sachusetts passed a detailed statute which required oil company franchisors to make certain disclosures to those considering becoming dealers, barred franchisors from requiring dealers to participate in sales promotions, required franchisors to repurchase inventory if they did cancel or fail to renew a franchise, provided that franchisors could not insist on the service station being open certain hours, and established an elaborate procedure whereby a dealer could sell the business to another or pass the business to a successor upon his or her death. It also prohibited franchisors from interfering with dealers' participation in trade associations[79]. California has a similar law[80], and many other states have enacted some but not all of these provisions[81]

In 1987, Nevada enacted a number of provisions advocated by its retail gasoline dealer association which were aimed primarily at refusals to renew dealerships[82]. The legislation had to deal with the problem indirectly because the federal PMPA preempts the power of a state to limit the right not to renew. For example, the Nevada legislation requires compensation "at a fair going business value" for a dealer's capital investment if a refiner fails to renew in bad faith[83]. Refiners must give written notice at least thirty days before the end of a term specifying "[a]ll the reasons for any intention of the refiner not to renew"[84]. If a refiner fails to give the required notice, the franchisee has an option to renew for one year under the same terms[85]. Finally, and importantly, refiners may not begin to operate any additional service stations themselves with their own employees after July 1, 1987, and they may not "engage in the direct operation of more than 15 service stations in this state . . ."[86] This last provision is designed to inhibit oil companies from pushing out franchised dealers and taking over stations themselves or installing large company owned stations which would compete against franchised dealers.

79 Massachusetts Laws Annotated, Ch. 93E, 1-9 (1985).
80 California Business & Professions Code, 21140-21150.1 (1986).
81 See, e.g., 7A Minnesota Statutes Annotated 80C.146(2) (Cumulative Annual Pocket Part 1989), providing "[t]he agreement must provide that if the motor fuel franchisor eliminates one or more service bays during the term of the agreement, the franchisor must first pay to the franchisee in cash an amount that fairly and adequately compensates the franchisee for the loss of the service and repair business".
82 31 Nevada Revised Statutes 598.660-598.679 (1988). These provisions were enacted after a tremendous battle between the dealers and the oil companies before the Nevada Legislature.
83 Section 598.660(1).
84 Section 598.665(1)(b)(1). We can question whether this provision will withstand a federal preemption challenge in light of Section 2806(a) of the PMPA.
85 Section 568.670.
86 Section 598.677(1),(2).

c) *General Franchise Protection Laws*

At least ten states have franchise protection laws which apply to all dealers[87]. The Wisconsin Fair Dealership Law[88] provides broad protection to dealers[89]. A "dealership" covered by the statute requires "a community of interest in the business of offering, selling, or distributing goods or services at wholesale, retail, by lease, agreement or otherwise"[90]. A "community of interest" means "a continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods or services"[91]. There has been a great deal of litigation testing the meaning of these terms. Lawyers for those engaged in relationships other than traditional franchises and dealerships have tried to bring their clients within the bounds of the act.

A grantor of a franchise in Wisconsin may not cancel, fail to renew or change the competitive circumstances of a dealer without carrying the burden of proving there was good cause[92] Good cause is defined as:

"(a) Failure by a dealer to comply substantially with essential and reasonable requirements imposed upon him by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement; or

(b) Bad faith by the dealer in carrying out the terms of the dealership"[93]

The statute also provides for notice of deficiencies and an opportunity to cure them in all but a few situations[94]. Dealers can sue for damages and injunctive relief, and, if they prevail, they can recover reasonable attorney fees[95]

87 Some of these states also have laws specifically applicable to motor vehicle, petroleum, farm equipment or other kinds of dealers. Sometimes the general statutes state that they do not apply to such dealers; sometimes the statutes leave open whether a dealer may choose which statute to use or whether a specific statute displaces a general one.
88 Wisconsin Statutes 135.01-.07 (1988).
89 Compare similar protection given dealers by the Arkansas Franchise Practices Act, Arkansas Statutes 4-72-201 et seq.; the California Franchise Act, California Business & Professions Code 20000 et seq.; the Delaware Security for Franchised Dealers Act, 3 Delaware Code Annotated 2551 et seq.; the New Jersey Franchise Practices Act, New Jersey Statutes 56:10-1 — 56:10-15; the Pennsylvania Fair Dealership Law, 73 Pennsylvania Statutes 205-1 et seq.
90 Wisconsin Statutes 135.02(3).
91 Sec. 135.02(1).
92 Sec. 135.03.
93 Sec. 135.02(4).
94 Sec. 135.04.
95 Sec. 135.06.

From 1976 to 1988, there were 112 reported cases under this statute. While franchisors usually win these cases, dealers have won some important victories[96]. Riteris and Robertson review the Wisconsin litigation and say,

> "The past decade has shown that termination litigation abounds. It normally starts with a complaint and a request for a temporary injunction filed by the soon-to-be-terminated dealer. The request is then usually turned into a motion for a preliminary injunction, and an evidentiary hearing is scheduled . . . Then there is a rush of needed, as well as superfluous, discovery[97]. After the hearing, the trial court will make every effort to end the controversy at that point ...
>
> Of course, exceptions exist but experience has shown that much more often than not the fight is at the preliminary injunction stage and over thereafter. Except for jury trials on the issue of damages, there are no reported decisions of jury trials on the issue of good cause"[98].

Again, we have no measure of the indirect or deterrent effects of the statute. Riteris and Robertson conclude: "it is fair to assume that as time goes on grantors will learn to live with the concepts of good cause and cure. It seems that they will not have an alternative"?[99]

But perhaps franchisors still have a move or two left in the game. Faruki, a corporate lawyer, wrote an article which offered franchisors advice on how to cope with statutes such as Wisconsin's[100]. He notes:

96 See *Kealey Pharm. & Home Care Serv., Inc.* v. *Walgreen Co.*, 761 F.2d 345 (7th Cir. 1985). However, the Supreme Court of Wisconsin took away some of the gains franchisees won in the Kealey case. See *Ziegler Co.v, Inc.* v. *Rexnord, Inc.*, 147 Wis.2d 308, 433 N.W.2d 8 (1988).

97 The lawyer who drafted the Wisconsin statute has said "[t]he non-discrimination clause in the Act is really a kicker. It allows you to go through all the franchisor's records. That doesn't make them too happy but its essential". William F. Nelson, Legislative History, in State Bar of Wisconsin, Advanced Training Seminars — Continuing Legal Education, Magna Carta for Wisconsin Businesses: The Wisconsin Fair Dealership Act (Nov. 1979). Franchisors who do not want franchisees searching their files might be more included to settle a case quickly.

98 Riteris & Robertson, The Fair Dealership Law: Good Cause for Review, Wisconsin Bar Bulletin, March, 1986, at 8, 49.

99 Ibid. At an April 1991 meeting of the American Bar Association's Section on Antitrust Law, several lawyers experienced in advising clients about state franchise protection laws appraised their impact:

> Andrew C. Selden, of the Minneapolis office of Briggs & Moran, asserted that the practical marketplace effect of state franchise laws, enacted in some states for about 20 years, has been "very slight" outside Wisconsin.
>
> Except under Wisconsin's statute, "very little case law" has developed, he observed. One reason a statute may have little effect is because of "a constitutional problem with applying an anti-termination statute to a preexisting franchise", Selden explained. By and large, the statutes are "aimed at the wrong target", he lamented. In most cases, even if the franchisee breaches the contract in a material respect, the franchisor's decision to terminate is based on the franchisor's prediction of whether the breaches will continue to occur.
>
> [Arthur I.] Cantor, [of Washington, D.C.] suggested that "the real place the state laws may have bite" is with respect to shorter-term relationships where the franchisee has not insisted on protective provisions in the contract. Selden, concurring, noted that most contracts involve longer-term relationships and that most of those contracts "have due process protections built in".

60 Bureau of National Affairs, Antitrust and Trade Regulation Report, April 18, 1991, at 533.

100 Faruki, The Defense of Terminated Dealer Litigation: A Survey of Legal and Strategic Considerations, 46 Ohio State Law Journal 925 (1985).

> "The Wisconsin act's standards import into distribution agreements a far more stringent set of requirements than is usually contained in a dealer agreement prepared by a manufacturer. However, the selection of the law of another state, coupled with an arbitration provision, should enable a manufacturer to avoid the applications of the statute"[101].

A franchisor probably cannot avoid Wisconsin law by a clause in a franchise contract stating that it will be governed the law of another state[102]. However, the arbitration move works. The Supreme Court of the United States declared that the federal arbitration act controls state regulation of franchises[103]. A United States District Court, sitting in Wisconsin, has said that the Wisconsin Fair Dealership Act was subject to the Federal Arbitration Act[104]. Lawyers can debate what rules arbitrators must follow in applying franchise contracts to disputes[105]. More importantly, franchisors are likely to hold significant influence over who will serve as arbitrator and where the arbitration will take place[106].

d) *Evaluations of the Statutes*

Several writers have argued that all franchise protection legislation unduly curbs the franchisors' power to control dealers and to end relationships with them. Epstein[107] argues that franchisors and good franchisees share an interest in protecting the reputation symbolized by the trade mark. The organization defends itself by ending the relationship with poor performers, and the termination threat serves as an incentive for better performance by all franchisees. Franchise protection legislation, he assumes, destroys these incentives.

Moreover, Lockerby[108] objects:

101 Id. at 973-974.

102 See *Bush* v. *National School Studies, Inc.*, 139 Wis.2d 635, 407 N.W.2d 883 (1987).

103 *Southland, Corp.* v. *Keating*, 465 U.S. 1 (1984). See, also, *Saturn Dist. Corp.* v. *Williams*, 905 F.2d 719 (1990).

104 See *Good(e) Business Services, Inc.* v. *Raytheon Co.*, 614 F.Supp. 428 (W.D. Wis. 1985).

105 Wisconsin Statutes, sec. 135.05 states that "[t]his chapter shall not apply to provisions for the binding arbitration of disputes . . . if the criteria for determining whether good cause existed for a termination, cancellation, non-renewal or substantial change of competitive circumstances, and the relief provided is no less than that provided for in this chapter". In the Good(e) Business Services case, supra, the court said "federal law governing the arbitrability of commercial contracts entirely displaces state regulation of the field. States simply lack the power to enact limits on the arbitrability of commercial contracts that go beyond those contained in 9 U.S.C. sec. 2".

106 See Speidel, Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform, 4 Ohio State Journal on Dispute Resolution 157 (1989).

107 Epstein, Unconscionability: A Critical Reappraisal, 18 Journal of Law and Economics 293, 314-315 (1975).

108 Lockerby, Franchise Termination Restrictions: A Guide for Practitioners and Policy Makers, 30 Antitrust Bulletin 791, 847-848 (1985). Lockerby draws on a classic article dealing with attempts to regulate gasoline franchises by the Uniform Commercial Code's unconscionability provisions. See Jordan, Unconscionability at the Gas Station, 62 Minnesota Law Review 813 (1978). For similar argu-

"By requiring case-by-case adjudication to establish a franchisor's right ... state and federal «good cause» statutes impose a heavy burden in terms of litigation costs. The fact that every franchise termination under a good cause requirement may be the subject of litigation greatly increases monitoring costs in anticipation of litigation. Even clear cases must be carefully documented to survive possible court challenge ... The litigation process also imposes on the terminating franchisor «error costs», i.e. the possibility that a factfinder may find even valid reasons unpersuasive makes any termination more difficult".

Lockerby asserts that these statutes achieve little more than burdening franchisors with litigation costs. Franchisors, he says, are not going to cancel without cause because franchisor and franchisee are mutually dependent. "A franchisor who terminates an experienced franchisee thus incurs substantial costs himself". Lockerby then notes that good cause is relatively easy to establish under the various dealer protection statutes. From this he concludes: "the good cause statutes allow a franchisor — after litigation — essentially to do that which he could also do with an unrestricted power of termination — but without litigation"[109].

Undoubtedly, franchisors value skilled and experienced franchisees. Most terminations cost franchisors something. And legal review of business decisions can impose costs. However, we cannot establish deductively whether without these statutes there would be enough arbitrary, bad faith or foolish terminations to justify imposing these costs. Such normative judgments must rest on greater empirical knowledge than we now have.

However, we can offer counterarguments to these attacks which seem just as plausible, based on what we know. Again, it is important to remember that these statutes should have little impact in clear cases. Excellent and terrible franchisees can be treated appropriately. This leaves a middle range of situations where both franchisors and dealers have credible arguments. This range may be broader or narrower depending on whether the law defines cause to cancel or not renew in general or specific terms. Even a statute that does not define cause should become more precise over time as courts give it meaning in specific cases.

When franchisors are not sure whether they have cause to cancel, they can buy a franchisee's business or arrange a sale to another to settle the dispute and avoid the courts. Ford Motor Company, for example, offers termination benefits to dealers unless they are canceled for actions involving bad faith. If a dealer is terminated, it may elect to require Ford to purchase or accept return of vehicles, parts, signs, and special tools and equipment. However, the Ford franchise also provides for a release from all other liability:

ments see Mosser, Franchise Regulations: The Good, the Bad, and the Ugly, 29 Cornell Hotel and Restaurant Administration Quarterly, August 1988, at 8-9.

109 Lockerby, ibid. at 846-847.

"If dealer fails to return the form stating such election within such thirty (30) days, the Dealer shall be deemed to have elected to accept such benefits. Upon the Dealer's election to accept any of such [repurchase or return] benefits, or upon the Dealer's demand of any such benefits upon any termination or nonrenewal by the Dealer, the Company shall be released from any and all other liability to the Dealer with respect to all relationships and actions between Dealer and the Company ..."[110].

While a good cause statute undoubtedly does increase franchisor costs, it is not clear how great this burden is. Large franchisors will collect much of the data necessary to establish cause as part of the regular process of monitoring dealers. Franchisors regularly measure the sales and profits of one dealer against other comparable dealers, and they keep records of consumer complaints and their resolution. Good dealers are valuable. Few franchisors allow field level supervisors to cancel dealers without preparing a formal reviewable justification.

Furthermore, in Galanter's terms[111] franchisors are "repeat players" while dealers usually are "one shotters". Repeat players enjoy economies of scale in handling common disputes and litigation. The costs of preparing a basic legal argument and strategy can be spread over many transactions. Their lawyers become expert in this type of case. Dealers, on the other hand, often have to use lawyers who must research and plan without prior experience[112].

Dealers who have been canceled also face high cost barriers to litigation. The American practice of the contingent fee may help some dealers overcome these barriers. However, lawyers take cases on contingent fees only when there is some chance of success and where the potential damages are great enough to justify taking the chance of receiving nothing for a large amount of legal work. If franchisors win most of the cases under these statutes, fewer lawyers will be willing to gamble and take dealers' cases.

Moreover, poorly run dealerships are unlikely to be profitable, and banks and other creditors are likely to act to protect their interests. Such actions by creditors themselves may be cause to cancel a franchise. Few dealers are likely to invest large sums to save a failing business by trying to assert rights created by a statute. Some dealers may have personally guaranteed the debts of their corporate dealership to lenders. These individuals have reason to push losses back on franchisors. However, the legal system presents many filters to block such cases from courts and agencies absent a plausible claim. On one hand, lawyers will

110 This provision was upheld in *DeValk Lincoln Mercury, Inc.* v. *Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1987). Among other things, the court refused to find the clause to be unconscionable: "Ford is entitled to a valid exercise of its corporate power in offering dealers a choice of either electing benefits in exchange for a release of liability or of declining benefits altogether". The court cites five other cases to this effect.

111 See Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Society Review 95 (1974).

112 If dealers are members of a trade association, they may gain some of the benefits of repeat player status.

want to be paid. On the other, it is not easy to survive motions for summary judgment.

As Lockerby says, the statutes may do little more than reinforce a franchisor's interest in preserving dealerships whenever possible. However, inevitably there will be close cases that raise questions of judgment. All the statutes may do is influence choices where there is something to say for the dealer. The chance of legal challenge may prompt superiors to review more carefully recommendations to cancel by field people who supervise dealers. If qualified dealers are an asset, the costs of this careful review may be offset by avoiding a mistaken cancellation.

Furthermore, despite manufacturers' costs in coping with federal and state regulation for over 30 years, automobile distribution has not been frozen in place. As Spinella points out:

> "Slow and plodding Darwin-like evolution already has weeded out the weakest [automobile] dealers. In 1950 there were 50,000 dealerships. By 1987 the figure had been halved. And by 1991 it is likely that only 17,500 will remain.
>
> Even more dramatic, the number of dealer principals tumbled from 45,000 to 17,000 between 1950 and 1987, with the prospect of only 14,000 dealership owners by 1991"[113].

Finally, dealer protection statutes do not take away from franchisors all means of giving franchisees incentives to perform their duties. Franchisors reward dealers who do well. Some rewards are symbolic, such as ceremonies and plaques to hang on the wall. Others are more tangible. For example, an automobile manufacturer often has easy-to-sell popular cars and hard-to-sell less popular ones. It can allocate more of the popular models to dealers who sell more of the less popular ones. There are also sanctions. Franchises still can cancel for cause, and franchisees cannot be certain how poorly they can run their dealerships without crossing the line and giving the franchisor cause to cancel. General Motors puts dealers who are selling only 65% of their sales target into a Dealer Improvement Program. Such dealers are offered help in improving sales, customer satisfaction, and facilities, but they know that they are being watched and records are being prepared to justify termination. Just being singled out for this unwanted attention is itself a sanction[114].

113 Spinella, The Dealer Dimension, 24 Ward's Auto World, May, 1988, at 53.

114 See Krebs, GM Maps Franchise for the '90s, Automotive News, April 3, 1989, at 1. See also Automotive News, March 13, 1989, at 1.

IV. The Campaign of the Retail Gasoline Dealers: Law and the Balance of Power

Up to this point, we have reviewed academic theories as well as judicial and legislative attempts to regulate long-term continuing relationships in the distribution of goods. However, judgments about whether and how to regulate in this area are not only disinterested exercises of reason. Power and politics affect whether laws are passed, what form they take and their impact. Or, as Joerges put it in challenging Macneil's relational theories:

> "To conceive of . . . [the argument about the legal form of the manufacturer-dealer contractual relation] simply as a discussion on the merits of "neo-classical" or "relational" contract law, of either a hidden or explicit legal response to relational elements in contract law, abstracts the controversies being fought out by the participants on the legal status of "quasi-entrepreneurs". . . . I interpret his [Macneil's] concept as a possibility for overcoming the abstractions from social problems by means of classical and also neo-classical contract law. For exactly this reason, however, I insist that the social problems and conflicts concerned be recognized as such and that the colliding legal claims be taken seriously"[115].

The struggle over franchise laws teaches us much about the reality of regulation in the United States. The process involves battles in a never-ending war, moves in an endless game[116]. Both franchisors and franchisees are well-armed with rhetorical symbols dear to Americans: "the free market" and "efficiency" battle "the virtues of small business", and the claims of expectations created by practice. While both sides bring experts into the contest, the manufacturers' economists more often are pitted against the dealers' victims of atrocities at the hands of franchisors. Dealers have advantages at the state level while franchisors usually are large corporations, well versed at playing in the national arena in Washington, D.C.

This is a story of the efforts of the retailers of branded gasoline to improve their position against the major oil companies. The tale of prolonged legal warfare will illustrate all the difficulties in such battles as well as the uncertain nature of the outcome. First, we will examine the nature of this "franchise" relationship — the norms and sanctions in this semi-autonomous social field, looking at the strains which prompted the dealers to seek outside help. We will then sketch the endless battles they won and lost, and we will try to indicate something of the impact of all these efforts.

115 Joerges, Relational Contract Theory in a Comparative Perspective: Tensions Between Contract and Antitrust Law Principles in the Assessment of Contract Relations Between Automobile Manufacturers and Their Dealers in Germany, 1985 Wisconsin Law Review 581, 608-609, 613.

116 See the discussion of the "typical sequence of stages" in challenging power through legal action in S. Macaulay, Law and the Balance of Power, at 22-23 (New York: 1966).

Before the energy crisis in the early 1970s, the major oil refiners sought to maximize the amount of gasoline sold[117]. Much of their profit came from products such as petrochemicals, and often gasoline was a by-product to be disposed at the best price available. It was uneconomic, because of the structure of the tax laws, to keep crude oil in the ground. Refining petrochemicals or heating oil also yielded gasoline which, as a practical matter, could not be stored for long. Even when a refinery run was planned to produce gasoline, the nature of the technology called for production in large quantities.

The major oil companies sold gasoline in many ways. Much, of course, was sold through service stations bearing the trade mark of a major oil company. The company usually owned some of these stations itself, hiring employees to manage them. Most companies, however, contracted with franchised dealers and leased service station premises to them. Until the 1970s, most oil companies worked to increase the number of stations offering their products, and many attempted to build national networks of distribution[118].

The major oil companies made the franchised dealer the focus of their retailing efforts in the 1930s. For a relatively small investment of capital, the companies told dealers that they could run "their own business". For example, a Shell Oil Company advertisement seeking new dealers said,

> Work for a good man-yourself. A Shell Dealership offers:
> — Paid training;
> — Financing Assistance;
> — High Income Potential.

When it suited their purposes, the oil companies characterized the dealers as independent business people. However, the companies managed to retain almost the same degree of control over the dealers as they would have had over employees. The companies drafted standard form contracts and leases which guarded their interests. Dealers assumed many obligations under these contracts, including such things as the hours they stayed open, the products they would sell, and responsibility for handling credit card purchases. The franchise usually was for a relatively short term — sometimes as little as 30 days with an optional renewal feature — and franchises could be canceled at will with no need to show cause. Furthermore, some oil companies frequently refused to allow a dealer to

117 See Roche, Major Oil Firms Seek Earnings on Gasoline, Long a "Loss Leader", Wall Street Journal, March 28, 1977, at 1, col. 6, at 11, col. 3.

118 Gasoline also was available at service stations which did not display the trademark of a major oil company. Typically, this gasoline was sold for a few cents a gallon less than branded fuel. Many consumers distrusted this gasoline although usually it was chemically indistinguishable from branded fuel, and often one of the major oil companies had refined it. These independent stations served to impose competitive pressure on the franchise dealers. If branded gasoline prices went too high, some consumers would put aside their distrust and elect to save money.

have an attorney review their contracts and leases before they were because they would allow no changes.

Dealers were well aware that it was good policy to keep the companies' district managers pleased. Dealers knew that their franchise ran for a term, but most assumed that they would be renewed. This view was reinforced the longer they stayed in business and obtained renewals. District managers often told their dealers that there was nothing to worry about, as long as there were no problems. This both reassured dealers and served as a warning of what might happen if there were problems. If a dealer's performance were questionable, the company also could open another station across the street or a block or two away. Finally, the companies offered training for dealers in management skills and business systems. This not only helped dealers become profitable but also served to channel their operations into the companies' patterns.

The dealer was thus given a strong incentive to pour time and effort into managing the station, building good will in the immediate area, and investing in tools, tow trucks and the like. The companies benefited by characterizing their dealers as independent business people rather than as employees. Oil companies could not have devised a better incentive structure which would prompt most employees to work the long hours and take the responsibility assumed by dealers. Also, "independent" dealers were not subject to minimum wage and maximum hour regulations, and they would not unionize and ask to collectively bargain.

Sometimes everyone was happy. Often the oil company and the dealer shared interests. Successful dealers made money and had a degree of independence. Sometimes successful dealers even had some countervailing power. When major oil companies were expanding into new regions of the country, they might seek to entice experienced and capable dealers away from other companies. Companies probably threatened to cancel, both expressly and impliedly, far more than they actually terminated dealers. Oil companies usually renewed even slightly marginal dealers. There were costs in changing dealers by canceling franchises — the replacement, for example, might not do as well.

However, there often were strains in the relationship. These strains were provoked in part by the contradiction between the reality of the situation and the fiction that the dealer was an independent business person. Until the energy crisis of the 1970s, there were recurring price wars in many areas when one refiner wanted to get rid of surplus gasoline or wanted to establish itself. The oil company would order its dealers to cut prices to increase sales. The other major oil companies would respond by telling their dealers to meet the price cuts or to drop the price even lower in order to bring in new customers. The dealer usually had to bear part of the burden of lower prices. Dealers would be given allowances to enable them to survive a price war, but the major oil companies decided how great an allowance to offer and how long to keep it in effect. Truly independent dealers would have had the power to set their own prices based on their own judgment about long term benefits and their own particular situation. This independence was denied to most franchisees in gasoline price wars. Price competition was a tactic which might help a major oil company get rid of gasoline or bring in a few new people to a station once or twice. However, cuts were met quickly by cuts from the station across the street.

Also, dealers often could make more profit selling tires, batteries and accessories (TBA) and even motor oil which they bought from wholesalers than by offering only products supplied by the major oil companies. Refiners controlled the TBA offered by their dealers in many ways, ranging from requirements contracts to what the Federal Trade Commission and the courts later were to label as coercion.

In the late 1960s, many major oil companies decided to deemphasize neighborhood stations, and the servicing and repairing automobiles and use marketing techniques which would sell more gasoline at fewer stations. Experts began to say that the United States had far too many gasoline stations for efficient distribution. Jordan described the tensions in the relationship as follows:

> "The company sees the station as its means of selling petroleum products, with price competition and high volume as keys to profit. The dealer, in contrast, often sees the station primarily as *his* repair and maintenance operation. Since the bulk of his income tends to come from automotive services that he, not the oil company, provides, he is less concerned than the company about increasing sales of the relatively low-profit gasoline. Moreover, though some agreements do specify a maximum rent, rental rates are often based on a percentage of gasoline sales, in effect giving the dealer a *negative* incentive. This disparity between the interests of the company and the operator simply does not exist where both are exclusively interested in selling the same product and splitting the profits"[119].

Dealers were told to close service facilities which had been highly profitable to them and turn to self-service, trading stamps, contests, premiums, and extended hours of operation. Major companies began to withdraw from regions of the country where they did not have a large share of the market, leaving many canceled dealers in their wake. After the Arab Oil Embargo in 1973, many major oil companies worked even harder to close their less profitable stations. Gasoline no longer was merely something to be disposed of. This part of their operation had to maximize profit rather than volume.

The major oil companies rationalized their control of their dealership network by their property, trademark and contract rights. Often they owned the stations which were leased to dealers; they claimed ownership of trademarks such as "Standard", "Shell", and "Texaco" and thus controlled those who displayed

119 Jordan, Unconscionability at the Gas Station, 62 Minnesota Law Review 813, 817-818 (1978).

them; and they drafted form contracts that gave them the right to cancel dealerships at their discretion. Often the oil companies justified their power and policies in terms of efficiency and benefits to consumers. They pictured canceled dealers as inefficient operators who survived by charging customers high prices and running dirty stations. They argued that consumers expected to find the same high quality of product and service at all stations displaying, for example, the "Shell" trademark. The oil companies also pointed out that they supplied most of the capital involved in the network of gasoline stations, and they said that as conditions changed, any particular dealer had few equities to offset required changes in the entire franchise system.

The dealers, of course, saw matters very differently. They said that they were independent business people who created the value of their service station by their labor and their efforts to build good will. They relied on having their franchise renewed because of representations made to them, expressly and impliedly, by the oil companies. They did not deal with the lawyers and top officials who fashioned the legal paper work. They talked to field representatives who led them to believe that they would keep their stations and their independence as long as they did a good job. The dealers' efforts, in partnership with the oil companies, had created the business at the local level. It was unfair for oil companies to pass back to the dealers a major part of the burdens of economic change brought about by OPEC — which was a response to the conduct of the major oil companies in Third World Countries. Finally, dealers made the classic argument of small business against competition: price competition in gasoline destroyed service and would end with a few near monopolists able to impose whatever prices they wanted, without offering service to customers.

Perhaps the dealers' appeal to American ideology was best put by Justice Douglas[120], in one of the earlier antitrust cases involving gasoline dealer franchises:

> "The lessons Brandeis taught on the curse of bigness have largely been forgotten in high places. Size is allowed to become a menace to existing and putative competitors. Price control is allowed to escape the influences of the competitive market and to gravitate into the hands of the few. But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry".

The tensions in their relationship with the oil companies prompted gasoline dealers to organize. Gasoline dealers, both individually and through their organizations, tried to change the nature of their relationship with the major oil compa-

120 *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 318-319 (1949) (dissenting opinion).

nies for more than thirty years. Trade associations proposed informal dispute resolution panels, but the oil companies were not interested. District managers of the oil companies would not allow a dealers' organization to represent dealers in meetings with the company. The managers said that they would only talk with dealers as individuals, and they pointed out a possible conflict of interest — the organizations represented dealers selling competitive products.

When these efforts at informal dispute resolution failed, the organized dealers turned to the legal system. Their basic strategy was to search for a new legal categorization of the relationship, and to collect atrocity stories to provoke a scandal. And dealers hired lobbyists and lawyers with enough experience and skill to counter the representatives of the major oil companies. They appealed to the Federal Trade Commission, state and federal courts, state legislatures, and the United States Congress with varying success over the years. Every legislative representative has retail gasoline dealers doing business in his or her district, and these retailers are "small business", a symbol dear to both major political parties.

From World War II through the 1960s, a number of antitrust actions attempted to protect the status of retail gasoline dealers as independent business people by lessening the oil companies' control. Victories were won by and for dealers; a notable line of cases in the Supreme Court of the United States developed. The Federal Trade Commission and private suits attacked the oil companies' control over the prices charged by their dealers and the response to price wars as well as various attempts to induce dealers to stock only the companies' TBA. The FTC won consent decrees limiting the use of short-term leases of service stations, which the Commission said made the dealers more vulnerable to the oil companies' coercion.

The FTC also attempted to solve many conflicts informally. President Nixon's Task Force on Productivity and Competition complained:

> "The efforts of the Commission to protect small dealers from allegedly unfair and coercive business practices constitute a dark chapter in the Commission's history. Much of this enforcement activity does not eventuate in formal proceedings. What happens is that a dealer who is terminated, for whatever reason, is likely to complain to the Commission, knowing that the relevant Commission staff is well disposed toward "small business". The staff uses the threat of an FTC proceeding to get the supplier to reinstate the dealer, and if threats fail — usually they succeed — the FTC may file a complaint charging the supplier with having cut off the dealer because he was a price cutter, or for some other nefarious reason. Our impression, in sum, is that the Commission, especially at the informal level, has evolved an effective law of dealer protection that is unrelated and often contrary to the objectives of the anti-trust laws"[121].

While these victories undoubtedly changed day-to-day practices of major oil companies, some companies asserted that they always had honored the status of

121 BNA Antitrust and Trade Regulation Reporter, 1969: X-3.

their dealers as independent business people. Amoco Oil Company's Statement of Dealer Policy said, for example:

> "Amoco's commitment to recognizing the dealers' rights as independent business men has been stressed to employees at all levels of our Company. Should dealers at any time receive an indication that our Policy is not receiving strict adherence from all of our personnel, they have the right to bring this fact to the attention of the District Manager. If after a discussion with the District Manager, disposition of the dispute is not made to their satisfaction, they may contact the Chairman of the Regional Dealer Relations Committee".

Despite such policy statements, some dealers thought that too much pressure to take orders remained. The General Counsel of the National Congress of Petroleum Retailers appeared before a Congressional committee hearing on problems in gasoline retailing. He explained:

> "The district manager comes in and sees that another TBA is in your station. That doesn't happen to be the brand they are selling, and he says, "Good heavens. What is this oil doing here"? And the dealer says, "You know, I thought I could sell it, and the *Texaco* case, and the *Simpson* case, and all the others say that I am entitled to sell anything I want to sell".
>
> The district manager says, "You certainly are, Joe Blow; you are a nice family man; you have six kids. Your lease will be over in 4 months, and I will tell you just a little ahead of time so you can be looking around for a new job".
>
> The Pennzoil goes out to the backroom. This is the problem with the antitrust cases. As long as someone is choking you, and they have got their hands around your throat, you can't say "I know my rights". But sometimes, your knowing your rights, and their knowing your rights, isn't enough to stop them from choking you. When the pressure gets hard enough, you go along with them".

The Executive Director of the National Congress thought that the pressure often was more subtle. Dealers would be told that the company expected all aspects of the station to be highly profitable and certain targets would be set. Dealers could not achieve the goal for selling, say, Standard's brand of oil if they sold too much Pennzoil or Quaker State.

Since the 1950s, the retailers sought to limit the power of oil companies to cancel or refuse to renew franchises because this power is the source of much of their leverage over dealers. In 1956, Congress passed the "Dealers Day in Court Act", giving some protection to franchised *automobile* dealers. Franchised dealers selling other products found this statute a legislative precedent for claiming a right to similar protection. Throughout the 1950s and 1960s, both the House and Senate Small Business Committees held hearings where franchised dealers, including those who operated gasoline stations, made the populist appeal against big business again and again. In the mid1960s, Senator Philip Hart of Michigan held hearings and then offered several bills that would have protected *all franchisees* from termination or non-renewal except for cause. The oil companies, particularly Mobil, vigorously attacked these proposals as benefiting only the inefficient. The bills also ran counter to the ideas of the Nixon Administration about efficiency and competition, and even had they passed, they risked a presidential veto. The bills did not pass. However, Senator Hart's effort brought attention to the franchisee's claim that there was a problem, and it may have played a role in changing attitudes when events later made the plight of the gasoline dealers appear more worthy of sympathy[122].

After the failure of the Hart bills at the federal level, the legislative battle moved to New York. In 1969, the legislature there passed a statute which would have required all franchisors to act in a fair, equitable and honest manner and in accordance with reasonable standards of fair dealing when granting, modifying, terminating or failing to renew a franchise. However, Governor Rockefeller vetoed the bill because of the "unreasonable injunctive rights it would grant dealers".

Next, individual gasoline dealers who had been canceled or not renewed, went to court. Their lawyers, backed by their trade associations, searched for legal concepts which would override the oil companies carefully fashioned positions based on property, trademark and contract. Wall Street very successfully warded off Main Street, and the dealers usually lost. For example, two lower New York courts refused to apply the Uniform Commercial Code's provisions concerning "good faith" and "unconscionability" to gasoline dealer franchises[123]. The Code, the courts explained, applies only to transactions in goods, and a franchise involves both goods and a lease of real estate. These courts also refused to consider evidence of a custom to renew station leases absent cause for cancellation. Any such custom would contradict the express terms of the franchise document drafted by the oil company lawyers. Yet even these defeats were to play a role in later developments as indicating the need for legislation.

One of the judges emphasized the vetoed legislation and saw legal change in this area as an appropriate legislative task. He remarked that he was "not unsympathetic to the plaintiff's plight . . ." and said he was sending copies of his opinion to the appropriate legislative committees[124]. The other judge made the interesting statement that it is "unconscionable, although legal at present, for the . . . [Mobil Oil Company] . . . to be allowed, without cause, to terminate this lease

122 Scandals may also have played a similar part in influencing attitudes about franchisees. During the 1960s, promoters sold franchises of little value. Prominent entertainers and sports figures sold their names to promoters who announced that "John Smith Fast Food" franchises were available for a price. The promoters represented them as potential gold mines, and people invested their life savings only to discover that there was little substance in the franchise. While these fraudulent schemes did not involve gasoline retailers, the scandal may have helped some legislators see franchisees as needing protection similar to that given consumers or buyers of corporate securities.

123 *Mobil Oil Corp.* v. *Rubinfeld*, 357 N.Y.S.2d 589 (Ap.Term, 2d Dept. 1974), reversing 339 N.Y.S.2d 623 (Civ.Ct.N.Y.C. 1972); *Division of Triple T Service, Inc.* v. *Mobil Oil Corp.*, 304 N.Y.S.2d 191 (S.Ct. Westchester Co. 1969), aff'd without opinion, 311 N.Y.S.2d 961 (2d Dept. 1970).

124 *Division of Triple T Service, Inc.* v. *Mobil Oil Corp.*, supra note 123.

after 19 years of annual renewal". He thought Mobil's action "harks back to the early days of our nation's industrial development when corporations were kind and the workers were only to be used". He concluded that he "the Legislature and the Governor of this State will see fit to enact, again, legislation which will protect this vast number of our citizens"[125].

Still a third New York lower court judge did not think he had to await legislation. He pointed to representations made by the Mobil Oil Company to a canceled dealer, noted that Mobil had not allowed the dealer to have an attorney present when the lease was signed since it "would not tolerate changes in any of the provisions of the printed agreements", and stressed that Mobil's refusal to renew because the dealer had not followed Mobil's price-setting directions violated the antitrust laws. He concluded that there was a "fiduciary relationship" which Mobil had violated[126]. Thus, the court refused to grant Mobil's petition to recover possession of its station[127]. However, this innovative exercise was reversed on appeal[128].

In the early 1970s, state and local gasoline dealers organizations pressed for legislation in many states. After several failures, a bill offering all franchisees protection was passed in Wisconsin. Both Connecticut and New Jersey passed statutes providing that franchisors could not cancel or fail to renew franchises "without good cause". In addition, the Connecticut law provided that any franchisee could submit the question of "good cause" to arbitration in accordance with the rules of the American Arbitration Association.

In Connecticut, Mobil Oil Company led the attack on the new statute. It told twenty-six of its dealers who ran the most valuable stations in the state that it would not renew their franchises and would take over their stations. It could adopt this strategy because the statute did not apply retroactively to franchisees which had been created before the law became effective. At a legislative hearing, a representative of Mobil said that it could not leave $300,000 stations in the hands of dealers who had tenure granted by the law. Unless the statute were repealed, Mobil would have to take over all of its stations in the state[129].

125 *Mobil Oil Corp.* v. *Lione*, 322 N.Y.S.2d 82 (3d Dist., Suffolk Co. 1971).

126 *Mobil Oil Co.* v. *Rubenfeld*, 339 N.Y.S.2d 623 (Civ.Ct.N.Y.C. 1972), aff'd, 357 N.Y.S.2d 589 (Ap. Term 1974).

127 Fiduciary relationships exist when one purports to act for the benefit of another — lawyers are in such relationships with their clients, for example.

128 *Mobil Oil Co.* v. *Rubinfeld*, 370 N.Y.S.2d 943 (Ap. Term. 1975).

129 A member of Mobil's legal staff explained his firm's position in Connecticut:

> "Our concern with the 1973 amendments to the Connecticut Franchise Act was that they had the effect of giving a dealer, who had invested approximately $10,000 in inventory and equipment, the same long-term property rights in a service station as an oil company supplier-landlord that had invested $300,000 in acquiring the property and constructing the service station improvements . . ."

Letter of November 14, 1974 to Professor Stewart Macaulay.

Members of the legislature reacted angrily to what they saw as coercion. Some legislators discovered that Mobil's representative was not registered as a lobbyist, and they demanded prosecution. A story appeared in the *New York Times*[130], which noted that if "Mobil was going to get in trouble for its efforts on behalf of all the oil companies, Mobil's brass would be embarrassed and many of the company's officers live in Connecticut — including the chairman of the board . . ." Mobil's officers may have recognized this. At any rate, they withdrew the heavy attack, apologized, and then joined with the Connecticut Gasoline Retailers Association to offer amendments to the statute. Under these changes, franchisors could cancel or refuse to renew a dealer's lease for failure to perform obligations under a contract or where the franchisor converted its property to a use not covered by the franchise agreement. In addition, the provision for arbitration was deleted as an interference with the franchisor's constitutional right of trial by jury[131].

In New Jersey, major oil companies canceled or refused to renew franchises in response to that state's franchise law. The Supreme Court of New Jersey, however, decided in *Shell Oil Co.* v. *Marinello*[132] that franchise agreements entered into before the state's law became effective were subject to an implied covenant that the franchisor would renew as long as dealers had substantially complied with their obligations[133]. The New Jersey court was able to rely on the legislation as a declaration of the state's policy warranting the imposition of an implied term in the contract. Imposing an "implied term" is a well-known move in the contract doctrine game, but this was the first time that it was applied to franchises.

Once again action prompted reaction. At the request of oil companies, a federal district court found invalid the decision which implied a covenant to renew as well as the New Jersey statute because they conflicted with the federal Lanham Act governing trademarks[134]. This decision later was reversed on appeal[135], but

130 March 19, 1974, at 47; March 20, 1974, at 53.

131 The Mobil lawyer continued:

> "While we resumed our leasing practices in the state of Connecticut in response to the 1974 amendments, we are still philosophically opposed to any law that restricts a landlord's right not to renew a lease agreement after it has expired. We believe that this type of legislation unconstitutionally transfers long term property rights from a land owner, who has invested substantial sums of money to acquire property, to a lessee dealer who has put up little or no capital that he can't otherwise get back out of his business".

Letter of November 14, 1974 to Professor Stewart Macaulay, supra note 129.

132 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

133 The trial court found an implied covenant not to terminate based on the parties' course of performance, Shell's own practices, and considerations of public policy. See *Shell Oil Co.* v. *Marinello*, 120 N.J.Super 357, 294 A.2d 253 (Law Div. 1972). The trial court's opinion is very similar to the Nanakuli decision discussed supra.

134 *Marinello* v. *Shell Oil Co.*, 368 F.Supp. 1401, 1407 (D.N.J. 1974).

135 *Marinello* v. *Shell Oil Co.*, 511 F.2d 853 (3d Cir. 1975).

for a time it brought all efforts of gasoline dealers in the state legislatures into question[136].

Despite the dealers' difficulties in getting courts to protect existing franchises, the dealers' organizations did well before many state legislatures. By the mid-1970s, over thirty states had some kind of franchise protection law applicable to retail gasoline dealers whose franchises were created or renewed after the statutes went into effect. Some of these statutes applied only to gasoline dealers; others applied to all franchises including gasoline dealerships.

The dealers' lobbying organizations tried still another approach. They pressed for statutes that would restrict oil companies' operation of retail outlets. If these statutes were passed, oil companies no longer could threaten to take over stations before the effective date of franchise protection statutes as Mobil had done in Connecticut. They also could no longer open company stations to compete with franchised dealers or threaten to do so for leverage. By 1977, twenty eight states had given some consideration to such bills, and laws to this effect had passed in Maryland, Florida, Delaware, Virginia and the District of Columbia. Several bills to this end were introduced in Congress.

Exxon, Shell, Gulf, Phillips, Ashland, Continental and Commonwealth Oil Companies joined to challenge the constitutionality of the Maryland statute. However, the Supreme Court of the United States upheld it[137]. After this decision, the threat of passing these statutes was used to promote a federal legislative solution. The dealers' trade associations continued to struggle in the 1970s to gain federal legislation that would limit termination and non-renewals and protect existing dealers. Senator Claiborne Pell of Rhode Island said "if these small people are put out of business, there isn't going to be the competition or the retail service in the local neighborhoods"[138]. He proposed divestiture of retailing under the antitrust laws might be needed if adequate legislation to protect dealers could not be passed.

136 In *Ashland Oil, Inc.* v. *Donahue*, 223 S.E.2d 433 (W.Va. 1976), the court found that the Uniform Commercial Code applied to a gasoline dealer's franchise and that a ten-day cancellation clause was unconscionable. Other state courts were unwilling to follow New Jersey's implied covenant approach, to apply the Uniform Commercial Code to a gasoline dealership so that an implied condition of "good faith" would be imposed on the relationship, to find fiduciary obligations, or to apply the reliance principles of Restatement of Contracts, Section 90 to terminations of dealer franchises. See, e.g., *Cornitius, Inc.* v. *Wheeler*, 276 Ore. 747, 556 P.2d 666 (1976); *Clark Oil & Refining Corp.* v. *Leistikow*, 69 Wis.2d 226, 230 N.W.2d 736 (1975). In the Clark case, the Supreme Court of Wisconsin said,

> "defendants have alleged a promise or representation of occupancy as long as they did well, made by Clark's agents or servants to induce them to enter the agreements. They allege that they left their former employers of long-standing as a result of these promises and entered into the agreements. We think these allegations are not sufficient to raise promissory estoppel. There is no allegation that injustice can only be avoided by enforcing the promise and it is questionable if the leaving of former employments are actions of 'a definite and substantial character.' [When relief has been given] . . . the plaintiff suffered monetary losses in preparing . . . [himself for association with the defendants]".

137 *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978).

138 Wall Street Journal, June 16, 1977, at 24.

At the beginning of the decade, the large oil companies were supported by people in the Nixon and Ford administrations who opposed these bills as anticompetitive and promoting inefficiency. In 1974, President Nixon vetoed a comprehensive energy bill which included provisions prohibiting fuel sellers from terminating dealer franchises unless the dealer had failed to comply with reasonable requirements of the franchise. The Senate failed to override the veto, and the dealers suffered still another defeat.

However, the Federal Energy Administration found itself dragged into the question of franchise termination by the Emergency Petroleum Allocation Act, which had been passed after the Arab oil embargo in 1973. This statute prohibited an oil company canceling a dealer and moving its allocation of fuel to a company-run station. FEA Ruling 1974-3, prohibited franchise terminations without a legitimate business purpose, those taken to circumvent the allocation program or those retaliating for dealers exercising rights created by FEA regulations. In 1976, the FEA handled between 300 to 400 dealer-company disputes, a job which its officials viewed as a diversion from the agency's major responsibilities.

The dealers' lobbyists were undaunted after the veto of the energy bill in 1974, and they began still another major federal campaign. Individual dealers and groups of dealers met with their congressional representatives in district after district. They dramatized their plight by recounting atrocity stories and dwelling on the ideology of small business and traditional American hostility to large multinational corporations. International developments now made the dealers' story even more appealing. As the price of gasoline increased in the early 1970s, many Americans were angered by the major oil companies' extraordinary profits. Many thought that the large oil companies had manufactured the entire "oil crisis" to excuse price increases. Dealers claimed that these companies should not pass on the burdens of disruption in the oil business to their dealers and customers when the companies were making record profits.

During 1977, some of the major oil companies changed their position and supported federal dealer protection legislation. The dealers' lobbyists and the companies' lawyers worked out most of the technical objections to earlier legislative proposals, arriving at a compromise with the help of the staffs of the House and Senate committees considering legislation in this area. Exxon's representative was able to say, "it is a reasonable bill and one with which all marketing segments can live". Chevron, U.S.A. noted that the bill "has wide support throughout the industry because it is a compromise measure".

Perhaps a major reason for this change was that many companies now felt that they needed federal legislation to preempt the many varying state statutes and to ward off the threat of divestiture of all retail operations. The dealers' associations had produced enough state law that the companies valued uniformity itself. Furthermore, there was always a threat that the dealers could get states to pass laws

less favorable to oil company interests than the compromise worked out at the federal level. Finally, the major oil companies were concerned about congressional reaction to proposals for such things as gasoline rationing and a windfall profits tax. Some officials of the large corporations thought it was time to withdraw from the public role as the villain who pushed around local small business.

Congress passed the Petroleum Marketing Practices Act (PMPA), which became effective in June of 1978[139]. While this statute limits cancellation of a franchise to specified grounds, it also leaves the major oil companies relatively free to not renew dealer franchises. The franchisor need only negotiate in good faith for a renewal; it need not negotiate reasonably in light of the dealer's interests. The federal courts have read the PMPA's provisions on non-renewal so that a dealer's threat of formal legal action is but a paper tiger. Moreover, the PMPA preempts all state legislation which might otherwise benefit gasoline dealers.

In 1984, The Service Station Dealers of America, Inc. returned to Congress seeking amendments to the PMPA, and it has lobbied for legislation at every session since then[140]. Its president painted a picture of problems under PMPA to a United States Senate Committee on Energy and Natural Resources[141]:

> "Dealers are being forced to sign take-it-or-leave-it leases with provisions so coercive that signing one can be an agreement to self-destruction. Oil companies can now force a dealer to accept any lease provision if their determinations are made as a result of their interpretation of what constitutes good faith in the normal course of business, as stipulated in the act. The kicker is that under PMPA failure to agree to any provisions proposed by the supplier in "good faith" is grounds for non-renewal.
>
> Unreasonable franchise provisions have resulted in dealers being canceled for not being able to sell unattainable minimum volumes even though their wholesale prices are competitive. They must agree to 24-hour operation and risk employees' lives when there is no business to justify it.
>
> Dealers have been given rent increases of 1,000 percent because an oil company imposes its own appraisal of real estate value . . .
>
> Dealers are now being forced to sign bulldozer clauses which allow a company with thirty days' notice to bulldoze a dealer's location and rebuild it as a convenience store or a pumper without service bays. Thousands of locations are now being converted annually.
>
> A major misinterpretation of the intent of PMPA language by a Federal judge in *Baldauf v. Amoco* in 1981 opened the floodgates for conversions. Many are used to force dealers out by including huge rent increases based on promised new profits which never materialize. The dealer is forced out and the location becomes a company operation.

139 The statute appears at 15 United States Code, 2801-2806.

140 See 77 National Petroleum News, July, 1985, at 27.

141 U.S. Senate, Committee on Energy and Natural Resources, Subcommittee on Energy Regulation and Conservation, Hearings on the Petroleum Marketing Practices Act Amendments of 1987, 100th Cong., 2d Sess. 1988, at 13-14.

> In other cases, oil companies have used expiration of underlying leases to close dealer-operated stations that would offer competition to new company-operated facilities that appropriate the dealer's goodwill. Dealers and their customers have been forced to pay as much as 20 cents per gallon more for gas when refiners have passed on price reductions to their other customers but not to their own captive dealers".

The dealers and legislators championing their cause proposed a statute which would require changes and additions proposed by a franchisor in renewal negotiations to be "fair and reasonable" in addition to being in good faith[142].

Chevron's Vice-President of Marketing responded for the American Petroleum Institute: "[u]nder the amendments, the courts would be compelled, on a case-by-case basis, to second guess the business judgment of franchisor decisions. Franchisors would naturally be reluctant to be innovative because of the threat of protracted litigation. For the most part, current contract terms and methods of operation would be frozen in place"[143].

In 1988, the proposed statute amending the PMPA was passed by the House of Representatives but not by the Senate. It was reintroduced in 1989. The Director of Legislative and Political Affairs for the Petroleum Marketers Association of American stated that he thought there was a "50:50 chance that President Bush would veto" the PMPA Amendments if they were passed[144].

The retail gasoline dealers also returned to the state legislatures[145]. During the 1980s, they won victories in Massachusetts, Nevada and other states. However, their lawyers are now defending these statutes against constitutional challenges and charges that they attempt to regulate in an area taken from state power by the PMPA[146]. Once again, move prompts countermove. The Federal Trade Commis-

142 See Senate Bill S.2179, 100th Cong. 2d Sess. 1988.

143 Id. at 103, 107.

144 67 Platt's Oilgram News, No. 84, May 2, 1989, at 4.

145 The International Franchise Association's treasurer discussed the success of this franchisor organization in blocking proposed state franchise protection legislation. The group works to kill these proposals in committee. This allows legislators to vote against these bills without publicity. He said in 1986, the IFA defeated 27 bills introduced in 18 states. See Bernstein, IFA Faces Franchise Law Fracas, 21 Nation's Restaurant News, Feb. 9, 1987, at 1.

146 Compare, Deutsch, Franchisees Fight Back, N.Y.Times, Dec. 4, 1988, Sec. 3, at 1, col. 4:

> "When the Southland Corporation went private last year in a leveraged buyout, franchisees of its chain of 7-Eleven convenience stores stepped up lobbying in several states for legislation that would make it more difficult for franchisors to change or terminate franchise contracts. After the buyout, Southland ... [raised] fears among the 3,000 franchisees that it would slash services and advertising support, would increase royalties as contracts came up for renewal, or would withdraw from some regions.
>
> Terrified of new laws, Southland met with Joe Saraceno, chairman of the franchisees' national organization, and worked out a program to give every franchisee the option of extending existing contracts and terms to the year 2000. «We got rid of uncertainties, so there was no longer a push for stronger laws or a need for lawsuits», said Thomas B. Kanawyer, manager of Southland's franchise department. Apparently, the franchisees are satisfied. "We do have some problems to deal with, but if things don't get any worse than they are today, we are in good shape", said Mr. Saraceno".

Experts say such amicable agreements are few and far between these days ...

sion began rule-making hearings on proposed franchising rules in 1986. This process continued through 1990[147]. The announced objective is to provide a single uniform law governing disclosures franchisors must make to prospective franchisees. Most states have statutes requiring such disclosures, but a disclosure required by the laws of some states violates those of others. The resulting FTC rules, however, may do more than provide a uniform system for disclosures. The FTC, under the Reagan Administration, opposed state franchisee protections as ill-serving the consumer by limiting competition. The FTC, now under the Bush Administration, may propose rules which preempt state legislation limiting canceling and not renewing franchises.

What has been the impact of all this legal warfare? Certainly the organized gasoline dealers gained a federal law which gives them broad protection against cancellation during the term of a franchise. It is, for example, much more favorable on this score than the 1956 "Dealers Day in Court Act" which applies to automobile dealers' franchises[148]. However, the PMPA offers little protection against non-renewal of a franchise. Moreover, unlike the federal motor vehicle dealers statute, the PMPA preempts state legislation dealing with cancellation and non-renewal.

The number of franchised dealers of gasoline has continued to decline even after the federal legislation went into effect[149]. The price of fuel remains high, and many motorists drive less and buy cars that get high mileage. This limits gasoline sales. Motorists are less willing to pay a few cents a gallon more at their neighborhood stations which do not discount their prices. Automobile manufacturers have decreased the frequency of needed maintenance, and dealers have lost oil change and lubrication business. Automobiles have become more difficult to repair, requiring specialized tools for each make and trained mechanics. This decreases the opportunity to repair cars at service stations. And the federal legislation came in 1978 rather than in 1968. Many of the dealers who might have benefited when the great wave of terminations and non-renewals began, lost out long before the law was passed.

Thus, the long struggle to gain federal legislation may have produced a law with more symbolic significance than instrumental impact. Of course, it may have benefited those who managed to survive until it was passed. Some dealers may have won renewals before the oil companies established the judicial interpretations that are so favorable to them. There might have been even a greater decline in the number of service stations had there been no federal law.

147 See 54 Federal Register, No. 31, Feb. 16, 1989, at 7041.

148 See, S. Macaulay, Law and the Balance of Power (New York: 1966) for the background of this statute.

149 "Although nobody knows the total number of retail gas outlets — estimates range from 150,000 to 300,000 — Government figures show that the number of service stations is now 112,000, less than half the 1972 peak". Hershey, Fill'er Up and Check the Doughnuts, N.Y.Times, July 1, 1989, at 16, col. 1,3.

As we noted, the gasoline dealers' efforts in some states produced statutes offering protection to most franchisees rather than just those who sold gasoline. These statutes are preempted by the federal Petroleum Marketing Practices Act only insofar as they apply to gasoline dealers. There is an ironic twist here. The gasoline dealers worked to pass these statutes, and they included other franchisees only to broaden the appeal of the proposed legislation. Those who just went along for the ride are the major beneficiaries of the retail gasoline dealers' lobbying efforts.

V. Conclusion

Dissatisfied participants in several unstable private governments have sought and gained statutes and victories in court. Participants generated many overlapping and contradictory images. When franchisors are recruiting dealers, franchisors use pictures of community and partnership. When everything is going well, the success of one is the success of the other. When problems arise, franchisors use imagines of competition and efficiency while franchisees call on pictures of David and Goliath.

Franchisees' power and control of their businesses is ambiguous. They must invest significant resources in the dealership, and they must manage skillfully. They are not employees taking orders, but they are not independent business people either. Franchisor and franchisee define the range of permissible discretion differently. In most successful franchises, the franchisor retains authority to chart the course for the group. Franchisors can insist on uniformity rather than diversity, defending this in terms of the interests of the larger community. It helps all those operating Hilton Hotel franchises if consumers know what to expect when they go to any Hilton.

The interests of franchisor and franchisee may conflict. Then, the franchisor asserts that its interests take priority. The image now is that of free contract and choice; the franchisee signed a document which, when properly translated, gives priority to the franchisor over all others. Franchisors also talk about protecting consumers by retaining the flexibility necessary to adapt to changing consumer tastes.

Franchisees read the situation differently. They argue that there are relational norms such as those described by Macneil. Franchisees claim that neither party should do anything to imperil the relationship and call on the norm of solidarity. They challenge the franchisor's role integrity. The franchisors may talk of pursuing a collective good, and their officials' actions usually match this image. However, when franchisors want to eliminate dealers or revise business strategy, the trusted partner turns into a bargaining adversary playing hardball. This violates the tacit rules of the game.

Finally, franchisees see mutuality as their right. In Macneil's terms, again, the "parties must divide the exchange surplus so that each gains appropriate but not necessarily equal returns". One atrocity story dealers tell judges and legislators pictures a dealer developing good will in a locality and a franchisor who then appropriates it by pushing out the dealer. Another atrocity story involves franchisors who impose new programs which benefit them at great cost but little benefit to franchisees. Macneil's mutuality principle has a contrary implication as well: losses should be divided so that each bears an appropriate but not necessarily equal amount.

Even in the best of times, dealers perform differently. Some fail when measured by any standard, and franchisors can cancel these dealerships. Others are clear successes, and their efforts profit both themselves and the franchisor. Even here, difficulties may arise. A franchisor may cancel a highly successful franchisee if that franchisee is located in an area which becomes uneconomic for the franchisor to serve. The franchisor will lack cause to cancel or not renew as measured by the conduct of the franchisee, but its decision will be in perfect good faith. This is a difficult case to resolve to the satisfaction of all concerned.

Problems usually arise when situations are not so clear cut. Some dealers offer barely passing performance; others do well when they might be able to do much better. The solidarity norm calls for notice of deficiencies, a chance to cure and, perhaps, help in doing so. Most franchisors accept this obligation, and many statutes codify it.

Close cases, however, involve judgment. Franchisor representatives and franchisees often construct sharply differing stories about the causes of problems. They may not share the same vocabulary of excuses. Dealers' sales, for example, are compared to those of comparable dealers. The factory representative may see, say, a Ford dealer in one city as comparable to one in another city of similar size. The dealer whose performance is challenged may see that city as having a noncomparable market because of historical dominance by a competitor.

Changes in international markets may strain comfortable patterns of doing business. The success of Toyotas, Datsuns and Hondas in the American market changed the game for Ford, Chevrolet and Plymouth dealers and their franchisors. All parties in a long-term relationship are likely to accept that a relationship must change as the world changes. The problem comes when they cannot agree on the responses needed or on who will bear what share of the costs.

If we accept this general picture of the situation, what are appropriate legal responses? The case for doing little, if anything, is familiar and is not without wisdom: Macneil, for example, is skeptical about legal action to remedy relational problems. People, he reminds us, resent being ordered to do what they do not wish to do. This resentment triggers evasion and coping strategies which threaten norms of cooperation.

Whitford stresses the difficulty of asking legal agencies to make qualitative decisions about good faith, due cause and reasonableness. These agencies may lack capacity to gather enough facts, see all interests, and make necessary judgments. Both Gottlieb and Smith warn about unrepresented third party interests which may be injured by regulation and protection from market forces. Dealers' happiness may come at the expense of higher prices paid by consumers.

Scott and Kidwell remind us that legal doctrines are filtered through bargaining systems and social norms. Rights do not vindicate themselves, and judicial or administrative procedures are costly. When we consider legal reform, we must picture it in the context of the costs of triggering the reform and changing the balance of power. It is possible, if we are not careful, that a reform may give the undeserving too much and the worthy too little.

Jordan argued that many franchisees know that they may lose their business whether the franchisor decides to cancel for good, bad or no reason. Experienced dealers may read franchise documents or they learn of the real risks from contacts with other dealers and officials of their own trade associations. They may assume that they will not be canceled absent cause, but they know that the franchisor claims to be the court of last resort on the question of cause. Indeed, the years of legal battles by dealer trade associations stand as good evidence that many, if not most, dealers are well aware that franchisors can act for their own interests without regard to the interests of franchisees. Many know that the courts, both before and after the passage of franchise protection statutes, have been hesitant to intervene to change the balance of power.

Some dealers may be unaware of the rights reserved by the franchisors and the duties imposed on franchisees[150]. General Motors apparently recognizes this. Speaking about proposals for new franchise documents, Robert H. Ogden, G.M.'s General Director of Sales Operations and Dealer Relations, said: "We don't want something that they [the dealers] stick in the drawer for another five years. It needs to be something that will provide everybody direction and help us all do a better job in selling cars and trucks". Dick Smith, Chairman of the National Automobile Dealers Association's G.M. line group, agreed: "Usually, a

150 Reference to documents signed at the initiation of the relationship may be little more than a magical way of answering the questions raised. This can be true even when those documents purport to deal with major changes in the economic context of the relationship. Neither franchisor nor franchisee may have understood how general provisions in a form contract might apply to a specific situation. Operation of the relationship over time may create expectations not totally congruent with the commands of a form contract. Of course, officials of a large corporate dealership, represented by experienced commercial lawyers, are more likely to understand the formal franchise system than the operator of a gasoline station. Nonetheless, even corporate officials are likely to rely on practice rather than printed contract clauses.

dealer only reads the agreement when he's in trouble"[151]. However, Jordan notes that demanding that franchisors prove that dealers actually understood the franchise document would involve prohibitively high costs. Governing officials of major corporations control what is written in form contracts. They have much less power over dealers' expectations which are formed by contact with company agents and each dealer's own experiences. It is difficult to imagine any system which could counter these expectations which would not be extremely costly. Holding dealers responsible to read and understand their franchise document eases the burdens on franchisors and courts alike.

In short, although she did not consider the point, Jordan probably would argue that Macneil's relational norms do not describe the actual expectations of many franchisees. Or, perhaps franchisees understand that while they can hope franchisors will honor relational norms, they know that franchisors may not do so. Jordan recognizes that in particular cases trade usage and course of dealing may qualify the provisions of standard form franchise agreements. However, she argues, this is a question of fact in each case.

American legislators have heard all of this, but they continue to enact franchise protection legislation of various types. Perhaps this reflects the power of small business as a symbol in the American public drama, but more may be involved. Part of the power of the image of contract is the idea that we can rely on our reasonable expectations. Most of us think that trust is to be preferred to paranoia. Upsetting expectations and mocking trust produces anger and cynicism, and it endangers useful commitments. We might console ourselves by imaging that franchisors never would use unfettered power against franchisees who deserved better. But this comforting picture rests on the assumption that there are only deserving and undeserving franchisees and that it is easy to tell the difference. This is not true. Cases at the extremes may be clear, but inevitably there will be close questions. Trust and expectations are subjective perceptions based on reactions to situations in context. Legal procedures exist, in part, to guard trust and expectations. At some point, defeating expectations and trust might endanger the patterns of cooperation needed for a working large-scale society.

Roberto Unger has commented:

> "[A] higher standard of solidarity — the one that gives primacy to the other party's interests — is necessarily exceptional. Any attempt to insist upon it in the generality of dealings would depart so radically from the standards by which people ordinarily deal with each other that it would merely encourage massive circumvention and hypocrisy coupled with a stifling despotism of virtue. It does not follow, however, that ordinary contracts and human encounters should be surrendered to the notion that one may treat other people's interests as if they were nonexistent. In fact, the parties to continuing or recurrent contractual relations, and often even to one-shot transactions, seem gener-

151 Krebs, GM Maps Franchise for '90s, Automotive News, April 3, 1989, at 1.

ally to adhere to a far stricter standard . . . [D]octrine might develop a series of distinguishing criteria to characterize situations suitable for the application of a more limited solidarity constraint requiring each party to give some force to the other party's interests, though perhaps less than to his own"[152].

We can ask how close we may have come to Unger's ideal through the private government of franchises interacting with the various franchise protection acts as they are implemented in practice. None of our statutes freezes distribution systems in place permanently. Under the federal PMPA, oil companies can refuse to renew franchises when they cannot negotiate new arrangements, and the courts will not questions the companies' business judgment. Whatever the text of other statutes, courts seldom will order specific performance, forcing a relationship to continue when it makes no sense to do so. Even a dealer who cannot be canceled except for good cause and who has carried out all of the terms of the franchise, is likely to accept some amount of money to end the business and the dispute[153]. If a dispute went to court, the dealer would have to prove damages with reasonable certainty. The dealer faces delay and some costs, even where a statute awards attorneys fees to those who win. The American legal system in practice controls most of those who view litigation as an indoor sport. Our judges now take pride in their skill at coercing litigants to settle, and those who refuse to settle may get no further than summary judgment for their opponents.

Several writers have argued that franchise protection legislation unduly burdens franchisors[154]. Franchisors, they say, cannot act without being ready to defend their actions in court or before an administrative agency. I see the situation differently. Franchisors can cancel franchisees when there is no doubt that they have cause, and legal challenges by franchisees are unlikely in those cases. In most other situations franchisors can buy out a franchisee who is having difficulty operating the business or they can help the franchisee arrange a sale to another entrepreneur. Riteris and Bleakley, lawyers who handle franchise cases regularly, spoke to the American Bar Association's 5th Annual Franchising Forum in November of 1982. Riteris said that if it were possible, a buyout or permission to sell the franchise is, in the end, the least expensive and traumatic alternative to litigation. He recommended that litigation be avoided at all costs. Bleakley said, "I haven't seen more than one or two cases that should not have been settled". Bleakley suggested renewing troubled franchises conditionally. A franchisor should clearly state problem areas, and renew subject to the condition that these problems are solved within the next renewal period[155].

152 The Critical Legal Studies Movement, 96 Harvard Law Review 561, 641-642 (1983).

153 This situation should be rare except when a franchisor wants to withdraw from business or withdraw from an area entirely.

154 See, e.g., Lockerby, Franchise Termination Restrictions: A Guide for Practitioners and Policy Makers, 30 Antitrust Bulletin 791 (1985); Pitegoff, Franchise Relationship Laws: A Minefield for Franchisors, 45 The Business Lawyer 289 (1989); Jordan, Unconscionability at the Gas Station, 62 Minnesota Law Review 813 (1978).
Lockerby adopts a relational contract approach. He thinks that he have focused too much on the franchisor's unrestricted right to terminate and not enough on protecting each party's expectations in the event of termination. See Lockerby, at 839. His argument assumes litigation rather than settlement as the norm; I think this highly unlikely. I would expect litigation or an administrative proceeding only in the close case, and I think that most cases will not be close cases. I suggest that regulation affects bargaining to end franchises and the price for accepting termination often is some protection for a dealer's expectations.

Franchise regulation, in all but a few instances, only changes the bargaining position of the dealer. The major burden that franchise legislation imposes on franchisors may be the cost of keeping records to preserve the power to cancel for cause[156]. Larger corporate franchisors are likely to keep such records for their own purposes whether or not they are burdened by franchise regulation.

Thus, if my assumptions about practice are warranted, the issue is whether our legal structures interacting with the private government of franchise relationships give too much, too little or just enough as the price of ending the relationship through settlement. Of course, we must specify what we mean by enough compensation to serve as a transition payment upon cancellation. Statutes often require the franchisor to repurchase inventory, special tools and the like even when dealers are canceled for cause, as long as the case does not involve bad faith. People may differ about whether this enough. However, it is hard to make a firm judgment without better evidence about how the various franchise systems work at the negotiation for termination stage. We do not know who gets how much and why. We can suspect that auto dealers do better than gasoline dealers. The Dealers Day in Court Act, unlike the Petroleum Marketing Practices Act, does not preempt state franchise protection statutes, and the state statutes give automobile dealers some important rights. If these suspicions are right, we might wonder about a system that offers the most to automobile dealers, less to service station operations, and the least to ordinary employees working for wages — most of whom in the United States can be fired for good, bad or no reason.

Of course, we can also suspect that dealer protection comes at the consumer's expense, but the actual cost is unclear. Some researchers report a large and precise amount of increased cost based on correlational studies. However, their data are not that good. Moreover, we cannot be sure that the researchers have controlled for all other explanations of the correlations they find. Indeed, no study controls for whether a franchise protection statute is enforced aggressively or only passively. We can assume that manufacturers have found ways to cope with unwanted regulation. Factories and refineries can push dealers to compete whatever a regulatory statute may say. Moreover, it is not clear that everyone benefits from extreme forms of price competition. People cope with the market as well as with regulation, and dealers can offer the illusion of competition rather than the

155 See Bureau of National Affairs, Daily Report for Executives, November 18, 1982.

156 Franchisors also spend a great deal of money lobbying before Congress and state legislatures to ward off increased regulation. It is hard to know how much of this investment is money well spent.

costly reality. Seemingly low prices can be combined with high financing charges, and many consumers will not see that they have been duped. Getting warranty service from a dealer who advertises low prices is never easy. Sophisticated self-reliant consumers are likely to do better in competitive markets than most Americans who dislike bargaining and comparative shopping.

Perhaps automobile dealers have more opportunity to cope than gasoline dealers. A consumer seeking information about purchasing an automobile needs to know much about makes and models, warranties and a dealer's reputation for service as well as financing. Many consumers think gasoline is a generic product, and so it may be harder for dealers to exploit imperfect information.

Whatever we may think is an ideal solution, we must recognize that dealer protection law has been fashioned through a political process. Our story has not been one of philosophers debating the good, the true and the beautiful. Rather we have looked at endless battles in a long war. Legal action provokes reaction, and reaction provokes further reaction. Lawyers drafted contracts placing all power in the hands of franchisors. Franchisees organized, litigated and lobbied, and won apparently favorable laws. Franchisors found ways to avoid the thrust of the statutes by changing their procedures and tactics. They challenged the constitutionality of the statutes, they sought restrictive interpretations of key provisions, and they used legal procedures to delay results and increase the costs of seeking remedies. Franchisors were sufficiently successful to provoke franchisees to litigate and lobby again. Additional successes were met with more evasion and more challenges. And we must remember that the number of new car dealers and retail gasoline dealers in the United States has continued to decline at least since 1970.

The American legal system offers almost unlimited opportunities for opposing interests to wage a long-term war, but it is not a neutral battlefield. There is a burden of persuading a legal agency to act. It is easier to block legislation than get favorable statutes enacted. It is easier to persuade legislators to pass statutes that are largely symbolic than to enact laws with real teeth. Judges, too, avoid generating new theories and expanding old ones to cover new situations.

Moreover, legal warfare costs money. Almost always, franchisors are better able than franchisees to hire lawyers, lobbyists and expert witnesses as well as make campaign contribution to friendly legislators. Most franchisors are large corporations, some of them are the largest in the Americas if not the world. These corporations buy excellent legal services. A classic role played by the American corporate lawyer is that of saboteur of populist legislation[157]. Yet saboteurs typically only blunt the impact of legislation. Even symbolic legislation can have an indirect impact on behavior. Franchisee organizations are not without resources — all representatives in both state and federal legislatures have automobile dealers and retail gasoline dealers as constituents. If franchisor behavior is too outrageous, franchisees can use this conduct as an atrocity story in legal battles. This possibility alone may affect franchisor behavior and deter some abuses, at least when the gains from outrageous behavior are not too great.

The challenge is to see how all of these battles affect the beginning, the long-term life, and the ending of relationships between manufacturers and dealers. In Gottlieb's terms, we must look to the mediating systems of the relational order. We must see the techniques used to reconcile the informal systems and patterns of conduct with the formal requirements of the system of rules and institutions.

157 Some have claimed that corporate lawyers help enforce regulatory legislation by drafting documents and devising procedures to bring their clients into compliance with these laws. I have discussed this client control function in Macaulay, Control, Influence and Attitudes: A Comment on Nelson, 37 Stanford Law Review 553 (1985). ("Any theory about the role of the legal profession in serving social integration or any other positive function must be scaled down to fit the facts. Some lawyers play such parts, but others simply serve those who hold power — using legal argument, procedures, delay, and technicality, as tools to defeat legal ideals".) Id. at 562-563. See, also, Arkin, Be a Good Corporate Citizen: Fight the Feds, Wall Street Journal, March 13, 1990, at A18, cols. 3-6. ("Aside from the business benefits that may flow to the company, standing up to authority that is unwisely, arrogantly or selfishly exercised services a higher good"). Ibid.