Introduction

American Competition

Trade Associations, Codes of Fair Competition, and State Building

> As for the ethical side, there is no cure but in an increasing scorn of unfair play, an increasing sense that a thing won by breaking the rules of the game is not worth the winning. When the business man who fights to secure special privileges, to crowd his competitor off the track by other than fair competitive methods, receives the same summary disdainful ostracism by his fellows that the doctor or lawyer who is "unprofessional," the athlete who abuses the rules, receives, we shall have gone a long way toward making commerce a fit pursuit for our young men.
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> – Ida M. Tarbell, *History of the Standard Oil Company* (1904)

Writing in popular magazines at the turn of the nineteenth century, Ida Tarbell, a famous investigative journalist, biographer, and "muckraker" (according to President Theodore Roosevelt), challenged one of America's most cherished Gilded Age myths – that of the self-made man and the free enterprise system. Her exposé of John D. Rockefeller's business tactics focused on his manipulation of railroad rates to capture market share in oil refining and distribution and his use of predatory pricing to temporarily drive market prices below his competitors' costs. Independent refiners decried Standard Oil's abuse of market power, believing that "the railways were bound as public carrier to give equal rates; that any combination which favoured one firm or one locality at the expense of another was unjust and illegal."[1] Tarbell prescribed a remedy of "free and equal transportation privileges" for the oil industry, as well as more rigorous

[1] Ida M. Tarbell, *The History of the Standard Oil Company* (New York, 1904), 1: 101. Tarbell's writing on Rockefeller and Standard Oil first appeared in *McClure's* magazine before being published as a book.

antimonopoly investigations and prosecutions in general.[2] While acknowledging that there was much to praise in Rockefeller and his business empire, Tarbell wrote that ultimately, "religious emotions and sentiments of charity, propriety, and self-denial seem to have taken the place in him of notions of justice and regard for the rights of others."[3] For Tarbell, justice required free and open market competition guaranteed by state oversight to guard against abuses by dominant firms.

As Tarbell and many others noted, by the late nineteenth century, the growth of large-scale industrial and financial corporations, along with rising income inequality, seemed to belie the liberal-democratic tradition that had promised some level of rough equality and entrepreneurship. Antimonopoly sentiment had previously expressed hostility to the special privileges that government conferred to individuals or corporations for private gain. By the 1880s, however, new concerns arose that hegemonic concentrations of market power – even those achieved without state-conferred special privileges – facilitated undue economic and political influence. Common law on competition policy had developed over the course of the century to govern proprietary capitalism – largely personal exchanges involving sales and employment contracts within confined geographies. These rules governing marketplace exchanges relied upon a presumption of equality that no longer appeared consonant with a changing economic reality. Although states exercised considerable authority over corporations chartered within their borders, a coordination problem arose as businesses and commerce increasingly traversed state lines. The older regulatory order broke down as states competed to attract corporations and their tax dollars. Displaced or marginalized farmers, workers, and independent proprietors protested the wealth accumulated by the very few and demanded legislative intervention. Harnessing this antimonopoly sentiment unleashed a new era of market regulation that was intended to restore market competition through a combination of stronger state and federal laws as well as private trade association rules.

American Fair Trade focuses on the development of antimonopoly law and economics from the late nineteenth century through the New Deal era. It shows how groups of independent proprietors, first in manufacturing and later in retailing, crafted an antimonopoly movement to create codes of fair competition whose purpose was to reshape industrial corporate capitalism. These business owners included drug makers, druggists, printers,

[2] Ibid., 2: 292. [3] Ibid., 1: 102.

stationers, booksellers, electronics manufacturers, specialty producers of brand-name foodstuffs, grocers, and distillers. As a result of this movement, the notion of fair competition transformed from a populist concern for community and individual rights into a progressive preference for bureaucratic organization and administrative oversight. By coordinating industry-specific trade associations and the U.S. Chamber of Commerce, a formidable group of businesspeople, lawyers, and legislators orchestrated a legal and economic movement to liberalize antitrust laws. Through the 1920s, they simultaneously facilitated a new regulatory agenda that empowered both federal administrative agencies and private trade associations to manage market competition. *American Fair Trade* investigates the contested political and legal meanings of *fair competition* and reveals how the development of the administrative state occurred in tandem with the empowerment of business associations to shape the rules of modern American capitalism.

While a great deal of scholarly attention has followed Tarbell's lead and focused on political and legal efforts to either break apart or regulate large industrial firms, another agenda was also afoot: to empower independent proprietors to manage competitive markets. The predominant historical narrative of American capitalism has focused too narrowly on the ascent of corporate capitalism, as characterized by centralized markets, managerial hierarchies, adversarial relationships with the state, and limited regulation. That narrative fails to account for the diversity of approaches that private organizations, public administrative agencies, and heterodox economists pursued – approaches that promoted new techniques to manage competitive markets. Initially, the Supreme Court treated efforts by trade associations to manage trade practices through their distribution networks as attempts at cartelization and therefore found their agreements unenforceable. Eventually, however, changes in public policy empowered administrative agencies to collaborate with trade associations in industry-wide deliberation, rule making, and enforcement processes. By the late New Deal era, the combination of private associations and public regulatory agencies created a largely unseen regulatory regime that subsumed the antimonopoly tradition. The institutional development of the modern American regulatory state – particularly its configuration of public and private governance over so-called ordinary trades – accommodated forms of proprietary capitalism alongside the new industrial order of corporate capitalism. In fact, the struggle over the meaning of *fair competition* helps explain the rise of the modern regulatory state as an embodiment of the symbiotic relationship

between trade associations and administrative agencies, such as the Department of Commerce and the Federal Trade Commission.

Reexamining the history of American capitalism with an emphasis on public–private regulatory structures reveals a more expansive regulatory state than scholars have previously acknowledged. This regulatory state contained alternative models of *corporate liberalism* that at times prescribed solutions to destructive competition while also eliciting new forms of cooperation between government and business. At the onset of the Great Depression, many leading businesspeople, bureaucrats, and academics believed that these partnerships could bring about a new system of economic planning. The breakdown in that cooperation in the mid-1930s signaled a divisive shift in business–government relations, wherein the federal government embraced Keynesian fiscal stimulus, experts in administrative agencies meted out antimonopoly prosecutions, and large-scale corporate capitalists found representation in government departments. The shift left little room for the pro-competitive arguments made by proprietary capitalists – arguments that seemed increasingly antiquated to consumers and regulators alike. Nevertheless, the preceding fair trade movement had lasting effects on the development of state police powers, bureaucratic capacity, and antitrust policy, not to mention private trade associations.

THE AMERICAN ANTIMONOPOLY MOVEMENT AND THE RISE OF ANTITRUST LAW

The history of American price regulations provides a framework for evaluating the rules, expectations, and practices that characterized distinct eras in the history of capitalism more generally. The legal doctrines governing older, eighteenth-century customary ideas of fair exchange and substantive justice had gradually given way to nineteenth-century market-based, transactional notions of fairness. What became known as laissez-faire liberalism – in which a fair price was determined by the trade bargain struck between individual dealers and set out in a written contract – overtook those older customs of equitable exchanges.[4] Political economists from Adam Smith to Alfred Marshall helped legitimize free

[4] Bernard Bailyn, "The Apologia of Robert Keayne," *William and Mary Quarterly* 7 (Oct. 1950): 568–87; Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA, 1977), 181–3, 201–2. Horwitz explains that the influence of Adam Smith and the Scottish Enlightenment also encouraged the movement away from the eighteenth-century customary ideas of natural justice and fair exchange and toward "the

market exchanges as the actualization of individual choice and the prerequisite for competitive markets. Undoubtedly, these ideas were not without their detractors; nevertheless, the market-based notions of fairness characterized the era. In contract law, for example, the doctrine of *caveat emptor* (buyer beware) replaced older protections for consumers, and principles of equity no longer extended to labor contracts.[5] In business law, states facilitated an ever-greater number of market transactions by passing general incorporation laws that reduced the privileges and responsibilities that special charters of incorporation had previously conferred.[6] These laws democratized and deregulated the corporation; by the 1850s anyone could form a limited liability corporation.[7] The nineteenth century was by no means strictly laissez-faire – after all, common law rules of competition, state corporate laws, and police powers abounded.[8] Nevertheless, in the post–Civil War "liberty of contract" era, marketplace

will theory of contracts," whereby private contracts could circumvent common law or statutory obligations (192).

[5] Laura Phillips Sawyer, "Contested Meanings of Freedom: Workingmen's Wages and the Company Store System, *Godcharles v. Wigeman*, 1886," *Journal of the Gilded Age and Progressive Era* **12** (July 2013): 285–319; Christopher L. Tomlins and Andrew J. King, *Labor Law in America: Historical and Critical Essays* (Baltimore, MD, 1992); William E. Forbath, "The Shaping of the American Labor Movement," *Harvard Law Review* **102** (Apr. 1989): 1109–256.

[6] Horwitz, *Transformations*, 254–5; Herbert Hovenkamp, *Enterprise and American Law, 1836–1937* (Cambridge, MA, 1991), 41; Lawrence Friedman, *A History of American Law*, 3rd ed. (New York, 2005), 390–1.

[7] Connecticut passed the first general incorporation law in 1837, and many states followed suit during the 1840s and early 1850s. See George Evans, *Business Incorporations in the United States, 1800–1943* (New York, 1948), 11; Willard Hurst, *The Legitimacy of the Business Corporation in the Laws of the United States, 1780–1970* (Charlottesville, VA, 1970), 30; Henry N. Butler, "Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges," *The Journal of Legal Studies* **14** (Jan. 1985): 129–66. For a critique of the functional demand for general incorporation laws, see Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* **36** (Jan. 1984): 57–71.

[8] On state and federal rules shaping the American political economy, see William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, NC, 1996); Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge, 2009). Novak and Balogh built on the post–World War II "commonwealth studies" in business and political history, which emphasized the influence of government policies over economic development. See Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776–1860* (Chicago, IL, 1968); Oscar Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861*, rev. ed. (Cambridge, MA, 1987); Harry N. Scheiber, "The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts," in *Law in American History*, eds. Donald Fleming and Bernard Bailyn (Boston, 1971), 329–402.

transactions came to symbolize the rough, formal, legal equality of individuals – despite inequalities in market power among those individuals.

In the closing decades of the nineteenth century, the political economy of resource allocation shifted again. The rise of large-scale, vertically integrated corporations and corporate finance revolutionized capitalism by introducing new managerial and organizational techniques designed to coordinate production and distribution more efficiently, with greater scale and scope. Managerial capitalism seemed to be replacing proprietary capitalism – but how the governing structures of liberalism would be reformed remained contested.[9] The growing market power of these vertically integrated corporations displaced many small, traditional enterprises and eroded the autonomy of independent proprietors and farmers.[10] Some of these changes resulted from the expansion of firms forward or backward into retailing or raw materials production, while others occurred through mergers and combinations.

In the 1880s Americans largely conflated these various paths to corporate consolidation. They focused on bigness, deriding corporate consolidations under the moniker *monopoly* and holding it in opposition to a bygone era of free and open competition, whether real or imagined.[11] Political cartoons, for example, depicted Standard Oil as an octopus set

[9] Alfred Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA, 1977), 1–3, 5–8; Alfred D. Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, MA, 1990), 593–4. Chandler pioneered the field of managerial capitalism by studying the growth of the top corporations throughout American history. He has been criticized for embracing an organizational determinism – arguing, for example, that managers in manufacturing firms recognized either the necessity or the improved efficiency of vertical integration into marketing or sales. For a critique that emphasizes the persistence of batch and bundle production methods, see Philip Scranton, review of *Scale and Scope*, in *Technology and Culture* 32 (Oct. 1991): 1102–4; Philip Scranton, "Diversity in Diversity: Flexible Production and American Industrialization, 1880–1930," *Business History Review* **65** (spring 1991): 27–90; Philip Scranton, "Small Business, Family Firms, and Batch Production: Three Axes for Development in American Business History," *Business and Economic History* **21** (1991): 99–105. For a revision of Chandler's explanation of vertical integration that instead emphasizes new firms rather than older, adapting firms, see Eric Hilt, "Corporate Governance and the Development of Manufacturing Enterprises in Nineteenth-Century Massachusetts," in *Enterprising America: Businesses, Banks, and Credit Markets in Historical Perspective*, eds. William J. Collins and Robert A. Margo (Chicago, IL, 2015), 73–102.

[10] Philip Scranton, *Endless Novelty: Specialty Production and American Industrialization, 1865–1925* (Princeton, NJ, 1997); Elizabeth Sanders, *Roots of Reform: Farmers, Works, and the American State, 1877–1917* (Chicago, IL, 1999); Charles Postel, *The Populist Vision* (New York, 2007).

[11] William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (New York, 1965), 9–10.

atop a map of the United States. With angry eyes, it whipped tentacle arms around statehouses and clutched politicians, workers, and farmers.[12] The vast economic and political power wielded by such large corporate entities seemed to belie the classical liberal tradition of rough individual equality. America's antimonopoly tradition, which rested on the assumption that widespread economic competition helped protect both well-functioning markets and democratic pluralism, appeared threatened by these social and economic changes. The visible hands of managerial capitalism made a mockery of any belief in the invisible hand of market forces, and in reaction, a widespread movement in business, academia, and government arose to mitigate these changes.[13]

Farmers, laborers, and independent proprietors decried the so-called laissez-faire rules of market capitalism and led efforts to enact new rules of fair competition, calling for government regulations to protect weak or marginalized groups and reinstate market competition. The Sherman Antitrust Act of 1890, one of the first federal statutes seeking to restore equity in market exchanges, prohibited anticompetitive conduct and required investigations into "trusts."[14] But although this law appeared straightforward, in reality it was something quite new and ambiguous. At face value, the act codified common law prohibitions on monopoly activities, attempting to bring centuries of Anglo-American jurisprudence into a single federal law. Congressional intent, however, remained unclear. Moreover, the act empowered both private litigants and public officials to bring suit, leading to a slew of cases to be reconciled by the courts. Thus the judiciary became the institution that established antitrust public policy. On the one hand, passage of the act suggested that the courts should scrutinize exorbitant concentrations of private economic power

[12] See, for example, Udo J. Keppler, *The Standard Oil Octopus*, cartoon, *Puck*, Sept. 7, 1904, 8–9; G. F. Keller, *The Curse of California*, cartoon, *The Wasp*, Aug. 19, 1882, 520–1; Frank Norris, *The Octopus: A Story of California* (New York, 1902). For more antimonopoly octopus images from the period and helpful annotations, see http://nationalhumanitiescenter.org/pds/gilded/power/text1/octopusimages.pdf. For a comparison of Gilded Age antimonopoly imagery with that of the present, see Rebecca Solnit, "The Octopus and Its Grandchildren," *Harper's*, Aug. 2014, 5–7.

[13] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (New York, 1944; Boston, 1957); Mark Blyth, *The Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge, 2002); William J. Novak, "Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst," *Law and History Review* 18 (spring 2000): 97–145.

[14] 26 Stat. 209, 15 U.S.C. §§ 1–7. The act prohibited any "restraint of trade" in interstate commerce and created treble damages and criminal penalties.

and break up the trusts.[15] On the other hand, the antitrust mandate functioned within an existing jurisprudence that protected private economic rights and adhered to a nineteenth-century model of federalism, which circumscribed national regulation of the market.[16] Antitrust existed in tension with itself – intended to reign in the trusts while also limited by "liberty of contract" protections on private business activity and a limited sphere of federal action.

Uncertainty beset the first decades of U.S. antitrust jurisprudence, and the Supreme Court floundered in search of clear rules to govern competitive markets.[17] By 1911 it was clear that the Court's rulings encouraged further corporate consolidations and targeted laborers and independent proprietors acting through loose associations.[18] These types of associations did not fit neatly into the Court's binary framework of corporate hierarchy versus market competition. According to that analysis, large-scale corporations created managerial hierarchies to mitigate the vicissitudes of a market by instituting singular corporate control, while laborers and independent proprietors, in contrast, participated in market

[15] In the late nineteenth century, there were three types of combinations: federated enterprises, holding companies, and trusts. The first trust was formed in 1881 by Standard Oil Co. when its member companies turned over their individual stocks to a governing board of trustees and received trust certificates of equivalent value. The trustees acted as managers of operating and investment decisions. The trust was created in New Jersey to avoid paying taxes in Pennsylvania, where many of its refineries were located. Chandler, *Visible Hand*, 315–31. Although a trust is a specific legal vehicle, the term was used colloquially to generalize about corporate consolidation and was often used as a synonym for "combination." Letwin, *Law and Economic Policy*, 9–10.

[16] United States v. E. C. Knight Co., 156 U.S. 1 (1895). The Court held that despite the fact that the company controlled 98 percent of the sugar-refining capacity in the United States, the company was not engaged in interstate restraint of trade because refining constituted manufacturing, not commerce, and thus fell under the regulatory purview of the states.

[17] Letwin, *Law and Economic Policy*, 15–17.

[18] Charles W. McCurdy, "Federalism and the Judicial Mind in a Conservative Age: Stephen Field" in *Power Divided: Essays on the Theory and Practice of Federalism*, eds. Harry N. Scheiber and Malcolm M. Feeley (Berkeley, CA, 1989), 31–43; McCurdy, "The *Knight* Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903," *Business History Review* 53 (autumn 1979): 304–42; Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899). In *Addyston Pipe & Steel*, the Court ruled that the agreement to divide territories among members of the association constituted a restraint of trade. The case is also significant because Chief Judge William Howard Taft's majority opinion for the Sixth Circuit Court of Appeals ruled against the association but reasoned that some restraints of trade – those found to be reasonable and ancillary to a lawful contract – would be permissible under the Sherman Act. Though the Supreme Court did not affirm this reasoning, Taft's opinion is credited with moving the Court away from its earlier literalist interpretation. See also Daniel R. Ernst, "The Labor Exemption, 1908–1914," *Iowa Law Review* 74 (July 1989): 1151–73.

exchanges governed by unfettered competition.[19] Labor and trade associations stifled market competition for their own benefit. Despite that tidy narrative, antitrust law was not settled; it would remain a contentious political and economic issue throughout the New Deal era. The Court's binary ran aground when confronted with older common law traditions of managing markets and newer progressive impulses to regulate competition – both of which sought to mitigate the social costs of industrialization. That legal and political uncertainty galvanized a movement to bring the antimonopoly tradition into regulatory governance – if not to break apart large firms, then to empower independent proprietors and laborers to cooperate through associations. In turn, a new era of associationalism coincided with the growth of the administrative state, and the two are intimately connected.[20]

FAIR COMPETITION AND THE ADMINISTRATIVE STATE

Throughout U.S. history, questions of market fairness have animated debates over economic regulations in both form and substance, in both procedure and outcome. Protesting the unfairness of a market exchange or defending the fairness of an economic system appeals to political and ideological frameworks as well as legal rules and norms.[21] While there is no timeless definition of *fairness*, understanding how people interpreted its meaning during a specific era can help historians discern historical trends from which we may periodize legal and economic regimes as well as social and cultural norms. In the late nineteenth century, widespread economic, social, and intellectual changes galvanized multiple social movements that challenged the existing rules of fair competition.

[19] Admittedly, it is somewhat anachronistic to refer to the markets-versus-hierarchy divide, given its recent prevalence in economic history literature. Nevertheless, the Court's early antitrust rulings relied upon just such a distinction, encouraging vertical consolidation by striking down the efforts of individual firms and associations of firms to manage markets through what the Court deemed cartel-like behavior. See Oliver Williamson, "Markets and Hierarchies: Some Elementary Considerations," *Organizational Forms and International Efficiencies* 63 (May 1973): 316–26; Walter Powell, "Neither Market Nor Hierarchy: Network Forms of Organization," *Research in Organizational Behavior* 12 (1990): 295–336; Naomi R. Lamoreaux, Daniel Raff, and Peter Temin, "Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History," *American Historical Review* 108, 2 (2003): 404–33.

[20] On associationalism, see note 29, p. 12.

[21] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA, 1996).

American Fair Trade demonstrates how groups of independent proprietors, working through trade associations, came to partner with government administrators to shape economic regulations through the 1920s. The co-evolution of trade association governance and administrative-state capacity redefined the meaning of fair competition and culminated in New Deal efforts to coordinate markets. Although the First New Deal's price controls fell under the Court's ax, by the end of the 1930s, federal administrative agencies had absorbed the legalistic procedures recommended by the courts and emerged as the primary arbiters of fair competition. The collaboration between businesses and government agencies had carved out a middle ground between free market competition and regulated monopoly; independent proprietors were able to collude or cooperate, depending on one's perspective.

Between 1890 and 1940, the United States developed national competition policies that over time accommodated a diverse set of economic and political ideals. This process of accommodation occurred not only through courts and parties but also through nascent administrative agencies and diffuse business associations. Independent proprietors, many of whom feared the competitive advantages of large-scale corporations, spearheaded efforts to form trade associations, with the goal of promulgating codes of fair competition that would dictate trade rules, business ethics, and (at times) so-called fair prices. These business associations overcame collective action challenges, such as defection or cheating, by institutionalizing rules for in-group deliberation, information sharing, monitoring, and enforcement.[22] U.S. laws never sanctioned overt cartels or private price-fixing agreements; however, state-level competition policy often provided exemptions for certain groups. In California, for example, antitrust law exempted labor unions as well as independent producers of farm products and specialty consumer goods from antitrust prosecution.[23] Legal reformers such as Louis Brandeis, the famous "people's

[22] On interest group collective action problems, see Joseph C. Palamountain, *The Politics of Distribution* (Cambridge, MA, 1965); Mancur Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA, 1971); Guy Alchon, *The Invisible Hand of Planning: Capitalism, Social Science, and the State in the 1920s* (Princeton, NJ, 1985). Olsen's thesis that collective action problems impede dispersed interest groups' political goals has recently been challenged. See Gunnar Trumball, *Strength in Numbers: The Political Power of Weak Interest Groups* (Cambridge, MA, 2012).

[23] See Victoria Saker Woeste, *The Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865–1945* (Chapel Hill, NC, 1998); Paul Duguid, "A Case of