



The Economics and Ideology of American Fair Trade: Louis Brandeis and Open Price Associations, 1911-1919

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In the first decades of the twentieth century, a widespread trend emerged in the Western world that questioned the basic assumption of classical economic theory, that economic competition fostered the common good. Propelled by the First World War and the rise of “institutionalist” economics, leading American scholars and public intellectuals initiated a movement for “new competition” that embraced inter-firm cooperation to stabilize and standardize market processes and prices. This experiment in “managed competition” allowed trade association combinations to determine prices, allocate markets, and facilitate ongoing consultation among members. The American Fair Trade League (AFTL), one of the most prominent and persistent supporters of the “new competition,” advocated the liberalization of antitrust laws to promote inter-firm cooperation, rather than consolidation, and to foster market stability by eliminating “cut-throat competition” and “over-production.” The “institutionalist” school provided necessary fodder for the AFTL and other trade organizations by explaining the viable, if not preferable, alternatives to pure market competition. The influence of this intellectual movement in economics and management has been largely excluded from the secondary literature explaining interwar competition policy.

In 1912, Louis Brandeis helped form the American Fair Trade League (AFTL), along with Charles Ingersoll, a New Jersey watchmaker, and New York University law professor Gilbert Montague. They envisioned the League coordinating the litigation and lobbying of numerous independent

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manufacturer and retailer associations; they prioritized antitrust reform to allow open price associations to systematize industry standards on price, services, and industry production standards. The movement began in response to the U.S. Supreme Court's "literalist" interpretation of the Sherman Antitrust Act of 1890. Attempting to apply this law consistently across all business categories, by 1911 the Court came to interpret the law as a prohibition against *any* explicit price-fixing contracts.¹ This "literalist" interpretation of antitrust policy threatened existing business networks that coordinated prices, output, and distribution through trade associations in specialty markets such as brand name therapeutics, hardware, lumber, furniture, jewelry, groceries, electronics, and toiletries.²

In *Dr. Miles v. Park & Sons* (1911), the Court created the *per se* prohibition of resale price maintenance contracts, arguably to protect free market competition. In this case, an infamous cut-rate retailer, John D. Park, refused to abide by price and service contracts that Dr. Franklin Miles affixed to his tonics and elixirs.³ The "Dr. Miles Price Plan" represented an industry-wide effort to stabilize drug prices and develop brand name reliability; however, the Court struck down the effort as blatant price-fixing.⁴ Although many business and legal historians have interpreted the Supreme Court's decision as encouraging corporate consolidation rather than industry cooperation, the fair trade movement to reform antitrust law demonstrates the unsettled nature of U.S. competi-

¹ *Dr. Miles v. Park & Sons, Inc.*, 220 U.S. 373 (1911). The Court created the *per se* prohibition of any sales contracts that stipulated retail prices.

² Rudolph J. R. Peritz, *Competition Policy in America, 1888-1992: History, Rhetoric, and Law* (New York, 1996), 26, 52-57.

³ Park used the Dr. Miles products as "loss leader" advertisements that undercut other retailers selling Dr. Miles brands. A "loss leader" is a kind of pricing strategy whereby a retailer advertises a brand name good for a clearly below-cost price in order to entice the consumer to enter the store. The pernicious interpretation of "predatory pricing" holds that the retailer would then either switch the brand name good with a lesser quality generic (called "bait and switch") or raise the price on other complementary goods sold. See: Meg Jacobs, *Pocketbook Politics: Economic Citizenship in the Twentieth Century* (Princeton, N.J., 2005); Milton Friedman and Anna Schwartz, *A Monetary History of the United States, 1867-1960* (Princeton, N.J., 1963), 89-134; Eric Rauchway, "The High Cost of Living in the Progressives' Economy," *Journal of American History* 88 (Dec. 2001): 898-924.

⁴ Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Boston, 1991). Hovenkamp emphasizes the relationship between law and economic theory, particularly in industrial regulation. The passage of the Sherman Antitrust Act of 1890 shifted antitrust from multiple state common law jurisdictions toward a national standard of fair trade applied to large and small traders alike.

tion policy.⁵ (In fact, these agreements remain in specialty retail markets today.⁶)

This essay explains how and why a sophisticated group of public intellectuals supported the fair trade movement and managed to legitimize a new form of fair trade agreements before the U.S. Supreme Court. Though the Court did not overturn *Dr. Miles*, by 1919 the AFTL secured judicial approval of open price plans that set retail price schedules by manufacturers. Indeed, a combination of organizational strength initiated by the AFTL and furthered by the Chamber of Commerce of the United States and given legitimacy by the burgeoning “institutionalist” movement in economics revitalized an older form of fair trade that proponents labeled “new competition.”

One of the most well known, but perhaps least understood, supporters of the American fair trade movement was Louis Brandeis. Historians have long been puzzled by his encouragement of the American Fair Trade League and resale price maintenance policies.⁷ How could a “trust-buster” support initiatives that allowed competitors to collude to share industry information on production methods, output, and costs? Of course, the “Brandeis Brief” relied on expert testimony from sociologists, economists, and social reformers in order to demonstrate the failures of *laissez faire* to produce an equitable distribution of the benefits of the second industrial revolution. Brandeis believed that economic regulation negotiated through

⁵ Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (New York, 1988). Sklar argues that the Court’s interpretation of the Sherman Antitrust Act favored vertically integrated firms and that the passage of the FTC and subsequent rulings on the Commission’s administrative powers left American competition policy largely settled. This essay borrows more from Olivier Zunz’s work, which emphasizes the transformation of middle-class salaried professionals and their influence on competition policy. See: Olivier Zunz, *Making America Corporate, 1870-1920* (Chicago, 1990).

⁶ *Leegin Creative Leather Products, Inc. v. PSKS, Inc. (Kay’s Kloset . . . Kay’s Shoes)*, 551 U.S. 877 (2007). This case upheld a resale price maintenance agreement on Leegin specialty leather goods against Kay’s Kloset, which used the goods for loss-leader advertising. The U.S. Supreme Court overruled *Dr. Miles Medical Co. v. Park & Sons, Inc.* (1911), which had prohibited these contracts under antitrust law.

⁷ 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”: 84. While Brandeis might not have been the clearest economic theoretician, his economic thinking borrowed from and helped further “institutionalist” economics, which rejected the *laissez faire* policy prescriptions of neo-classical economics. After all, they argued, economic efficiency does not always determine optimal structural or social outcomes. See: Mark Granovetter, “The Impact of Social Structure on Economic Outcomes,” *Journal of Economic Perspectives* 19 (Winter 2005): 33-50.

trade groups and enforced by the state could structure economic transactions in such a way as to halt business cycles of over-production and level the playing field among all competitors. He harnessed these resources to help form the American Fair Trade League and craft their litigation and lobbying strategies.

The conventional narrative of American fair trade and especially Brandeis' role in it depicts the movement as naïve, backward, and somewhat hypocritical.⁸ These nostalgic apologists failed to see the writing on the wall—modern American chain stores, selling high volumes at low prices, could not be stopped. The small proprietors thus yearned for a bygone era. Their time of local, economic decentralization had passed, and centralized mass production promised abundant low-cost consumer goods for the future. Their effort to seize the regulatory state to protect their decentralized economic and political preferences demonstrated the lengths to which these proprietors would go to preserve their diminishing market share, their threatened livelihood. They joined national organizations and sought federal legislation in futile attempts to negate direct price competition.

No doubt the American political economy was transformed during the early twentieth century, yet competing visions of modernization persisted.⁹ Although fair trade proponents sought to use the regulatory state to protect their diminishing market share, their proposals remained wedded to voluntary contractual arrangements between distribution points, and they were intended to revive their businesses.¹⁰ Their politics of distribution thus maintained an older associational model of business organization carried over from the second half of the nineteenth century.¹¹

⁸ Ellis Hawley, *The New Deal and the Problem of Monopoly* (Princeton, N.J., 1966), 108-9; McCraw, *Prophets of Regulation*, 283-303.

⁹ Philip Scranton, *Endless Novelty: Specialty Production and American Industrialization, 1865-1925* (Princeton, N.J., 1997); Scranton, "Diversity in Diversity: Flexible Production and American Industrialization, 1880-1930," *Business History Review* 65 (Spring 1991) 27-90; Charles Sabel and Jonathan Zeitlin, eds., *World of Possibilities: Flexibility and Mass Production in Western Industrialization* (New York, 1996); Gerald Berk and Marc Schneiberg, "Varieties in Capitalism, Varieties of Association: Collaborative Learning in American Industry, 1900 to 1925," *Politics and Society* 33 (March 2005): 46-87.

¹⁰ Richard Schragger, "The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940," *Iowa Law Review* 90 (March 2005): 101-84. "Anti-chain store advocates argued on behalf of an aggressive regulatory state, the purpose of which was to distribute widely economic and political power in the service of an economically-based citizenship": 106. He shows that the anti-chain store movement capitalized on rhetoric of localism in order to raise taxes on chain stores and preserve proprietors' ability to self-govern, as the communitarian philosopher Michael Sandel has romanticized in his work.

¹¹ Zunz, *Making America Corporate*, 18-30. Zunz describes the traditional business networks of small producers and proprietors in the late nineteenth

Even though in the 1930s many small proprietors encouraged anti-chain store restrictions, such as hefty taxes, the fair trade groups studied in this essay do not appear to have supported the use of regulation to assign or police retail prices. The fair traders wanted *exemption* from antitrust prosecution in order to enforce their traditional, associational price-setting contracts through trade association monitoring, education, and the courts if necessary.

On the one hand, the fair traders appealed to older notions of economic citizenship grounded in local communities rather than mass consumption at rock bottom prices. They succeeded by cloaking their traditional, associational business practices in localist ideology and consumer protection and thereby appealed to a broad cross-section of the American public as well as to professionals, academics, and jurists.¹² On the other hand, they seized upon new administrative agencies' capacity to oversee and approve trade association rule-making and an emergent strand of heterodox economics that questioned free market competition. Ultimately, these organizational entrepreneurs reshaped antitrust to reflect their preference for associational learning and policy-making.

Along with Brandeis, Arthur Jerome Eddy, author of *The New Competition* (1912), helped popularize the academic study of information-sharing on prices, costs, and production methods among manufacturers and retailers.¹³ Eddy argued that cooperative capitalism could function through binding trade association agreements that might help mitigate extreme price competition that led to "ruinous competition," in which prices chronically do not cover costs.¹⁴ Both men envisioned cooperatives of independent proprietors acting as a viable alternative to discount department stores and homogenous mass consumerism. Together, they reconfigured trade associations from competition-suppressing cartels into developmental associations devoted to "collaborative learning," as a

century. He combines social, business, and cultural history to investigate the culture of corporations and corporate hegemony in the Progressive Era as created by mid-level bureaucratic managers. My work here adds another layer to this business and social history by arguing that a certain level of heterogeneity persisted in the form of fair trade localism and quality consumption.

¹² Chapter 4 of the dissertation studies the fair trade movement in California and explores the appeal to consumers through local and traditional marketing devices, playing down the new economic theory and ideas about regulated competition.

¹³ Arthur Jerome Eddy, *The New Competition: An Examination of the Conditions Underlying the Radical Change That Is Taking Place in the Commercial and Industrial World—The Change Taking Place from a Competitive to a Cooperative Basis* (Chicago, 1917).

¹⁴ Mark Tadajewski, "Competition, Cooperation, and Open Price Associations: Relationship Marketing and Arthur Jerome Eddy," *Journal of Historical Research in Marketing* 1, no. 1 (2009): 122-43.

leading Brandeis scholar has recently phrased it.¹⁵ Thus, the fair trade movement went beyond the call for truth in advertising and prohibition of loss leaders and secret rebates; the movement encapsulated a widespread demand for data collection and information-sharing to stabilize prices and production. Ultimately, these were tools for macro-economic stabilization, albeit before the term existed.

This vision of progressivism espoused by Brandeis and Eddy informed Herbert Hoover's management strategies during World War I and later his administrative policies as Secretary of Commerce in the 1920s.¹⁶ A joint venture in private self-regulation by industrial associations coupled with public oversight and coordination emerged as a viable alternative to economic concentration. Like Brandeis, Hoover struggled to reconcile his distrust of "big government" with his task of managing wartime food production and distribution. Ultimately, the War Industries Board, which managed the domestic economy, employed voluntary trade associations to coordinate industry standards of production, service, and prices. After the war, Hoover promoted a new socioeconomic order by insisting that this technocratic vision of managed competition could be administered through federal agencies such as the Department of Commerce and the Federal Trade Commission (FTC).¹⁷ In the 1920s, Hoover's work in the Commerce Department helped popularize the practices of cooperative competition and encouraged fair trade revisions to U.S. antitrust law.¹⁸

These developments created room for managed competition, fitting in between the U.S. Supreme Court's binary categories of either free market competition or regulated monopoly. Fair traders called for management of the price system in order to control supply and demand, but that required bottom-up business information-sharing and cooperation. Private interests were forced to cooperate with public regulators in order to identify and enforce regulated prices. This middle way confounded the Court's insistence on a binary classification of antitrust law. Judges were not well equipped to distinguish competitive from monopolistic business practices, which proved necessary to determining how best to safeguard the public interest. By the early 1920s, however, "institutionalist"

¹⁵ Gerald Berk, *Louis Brandeis and the Making of Regulated Competition, 1900-1932* (New York, 2009), 20. Berk explains that these "developmental associations" employed a "heterarchy" organizational scheme, and collaborative information-sharing took the form of benchmarking, uniform cost accounting, and inter-firm deliberation.

¹⁶ Ellis Hawley, "Herbert Hoover, the Commerce Secretariat, and the Vision of an 'Associative State,' 1921-1928," *Journal of American History* 61 (June 1974): 116-40, 117.

¹⁷ William J. Barber, *From New Era to New Deal: Herbert Hoover, the Economists, and American Economic Policy, 1921-1933* (New York, 1985).

¹⁸ *United States v. Colgate & Co.*, 250 U. S. 300 (1919) enforced the Colgate sales contracts that in effect established resale prices by threat of refusal to deal with retailers who sold at lower prices.

economics had established the necessary rigor and autonomy to successfully defend collaborative associations of manufacturers or retailers. Brandeis and Eddy helped engineer this movement in economic regulation. Their work signaled a new era of managed competition arbitrated by trade groups, monitored by the Federal Trade Commission, and subject to judicial review. Ultimately, these socially embedded trade groups steered the American anti-monopoly tradition toward managed competition policies, rather than toward pure free market competition.

Brandeis believed that equity could be restored to the marketplace while both challenging monopoly market power and maintaining a decentralized “business commonwealth” supported by regulatory agencies. In 1913, Brandeis published an article in *Harper’s Weekly*. “Cut-Throat Prices—Competition that Kills” praised Justice Holmes’ “forward looking” dissent in the *Dr. Miles* case.¹⁹ Brandeis argued that “The process of exterminating the small independent retailer already hard pressed by capitalistic combinations—the mail-order houses, existing chains of stores, and the large department stores—would be greatly accelerated” by the continuation of the literalist Court interpretation of antitrust.²⁰ He pleaded, “Shall we, under the guise of protecting competition, further foster monopoly by creating immunity for the price-cutters?”²¹ Rather than accept the Court’s reliance on classical economic categories of perfect competition and natural monopoly, Brandeis suggested a third way. He proposed that a bureaucratic regulatory agency be established with the goal of reconciling competing aims of populist equality with progressive scientific administration. This “managed competition” would foster collaboration among peak businesses, professionals, and trade associations in order to “steer a diverse economy away from destructive competition while maintaining product diversity, innovation, and productivity.”²² The agency would foster efficient competition through collecting and disseminating vital industrial statistics while providing oversight of trade practices.

Brandeis insisted that the judiciary was not well equipped to distinguish between competition and monopoly, and especially not the vast grey area in between. As a result, the development of antitrust at common law depended heavily upon political, legal, and, increasingly, economic analyses offered by litigants. Neoclassical economics dominated mainstream law and economics in the academe and, though not entirely *laissez faire*, this approach doubted the efficacy of government intervention and opposed the Sherman Antitrust Act.²³ While they saw the

¹⁹ Louis Brandeis, “Cut-Throat Prices—Competition That Kills,” *Harper’s Weekly* (15 Nov. 1913), 573.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Berk, *Louis Brandeis and the Making of Regulated Competition*, 27-28.

²³ Anne Mayhew, “How American Economists Learned to Love the Sherman Antitrust Act,” *History of Political Economy* 30 (Supplement 1998): 179-201.

growth of the large-scale corporation as a necessary, if not inevitable, development of industrial society, they feared that not all corporate trusts sprang from legitimate channels. Economist Henry Carter Adams explained that the railroads constituted a natural consolidation, whereas recent trusts in manufacturing emerged from abnormal economic and juridical conditions that artificially favored some sectors above others.²⁴

Similarly, a growing contingent in economics questioned the deductive assumptions used in neoclassical models of perfect competition, existing income distribution, and human rationality. This group of dissenters, who became known as “institutionalist” economists, argued that economic institutions, habits, and norms changed over time through human design. Policymakers, therefore, should pay close attention to the divergence of market values (prices) from social values.²⁵ Like Brandeis, the institutionalists believed that empirical sciences could be harnessed by government-sponsored agencies—if reformed and refined—to foster economic progress, equity, and harmony.²⁶

The main tenets of “new competition” held that contracts were social, that effects of free market competition were ambiguous, and that economic organization and behavior could be steered by government and civil society to foster productive competition.²⁷ The AFTL exemplified these principles; however, Brandeis worked to extend this idea to the Federal Trade Commission as well as to the Chamber of Commerce of the United States, a non-governmental organization of business people. Both organizations were imbued with Brandeis’ idea of regulated competition, though both also maintained contingent factions within their ranks. Working within the Chamber of Commerce, key AFTL leaders encouraged the study of antitrust reform and insisted that fair trade networks receive the attention and support of Chamber members. By soliciting the help of academics as well as business groups, the Chamber helped develop the new discipline of “institutionalist” economics, which would prove instrumental to the legal defense for the AFTL vision of fair competition.

Mayhew argues that “the approval of the act was a product of the 1930s and that it developed as a consequence of several issues that arose during that troubled decade.”

²⁴ Henry Rand Hatfield, “The Chicago Trust Conference,” *Journal of Political Economy* 8 (Dec. 1899): 1-18, 6. According to Mayhew, the Chicago conference was organized by the Civic Confederation; Hatfield’s article describes the paper presented at this conference. Hatfield states that Adams described a trust as “any combination so big as to be menacing.” *Ibid.*, 5.

²⁵ Yuval P. Yonay, *The Struggle Over the Soul of Economics: Institutional and Neoclassical Economists in America between the Wars* (Princeton, N.J., 1998), 52.

²⁶ Yonay, *Struggle over the Soul of Economics*, 46.

²⁷ Berk, *Louis Brandeis and the Making of Regulated Competition*, 51.

Propelled by experiments in managed capitalism during World War I and the emergence of “institutional economics” in leading universities, American scholars and public intellectuals initiated a movement for “new competition” that embraced inter-firm cooperation to stabilize and standardize market processes and prices.²⁸ These experiments in “managed competition” encouraged trade associations to standardize information-sharing procedures regarding accounting practices, production methods, and output levels. They also facilitated ongoing deliberation among members to improve service and quality standards of brand name goods.

The U.S. antitrust tradition banned collusion among competing firms and other ‘unfair’ business practices, but did not limit “the growth of companies that exploited economies of scale and scope to deliver products more efficiently than rivals.”²⁹ European firms, on the other hand, cooperated in cartels and set price and allocated markets, often with the support of the government. “By setting minimum prices, [associations] protected small firms against larger competitors, and by stabilizing markets, they kept the overall economy stable,” which was exactly what the Chamber resolved during their 1918 reconstruction meeting.³⁰ In yet another resolution, the Chamber made two pleas to Congress. First, to pass the Webb-Pomerane bill, which would permit “competitors to coordinate and cooperate in the development of foreign business.”³¹ The Chamber also wanted to reform domestic antitrust policy to permit combinations found “to prevent destructive competition, to prevent the

²⁸ Malcolm Rutherford, “Understanding Institutional Economics: 1918-1929,” *Journal of the History of Economic Thought* 22, no. 3 (2000): 277-308. Rutherford explains that the conventional history of the institutionalist movement in the early twentieth century portrays the movement as disjointed and incoherent; however, Rutherford and other revisionists have recently written against this interpretation. The revisionist economic historians argue that “institutionalism was associated with a particular research agenda that must, at the time, have seemed full of promise and excitement.” *Ibid.*, 278. The movement began with Thorstein Veblen’s critique of modern capitalism and continued through the work of Wesley Mitchell, John Commons, Walton Hamilton, and John Maurice Clark. During the interwar years, as later chapters in my dissertation show, several of the leading institutionalist economists worked with the AFTL as well as the FTC and other federal administrative agencies to shape competition policy.

²⁹ Wyatt Wells, *Antitrust and the Formation of the Postwar World* (New York, 2002), 1. Wells demonstrates that in 1938 leaders in the Antitrust Division of the U.S. Department of Justice attempted to impose their ideal of antitrust (that is, decartelization) on the rest of the world, particularly Germany and Japan. He explains the rise of international cartels in the post-World War I era.

³⁰ Wells, *Antitrust and the Formation of the Postwar World*, 2.

³¹ Resolution: “Industrial Cooperation,” Chamber of Commerce Records, acc. no. 1960, box 8 (3-6 Dec. 1918), 366, Hagley Museum and Library, Wilmington, Del.

sale of goods below cost, to protect the consumer from extortion; to permit industries to cooperate in eliminating needless waste.”³²

In early 1919, the U.S. Supreme Court heard its first fair trade case in the postwar atmosphere, which involved the Colgate-Palmolive Company’s toiletries distribution.³³ The *Colgate* ruling allowed voluntary cooperation on price schedules between a manufacturer and retailers, which the *Dr. Miles* case had prohibited in explicit contracts. The second concession made to supporters of resale price maintenance involved the “right to refuse to sell.” Justice James McReynolds, writing for the majority, stated:

In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.³⁴

McReynolds’ decision echoed the Holmes dissent from 1911 and incorporated the right of refusal to sell as the basis for firms to enforce price schedules.

Conclusion

The proponents of “managed competition”—such as Brandeis, several FTC administrators, trade associations, and the cost accountants—wanted to subject trade practice conferences and trade associations to standards of “process, power, and performance” rather than to the Supreme Court’s existing categorical binary of free competition or regulated monopoly.³⁵ Brandeis and the institutionalists conceptualized market competition as a historical process with ambiguous outcomes that affected the distribution of power and economic performance. The fair trade movement sought to eliminate predatory competition and thereby improve products and product distribution. They stressed that “ruinous competition” did not result from technological change or rational human self-interest; rather, insufficient accounting procedures had caused over-valued volume and over-production that encouraged loss leader advertising. The trade practice conferences and cooperative networks were intended to solve the historical problems of free competition. Although the AFTL did not win explicit federal legislation, by 1920 it had gained significant judicial and administrative approval.

³² Resolution No 9: “Industrial Combinations,” *ibid.*, 445. This resolution came from the clearance committee and passed the general assembly of the Chamber.

³³ *U. S. v. Colgate Co.* (250 U. S. 300, 1919).

³⁴ *U.S. v. Colgate Co.*, 300.

³⁵ Berk, *Louis Brandeis and the Making of Regulated Competition*, 229.