimulates supermarket sales by bringing consumers temptingly close to products they might need but did not plan on purchasing while compiling a shopping list. They might never think about these needs on a visit to a neighborhood service grocery store, but the supermarket gets a second chance of selling them much more than the items on their shopping lists. Supermarket customers get a close-up view of the merchandise. They can touch it, smell it, and stare at it if they prefer. As they browse through the shelves, they are bound to find many things they need and forgot to list. They also might to decide to buy things they never thought about buying before.

Although self-service was a crucial element of the King Kullen and Big Bear business models, neither Michael Cullen, Robert Otis, nor Roy Dawson played any role in originating the self-service system or popularizing it. We don’t know for sure who originated the self-service system in American food markets, but we do have a very good clue. We know that Clarence Saunders was the merchant who popularized this process, and he did that fourteen years before the first King Kullen store opened for business.
The seeds of the shift from service-oriented grocery sales to self-service groceries were planted when Clarence Saunders opened the first Piggly Wiggly store (the first of thousands) at 79 Jefferson Street in Memphis, Tennessee for business in 1916. Although he was blessed with a creative spirit and fertile imagination, he had little formal education. After leaving school at the age of fourteen, Saunders found a job in a general store and earned his living first as a retail clerk and later as a drummer for a grocery wholesaler for four years. Although he had been a retail clerk, Saunders concocted a new and daring process that would markedly reduce opportunities for grocery store clerks and the cost of employing them in the years to come.

His new process bypassed the wall shelf and counter system, the predominant service grocery store layout pattern of that era, in favor of a new system with freestanding shelving fixtures arranged in a grid pattern. That was revolutionary by itself, but another feature of the system was equally, if not more, important. Saunders was interested in more than a better store layout system. Self-service was on his mind. Although retail clerk productivity had increased in the late nineteenth century, the cost of employing retail clerks was still a heavy burden for grocers. Reducing the number of retail clerks would reduce the food merchant’s cost structure, and the savings could be passed onto the consumer.

Saunders organized his new store radically to achieve that goal. Piggly Wiggly customers passed through a wooden turnstile when they entered the store instead of queuing in front of store clerks stationed along a counter, customers promenaded through the store along a one-way path that led them past every shelf and refrigerated case. As they passed the shelves and refrigerated cases, they selected the cans, bottles,

947. See ZIMMERMAN, supra note 14, at 22.
948. See id. at 21-22.
949. Drummers were salesmen who represented manufacturers and wholesalers and visited retail store owners. See PEAK & PEAK, supra note 18, at 62-63. The most famous fictitious drummer is Professor Harold Hill of The Music Man.
950. See ZIMMERMAN, supra note 14, at 21-22.
951. See McAUSLAND, supra note 27, at 17.
952. See MAYO, supra note 53, at 89.
953. See id. at 89-92.
954. See id. at 89.
955. See id. at 92.
956. See id.
957. See id.; ZIMMERMAN, supra note 14, at 27.
boxes, and perishables they wanted and deposited them in a basket. The path led each customer to the ultimate destination, a checkout counter. The checkout counter was attended by a cashier who tallied the total purchase price, wrapped the merchandise, collected the money, and placed the money in another newfangled machine, a cash register.

The checkout cashier was also on the lookout for shrinkage, a polite retail term for shoplifting. Consumers of that era were not immune from the evil inclination. Allowing consumers to touch, feel, and hold the merchandise without direct interface with a retail clerk enhanced temptation for our morally weaker ancestors. Saunders’s new self-service system needed to deter the larcenous heart. The checkout cashier was carefully trained to observe customers as they exited to see whether they decided to pocket a bit of the store’s inventory without paying for it. A turnstile at the end of the checkout counter aisle insured that customers would not exit so quickly that the cashier could not get a good look at them.

One important reason why self-service worked for Piggly Wiggly customers was the early-twentieth-century transition from the bulk food sales system to the brand-named prepackaged goods sales system. Self-service was not a real option for most of the nineteenth century when gathering the food ordered by a customer in a grocery store or general store meant scooping grain from barrels and boxes, pouring liquids from casks, and cutting slices from large mounds of cheese. The birth and growth of brand-name prepackaged goods changed all that. By the twentieth century, most grocery stores and general stores had shifted from selling food in bulk to brand-name prepackaged food. Twentieth century grocery store clerks could gather the little cans, boxes, jars, and bottles to fill customer orders easily and quickly. However, Clarence Saunders realized that customers could do that for themselves just as well and that they might prefer doing so. As a result

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960. See Mayo, supra note 53, at 89.
961. See id.
962. See id.
963. See id. at 92.
964. See id.
965. See id.
966. See id.
967. See generally Zimmerman, supra note 14, at 145-47 (discussing the increased use of prepackaging in the early 1900s).
968. See Peak & Peak, supra note 18, at 5.
969. See Zimmerman, supra note 14, at 145-47 (noting that by the end of 1953, approximately 91% of supermarkets were completely self-service due to prepackaging).
970. See Mayo, supra note 53, at 92.
of heavy advertising by food processing companies and household product manufacturers, food market customers knew as much about the products as the clerks did, and they did not need advice from retail clerks. 971

Piggly Wiggly and other grocery stores of the era that adopted the self-service system needed fewer retail clerks. 972 Retail clerks who fetched things for customers were eliminated. 973 The remaining clerks ran the checkout counter, cleaned the store, and restocked the shelves. 974 The need to trim store employees was exacerbated by World War I. 975 The War started soon after Piggly Wiggly opened in Memphis and did not end until November of 1918. 976 Store clerks were not so easy to find during World War I and the early years after the War, 977 and self-service grocery stores did not need to find as many of them as full service grocery stores.

The most important long term benefit of Saunders's innovative technique was a big reduction in the cost of selling groceries. 978 It allowed him to institute a low-cost, low-price, and high-quality policy, an important element of the supermarket industry's theoretical foundation. 979 Saunders figured that he hit on something big, and he applied for a patent on his process. 980

Why call the store Piggly Wiggly? Some say the idea was sparked by the nursery rhyme, This Little Piggy. 981 Others maintain that Saunders was inspired by watching pigs squeeze under a fence. 982 Saunders himself testified that he chose the name to befuddle us. 983 He wanted people to ask: Why Piggly Wiggly? 984 He wanted to arouse curiosity and generate public support. 985

He did a lot more to achieve that goal than provoke curiosity with a cutesy trade name. Saunders promoted his new way of selling groceries
with evangelical fervor. He anointed himself, the self-service process, and Piggly Wiggly as noble warriors on a mission to save the public from the "demon of high prices." He could do battle with the "demon of high prices" and still earn generous profits because he had reduced his cost of operations drastically. His gross sales for the first six months of operations were $114,000, and his store operating expenses were only $3400. Very impressive. Saunders’s low prices generated more public support than almost anyone else could have possibly imagined. Not Saunders—he expected success, and he got it. He had prepared for the consumer avalanche that assembled at the store on opening day by printing admission tickets.

Although Clarence Saunders is considered the father of the self-service principle by most commentators, he was not the only grocer of his era to have conceived of that principle. He might not have even been the first grocer to organize a self-service market. A California food market named Ward’s Groceteria was reported to have begun self-service operations as early as 1912. If Ward’s Groceteria was not the first self-service food market, that honor might belong to California’s Alpha Beta chain and its owners, the Gerrard family. One commentator says that Alpha Beta introduced self-service in 1912 and another says that happened in 1914. The Alpha Beta trade name was chosen because its products were filed on shelves in alphabetical order. Thus, Alpha Beta customers knew, for example, they would find minestrone soup near matzos and soda near spaghetti. M.B. Skaggs was an early champion of self-service as he expanded the single store he bought from his father in 1915 to the 428 store grocery chain that became the dominant element of Safeway Stores, Inc. in 1926.

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986. McAUSLAND, supra note 27, at 17.
987. See MAYO, supra note 53, at 92.
988. See CHARVAT, supra note 130, at 14.
989. See McAUSLAND, supra note 27, at 17 (describing how admission tickets were provided to prevent an enormous opening day crowd).
990. See id.
991. See id.
992. See ZIMMERMAN, supra note 14, at 25.
993. See id.
994. See id.; see also McAUSLAND, supra note 27, at 21.
995. See McAUSLAND, supra note 27, at 21 (dating self-service back to 1914); ZIMMERMAN, supra note 14, at 25 (dating self-service back to 1912).
996. See McAUSLAND, supra note 27, at 21.
997. See SAFEWAY ANNUAL REPORT, supra note 40, at 2.
Franklin Davis, a Houston, Texas grocer opened a self-service grocery store in 1916. Davis' customers picked up baskets as they entered the store and selected what they liked from the shelves. They paid up at a checkout counter just as supermarket customers do today. Davis was either inefficient or way before his time. His operation folded in a couple of months, but his experiment impressed three important Houston grocers to try self-service themselves. Thus, Davis deserves credit for planting the seed that later sprouted under the auspices of J. Weingarten, Inc., Henke & Pillot, Inc. and ABC Stores, Inc.

Saunders's self-service system generated support among many other food merchants. He generated so much support that he was able to sell licenses to other grocers who wanted to convert their stores to Piggly Wiggies. Piggly Wiggly stores proliferated quickly. A second Piggly Wiggly was launched by Kessler & Dixon in Houston, Texas around 1918. Around that time, Piggly Wiggly stores also opened for business in Chicago and Cincinnati. Soon the movement spread to many southern and midwestern cities. By 1929, the roster of Piggly Wiggly stores had grown to 2600. However, Saunders's star had dimmed by then. He lost a small fortune in 1923 trying to stem the tide when the market value of Piggly Wiggly stock dropped precipitously because of a concerted effort by Wall Street bears. Shortly thereafter, he filed for bankruptcy.

Other grocers found self-service very appealing and shifted their operations to that method without applying for a Piggly Wiggly franchise. Joe Weingarten converted his Houston, Texas grocery and dairy departments to self-service in 1918, but other Weingarten departments including the meat department continued to operate on a service basis. Henke & Pillot, another forward-looking Houston,
Texas grocer, instituted self-service policies in its "#2 store" approximately two years later. Morris Miller adopted self-service techniques in his Denver area grocery stores around 1920. Miller's Colfax and Corona Cash Carry market opened for business in 1921. Morris Miller followed the self-service path again in the 1930s with his Super Public Market. Reportedly, some of southern California's drive-in markets joined the self-service fold in the 1920s also, but I do not know which drive-ins were converted to self-service and which were not. Sylvan and Alfred Goldman's early venture in Tulsa, Oklahoma, Sun Grocery, shifted from service grocery to self-service food markets around 1927, only one year after the chain was born. Ralph's Grocery Company, a southern California chain, tested self-service in 1925 and adopted a self-service policy for all of its stores in 1929. In 1929, the National Grocery Company experimented with large self-service stores in Detroit, but the experiment was a dismal failure. Most of its inventory was sold to competitors, but some of its managers came up with a creative idea. After joining forces with an advertising executive, they sold much of the remaining inventory directly to the public at well-advertised deep discount prices. Combining self-service with aggressive price point advertising drew crowds that could be contained only by the police.

As important as trimming fat from the food market's cost structure was, self-service conferred other meaningful benefits on Saunders and his disciples. They observed a new retail phenomenon, impulse buying. At last, people could see the little cans and boxes containing the food they ate up close. They could reach for them and grab them, too. Most of all, consumers could be tempted by products they could now reach and grab, and they tended to succumb to temptation.
Some early self-service pioneers were so ambivalent about whether the public would accept the new system, they gave their customers a choice and bisected the store with a five-foot-high shelf. A clerk presiding over a traditional service-type system fetched groceries on one side of the store. The new self-service system prevailed on the other side.

Clarence Saunders’s self-service principles were to influence food merchants long after he died. Latter day food merchants were more convinced of the merit of Clarence Saunders’s principles than many of his early adherents. George Jenkins, the founder of Publix Supermarkets was among them. Jenkins learned self-service on the job. He signed on as a retail clerk with a Tampa, Florida Piggly Wiggly operator in 1925. Jenkins learned self-service on the job. He was soon promoted to store manager and remained in that role until he started his own store in 1930. Grateful for what he learned there, he made this comment about Saunders’s principles many years later:

“I was lucky. I learned early at the source the fundamental of retailing that Saunders had discovered and made the basis of his operation.”

5. Credit and Delivery Policy: Cash and Carry

Although the earliest supermarkets maintained a cash and carry policy, neither Michael Cullen, Robert Otis, Roy Dawson, nor any other supermarket industry pioneer played any role in originating the cash and carry process. Recognition for originating cash and carry belongs to a few innovative grocers of an earlier era when most grocery store operators routinely extended credit to customers, enticed customers with

1027. See ZIMMERMAN, supra note 14, at 24.
1028. See id.
1029. See id.
1030. See id.
1031. See id.
1032. See WATTERS, supra note 201, at 59.
1033. See id.
1034. See id.
1035. See id. at 35, 37.
1036. See id. at 37.
1037. Id.
1038. A grocery store with a strict cash and carry policy will not extend credit to its customer; offer gifts, premiums, or prizes to stimulate sales; or provide free home delivery. See Carl N. Schmalz, Independent Stores Versus Chains in the Grocery Field, 9 HARV. BUS. REV. 431, 432 (1931). Until the early part of the twentieth century, service groceries routinely extended credit, offered gifts and premiums, and provided free home delivery. See MAYO, supra note 53, at 80.
gifts and prizes, and provided free delivery service.  

These innovative grocers realized that extending credit to customers, enticing them with gifts and prizes, and providing free delivery service significantly increased the cost of food.  

A grocer who could devise a way to eliminate these services could charge less for food and still make lots of money.

Although many layers of inefficiency had been wrung from America’s food distribution system by the later years of the nineteenth century, the process of selling food was still inefficient and costly.  

It was to get less efficient and more costly as the nineteenth century yielded to the twentieth century.  

Food distribution got less efficient and more costly because general storekeepers and grocers continued two very costly practices they inherited from their predecessors and instituted a new costly practice with which their predecessors were not burdened.

Late-nineteenth-century and early-twentieth-century grocers extended credit to their customers (one very old, very inefficient, and very costly practice), and they distributed expensive gifts, premiums, and prizes to their customers.  

They also instituted home delivery service, a new service with which their early-nineteenth-century counterparts were not burdened.  

The cost of extending credit and providing premiums and prizes were folded into the grocery store’s cost structure, and the cost of providing free home delivery was also added to the grocery store’s cost structure.  

The combined cost of credit, premiums, and prizes, and home delivery impeded the efforts of grocers to keep the cost of food down.

Why did general storekeepers and service grocers do these things in the first place?

General stores and other food markets had extended credit to customers long before these institutions were established in North America.  

This practice had persisted for centuries.  

Customers depended on it and preferred buying on credit even when merchants

1039.  See GREER ET AL., supra note 54, at 52.  
1040.  See id.  
1041.  See id.  
1042.  See HOYT, supra note 79, at 100.  
1043.  See id.  
1044.  See PEAK & PEAK, supra note 18, at 10-11.  
1045.  See id.; see also GREER ET AL., supra note 54, at 52.  
1046.  See PEAK & PEAK, supra note 18, at 7.  
1047.  See HOYT, supra note 79, at 100.  
1048.  See id.  
1050.  See PEAK & PEAK, supra note 18, at 10.
offered substantial discounts for cash payment.\textsuperscript{1051} Consumers had rebuffed many nineteenth century general storekeepers and service grocers who tried to wean them away from credit by offering significantly lower prices.\textsuperscript{1052}

What about delivery service? Late-nineteenth-century and early-twentieth-century service grocery stores provided expensive delivery services to their customers that were not provided by their fathers and grandfathers.\textsuperscript{1053} The need for delivery service arose from a change in the pattern of residential development.\textsuperscript{1054} Early in the nineteenth century, urban and suburban general stores and grocery stores were located near their customers' residences.\textsuperscript{1055} Back then, most city and town dwellers lived in residential neighborhoods in or near downtown central business districts.\textsuperscript{1056} Not surprisingly, service grocery stores also tended to locate in downtown central business districts.\textsuperscript{1057} The stores were close enough to residential neighborhoods for customers to drop by several times a week.\textsuperscript{1058} As consumers moved uptown and to the suburbs, grocery stores moved there too.\textsuperscript{1059}

At first, service grocery stores and their customers were close enough to each other to facilitate frequent visits, but that did not last long. Newer uptown and suburban neighborhoods were less densely populated than their earlier counterparts.\textsuperscript{1060} After moving uptown or to the suburbs, some people could no longer get to a grocery store without a long walk.\textsuperscript{1061} Facing longer walks than they liked, consumers preferred shopping less frequently. However, shopping less frequently meant carrying heavier bundles home unless the grocer delivered them. Grocery stores instituted home delivery to accommodate these customers and avoid losing them to a competitor who was willing to accommodate them.\textsuperscript{1062} To meet the need for home delivery service, grocery store management employed delivery personnel, purchased wagons, and kept stables of horses.\textsuperscript{1063} Paying delivery personnel, buying wagons, and

\textsuperscript{1051} See \textit{Atherton}, supra note 1049, at 61.
\textsuperscript{1052} See \textit{id}.
\textsuperscript{1053} See \textit{Peak & Peak}, supra note 18, at 7.
\textsuperscript{1054} See \textit{id} at 10-11.
\textsuperscript{1055} See \textit{id} at 7.
\textsuperscript{1056} See \textit{id} at 10-11.
\textsuperscript{1057} See \textit{Mayo}, supra note 53, at 71.
\textsuperscript{1058} See \textit{id}.
\textsuperscript{1059} See \textit{id}.
\textsuperscript{1060} See \textit{id}.
\textsuperscript{1061} See \textit{id}.
\textsuperscript{1062} See \textit{Peak & Peak}, supra note 18, at 15.
\textsuperscript{1063} See \textit{Laycock}, supra note 394, at 28, 48.
keeping horses added a new level of grocery operating cost.\textsuperscript{1064} In 1908, Kroger kept around 200 mules and horses in its stables, and they provided the power for its delivery trucks.\textsuperscript{1065}

The cost of promotion added another burden to the service grocer’s cost structure.\textsuperscript{1066} As the barter and bulk process that dominated America’s food distribution system for more than two centuries faded and the brand-name prepackaged food system began to glisten toward the end of the nineteenth century, clever food merchants sought new ways of stimulating sales and maintaining customer loyalty.\textsuperscript{1067} Some of them figured they could accomplish these goals by giving away premium merchandise.\textsuperscript{1068}

Despite its advocacy of the low-cost structure principle, A&P was an early champion of premium giveaways.\textsuperscript{1069} It got started with premiums even before it became a full-fledged grocery chain.\textsuperscript{1070} The premium program was initiated in 1871 when the company was still a tea company, literally a tea company.\textsuperscript{1071} The freebies started with free tea for good customers.\textsuperscript{1072} They were extended first to full color lithographs called \textit{chromos}\textsuperscript{1073} and then to a wide range of merchandise.\textsuperscript{1074} A&P's premium merchandise, including crockery and other household items, were listed in an illustrated catalog.\textsuperscript{1075} It gave away so much premium merchandise in the 1890s that it was described as “premium happy.”\textsuperscript{1076}

A&P was not the only food retailer to play the premium game.\textsuperscript{1077} Its competitors could not resist entering that arena. Grocery chains and independent grocers alike rewarded loyal customers with vouchers they could later trade in for clothing, kitchen utensils, and jewelry.\textsuperscript{1078}

Trading stamps supplanted single merchant-originated premiums in the last decade of the nineteenth century and the first decade of the

\begin{thebibliography}{99}
\bibitem{1064} See \textit{PEAK & PEAK}, supra note 18, at 15.
\bibitem{1065} See \textit{LAYCOCK}, supra note 394, at 28, 48.
\bibitem{1066} See, \textit{e.g.}, \textit{HOYT}, supra note 79, at 100.
\bibitem{1067} See \textit{MAYO}, supra note 53, at 158.
\bibitem{1068} See \textit{PEAK & PEAK}, supra note 18, at 305.
\bibitem{1069} See \textit{HOYT}, supra note 79, at 97.
\bibitem{1070} See id.
\bibitem{1071} See id. at 39-40.
\bibitem{1072} See id.
\bibitem{1073} See id.
\bibitem{1074} See id.
\bibitem{1075} See \textit{A&P, Past, Present and Future}, \textit{PROGRESSIVE GROCER}, 1971, at 10, 10 [hereinafter \textit{Past, Present and Future}].
\bibitem{1076} Id.
\bibitem{1077} See \textit{MAYO}, supra note 53, at 80.
\bibitem{1078} See id.
\end{thebibliography}
Department stores inaugurated trading stamps in 1891,\textsuperscript{1079} and many grocers followed suit in the 1900s when S&H Green Stamps became popular.\textsuperscript{1081} The Sperry & Hutchinson Company and its competitors sold trading stamps to merchants, and they issued them to their customers.\textsuperscript{1082} Trading stamps were more flexible and more appealing to consumers than single merchant originated premiums.\textsuperscript{1083} Consumers could get the same kind of trading stamps from a shoe repair shop and a butcher shop as they got in their favorite grocery store.\textsuperscript{1084} With so many merchants willing to issue trading stamps, consumers could accumulate the amount needed for the merchandise they craved more rapidly than they could with premiums issued only by one merchant.\textsuperscript{1085}

Trading stamps worked better for merchants than buying and distributing their own premiums.\textsuperscript{1086} Merchant-originated premiums had resulted in increased payroll expenses because the premiums were redeemed in the stores.\textsuperscript{1087} A store that issued its own premiums needed to hire more store clerks because its store clerks divided their time between selling food and redeeming premiums.\textsuperscript{1088} A store that issued its own premiums also needed to set aside valuable shelf space for the premiums.\textsuperscript{1089} Some early A&P tea stores allocated as much shelf space to premiums as to tea.\textsuperscript{1090} Merchants’ love affair with premiums and trading stamps was not to last forever.\textsuperscript{1091} The giveaways cost plenty of money.\textsuperscript{1092} In 1900, the value of A&P’s premiums was more than one-third of its profits.\textsuperscript{1093}

Taken together, the cost of credit, home delivery service, and premiums add appreciably to the storekeeper’s operating expenses.\textsuperscript{1094}

\begin{thebibliography}{10}
\bibitem{1079} See id.
\bibitem{1080} See id. at 180.
\bibitem{1081} See id. at 80.
\bibitem{1082} See id. at 180.
\bibitem{1083} See id. at 80.
\bibitem{1084} See id. at 180.
\bibitem{1085} See id. at 80.
\bibitem{1086} See id.
\bibitem{1087} See Past, Present and Future, supra note 1075, at 16.
\bibitem{1088} See id.
\bibitem{1089} See id. at 17.
\bibitem{1090} See id.
\bibitem{1091} See MAYO, supra note 53, at 180.
\bibitem{1092} See id.
\bibitem{1093} See HOYT, supra note 79, at 100.
\bibitem{1094} See id. at 100-01.
\end{thebibliography}
Eliminating these burdens would lighten the storekeeper's load and pave the way for lower prices.1095

Frank Munsey's Mohican stores experimented with cash and carry policies in 1896.1096 Munsey tried to convince the public that lower food prices justified parting with credit, home delivery service, and premiums.1097 They would not bite. Frank Munsey had innovative ideas, but the public was not ready for them—not yet.1098

John Hartford, the youngest son of A&P founder George Huntington Hartford, also addressed these problems.1099 Immersed in the family business since early childhood, John had become an exceptionally insightful grocery store executive by 1912 when he celebrated his fortieth birthday.1100 He firmly believed that a retail grocery store chain's principal business mission is to maintain efficient operations and a low-price structure and pass the fruits of its efficient operations onto the consumer in the form of low food prices.1101 Given this premise, it is easy to understand why reading A&P's financial statements must have been a painful task for him then. The Tea Company's cost of food, home delivery service, and premiums were increasing.1102 Its credit losses were also increasing.1103 The increases in expenses and credits losses were reflected in higher retail prices at A&P and other grocery store chains.1104 Nationwide, the retail cost of food had increased by 35% between 1900 and 1912.1105 Reflecting on these circumstances, John realized that A&P and other chain store service grocers had strayed from their mission.1106

Convinced that A&P's profits would be affected negatively in the long run by the rising tide of food prices, John proposed a new prototype store for A&P.1107 The proposed new prototype store, called the Economy Store to distinguish it from other A&P stores, would eliminate such expensive services as credit, home delivery, and premiums.1108 With the

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1095. See id.
1096. See Zimmern, supra note 14, at 21.
1097. See id.
1098. See id.
1099. See Hoyt, supra note 79, at 101.
1100. See id.
1101. See id. at 100.
1102. See id.
1103. See id.
1104. See id.
1105. See id.
1106. See id.
1107. See id. at 101.
1108. See id. at 102.
cost of these services purged from its cost structure, A&P could afford to reduce prices dramatically without sacrificing its profits.\textsuperscript{1109}

His father reacted negatively—even incredulously—to what he perceived as a crackpot scheme.\textsuperscript{1110} George Huntington Hartford had come to believe that credit, home delivery, and premiums were the cornerstones of A&P's business success.\textsuperscript{1111} Unlike his son, John, the elder Hartford figured that food consumers were not price conscious—at least not then.\textsuperscript{1112} He also figured that they demanded convenience and would not walk a few extra blocks to save a few cents on food.\textsuperscript{1113}

John Hartford nagged his father to allow him to experiment with at least one Economy Store, and he kept nagging until his father relented.\textsuperscript{1114} John's fuss and bother were rewarded but not lavishly.\textsuperscript{1115} He was allowed to develop one Economy Store,\textsuperscript{1116} but the only resources allocated to the project were a $3000 appropriation and the services of one A&P employee.\textsuperscript{1117} Nevertheless, the Economy Store was successful.\textsuperscript{1118} It was successful beyond John Hartford's wildest dreams. Its success proved that credit, delivery service, and premiums could be eliminated from the food merchant's cost structure and that the savings could be passed onto the consumer.

Only three years later, in 1915, 554 of A&P's 938 stores were reconfigured as Economy Stores.\textsuperscript{1119} Since none of its pre-1912 stores were Economy Stores, it is clear that the great majority of its new stores were Economy Stores.\textsuperscript{1120} It is also clear that the Tea Company had shifted the emphasis of its expansion program to the Economy Store and adopted the new format wholeheartedly.\textsuperscript{1121}

The merchandise premiums and prizes that were discarded by A&P when it adopted the Economy Store cash and carry program in 1912, never died completely.\textsuperscript{1122} Some A&P competitors responded to A&P's cash and carry move by discarding their own merchandise premiums and

\begin{enumerate}
\item[1109.] See Goldman, supra note 169, at 57.
\item[1110.] See HOYT, supra note 79, at 101.
\item[1111.] See id.
\item[1112.] See id.
\item[1113.] See id.
\item[1114.] See id.
\item[1115.] See id.
\item[1116.] See id.
\item[1117.] See id.
\item[1118.] See LEBHAR, supra note 946, at 25.
\item[1119.] See HOYT, supra note 79, at 103.
\item[1120.] See id.
\item[1121.] See id.
\item[1122.] See id. at 219.
\end{enumerate}
prizes and lowering their prices.\textsuperscript{1123} Other competitors continued to offer merchandise premiums and prizes.\textsuperscript{1124} The cost of the giveaways was reflected either in higher prices or lower profits. Paradoxically, food merchants' interest in merchandise premiums and other costly promotions was rekindled in the Great Depression.\textsuperscript{1125} Carl W. Dipman, Editor of \textit{Progressive Grocer}, reported a material increase in the use of merchandise premiums in 1938.\textsuperscript{1126} The supermarket industry was not exempt from this trend.\textsuperscript{1127} Many supermarket organizations stimulated their sales with merchandise premiums and prizes of their own.\textsuperscript{1128} They did this despite their low-price policies and their need for a low-expense structure.\textsuperscript{1129} From the outset, some supermarket operators gave away automobiles, money, and refrigerators.\textsuperscript{1130} More recently, they rewarded customers with trading stamps, and still more recently, most of them stopped rewarding their customers with trading stamps.\textsuperscript{1131}

Marion Barton Skaggs, founder of Safeway Stores, Inc., was another important cash and carry advocate.\textsuperscript{1132} Skaggs's father, a Baptist minister, was convinced that the prevailing credit system worked to the disadvantage of local farmers.\textsuperscript{1133} Buying food on credit made them overly dependent on grocers and general storekeepers.\textsuperscript{1134} Grocers and general storekeepers charged higher prices because they were willing to part with merchandise today and get paid sometime in the future.\textsuperscript{1135} The elder Skaggs built his own grocery store in American Falls, Idaho, sold food for cash, and passed the savings onto his customers.\textsuperscript{1136} Skaggs bought the store from his father in 1915 and adopted his father's attitudes about selling groceries on credit.\textsuperscript{1137} Cash and carry was a crucial element of the business methods that bolstered his rise to wealth and prominence in the grocery business.\textsuperscript{1138} Skaggs's aversion to credit sales is exemplified by this admonition: "As an organization, let us

\textsuperscript{1123} See \textsc{Charvat, supra note 130}, at 65.
\textsuperscript{1124} See id.
\textsuperscript{1125} See Greer et al., supra note 54, at 27.
\textsuperscript{1126} See Dipman, supra note 803, at 270.
\textsuperscript{1127} See Peak & Peak, supra note 18, at 312.
\textsuperscript{1128} See id.
\textsuperscript{1129} See id.
\textsuperscript{1130} See \textsc{Charvat, supra note 130}, at 65.
\textsuperscript{1131} See Mayo, supra note 53, at 180.
\textsuperscript{1132} See Safeway Annual Report, supra note 40, at 2.
\textsuperscript{1133} See id.
\textsuperscript{1134} See id.
\textsuperscript{1135} See id.
\textsuperscript{1136} See id.
\textsuperscript{1137} See id.
\textsuperscript{1138} See id.
imbibe not too freely of this present national frenzied optimism—but rather let us lend every effort consistent with our positions and occupations in combatting its offspring, the growing evil of installment purchasing.”

Despite the success of A&P’s Economy Store business model, credit remained firmly entrenched among American grocers. Many service grocery stores and general stores continued to extend credit to their customers and absorbed its heavy cost well into the twentieth century. George Jenkins, founder of Publix Supermarkets, recalled that cotton farmers bought what they needed on credit year-round from his father’s general store in the early decades of the twentieth century. The elder Jenkins’ customers would settle their accounts but only when they brought their cotton crop to market. The Jenkins general store failed when the local farmer’s cotton crops were annihilated by boll weevils. My grandmother, who was in the grocery store business in the Bronx, New York around World War I, did not insist on cash payment and kept careful records of her credit transactions. Her customers paid her when they could. After a while, they could not pay or simply did not pay, and her business failed too. Neighborhood independent grocers continued to extend credit to customers throughout the 1920s, and they did so to their disadvantage. The cost of carrying their accounts receivable and their credit losses added materially to their store operating expenses. Ironically, some service grocers, who steadfastly insisted on cash payments in the 1920s, were willing to extend credit during the Great Depression of the 1930s. Their Depression-plagued customers were short on cash but still needed to eat. What else could a merchant of good will do?

Home delivery also persisted well into the twentieth century despite the success of the Economy Store. Even after giving effect to the rapid increase in automobile ownership after 1915, only a minority of American families had access to a motor vehicle until the post-World

1140. See GREER ET AL., supra note 54, at 16.
1141. See id.
1142. See id.
1143. See id.
1144. See Schmalz, supra note 1038, at 433.
1145. See id. at 439.
1146. See GREER ET AL., supra note 54, at 27.
1147. See id.
1148. See, e.g., LONGSTRETH, supra note 60, at 82-84 (noting that when Ralph’s opened in 1911, the majority of its business was through deliveries).
War II era. With few exceptions, early-twentieth-century general stores, service grocery stores, and other food markets made no effort to provide parking facilities for their customers. Shoppers who owned automobiles depended on the limited supply of curbside spaces near the stores. With the frustration of curbside parking in mind, many car owners preferred leaving the car home and walking to the food market. It is no wonder that many food market proprietors figured it was still in their self-interest to continue free home delivery services.

Home delivery still remained an important option for grocers in the 1920s, 1930s and 1940s. Southern California's Ralph's Grocery Stores continued home delivery for most of the 1920s. It began dismantling its home delivery policy slowly in 1925 but did not eliminate it entirely until 1930. In his 1931 Harvard Business Review article, Carl Schmalz reported that, for the most part, service grocery chains had discarded home delivery service by then. On the other hand, he pointed out that home delivery was very much alive around 1930 in neighborhood service groceries owned by independents. Sylvan and Alfred Goldman's 1930s chain of five grocery stores in Oklahoma City, happily delivered their customers' orders. The Goldmans favored home delivery for these stores because most of them had no parking facilities and many of their customers preferred to economize on gasoline expenses by not driving to grocery stores.

Buying food on credit and home delivery declined rapidly as the supermarket ascended rapidly. The rise of the supermarket seemed destined to kill food buying on credit and food market home delivery for eternity, but old retailing concepts never really die. They are resurrected by future generations that convince themselves that they originated ideas that were discarded as outmoded by their grandfathers.

1149. See CHARVAT, supra note 130, at 38 tbl.3-5.
1150. See MAYO, supra note 53, at 133.
1151. See PEAK & PEAK, supra note 18, at 89.
1152. See id.
1153. See MAYO, supra note 53, at 134.
1154. See LONGSTRETH, supra note 60, at 86-87.
1155. See id. Frank Charvat maintains that Ralph's began dismantling free delivery in 1926. See CHARVAT, supra note 130, at 15.
1156. See id.
1157. See Schmalz, supra note 1038, at 432.
1158. See id.
1159. See WILSON, supra note 814, at 56.
1160. See id.
1161. See PEAK & PEAK, supra note 18, at 7, 10.
1162. See id. at 15.
Accordingly, internet food retailers now dream of competing with supermarkets by offering that innovative new service, home delivery.\textsuperscript{1163}

6. Availability of Parking Facilities

Free parking was an essential ingredient of the supermarket concept from the outset.\textsuperscript{1164} It filled the vacuum created by the elimination of home delivery when the cash and carry system was embraced zealously by A&P and some of its competitors.\textsuperscript{1165} By adopting the cash and carry policy, a grocery company improved its bottom line by avoiding the cost of extending credit, offering premiums, and providing delivery service.\textsuperscript{1166} On the other hand, refusing to deliver a consumer’s food purchases to the home had a negative effect on the bottom line for some grocers.\textsuperscript{1167} A cash and carry grocer lost customers who preferred delivery service to low prices.\textsuperscript{1168} Worse, by refusing to deliver, a food merchant limited the quantity of food and household products his remaining customers would buy on a single shopping expedition.\textsuperscript{1169} A customer would buy no more than he or she was willing to carry home.\textsuperscript{1170} So, the food merchant was faced with hard choices. On the one hand, he could reduce his operating expenses by adopting a cash and carry policy.\textsuperscript{1171} With lower expenses resulting from the cash and carry policy, he could attract price conscious customers by cutting his prices materially.\textsuperscript{1172} On the other hand, cash and carry was bound to alienate some existing service conscious customers.\textsuperscript{1173} They were willing to pay a little bit more for food as long as it was delivered.\textsuperscript{1174} Here was a puzzle waiting to be solved, and good fortune was bound to reward the grocer who could solve it.

Michael Cullen was convinced that he was the grocer who found the solution.\textsuperscript{1175} The solution was free parking facilities.\textsuperscript{1176} He maintained

\textsuperscript{1163.} See Darnell Little, \textit{Peapod is in a Pickle}, BUS. WK., Apr. 3, 2000, at 41, 41.
\textsuperscript{1164.} See \textit{ZIMMERMAN}, supra note 14, at 32 (noting that Michael Cullen implemented the idea of parking spaces with his first supermarket).
\textsuperscript{1165.} See \textit{MAYO}, supra note 53, at 86.
\textsuperscript{1166.} See \textit{Schmalz}, supra note 1038, at 432.
\textsuperscript{1167.} See \textit{id.} (mentioning that many American women still valued and demanded delivery services).
\textsuperscript{1168.} See \textit{id.}
\textsuperscript{1169.} See \textit{LONGSTRETH}, supra note 60, at 87.
\textsuperscript{1170.} See \textit{id.}
\textsuperscript{1171.} See \textit{Schmalz}, supra note 1038, at 432.
\textsuperscript{1172.} See \textit{id.}
\textsuperscript{1173.} See \textit{id.}
\textsuperscript{1174.} See \textit{id.}
\textsuperscript{1175.} See \textit{ZIMMERMAN}, supra note 14, at 32 (detailing Cullen’s recommendations to Kroger).
\textsuperscript{1176.} See \textit{id.}
that shoppers would rather drive to a distant supermarket and ride home with a full load of groceries than walk to a nearby grocery store and lug heavy bundles in their arms. While he was still a Kroger employee, he enunciated this principle in his letter to William Albers, Kroger's president at the time.

Cullen planned to locate the super stores he proposed in the letter, as he put it, "two or three blocks from the business center of a big city." That is where rent was inexpensive and parking facilities were easy to come by. While urban consumers with automobiles might have to travel much farther to his super stores than they ever traveled for food shopping before, he figured that convenient parking facilities would help attract them. In the 1920s, motorists were not enthusiastic about driving to neighborhood grocery stores. In his view, grocery shoppers would be willing to drive much farther to get to a Cullen super store and take advantage of its much cheaper prices if parking hassles could be avoided.

Nevertheless, the first King Kullen super store (which probably was America's first supermarket) opened for business in August of 1930 at 171st Street and Jamaica Avenue in New York City's Borough of Queens with no parking lot of its own. Cullen did not choose that site because of its off-street parking facilities. What attracted Cullen to Jamaica Avenue and 171st Street was its ample curbside parking. This super store had the benefit of free nearby parking without buying or leasing an off-street parking lot.

Providing free and convenient parking facilities was a crucial element of the Robert Otis and Roy Dawson business model for the Elizabeth, New Jersey Big Bear. Although they were just as stingy with store operating expenses as Michael Cullen, they did not flinch at the cost of leasing a parking lot near the former automobile plant that

1177. See PRINCE, supra note 275, at 2.
1178. See ZIMMERMAN, supra note 14, at 32-35.
1179. Id. at 34 (quoting letter from Michael Cullen to the Vice President of the Kroger Grocery & Baking Co.).
1180. See id. at 34-35.
1181. See PRINCE, supra note 275, at 2.
1182. See LIEBS, supra note 55, at 118.
1183. See ZIMMERMAN, supra note 14, at 34-35.
1184. See id. at 35.
1185. See MAYO, supra note 53, at 141 (noting that Michael Cullen's objective was to rent a cheap building).
1186. See id.
1187. See id.
1188. See ZIMMERMAN, supra note 14, at 40.
housed Big Bear's mother store. The parking lot proved to be well worth its rent when Big Bear's grand opening hit the jackpot. In its first year, the Big Bear grocery department's sales exceeded $2,100,000, a stupendous volume for an early 1930s grocery store when Americans were struggling with the Great Depression.

Although most 1930s supermarket customers could park their cars at free customer parking facilities maintained by the store owners, that was not universally true. Some early supermarkets, particularly those operated by national grocery chain store organizations, were located in densely populated or high-traffic areas where adding a parking lot was too expensive and relying on free curbside parking was unrealistic. To lure motorists, some of these stores outsourced their parking services by making deals with nearby commercial garages or commercial parking lot owners. Others tried to make their new supermarkets work without parking facilities altogether.

These attempts to operate supermarkets without parking facilities fizzled, and grocery chains (even the large ones) came to understand the crucial link between the supermarket and convenient free parking facilities. The Kroger Company tested this link in 1932 when it opened a new unit in Indianapolis. The new unit, a freestanding grocery store surrounded on all four sides by a seventy-five car parking lot, was launched as a pilot project to measure the relationship between the availability of free parking facilities and gross sales. Kroger soon learned the closeness of that relationship. The new unit was more successful than anticipated. Its gross sales were 40% higher than the company's projections. Sidney Rabb, a supermarket industry pioneer and prime mover at Stop & Shop, learned that ample free parking was essential to the supermarket concept from his first two super stores in the Boston area. One had a parking lot with 1000 spaces, and the other

1189. See id.
1190. See id.
1191. See id. at 42.
1192. See Phillips, supra note 118, at 192.
1193. See id.
1194. See id.
1195. See id.
1196. See PEAK & PEAK, supra note 18, at 89.
1197. See Mathews, supra note 41, at 39.
1198. See id.
1199. See id.
1200. See GREER ET AL., supra note 54, at 155.
had no parking facility at all. The store with the parking lot was very successful, and the other was a dud.

Although Michael Cullen, Robert Otis, Roy Dawson, Sidney Rabb, and the Kroger Company's management demonstrated the dramatic impact of free parking facilities on the food supermarket's success, they were not the first food market entrepreneurs to provide free parking facilities for their customers.

Houston, Texas area grocers and Los Angeles, California area real estate entrepreneurs were among the first entrepreneurs to sense that the proliferation of automobile ownership would result in previously unimaginable opportunities for retailing in general and food retailing in particular. Automobile ownership had been proliferating noticeably in the United States since 1915. By 1920, more than nine million automobiles were registered in the United States, six million more than in 1915. The number of registered automobiles grew to almost twenty million by 1925, more than twenty-six million by 1930, and more than thirty-two million by 1932. Proud new owners of these vehicles wanted to use them on shopping expeditions but were often frustrated by traffic jams and extended hunts for parking spaces in central business districts and neighborhood shopping districts. These Houston grocers and Los Angeles real estate people were determined to find a way to exploit the automobile trend.

A Houston, Texas grocery chain, Henke & Pillot, resolved to attract the growing ranks of automobile owners early on and provided parking facilities for its customers in the 1920s. Henke & Pillot's first branch store opened in 1923. Its customers could park in an adjacent 300-car parking lot developed by Henke & Pillot itself. In one early 1920s photograph, a big crowd of Henke & Pillot customers gather near their automobiles in the store's parking lot. Another 1920s photo shows a

1201. See id.
1202. See id.
1203. See LONGSTRETH, supra note 60, at 94 (noting that Henke & Pillot opened a facility with off-street parking in the 1920s).
1204. See CHARVAT, supra note 130, at 37.
1205. See id. at 38 tbl.3-5.
1206. See id.
1207. See id.
1208. See id. at 16.
1209. See LONGSTRETH, supra note 60, at 100.
1210. See id. at 94.
1211. See id.
1212. See id.
1213. See id.
Henke & Pillot parking lot swarming with automobiles.\textsuperscript{1214} Henke & Pillot must have been satisfied with the results of its parking experiment because it built a 450-car parking lot to serve a new store in 1926.\textsuperscript{1215}

Los Angeles area consumers’ interest in food market parking facilities mounted in the early 1920s for four principal reasons.\textsuperscript{1216} Perhaps the most significant reason was that Angelenos loved their automobiles and they owned plenty of them.\textsuperscript{1217} Automobile ownership was proliferating throughout America in 1927, but it proliferated nowhere else as much as it proliferated in southern California.\textsuperscript{1218} Angelenos and other Californians were more likely to own an automobile than other Americans.\textsuperscript{1219} By the late 1920s, more than one out of every three Californians owned a car.\textsuperscript{1220} The Auto Club of Southern California indicated that, as of December 1, 1928, over 1,750,000 automobiles had been licensed in Los Angeles.\textsuperscript{1221} Dismal public transportation facilities was a second reason.\textsuperscript{1222} The city’s public transportation was so bad that shopping by automobile was more of a necessity than a comfort.\textsuperscript{1223} The third reason was the scarcity of parking facilities.\textsuperscript{1224} Parking spaces were already scarce in downtown Los Angeles in the 1920s.\textsuperscript{1225} The last and not necessarily the least important reason was the Los Angeles area’s benign weather.\textsuperscript{1226} Unencumbered by snow and ice, Los Angeles area residents spent more time outdoors.\textsuperscript{1227} The warm climate also enabled food markets to operate without expensive heating facilities.\textsuperscript{1228} Some Los Angeles area food markets operated with open doors and open store-fronts.\textsuperscript{1229} Adjacent parking facilities were natural adjuncts to open-front stores.\textsuperscript{1230}

In 1923, an insurance executive named C.L. Peckham unveiled his plan for a drive-in food shopping complex with adjacent parking

\begin{thebibliography}{99}
\bibitem{1214} See \textit{Mayo}, \textit{supra} note 53, at 139.
\bibitem{1215} See \textit{Longstreth}, \textit{supra} note 60, at 94.
\bibitem{1216} See \textit{Charvat}, \textit{supra} note 130, at 16.
\bibitem{1217} See id.
\bibitem{1218} See id.
\bibitem{1219} See id.
\bibitem{1220} See id.
\bibitem{1221} See id.
\bibitem{1222} See id.
\bibitem{1223} See id.
\bibitem{1224} See id.
\bibitem{1225} See id.
\bibitem{1226} See id.
\bibitem{1227} See id.
\bibitem{1228} See id. at 17.
\bibitem{1229} See id. at 16-17.
\bibitem{1230} See id.
\end{thebibliography}
facilities in Glendale, California, a Los Angeles suburb. As originally conceived, the project, called Ye Market Place, was intended to be a U-shaped building with twenty-three small in-line food stores, an enclosed mall connecting the stores, a freestanding building with a propeller attached to its facade, and an automobile parking lot.

The Glendale site was far from a 100% location. Why did Peckham plan a shopping complex there, and why was he so determined to provide an automobile parking lot?

Peckham lived in Glendale and would drive by this site frequently while running his own errands. He was perturbed by the time and effort it took him to park his automobile in that neighborhood. His problems were not unique, and he knew that. Los Angeles area neighborhood shopping districts were suffering from traffic congestion, and curbside parking was scarce. Traffic control regulations exacerbated the curbside parking problem when no parking zones were established at intersections in an effort to alleviate traffic congestion. Curbside parking was no picnic even after you found a parking space. In this era, long before power steering became a commonplace feature of the American automobile, parallel parking was a laborious and unpleasant chore for most people. Accordingly, Peckham concluded that a retail complex that provided free off-street parking would appeal to automobile owners frustrated by traffic congestion.

That was not the only attractive aspect of the site. Thousands of automobiles drove past it daily. He figured that many drivers would drop by on impulse as they approached the project. Moreover, a drive-in food market had a much greater chance of success than a food market in a neighborhood shopping district. A drive-in food market would draw customers from much greater distances than a neighborhood food market could hope for.

1231. See LONGSTRETH, supra note 60, at 33-34.  
1232. See id. at 34.  
1233. See id. at 35.  
1234. See id. at 34.  
1235. See id.  
1236. See id.  
1237. See id. at 34, 38.  
1238. See id. at 38.  
1239. See id. at 38-39.  
1240. See id. at 38.  
1241. See id. at 35.  
1242. See id. at 39.  
1243. See id. at 38.  
1244. See id. at 39-40.
After a while, Peckham changed the project’s design radically. \(^{1245}\) Although he retained its most prominent feature, a courtyard with free parking facilities, he abandoned the enclosed mall and decided not to build partition walls between the stores. \(^{1246}\) With no partition wall separating one tenant from another, the entire redesigned building seemed to the general public as if it were occupied by a single food market—albeit a very large food market for the early 1920s. \(^{1247}\) Instead of meandering along an enclosed walkway and dropping by the stores they liked best, consumers would merely pass from sector to sector through the building itself. \(^{1248}\) They could walk through the building from one end to another and buy the merchandise they wanted as they did. \(^{1249}\) By coordinating their opening and closing hours and their advertising, the tenants contributed to the illusion that the building was occupied by a single retail enterprise. \(^{1250}\) Peckham’s efforts and his faith in the tie between food shopping and customer parking were rewarded by a gratifyingly successful grand opening on October 24, 1924. \(^{1251}\) Forty-thousand people attended the grand opening.

Like almost every other food distribution innovation, Peckham’s drive-in market looked good to insightful entrepreneurs. \(^{1253}\) It was a new way to make an honest dollar. Peckham disciples copied it, but they did not clone it. \(^{1254}\) They borrowed what they liked and added their own variations on the theme. \(^{1255}\) The next wave of drive-in food markets reflected variations stemming from their locations and the personal eccentricities of their developers. \(^{1256}\) Three new drive-in food markets opened for business in 1925, and another five opened in 1926. \(^{1257}\) The movement gained in popularity in 1927, and a considerable number of drive-in food markets were built that year along busy southern California...
arterial highways. By New Year's Day of 1929, more than 100 drive-in markets were doing business in the Los Angeles metropolitan area.

Reacting to the success and popularity of the drive-in food markets, Ralph's Grocery Company, a California regional grocery store chain, decided to join the parking lot movement. It provided free parking facilities for forty automobiles at its new Pasadena store in 1929. After that, providing free parking facilities became standard operating procedure at Ralph's.

Ye Market Place and subsequent drive-in markets validated Peckham's theories about the link between successful food retailing and free parking. The drive-in's consequences were far reaching and evident to astute observers like Michael Cullen and other early supermarket pioneers. Drive-in food markets provided appealing facilities that food shoppers could find nowhere else. Like contemporary shopping center customers, drive-in food market customers parked their cars in off-street parking facilities provided by the store owners, and the parking spaces were free. Although free parking in front of a food market is commonplace now, it was new and special in the 1920s. Motorists would travel farther to shop at food markets that provided free and convenient parking facilities. Consumers would bypass congested neighborhood shopping districts and drive to a food market where they could park easily. Some customers living only one block away preferred driving to a food market according to Walter Van de Kamp, President of the California Advertising Agency that specialized in food industry advertisers. The parking lot provided a suitable way for consumers to transport heavy food bundles home. With a parking lot, a food market could adopt a

1258. See id.
1259. See Walter Van de Kamp, An Innovation in Retail Selling, MAG. BUS., July 1929, at 42, 42.
1260. See LONGSTRETH, supra note 60, at 37-38.
1261. See id. at 88; Flint, supra note 204, at 34.
1262. See LONGSTRETH, supra note 60, at 88.
1263. See id.
1264. See id. at 39.
1265. See id. at 121.
1266. See id. at 37.
1267. See id. at 38.
1268. See id.
1269. See id. at 38, 40.
1270. See id. at 38.
1271. See Van de Kamp, supra note 1259, at 42.
1272. See LONGSTRETH, supra note 60, at 39.
cash and carry policy and save the cost of free home delivery without fear of losing customers.\(^{1273}\)

Unlike contemporary shopping center customers, some drive-in customers could shop without even leaving their cars.\(^{1274}\) The merchants would send retail clerks to greet them in their cars, take their orders, and return with bags full of food.\(^{1275}\) What did these lucky customers do while they waited? I do not know, but I am really curious.

Southern California's drive-in food markets declined soon after they reached the crest of their popularity.\(^{1276}\) The decline was obvious by 1930, the first full year of the Great Depression, and it did not stop then.\(^{1277}\) Only one-third as many public markets opened for business in 1931 as in 1930, and only three new public markets opened for business in 1932.\(^{1278}\) The drive-in's rapid descent did not detract from the validity of its underlying theory.\(^{1279}\) The demise of the California drive-in market was caused by a worldwide calamity.\(^{1280}\) The Great Depression had begun, and very few retail businesses were able to withstand the horrific problems resulting from it.\(^{1281}\) With a legion of workers unemployed in an age before unemployment compensation and other vital aspects of the social safety net we take for granted today, money was scarce.\(^{1282}\) Even money for food was scarce.\(^{1283}\) Under these circumstances, the food retailer who could offer the lowest prices would get the business, and the drive-in food markets did not or could not offer the lowest prices.\(^{1284}\)

7. Efficient Merchandise Movement

When food or other merchandise is delivered to a food market, it becomes part of the store's inventory, and the store owner keeps it somewhere on premises until it is sold.\(^{1285}\) Some of it is kept where customers can see it, and the balance is kept in reserve in a separate storage room.\(^{1286}\) All food markets need to plan how and where to store

\(^{1273}\) See id.

\(^{1274}\) See id. at 38.

\(^{1275}\) See id.

\(^{1276}\) See id. at 79.

\(^{1277}\) See id.

\(^{1278}\) See id. at 79.

\(^{1279}\) See id.

\(^{1279}\) See id. at 80.

\(^{1280}\) See id. at 79.

\(^{1281}\) See id.

\(^{1282}\) See McAUSLAND, supra note 27, at 6.

\(^{1283}\) See id.

\(^{1284}\) See LONGSTRETH, supra note 60, at 80.

\(^{1285}\) See PEAK & PEAK, supra note 18, at 96.

\(^{1286}\) See id.
inventory most effectively. They also need to design an appropriate system for selling the merchandise, retrieving it from storage, moving it through the storeroom, and then getting it to its customers' home storage facilities. Storekeepers do these things in very different ways. They can be done expensively or inexpensively. The process can be convenient or inconvenient. It can stimulate or inhibit sales.

Until the supermarket streamlined America's food distribution system, the process of selling food in service grocery stores, fruit and vegetable stores, and butcher shops and getting it to the customer's home was unnecessarily expensive and time-consuming. Much of the unnecessary expense and wasted time was attributable to formidable barriers that impeded the process by which food products were sold to the customer, retrieved from the food market's inventory, moved through the store, and transported to the customer's pantry. The process was disadvantageous for food merchants and consumers alike.

Before the supermarket's ascent, most twentieth-century American families relied on service grocery stores, service-oriented fruit and vegetable stores, and service-oriented butcher shops for their food. Each step along the path by which merchandise moved from the store's inventory to its customer's home was subject to a pair of hands and other formidable obstacles. These obstacles increased the storekeeper's budget and the cost of food. They also lengthened the time the consumer spent on a food shopping expedition. Although retrieving merchandise from storage was more efficient in twentieth century service-oriented food markets than it was in nineteenth century general stores, the service-oriented food market merchandise movement process was inefficient by today's standards.

One factor influencing the inefficiency of the service-oriented food market's merchandise movement process was the storeroom's layout. The layout of pre-supermarket-era twentieth century service grocery storerooms was usually based on the counter and wall system.

1287. See id.
1288. See MAYO, supra note 53, at 89.
1289. See id. at 78.
1290. See id. at 78-79.
1291. See id. at 99-100.
1292. See id. at 83.
1293. See id. at 99-100.
1294. See id. at 100.
1295. See id. at 177.
1296. See id. at 215.
1297. See id.
the counter and wall system prevailed, shelves lined the storeroom’s side and rear walls, and a counter was placed a few feet away from each side wall.\footnote{1299}

The process by which food products traveled from the service grocery store’s storage areas to the customer’s pantry started with a retail clerk carrying a carton of cans, bottles, boxes, or jars from the storage space to the storeroom.\footnote{1300} He would empty the carton and place the cans, bottles, boxes, or jars on the shelves.\footnote{1301}

A shopper would enter the store and look for a retail clerk ready to serve her.\footnote{1302} Retail clerks were stationed between a counter and a nearby side wall.\footnote{1303} Customers gathered in a spacious center vestibule that separated the counters.\footnote{1304} If a retail clerk was not busy with someone else, he or she initiated the sales process by approaching him.\footnote{1305} If all clerks were busy, he or she stood in line and waited.\footnote{1306} When the customer’s turn came, he or she would recite his or her shopping list.\footnote{1307} The clerk would take the order and retrieve the food and household products ordered by the customer from the shelves and other places where it was stored.\footnote{1308} Some merchandise was stored on and under the counters, but most merchandise was stacked on the shelves.\footnote{1309} Cans, cardboard boxes, jars, and bottles were piled high—very high.\footnote{1310} Customers could not fetch things from the shelves.\footnote{1311} They relied on retail clerks to do that for them.\footnote{1312} Upper shelves were far beyond the reach of the tallest retail clerks, and clerks used poles with metal attachments to get at merchandise stored on upper shelves.\footnote{1313}

After retrieving a customer’s purchases, the retail clerk would calculate the total purchase price manually with a pencil on a paper bag.\footnote{1314} Sometimes the arithmetic was correct, and sometimes it was

\footnotesize{\begin{itemize}
  \item[1299.] See id.
  \item[1300.] See LIEBS, supra note 55, at 117.
  \item[1301.] See id.
  \item[1302.] See id.
  \item[1303.] See id.
  \item[1304.] See id.
  \item[1305.] See id.
  \item[1306.] See id.
  \item[1307.] See id.
  \item[1308.] See id.
  \item[1309.] See id.
  \item[1310.] See id.
  \item[1311.] See id. at 118.
  \item[1312.] See id.
  \item[1313.] See id. at 117.
  \item[1314.] See id.
\end{itemize}}
not. Then, the clerk would fill that bag and other bags with the groceries and other items he or she purchased.

Until they could shop at supermarkets, most twentieth century urban and suburban consumers traveled to neighborhood service-oriented food markets by foot. With no motor vehicle available to serve as a mechanized beast of burden, the weight and mass of food bundles deterred most consumers from buying very much on any single food shopping expedition. Most people bought only what they and their children could carry home in their arms. Some consumers brought little carts or wagons to ease the load. With a cart or wagon, a consumer could carry a little more; so he or she would buy a little more. To encourage consumers to buy much more, many service grocery stores and other service-oriented food markets provided home delivery service.

As the euphoria of 1929 yielded to 1930's grim reality, America's service-oriented food markets were still firmly committed to their merchandise movement process. With all of its defects, it got the job done. On the other hand, the process was costly, it alienated customers, and it inhibited sales. The human resources needed to power this process were very expensive. The retail clerks and delivery staff employed to make it work weighed heavily on the storekeeper's payroll. Despite all the attention they got from retail clerks, many customers did not trust the clerks completely. Clerks pushed private label merchandise on customers who wanted national brands. Clerks steered customers to slow-moving products they would never think of buying without a sales talk. Clerks tried to influence customers to buy more than they planned to buy. The counters and clerks served as barriers separating customers from the cans, boxes, and bottles they

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1315. See id.
1316. See id.
1317. See id.
1318. See id. at 118.
1319. See LONGSTRETH, supra note 60, at 87.
1320. See LIEBS, supra note 55, at 117.
1321. See id. at 118.
1322. See Goldman, supra note 169, at 58.
1323. See MAYO, supra note 53, at 89.
1324. See id.
1326. See infra Part III.C.
1327. See PEAK & PEAK, supra note 18, at 133-35 (discussing the benefits to supermarkets of selling private label merchandise).
wanted, and that inhibited potential sales.\footnote{1328} Maybe worst of all, when a service grocery store was busy, its customers could not buy anything without waiting on line. The lines could be very long, and the customers hated them.\footnote{1329}

The supermarket industry’s pioneers devised a more efficient merchandise movement process. The process they devised relied partly on techniques originated by grocers of earlier generations and partly on techniques they originated themselves.\footnote{1330} Taken together, these techniques ended the grocer’s reliance on counters and wall shelves for merchandise storage.\footnote{1331} Instead, the counter and wall shelf system was discarded in favor of the freestanding shelf and grid pattern layout for which we owe Clarence Saunders many thanks.\footnote{1332} Saunders used the freestanding shelf and grid pattern layout advantageously to reduce payroll expenses, reduce prices, and increase sales volume.\footnote{1333} Sales volume increased at Piggly Wiggles only partly because of the lower prices.\footnote{1334} Customers also bought more on a Piggly Wiggly visit because they were close enough to the merchandise to be stimulated by its look, touch, and feel.\footnote{1335} Despite the benefits they derived from this aspect of the freestanding shelf and grid pattern layout, food merchants realized that they could do even better if they found a way to overcome a significant barrier. As customers passed through the aisles and selected food and other merchandise from the shelves, they could not possibly carry all they wanted in their arms.\footnote{1336} The quantity of groceries they were buying was much smaller than the quantity they were able to take home in their automobiles.\footnote{1337}

The supermarket industry’s founders understood at the outset that they could not maintain an aggressively low-price policy without finding a better method for moving merchandise from a storeroom’s storage facilities to customers’ home storage facilities.\footnote{1338} Supermarkets needed a way to make it easier for shoppers to retrieve food and other

\footnotesize{\begin{itemize}
\item \footnote{1328} See \textit{Mayo}, supra note 53, at 89.
\item \footnote{1329} See \textit{Charvat}, supra note 130, at 61.
\item \footnote{1330} See, e.g., \textit{Goldman}, supra note 169, at 57-58 (stating that except for the lower prices, A&P’s economy stores were similar to earlier stores).
\item \footnote{1331} See \textit{id}.
\item \footnote{1332} See \textit{id}.
\item \footnote{1333} See \textit{id} at 58.
\item \footnote{1334} See \textit{Liebs}, supra note 55, at 120.
\item \footnote{1335} See \textit{id}.
\item \footnote{1336} See \textit{Mullen}, supra note 1325.
\item \footnote{1337} See \textit{id} (noting that once a housewife filled her basket with groceries, she would have to stop shopping).
\item \footnote{1338} See \textit{id}.
\end{itemize}}
merchandise from store shelves, to transport the merchandise they retrieved to the checkout counter, and to move themselves and their accumulated bundles first through the supermarket's exit door and then to their automobiles.\footnote{1339. See id.}

One supermarket industry founder, Sylvan Goldman, invented the first practical shopping cart a few years after the first supermarket opened for business, and the other supermarket operators adopted the shopping cart quickly.\footnote{1340. See \textit{Wilson}, supra note 814, at 3-4.} The shopping cart was such a powerful influence on supermarket operations that it prompted the industry to refine the grid pattern layout popularized by Clarence Saunders. George Jenkins, another supermarket industry founder, contributed to the supermarket's merchandise movement process by introducing automatic doors to the supermarket industry.\footnote{1341. See \textit{Watters}, supra note 201, at 61.} These techniques eliminated the bottlenecks impeding the process by which food product traveled between supermarket shelves and shoppers' automobiles.\footnote{1342. See id.} They would become crucial elements of the system that helped many American families survive the Great Depression and ultimately became the most efficient food distribution system devised in the industrial age.\footnote{1343. See id.}

a. The Freestanding Shelf System and Grid Pattern Layout

The freestanding shelf system was a byproduct of Clarence Saunders's effort to reduce the number, and consequently the cost, of employing retail clerks inside the store in 1916.\footnote{1344. See \textit{Goldman}, supra note 169, at 58.} Although grocery store clerks did not earn big money in the second decade of the twentieth century, their wages were a very significant part of the total cost of store operations.\footnote{1345. See \textit{Mayo}, supra note 53, at 89.} Grocers yearned for a way to eliminate this cost or reduce it severely.\footnote{1346. See \textit{id.} at 64.} Clarence Saunders, founder of the Piggly Wiggly grocery chain, conceived of the self-service system as a practical way to accomplish that goal.\footnote{1347. See \textit{Goldman}, supra note 169, at 58; see also \textit{Prince}, supra note 275, at 1.} Where the self-service system prevailed, customers bypassed retail clerks and retrieved the merchandise they wanted from in-store storage facilities themselves.\footnote{1348. See \textit{Goldman}, supra note 169, at 58.}
Saunders realized that self-service would not work unless the counters and vestibule that occupied so much storeroom space were discarded. The wall shelving was retained in his new system, but the counters and the very wide center corridor that occupied valuable selling space were scrapped. The space formerly allocated to counters and the expansive center corridor in which customers gathered was reallocated to freestanding shelving fixtures and adjacent aisles arranged in a grid pattern. The wall shelves and the freestanding shelves were loaded with merchandise—much more merchandise than service grocery stores could stock with the wall and counter system. The retail clerks who had previously guarded the wall shelves and retrieved merchandise from them in conventional service grocery stores were also scrapped.

With the success of his freestanding shelf and grid pattern layout, Saunders achieved his principal goals. Store operating expenses were reduced materially. That made it possible for Piggly Wiggly and its imitators to reduce prices and increase sales volume without sacrificing profits. Better yet, by devising his freestanding shelf and grid pattern layout, Saunders eliminated significant layers of inefficiency in grocery store operations. Ultimately, it would become a cornerstone of the modern supermarket.

Significant sales and merchandise movement barriers were eliminated by the freestanding shelf and grid pattern layout. No longer burdened by the need to stand on line and hang around while store clerks fetched the merchandise, Piggly Wiggly customers could stroll about as quickly or as slowly as they wished along a one-way path passing shelves full of merchandise within easy reach. They could touch the cans, bottles, and little boxes on the shelves up close. They could examine the cans, bottles, and boxes. They could fetch what they liked...
by themselves without waiting on line.\footnote{1363}{See id.} They placed their selections in a basket provided by the store and lugged them to another segment of Saunders’s system.\footnote{1364}{See id.}

Piggly Wiggly customers paid for their purchases at checkout counters.\footnote{1365}{See \textit{LIEBS}, supra note 55, at 119.} Although Piggly Wiggly checkout counters resembled the checkout counters used by contemporary supermarkets in many respects, they were different in some respects. One difference is that Piggly Wiggly checkout counters included a turnstile through which customers passed as they exited.\footnote{1366}{See \textit{MAYO}, supra note 53, at 89.} Another difference is that some Piggly Wiggly customers entered the checkout counter through an aisle that sat parallel to the storefront and perpendicular to the aisles separating the freestanding shelving fixtures.\footnote{1367}{See \textit{id.} at 91.} When they reached the end of that aisle, shoppers made a ninety-degree left turn into another aisle before reaching the cashier.\footnote{1368}{See \textit{id.} at 171.} Contemporary checkout counters are usually perpendicular to the storefront and extend the rectilinear pattern formed by the aisles separating the store’s freestanding shelving fixtures.\footnote{1369}{See \textit{id.}}

Saunders’s self-service system and his freestanding shelf and grid pattern layout were admired by many grocers.\footnote{1370}{See \textit{ZIMMERMAN}, supra note 14, at 22.} Some grocers admired them so much that they were willing to pay for the privilege of doing business as a Piggly Wiggly franchisee and with Clarence Saunders’s guidance.\footnote{1371}{See \textit{Goldman}, supra note 169, at 58.} They licensed the Piggly Wiggly name, its self-service policies, and its layout.\footnote{1372}{See \textit{ZIMMERMAN}, supra note 14, at 27.} Others admired Saunders’s methods and simply copied them.\footnote{1373}{See \textit{id.}} Still others adopted some of Saunders’s ideas in their own stores but rejected others.\footnote{1374}{See \textit{id.}} Henke & Pillot, a Houston Texas chain adopted the self-service principle only a few years after Piggly Wiggly popularized the concept, but it did not adopt Piggly Wiggly’s grid pattern layout.\footnote{1375}{See \textit{id.}} Henke & Pillot’s merchants contrived a unique layout for the company’s first self-service store.\footnote{1376}{See \textit{id.}} They stored
everything on shelves and arranged the shelves in an M formation. Store employees stocked the shelves from outside the M while customers browsed along inside the M and picked what they wanted. The M formation might not have been a huge success. I never saw it used, and I never heard of its use by another grocer.

Saunders’s admirers were in the minority for many years. Despite the obvious merits of self-service and the grid pattern layout, most grocers doing business between 1916 and the Great Depression of the 1930s were not impressed by them. The vast majority of grocery stores in America during this period were service-oriented stores with a counter and shelf layout. The service grocery and its counter and wall shelf layout dominated food retailing until the supermarket was born. Then, the freestanding shelf and grid pattern layout surpassed the counter and shelf layout, and America’s food distribution was streamlined for good.

b. Folding Basket Carriers and Shopping Carts

Despite significant advances in sales and merchandise movement techniques incorporated in the business model conceived by Michael Cullen, Robert Otis, Roy Dawson, and other early supermarket industry pioneers, significant merchandise movement barriers remained. Try as they did to find techniques or devices to overcome these barriers, the solution eluded Cullen, Otis, Dawson, and their disciples. The remaining barriers impaired the supermarket’s competitive advantage over service-oriented food markets, irritated supermarket customers, and inhibited supermarket sales growth. Unlike service grocery store customers, supermarket customers needed to lug heavy bundles of food and household products from the store shelves to a checkout stand where they could pay for what they bought. The freestanding shelf and grid

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1377. See id.
1378. See id.; see also WILSON, supra note 814, at 83.
1379. See Goldman, supra note 169, at 58.
1380. See id.
1381. See id. (explaining how stores continued with a counter system in addition to a self-service system).
1382. See id.
1383. See ZIMMERMAN, supra note 14, at 22.
1384. See WILSON, supra note 814, at 77-117 (explaining how customers needed a more efficient way to carry their groceries from the store to their homes).
1385. See id. (stating that many individuals tried to cure the limits on grocery purchases through various failed inventions).
1386. See WILSON, supra note 814, at 85.
1387. See ZIMMERMAN, supra note 14, at 40.
pattern layout brought the customer within feeling, smelling, and grabbing distance of the food they served their families and the everyday household products they need to clean and keep house. Without relying on a retail clerk’s intercession, it was so tempting and so easy to simply take what they wanted. The problem was that consumers wanted to buy much more than they could carry.

Although the shopping cart is indelibly associated with the modern supermarket now, early supermarket shoppers had to cope without them. Transporting cans, bottles, jars, and boxes of groceries from the shelves to the checkout counter was not easy for 1930s supermarket customers, and transporting heavy bundles between the store and a waiting automobile was no easier. The earliest supermarkets provided baskets for customers as they entered. They filled the baskets with food, household products, and other merchandise as they meandered through the aisles. Since carrying a big load of groceries and dairy products was physically taxing, customers would not buy more than they could handle without excessive discomfort. These physical limitations were barriers to the supermarket industry’s ability to serve consumers, and they deterred the growth of the industry’s sales volume. Although they arrived at supermarkets in automobiles that could carry home all the food, household products, and other merchandise they might dream of buying, they knew that they were destined to schlepp all they selected to the checkout counter, through the store, and then to the car. Consequently, they wouldn’t buy more than they could carry in their arms without excessive discomfort.

Customers who bought less paid less. So, in the days before the folding basket carrier and the nesting shopping cart were invented, the average supermarket cash register receipt was much smaller than it had to be. Food merchants knew that their customers would buy much more on each shopping expedition if someone invented a better way to
move food and household products from the shelves to the checkout counter, from there through the exit door, and finally to a waiting motor vehicle.\textsuperscript{1399}

The effort to invent a contraption to alleviate the need for a food market shopper to carry heavy loads of food and household products from food market shelves to checkout stands began many years before the supermarket industry was born.\textsuperscript{1400} Progressive grocers like the Cifrino Brothers, Henke & Pillot, and J. Weingarten devised such contraptions and put them to work.\textsuperscript{1401} However, their contraptions did not work well.\textsuperscript{1402}

The Cifrino Brothers of Boston, Massachusetts are reputed to have been among the first to tackle the problem.\textsuperscript{1403} They devised a chain belt system that relieved the need for customers to carry groceries through the store entirely.\textsuperscript{1404} Cifrino did not use the self-service system then.\textsuperscript{1405} Its customers ordered groceries and other merchandise from retail clerks stationed at counters around the store.\textsuperscript{1406} The clerks filled customer orders but did not hand the merchandise to the customers.\textsuperscript{1407} Instead, the customer received order slips listing the things they bought.\textsuperscript{1408} The items they purchased traveled to the checkouts over a conveyor belt.\textsuperscript{1409} So, until the last segment of the journey through the store, the path between the checkout counter and the exit door, Cifrino shoppers carried nothing more than their children and their handbags.\textsuperscript{1410} Why wasn’t Cifrino’s system adopted universally? One reason was that it didn’t work all the time.\textsuperscript{1411} Like all mechanical objects, the chain belt needed servicing.\textsuperscript{1412}

\textsuperscript{1399} Van Gelder quoted Sylvan Goldman:

"In watching customers carrying baskets on their arms ... the thought came to me if there were some way we could give that customer two baskets to shop with ... we could do considerably more business, because usually when the housewife got her basket full it was heavy for her to carry and she would stop shopping.”

Van Gelder, supra note 1395 (quoting letter from Sylvan Goldman to the Department of Cultural History at the Smithsonian Institution).

\textsuperscript{1400} See Wilson, supra note 868, at 82.
\textsuperscript{1401} See id. at 82-83.
\textsuperscript{1402} See id.
\textsuperscript{1403} See id. at 82.
\textsuperscript{1404} See id.
\textsuperscript{1405} See id.
\textsuperscript{1406} See id.
\textsuperscript{1407} See id.
\textsuperscript{1408} See id.
\textsuperscript{1409} See id.
\textsuperscript{1410} See id.
\textsuperscript{1411} See id. at 82-83.
\textsuperscript{1412} See id. at 83.
Unlike most mechanical objects, the chain belt was out of action frequently.\textsuperscript{1413} It often chose to break down when the store was at its busiest.\textsuperscript{1414} Moreover, conveyor belts were expensive.\textsuperscript{1415} They were expensive to fabricate, install, and maintain.\textsuperscript{1416} In addition, they were not easily adaptable to self-service.\textsuperscript{1417} Worse, this system depended on retail clerks who fetched the groceries, listed customer purchases on order slips, and placed the purchases on the chain belt.\textsuperscript{1418}

Like other early self-service grocers, Henke & Pillot issued a basket to each of its customers.\textsuperscript{1419} Unlike other grocers’ baskets, Henke & Pillot baskets had little wheels on the bottom.\textsuperscript{1420} Also unlike other self-service grocers, Henke & Pillot installed a fifteen inch wide and thirty-inch-high track against its shelving units.\textsuperscript{1421} The baskets’ little wheels fit on rails set on top of the track, and customers pushed the baskets along the track.\textsuperscript{1422} Customers found that much easier than lugging a basket around the store in their arms.\textsuperscript{1423} Although Henke & Pillot’s system made some of its customers happy, it was not widely imitated.\textsuperscript{1424} The rail system was tied to an \textit{M}-shaped shelf configuration that had mixed reviews.\textsuperscript{1425} The upside was that most shoppers were delighted to avoid lugging heavy loads of groceries around the store.\textsuperscript{1426} On the down side, the rail forced all shoppers to traverse the same route, and they had to follow each other in a long line.\textsuperscript{1427} Slow moving and picky shoppers held up the line, and impatient shoppers standing behind them were resentful.\textsuperscript{1428} Nevertheless, the rail system proved there was much to be gained by finding a way to make it easy for grocery store customers to select merchandise, bring it to a checkout clerk, and get it home.\textsuperscript{1429}

\textbf{Joe Weingarten}, founder of Houston’s J. Weingarten, Inc., contended that his company was the first to provide its customers with
moveable vehicles for transporting purchase merchandise around the store and to their automobiles. The Weingarten vehicle, described as a "'kiddie' car on wheels," was introduced in 1918. Joe Weingarten remembered looking to one of his employees, Ellis D. Turnham, for a way to alleviate the food shopper's plight. Described as a "mechanically minded gentleman," Turnham devised a rolling basket carrier that seems to have been a crude version of a contemporary shopping cart. Weingarten stated that his rolling basket carrier was based on a "toy express wagon[]." The contraption was "made of steel with a handle to push it around." Surely, the basket carrier made life easier for Weingarten customers. Pushing or pulling almost anything on wheels is less taxing than carrying a heavy basket full of food. However, the rolling basket carrier did not help that much. It was much smaller than the modern shopping cart and could not carry enough food and household products to satisfy the needs of an average family for a week. Worse than that, Weingarten's carts did not fold or stack. Consequently, they occupied large blocks of space that could have been used more profitably.

Early supermarket operators also tried their best to contrive something or other to make it easier for the customer to bring the merchandise selections from the shelves to the checkout counter and beyond. King Kullen tried a basket on wheels, but it caused much more trouble than it was worth. Although most King Kullen shoppers used the wheeled baskets for their intended purpose, their children had something else in mind. The wheeled baskets looked like great fun to them, and they used them for joyriding. Inevitably, they injured themselves and others. The Big Bear introduced a food taxi modeled

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1430. See id. at 27.
1431. Id. at 152.
1432. See id. at 28.
1433. Id.
1434. Id.
1435. Id.
1436. See id.
1437. See id.
1438. See id.
1439. See id.
1440. See id.
1441. See WILSON, supra note 814, at 83.
1442. See, e.g., id. at 82-83 (listing the various inventions created to alleviate the burden of carrying heavy baskets).
1443. See Furnas, supra note 273, at 38.
1444. See id.
1445. See id.
on a soap box wagon.\textsuperscript{1446} I do not know why that contraption did not make it, but it did not.\textsuperscript{1447}

The problem remained unsolved until 1938 when Sylvan Goldman made it one of his priorities.\textsuperscript{1448} Like other prominent food merchants of the 1930s, Sylvan Goldman, an Oklahoma City supermarket operator, sought to ease his customers' physical burdens.\textsuperscript{1449} He too decided that what the world needed was a practical contraption to move the food and household products selected by the shopper through the store.\textsuperscript{1450} Sylvan Goldman devised the contraption.\textsuperscript{1451} It solved the problem, and it changed the course of food retailing forever.\textsuperscript{1452}

Before we focus on Sylvan Goldman's solution to this problem, we should learn more about this supermarket industry pioneer and his family.

Sylvan Goldman was immersed in retailing all his life, and he must have inherited a creative merchant gene.\textsuperscript{1453} His father, Michael Goldman, a Latvian Jew, immigrated to the United States in 1880.\textsuperscript{1454} After a brief stint as an apprentice retail clerk in an uncle's dry goods store in Baltimore, Michael Goldman trekked west.\textsuperscript{1455} He journeyed to Oklahoma around 1890 for a shot at acquiring a little piece of the two million acres of government land just made available for homesteading.\textsuperscript{1456} Michael managed to buy 160 acres of farmland when he got to Oklahoma, but he was not cut out for farming.\textsuperscript{1457} He realized that a little too late. He had already bought the land.\textsuperscript{1458} Nevertheless, he was sensible enough to leave the farm in search of a better opportunity.\textsuperscript{1459} To this end, he headed for Gainesville, Texas where he found work more suitable to his training and disposition.\textsuperscript{1460} For the short run, he found a good job with Kahn Brothers Wholesale Groceries, Produce and Dry Goods Company.\textsuperscript{1461} In the long run, it was more than a

\textsuperscript{1446} See id.
\textsuperscript{1447} See id.
\textsuperscript{1448} See WILSON, supra note 814, at 90.
\textsuperscript{1449} See id. at 82.
\textsuperscript{1450} See id.
\textsuperscript{1451} See id. at 77, 90.
\textsuperscript{1452} See id. at 77.
\textsuperscript{1453} See id. at 4.
\textsuperscript{1454} See id. at 77.
\textsuperscript{1455} See id.
\textsuperscript{1456} See id. at 4-5.
\textsuperscript{1457} See id. at 5.
\textsuperscript{1458} See id.
\textsuperscript{1459} See id.
\textsuperscript{1460} See id.
\textsuperscript{1461} See id.
good job. After a few years with his new boss, he married the boss’s niece, Hortense Dreyfus, in 1894 and became a member of the Kahn/Dreyfus family.1462

Michael’s new status as family member came with new responsibilities and new adventures. The family shipped him off to Native American territory to manage a poorly performing general store owned by family members.1463 His mission was to turn the store around, and he accomplished the feat.1464 One additional mission was accomplished before he left Indian territory but not entirely by Michael. Hortense Goldman gave birth to the newlyweds’ first son, Alfred, in 1895.1465

His next assignment took Michael Goldman, his wife, and his son to Ardmore, Oklahoma to wrestle with the problems of another pathetic general store in which the family had an interest.1466 The Ardmore assignment brought him to still another general store and, more importantly, another son.1467 Sylvan Goldman was born in Ardmore in 1898.1468 He lived there, attended school there, worked in his father’s store there, and became a Bar Mitzvah there.1469

When Sylvan was fifteen years old in 1913, Michael sold the Ardmore store and moved his family to Tulsa where his wife’s brothers lived.1470 The Dreyfus brothers were in the wholesale grocery and produce business then, and they were doing well.1471 Shortly after they arrived in Tulsa, Sylvan Goldman started working for his uncles.1472 Like his father before him, the family business dispatched him to a branch store in another town.1473 This town was Sapulpa, Oklahoma.1474 Unlike his father before him, Sylvan was not to be the store manager.1475 He spent the next four years in a Sapulpa, Oklahoma grocery store learning

1462. See id.
1463. See id.
1464. See id.
1465. See id.
1466. See id. at 5-6.
1467. See id. at 6.
1468. See id.
1469. See id. at 7-8.
1470. See id. at 9.
1471. See id.
1472. See id.
1473. See id.
1474. See id.
1475. See id. at 10.
the grocery business under the watchful eye of his uncle and boss, Samuel Dreyfus. 1476

Even a World War did not interrupt Sylvan Goldman’s connection to the retail trade in general and to food retailing in particular. 1477 Imbued with patriotic fervor, Sylvan Goldman lied about his age (he was too young for military service) and signed on with the U.S. Army in 1917. 1478 Oddly, the U.S. Army, Company D of the Second Battalion of the 111th Engineers recognized his merchant’s talent and experience in the food business. 1479 Goldman became a food specialist with a mess sergeant’s rank. 1480

Whoever put Sergeant Goldman in charge of procuring his unit’s food supply had the wisdom of Solomon. Reportedly, his comrades-in-arms praised his meals 1481 which, I must say, was an unusual event in the life a U.S. Army mess sergeant.

When the 111th was stationed in France at the front lines in September 1918, Goldman confronted new and difficult problems in his effort to procure enough good food to feed his Company. 1482 His Company was attached to other Army units, and that made it dependent on other units for its food supply. 1483 When the other units’ commanders were reluctant to share their food, Sergeant Goldman turned to the kind of impromptu tactics that make the difference between winning and losing a war, or, for that matter, any contest. 1484 He dispatched soldiers in horse drawn wagons to hunt for food at night, and the wagons returned with plenty of food night after night. 1485 They scrounged food from supply depots, and they diverted food supplies from convoys headed elsewhere. 1486 Needless to say, the men of Company D were well fed. 1487

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1476. See id.
1477. See id.
1478. See id. at 10-11.
1479. See id. at 12.
1480. See id. The Army decided I was a food specialist too when I was transferred to the 214th Quartermaster Company of the 77th Infantry Division forty-three years later. Since my only previous experience with food had been several stints as a grocery store delivery boy and a hotel dining room busboy, I have always questioned the wisdom of the nameless person who decided I was a food specialist and assigned me to a bakery unit. Other food specialists in my unit questioned his wisdom too. Some of them insisted that the Army decided they were bakers because of a typographical error. In civilian life, they were bankers.
1481. See id.
1482. See id. at 18.
1483. See id.
1484. See id.
1485. See id.
1486. See id.
1487. See id.
As for Sergeant Sylvan Goldman, he returned to America after the Armistice with the valuable lessons he had learned about improvisation.\(^{1488}\) He was honorably discharged from the U.S. Army in 1919.\(^{1489}\)

His brother Alfred Goldman also served in the U.S. Army during World War I, but Alfred was discharged early because of a medical disability.\(^{1490}\) After his discharge, Alfred found a job with a San Antonio, Texas based wholesale grocery and produce business and hung out there until Sylvan’s tour of duty with the U.S. Army ended.\(^{1491}\) Then he proposed that the brothers join forces and start their own food business.\(^{1492}\) Sylvan was glad to do that, and the Goldman brothers began a collaboration that would end only with Alfred’s untimely death in 1937.\(^{1493}\) They started with a wholesale grocery and produce business in Cisco and Stephens Counties in Texas in 1919 where oil was gushing and money was flowing.\(^{1494}\) Initially, they were very successful, but their success lasted only as long as the oil boom lasted.\(^{1495}\) The market for oil waned in 1922, and the Goldman brothers’ first venture together was buried under a mass of uncollectible accounts receivable.\(^{1496}\)

Disillusioned with their prospects in Oklahoma, Alfred and Sylvan headed for southern California where they found jobs with produce wholesalers.\(^{1497}\) California was growing fast, and like other young people of their generation, they viewed Los Angeles as the land of opportunity.\(^{1498}\) They intended to start a wholesale food business there themselves as soon as they accumulated enough capital to make the move.\(^{1499}\) However, their uncles who were still doing well, very well, in Oklahoma, had other plans in mind for the Goldman brothers.\(^{1500}\) The uncles wanted to start a new retail grocery chain in Tulsa, and they needed a couple of bright, energetic, and trustworthy men to manage the new business.\(^{1501}\) They could not think of a better place to look for talent

\(^{1488}\) See id.
\(^{1489}\) See id.
\(^{1490}\) See id. at 25.
\(^{1491}\) See id. at 25-26.
\(^{1492}\) See id. at 26.
\(^{1493}\) See id. at 26, 73-74.
\(^{1494}\) See id. at 26.
\(^{1495}\) See id. at 29.
\(^{1496}\) See id.
\(^{1497}\) See id. at 29-30.
\(^{1498}\) See id. at 30.
\(^{1499}\) See id.
\(^{1500}\) See id. at 30-31.
\(^{1501}\) See id. at 31.
than their own family, and they made an offer the Goldman brothers could not refuse. The uncles would put up all the money and would get 75% of the new company's stock in return. The Goldman boys would split the balance of the stock but would not be required to invest a nickel of their own in the new company. Other benefits were in store for them too. They would learn more about the retail grocery business by working for Los Angeles area grocers. Then they would launch the new company and manage it.

It was a deal, and Sun Grocery was born. Its first store opened for business with the public on April 3, 1926. Sylvan and Alfred's performance justified their uncles' faith in them. Sun Grocery was a very successful business, and it expanded rapidly. In only three years, the chain was operating fifty retail stores. Its success was noticed by Skaggs-Safeway Stores, Inc. Early in 1929 and a few months before the New York Stock Exchange's cataclysmic crash, Safeway agreed to buy both Sun and the uncles' wholesale business. When the deal closed, Sylvan and Alfred Goldman were rich men on paper in an America enthralled with the stock market.

People from all walks of life were playing the stock market in 1929. Ordinary people invested much more money in the stock market than they could afford to lose. To make matters worse, investors were buying on margin routinely, and the minimum margin was 10%. So, if you bought $10,000 worth of stock, you parted with no more than $1000 in cash. Your broker would lend you the rest. With a 10% margin, you could make a fortune quickly. If the stock you bought for $10,000 appreciated by only 10%, you would double your money. On the other
hand, you would lose all of your money if the stock price dropped by 10%.

The profits that inured to the Goldman Brothers from the Safeway deal did not last long. They risked it in the stock market. Although they were more conservative than most investors were, and borrowed from their broker much less than the average person did, they sustained heavy losses when the stock market crashed.

Sylvan and Alfred Goldman left Tulsa for Oklahoma City in 1929. By then, the grocery business had permeated their psyches. Despite the pessimism that had permeated American business as a result of the stock market crash, the Goldman brothers yearned for new opportunities. Tulsa was one place they could not look for new opportunities because a restrictive covenant in their contract with Safeway prohibited them from doing business in any community in which Sun Grocery did business. However, the restrictive covenant did not extend to Oklahoma City, and the brothers bought four suburban grocery stores and one urban grocery store in the Oklahoma City market from a bankrupt grocery chain. The urban store was located in downtown Oklahoma City and was named the Standard Grocery. Although it became the mother store of the new food market chain the Goldmans were about to create, the downtown store was no prize. Compared to the innovative stores they had developed for Sun Grocery in Tulsa, it was not much to work with. It was tiny by today’s standards with only 1250 square feet of sales floor area, and it had no parking facilities. The suburban stores had no parking facilities either. At first, the Goldmans ran them as service groceries and offered free home delivery. That did not last long. As the suburban store leases expired, they replaced them with new and larger units. By 1934, the Goldmans were reintroducing the policies that had made the

1519. See id. at 50.
1520. See id. at 46.
1521. See id. at 50.
1522. See id. at 52.
1523. See id. at 51.
1524. See id. at 54-56.
1525. See id. at 52.
1526. See id. at 56.
1527. See id.
1528. See id.
1529. See id.
1530. See id.
1531. See id.
1532. See id. at 61.
Sun Grocery chain so successful. In 1934, Standard opened a new store with 7000 square feet of floor area and its own parking lot. Also in 1934, Standard acquired its bankrupt competitor, Humpty Dumpty, a small chain of self-service stores, from its receiver. For approximately nine years, Standard and Humpty maintained their separate identities. The operations were merged in 1943, and the combined operation came to be known as Standard-Humpty Dumpty.

The Standard and Humpty Dumpty chains grew despite the dismal economic climate of the 1930s and the Great Depression, and the Goldmans returned to the self-service policies they had adopted for their Sun Grocery stores in the 1920s. Although some of these stores were too small to be called supermarkets, the Standard and Humpty Dumpty stores opened after 1934 were self-service stores. Like other self-service food markets of that era, the Standard and Humpty Dumpty grocery departments were operated on a strict self-service basis. Unlike many other self-service food markets of that era, Standard and Humpty Dumpty produce departments were also operated on a self-service basis.

Their dedication to the self-service principle influenced the Goldmans to try their hands at overcoming the most difficult barrier to the smooth operation of the self-service system, the hardship imposed on the stores' mostly female customers by the weight of hand carried baskets loaded with heavy food packages. After Alfred Goldman died in 1937, Sylvan Goldman shouldered this burden alone as well as all the other burdens of being the sole chief executive officer of a rapidly expanding food market chain store organization.

Sylvan Goldman's first scheme to cope with the limitations imposed on the self-service system by the weight of market baskets loaded with heavy food packages was distinctly low tech. His retail clerks were directed to eyeball shoppers as they traipsed about the store selecting merchandise from the shelves and loading their shopping

1533. See id. at 59-61.
1534. See id. at 61-62.
1535. See id. at 63.
1536. See id. at 65.
1537. See id. at 65, 67.
1538. See id. at 56, 63.
1539. See id. at 56.
1540. See id.
1541. See id. at 63.
1542. See id. at 77-78.
1543. See id. at 74, 76.
As the contents of a basket approached the physical limits of the shopper carrying it, a retail clerk would come to the rescue. He would carry the basket to the checkout counter for her. There it would sit until the shopper dropped by to retrieve it. It was a good scheme for consumers because it made food shopping less taxing. It was a good scheme for the merchant because it made it possible for shoppers to buy more than they could have bought otherwise. Nevertheless, it was only a stopgap measure.

Prior contraptions devised to make it easy for a shopper to transport food and other merchandise from the shelf to the checkout counter or further had failed for one reason or another. The Cifrino Brothers’ conveyor belt kept breaking down. Henke & Pillot’s rail and basket system frustrated impatient shoppers because they were forced to follow a fixed path past the shelves and stay in line. The rail prevented aggressive shoppers from passing slow moving shoppers. Weingarten’s shopping carts failed because they occupied too much floor space, floor space that could be put to better and more profitable use. Goldman’s own attempt to help shoppers by dispatching retail clerks to carry their shopping baskets worked, but it kept payroll expenses higher than a cost-conscious merchant could tolerate. Now what?

Sylvan Goldman must have been obsessed with shopping carts. One day, while he glanced at a folding chair in his office, the vision of a foldable rolling shopping basket carrier on wheels materialized in his mind’s eye. He figured that, if the basket carrier’s skeletal support elements were based on the design of a folding chair, they could be folded and stacked like folding chairs. When the basket carriers were needed, store personnel could unfold them and insert wire shopping baskets.
baskets in preset grooves in the skeletal supports. Presto, the wheeled basket carriers would be ready for action. Conversely, when they were not needed, store personnel could remove the baskets, compress the skeletal supports, and stack them again.

Goldman figured he could contrive a foldable rolling basket carrier by adapting the design of his folding chair. The seat itself would be replaced by a skeletal support for a wire basket. By raising the skeletal support element that replaced the chair’s seat a bit, he could create room for a skeletal support for a second wire basket. A removable wire basket would be inserted on each skeletal support element. With wire shopping baskets attached, the new contraption would become the customer’s personal vehicle for the entire shopping expedition. The customer could select all the cans, bottles, boxes, and jars he or she wanted from the supermarket’s shelves and plop them in the baskets supported by the vehicle. Then, he or she could gently push it through the store and its parking lot to an automobile. There, the customer would transfer the merchandise to his or her automobile and drive home without having to lug a heavy load until the last leg of the journey. At home, (hopefully, with the family’s aid) he or she would carry the stuff from the automobile to the pantry and refrigerator. With the foldable rolling basket carrier, the entire process of transporting a customer’s merchandise from the supermarket shelf to his or her home could be completed without the assistance of store personnel other than a checkout counter clerk. The checkout counter clerk’s role would be limited to retrieving the merchandise from the basket carrier, bagging the merchandise, resetting the bags in the shopping cart, and collecting the money. If you wanted to take the self-service principle a step farther and shave a few pennies more from your operating expense structure, you could ask the customer to do the bagging too.

It was a great idea, but would it work? Goldman decided to seek the answer to that question by designing and building a prototype.
a mission he could not accomplish alone. Sylvan Goldman was a merchant, albeit a creative merchant, but he was not a craftsman. He could conceive of a folding basket carrier on a wheeled platform and he could conjure a hazy vision of how it might look. However, he did not have the skill to fabricate it. That task was assigned to a Standard-Humpty Dumpty maintenance employee named Fred Young, and he proved to be a worthy collaborator. With only general ideas to work with, Young built a working model by trial and error. As you may expect, it had many flaws, and it did not work well at first. It needed this, it needed that, and it encountered many problems. Goldman's role was to figure out how to eliminate the flaws and overcome the problems. Young's role was to make Goldman's ideas work. Their persistent efforts bore fruit and resulted in a practical foldable basket carrier that supported two wire baskets. It could be rolled through a supermarket without great effort. Foldable basket carriers were made available for customer use in Standard and Humpty Dumpty stores, but, at first, customers were reluctant to use them. However, after a brief period, the folding basket carriers were enthusiastically accepted.

Goldman soon realized that he and Fred Young had created much more than a gadget that would enable Standard and Humpty Dumpty stores to excel in a highly competitive marketplace. The foldable rolling basket carrier proved to be the world's first practical device for transporting merchandise retrieved by customers from supermarket shelves to their automobiles. Although the foldable rolling basket carriers were different from contemporary nesting shopping carts, they served the same function as contemporary nesting shopping carts. Every supermarket in America needed foldable rolling basket carriers. True to his entrepreneurial spirit, Goldman organized the Folding Carrier

1570. See id. at 80.
1571. See id. at 78.
1572. See id.
1573. See id.
1574. See id. at 78, 80.
1575. See id.
1576. See id. at 80.
1577. See id.
1578. See id. at 80-81.
1579. See ZIMMERMAN, supra note 14, at 153.
1580. See Van Gelder, supra note 1395; see also ZIMMERMAN, supra note 14, at 153.
1581. See Van Gelder, supra note 1395; see also WILSON, supra note 814, at 88.
1582. See WILSON, supra note 814, at 88.
1583. See ZIMMERMAN, supra note 14, at 153.
Company to manufacture and sell his new invention to his food market competitors.\footnote{1584} Goldman also deserves credit for the nesting shopping cart. It was introduced by the Folding Carrier Company in 1947.\footnote{1585} The nesting shopping cart was even better than the foldable rolling basket carrier and supplanted it.\footnote{1586} Storage space for the nesting shopping carts was minimized because the back panel of each wire basket could be nudged forward and up to a horizontal position.\footnote{1587} Consequently, another shopping cart could be inserted through the back panel.\footnote{1588} This arrangement could be repeated in a long daisy chain that permitted the carts to be stored in a compact area.\footnote{1589}

c. The Grid Pattern Layout

The foldable rolling basket carrier came to be an essential element of the American supermarket.\footnote{1590} It retained that status until it was replaced and superseded by the nesting shopping cart.\footnote{1591} In time, every supermarket customer came to expect to find one or the other before, or as, he or she enters a supermarket.\footnote{1592} The foldable rolling basket carrier and its successor, the nesting shopping cart became the customer’s personal vehicle for use in the supermarket and its parking lot.\footnote{1593} Customers entered and left the parking lot in an automobile. An automobile could get them near the supermarket efficiently and comfortably, but it could not make their shopping experiences efficient or comfortable. They needed another vehicle to pick up where the automobile left off. At first, that vehicle was the foldable rolling basket carrier.\footnote{1594} Later, it would be the nesting shopping cart.\footnote{1595}

The salutary impact of folding basket carriers and nesting shopping carts on supermarket operations led supermarket operators to reconfigure the layout of their stores.\footnote{1596} Checkout counters were modified to make it

\begin{itemize}
  \item \footnote{1584}{See Wilson, supra note 814, at 89.}
  \item \footnote{1585}{See id. at 103.}
  \item \footnote{1586}{See id.}
  \item \footnote{1587}{See id.}
  \item \footnote{1588}{See id.}
  \item \footnote{1589}{See id.}
  \item \footnote{1590}{See Zimmerman, supra note 14, at 153.}
  \item \footnote{1591}{See Wilson, supra note 814, at 103.}
  \item \footnote{1592}{See Zimmerman, supra note 14, at 153.}
  \item \footnote{1593}{See Mayo, supra note 53, at 150.}
  \item \footnote{1594}{See Wilson, supra note 814, at 103.}
  \item \footnote{1595}{See id. Professor James Mayo compared the shopping cart to a railroad car. See Mayo, supra note 53, at 150.}
  \item \footnote{1596}{See Wilson, supra note 814, at 93.}
\end{itemize}
easier for checkout clerks to unload merchandise from the foldable basket carriers. Supermarket aisles were also widened to accommodate these vehicles. Aisles had to be at least as wide as two basket carriers or shopping carts standing side by side, and eventually they became much wider than that.

Shopping cart traffic completed the process that molded the supermarket’s interior layout in a grid pattern that resembles the grid pattern of streets in a modern urban central business district. The aisles were configured like streets to accommodate the free flow of traffic of the shopping cart, the supermarket’s internal vehicle. Just as a highway leading to a bridge flows directly into the toll booth’s drive-up lanes, supermarket aisles spilled into lanes that led the customer to the checkout counter.

Shopping carts and their use would be embellished in time. Baby seats were added. The wire baskets were expanded. Wheels became sturdier. Some supermarkets, including Publix Super Markets, added a personal twist to the supermarket’s otherwise impersonal merchandise movement system. Bag boys stationed at the checkout counter would load the cart and roll it through the store’s exit door and the parking lot to the customer’s car. Then, they would load the car. Publix customers were not concerned about increasing their food cost by the need to tip the bag boys. At Publix, tipping was strictly forbidden.

d. The Automatic Door

After the folding rollable basket carrier was firmly established, one formidable barrier still impeded the shopper’s effort to move food purchases between the checkout counter and his or her automobile. After paying for the merchandise and leaving the checkout counter, the shopper still needed to pass through the exit door with a shopping cart.

1597. See id.
1598. See MAYO, supra note 53, at 150.
1599. See id.
1600. See LIEBS, supra note 55, at 129.
1601. See id.
1602. See WILSON, supra note 814, at 103.
1603. See id. at 80, 103.
1604. See id. at 80.
1605. See WATTERS, supra note 201, at 136-37.
1606. See id. at 142.
1607. See id.
1608. See id.
1609. See id.
In the 1930s, supermarket exit doors were much like exit doors people
had been using for a few thousand years.1610 A customer could open the
door by pushing it, and he or she could open the door by pulling it.1611
Some exit doors were more flexible and would open when pushed or
pulled, but no supermarket exit doors could decide to open by
themselves in the 1930s.1612 Regardless of whether the shopper pushed or
pulled the door open, he or she needed to keep it open as the cart passed
through the doorway. In some cases, the shopper pushed the door open
with the cart and kept it open with one hand. In other cases, he or she
parked the shopping cart momentarily, opened the exit door manually,
maneuvered past the open door, and dragged the shopping cart through.

Pushing the door, pulling the door, and parking the cart all had one
thing in common. They frustrated shoppers—at least momentarily.
Almost every shopper who entered a supermarket building entered with
a shopping cart.1613 Unless a store had a magical way to move the
shoppers’ accumulated purchases through the exit door to the parking
lot, almost every shopper who left the store had to roll a shopping cart
through the exit door.

Supermarket entrance and exit doors in the 1930s functioned like
highway toll booths. A shopper approaching the exit door brought the
shopping cart to a halt to open the door. That forced every shopper
behind him or her to halt also. The result could be a line of frustrated
shopping cart pushers with the same kind of emotions as frustrated
motorists lined up at a toll booth with a defective toll barrier.

Contemporary supermarkets and contemporary supermarket
shoppers owe many thanks to George Jenkins, founder of Publix Super
Markets for the device that overcame this obstacle.1614 On his way home
to Florida from a New York journey around 1940, Jenkins made his way
to Pennsylvania Railroad Station from the Statler Hotel where he was
staying.1615 At Pennsylvania Station, Jenkins passed through a door that
opened for him before he had a chance to push it open.1616 This was such
a novelty that Jenkins decided to walk through the door again.1617 After
inspecting it carefully, he concluded that learning about this door was

1610. See id. at 61.
1611. See id.
1612. See id.
1613. See id. at 64.
1614. See MAYO, supra note 53, at 150.
1615. See WATTERS, supra note 201, at 60.
1616. See id.
1617. See id.
more important to his future than catching a train headed for Florida. After walking through the door repeatedly, he realized that a door like this one would remove the last barrier to the efficient flow of supermarket merchandise from its shelves to its customers' automobiles. If he could install an electric door in his new supermarket, his customers would not have to push a door open as they moved their accumulated purchases from the checkout counter to their automobiles.

When he noticed that the manufacturer was New Britain, Connecticut-based Stanley Works, Jenkins postponed his homeward voyage to Florida and returned to the Statler hotel. He lodged there until he could board a train for New Britain. Stanley Works agreed to provide an automatic door for his new supermarket, but put a $1,300 price tag (big money for a door in 1940) on the job. Jenkins bit the bullet, signed on for the door, and never regretted it. Years later, he stated that his competitors really paid for the door because so many of their customers shifted to his store just to walk through the automatic doors.

C. Defining the Supermarket

Albers Super Markets is reputed to have been the first company to use the word supermarket in its trade name. Does that mean that William Albers, founder of Albers Super Markets, coined the word supermarket? Max Zimmerman, a respected supermarket industry observer from its earliest days in the 1930s through the 1950s and founder of the Super Market Institute, stated that the words “super market” were already in use when he worked on his first supermarket study between 1934 and 1936. Zimmerman reported that Neal Ramsey, president of Market Basket, a California-based supermarket company, believed that motion picture promoters originated the word in the 1920s. Also, according to Zimmerman, T.A. Von Der Ahe,
founder of Von’s Grocery Co., another California-based supermarket company, maintained that Easterners visiting large California food markets were so impressed with the markets they saw that they named them “supermarkets.”

Does that mean that the large California food markets were supermarkets? Not necessarily. The answer to that question depends on how you define supermarket.

Max Zimmerman, tried to compose a definition of supermarket several times. At first, he defined a supermarket as a store meeting these criteria:

—The store would be highly departmentalized;
—The store would sell food and other merchandise;
—The store would have a self-service grocery department;
—It would also have other departments, and these departments might be wholly owned by the storekeeper or operated by concessionaires;
—It would have adequate parking space for its customers;
—Its annual sales volume would exceed $250,000.

Later, he amended his definition. As of the 1950s, to be a supermarket from Zimmerman’s point of view, a food market’s annual volume needed to be at least $400,000. Zimmerman’s definitions were well meant, but they missed the mark. Zimmerman himself alluded to significant criteria that were not mentioned in his definitions. In his 1955 work, The Super Market, A Revolution in Distribution, he pointed out that self-service was the “heart” of the supermarket industry. He also asserted that the cash and carry principle was adopted by the earliest supermarket pioneers and then incorporated in its industry’s underlying structure.

Frank Charvat, an Associate Professor of Marketing at Emory University, defined a supermarket as a “departmentalized retail food store having four basic food departments—self-service groceries, meat, produce, and dairy—plus any number of other departments, with the establishment doing a minimum yearly volume of $500,000.” Charvat’s 1961 book was published after Zimmerman’s most
comprehensive work, which was published in 1955. Charvat had the benefit of Zimmerman’s wisdom and eyewitness reports, but his definition is less insightful than Zimmerman’s. Although Charvat made sure that his readers understood that super means ‘‘above,’ ‘over beyond,’ [and] ‘that which surpasses,’’ he said nothing about a supermarket being super in size or even dramatically larger than other food stores. One of Charvat’s points was that supermarkets had at least four departments including groceries, meat, and produce. That was not necessarily so, and having these departments did not distinguish supermarkets from service-oriented combination stores and some service grocery stores. Many self-service grocery stores and combination stores that clearly were not supermarkets had been carrying meat, produce, and dairy for at least a decade before the first supermarket opened for business. It was a common practice for service-oriented combination stores and some service groceries to carry meet, produce, and dairy since the 1920s. Kroger began selling meat in its grocery stores much earlier (around 1904). Combination stores carried all four food categories and almost all of them did this from stores that were tiny (approximately 2500 square feet of floor area) compared to even the earliest supermarkets. Charvat’s definition is also flawed in that itdoes not mention the supermarket’s low-cost and low-price structure, its cash and carry policies, and other significant elements of the supermarket business model.

James Mayo, a Professor of Architecture at the University of Kansas, wrote an excellent treatise on the American grocery store, but he did not even try defining supermarket. He concluded that the task was difficult because “its meaning has changed over the years.” Instead, he referred his readers to the following definition he asserts was adopted by the “grocery trade”:

“A Super Market is a highly decentralized retail establishment, either wholly owned or concession operated, with adequate parking space,

1636. See generally CHARVAT, supra note 130; ZIMMERMAN, supra note 14.
1637. CHARVAT, supra note 130, at 6.
1638. See id. at 7.
1639. See, e.g., id. at 12-13 (examining the characteristics of Crystal Palace Market and comparing it to the current definition of a supermarket).
1640. See, e.g., id. (noting that the Crystal Palace Market, established in 1922, had such departments).
1641. See LAYCOCK, supra note 394, at 47.
1642. See WILSON, supra note 814, at 38.
1643. See CHARVAT, supra note 130, at 7.
1644. MAYO, supra note 53, at 117.
doing a minimum of $250,000 annually. The grocery department, however, must be on a self-service basis.” Over the years the dollar volume specification has changed, but this definition is generally applicable for today’s supermarkets.¹⁶⁴⁵

I disagree. This definition is not applicable to today’s supermarkets, and it was not applicable to yesterday’s supermarkets. It omits such fundamental supermarket attributes as the low-cost and low-price structure, the cash and carry principles, the grid pattern layout, and the use of shopping carts as in-store vehicles.¹⁶⁴⁶

The most insightful definition of supermarket I have seen in print was formulated by Richard Longstreth, a Professor of American Studies at George Washington University. He puts it this way:

Conceptually, the supermarket was structured to meet the demands of a large trade. Sustaining that trade was essential to the life of the business, and was achieved by offering products of dependable quality and in wide variety at low prices—prices often lower than those of major chain stores. The pricing schedule meant a low profit margin on any given item; only through high-volume sales could the supermarket function as a financially sound operation. . . . The building itself had to be larger than most, if not all, other food stores of previous years. Since the supermarket depended on motorists for much of its clientele, a tangent parking lot of substantial size became a standard feature at an early date.¹⁶⁴⁷

As insightful as Longstreth’s definition is, it does not distinguish the supermarket from the large public markets and some exceptionally large service-oriented combination stores. Large public markets and some exceptionally large combination stores had been doing business long before the supermarket business was born.¹⁶⁴⁸ Like supermarkets, they were “food stores,” they were lodged in buildings that were “larger than most,” some of them had “parking lots,” and some of them had “low prices.”¹⁶⁴⁹ However, they were not supermarkets. Unlike supermarkets, the large public markets and combination stores were not operated on a self-service basis, and they were not cash and carry stores.¹⁶⁵⁰

¹⁶⁴⁵. Id. (footnote omitted) (quoting ZIMMERMAN, supra note 14, at 17-18).
¹⁶⁴⁶. See id.
¹⁶⁴⁷. LONGSTRETH, supra note 60, at 78-79.
¹⁶⁴⁸. See id. at 79-80.
¹⁶⁴⁹. See id. at 80.
¹⁶⁵⁰. See MAYO, supra note 53, at 134.
Zimmerman, Charvat, Mayo, and Longstreth were only three of many observers who wrestled with this problem unsuccessfully. Mayo may have taken the wisest path by not defining supermarket. Longstreth’s definition was accurate as far as it went, but it was not completely successful. Zimmerman’s and Charvat’s definitions were unsuccessful too. One reason why they were unsuccessful was that Zimmerman and Charvat were not trying to define supermarket so that shopping center landlords and tenants would be able to draft use and exclusive clauses more intelligently or understand them better. They were not defining supermarket so that these super food stores could be distinguished from any other stores for the purposes of a licensing statute, a tax law, or government regulation. Zimmerman and Charvat were defining supermarket so that they could count supermarkets, compile statistics with respect to supermarkets, and decide which food market was the first supermarket. 1657 They seem to have felt that it was important to count the number of supermarkets in the world, and the statistics they compiled depend on their definitions. 1652 This was clear to Charles Phillips. In his 1938 Harvard Business Review article, Phillips complained of widely divergent statistics as to the number of supermarkets. 1653 He insisted that the divergent statistics were probably due to widely divergent views as to the definition of supermarket. 1654 When Carl Dipman, Editor of Progressive Grocer, 1655 addressed the American Marketing Association in May 1938, he complained that everyone listening (a big crowd) had his own definition of that word. 1656 Dipman’s view is supported by Lucius Flint, former Field Editor of Chain Store Age magazine. 1657 In his article, The Los Angeles Super, Flint commented that “the meaning of the term, ‘supermarket’ has always been a flexible one.” 1658

I am inclined to think that Dipman and Flint came closest to the truth. I am unaware of any consensus among retail food industry professionals, academics, lease negotiators, and consumers as to the definition of a supermarket. The precise boundaries of the word,

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1651. See CHARVAT, supra note 130, at 7.
1652. See id.
1653. See Phillips, supra note 118, at 191 n.10.
1654. See id. at 191.
1655. In the 1930s, Progressive Grocer’s audience consisted largely of service grocers who were less than enthralled by the competition they were getting from supermarkets. See Dipman, supra note 803, at 270.
1656. See id. at 269-70.
1657. See Flint, supra note 204, at J34.
1658. Dipman, supra note 803, at 269, 270.
Supermarket, are still hazy after more than seven decades. Supermarkets are not only different from their service grocery store and other service-oriented food market predecessors, they are different from each other despite many common characteristics. Supermarket storerooms are very large, much larger than grocery stores were, but some supermarkets are much larger than others. Self-service prevails in supermarkets, but customers are served by retail clerks and butchers in parts of many supermarkets. Although the supermarket’s primary mission is to sell food and household products, supermarkets differ considerably in the kinds of food they sell and the food categories they emphasize. Within the broad framework of a low-cost structure and low-price policy, some supermarkets can brag of lower expenses and can afford to charge lower prices than others. Although convenient parking facilities are consistent with the supermarket concept, and home delivery is inconsistent with the supermarket concept, free parking is often impractical in urban settings. Consequently, some supermarkets located in urban settings where free parking facilities are out of the question need to adapt to their surroundings by offering home delivery services. Supermarkets can be so different from each other that it is easy to understand why a general consensus for a precise definition has been so elusive.

One question remains. How do I define supermarket? I cannot give you a perfect definition. A perfect definition should embrace every store I believe is a supermarket as well as exclude every store I believe is not a supermarket. People use this word to describe retail operations that are so different from each other that a perfect definition is not possible. A food market that conforms to all aspects of the business model devised by supermarket industry’s pioneers is a supermarket, and a food market that conforms to the business model devised by the industry’s pioneers preponderantly, but not completely, is also a supermarket. When a food market conforms to less than all aspects of the supermarket business model, I make a value judgment to determine whether it is or is not a supermarket. I do that by weighing the degree to which the store’s size and business practices conform to the supermarket business model against the degree to which it departs from the model. For example, a

1659. See Phillips, supra note 118, at 188.
1660. See PEAK & PEAK, supra note 18, at 96-97.
1661. See id. at 24
1662. See id. at 125.
1663. See Phillips, supra note 118, at 190.
1664. See PEAK & PEAK, supra note 18, at 89.
large self-service food market doing business in a downtown central business district that offers a diverse mix of food and household products can be a supermarket even if it does not provide free parking for its customers. Similarly, although some contemporary supermarkets depart from self-service principles with such service departments as butcher shops and fresh fish counters, they remain supermarkets because self-service predominates in the store.

Without a general consensus as to the definition of supermarket, a landlord negotiating a supermarket use or exclusive clause with the vision of a very specific kind of food market in his head should propose that supermarket be defined in the lease. He or she should not assume everyone else has the same vision of a supermarket as he or she does.

Here is a brief review of the basic elements of the supermarket model. Lease negotiators can use them or any combination of them to concoct their own definitions in use and exclusive clauses if they really feel the need to define supermarket.

1. Store Size

Supermarkets are big stores. Early supermarkets were big—usually much bigger than the service grocery stores of the 1920s and 1930s. They are even bigger now.

2. Price Policy and Cost Structure

Low prices and low operating expenses are basic to the supermarket movement. Early supermarkets kept their expenses way down and sold groceries at rock bottom prices. Although contemporary supermarkets can be very different from each other in price policy and cost structure, they tend to sell food more efficiently and less expensively than other kinds of food stores.

3. Product Mix

Although the primary mission of a supermarket is to sell food and household products, the supermarket’s product mix is much broader than that. From their earliest days, supermarkets sold nonfood products. Supermarkets allocated a greater percentage of shelf space to nonfood merchandise during World War II and a still greater percentage after the

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1665. See Charvat, supra note 130, at 101.
1666. See Peak & Peak, supra note 18, at 261.
1667. See id. at 262.
They sell more nonfood products now than they did in their early days.\footnote{1669}

4. In-Store Service Policy

Unlike customers of service groceries, supermarket customers fetch most of the things they buy from open access shelving.\footnote{1670} To the extent they could, early supermarkets dispensed with store service and relied on customer self-service.\footnote{1671} That is still the basic principle. However, some early supermarkets did not extend the self-service policy to meat, fish, bakery, deli, and other departments.\footnote{1672} World War II labor shortages led many supermarkets to convert their meat departments to self-service.\footnote{1673} Many supermarkets resurrected meat department service later.\footnote{1674} The pendulum swings back and forth between service and self-service policies in meat, fish, and deli departments.\footnote{1675}

5. Credit and Delivery Policy

Unlike their rivals, the service grocery stores, early supermarkets refused to extend credit, and they refused to deliver groceries to customers’ homes.\footnote{1676} For the most part, these policies continue to this day.\footnote{1677} Although almost all supermarkets honor bank-sponsored credit cards, they do not take responsibility for their customers’ accounts receivable.\footnote{1678} Supermarket executives do not have to worry about customers not paying their credit card bills. Credit losses will be absorbed by the credit card issuers.\footnote{1679} Some supermarkets in urban areas provide delivery services, but, on the whole, supermarket delivery services are rare.\footnote{1680}
6. Availability of Parking Facilities

Early supermarket customers had access to convenient nearby parking facilities.\(^{1681}\) That is still a crucial element for almost all supermarkets. The exceptions to this rule are a small minority of supermarkets located in urban areas where store provided parking is impractical.\(^{1682}\)

7. Efficient Merchandise Movement System

Supermarkets provide large nesting shopping carts to facilitate browsing, purchasing large loads of food and other merchandise, and transporting food and other merchandise from the stores to the parking facilities and customers' vehicles.\(^{1683}\) Store layouts are organized in a grid system to accommodate self-service policies and facilitate shopping cart use.\(^{1684}\) Almost every shopper passes through a checkout counter where his or her purchases are tallied by a retail clerk.\(^{1685}\) Then, he or she pushes a shopping cart to and through an automatic exit door and then through a parking lot where the contents of the shopping cart are shifted to an automobile.\(^{1686}\)

IV. Restricting the Use of the Demised Premises to Use for Any Legal Purpose

A. The General Principle

Supermarket lease use clauses have become less restrictive than they were in the 1950s and early 1960s. As early as the late 1960s, formidable supermarket chains with ample bargaining power and considerable expertise in lease negotiations resisted landlord demands for extensive restrictions on the use of the supermarket premises. They insisted on softening or even eliminating use clause restrictions proposed by their landlords.

Supermarket executives of the late 1960s foresaw the potential for continued expansion of the supermarket's nonfood sector. They sought to avoid restrictions that might impede the nonfood sector's growth. They wanted to be sure that no lease restriction would bar them from

\(^{1681}\) See MAYO, supra note 53, at 141.

\(^{1682}\) See PEAK & PEAK, supra note 18, at 89.

\(^{1683}\) See MAYO, supra note 53, at 150.

\(^{1684}\) See id.

\(^{1685}\) See PEAK & PEAK, supra note 18, at 280.

\(^{1686}\) See MAYO, supra note 53, at 150.
expanding the proportion of shelf space allocated to the sale of nonfood merchandise. They also sought to avoid restrictions that might impair their ability to adapt the merchandise mix of their stores operations to changed circumstances.

Although most supermarket storerooms had limited space for general merchandise in the late 1960s, they allocated significant portions of their storerooms to nonfood items and made good money from them.\footnote{1687} Carrying nonfood merchandise was nothing new to the supermarket industry in the late 1960s.\footnote{1688} The two earliest supermarkets, Jamaica, New York's King Kullen unit and Elizabeth, New Jersey's Big Bear unit carried nonfood merchandise from the outset.\footnote{1689} In the 1940s, during World War II, even supermarkets that had not allocated much shelf space to nonfood items previously expanded the proportion of their space allocated to nonfood products.\footnote{1690} Food was rationed and hard to obtain then.\footnote{1691} To avoid leaving large blocks of shelf space empty, World War II era supermarkets filled that space with nonfood items\footnote{1692} and were pleased with the results. They were pleased enough with the results to continue allocating significant shelf space to nonfood items.\footnote{1693} The end of World War II spurred a further expansion of the proportion of a supermarket's shelf-space allocated to nonfood merchandise.\footnote{1694}

The end of World War II was also the beginning of a long and rapid expansion period for the supermarket industry. The vitality of this new food distribution method combined with other factors to accelerate the flowering of the shopping center industry.\footnote{1695} Although many supermarkets of the pre-War era were doing business from storerooms that contained much more than 20,000 square feet of floor area, most early supermarkets operated by the major grocery chain store organizations were content to do business from storerooms that contained much less than 20,000 square feet of floor area.\footnote{1696} National grocery chain store organizations made conservative decisions as to the size of their early supermarkets.\footnote{1697} In the 1930s, supermarkets operated

\footnote{1687. See ZIMMERMAN, supra note 14, at 236.} \footnote{1688. See id.} \footnote{1689. See id.; see also CHARVAT, supra note 130, at 19.} \footnote{1690. See ZIMMERMAN, supra note 14, at 236.} \footnote{1691. See id. at 236-37.} \footnote{1692. See id.} \footnote{1693. See id. at 237.} \footnote{1694. See id. at 150.} \footnote{1695. See id. at 140-45 (listing nine factors attributed to the growth of the supermarket industry).} \footnote{1696. See id. at 62.} \footnote{1697. See id.}
by major grocery chain store organizations were in the 5000 to 10,000 square foot range. Supermarket storerooms grew to approximately 20,000 square feet of gross leaseable area in the 1960s. By the 1970s, new supermarkets rarely had less than 30,000 square feet of gross leaseable area. Fifty thousand square foot supermarkets were commonplace by the early 1980s, and 65,000 square foot supermarkets were commonplace by the 1990s. Many contemporary supermarkets are bigger than that.

One aspect of the strategy underlying supermarket floor area growth was the retailer’s determination to provide shelf space for as many merchandise items as possible. Food processing companies were busy inaugurating new products and advertising them heavily. Supermarket executives wanted to avoid frustrating consumers on the prowl for the latest heavily advertised food product. A shopper might prefer a bigger supermarket to a smaller one if she is more likely to find what she is looking for in the bigger one. Not only will the bigger store offer a greater variety of merchandise items, it is less likely to run out of inventory than a smaller store.

Another reason for a supermarket executive to aspire to a larger rather than a smaller size storeroom is that the percentage of gross leaseable area dedicated to general merchandise with higher markups can be much greater in a larger supermarket storeroom than in a small supermarket storeroom. The percentage of general merchandise items can still be larger in an enormous supermarket storeroom than it is in a merely large supermarket storeroom.

B. Problems Arising from Extremely Liberal Supermarket Lease Use Clauses or the Absence of a Use Clause in a Supermarket Lease

Some supermarket chains have sought greater product mix flexibility by openly demanding use clauses that expressly permit the

1698. See id.
1699. See McAUSLAND, supra note 27, at 83.
1700. See id. at 100.
1702. See id.
1703. See HAMPE & WITTEBENBERG, supra note 8, at 346.
1704. See McAUSLAND, supra note 27, at 68.
1705. See HAMPE & WITTEBENBERG, supra note 8, at 346.
1706. See PEAK & PEAK, supra note 18, at 97.
1707. See id.
demised premises to be used for any legal purpose.\textsuperscript{170} Other supermarket chains have realized that the best use clause for a tenant is no use clause at all, and they provide for none in their form leases. An extremely broad supermarket use clause or the absence of a use clause from a supermarket lease can be a big headache for a community-type or neighborhood-type shopping center landlord.

I should point out that extremely liberal supermarket use clauses or the absence of a use clause from a supermarket lease does not harm the landlord all of the time or even most of the time. Over the years, most supermarket tenants have not excessively ventured into uncharted waters, despite use clauses that granted them the right to use the demised premises for any legal purpose. Nevertheless, a minority of supermarket tenants have used very liberal use rights destructively in the past, and they are free to do so in the future.

The problem is that, without the constraints of an equitable use clause, a supermarket tenant has the power to harm the landlord and every other tenant of the shopping center. The right to use the demised premises for any legal purpose includes the right to become something other than a supermarket. That right has been exercised many times and in many ways to the disadvantage of shopping center landlords and their other tenants. Shopping center supermarkets have been converted to many different kinds of retail units including drugstores, clothing stores, and such category killers as home improvement centers.

The right to use the demised premises for any legal purpose is a potential threat to landlords, department stores, category killers, and shop space stores. With an extremely broad use clause or no use clause, a shopping center landlord might have no way of preventing a supermarket tenant from converting its storeroom to a department store or category killer or to carve out parts of its storeroom for conversion to shop space stores. With an extremely broad use clause or no use clause, a shopping center landlord might have no way of preventing the conversion of a supermarket to a flea market, a skating rink, a motion picture theater specializing in X-rated movies, or a mortuary.

A supermarket lease with an extremely liberal use clause or a supermarket lease without a use clause gives the supermarket the power to undermine:

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170. See supra Part II.C.2.
a shopping center’s competitive balance, and
a landlord’s ability to negotiate future leases with tenants
demanding exclusive clause restrictions.

C. Coping with a Supermarket Proposal for the Right to Use the
Demised Premises for Any Legal Purpose

Although they may understand how destructive it can be when the
use clause permits a supermarket storeroom to be used for any legal
purpose, many landlord negotiators have a difficult time getting the
tenant’s lease negotiators to back off from that principle. As difficult as
it may be to confront negotiators for a powerful chain store organization,
landlord negotiators should not meekly accede to a supermarket use
clause that does not limit the supermarket’s use. Community-type and
neighborhood-type shopping center landlords need to impose reasonable
limits on the supermarket tenant’s use.

How do landlord lease negotiators cope with a supermarket tenant’s
fondness for the right to use the demised premises for any legal purpose?

Some landlord negotiators lock horns with the tenant negotiators
and insist on limiting the use of the demised premises to a
supermarket or food supermarket use.9

Some landlord negotiators are content with a tepid modification of
the any legal purpose restriction by inserting the word retail. The result
is a restriction to any legal retail purpose.1710

Some landlord negotiators agree that the demised premises can be
used for any legal purpose but propose amendments to temper the
negative effects of this principle. One type of amendment restricts the
use of the demised premises to a single retail entity. Another prohibits
the supermarket tenant from violating other tenants’ exclusive clauses,
and still another prohibits the tenant from changing the principal use of
its storeroom to the principal use of another store in the shopping center.
Sometimes more than one or all three types of these amendments are
added to a supermarket use clause.

1. The Right to Use for Any Legal Retail Purpose

A use clause that restricts the use of the demised premises to any
legal purpose is about the same as a use clause that restricts nothing.
With a use clause as broad as the right to use the demised premises for
any legal purpose, the tenant can do anything in the demised premises

1709. See supra Part II.C.1.
1710. See infra Part IV.C.1.
except sell an illegal product or engage in an illegal activity. Only a governmental requirement like a statute, court decision, or administrative regulation limits the use rights of a tenant with such a liberal use clause.

The virtually unlimited power to change the use of the demised premises arising from a liberal use clause could be used as a weapon in a bitter landlord/tenant dispute. With no limits on its use imposed by the lease or a legal requirement like a zoning law, nothing but good sense could stop a supermarket tenant from converting its storeroom to a factory, a hospital, a hotel, or (for that matter) a mortuary. Conversions like that sound weird, but tenants involved in bitter disputes with their landlords are capable of doing weird things.

Consequently, it is very much in the self-interest of a supermarket landlord to find ways to soften the bite of a supermarket tenant’s proposal for the right to use the demised premises for any legal purpose. One way to soften the bite of such a use clause, but not necessarily the best way, is to propose amending the tenant’s proposal so that the tenant’s use rights will be limited to any legal retail purpose rather than any legal purpose. Although restricting the use of a supermarket storeroom to any legal retail purpose is no panacea, it is less dangerous for the landlord than any retail purpose. The good news is that a restriction to any legal retail purpose would bar the tenant from using the demised premises as a factory, office complex, or hotel. Moreover, the supermarket lease negotiators might agree to the amendment quickly and easily. Why shouldn’t they? It would leave them with complete freedom to sell anything at retail.

The bad news is that a supermarket use clause limiting the tenant to legal retail uses does not address the real problems of a neighborhood-type or community-type shopping center landlord. It does nothing to prevent the supermarket tenant from converting its storeroom to a department store, a category killer, or a flea market. It does not bar a supermarket tenant from subdividing its storeroom into a series of shop space stores.

Although this amendment is better than nothing, a prudent neighborhood-type or community-type shopping center landlord needs to find a better way to cope with aggressive supermarket tenant use clause proposals.

2. Restricting the Use of the Demised Premises to a Single Entity

The right to use the demised premises for any legal purpose includes the right to conduct more than one retail business from the
demised premises. With the right to use its storeroom for any legal purpose, a supermarket tenant could have the power to sever parts of the demised premises from its supermarket storeroom and open additional stores in the severed space. If the tenant has the right to use its storeroom for any legal purpose, only building codes, zoning laws, lease alteration clauses, and similar clauses can impose realistic restraints on this power. A supermarket tenant with the power to carve up its storeroom might decide to sever parts of the demised premises and use them as flower shops, restaurants, candy stores, or other small store retail units. The supermarket tenant might provide separate entrances for each unit it severs from the supermarket space and build partitions that would isolate each separate unit from the supermarket space completely. One way landlord negotiators might cope with this problem without completely discarding the general principle is to propose an additional restriction on the tenant’s use. Although the additional restriction would accede to the general principle that the tenant will have the right to use the demised premises for any legal purpose, it would permit the tenant to do so only as a single retail entity.

One good aspect of a proposal to restrict the use of the demised premises to a single retail entity is that, when combined with the right to use the demised premises for any legal purpose, it is not very threatening to most supermarket tenants. A supermarket tenant that agrees to this restriction would not be barred from selling any product or providing any service in its own store. However, it would not have the right to operate more than one store from the demised premises.

On the other hand, limiting the use of the supermarket premises to a single retail entity might be too strict from the supermarket tenant’s point of view and still too liberal from the landlord’s point of view. Let’s look at this proposed restriction from the tenant’s point of view first. Restricting the use of the demised premises to a single retail entity might be a problem for many contemporary supermarket tenants. They try to incorporate the functions of what they perceive as an early-twentieth-century village square within the supermarket premises. Shop-like departments resembling bakeries, fish stores, butcher shops, delicatessens, pharmacies, banks and flower shops are placed along the store’s periphery.\(^{1711}\) They surround a core of self-service shelf space stacking food, household products, and general merchandise offerings.\(^{1712}\) If the use clause prohibits more than one retail entity in the demised

\(^{1711}\) See PEAK & PEAK, supra note 18, at 98.

\(^{1712}\) See id.
premises and does not clarify what the parties mean by a retail entity, the supermarket’s right to include shop-like departments might be challenged.

For many supermarket tenants, controversies over the definition of a single retail entity can be avoided by defining retail entity right in the lease. I define a retail entity as a business focused principally on the sale of merchandise to the general public, serving food to the general public, or providing services that are normally provided in shopping centers. A retail entity is separated from other retail entities by partitions or other barriers. It has its own entrance to a sidewalk, walkway or other common area. It usually does business under its own business names, and it collects the purchase price for the goods and services it sells. By defining retail entity this way, the supermarket’s shop-like departments would be part of a single retail entity, the supermarket unless they have separate entrances to the common area.

On the other hand, defining retail entity this way will not make a single retail entity restriction palatable to all supermarket operators and landlords. Some supermarket tenants want the right to provide sidewalk entrances for their separate shop-like departments, and they bargain for that right. Customers of a supermarket that has this right and exercises it have the choice of entering a supermarket’s shop-like department from the sidewalk or from the supermarket. That arrangement might be convenient for supermarket customers and effective marketing for the supermarket tenant, but it can also be destructive for the landlord. Shop-like departments with separate entrances to the common area look like separate shop space stores and function like separate shop space stores in many ways. Shop-like supermarket departments that look like separate shop space stores and function like separate shop space stores compete directly with shop space stores and pose a threat to their stability. Moreover, unless the supermarket lease prohibits subletting, a tenant with the right to sever part of its storeroom and create shop-like departments with separate entrances from the common area could compete directly with the landlord for potential rent paying occupants.

Landlords and supermarket tenants could happily compromise on this issue by providing that the tenant will have the right to sever a limited part of its storeroom and create a few shop-like departments with separate entrances to the common area. Some supermarket operators find this solution palatable. They are not trying to enter the real estate business. Fear is their motivation for negotiating for the right to sever parts of their storerooms and using them as separate stores. They fear being bound by strict lease restrictions, making it excessively costly to
reduce the size of the storeroom when a size reduction is mandated by market conditions. This fear is grounded in good sense. For the past seven decades, the size of supermarket storerooms has increased steadily in response to market conditions.\textsuperscript{1713} That trend will not necessarily continue. Will each generation's supermarkets be greater than the previous generation's supermarkets? Supermarket executives do not know the answer to that question, and neither do I. The day may come when supermarket chains discover that their storerooms have too much space.

Supermarket landlords should not rely solely on a use clause restriction permitting the tenant to use the demised premises for any legal purpose but limiting the use of the demised premises to a single retail entity. A use clause limiting the use of the demised premises to a single retail entity provides no protection against the possibility that the supermarket tenant will change the use of the entire storeroom. Despite a restriction limiting the use of the demised premises to a single retail entity, a supermarket tenant could shift its focus to a home improvement center, a toy store, or a furniture store. A shift like that would impair the shopping center's ability to attract customers. None of these stores can be expected to attract as many customers to a shopping center as a supermarket or as often as a supermarket.

Consequently, standing by itself, a use clause restriction permitting only a single retail entity has positive elements, but it does not completely solve the tenant's problems or the landlord's problems. By combining this restriction with an appropriate definition of \textit{single retail entity} it might work for the tenant. By combining this restriction with other restrictions it might work for the landlord.

3. Restriction Against Violating Exclusives

A shopping center landlord bound by exclusive clauses in leases executed before the supermarket lease can put his or her neck in a noose with an excessively liberal supermarket use clause. With no effective limits on its right to use the demised premises, the supermarket tenant could violate the exclusive clause in every preexisting cotenant's lease. By agreeing that the supermarket tenant will have the right to use its storeroom for any legal purpose and forgetting to negotiate an exception for the exclusive clauses in leases he or she executed previously, a landlord could become vulnerable to lawsuits he or she could not possibly win. If a supermarket tenant with the right to use the demised

\textsuperscript{1713.} \textit{See supra} text accompanying notes 1695-1702.
premises for any legal purpose violates the exclusive clause in another tenant's lease, the landlord will not have the power to avert the violation. The other tenant might respond to the violation by suing the supermarket tenant and the landlord, and the supermarket tenant might countersue the other tenant and the landlord.

A supermarket lease with no effective restraint on the tenant's use is incompatible with a department store lease exclusive clause that bars any other department store from the shopping center. In the case of a community-type shopping center, the department store usually insists on being the only department store in the shopping center. If the landlord agrees in a department store lease to exclude all other department stores from the shopping center, he or she must be concerned about the possibility that another large store in the shopping center might be converted to a department store in the future. The conversion of any large store to a department store would cause the landlord to be in violation of the department store exclusive clause, and that large store could be the supermarket. All supermarkets are large—at least when compared to the shop space stores in a community-type shopping center, and some of them are large enough to become department stores. A large supermarket could accomplish that feat by drastically reducing the amount of food it carries and drastically increasing the amount of general merchandise it carries.

Category killer tenants also negotiate for exclusive clauses to protect themselves against direct competition from any cotenant. Category killers are merchants occupying very large blocks of space, some even larger than supermarkets. What makes them different from other large nonfood stores is that they concentrate on a narrow group of merchandise categories. Their exclusive clauses prohibit the landlord from leasing other stores to be used principally for the sale of the same narrow group of merchandise categories in which they specialize. Category killers have nothing to fear from the sale of food, household products, and general merchandise from a supermarket; and they usually do not squawk about a supermarket selling some or even many of the products they sell. However, if a supermarket decides to change its product mix drastically and concentrate on the same narrow group of merchandise categories as the category killer, the category killer might well try to enforce its exclusive clause. This prospect is of special concern when the supermarket use clause is so liberal that the

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1714. This assumes that (1) the preexisting leases were recorded, or (2) the tenants of the preexisting leases took possession of their premises before the supermarket lease was recorded or the supermarket tenant took possession of its premises.
supermarket has the right to sell anything at all. Selling *anything* does not mean selling *everything*. The right to use the premises for any legal purpose would give the supermarket tenant, or for that matter any other tenant, the right to narrow its merchandise offering and directly challenge a category killer cotenant.

Some shop space tenants, especially chain store organizations that lease small store space, negotiate for exclusive clauses too. A well-represented prospective beauty parlor tenant wants an exclusive clause providing that its store will be the only beauty parlor in the shopping center. Similarly, a well-represented prospective Italian restaurant tenant wants its restaurant to be the only Italian restaurant in the shopping center or (occasionally) the only restaurant in the shopping center. The same is true of dry cleaners, card and gift shops, stationery stores, liquor stores, and many other shop stores when they are represented by experienced shopping center lease attorneys. A supermarket lease that permits the tenant to use the demised premises for any legal purpose could easily cause a violation of a shop space tenant’s exclusive clause. It could cause an exclusive clause violation because a supermarket tenant with the right to use its storeroom for any legal purpose could be free to segregate a part of its storeroom and use it as a separate store in violation of a shop space tenant’s exclusive clause. A supermarket tenant would be free to segregate a part of its storeroom and use it as a separate store unless the use clause or alterations clause of its lease or the applicable zoning law forbids it from doing so. Consequently, a landlord confronted with a supermarket tenant request’s for the right to use its storeroom for any legal purpose needs to limit that right somewhat to avoid a violation of the exclusive clauses in its shop space tenants’ leases.

Landlords concerned about potential exclusive clause violations (every landlord should be concerned about them) should ask the supermarket tenant to agree that, despite its right to use the demised premises for any legal purpose, it will not violate the exclusive clause in any existing cotenant’s lease. A landlord proposal to bar a supermarket tenant from violating existing tenants’ exclusive clauses has a good chance of getting a sympathetic reaction from supermarket lease negotiators.

Here is how the landlords approach this. The first step for the landlord is to inform the supermarket tenant that leases for other stores in the shopping center contain exclusive clauses, provide a list of the leases that contain them, and attach an exhibit to the supermarket lease setting forth the full text of each exclusive. With copies of the exact
language of the exclusive clauses to which its use rights would be subjected, the tenant has three choices. It could decide that the other tenants’ exclusive clauses are too restrictive and break the deal. It could demand that the landlord try to renegotiate one or more exclusive clauses in other tenants’ leases. It could also agree not to cause a violation of any of them either for the entire term of the supermarket lease, or for the balance of the term of the cotenant’s lease. In my experience, most supermarket executives take the latter path.

Given the proclivity for all kinds of tenants to demand exclusive clauses, a supermarket use clause granting the right to use the demised premises for any legal purpose can impair a shopping center landlord’s ability to negotiate additional leases after the supermarket lease is executed. If the supermarket tenant has the right to use its storeroom for any legal purpose, the landlord cannot accede to any new tenant’s demand for an exclusive clause without insisting on an exception for the supermarket premises. Some shop space tenants are willing to settle for an exclusive clause that applies everywhere in the shopping center but the supermarket premises, but some shop space tenants demand exclusive clauses that apply to the supermarket premises as well as every other store in the shopping center.

Since the supermarket lease is often the first lease a landlord negotiates for a new community-type or neighborhood-type shopping center, the landlord can take one of several paths for protection against granting the supermarket tenant use clause rights that could result in a violation of a future tenant’s exclusive clause. One path is to refuse to agree that the tenant will have the right to use the storeroom for any legal purpose and suggest that the use of the storeroom be limited to the conduct of a supermarket business. Another path is to agree that the tenant will have the right to use the storeroom for any legal purpose except for any use that might cause a violation of an exclusive clause in any future cotenant’s lease as well as any existing cotenant’s lease.

The latter path is a hard sell. Agreeing not to violate exclusive clauses of leases executed in the future is a much more challenging proposition for a supermarket executive than agreeing not to violate exclusive clauses in existing leases. Who knows what restrictions will wind up in future leases? When a supermarket lease is concerned, the future is a long time. The term of a supermarket lease can be as long as (or longer than) fifty years after giving effect to the tenant’s options to extend the term. Agreeing to be bound by all future exclusive clauses is like signing a blank check. Unless limited by sensible parameters, this constraint would empower the landlord to change the supermarket
tenant’s use rights by entering into a new lease without the supermarket tenant’s assent.

What parameters should limit the scope of this constraint?

Obviously, a supermarket tenant will not agree to abide by another tenant’s exclusive clause restriction against the sale of food for off-premises consumption.

The only future exclusive clause restrictions binding on the supermarket tenant should be the right of a department store tenant to be the only department store in the shopping center, the right of a category killer to be the only store in the shopping center used principally for the sale of the product categories sold in the category killer’s store, and the right of a shop space tenant to be the only store in the shopping center used principally for the sale of the product categories sold in the shop space tenant’s store. A supermarket tenant should not be asked to honor an exclusive clause in a future cotenant’s lease that forbids the sale of any merchandise item or service unless the supermarket lease itself expressly designates the forbidden merchandise or service.

The future lease exclusive provision exception should also reflect the following principles. When a new lease is executed, the supermarket tenant should not be bound by its exclusive clause until the landlord gives the supermarket tenant notice that the new lease has been executed and the complete text of its use and exclusive clauses. If the supermarket shifts the principal use of its storeroom or a segregated portion of its storeroom to a principal use not already prohibited by another tenant’s exclusive clause, the supermarket tenant should give notice of the shift to the landlord. After that, the landlord would not have the right to execute a new lease with an exclusive clause prohibiting the supermarket or any part of the supermarket from being used principally for that purpose.

4. Restriction Against Using the Demised Premises for the Principal Use of Another Store in the Shopping Center

Curtailing a supermarket tenant’s right to use its storeroom for any legal purpose by prohibiting a violation of exclusive clauses in cotenant leases avoids many tenant mix problems for a community-type and neighborhood-type shopping center landlords. However, some tenant mix problems transcend that limit on a supermarket tenant’s power.

With the notable exception of chain store organizations, shop space tenants tend to know little about lease negotiations, and they are often (all too often) represented in lease negotiations by inexperienced
attorneys. With little knowledge of industry customs and how to protect themselves against the power of larger and more sophisticated merchants, these tenants and their attorneys often neglect to request exclusive clauses. When they do request an exclusive clause, they often retreat from their request when confronted by a bombastic landlord lawyer. The result is a great many shop space leases with no exclusive clause at all.

Some landlords brood about the prospect that shop space merchants will be overwhelmed by a supermarket cotenant’s ample space and greater purchasing power. Over the years, forward thinking landlords have tried to protect shop space tenants from being eaten alive by supermarkets and other big box retailers. A landlord’s concern for shop space tenants does not spring from humanitarian principles. It is derived from unvarnished self-interest. Although shop space tenants (other than chain store organizations) usually add little financial muscle to a shopping center’s financing package, they are a very important part of the shopping center community. Many of them are capable merchants with excellent ties to the community. They can transform a run-of-the-mill shopping center that is no different from any other shopping center into a vibrant shopping center with a distinct personality. If a shop space tenant does not make money, it will not have the funds it needs to pay minimum rent to the landlord. If most of a shopping center’s shop space tenants do not make money, the shopping center might end up with no shop space tenants. Without shop space tenants, a community or neighborhood shopping center is a different and not so attractive place.

Supermarket landlords had good reason to brood over the supermarket’s power to overwhelm shop space tenants in the past, and now they now have greater reason to brood. Supermarkets sell and have always sold a great many things normally sold by neighborhood-type and community-type shopping center shop space tenants. In this respect, supermarkets have competed with shop space tenants from the outset, but they did not overwhelm most of them. With supermarket and shop space tenants sitting side by side along a strip of stores, each could do its best to attract shoppers.

Supermarkets that have adopted the village square concept locate departments emulating independent shops along the outer rim of their storerooms. These shop-like departments offer more direct competition

1715. This problem starts early—at the very inception of the lawyer’s career. “[T]he cluster of transactional skills necessary to competently represent a client in a business transaction” are “ignore[d] completely” by many law schools. Debra Pogrund Stark, See Jane Graduate. Why Can’t Jane Negotiate a Business Transaction?, 73 ST. JOHN’S L. REV. 477, 481 (1999).
for shop space stores, restaurants, and banks than supermarkets without shop-like departments. Most shop space merchants can probably withstand this competition. However, a shop space tenant such as a dry cleaner, bank, coin laundry, or liquor store might find it very difficult to survive in a community-type or neighborhood-type shopping center location if its supermarket cotenant decides to open a shop-like department selling the same product categories as the shop space tenant. A supermarket tenant with the right to use the demised premises for any legal purpose would have the right to do this unless that right is curtailed appropriately.

How can a landlord protect shop space tenants without exclusive clauses in their leases from direct head-on competition from a supermarket? The landlord can negotiate for an exception to the supermarket tenant’s unlimited right to use its storeroom for any legal purpose. The exception could be a restriction against shifting the use of the supermarket premises or a severed part of the supermarket premises for the principal use of any other store in the shopping center.

This restriction sounds a lot like the restriction against violating cotenants’ exclusive clauses, but it is different. A restriction against violating exclusives would prevent a supermarket tenant from shifting its principal use to the principal use of a cotenant’s store only if the cotenant is protected by an exclusive clause in its lease. This restriction would prevent a supermarket tenant from shifting its principal use to the principal use of a cotenant’s store regardless of whether the cotenant is protected by an exclusive clause in its lease.

A restriction like this needs its own parameters to make it acceptable to a supermarket tenant. For starters, a list of every existing cotenant’s principal use should be attached to the supermarket lease as an exhibit. With the exhibit attached to its lease, the supermarket will know what it can do and what it cannot do—at least until the landlord executes another cotenant lease. When a new cotenant lease is executed, the supermarket tenant should be bound by the new cotenant’s principal use only after the landlord gives the supermarket tenant notice of the new cotenant’s principal use. This restriction should have no impact on the supermarket’s right to sell a specific product or render a specific service. Like the restriction against violating cotenants’ exclusive clauses, a supermarket with the right to use its storeroom for any legal purpose should have the right to shift the principal use of its storeroom or a severed portion of its storeroom to any retail use other than a cotenant’s principal use at the time of the shift. If it does so and gives notice to the landlord of the shift, the supermarket tenant’s right to use
its storeroom principally for that purpose should not be curtailed by any future lease executed by the landlord.

V. USE AND EXCLUSIVE CLAUSE RESTRICTIONS AGAINST THE SALE OF SPECIFIC PRODUCTS AND SERVICES

A. Supermarket Restrictions Against Cotenant Sales of Food and Beverages for “Off-Premises Consumption” and Competing Food Stores

1. The General Principle

Although some supermarket chains have been willing to settle for an exclusive clause that prohibits the landlord from leasing any other premises in the shopping center for use as a supermarket or food supermarket, most supermarket negotiators request much more restrictive exclusive clauses.

Some supermarket folks have aggressive goals when it comes to their own exclusive clauses. For starters, they bargain for an exclusive clause that prohibits much more than another supermarket. They seek to prohibit the sale of food and beverages for off-premises consumption by any other tenant of the shopping center. A restriction against the sale of food or beverages for off-premises consumption is very nice for the supermarket tenant, but it is a bitter pill for the landlord and the other tenants to swallow. It is such a bitter pill that a landlord who agrees to such a restriction without extensive qualifications could cause himself or herself unnecessary problems.

Aggressive supermarket negotiators are not worried about logical redundancy. To make sure they leave no stone unturned in their effort to bar direct competitors from the shopping center, supermarket tenants want to specifically prohibit a second supermarket from the shopping center. Similarly, many supermarket negotiators ask their landlords to specifically promise that no other part of the shopping center will be used as a grocery store, bakery, delicatessen, or butcher shop. They want specific restrictions against a grocery store, bakery, delicatessen, butcher shop, and second supermarket, despite the obvious fact that a restriction against the sale of food and beverages for off-premises consumption by any other tenant clearly bars a grocery store, bakery, delicatessen, butcher shop, and second supermarket from the shopping center. 1716

1716. See infra Part V.B.
Prohibiting any other tenant from selling food for off-premises consumption is as broad a restriction against food market competition as you can conceive.

2. Restating the General Principle to Accommodate Restaurants, Luncheonettes, and Snack Bars

Landlords who accept the general principle that no store of the shopping center except for the supermarket will have the right to sell food or beverages for off-premises consumption face many problems. One problem that comes to mind immediately concerns the phrase, for off-premises consumption. Although a benign intent underlies the phrase, it is vague and potentially dangerous. Its goal is to distinguish the food and beverages served by luncheonettes, snack bars, and restaurants from the food and beverages sold by supermarkets, grocery stores, and similar establishments. Does it achieve its goal? Does it cause any mischief?

Here is the difficulty. A literal interpretation of the language, for off-premises consumption, could cause unintended problems. When a snack bar sells a hamburger, its management does not expect the customer to eat the hamburger in the snack bar premises. A snack bar hamburger is as likely to be eaten off the snack bar premises as on the snack bar premises. Snack bar premises have room to take customer orders, but they tend to have little or no room for customers to eat and lounge after the orders are filled. Consequently, a considerable proportion of food sold by snack bars is sold for off-premises consumption. Luncheonettes, fast food operations and restaurants could also be stymied by a restriction against the sale of food for off-premises consumption. Although they serve meals in the expectation that the customer will eat it at a table or a counter in the store, what’s to stop the customer from taking the meal and eating it somewhere else? When a customer buys a meal at a luncheonette, fast food operation or restaurant and eats it in the shopping center common area or at home, the consumption is taking place off-premises. Department stores and variety stores with internal snack bars, luncheonettes, and restaurants could cause a similar problem. If the supermarket lease exclusive clause requires the landlord to prohibit department stores, variety stores, snack bars, luncheonettes, fast food operations, and restaurants from selling food and beverages for off-premises consumption, any sale for off-premises consumption could cause a landlord default with respect to the supermarket lease. All of that is unintended and makes no sense.
When confronted with a proposed supermarket lease restrictive covenant stating that all tenants but the supermarket are prohibited from selling food or beverages for off-premises consumption, landlord negotiators should propose that the language be restated to avoid potential harassment of snack bars, luncheonettes, department store and variety store luncheonette operations, and restaurant operators. As a first step, landlords should ask that the restriction against the sale of food for off-premises consumption be reworded. The new language would ban the sale of food or beverages that are not intended to be consumed at the shopping center instead of banning the sale of food and beverages for off-premises consumption. The restated clause would be an improvement because a restaurant customer’s decision to eat the food purchased at the restaurant in the common area probably would not result in a technical default under the supermarket’s exclusive clause.

Nevertheless, if applied literally, a supermarket’s restriction against food and beverage sales intended to be consumed away from the shopping center would still inhibit the sale of prepared takeout food by a snack bar, luncheonette, or fast-food operation. Even tablecloth restaurants have takeout food operations. Although fast food restaurants are primarily concerned with feeding customers on premises, they will not yield the takeout trade—at least not voluntarily.

Although supermarket food sales are not now and never were threatened by fast food restaurants, some supermarkets have tried to limit the number and size of fast food restaurants for reasons that have nothing to do with fear of competition. Some early hamburger restaurants did not provide customers with tables and chairs. Customers ate in their vehicles then. Supermarket executives who remembered the early fast food restaurant days continued for a long time afterward to worry about restaurant patrons’ vehicles occupying valuable space in the shopping center parking lot. They are still concerned that fast food customers make parking tighter and the parking lot dirtier than it would be otherwise.

Supermarket executives’ fears of other tenants’ sales of prepared foods for off-premises consumption have varied considerably over the years. In my experience, they acceded to landlord requests for an exception for prepared food more often than they did not. When the subject was hotly negotiated, it was usually because the supermarket had dreams of competing for the prepared food dollar.

How can lease negotiators draft a supermarket exclusive clause that permits snack bars, luncheonettes, fast food operations and restaurants to conduct operations in the ordinary course of business without an
unintended violation of a supermarket exclusive clause that forbids cotenants from selling food for off-premise consumption? They should concentrate on the factors that really distinguish snack bar, luncheonette, fast food operations and restaurant food and beverages from supermarket food and beverages.

These factors distinguish snack bar, luncheonette, and restaurant food and beverages from supermarket food and beverages:

Luncheonette and restaurant food and beverages are usually consumed on premises. The most obvious exceptions are takeout food and beverages. Other exceptions are food and beverages purchased for consumption in the common area. Food and beverage patrons of shopping center snack bars and fast food operations located in enclosed malls frequently purchase their goodies with an intent to consume them in a food court or the shopping center’s common area. There are probably a few more exceptions.

Snack bar, luncheonette, fast food operations, and restaurant food and beverages are usually prepared, processed or packaged on premises. Except for supermarket delicatessen, butcher, and bakery departments, supermarket food and beverages usually are not.

Food and beverages sold by snack bars, luncheonettes and restaurants are usually sold in small portions that are intended to be consumed on the day of sale. A snack bar, luncheonette, fast-food operator or restaurateur normally sells beverages in large or small paper or plastic cups. The beverages are dispensed into the cups at the store.

Canned and bottled beverages sold in snack bars, luncheonettes and restaurants are usually refrigerated. The bottles and cans are usually opened by the seller at the point of sale.

The next step for the landlord is to convince the supermarket negotiator to provide that snack bars, luncheonettes and restaurants will have the right to sell food and beverages intended to be consumed away from the shopping center rather than food for off-premises consumption. They should also have the right to sell food and beverages that are prepared, processed, packaged or repackaged on premises. They should have the right to sell beverages in large or small paper or plastic cups. They should also have the right to sell canned, boxed, and bottled beverages that are refrigerated and opened.

Almost all supermarket negotiators with whom I have dealt understood the problem and agreed to restate the restriction. I thanked them sincerely and was duly grateful.
3. Beverage Sales Issues

Beverage sales can be big tickets to profit. Getting the exclusive right to sell beverages in any well-attended place is like winning a lottery.

In the shopping center context, beverage sales have never been completely in the supermarket orbit. They are and have always been sold in many parts of shopping centers. Snack bars, luncheonettes, and restaurants are only three of many examples. Theaters make good money from their food and drink concessions, and vending machines can be found in so many places.

Supermarkets do not direct their attention to thirsty people who want to satisfy their cravings right away. So they usually do not regard any of these establishments as direct competitors. A landlord can resolve a potential conflict between a supermarket exclusive clause restriction against the sale of beverages for off-premises consumption and anticipated snack bar, luncheonette, restaurant, and theater use clauses that would permit these tenants to sell beverages. The potential conflict can be resolved partly by restating the proposed restriction so that it prohibits the sale of beverages intended to be consumed away from the shopping center instead. Many shopping center tenants (other than snack bars, luncheonettes, restaurants, and theaters) will not object to a restrictive covenant against the sale of beverages intended to be consumed away from the shopping center.

However, the landlord’s dilemma as to potential lease conflicts with respect to beverage sales by such cotenants as general merchandise stores, drugstores, and liquor stores cannot be resolved completely or even principally by merely restating the general principle that all other tenants are barred from selling beverages intended to be consumed away from the shopping center. Department stores, variety stores, drugstores, liquor stores, and specialty food stores all sell beverages intended to be consumed away from the shopping center. Although supermarket negotiators are fully aware of these sales and have tolerated them over the years, many supermarket form lease exclusive clauses still prohibit them. If a landlord wants the supermarket’s exclusive clause to be realistic and reflect the conditions a supermarket normally encounters in a community-type or neighborhood-type shopping center, he or she must negotiate for additional exceptions to the general principle of the restriction.
a. Exceptions for the Sale of Alcoholic Beverages

The sale of alcoholic beverages might be one of the specific exceptions. Liquor stores would be completely barred by a supermarket beverage exclusive clause. They do not offer much for sale other than beverages, albeit alcoholic beverages. Department store and drugstore wine and whiskey sales would be barred as well. A restriction against the sale of beverages for off-premises consumption would also apply to beer sales by department stores, variety stores, drugstores, and health and beauty aid stores.

Although most supermarket tenants have acceded to my requests for an alcoholic beverage exception, some have insisted on an exception to the exception. Liquor stores are not normally into beer sales, and beer is an important supermarket item. These supermarket tenants argue that their interest in a beer exclusive clause should prevail over the small possibility that a liquor store operator will even ask for the right to sell beer in a subsequent negotiation. On the other hand, some department stores and other general merchandise type stores such as variety stores, drugstores, and health and beauty aid stores, insist on the right to sell beer. That right is, of course, incompatible with a supermarket’s exclusive right to sell beer. The most important influence on use clause negotiations concerning the sale of alcoholic beverages is the applicable liquor law. Chain store lease negotiators seldom waste much time and energy trying to prohibit other tenants from selling merchandise their employer is barred from selling pursuant to statutory law or case law.

b. Exceptions for the Sale of Nonalcoholic Beverages

Negotiations relating to exceptions to restrictions against the sale of nonalcoholic beverages intended to be consumed away from the shopping center revolve around the same ideas as negotiations relating to exceptions to restrictions against the sale of food intended to be consumed away from the shopping center. It is best to deal with most food and nonalcoholic beverage problems at the same time.
4. Specific Restrictions Against Food and Beverage Sales by General Merchandise Cotenants

a. Department Store, Variety Store, and Drug Store Food and Beverage Sales

Supermarket policy on food sales by cotenant department stores and variety stores has varied from chain to chain and from era to era. Some supermarket companies have always been delighted to have the company of department stores and variety stores and have always been content to live with their cotenant’s promise not to have a food supermarket department in the store. Other food chains have historically bargained strenuously for a covenant prohibiting department stores, variety stores (and all other tenants) from selling food and beverages for off-premises consumption.

Landlord, department store, and variety store negotiators usually find it easy to cope with a supermarket restrictive covenant that prohibits the department store and variety store from containing a food supermarket department and that goes no further. Most (but not all) shopping center department stores have had little interest in competing with supermarket food sales, and, over the years, their negotiators have accepted restrictions against supermarket departments with little fuss. A covenant against operating a food supermarket department says nothing about selling individual food items. It merely forbids a *food supermarket department* within the department store and variety store.

On the other hand, a shopping center landlord cannot be sure that all department stores will agree not to include supermarket departments in their stores. Some department stores had massive food departments even in the nineteenth century and long before the first supermarket opened for business.1717 Many discount department store chains had food departments as early as the 1950s.1718 Two Guys from Harrison, an early discount department store chain, incorporated a food department in its stores in the 1950s and 1960s.1719 Its food department was as large as most supermarkets of that era.1720 Two Guys’ competitor, E.J. Korvette, which claimed to be the first discount department store chain,1721 also included vigorously competitive food departments in its department

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1718. See Mahoney & Sloane, *supra* note 228, at 357.
1719. See id. at 355-56.
1721. See Mahoney & Sloane, *supra* note 228, at 362.
stores before it passed from this world into retailers' heaven. 1722 Some contemporary discount department store chains, notably Wal-Mart and Kmart, have no qualms about competing with supermarket food sales.

When they are willing to accede to restrictions against operating a supermarket department, department store and variety store negotiators need to clarify or amend this restriction to make sure that it will not prevent them from opening a gourmet food department. Department store gourmet food departments usually specialize in high-priced food items not usually emphasized by supermarkets. Over the years, it has not been difficult to convince a supermarket chain that its restrictive covenant against food sales in other stores should provide for an exception permitting a gourmet food department in a department store, variety store, and drugstore.

A supermarket lease negotiation becomes a much more complicated task when the supermarket negotiators demand a stringent broad-based restriction against the sale of food and beverages for off-premises consumption (or away from the shopping center). Unlike a restriction against the operation of a food supermarket department, a supermarket proposal to prohibit all other tenants from selling food and beverages for off-premises consumption (or away from the shopping center) forces the landlord, department store, variety store, drugstore, and shop space lease negotiators to proceed with exceptional care. Department stores and other general merchandise stores do sell products (like candy, pretzels, popcorn, and cake) that most people perceive as food. 1723 The stuff might not contain any nutrition, but it is deemed food by industry usage.

When supermarkets occupied much smaller storerooms than they currently occupy, use and exclusive clauses of general merchandise store and supermarket leases were often reconciled by prohibiting each of them from selling the others’ principal merchandise categories except from a small part of its floor area. Accordingly, in that era, some supermarkets prohibited general merchandise store sales of food intended to be consumed away from the shopping center. An exception to this restriction allowed general merchandise stores to sell most food categories from an area that ranged between 3000 square feet and 10% of the floor area of the general merchandise store. Conversely, some general merchandise stores prohibited the supermarket from selling general merchandise items not defined by the lease as typical supermarket items. An exception to this restriction allowed the

1722. See id. 1723. See MAYO, supra note 53, at 72.
supermarket to sell items not defined by the lease as typical supermarket items from an area that might range between 3000 square feet of floor area to 10% of the floor area of the supermarket.

As a general principle, this solution was good, but it needed fine tuning. Supermarket people believed that a general merchandise store’s use of as little as 10% of its floor area for the sale of food could be dangerous competition. Consequently, when the supermarket and general merchandise store reconciled their differences by providing a restriction-free island within the stores, the supermarket wanted an additional restriction. They insisted on an additional restriction against the sale of specific food products.

To find common ground with supermarket people who proposed exclusive clauses that, as a general principle, barred any store but the supermarket from selling food and beverages for off-premises consumption, some landlords would propose that the restriction be narrowed or made more specific. Supermarket negotiators usually agreed to mollify the restriction by narrowing it to allow department stores, variety stores, drugstores, and shop space stores to sell many food items. To this end, except for supermarkets that had puny bargaining power or an inadequate understanding of shopping center lease negotiations, supermarkets would not allow other tenants to sell fresh and frozen meat, fish, poultry and crustaceans; fresh and frozen fruit and vegetables; or dairy products. Other specific classes of food frequently denied to department stores, variety stores, and other general merchandise stores by supermarket lease exclusive clauses have included smoked meat; frozen dinners; some kinds of frozen desserts; some kinds of pet food; and canned soup, fruit, vegetables, and hams. I have had success in proposing a compromise that limited the general merchandise store canned food sales to imported gourmet lines of canned soup, fruit, vegetables, and hams, but many general merchandise stores found that too restrictive. Variety stores have not always been willing to agree to a restriction against the sale of canned food. Major food categories that have provoked the most difficult negotiations among landlords, supermarkets, department stores and variety stores include frozen desserts, dairy products, canned soup, canned fruit and vegetables, imported smoked meat and fish, canned hams; and pet food.

Let’s take a closer look at pet food. Supermarkets are very defensive about their ability to sell cat and dog food. Nevertheless,

1724. Some contend it is more nutritious than some processed food products intended for human consumption, but that is another story.
some department store and variety store chains want a share of this market. Although cat and dog food are more appropriately regarded as supermarket items, some supermarket executives have tolerated a department store, variety store, and drugstore right to sell dog and cat food, at least to a limited extent. In my experience, supermarkets have not been as concerned about bird food and other kinds of pet food sales. The supermarket, department store, variety store, and drugstore might all end up with the unlimited right to sell bird food and other types of pet food.

A supermarket’s insistence that general merchandise stores refrain from selling milk or dairy products should be negotiated. Few department stores, variety stores, or drugstores seriously intend to get involved in milk sales. However, if a department store, variety store, or drugstore agrees not to sell any dairy products, it may ultimately regret the decision. Department stores and variety stores sell many inedible products of which one ingredient or another is derived from milk. A landlord negotiator should propose a substitute clause that would achieve the supermarket’s main goal with respect to dairy products without subjecting the department store and variety store to a mindlessly harsh restriction. The substitute restriction would bar the sale of specific classes of dairy products. The list should include sweet and sour cream, sweet and sour cream substitutes, yogurt, cheese spreads, margarine, and butter.

Cheese should also be restricted but not completely. Many department stores sell cheese from their gourmet food departments, and they should not be required to relinquish that right. Supermarket executives with whom I have negotiated have agreed to limit the cheese restriction, insofar as it applies to the department store, to brand-named cheese produced by food processing companies in the United States. However, department store gourmet food departments should be entirely exempt from that restriction.

Frozen desserts should also be restricted but not completely. Frozen dessert sales can be a contentious issue in supermarket exclusive clause negotiations. Do not describe these items as ice cream. Frozen desserts include frozen yogurt, frozen juice bars, ice milk, sherbet, ices, frozen cream pies, frozen fruit compote, and many other treats. Over the years, most department stores and variety stores have had little interest in the right to carry frozen cream pies and frozen fruit compote. However, department stores and variety stores have been reluctant to yield the right to sell ice cream, frozen yogurt, ice milk, sherbet and ices.
b. More on Drugstore Store Food and Beverage Sales

Here's more on drugstore store food and beverage sales. I discuss drugstore issues as part of my discussion of general merchandise stores. Drugstores have a split personality. A great many contemporary drugstores function partly as general merchandise stores and partly as specialized stores with a very heavy concentration on health and beauty related categories. With the decline of variety stores over the last twenty years, the drugstore general merchandise role has expanded to assume the variety store function. This section focuses on the drugstore in its more traditional role of specialized store with some general merchandise functions.

Traditional drugstores and health and beauty aid stores loved being near supermarkets for about three decades after World War II ended. In that era, many drugstore operators would press landlords for the store right next to the supermarket. Few supermarkets sold prescription drugs, supermarket health and beauty aid shelves were much thinner than drugstore health and beauty aid shelves, and drugstore food sales were much thinner than they are now.

I am not suggesting that supermarkets first started selling prescription drugs only recently or that supermarket health and beauty aid shelves first appeared after World War II. Supermarkets were selling prescription drugs as early as 1937. Although many decades passed before prescription drug departments were routinely incorporated in supermarkets, the Big Bear supermarket in Elizabeth, New Jersey that opened for business in 1932 had a health and beauty aid department. A 1937 survey indicated that 20% of the supermarkets that participated in the survey had drug departments, and 25% had cosmetics departments. Supermarket interest in health and beauty aid sales increased after World War II.

Moreover, I am not suggesting that drugstore food sales are a recent phenomenon. Drugstores have been selling many products that were not related to health care for years. Although the traditional pharmacist considered himself a professional, he realized that he could not really fill all of his time or space by preparing and selling prescription drugs and

1725. See Longstreth, supra note 60, at 164-65.
1726. See Zimmerman, supra note 14, at 120-21.
1727. See id.
1728. See id. at 127.
1729. See id. at 150.
1730. See Longstreth, supra note 60, at 164-65.
performing other pharmaceutical duties.\textsuperscript{1731} The Elias Durand pharmacy that opened for business in Philadelphia in 1825 is an example.\textsuperscript{1732} This was the first pharmacy in America to include a soda fountain.\textsuperscript{1733} With an ever-careful eye on the dollar, the pharmacist came to stock anything he could sell to customers itching to kill time as they waited for prescriptions to be filled.

Now, we live in the age of the super supermarket and the super drugstore. Supermarkets are larger than ever, and super drugstores are much larger than ever. Contemporary supermarkets tend to sell prescription drugs and health and beauty aids—big time; and super drugstores sell food—plenty of food. What used to be a very compatible marriage of convenience has become an intense rivalry.

How does a supermarket landlord reconcile supermarket and super drugstore use and exclusive clauses these days? Not easily, and maybe not at all. Contemporary supermarket and super drugstore use and exclusive clause concepts are so divergent that even a Nobel Prize winner may lack the wisdom to propose an acceptable compromise. Nevertheless, compromise is still a possibility. A supermarket or a super drugstore will find a way to compromise these issues when they are presented with a desirable location they know they cannot have without compromise. They will buy leaseholds subject to severe restrictions to add a desirable location. They will bid for leaseholds in the bankruptcy court and accept dismal lease restrictions to add a desirable location. They will even negotiate with each other when they want a location and discover they cannot get everything they want in the lease negotiation. They might even be reasonable.

I cannot provide precise guidelines for proposed compromises between aggressive supermarkets and aggressive super drugstores. However, they should have no trouble living and thriving together in the same shopping center without massive changes in standard operations. These days, supermarket negotiators will not agree to a restriction against a prescription drug department, and drugstore negotiators will not agree to traditional restrictions against the sale of food. However, a supermarket might be willing to tolerate a drugstore’s food sales if the food department occupies less than 15% of the drugstore’s floor area; if the drugstore agrees not to sell fresh meat, fish, poultry, crustaceans, fruit, and vegetables; and if the drugstore agrees to limit the sale of frozen meat, fish, poultry, crustaceans, fruit, and vegetables.

\textsuperscript{1731} See Mahoney & Sloane, supra note 228, at 343.
\textsuperscript{1732} See id.
\textsuperscript{1733} See id.
One alternative remains for a shopping center landlord. He or she could skip the big super drugstore chains and try to interest a less aggressive traditional drugstore operator in leasing space in the center. Not all contemporary drugstores are huge and aggressive. Unrestricted rights to sell food are not essential to all drugstore operators. If a community-type and neighborhood-type shopping center landlord has the opportunity to lease storerooms to both a supermarket chain and a less aggressive traditional drugstore operator, he or she might get the job done by distinguishing between food items carried in traditional drugstores before the ascent of the super drugstore from their counterparts in supermarkets.

Here is a list of some of the food items carried by traditional drugstores before the ascent of the super drugstore:
- Baby food.
- Diet food.
- Confection type food.
- Jam and jelly.
- Frozen desserts.
- Cookies.
- Other food loss leaders.

Prepackaged baby food was a staple item for traditional drugstores. Many shoppers prefer buying baby food in a drugstore. It is a convenience product with reasonable shelf-life and does not require refrigeration facilities.

Diet food has the aroma of both health and beauty. Health and beauty have been the underlying themes of traditional drugstore merchandising. Traditional drugstores have considered diet food to be a natural part of their merchandise mix.

Traditional drugstores have sold confection-type food including candy, nuts, potato chips and pretzels. Drugstore confections have been different from the confections sold in department stores and variety stores but not entirely different from supermarket confection offerings. Like supermarkets, traditional drugstores have usually had a shelf section stocked with economy size packages of popularly-priced chocolate bars, Lifesavers, chewing gum, and other types of cheap confections. Unlike most supermarkets, some traditional drugstores have carried a small selection of modestly priced boxed chocolates.

Jam and jelly have been sold in some traditional drugstores for many years. However, over the years, drugstore jam and jelly jars tended to be larger than the best-selling supermarket jam and jelly jars, and
drugstore jam and jelly brands have not always been stocked in supermarkets.

Traditional drugstores have sold cookies too. Supermarkets with on-site bakeries are likely to try prohibiting all other stores from selling cake and cookies baked on the premises. However, over the years, supermarkets usually tolerated traditional drugstore sales of prepackaged cookies baked off-premises.

B. Supermarket Restrictions Against Specialty Food Stores and Specialized Food Items

Will a supermarket tenant permit a delicatessen store to do business in the same shopping center as the supermarket? For that matter, how do supermarkets react to bakeries, butcher shops, fish stores, and greengrocers as cotenants? They are not happy about any of them. However, fair is fair, and the shopping center will probably never be built in the first place unless the developer is able to find shop space tenants. To make a shopping center work financially, somebody’s got to pay big rent; the department stores and supermarkets do not. The department stores and supermarkets have the bargaining clout to avoid volunteering for this chore, but they do not have enough clout to prohibit landlords from leasing space to all shop space cotenants.

The supermarket’s attitude as to cotenancies depends a great deal on the size of the shopping center. If the supermarket is the anchor tenant of a neighborhood-type shopping center, it will probably insist that the developer live without a delicatessen, a bakery, etc. If the shopping center is of the community-type and it has department store and drugstore neighbors, the supermarket’s attitude toward specialized food shops might soften.

The supermarket’s attitude as to cotenancies also depends a great deal on the size of the cotenants’ storerooms. A landlord might need to plead for relief from a supermarket food and beverage restriction with hat in hand to accommodate a shop space tenant’s needs. He or she should be willing to reassure the supermarket tenant that each cotenant allowed to sell food and beverages for consumption away from the shopping center will be appropriately small (try 2000 or 3000 square feet of floor area) and that it will not step on the supermarket’s tail with a heavy concentration of high markup food products or volume building food products the supermarket sells or might want to sell.

Assuming that a supermarket tenant is willing to accept specialized food cotenants in the shopping center, here are some reactions a landlord
might get from a supermarket tenant when he tries to reconcile the supermarket’s exclusive clause with the specialized food store’s use clause:

1. Delicatessens

Supermarkets do not regard delicatessens as good company these days. Delicatessen departments are highly prized by supermarkets, and most modern supermarkets will not willingly permit competition for this market segment. Nonetheless, the label, delicatessen, applies to more than one type of retail unit. The types are materially different from each other, and the differences are significant to supermarket negotiators.

Some delicatessens more closely resemble restaurants than stores. Although they do sell food intended to be consumed away from the shopping center, they concentrate on customers who eat on premises. Although the delicatessen might also sell canned food, fresh fruit and vegetables and other food items, these sales are not terribly significant. Consequently, supermarket people tend to tolerate them.

However, supermarket people are much less tolerant of delicatessens that concentrate on products intended to be consumed away from the premises. In the supermarket psyche, that is the culprit.

Under some circumstances, supermarket chains are even willing to live with a delicatessen that concentrates on products intended to be consumed away from the premises. If a supermarket chain believes its store will have a low marginal appeal to a particular ethnic group, it may permit an ethnic type delicatessen to be a cotenant. So, where the supermarket tenant is convinced that it does not have many Jewish, Italian, German, or Polish customers, it might not object to a Jewish, Italian, German, or Polish delicatessen store. Permitting an ethnic deli could bring these people to the shopping center where the supermarket will have a chance to attract them.

2. Bakeries

Many supermarket chain form leases bar a bakery from any other part of the shopping center. Some supermarket leases specifically forbid the landlord from leasing any premises other than the supermarket for use as a bakery. Other supermarket leases do not specifically prohibit a bakery but contain broad-based restrictions, like restrictions against the sale of food and beverages intended to be consumed away from the shopping center, that would exclude a bakery anyway. These restrictions are usually aimed at retail bakeries that bake bread or cake on the premises.
Doughnut shops are bakeshops, and a great many of them bake on premises. They could easily be barred by a bakery prohibition. On the other hand, doughnut shops do not really present a threat to supermarkets even when the doughnuts, muffins, and other highly caloric delicacies are baked on premises. The landlord should be astute enough to propose that a doughnut shop be exempt from the restriction against a bakery and the restriction against the sale of food intended to be consumed away from the shopping center. The tendency of doughnut shops to carry milk has aroused the ire of supermarket tenants over the years, but most doughnut shops sell milk routinely and will not execute a lease that forbids the sale of milk. Consequently, landlords should propose that the supermarket tenant permit the doughnut shop tenant to carry one or two freezer cases of milk and other dairy products but no more.

Bagel stores are also specialty bakeries. A bagel store sells, and usually bakes, the traditional Eastern European Jewish doughnut-shaped morsel. Does the bagel store provide fearsome competition to the supermarket? Probably not. Most supermarket executives will be tolerant of a bagel store as long as it sticks to selling bagels. However, they do not all stick to selling bagels, and many bagel stores find room for milk and other dairy products. Milk and dairy product sales by bagel stores are no different from such sales by other bakeries. The supermarket will not suffer as long as the space allocated to milk and other dairy products is strictly limited. Accordingly, landlords should propose that the supermarket’s restriction be amended to permit a freezer case or two of dairy products in the bagel store.

A pizza parlor might be perceived as a bakery also, and some restaurants bake bread and cake on premises. Landlords should make sure that pizza parlors and restaurants are excluded from bakery restrictions in supermarket leases.

3. Butcher Shops

Butcher shops are also very unpopular as potential supermarket neighbors in community-type and neighborhood-type shopping centers. Contemporary supermarket lease forms tend to prohibit the sale of fresh or frozen meat in any part of the shopping center other than the supermarket and specifically bar a butcher shop from the shopping center. It is not an easy task to modify or delete this restriction. Supermarket lease negotiators tend to strenuously resist landlord efforts to delete or modify the restriction.
Nevertheless, some supermarket chains will allow the landlord to lease space to a small ethnic type butcher shop. Kosher, Italian, and German butchers are examples. Naturally, a supermarket will do this only if it believes that it has a remote chance of attracting customers from the applicable ethnic group to its meat department.

4. Fish Stores
A landlord should be able to negotiate an exemption to a supermarket restriction against the sale of food for off-premises consumption for a fish store. However, he or she might not be able to find a fish store tenant to take advantage of the exemption. We do not see many fish stores in shopping centers nowadays. Their absence is not primarily caused by supermarket intransigence, but by a general scarcity of prospective tenants.

5. Appetizing Stores
Few landlord lease negotiators need worry about providing for an appetizing store exemption from the supermarket restrictive covenant. You just do not see many of them anymore. A large part of their traditional market has been usurped by kosher-style delicatessen stores. Nevertheless, you will find old supermarket lease clauses providing that appetizing stores are immune from a supermarket exclusive. Old clauses make new lawyers very happy, and sometimes (all too often) they get copied word for word. So, I would not be surprised to see an appetizing store restriction in a new lease drafted by a lawyer who never saw or heard of one and who has not the slightest idea of what an appetizing store might be.

As a former employee of one such store (situated at the corner of Archer Street and White Plains Road in the Bronx), I feel that it is my duty to tell you about it (whether you thirst for this knowledge or not). Appetizing stores specialized in distinctly Eastern European Jewish type of fish, salads and other food. They featured smoked fish, especially smoked salmon products such as lox and Nova Scotia. Their stock was full of loose candy, dried fruit, potato salad, and cole slaw. Cheese was a big seller. Traditional appetizing stores carried no meat or meat products; that is what distinguished them from kosher delicatessens. Traditional kosher delicatessens specialized in smoked meat and sausages, paid little attention to fish, and carried no dairy products whatsoever.

If the supermarket does not expect to attract many Jewish customers, it might permit a shopping center to have an appetizing store.
However, this issue is likely to surface these days only in the Metropolitan New York area and southern Florida.

6. Cheese and Smoked Meat Stores

Can a supermarket successfully bar a fancy cheese and smoked meat specialty store? The supermarket will probably try, and many factors will influence its chance of success.

The principal factor is whether the shopping center in question is a regional-type, community-type, or neighborhood-type shopping center. As I have indicated above, supermarkets usually favor community-type or neighborhood-type shopping centers. Conversely, fancy cheese and smoked meat stores seldom have any interest in locating in a community-type or neighborhood-type shopping center. They prefer enclosed mall shopping centers, and very few community-type or neighborhood-type shopping centers have enclosed malls. Thus, conflicts between supermarket exclusive clauses and a fancy cheese and smoked meat store use clauses do not often occur.

Of course, enclosed mall shopping centers come in many different varieties, and some of them do include a supermarket. Supermarkets are anchor tenants of some smaller enclosed malls. When the supermarket is a mall anchor, it has considerable bargaining power. In the unlikely event that a fancy cheese and smoked meat store wants to locate in that kind of mall, it might be frustrated entirely by the supermarket lease exclusive clause.

As enclosed mall shopping centers get larger and more upscale, the interest of their landlords in a supermarket tenancy gets smaller. Regional shopping center landlords do not want a supermarket in the enclosed mall. Shopping carts clash with the luxurious ambience most enclosed mall landlords try to project, and the mere sight of shopping carts in the mall would convince some shoppers to buy their designer jeans and overpriced party dresses elsewhere. Consequently, when a regional enclosed mall shopping center is willing to lease space to a supermarket, the supermarket is often tucked away in a location separated from the enclosed mall and completely independent of the mall. The fancy cheese and smoked meat store, on the other hand, would more likely be in the enclosed mall area where the department stores are located. In this situation, the landlord will probably have enough

1734. See supra Part I.B (analyzing the relationship between shopping centers and supermarkets).
bargaining power to ignore a supermarket demand that the specialty store be excluded.

7. Gourmet Food Stores

Independent gourmet food shops are almost universally detested by supermarket negotiators, and they tend to try to exclude these kinds of specialty stores from shopping center cotenancies.

However, landlords seldom worry about conflicts between gourmet food store use clauses and shopping center exclusive clauses. These birds seldom nest in the same place. Gourmet food shops target high-income people and want to draw customers from very large geographical markets. Regional enclosed malls are usually the best kind of shopping center to satisfy their criteria. Conversely, regional enclosed mall shopping centers are not favored by supermarket tenants, and supermarket tenants are not favored by regional shopping center landlords.

Potential conflicts between supermarkets and gourmet food stores do not happen very often. Here and there, you will find an upscale community-type shopping center anchored or coanchored by a supermarket. A community-type shopping center might attract a gourmet food shop if it caters to upper-income-bracket customers and attracts other upscale shops. When this situation occurs, the landlord should try to get the supermarket to soften its food restriction to permit the gourmet food store. In turn, the supermarket might bargain for assurances that would limit the size of the gourmet food store and prohibit the gourmet food store from carrying supermarket-type grades of meat and fish.

8. Ice Cream Stores

Ice cream stores favor all kinds of shopping centers including community-type and neighborhood-type shopping centers.

Although supermarkets and ice cream stores are frequent cotenants, the popular broad based restrictive covenants found in supermarket chain form leases would be violated by the presence of an ice cream store. Ice cream and other frozen desserts sold in ice cream stores are food, and they are sold for off-premises consumption as well as on-premises consumption.

Obviously, landlords have not had a hard time convincing supermarket negotiators to mollify their form lease use restriction to adapt its lease form to the landlord’s need for a small ice cream store lease.
The key to reconciling a supermarket exclusive clause with an ice cream store use clause is to exploit the difference between the frozen desserts sold in ice cream stores and the frozen desserts sold in supermarkets. Ice cream stores cater principally to the shopper who prefers to eat ice cream at the shopping center, while the supermarket caters primarily to the shopper who prefers to take the dessert home in large packages. Of course, ice cream stores sell for off-premises consumption too, but their take-home desserts tend not to be prepackaged items. Take-home desserts purchased from an ice cream store tend to be scooped and packaged at the point of sale.

9. Candy Stores

Regardless of your mother’s opinions and nutritional science, candy is food in the eyes of supermarket executives. They can be excessively contentious in trying to prevent anyone from selling candy or any other edible (or allegedly edible) substance in the shopping center. Landlords confronted by contentious supermarket executives can find themselves without a candy store altogether or with a limit on the size and number of candy stores. Fortunately, the clash seldom occurs because of the candy store’s proclivity for regional shopping centers and the supermarket’s proclivity for community-type and neighborhood-type shopping centers.

10. Stationery Stores

Stationery stores are also candy merchants.

If that is the case, why not call the store a candy store? Earlier generations did call them candy stores. The contemporary shopping center stationery store is not very different from the urban corner candy store of an earlier day. Its merchandise mix is closer to the earlier day urban candy store than it is to the earlier day urban stationery store. Shopping center stationery stores usually include a counter or rack featuring cheap candy, chewing gum, and cough drops. They also carry boxed chocolates, frozen desserts and (sometimes) milk. Like earlier day urban candy stores, some shopping center stationery stores provide dessert and soft drink counter service.

A stationery store tenant is a valuable element of a community-type or neighborhood-type shopping center’s tenant mix. These stores tend to be small, family-owned businesses, bind themselves to healthy (for the landlord) rental rates, and are staffed (at least in part) by their owners.

However, if the shopping center is to have a stationery store, the landlord must cope with the supermarket’s basic premise that it should
have the exclusive right to sell food and beverages in the shopping center. The landlord's obvious need is an exemption for the sales of food and beverages in a stationery store. Supermarket executives are usually inclined not to resist stationery store cotenancies but try to impose reasonable limits on the size of the store and its product mix. The landlord should be able to gain a supermarket negotiator's confidence by agreeing to limit the size and number of stationery stores. In most cases, one stationery store is enough, and its floor area need not exceed 2000 or 3000 square feet. The supermarket people also like to see language that prohibits the concentrated sale of high markup food products or volume building food products the supermarket sells or might want to sell.

11. Fancy Food and Fancy Fruit Gift Packages

Fancy food and fancy fruit gift packages are additional food items that should not be banned by the supermarket's restrictive covenant against the sale of food and beverages intended to be consumed away from the shopping center. Food gift packages are sold by many shopping center stores including catalog stores, department stores, gift shops and gourmet food stores.

12. Mail Order Catalog Items

Speaking of catalog stores, they do sell food items from their catalogs and usually will not identify specific items in advance. Catalog store food sales are much too small to concern a supermarket, and supermarket tenants are usually willing to modify their restriction against food sales to accommodate the needs of a catalog store. To get this job done, the drafters need to say no more than this: *any item sold pursuant to a mail order catalog will be exempt from the restriction.*

VI. WHERE DO WE GO FROM HERE?

All of this should discourage supermarket lease negotiators from mindlessly borrowing use and exclusive clauses from old leases. Old leases are no more sensible than new leases. Lease negotiators of prior generations learned no more about supermarket business operations in law school than contemporary lease negotiators. Meaningful supermarket use and exclusive clauses that are appropriate for today's

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1735. See HAMPE & WITTENBERG, supra note 8, at 366.
1736. See supra note 1715 for a discussion of American law schools' customary neglect of transactional matters.
appropriate and meaningful supermarket use and exclusive clauses emerge from negotiations among reasonable and knowledgeable landlord and tenant representatives. They should reflect:

— the customary product line boundaries between supermarkets and other shopping center tenants;
— the fundamental principles underlying the supermarket business model devised by Michael Cullen and other supermarket industry founders such as a low-price policy, a low-cost structure, large store size, diverse product mix with a heavy concentration of food and household products, self-service, cash and carry, availability of parking facilities, and an efficient merchandise movement system with a grid pattern layout and shopping carts;
— the impact of the supermarket on the shopping center’s tenant mix;
— the impact of the supermarket on the shopping center’s financeability;
— the impact of the supermarket on the shopping center’s marketability;
— the impact of the shopping center on the supermarket’s sales volume; and
— the shopping center landlord’s need to avoid conflicts between supermarket use clauses and exclusive clauses in co-tenant leases.

All of this should discourage supermarket lease negotiators from proposing one-sided use and exclusive clauses and bargaining for them aggressively. The supermarket and shopping center industries grew from common roots, and they embraced each other early on. Both industries were founded on the birth and phenomenal growth of motor vehicle transportation in the twentieth century. In the twenty-first century, supermarkets and community-type shopping centers will prosper together or decline together. Similarly, supermarkets and neighborhood-type shopping centers will prosper together or disappear together. Whether they prosper, decline, or disappear in the twenty-first century depends on many factors neither a food merchant nor a real estate developer can control. However, food merchants and real estate developers should ensure that their leases reflect the principles underlying the supermarket model and the impact of the supermarket on the shopping center.

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1737. See Mayo, supra note 53, at 165-66.
1738. See id. at 115.
developers can control whether they will cooperate to take advantage of the symbiotic relationship that provided supermarket operators and real estate developers enormous profits during the last seventy years. Cooperation will not insure success, but it will go a long way towards averting failure.