

*Laura Phillips Sawyer*

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## California Fair Trade: Antitrust and the Politics of “Fairness” in U.S. Competition Policy

In the decades before World War II, U.S. antitrust law was anything but settled. Considerable pressure for antitrust revision came from the states. A perhaps unlikely leader, Edna Gleason, organized California’s retail pharmacists and coordinated trade networks to monitor and enforce Resale Price Maintenance (RPM) contracts, a system of price-fixing, then known as “fair trade.” Progressive jurists, including Louis Brandeis and institutional economist E. R. A. Seligman, supported RPM as a protection to independent proprietors. The breakdown of legal and economic consensus regarding what constituted “unfair competition” allowed businesspeople to act as intermediaries between heterodox economic thought and contested antitrust law, ultimately tailoring federal policy to accommodate state regulations.

U.S. competition policy is generally portrayed as exceptional and idiosyncratic, resulting from open-ended legislative acts and strict judicial enforcement, especially when compared to other developed countries, which lacked such laws until the second half of the twentieth century.<sup>1</sup> It reflects, we are told, Americans’ deep-seated hostility to monopoly power, which was codified in federal policy with the Sherman Antitrust Act of 1890.<sup>2</sup> The courts then enshrined a faith in marketplace

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<sup>1</sup> Tony Freyer, *Antitrust and Global Capitalism, 1930–2004* (Cambridge, U.K., 2006); William Kovacic, “Competition Policy in the European Union and the United States: Convergence or Divergence?” in *Competition Policy in the EU: Fifty Years On from the Treaty of Rome*, ed. Xavier Vives (Oxford, 2009), 314–43; William Kovacic, “The Modern Evolution of U.S. Competition Policy Norms,” *Antitrust Law Journal* 71 (Jan. 2003): 377–478.

<sup>2</sup> Sherman Antitrust Act of 1890, 26 Stat. 209.

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competition and reinforced the fear of monopoly power that became a hallmark of U.S. attitudes and regulatory impulses.<sup>3</sup> This story, however, belies the unsettled and contingent history of U.S. competition policy and neglects the variety of approaches used to regulate competitive markets.<sup>4</sup> Recent revisionist accounts in business and legal history have begun to reframe U.S. competition policy as a contested terrain of compromise and accommodation between open market competition and efforts to manage competitive practices.<sup>5</sup>

The creation of the legal category of “unfair competition” in the early twentieth century challenged the idea that the public good was best protected by market competition. Historically, rather than U.S. competition policy exclusively protecting market *competition* to achieve efficiency and low prices, state and federal policies often protected *competitors* as a means to preserve competition while producing more equitable outcomes through the democratic process. Louis Brandeis—the renowned “people’s lawyer,” crusader against “bigness,” and Supreme Court Justice—helped coin the term “fair trade” to rebrand Resale Price Maintenance (RPM) contracts, a much less palatable term.<sup>6</sup> Fair trade allowed

<sup>3</sup> William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago, 1965), 3; Hans Thorelli, *Federal Antitrust Policy: Origination of an American Tradition* (Baltimore, 1956), 609.

<sup>4</sup> On the conventional narratives of antitrust law that emphasize law and policy being “settled” in the 1910s, see Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge, U.K., 1988). Sklar interprets the law as favoring big business to the detriment of other democratic goals. See also Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York, 1978). Bork argues that the law is necessarily consumer oriented, favoring efficiency and low prices, regardless of structural implications for the economy.

<sup>5</sup> Edward J. Balleisen, “The Prospects for Effective Coregulation in the United States: A Historian’s View from the Early Twenty-First Century,” in *Government and Markets: Toward a New Theory of Regulation*, ed. Edward J. Balleisen and David A. Moss (Cambridge, Mass., 2010), 443–81; Richard John, “Robber Barons Redux: Antimonopoly Reconsidered,” *Enterprise & Society* 13, no. 1 (2012): 1–38; William Novak, “Law and the Social Control of American Capitalism,” *Emory Law Journal* 60 no. 2 (2010): 377–405; William Novak, “The Public Utility Idea and the Origins of Modern Business Regulation,” in *The Corporation and American Democracy* (Cambridge, U.K., forthcoming); Gail Radford, “From Municipal Socialism to Public Authorities: Institutional Factors in the Shaping of American Public Enterprise,” *Journal of American History* 90 (Dec. 2003): 863–90. See also Kenneth Lipartito, “The Antimonopoly Tradition,” *University of St. Thomas Law Journal* 10 (Apr. 2014): 991–1012; Richard C. Schragger, “The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940,” *Iowa Law Review* 90 (Mar. 2005): 101–84.

<sup>6</sup> Louis Brandeis, “Shall We Abandon the Policy of Competition?” *Case and Comment* (Feb. 1912): 494, and “Cut-Throat Prices—Competition that Kills,” *Harper’s Weekly*, 15 Nov. 1913, 573; *To Prevent Discrimination in Prices and to Provide For Publicity of Prices to Dealers and The Public: Hearings on H.R. 13305, Before the House Comm. on Interstate and Foreign Commerce*, 63rd Cong., 2nd sess. (1914–1915) (testimony of Louis Brandeis); Gerald Berk, *Louis D. Brandeis and the Making of Regulated Competition, 1900–1932* (Cambridge, U.K., 2005). On “associationalism,” see Ellis Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, 1966).

manufacturers to set retail price floors and require particular services for brand-name goods.<sup>7</sup> For Brandeis, fair trade meant protecting proprietary associations, which in his view were little different than labor unions or agricultural cooperatives.<sup>8</sup> The Supreme Court, however, disagreed. In 1911, it held that those arrangements fostered horizontal combinations of retailers and facilitated price-fixing—practices deemed anathema to American antitrust policy.<sup>9</sup> Historian Thomas K. McCraw sided with the Court, famously dismissing Brandeis's support for RPM contracts as naïveté generated by ignorance of basic economics.<sup>10</sup> Brandeis and proponents of fair trade, however, were concerned with more than economic efficiency. Their fight to overcome the Court's per se prohibition of RPM agreements shows how businesspeople acted both as organizational entrepreneurs and as conduits to disseminate new ideas about competition policy. Ultimately, proponents of fair trade pushed trade associations into a new role as intermediaries between citizens and the state, giving them a public regulatory purpose while also expanding the state's regulatory powers.

Historicizing the arguments for resale price-fixing does not, of course, resolve the debate over the merits of these arrangements, but rather demonstrates the historical contingency of U.S. antitrust law and its dependence on economic thought as mediated by businesspeople. Rather than being “settled” in the early twentieth century, or reflecting some timeless preference for free market competition, American competition policy has responded both to shifts in economic thought and to political activism.<sup>11</sup> Determining the competitive effects of various types of business arrangements could not be determined by an intrinsic American preference for a particular type of economic organization. Those determinations required economic reasoning and calculation by some impartial body, replacing

<sup>7</sup> The use of “fair trade” throughout the article refers specifically to how actors used it at the time, not a more generally applicable or timeless meaning.

<sup>8</sup> See *Duplex Printing Press Company v. Deering*, 254 U.S. 443 (1921), Brandeis dissent.

<sup>9</sup> *Dr. Miles Medical Company v. Park & Sons, Inc.*, 220 U.S. 373 (1911). For the case overturning *Dr. Miles* as based on outdated economics, see *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). See also Lester Telser, “Why Should Manufacturers Want Fair Trade?” *Journal of Law and Economics* 3 (Oct. 1960): 86–106; Richard Posner, “The Chicago School of Antitrust Analysis,” *University of Pennsylvania Law Review* 127, (Winter 1979): 925–48; Bork, *Antitrust Paradox*, 107–16; Kenneth Elzinga and David Mills, “Leegin and Procompetitive Resale Price Maintenance,” *Antitrust Bulletin* 55 (June 2010): 349–92; and Herbert Hovenkamp, “Leegin, the Role of Reason, and Vertical Agreement” (University of Iowa Legal Studies Research Paper No. 10–40, College of Law, University of Iowa, Iowa City, 2010). <http://ssrn.com/abstract=1673519>.

<sup>10</sup> Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, Mass., 1984). “Brandeis offered regulatory solutions grounded on a set of economic assumptions that were fundamentally wrong” (p. 84).

<sup>11</sup> See Sklar, *Corporate Reconstruction*, 106, 173.

fixed categories of market competition or regulated monopoly with new understandings of imperfect market competition. Fair trade reforms to antitrust law required the development and adoption of a new economic logic by a heterodox group of economists, known as the institutionalists, as well as on-the-ground coordination of trade associations that leveraged their political power along with the ideas of the institutionalists. Those twin developments altered the trajectory of American regulatory structure, expanding the reach of the “rule of reason” in antitrust law, which allowed greater flexibility in business organizations and regulatory frameworks. The crisis of the Great Depression precipitated a rush of experimentation in economic regulation, bringing into sharp focus competing interpretations of free versus fair competition.<sup>12</sup>

The origins of the California Fair Trade Act of 1931—later referred to as the “Little NRA” in reference to the New Deal’s National Recovery Administration (NRA)—represented the culmination of fair trade activism dating back to the 1910s. Yet California was unique: its competition law and policy openly fostered cooperative practices that the U.S. Supreme Court had declared illegal in interstate trade. The problem of federalism thus created the opportunity for organizational entrepreneurship, a task that the unlikely business leader and independent pharmacist Edna Gleason embraced. This article emphasizes the instrumental role that Gleason and her colleagues played in the passage of the California law. The first section examines the small-town origins of the California fair trade movement.<sup>13</sup> The following section demonstrates how Gleason and her colleagues transformed a populist movement into a sophisticated statewide price stabilization plan carried out by private associations, public regulators, and economic experts. The final section explores how through the 1930s nearly every state passed similar acts—even duplicating a typo in California’s original law—and those statutes survived both the Supreme Court’s evisceration of the First New Deal and President Franklin Roosevelt’s reversal of cartelization policies in the later 1930s.<sup>14</sup> Fair trade products and networks faltered under the postwar onslaught of low-cost consumerism and inflation, having thrived under

<sup>12</sup> Herbert Hovenkamp, *Opening of American Law: Neoclassical Legal Thought, 1870–1970* (New York, 2014), 206–14.

<sup>13</sup> Historical accounts of RPM have focused exclusively on national law and policy to the detriment both of local law and actors and of the contingency of economic thought. See, for example, Joseph Cornwall Palamountain, *The Politics of Distribution* (Cambridge, Mass., 1955); Thomas K. McCraw, “Competition and ‘Fair Trade’: History and Theory,” *Research in Economic History* 16, no. 1 (1996): 185–239.

<sup>14</sup> On President Roosevelt’s reversal from cartelization policies to antitrust enforcement, see Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York, 1995). For example, *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940) reaffirmed the Court’s hostility toward combinations affecting competitive prices; the Court struck down practices that had been sanctioned by the FTC less than a decade earlier.

conditions of scarcity and deflation. Nevertheless, the fair trade story demonstrates how the breakdown of legal and economic consensus regarding what constituted unfair competition allowed well-organized interest groups to facilitate greater experimentation in policy and law. Ultimately, these businesspeople acted as intermediaries between heterodox economic thought and contested antitrust law, creating a more tailored approach to industrial organization and regulation.

### Origins of California Fair Trade

The California fair trade movement really began with Edna Gleason, a self-trained and state-certified pharmacist, who in the late 1920s became known as the “mother of fair trade” (Figure 1). She owned and operated three drugstores in Stockton, California, the first of which she and her husband had opened in 1915. His death left her as the sole proprietor and manager, a task she embraced with aplomb. In a rapidly changing retail market, Gleason confronted new types of competition from chain stores and what were then known as pineboards: discount outlets that often sold overstocked brands at bargain prices. Neither of the new competitors sold prescription compounds or offered medical advice; however, the brand-name goods that they advertised at cut-rate prices presented a major threat to the traditional pharmacist’s bottom line.<sup>15</sup> This section introduces Gleason and her early efforts to organize local businesspeople in response to the retailing revolution.

In a town of roughly forty thousand inhabitants, Gleason focused on advertising her pharmacy as locally owned, community oriented, and most of all, not a chain store.<sup>16</sup> After her husband’s death she renamed her store “Tom Gleason’s” to “avoid giving out the big-chain impression.”<sup>17</sup> She also offered medical advice, delivery services, and prescription compounding—services not offered by department stores. Gleason also cultivated a reputation for providing indigent community members with medical advice and services.<sup>18</sup>

<sup>15</sup> “Gleason Taken by Death,” *Stockton Record*, 15 Mar. 1922, 3; Otis R. Tyson, “I Had to Have More Stores’ So Said Edna Gleason,” *Pacific Drug Review* [hereafter *PDR*], May 1931, n.p.; “Edna Gleason Seated by Council: Councilwoman Is Cut-Rate Foe,” *Stockton Record*, 23 Oct. 1951, 1. Unfortunately, Gleason did not leave personal papers, making it difficult to speculate on her motivations. Due to the length constraints of an article, the author has elected to reserve commentary on Gleason’s gendered role in the fair trade movement for the book manuscript from which this article has been derived. Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Networks, and the “New Competition,” 1890–1940* (Cambridge, U.K., forthcoming).

<sup>16</sup> John Moody, *Moody’s Analyses of Investments* (New York, 1920), 4:123.

<sup>17</sup> Tyson, “More Stores.”

<sup>18</sup> Alice Jean Matuszak, “Edna Gleason: Dynamite from California,” *Pharmacy in History* 40, (Jan. 1998): 85–92. The author interviewed Professor Matuszak, who had previously



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Figure 1. Edna Gleason. Photo courtesy of the University of Wisconsin Institute for the History of Pharmacy, Madison, Wisc., c. 1929.

In the 1920s, she identified three threats to the longevity of her business: chain store price competition, rising rent costs, and downtown parking problems. The latter two she countered by opening two additional stores in newer neighborhoods close to the trolley line. Price competition, however, became the centerpiece of her decades-long activism for fair trade. Already, national and regional trade associations of retail druggists published prescription formulas and recommended retail prices. In an authoritative study of U.S. drug regulation, economic historian Peter Temin has shown that very little price variance existed in compounding.<sup>19</sup> Fair trade sought to extend price controls to brand-name medicines and toiletries.

While pharmacists offered customers advice and expert prescription compounding, chain and department stores began carrying similar brand-name toiletries.<sup>20</sup> In the 1920s, the retailing revolution came of age when chains and department stores spread across America, offering

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interviewed several people who worked with Gleason. They attested to Edna Gleason providing free health care advice and products to poor members of the community. Carmen Spradley, "The Gleason House: Serving the Medical Needs of the Homeless," *San Joaquin Magazine Health and Medical Guide 2011*, 36–39, accessed 20 May 2011, [http://issuu.com/sanjoaquinmagazine/docs/medguide\\_issuu\\_final](http://issuu.com/sanjoaquinmagazine/docs/medguide_issuu_final).

<sup>19</sup> Peter Temin, *Taking Your Medicine: Drug Regulation in the United States* (Cambridge, Mass., 1980), 60.

<sup>20</sup> *Ibid.*

lower prices on a wide range of goods.<sup>21</sup> East Coast chain stores, like the Great Atlantic & Pacific Tea Co. (A&P), and department stores, like R. H. Macy's, pioneered a business model that captured profits by combining high-volume sales with lower profit margins. Most of these retailers purchased goods from a variety of manufacturers. High-throughput manufacturing revolutionized consumer products from processed foods (e.g., Campbell's Soup) to cigarettes (e.g., American Tobacco).<sup>22</sup> Taking advantage of manufacturers' economies of scale, these new retailers uprooted the existing distribution system, tilting economic power toward large-scale retailers and away from the networks of regional manufacturers, wholesalers, and local retailers.<sup>23</sup> Many manufacturers also complained that they had lost control of their brands.

Chain stores, such as Owl Drug or Walgreens, pursued retailing tactics similar to the variety grocery chains, like A&P and Ralph's Grocery Company. These firms relied on bulk wholesale purchases from either a producer or a jobber, though the latter was increasingly becoming displaced by direct sales. Historians have emphasized how the retailing revolution *created* consumer demand through extensive brand advertising campaigns and grand openings of new stores.<sup>24</sup> Certainly, chain stores captured consumers' attention, offering reduced prices on brand-name goods by increasing their volume of sales. Manufacturers and independent retailers, however, did not back down from the challenge; they contested the rise of chain stores and their discount counterparts.

For Gleason, however, chain stores were not exactly the problem. In fact, many chain stores joined the fair trade movement. Instead, she and her fellow independent retailers identified pineboards, as they were known on the West Coast, as the major threat to their livelihood. These discount outlets were sometimes chains, but not all chains were pineboards. The distinctive feature of the pineboard was its ability to offer brand-name products at prices below the manufacturers' retail network, undercutting even the chain stores. Typically, outlet stores

<sup>21</sup> Nelson Lichtenstein, *The Retail Revolution: How Wal-Mart Created a Brave New World of Business* (New York, 2009), 18–22.

<sup>22</sup> Alfred D. Chandler Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, Mass., 1977).

<sup>23</sup> Susan Strasser, *Satisfaction Guaranteed: The Making of the American Mass Market* (New York, 1989), 15–21.

<sup>24</sup> U.S. Federal Trade Commission [hereafter, FTC], *Chain Stores: Growth and Development of Chain Stores* (Washington, D.C., 1932), ix–x. Over a forty-three-year period through 1928, the FTC estimated that approximately 51,565 new chain stores were opened and 6,475 stores were acquired by chains. Acquisitions rose in the period between 1928 and 1930, bringing the percentage to 15 percent of the total. On creating consumer demand, see Roland Marchand, *Advertising the American Dream: Making Way for Modernity, 1920–1940* (Berkeley, 1985).

lowered their fixed costs by occupying low-rent commercial space on a temporary basis to test competitive waters. Outlets could also lower variable costs of labor by employing unskilled, low-wage laborers rather than trained pharmacists. Costs were further reduced as these stores required cash payments and did not offer delivery services.<sup>25</sup> Rather than offering prescription drugs requiring a registered pharmacist, these drug outlets sold more basic consumer goods. Pineboards were alleged to practice predatory pricing, or sales below cost, in an effort to force traditional retailers out of business.<sup>26</sup>

Gleason's arguments against pineboards emanated from her appeal to local control, economic independence, and self-regulation of competitive markets. In 1927, Gleason entered into her first contest with a so-called pineboard. In response to R. L. McMaster opening Kut-Price drug outlets in Fresno, Stockton, and Modesto, California, Gleason launched a campaign to coordinate Stockton's Independent Merchants' Association to open the town's first cooperatively owned discount drug-store, aptly named Bed Rock Drug Store.

By pooling local resources, Bed Rock advertised aggressively and mimicked the no-frills sales approach of Kut-Price.<sup>27</sup> The major difference, of course, was the reputation of the Independent Merchants' Association. By October, Gleason had bought out the Kut-Price store and liquidated its merchandise.<sup>28</sup> The "Stockton Plan" demonstrated the feasibility of competitors forming a market-based collaboration while preserving service competition and minimizing direct price competition.

By the end of the decade, the limits of cooperation and control through an independent cooperative had been reached in Stockton. Gleason then turned to the state association to rally retailers behind the banner of fair trade. Her activism elevated her through the ranks of the state trade association toward a new position advocating for state regulation.

<sup>25</sup> "Who's Your Competitor? What Is This New Type of Competition Commonly Called the 'Pine-Board' Store?" *PDR*, Apr. 1931, n.p.

<sup>26</sup> "Below-cost pricing" refers to selling a good below its average variable cost, which may include the cost to purchase from a manufacturer or wholesaler as well as labor costs. If done in an effort to drive competitors out of business, this is referred to as "predatory pricing." See Philip Areeda and Donald F. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," *Harvard Law Review* 88 (Feb. 1975): 697–733; Eric Rauchway, "The High Cost of Living in the Progressives' Economy," *Journal of American History* 88 (Dec. 2001): 898–924; Marc Levinson, *The Great A&P and the Struggle for Small Business in America* (New York, 2012), 136, 142, 147.

<sup>27</sup> "Beating 'Pineboards' to the Punch," *PDR*, May 1930, n.p..

<sup>28</sup> "California," *PDR*, Nov. 1930, 23.



## From Populist Organization to Progressive Regulation

As early as the 1910s, the high-volume, low-margin business model came under attack by people like Edna Gleason and her allies; their fair trade movement rendered the retailing revolution more contingent than was conventionally thought.<sup>29</sup> Over two-thirds of retail services continued to be provided by independent proprietors with low capitalization.<sup>30</sup> These independents were well coordinated, connected, and active. Despite collective action challenges to such a dispersed and diffuse group of businesspeople, and federal antitrust prohibition of price-fixing, the retail druggists—first in California—launched one of the most formidable campaigns of the early twentieth century to regulate consumer prices of ordinary goods.

Advocates of fair trade envisioned a strong state association that would publicize standardized price lists and monitor member compliance. The publication of monthly price lists would, they argued, allow businesspeople and regulators alike to monitor price changes. This approach was modeled after the U.S. National Formulary, established in 1888 by the American Pharmaceutical Association to standardize compounding formulas and their input prices.<sup>31</sup> As representatives of a profession, the pharmaceutical associations endorsed tougher regulations on prescription compounding, licensure exams, standardization of colleges of pharmacy, and ownership rules for pharmacies. As business owners, the pharmacists pushed for price schedules to create transparency in retailers' buying, marketing, and sales.

The success of the Stockton Plan brought Gleason into contact with a well-known San Francisco pharmacist and lawyer, W. Bruce Philip, who proved a natural ally. Through the 1920s, Philip led efforts by the American Pharmaceutical Association (APhA) to modernize retail management. As a professor of pharmacy at the University of California, he advocated revising curricula to better educate students on modern merchandising and cost accounting, a first step toward price transparency

<sup>29</sup> See also Tracey Deutsch, *Building a Housewife's Paradise: Gender, Politics, and American Grocery Stores in the Twentieth Century* (Chapel Hill, 2010).

<sup>30</sup> Strasser, *Satisfaction Guaranteed*, 65; Melvin Copeland, *Principles of Merchandising* (New York, 1924).

<sup>31</sup> Edward Kremers and Glenn Sonnedecker, *Kremers and Urdang's History of Pharmacy* (1940; repr., Madison, Wis., 1986), 275; Temin, *Taking Your Medicine*, 24–30. In 1906, the National Formulary (NF) was adopted by the federal government as an official document of compounding formulas. The NF was modeled after the U.S. Pharmacopeia; in 1975, the two standard-setting organizations merged. See Lee Anderson and Gregory J. Higby, *The Spirit of Voluntarism: A Legacy of Commitment and Contribution: The United States Pharmacopeia, 1820–1955* (Rockville, Md., 1995); Gregory J. Higby, ed. *One Hundred Years of the National Formulary: A Symposium* (Madison, Wis., 1989).

and standardization.<sup>32</sup> Under Philip's guidance, the APhA endorsed the federal fair trade bill, which had been stalled before the U.S. Congress for decades.<sup>33</sup>

Since the late 1890s, the Supreme Court had interpreted antitrust law as prohibiting contracts that facilitated horizontal combinations of competitors.<sup>34</sup> Despite the development of the "rule of reason" test, which allowed the Court to weigh the competitive effects of a business arrangement, the Court in 1911 strengthened its opposition to contracts that might promote horizontal cooperation, creating the *per se* prohibition of such agreements.<sup>35</sup> The Court refused to consider the intent or competitive effects of any such networks; it did, however, remain divided on how best to protect competitive markets. Rather than a strict rule, Justice Oliver Wendell Holmes Jr. believed the "rule of reason" should be applied in cases involving the cooperative standard-setting by trade associations or small proprietors. Brandeis, the "people's lawyer" who joined the Supreme Court in 1916, formulated a similar rule, which the majority implemented in 1918.<sup>36</sup> The Court remained divided between strict constructionists and liberal activists.

Brandeis actively supported the fair trade movement, arguing that antitrust should allow trade associations of independent proprietors to pool their buying, marketing, and sales power to rival chain store competitors.<sup>37</sup> In doing so, the independents mimicked many of the cost-cutting strategies of the chains while preserving the large number of competitors. Brandeis and others also favored greater regulation of unfair trade practices, which included sales below cost, secret rebates, and advertising allowances. In other words, in the view of Brandeis and other fair trade advocates, the legislature should determine the parameters of "fair competition" and the courts must investigate the particular facts relevant to the industry and the "evils believed to exist."<sup>38</sup>

<sup>32</sup> See the following by W. Bruce Philip: "Increasing Net Profits by Increasing Average Sales," *Journal of the American Pharmaceutical Association* [hereafter *JAPA*] 17 (June 1928): 576–80; "Conference of Teachers of Commercial Pharmacy," *JAPA* 17 (Oct. 1928); "The Right Side of the Show Case," *JAPA* 18 (Aug. 1929): 818–19; "A New Faculty Member," *JAPA* 19 (Apr. 1930): 388–90.

<sup>33</sup> "The Department of the National Association of Boards of Pharmacy," *JAPA* 18 (Mar. 1929): 284–89.

<sup>34</sup> *U.S. v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897), striking down a railroad combination.

<sup>35</sup> *Dr. Miles*, 220 U.S. at 373.

<sup>36</sup> *Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918), upholding private association rules affecting prices; Tony Freyer, *Regulating Big Business* (Cambridge, U.K., 1992), 112–13, 191–92.

<sup>37</sup> Gerald Berk, "Communities of Competitors: Open Price Associations and the American State, 1911–1929," *Social Science History* 20 (Dec. 1995): 380–81.

<sup>38</sup> *Chicago Board of Trade*, 246 U.S. at 238.

While federal courts embraced strict prohibitions against horizontal cooperation of businesses or laborers, California competition policy went in the opposite direction. That state fostered some of the earliest cooperative efforts of union laborers and farmers. As early as the 1860s, California labor unions and craft guilds used a union label campaign to improve their working conditions, as well as to denounce immigrant laborers, child labor, and tenement production facilities. Xenophobia animated these campaigns to a large extent.<sup>39</sup> Nonetheless, California courts enforced the sales provisions attached to the union labels. Registered collective marks spread beyond labor unions to include winemakers, farmers' cooperatives, fruit growers, and butchers throughout the state.<sup>40</sup> Farmers in the citrus and raisin industries pioneered associational techniques to control supply and distribution, using both legal and extralegal means.<sup>41</sup> Raisin growers, for example, initiated standardized grading, packaging, and shipping. They established an incorporated exchange, where crops were deposited, loans could be issued, and sales were made across the country. The farmers' "benevolent trust" also relied upon violence and intimidation to punish detractors and deter outside competitors.<sup>42</sup> In the United States, collective and certification trademark laws, which were popular throughout Europe, depended on state law and enforcement.<sup>43</sup>

When California codified its competition policy in the early twentieth century, it maintained its distinctive history. California antitrust law focused on penalizing concentrations of capital, exempting combinations of laborers, farmers, and independent proprietors from prosecution.<sup>44</sup> Moreover, the California Supreme Court established that specialty producers' minimum retail prices would be enforced despite

<sup>39</sup> John Brooks, "The Trade Union Label," *Bulletin of the Department of Labor* 15 (Washington, D.C., 1898): 197–221; Cal. Stats. (1863), 79–80, sect. 353–57; Paul Duguid, "A Case of Prejudice? The Uncertain Development of Collective and Certification Marks," *Business History Review* 86 (Summer 2012): 311–33.

<sup>40</sup> Victoria Saker Woeste, *The Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865–1945* (Chapel Hill, 1998); Charles Postel, *Populist Vision* (New York, 2007).

<sup>41</sup> Woeste, *Benevolent Trust*, 179–81.

<sup>42</sup> *Ibid.* See also Elizabeth Hoffman and Gary Libecap, "Institutional Choice and the Development of U.S. Agricultural Policies in the 1920s," *Journal of Economic History* 51 (June 1991): 397–411; and Lawrence Shepard, "Cartelization of the California-Arizona Orange Industry, 1934–1981," *Journal of Law and Economics* 29 (Apr. 1986): 83–124.

<sup>43</sup> *Report of the Commissioners Appointed to Revise the Statutes Relating to Patents, Trade and Other Marks, and Trade and Commercial Names* (Washington, D.C., 1900): 349–51, 103. The Lanham Act of 1947 granted trademark status in federal law to collective and certification marks.

<sup>44</sup> California passed the Cartwright Act in 1907; amendments in 1909 exempted laborers, marketing associations, and any agreement "the object and purpose of which is to conduct business at a reasonable profit." California Business and Professions Code (Deering's California Codes), Sect. 16700–758, 16703, 16723, 16724 (San Francisco, 1944).

contrary federal antitrust developments.<sup>45</sup> California courts insisted that associational product development and control was a legitimate protection of brand-name goodwill, retail networks, and consumers' interest in quality and safety.<sup>46</sup> According to the federal law, if a producer wanted to affect retail policies, then he must own his own retail stores (i.e., vertically integrate); however, in California, producers could make retail-sales agreements with networks of retailers, allowing each entity to remain independently owned though cooperatively managed.<sup>47</sup> Other states followed California's formulation of antitrust law by exempting farmers, laborers, and independent proprietors conducting business to maintain "reasonable prices."<sup>48</sup>

Despite the autonomy of state laws within intrastate commerce, federal antitrust jurisprudence still loomed over private actions as well as state law.<sup>49</sup> The Federal Trade Commission (FTC), for example, went after San Francisco-based Hills Brothers for price-fixing its fair trade coffee.<sup>50</sup> Hills had maintained a nationwide retailer network for its high-end vacuum-packed coffee since the early 1920s.<sup>51</sup> Trouble arose when the discount grocer Piggly Wiggly advertised Hills coffee as a loss leader, flouting its wholesale and retail contracts to maintain "reasonable prices." The FTC found that Hills's systematized record-keeping coupled with its refusal to deal with noncompliant retailers had the intended effect of fixing prices.<sup>52</sup> Moreover, the U.S. Supreme Court retained the power to invalidate all or part of the California codes, as they did in Colorado.<sup>53</sup> Thus, the problem of federal antitrust

<sup>45</sup> *Charles P. Grogan v. H. G. Chaffee*, 156 Cal. 611 (1909), upholding manufacturer-set minimum prices because of an absence of intent or power to monopolize; Ewald Grether, "Experience in California with Fair Trade Legislation Restricting Price Cutting," *California Law Review* 24 (Sept. 1936): 640–700.

<sup>46</sup> Goodwill refers to the value of the brand name and its association with quality or price. FTC, *Report on Resale Price Maintenance* (Washington, D.C., 1929), 1:45, 18; FTC, *Report on Price Maintenance* (Washington, D.C., 1931), 2:8, 10, 13; Roy Johnson, William Ingersoll, and Gilbert Montague, *The Control of Resale Prices* (Chicago, 1936), 120–36.

<sup>47</sup> Woeste, *Benevolent Trust*, 111–12.

<sup>48</sup> See *Fisher Flouring Mills Co. v. Swenson*, 76 Wash. 639 (1913); and Colo. Sess. Laws, 1913, c. 161.

<sup>49</sup> See *People v. Sacramento Butchers' Association*, 12 Cal. App. 471 (3d Dist. 1910), upholding the California antitrust act.

<sup>50</sup> *Hills Bros. v. FTC*, 9 F. 2d 481 (1926).

<sup>51</sup> Mark Pendergrast, *Uncommon Grounds: The History of Coffee and How It Transformed Our World* (New York, 2000), 150–51, 164, 217.

<sup>52</sup> *Hills Bros.*, 485. The court found that Hills's records of price-cutting discount chains constituted an effort to restrain trade, making any refusal to deal with Piggly Wiggly nearly impossible.

<sup>53</sup> *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927), striking down Colorado's "reasonable price" provision as too vague. The California Supreme Court upheld the Cartwright Antitrust Act in *Spegle v. Board of Fire Underwriters*, 29 Cal. 2d 34 (1946).

prosecutions presented a major hurdle to the expansion of associational business activity in California.

In February 1929, Gleason and Philip led efforts to coordinate a unified, statewide initiative for legislation to strengthen the “reasonable price” provisions of California law. First, they reorganized the California Pharmaceutical Association, consolidating two regional associations into a more formidable single entity.<sup>54</sup> Association dues supported monthly price bulletins and lobbying in Sacramento. The bulletins included standardized prescription compounding and pricing, uniform cost-accounting methods, and manufacturer-set fair trade price schedules.<sup>55</sup> A system of open bidding would allow firms to compare costs, prices, bids, and contracts on medicines and consumer brands. The state journal also advertised fair trade products, price lists, and locally owned retailers who agreed to abide by the standardized service policies.<sup>56</sup> In the summer, the association announced a system of monitoring to be launched.<sup>57</sup>

Initially, enforcement of the voluntary price plan operated through the pharmaceutical associations, but these efforts at partial planning required state complicity. Pharmacists pressured manufacturers to advertise and enforce fair trade sales contracts that set price schedules and service guarantees. Retailers then policed one another, to maintain price levels and service agreements, and reported detractors to their local association and the manufacturer. Manufacturers were then to pressure pineboards and department stores to abide by those same sales contracts or they would be blacklisted, though keeping or publishing such a list was against federal law.<sup>58</sup> Lacking much enforcement power, the committee needed state enforcement, which was uncertain given that most drugs and toiletries traveled across states lines into California.

The California Pharmaceutical Association’s 1930 meeting demonstrated the limitations to self-regulatory price stabilization plans. Edna Gleason took center stage.<sup>59</sup> L. N. Brunswig, president of Brunswig Drugs, allegedly dumped unsold products to cut-rate retail outlets. He acknowledged that his wholesale company sold items to cut-rate

<sup>54</sup> “California United,” *PDR*, Feb. 1929, 13.

<sup>55</sup> The *PDR* published a ten-part series, called “Prescription Pricing,” throughout 1930.

<sup>56</sup> “Armand Defends Sales Policy,” *PDR*, May 1929, 106; G. L. Sorenson, “Profit and Success in Independence,” *PDR*, Mar. 1930, n.p.; McKesson & Robbins advertisement, “Write to Your Congressman,” *PDR*, Apr. 1930, n.p.; “Los Angeles and Southern California: Cut Prices and Cut Profits,” *PDR*, May 1930, 120; E. J. Clary, “Right Competition Is a Stimulant,” *PDR*, Aug. 1929, 20.

<sup>57</sup> “Convention of the California Ph. A.,” *PDR*, July 1929, 36–42, 39.

<sup>58</sup> *Hills Bros*.

<sup>59</sup> “California A. Ph. A. Convention,” *PDR*, July 1930, 22.

dealers in Stockton and Fresno. Gleason, who “apparently [came] to the convention determined to open up this question and have it thoroughly discussed,” accused Brunswick of misrepresentation and predatory practices. Brunswick denied the accusation, but Gleason’s fellow Fair Trade Committee members defended her allegations.<sup>60</sup> It was men like Brunswick, they believed, who threatened the network and had caused recent falling prices. Heated discussion revealed that discount pineboard chain stores in southern California had traveled to Chicago and New York to circumvent jobbers and wholesalers who required fair trade contracts.<sup>61</sup>

As a result of both continued price deflation and the “most vitriolic [meeting] on record,” the California Fair Trade Committee focused on legislation to make mandatory its codes of fair competition.<sup>62</sup> The association also began to address ways in which the FTC’s trade-practice conferences and ongoing chain-store investigation might aid their cause.<sup>63</sup> With the onset of the Great Depression and the momentum against big businesses, a number of chain drugstores and out-of-state producers began publicly advocating for codes of fair competition.<sup>64</sup> (An effective countermobilization had yet to arise, excluding the federal-level lobbying by department store Macy’s and litigation against RPM contracts.)

The FTC’s trade-practice conferences, begun in 1926, illustrated both the possibilities and the legal limitations of association efforts to manage competition. These conferences brought together businesses within a single industry to voluntarily coordinate information on production, orders and bids, distribution costs and services, and prices.<sup>65</sup> FTC commissioners presided over these meetings and approved association “submittals” that circumvented Department of Justice antitrust prosecutions, but the FTC failed to reach internal consensus. In 1929, the FTC issued a report that called for greater administrative oversight of competitive practices while also questioning the stabilization effects of such rules.<sup>66</sup> Nevertheless, the information shared at trade-practice

<sup>60</sup> “Relieved Druggists Forget Program in Cut-Price Up roar Chain-Store,” *Los Angeles Times*, 26 June 1930, 12.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*; “California Appoints Fair Trade Committee,” *PDR*, Nov. 1930, 25.

<sup>63</sup> “Trade Ethics,” *PDR*, May 1930, 16–17. Congress ordered the FTC to conduct a study of chain stores and their relation to independent proprietors in addition to a study of public utilities. The results of the chain store investigation were released in two parts: The first, in 1931, advocated for experiments in RPM under FTC oversight. The second, in 1933, stated that RPM was not workable and instead endorsed uniform prohibitions on loss limitation provisions and codes of fair competition outlawing, for example, sales below cost.

<sup>64</sup> “The Winds Change,” *PDR*, May 1930, 13.

<sup>65</sup> FTC, *Annual Report of the Federal Trade Commission* (Washington, D.C., 1927), 186–94.

<sup>66</sup> FTC, *Report on Open-Price Trade Associations* (Washington, D.C., 1929), xxi, 78–79.

conferences provided a blueprint for trade associations to institute standardization guidelines and codes of fair competition, addressing sales below cost and price lists.<sup>67</sup>

Although the Supreme Court continued to limit the FTC's authority to define unfair competition, the appointment of Harlan Fiske Stone to the bench bolstered Brandeis's cause.<sup>68</sup> Shortly after Stone's appointment, the Court extended Brandeis's previous "rule of reason" decision, applying it to a hardwood lumber association.<sup>69</sup> In both administrative procedure and legal precedent, new avenues were opening up for price stabilization plans.<sup>70</sup>

The confluence of falling retail prices, growing associational power, and increasingly permissive competition policy attracted neophytes prominent in business, law, and economics.<sup>71</sup> In July 1930, for example, Lehn & Fink, manufacturers of Lysol, the first brand-name disinfectant in the U.S. market, joined the fair trade bandwagon.<sup>72</sup> Company president Edward Plaut announced a "comprehensive campaign designed to induce the public to trade only at those retail stores where fair retail prices prevail and to encourage the retail druggists of the country to maintain fair trade retail prices."<sup>73</sup> Advertisements flooded the *Saturday Evening Post* and *Collier's* women's magazine. After traveling to Europe, Plaut believed that European competition policy might provide a model for the United States.<sup>74</sup> As the chairman of the New York Board of Trade, he commissioned two economists to study price maintenance policies. Professors Edwin R. A. Seligman of Columbia University and Robert Love of City College of New York

<sup>67</sup> See FTC, *Millwork Industry*, Trade Practice Conference [hereinafter TPC] (Washington, D.C., 1928), 140, 143 [circulation of price lists], 143 [later rescinded].

<sup>68</sup> *FTC v. Gratz*, 253 U.S. 421 (1920), limiting FTC power to determine what constituted unfair practices; *American Column Co. v. U.S.*, 257 U.S. 377 (1921), striking down trade association information-sharing practices on costs and prices as intent to fix prices; *FTC v. Raladam Co.*, 283 U.S. 643 (1931), limiting the FTC to proscribe only conduct directly related to competitive practices. The Wheeler-Lea Act of 1938 later extended the reach of FTC jurisdiction to "unfair and deceptive practices." Freyer, *Regulating Big Business*, 112–13, 175–78, 192–94, 218–23.

<sup>69</sup> *Maple Flooring Manufacturers' Association v. U.S.*, 268 U.S. 563 (1925), upholding association information sharing on prices and output.

<sup>70</sup> "Sherman Act Conspiracy Theory in Resale Price Maintenance Cases," *University of Chicago Law Review* 30 (Summer 1963): 766–83.

<sup>71</sup> "Price War Wages Merrily," *PDR*, July 1930, 20.

<sup>72</sup> "Lehn & Fink to Undertake Fair-Price Campaign," *PDR*, July 1930, 64; for brief description of the company, see Lehn & Fink Products Co., Lehman Brothers Collection, Baker Library, Harvard Business School. [http://www.library.hbs.edu/hc/lehman/company.html?company=lehn\\_fink\\_products\\_co](http://www.library.hbs.edu/hc/lehman/company.html?company=lehn_fink_products_co).

<sup>73</sup> *Ibid.*

<sup>74</sup> "Europe Has Met Price Cutting," *PDR*, Nov. 1930, 20; "NARD to Consider Philip Survey," *PDR*, Apr. 1931, n.p.; H. S. Noel, "Pacific Drug Review Survey Excites Comment from Easterner," *PDR*, Apr. 1931, n.p.

released their study in 1932; they recommended strengthening the right of refusal to sell, expanding the FTC trade practice conferences, and formalizing federal oversight through legislation.<sup>75</sup> At the time, Columbia's economics department housed some of the most vociferous proponents of "institutional economics"—a progressive school of economics that supported managing competition through public-private partnerships. The institutionalists rejected neoclassical economists' models of perfect competition and instead argued that market imperfections required empirical study and regulatory interventions.<sup>76</sup>

Carl Weeks, president of the Armand Company, testified before the FTC in favor of national fair trade legislation. Weeks hired Charles Wesley Dunn, who had defended Colgate's and Beechnut Packing Company's price protection plans, to write Armand's fair trade contracts.<sup>77</sup> Dunn, who also served as counsel to the American Pharmaceutical Manufacturers' Association, proposed that the FTC be given the regulatory power to determine "unfair trade practices," using uniform pricing data collected by associations.<sup>78</sup> E. R. Squibb & Sons also joined the campaign.<sup>79</sup> Curtis Beach, the staff economist at the California Pharmaceutical Association, suggested that the printing industry's success in standardizing uniform cost-accounting methods could act as a model for pharmacists.<sup>80</sup> Columbia economics professor Paul Olsen instructed the association to gather the necessary cost and pricing information to demonstrate its need for legislation to permit and enforce uniform accounting standards.<sup>81</sup>

The Fair Trade Committee, in 1931, sought a remedy to what they believed was an information problem caused by inaccurate cost accounting at the firm level and insufficient coordination statewide. The committee announced plans to partner with the Census Bureau for a drug distribution survey covering the Pacific slope states: California, Washington, Oregon, and Utah. Problems arose immediately.<sup>82</sup> Gleason argued that the survey failed to differentiate among types of stores or locations. Only in a handful of cities did survey participants and local

<sup>75</sup> Edwin R. A. Seligman and Robert Love, *Price-Cutting and Price Maintenance: A Digest* (pamphlet, n.d.) and *Price Cutting and Price Maintenance: A Study in Economics* (New York, 1932), 479–84.

<sup>76</sup> Malcolm Rutherford, "Understanding Institutional Economics: 1918–1929," *Journal of the History of Economic Thought* 22 (Sept. 2000): 277–308, 290.

<sup>77</sup> "Volunteer Fighters," *PDR*, June 1930, n.p.

<sup>78</sup> Front matter on Capper-Kelly bill, *PDR*, Jan. 1931, 1.

<sup>79</sup> R. D. Keim, "The Economics of Price Standardization," *PDR*, Aug. 1930, 19.

<sup>80</sup> Curtis L. Beach, "What Price Prescriptions?" *PDR*, Mar. 1931, 18–20.

<sup>81</sup> "News of the Associations," *PDR*, Nov. 1930, 84.

<sup>82</sup> F. C. Felter, "Drug Distribution Census," *PDR*, Apr. 1931, n.p.



administrators compare medicinal products and prices across various categories of drugstores.<sup>83</sup>

Gleason and Philip organized their own statewide survey, which reached over 1,200 California druggists and cataloged manufacturer and retailer prices on over one hundred trademarked goods and compounded prescriptions.<sup>84</sup> On the latter, prices varied little among pharmacists in urban and rural areas. On trademarked goods, pharmacists were asked to identify competition they felt in their local area, namely, from department stores and pineboards. The survey cataloged falling prices, sales, and employment in independent drugstores. It also encouraged druggists to write in their complaints against special advertising allowances, quantity discounts, and rebates given to large retailers in their survey responses or to send them in a letter directly to their representatives.<sup>85</sup> What the druggists needed to demonstrate to the legislature was that independent proprietors were being denied the ability to earn a reasonable profit. The survey identified trade practices found to “generate and perpetuate predatory price cutting” that diminished independents’ market share.<sup>86</sup> It suggested that prices and the submittal process led to easier monitoring of outlet sales. Finally, the state association asked that each firm submit a written notice to both the California general assembly and the National Association of Retail Druggists (NARD) “stating the firm’s position in respect to the [federal] bill” before Congress.<sup>87</sup> Its report argued that sales below cost, secret rebates, and advertising allowances generated price wars that exacerbated deflation and unemployment, especially for independent proprietors who were less likely to have reserve capital or to be able to switch product lines easily.<sup>88</sup>

While the NARD continued to pursue a type of self-regulation akin to price-fixing, the Californians had done something slightly different. Gleason, Philip, and their association of pharmacists lobbied the state legislature to expand its police powers, in a time of economic emergency, over ordinary businesses trying to maintain reasonable profits. What they wanted was the setting of minimum price provisions by manufacturers, with feedback from retailers, a vertical restraint permissible by law. Moreover, the Board of Pharmacy would review and approve the codes generated through trade association deliberation. This regulatory

<sup>83</sup> *Ibid.*

<sup>84</sup> “Philip Survey,” *PDR*, Apr. 1931, 10.

<sup>85</sup> *Ibid.*, 1.

<sup>86</sup> “Criticism Requested,” *PDR*, July 1931, n.p.

<sup>87</sup> “Philip Survey,” 11; “Philip Survey ‘Goes National,’” *PDR*, Oct. 1931, 11. Seventeen state pharmaceutical associations issued similar surveys.

<sup>88</sup> “The Seligman Price Survey,” *PDR*, Dec. 1931, 18, 30.

beachhead transformed the initial self-regulation movement and led to a different trajectory in the early 1930s.

Their efforts to reorganize the state association, collect complaints, and publish price statistics and feedback proved fruitful. In the summer of 1931, the state legislature passed the Fair Trade Act.<sup>89</sup> Gleason later recalled her experience of conducting the survey with Philip and presenting the results to the assembly: "I left my store one day with only a toothbrush for baggage. I didn't get back for six weeks. I talked to druggists and grocers in every county in the state. And they talked to their legislators. . . . We got the law!"<sup>90</sup> Unfortunately, the legislature held closed sessions; still, the bill has been widely regarded as the result of the pharmacists' lobbying.<sup>91</sup> The California Fair Trade Act of 1931 replicated national proposals that exempted fair trade agreements from antitrust prosecution; however, it relied on state police powers over intrastate trade.<sup>92</sup> "Articles which are trade-marked and which are competitive with articles of a similar nature, if manufactured in California, may be price-protected in that state through contracts between the local producer and local distributors."<sup>93</sup> Further, consumer goods "in fair and open competition with commodities of the same general class" could be controlled by price contracts, stipulating that "the buyer will not resell such commodity except at the price stipulated by the vendor."<sup>94</sup> The independents had secured a bill that they believed would eliminate unfair methods of competition.

The Fair Trade Act attracted businesses to California.<sup>95</sup> The Miles Medical Company, for example, announced that it "now has established a branch in California to test the legality of the Junior Capper-Kelly bill."<sup>96</sup> Albert Beardsley, president of the Miles Medical Company, reported that his staff sent out over four thousand contracts to jobbers and retailers requesting their participation in the Miles price stabilization plan. Increasingly, companies began to advertise in trade journals and newspapers, endorsing fair trade agreements and protective

<sup>89</sup> Eugene C. Brokmeyer, "News from the Nation's Capital," *PDR*, July 1931, 54.

<sup>90</sup> Stuart Nixon, "Hawkins' Challenge of Fair Trade starts 'Rumble' from 'Mother' of Act," *Stockton Record*, 23 Feb. 1950, 21, 36.

<sup>91</sup> National Recovery Administration [hereafter, NRA], *Work Materials, No. 17: Tentative Outlines and Summaries of Studies in Progress* (Washington, D.C., 1935), 374–75.

<sup>92</sup> Amendment to the "Unfair Competition Act," *Cal. Stats.* 1913, at 508–510; Brokmeyer, "News from the Nation's Capital," 54.

<sup>93</sup> "Interstate or Intrastate?" *PDR*, Aug. 1931, 10–11.

<sup>94</sup> "California's Capper-Kelly Bill," *PDR*, July 1931, n.p.; *Cal. Stats.* 1931, p. 583.

<sup>95</sup> "Miles Incorporates California Company," *PDR*, Nov. 1931, 13–14; "Majority Sentiment Favors Resale Price Maintenance," *PDR*, Nov. 1931, 76.

<sup>96</sup> "Southern California Elections," *PDR*, Jan. 1932, n.p.

legislation.<sup>97</sup> The Miles California Company, a new subsidiary of the Miles Co., reported overwhelming cooperation but anticipated that it would wind up in court to enforce the agreements.<sup>98</sup> Indeed, by the following summer, the company had sued two well-known cut-rate retailers, the Sontag Drug Co. and Thrifty drugstores, and settled out of court.<sup>99</sup> The constitutionality of the act was not questioned.

### California Fair Trade, Unfair Practices, and the “Little NRA”

The California fair trade law expanded state police powers to regulate retail prices through private trade associations coupled with public regulatory oversight; this public-private approach to managing price competition came to exemplify Depression-era regulation. President Roosevelt, who entered office on March 4, 1933, attempted to institute similar regulation at the federal level; however, without a federal police power, the regulation of industrial and consumer prices fell under the auspices of national commerce power. The federal government had the power to regulate interstate commerce, but intrastate businesses would be untouched by Roosevelt’s regulations.<sup>100</sup> This made state cooperation with federal code authorities imperative. The 1930s reframed what constituted reasonable regulation of prices at the state and federal levels.

Continued price deflation, business closures, and unemployment through the early 1930s had galvanized both antimonopoly sentiment against large-scale corporations and demands for managed competition.<sup>101</sup> By 1933, prices had fallen by 20 percent, manufacturing output had declined by a third since 1929, and unemployment had reached 25 percent. Many workers had their hours cut and wages reduced. The pharmacists were not alone in seeking aid to manage markets. Across the states in the early 1930s, legislatures created administrative boards under emergency conditions to control competitive practices, wages, and retail prices on an industry-by-industry basis.

Roosevelt’s advisers were steeped in the antimonopoly tradition and institutionalist economics.<sup>102</sup> Attempting to maintain a certain level of

<sup>97</sup> “Operating Entirely within the Law,” *PDR*, Dec. 1931, n.p.

<sup>98</sup> “Price Protection Plans Progress,” *PDR*, Mar. 1932, n.p.

<sup>99</sup> “Malicious Merchandising,” *PDR*, June 1932, 22. Richard W. Longstreth, *The Drive-In, the Supermarket, and the Transformation of Commercial Space in Los Angeles* (Cambridge, Mass., 1999), 166; “To Operate under Fair Trade Act,” *PDR*, March 1933, n.p.

<sup>100</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918), striking down a national child labor law as a regulation of intrastate trade. This case stood in contradistinction to *Champion v. Ames*, 188 U.S. 321 (1905), upholding the commerce power as plenary.

<sup>101</sup> “Liggett Is Bankrupt,” *PDR*, May 1933, 16; NRA, *Work Materials No. 17*, 376–77.

<sup>102</sup> Raymond Moley, *Seven Years After* (New York, 1939), 5.

fiscal conservatism, the First New Deal instituted “partnership in planning” between government and “organized private industry” under the National Industrial Recovery Act (NIRA).<sup>103</sup> Regulators at the NRA extended the model of the FTC trade practice conferences to set mandatory codes of fair competition, intended to cease price deflation through mitigating oversupply and controlling retail prices.<sup>104</sup>

Several states responded, California being foremost among them. In 1933, California enacted two laws to strengthen its codes of fair competition and to extend them to other industries.<sup>105</sup> An amendment to the Fair Trade Act extended fixed prices beyond those parties to the original contract. It also permitted *anyone*, not solely the manufacturer that set the minimum resale price schedule, to bring suit against alleged price-cutters.<sup>106</sup> Secondly, California passed a statute incorporating the NRA codes of fair competition into state law. Where federal codes did not exist, the California law allowed code-making authority in intrastate commerce.<sup>107</sup> Other states suspended their antitrust laws; in each of those states, the codes of fair competition approved by the NRA carried the weight of state police powers.<sup>108</sup> California’s codes of fair competition included maximum working hours, minimum wages, and prohibitions on secret rebates and discounts.<sup>109</sup> The state’s Board of Pharmacy became the oversight body to approve codes; however, the courts retained adjudication power.

The NRA Code of Fair Competition for the Retail Trade did not legalize resale price-fixing per se and, ultimately, the drug trade wanted

<sup>103</sup> Franklin D. Roosevelt continued, “these [antitrust] laws were never intended to encourage the kind of unfair competition that results in long hours, starvation wages and overproduction.” Franklin D. Roosevelt, “Second Fireside Chat,” 7 May 1933. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucs.edu/ws/?pid=14636>.

<sup>104</sup> National Industrial Recovery Act (Pub. L. 73–90, 48 Stat. 195, enacted 16 June 1933); Hawley, *The New Deal*, 31–32, 37, 44.

<sup>105</sup> For example, “Building Executives Confer on Code for Recovery Act Plans,” *California Highways and Public Works* 11 (July–Aug. 1933): 20.

<sup>106</sup> Cal. Stats. 1933, at 793.

<sup>107</sup> *Ibid.*, c. 1029. Other states enacted similar laws: Ohio, Utah Laws (2d spec. sess. 1933), c. 21; New Jersey Laws 1933, c. 372; Wisconsin Laws 1933, c. 476; New York Laws 1933, c. 781; Colorado Laws (2d sec. sess. 1933–34), c. 17; New Mexico Laws 1934, c. 18; South Carolina Laws 1934, No. 1213; Virginia Laws 91st spec. sess. 1933), c. 61; Washington Laws (1st spec. sess. 1933), c. 50; West Virginia laws (2d spec. sess. 1933), c. 86; Wyoming Laws (spec. sess. 1933), c. 16.

<sup>108</sup> Kansas Laws (spec. sess. 1933), c. 78; Mississippi Laws 1934, c. 207; Texas laws (1st spec. sess. 1933), c. 53.

<sup>109</sup> “Tentative Code of Fair Competition Adopted; Edna Gleason Elected to Presidency,” *PDR*, July 1933, 20–21; “NARD Code of Fair Competition,” *PDR*, Oct. 1933, 17, 30; “NRA Writes Retail Drug Code,” *PDR*, Oct. 1933, 22–23; “Code of Fair Competition for the Retail Trade,” *PDR*, Nov. 1933, n.p.

stronger codes, not their repeal.<sup>110</sup> The provisions were largely procedural, prohibiting loss leaders, advertisements for cut-rate goods, and sales below cost.<sup>111</sup> Otherwise, though, all other demands of the California druggists and their national counterparts had been met, including an exemption from antitrust regulation.<sup>112</sup> Charles Walgreen, owner of the chain drugstores of that name, helped establish the Drug Institute of America (DIA), which worked with the NRA to publicize and monitor codes of fair competition.<sup>113</sup> Carl Weeks toured major cities campaigning for local associations to join the DIA.<sup>114</sup> Trade association leaders, the president of the U.S. Chamber of Commerce, Henry Harriman, and former FTC chairman Nelson Gaskill praised the NRA for rationalizing and managing competition through partnership.<sup>115</sup>

Although some members of the Supreme Court had encouraged such regulatory reforms to antitrust law, *United States v. Schechter* (1935) invalidated the law on two grounds.<sup>116</sup> The Court held that commerce powers did not extend to purely intrastate traffic and, moreover, that the delegation of legislative powers to the executive was unconstitutional. The ruling, however, did not consider the concerns of consumer welfare advocates who charged the codes with raising consumer prices; instead, the Court focused on determining the constitutional parameters under which the federal government could intervene to effect competitive practices and prices.

The Court dismantled the NIRA, yet the passage of state and federal codes of fair competition that outlawed “predatory price cutting” remained within *state* police powers.<sup>117</sup> The Court’s approval of state police powers to control competitive practices and price outcomes for ordinary goods and services was nothing less than a constitutional

<sup>110</sup> NRA, *Code of Fair Competition for the Retail Drug Industry* (Washington, D.C., 1933). The exception was the NRA’s *Code of Fair Competition for the Petroleum Industry* (Washington, D.C., 1933), art. 5, rule 26. See Lewis Mayer, *A Handbook of NRA: Laws, Regulations, Interpretations, Codes*, 2nd ed. (Washington, D.C., 1934), sect. 364.

<sup>111</sup> NRA, *Code of Fair Competition in the Retail Trade* (Washington, D.C., 1933), art. 7–9, sect. 1. The prohibition of sales below cost was strengthened on 29 Mar. 1934, by art. 8, sect. 6, which prohibited sales below the manufacturer’s wholesale list price per dozen items.

<sup>112</sup> 15 U.S. Codes Supplement VII, sect. 705 (1933).

<sup>113</sup> “Drug Institute of America, Inc.,” *Druggist Circular* 79 (1935): iv. See also Ronald Hamowy, *Government and Public Health in America* (Northampton, Mass., 2008), 154.

<sup>114</sup> “Drug Institute Leader in City,” *Spokane Daily Chronicle*, 2 June 1933, 3.

<sup>115</sup> Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York, 2013), 229–30.

<sup>116</sup> “To decide it wisely, it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles.” Justice Louis Brandeis, *Boston Store v. American Gramophone Co.*, 246 U.S. 8, at 27–28 (1918); *Schechter Poultry Co. v. U.S.*, 295 U.S. 495 (1935).

<sup>117</sup> See “Developments in the Law—Unfair Competition,” *Harvard Law Review* 46 (May 1933): 1171–95.

revolution, which would also affect labor standards, wage legislation, and consumer prices.<sup>118</sup> The year prior to the *Schechter* decision, the Court had upheld a New York state law that fixed milk prices for farmers, dealers, and retailers.<sup>119</sup> In *Nebbia v. New York*, Justice Owen Roberts, writing for the majority, held that the state had exercised legitimate police powers by intervening in *private* markets when the regular laws of supply and demand had failed to clear markets. Oversupply had exacerbated falling prices, forcing sales below production costs. Roberts appealed to both economic and moralistic reasoning: “Unfair and destructive trade practices in the distribution of milk [led] to demoralization of prices,” and “unrestricted competition [had been] found to be an inadequate protection to consumer interest.”<sup>120</sup> Such “economic maladjustments” had made state intervention into private markets necessary to protect the public welfare.<sup>121</sup> Justice James McReynolds and the rest of the old guard dissented. They called the Milk Control Board illegitimate, because it regulated ordinary, private businesses and constituted “management control” of markets.<sup>122</sup>

Not only was the *Nebbia* ruling crucial to extending police power regulations over minimum wages and maximum hours, it also proved critical to upholding the “little NRAs” of states. The *Nebbia* ruling has predominantly been used to demonstrate the expansion of state police powers, which influenced national efforts to expand the regulatory powers of the administrative state. However, *Nebbia* relied on antimonopoly jurisprudence that protected competitors rather than the competitive market. In February 1936, the California Supreme Court upheld the Fair Trade Acts, quoting extensively from the *Nebbia* decision.<sup>123</sup> In this case, a Beverly Hills retailer advertised and sold Max Factor products at prices below what the company stipulated in its sales contracts. The “chiseler,” Clarence Kunsman, threatened the distribution network between Max Factor, a Delaware corporation, and Sales Builder, its California distributor. The California Supreme Court held that the Fair Trade Acts legitimately prohibited Kunsman’s business methods, which demoralized trade and diminished the goodwill established in the Max Factor brand.

Previously, judicial review had focused on whether fair trade agreements violated antitrust rules; by the mid-1930s, state laws had shifted the Supreme Court’s focus to the issues of legislative power and

<sup>118</sup> Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York, 1998), 7, 78–91.

<sup>119</sup> *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>120</sup> *Ibid.*, at 518, 538.

<sup>121</sup> *Ibid.*, at 538, 503.

<sup>122</sup> *Ibid.*, at 537, 554.

<sup>123</sup> *Max Factor & Co. and Sales Builders, Inc. v. Kunsman*, 5 Cal. 2d 446 at 455–57 (1936). The U.S. Supreme Court denied cert.

economic reasoning.<sup>124</sup> The *Nebbia* ruling had shattered the Court's traditional distinction between "businesses affected with the public interest," which could be subject to price regulations, and purely private business, which could not.<sup>125</sup> After 1934, any business could be worthy of protection from unreasonable competition. While the state fair trade laws aimed to correct price-cutting that was deemed predatory, the laws were also clearly designed to restrict the benefits of economies of scale achieved by chain and department stores—Gleason's original intent. Thus, the real end, much as in the *Nebbia* case, was to protect small independent dealers by ensuring a fair profit margin. As Congress considered a national fair trade law, in the mid-1930s, reports regarding consumer welfare were mixed.<sup>126</sup> Critically, adverse reports did not challenge the legitimacy of the state's police power to enact such laws.

What began in antitrust—protecting competitors for the sake of competitive markets—spread to other economic regulatory domains. The voluminous state laws passed to protect small and independent proprietors altered federal-level strategies for proponents of both fair trade and managed markets more generally.<sup>127</sup> The NARD and the National Wholesale Drug Association (NWDA) altered their lobbying strategy by seeking a federal law that would enable fair trade contracts in interstate trade between fair trade states.<sup>128</sup> Building on this momentum in the states, congressmen advanced bills to protect small proprietors. Despite President Roosevelt's objections to legislation that mimicked certain provisions of the unpopular and unconstitutional NIRA, two bills were passed that institutionalized the fair trade vision for competition. First, the Robinson-Patman Act (1938), commonly criticized as a convoluted law, prohibited sales below cost and secret rebates.<sup>129</sup> Second, the Miller-Tydings Act (1937) made fair trade contracts enforceable in interstate commerce when made between fair trade states.<sup>130</sup>

<sup>124</sup> "Fair Trade Legislation," *Harvard Law Review* 49 (Mar. 1936): 811–21; John Barker Waite, "Public Policy and Personal Opinion," *Michigan Law Review* 19 (Jan. 1921): 265–82.

<sup>125</sup> Cushman, *Rethinking the New Deal Court*; Gustavus Robinson, "The Public Utility Concept in American Law," *Harvard Law Review* 41 (Jan. 1928): 277–308; Breck McAllister, "Lord Hale and Business Affected with a Public Interest," *Harvard Law Review* 43 (Mar. 1930): 759–91.

<sup>126</sup> "Legislation," *Columbia Law Review* 36 (Feb. 1936): 293–96. In 1931, the FTC opposed resale price agreements with government supervision as unworkable; however, FTC commissioners remained divided on the issue. See FTC, *Report on Resale Price Maintenance*, 2:1–6.

<sup>127</sup> *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527 (1931).

<sup>128</sup> S. 3518 and S. 3822, 74th Cong., 2d Sess. (1936).

<sup>129</sup> Robinson-Patman Act or Anti-Price Discrimination Act (Pub. L. No. 74–692, 49 Stat. 1526, 1936). Nancy Beck Young, *Wright Patman: Populism, Liberalism, and the American Dream* (Dallas, 2000), 73–104.

<sup>130</sup> Miller-Tydings Act (Pub. L. 314, 75th Cong., 1st Sess., 17 Aug 1937).

Lacking an administrative apparatus such as the NRA, a tight social movement—to maintain publicity, monitoring, and policing through the distribution chain—became all the more important. The druggists launched national publicity campaigns against department stores, ramping up pressure on fair trade manufacturers.<sup>131</sup> In the post-NRA New Deal era, however, department and chain stores organized against fair trade. Macy's led lobbying and litigation efforts attacking liberalized antitrust laws and police power regulations that enabled fair trade. Only a few months after the *Nebbia* decision national business leaders formed the American Liberty League to oppose the New Deal.<sup>132</sup> But for the druggists, the National Retail Federation and the National Retail Dry Goods Association proved most formidable. Those associations published journals, such as *Chain Store Age*, that taught chain store buying, marketing, and retailing practices. Macy's publicized its private brands, for instance, as a cheaper alternative to fair trade goods. Advertisements decried the entire fair trade program as anti-consumer and sought to take back the meaning of market fairness.<sup>133</sup> Although fair trade networks persisted into the post-World War II era, they depended on private distribution networks, persuasive advertising, and consumer support. Fair trade and the economics of imperfect competition also came under attack in the academy.<sup>134</sup> The University of Chicago's Free Market Study Group attacked and discredited the progressive populism of the Robinson-Patman Act, arguing that such laws were anticonsumer, anti-big business, and anti-free market.<sup>135</sup> Consumers, through organized protest and individual purchasing choices, seemed to agree.<sup>136</sup>

<sup>131</sup> Nixon, "Hawkins' Challenge," 36.

<sup>132</sup> Frederick Rudolph, "The American Liberty League, 1934-1940," *American Historical Review* 56 (Oct. 1950): 19-33.

<sup>133</sup> On low price consumer activism, see Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton, 2005).

<sup>134</sup> Hovenkamp, *Opening of American Law*, 211-19.

<sup>135</sup> Aaron Director and Edward Levi, "Law and the Future: Trade Regulation," *Northwestern University Law Review* 51, no. 2 (1956): 281-96; Robert Van Horn and Philip Mirowski, "The Rise of the Chicago School of Economics and the Birth of Neoliberalism," in *The Road from Mont Pelerin*, ed. Philip Mirowski and Dieter Plehwe (Cambridge, Mass., 2009). Today, the Chicago School of Law and Economics supports private RPM agreements as a permissible vertical restraint.

<sup>136</sup> Jacobs, *Pocketbook Politics*. On the end of experimentation in antitrust policy and law, see Brinkley, *The End of Reform*; and Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York, 1955).



## Conclusion

Despite its waning popularity in the latter half of the twentieth century, the fair trade movement significantly contributed to the changing structure of American regulation during its formative period. The California fair trade law provided one path toward regulating consumer markets, through the state's police powers, that remained consistent with the Supreme Court's "rule of reason" jurisprudence. Rather than self-regulating business associations or top-down administrative rules, a public-private system of coregulation emerged. This new regulatory system fostered standard setting, monitoring, and enforcement—multiple regulatory goals that fit within the reasonableness of the California fair trade laws.

The hallmark of U.S. competition policy has been the protection of a competitive marketplace; however, legal categories regarding what constitutes legitimate competition have not remained fixed. Antitrust law did not act as an exogenous force on business firms and organizations; instead, businesspeople demonstrated the malleability of U.S. competition policies over time. The fair trade story demonstrates how businesspeople were able to exploit the legal ambiguities of antitrust and federalism, promote the progressive economics of regulated competition, and leverage the political power of local elites to significantly alter state and national law. Ultimately, the druggists helped reorder competition policy to allow retail price-fixing—what had once been anathema to antitrust law.

Business law regarding combinations of competitors, therefore, has proved to be more unsettled and contingent than conventional history suggests. Reframing this historical understanding calls attention to the multifaceted demands placed on competition policy. On the one hand, U.S. antitrust law prohibits anticompetitive behavior and monopolization in order to protect market competition and guarantee market efficiencies derived therefrom. According to this consumer welfare argument, the means of market competition provide the ends of lowest consumer prices. On the other hand, protecting competition is also thought to require a robust number of competitors; that threshold depends not only on the industry but also on one's historical context. The goal of low or reasonable prices, thus, combines with the historically contingent economic and political goals of protecting competitors. In either scenario, protecting competition provides the means to particular goals: low prices or decentralized economic power. As policymakers and jurists try to balance these tensions within antitrust and state police powers, businesspeople often act as intermediaries of economic ideas through both litigation and lobbying. The history of capitalism too

often belies the variety of organizational forms that the U.S. adversarial system not only showcases but often accommodates. The logic of regulatory strategies in this case responded to the institutional environment and operating frameworks of firms and their associations.

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LAURA PHILLIPS SAWYER is an assistant professor at Harvard Business School in the Business, Government, and International Economy Unit. She received her PhD in history from the University of Virginia. She has held the Newcomen Fellowship at Harvard Business School and a postdoctoral fellowship at Brown University's Political Theory Project.