

A Brief Consideration of Primary Sources and Methods

A Companion Note to *Fraud: An American History from Barnum to Madoff*

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As I discuss in a companion essay on the historiography of American fraud, this book is an exercise in macro-history. It covers two centuries and considers the evolution of anti-fraud regulation on a continental basis. As a result, there is a strong thread of synthesis woven through the volume, as I draw on the findings of other historians, as well as a number of sociologists, legal scholars, behavioral economists, and political scientists. Nonetheless, my analysis also rests on extensive primary research, including archival research. Below, I reflect on my use of primary sources, as well as the analytical perspectives that I bring to them.

Primary Sources

Throughout *Fraud*, I depend on primary source databases -- digital repositories of appellate legal cases, books, magazines and trade journals, and above all, newspapers. (Indeed, this book would have been difficult if not impossible to write twenty years ago, before those databases existed.) The most important have been Lexis-Nexis Academic, Google Books, America's Historical Newspapers, American Periodical Series Online, HeinOnline, the Proquest Historical Newspapers to which Duke University subscribes, and Newspapers.com (to which I subscribe individually). Access to these digital storehouses meant that I could quickly identify legal proceedings and news coverage related to specific fraud episodes, specific individuals embroiled in serial fraud cases, and specific issues related to anti-fraud policy (such as the

controversies prompted by the attempts of nineteenth-century creditors to use criminal fraud complaints as a way to compel payment by debtors). It also enabled me to explore analytical issues like the extent to which nineteenth-century fraud prosecutions resulted in convictions (such as by searching the America's Historical Newspapers database for occurrences of "false pretenses" and "verdict" in selected years, as a means of gaining a rough sense of conviction rates). My research in Part II, which examines the porous nature of nineteenth-century fraud law, and the emergence of a journalistic culture of fraud exposure, relies especially heavily on research in these primary source databases. In addition, I delve into a diverse set of associated printed materials, including fiction and non-fiction that grapples with the problem of economic deception.

In many ways, the four chapters that comprise Part III of *Fraud* represents the heart of the book. These chapters investigate the invention and operation of modern anti-fraud institutions, both within and outside the state, as well as the major complaints that those new institutions prompted. Here I continue to rely on wide-ranging sources identified through digital searches and an expansive print literature on misrepresentation in economic life and American law. But I also make extensive use of archival records. Chapter Six, "The Postmaster General's Peace," is grounded in close readings of late nineteenth- and early twentieth-century century administrative fraud order case files. From the early 1890s through the early 1900s, these case files include correspondence from complainants and accused business owners, miscellaneous exhibits, and inspectors' reports about their investigations. After procedural reforms in the Wilson Administration, the case files become more uniform, comprising transcripts of formal fraud order hearings, without exhibits. Throughout, these records furnish excellent evidence about the sorts of arguments and evidence put forward to justify or contest proposed fraud

orders, including the importance of marshaling demonstrations of an accused business owner's social respectability.

My discussion of private/quasi-public regulatory bodies in Chapters Seven through Eleven, especially concerning the origins and development of the Better Business Bureau (BBB) network, depends on several archival collections dispersed across the United States. The New York Stock Exchange Archives and the Baker Library at the Harvard Business School possess BBB newsletters from around the country in the 1910s, 1920s, and 1930s. The Chicago History Museum holds extensive archival records of the Chicago Better Business Bureau from the 1930s through the 1980s, with most sources covering the 1940s through the 1970s. These heterogeneous materials range from the stuff of public education campaigns (pamphlets, advertisements, radio and television scripts), to internal policy discussions/correspondence, newsletters, memoranda, and annual reports, to relations with member businesses, to complaint case files. The Western History division of the Denver Public Library holds the papers of W. Dan Bell, a longtime head of the Denver BBB, and include similar sources, though the Bell Papers lack complaint files. Both of these collections include extensive correspondence with BBB officials in other regions and the national BBB. These documents furnish excellent evidence of the organization's evolving goals and tactics, as well as internal disputes about organizational priorities, policies, and resource allocation.

As *Fraud* moves closer to the present, my reliance on archival evidence diminishes. Indeed, in the final chapter, which spans the mid-1970s through the first half of 2016, I do not rely on any archival research. Rather than investigating the vast repositories of twentieth-century anti-fraud regulatory agencies, which might well have extended my research for another decade, and which would have complicated my goal of sketching out the broad trends and turning points in American anti-fraud regulation since the New Deal, I turned to other sources. These ranged

from public governmental records such as agency annual reports and legislative hearings, to news coverage, oral histories of and memoirs by regulators, and book-length treatments of specific business frauds penned by journalists, alongside relevant social science research. For the period from roughly 1950 through the mid-1970s, some of the most helpful scholarship was produced as “Notes” in law reviews by groups of law students, who collaborated to undertake extensive research on the practical operation of anti-deception policies. These materials proved to be sufficient for my purposes, though I have no doubt that deeper archival research will raise questions about some of my interpretations and conclusions, and I look forward to the work of future historians that may test my arguments through such research.

Methods

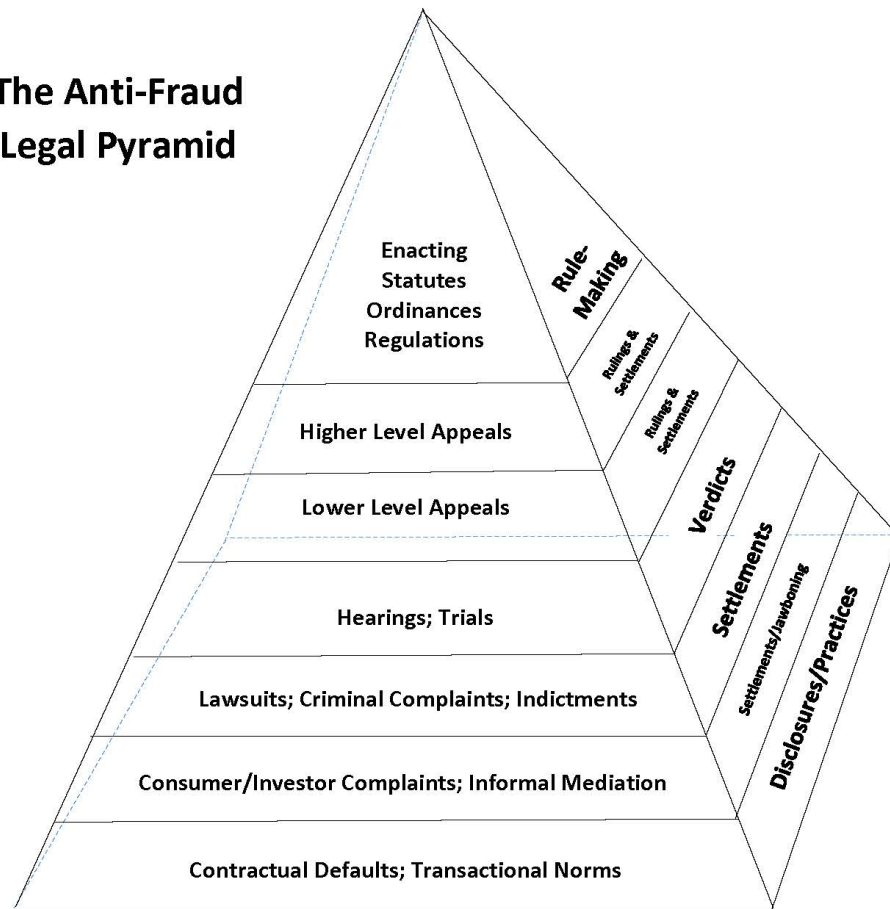
Although *Fraud* lacks a sustained discussion of methodological issues, I do sometimes pause to reflect on my approach to evidence and interpretation. Two concepts that structure much of my analysis merit more sustained explanation – “law in action” and “regulatory ecology.” These ideas shape my discussion of many specific episodes of business fraud. But I would argue that they come into sharper focus when placed within a longer narrative, which allows for identification and assessment of shifting institutional contexts.

Throughout the book, I explore how anti-fraud statutes and regulations did, or did not, reshape American marketplaces. That endeavor calls for exploring the interactions among formal rules and informal norms, as through press coverage or the impacts of public education campaigns by officialdom. It requires close attention to how state agencies and non-governmental organizations monitored business practices, investigated alleged violations of anti-fraud law, and exacted formal or informal punishments. And it demands awareness of how

strategic actors respond to and try to take advantage of legal rules and institutional approaches to enforcement.

One useful way to conceptualize this sort of engagement with “law in action” is to think of a given legal system as a pyramid. In any society, most day-to-day activity occurs at the bottom of the pyramid. Ordinary individuals, businesses, and organizations use standard legal processes to structure their affairs (through applications for birth certificates, drivers licenses, incorporations for firms, contracts that presume legal defaults and the nature or property or debt obligations, etc.) When there is a civil controversy between parties, they most often sort out any difference through simple negotiation. If an administrative agency spots non-compliance with some regulation by a business, its first response will typically be to educate the offending firm and ask that it change its mode of operation, action sometimes referred to as “jawboning.” Use of formal legal processes occur further up the legal pyramid, representing their greater infrequency. Most of the time, moreover, a civil lawsuit, administrative action, or criminal indictment does not lead to a completed trial. Instead, the parties work out some sort of settlement or plea deal. Appeals of legal decisions occur even less frequently. At the very top of the legal pyramid, one encounters the legislative processes that establish new statutory law and the bureaucratic processes that generate new administrative rules and processes, along with appeals of lower court rulings to the highest legal tribunals.

The Anti-Fraud Legal Pyramid



Since the turn to social history in the 1970s, legal historians have increasingly focused on dynamics toward the base of the legal pyramid. This approach still requires familiarity with statutory law, administrative rule-making, and appellate legal opinions, since so much legal practice depends on decision-making higher up the pyramid. But it pays greater attention to the most basic uses of law, and to how legal rules and standards influence social arrangements, cultural identities, and economic practices, as well as how those features of any society in turn shape legal rules and standards. In many contexts, then, the reconstruction of “law in action” depends on detailed examinations of voluminous legal records and law-like proceedings in non-governmental regulatory bodies. In *Fraud*, I take this tack most directly in my discussion of mail fraud cases and the handling of complaints by the Better Business Bureaus.

Because the archival work necessary to retrace law in action can be taxing, logistical considerations lead many legal historians to confine themselves to circumscribed case studies, such as by studying one type of law in a single jurisdiction over perhaps a generation or two. My first book, *Navigating Failure: Bankruptcy in Antebellum America* (Chapel Hill, 2001), had something of this character. With *Fraud*, I have linked a consistent focus on law in action to examination of legal and policy shifts in multiple issue areas, over a much longer arc of time, and with regard to the United States as a whole. This endeavor runs the risk of oversimplification. But it offers the possibility of identifying and explaining institutional transformations over the longer term.

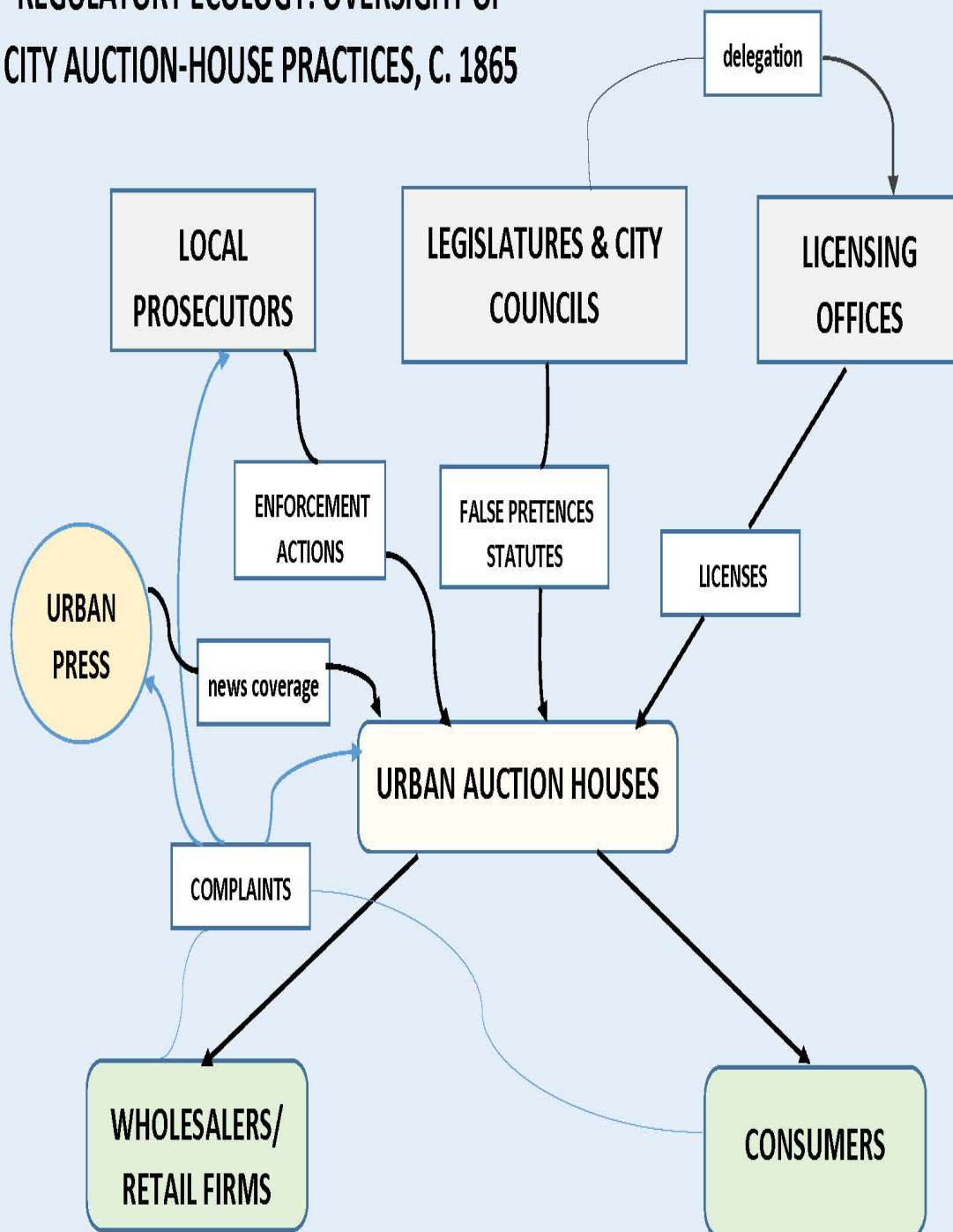
In just about any legal domain (and the arena of anti-fraud regulation is no exception), one cannot begin to sort out the dynamics of law in action without careful reconstruction of the relevant institutional landscape. Throughout the book, I investigate the emergence of new kinds of public or private regulatory bodies, trace the structure of their authority and powers, explore their stated missions and organizational cultures, and consider the impact of their efforts on business practices. These “regulatory ecologies” provide a key narrative through-line.

For readers who are visual thinkers, it may be helpful to refer to the following diagrams that describe American anti-fraud regulation at different points in time. These schematics convey the range of regulatory actors in given contexts, the nature of their authority, and how they went about attempting to constrain commercial and/or financial deceptions and misrepresentations. I have used such schematics in my teaching about legal institutions for many years, and find that they help many people grasp the messiness of regulatory environments. (Any teachers who assign this volume to students might consider using these diagrams as the basis for an assignment, such as asking students to create their own visual portrayal of mail fraud

enforcement in the late nineteenth-century, or anti-fraud regulation of e-commerce in the twenty-first).

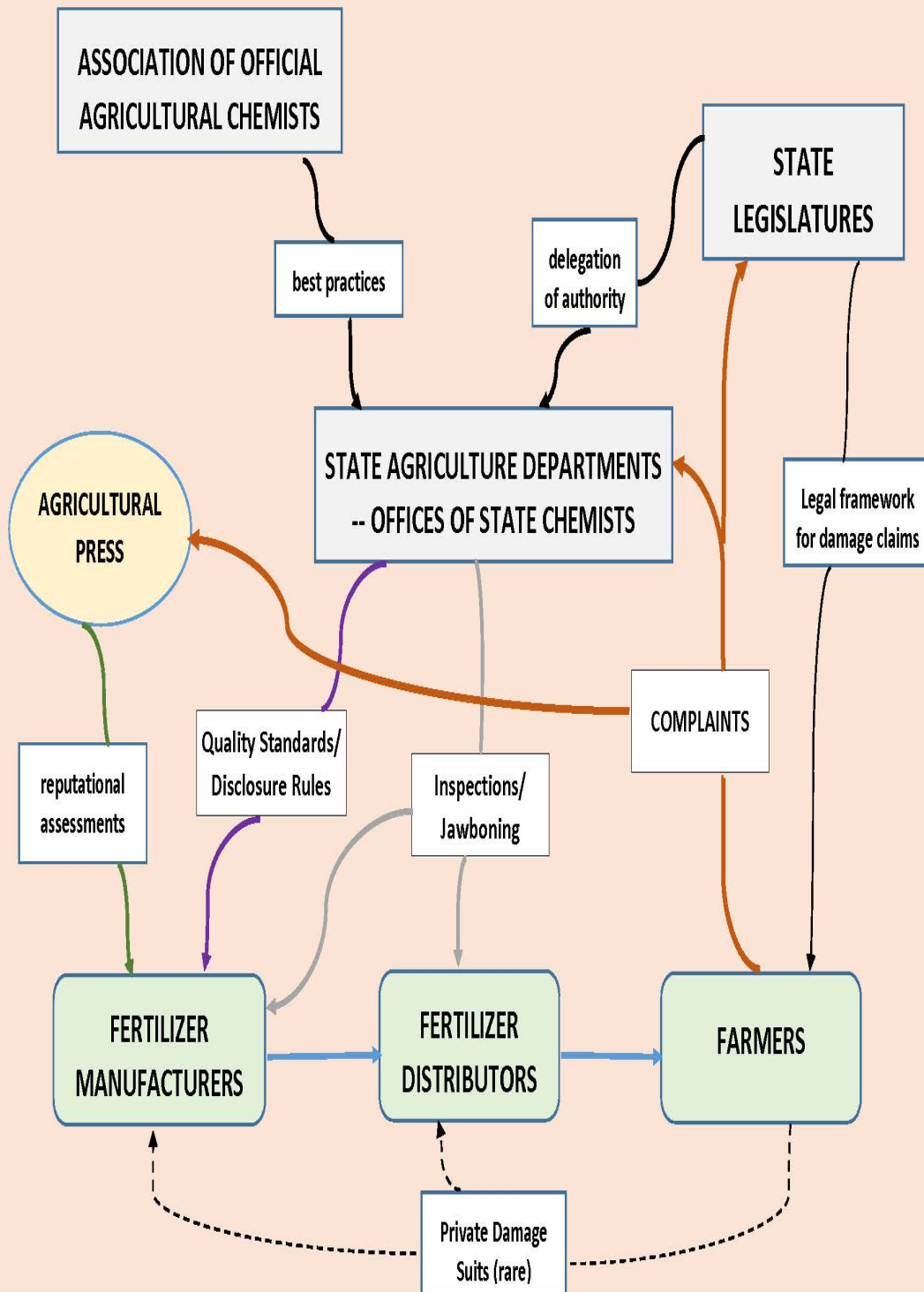
The first of these graphics depicts anti-fraud regulations of urban auctioneering around the close of the American Civil War, described in Chapter Three of *Fraud*. This policy ecology is a mostly a local one, reflecting the nature of anti-fraud policing at this time. Although state legislatures had enacted general laws against the gaining of property through false pretenses, specific legislation regarding the manipulation of auctions tended to come from city councils, as did any licensing requirements for auctioneers. Official modes of monitoring and enforcing legal rules were entirely local, and did not depend on extensive education or technical training/expertise. The urban press played an ancillary regulatory role, by publicizing general complaints about “Peter Funk” operations, and news coverage of specific legal cases. Compared to later regulatory regimes, this one has relatively few pivotal institutions and anti-fraud mechanisms.

REGULATORY ECOLOGY: OVERSIGHT OF CITY AUCTION-HOUSE PRACTICES, C. 1865



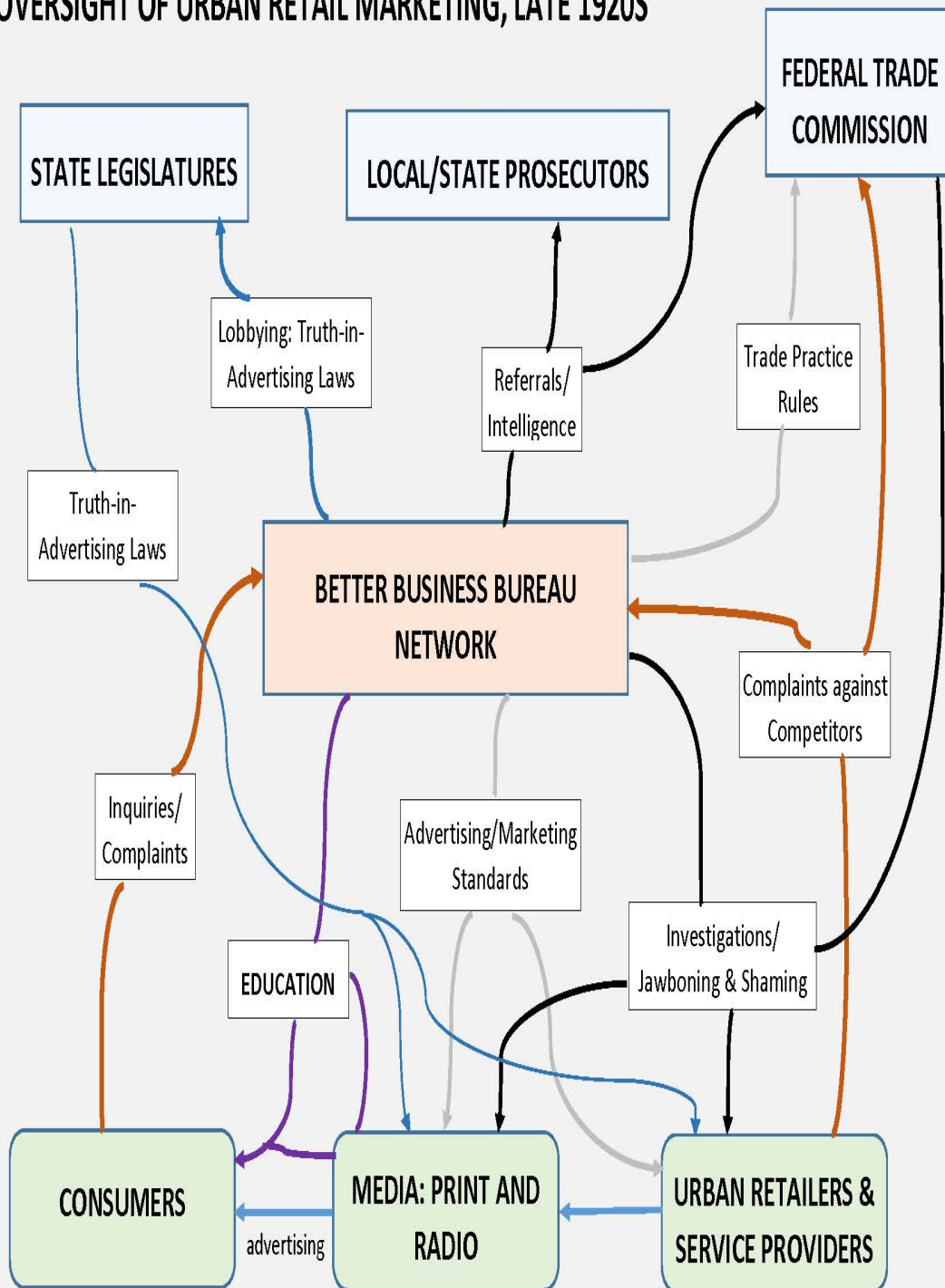
The next snapshot conveys the nature of fertilizer regulation several decades after it had diffused throughout the North American continent (a process described in Chapter Five), circa 1895. This set of regulatory niches occurred predominantly on the level of state institutions. Through legislative action, most states created a new bureaucratic agency, the Office of the State Chemist, within their departments of agriculture. The staff in these offices set quality standards, inspected distributors and manufacturers, and received complaints from farmers, which led to specific investigations. Many of these individuals were highly trained in scientific methods. Most legislatures also created legal standards for civil damage suits that farmers could file against manufacturers or distributors. The agricultural press remained a conduit for farmers to learn about the basic structures and standards of fertilizer regulation, as well as any enforcement actions. Although the federal government did not play a role in setting regulatory policy during this era, a national professional organization, the Association of Official Agricultural Chemists (AOAC), took on an important coordinating function from the early 1880s onwards. This association circulated information about policy developments across regions. It also standardized technical aspects of fertilizer analysis, a crucial step in the legitimation of agricultural chemists as dispassionate experts who could be trusted fairly to assess the questions of chemical composition and quality.

REGULATORY ECOLOGY: OVERSIGHT OF FERTILIZER MARKETING, C. 1895



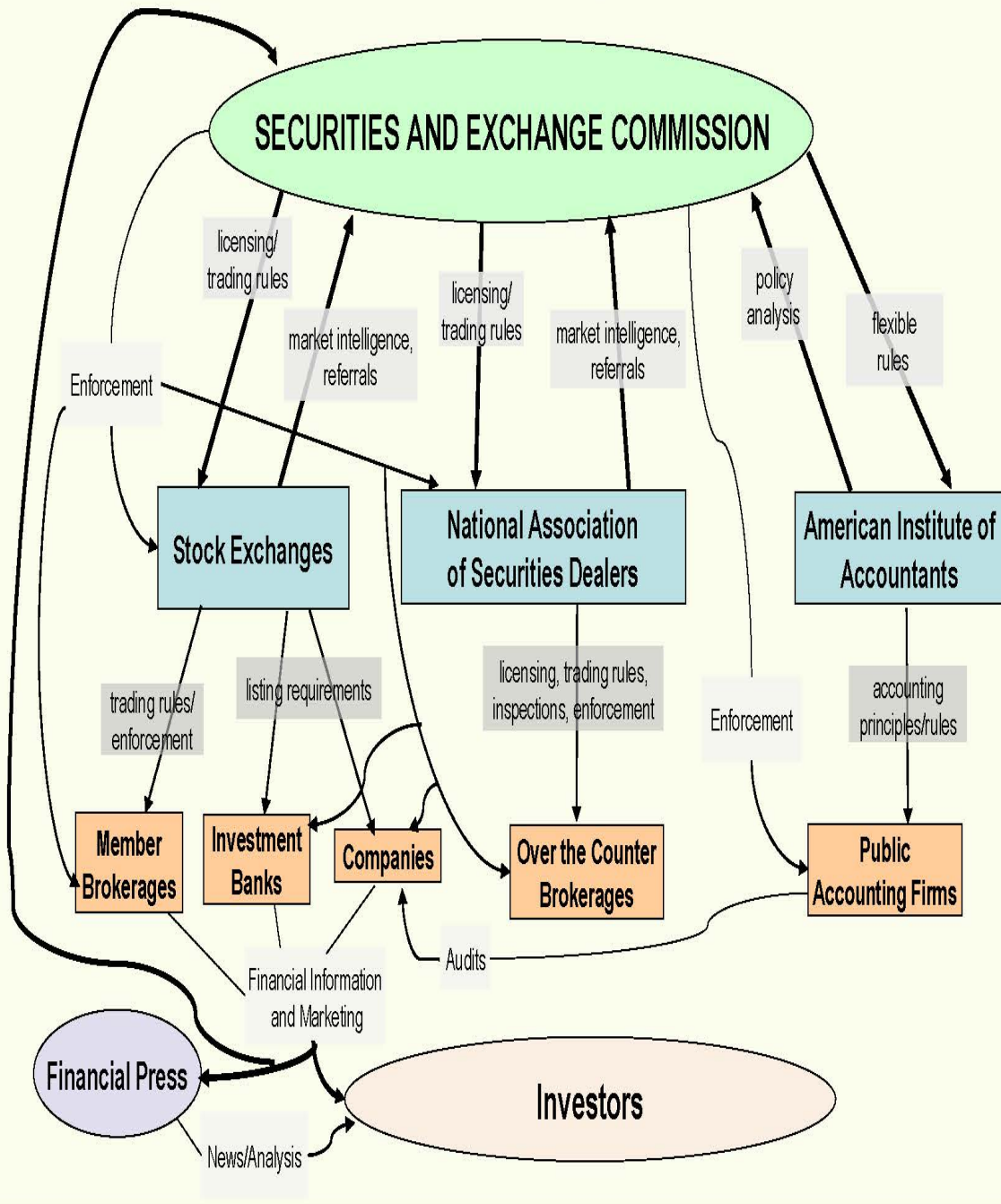
The third diagram conveys the dramatic growth in regulatory complexity associated with the expansion of federal anti-fraud regulation (earlier confined mostly to mail fraud enforcement) and the emergence of well-funded self-regulatory organizations (SROs) such as the Better Business Bureaus (BBB). (These dynamics receive extensive discussion in Chapter Seven of *Fraud*.) The focus here was on truthfulness in urban retailing, whether through advertising, other marketing practices, or some combination of the two. One feature of this far more complicated regulatory ecology involved a multiplication in the sources and types of relevant anti-fraud laws. In addition to decades-old statutes that criminalized the obtaining of property through false pretenses, a large majority of state legislatures had passed specific laws that created criminal penalties for false advertising. Under the Federal Trade Commission Act, the national FTC now had administrative jurisdiction to levy civil penalties in cases of deceptive marketing in interstate commerce. It had further encouraged the adoption of “trade practice rules” by industry conferences. Alongside these governmental institutions, the network of urban Better Business Bureaus had developed private codes of conduct for advertising and merchandising, even as its leaders lobbied successfully for the passage of false advertising laws and worked to facilitate the adoption of trade practice rules. BBB officials were as numerous as the staff of government regulatory agencies and took on crucial roles in developing anti-fraud campaigns of public education, monitoring advertisements and the selling practices of urban businesses, investigating complaints from consumers, and taking on anti-fraud enforcement. The latter involved both informal efforts to persuade offending businesses to change their operations, public “naming and shaming” of those firms who rejected such entreaties, and referrals of the most recalcitrant firms to the public authorities for legal action. The BBBs also coordinated journalistic coverage of their anti-fraud efforts, ensuring that the press retained a fraud beat.

REGULATORY ECOLOGY: THE BBB NETWORK & THE OVERSIGHT OF URBAN RETAIL MARKETING, LATE 1920S



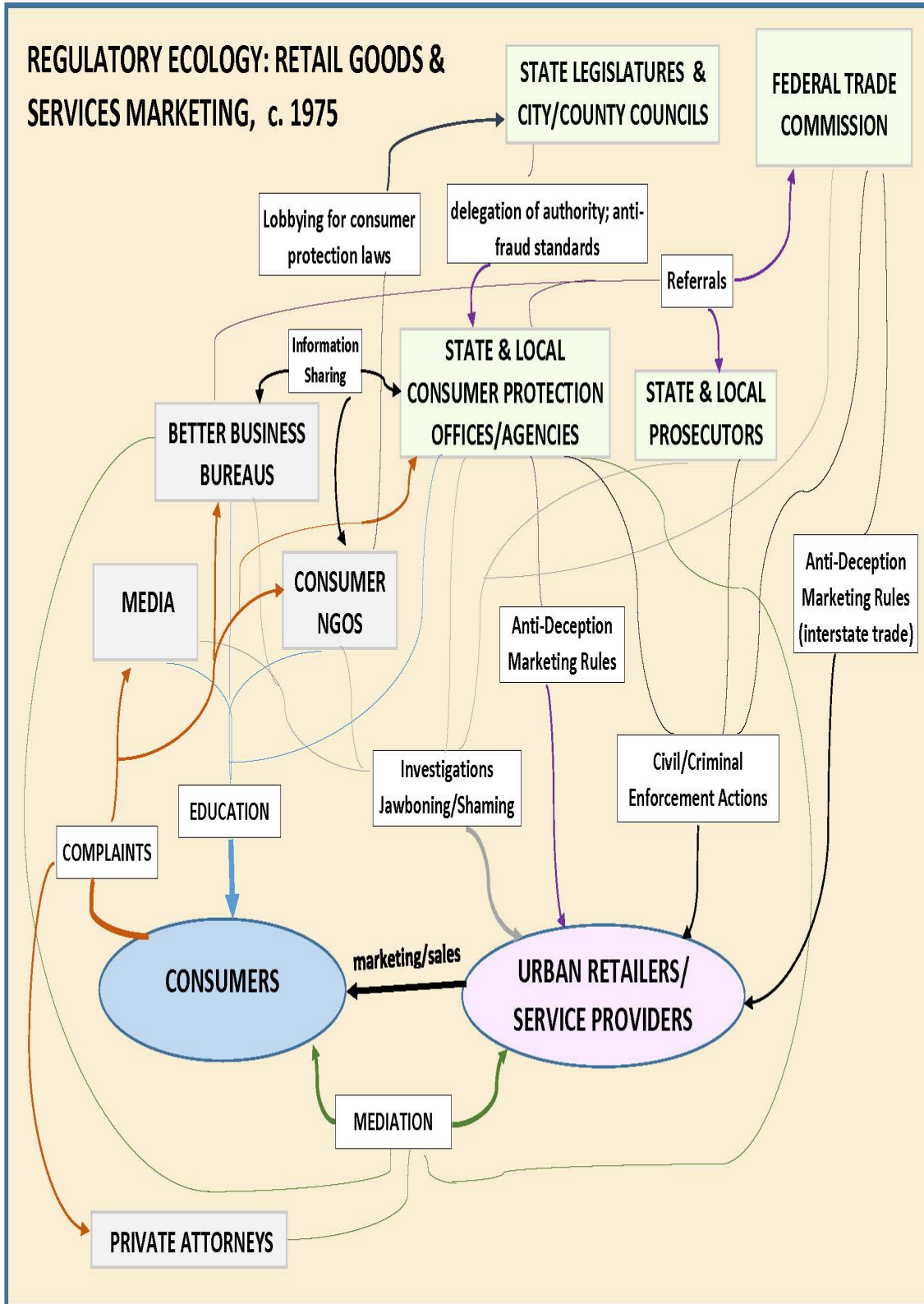
The next graphic considers the regulatory ecology in the American securities markets, around the mid-1950s. One sees here the ongoing proliferation of quasi-public and private modes of regulatory governance, though in a more specialized economic sector. The Securities & Exchange Commission (SEC) rested at the apex of this regulatory system, as described in Chapter Nine of *Fraud*. Created by Congress, the SEC had authority to adopt rules and regulations to govern the disclosure of information by public companies to investors, as well as buying and selling operations on public securities exchanges. It also had the power to monitor those markets, to investigate allegations of insufficient or false disclosures by firms, and to initiate civil and criminal actions against violators of the securities laws. But the SEC worked in close concert with a number of SROs. These included: securities exchanges such as the New York Stock Exchange, which admitted brokerage firms as members, and promulgated and enforced rules of fair dealing against those firms; the National Association of Securities Dealers (NASD), which also admitted brokerages that traded on the over-the-counter market, developed its own rules of fair trading, monitored the market behavior of these firms, and enforced its rules; and the American Institute of Accountants, which was responsible for the formulation of corporate accounting principles. All of these SROs were accountable to the SEC, which could override their rules and enforcement decisions. But in practice, the SEC relied heavily on these organizations for market intelligence, policy analysis, and oversight of all the key protagonists in the securities markets, which included public companies, investment banks, accounting firms, and brokerages. Thus American policy-makers crafted a particularly robust form of co-regulation, through which state agencies worked in concert with quasi-public ones. The financial press also provided analysis of all the financial disclosures required by the New Deal regime of securities regime, alongside news coverage of regulatory enforcement actions.

Regulatory Ecology: Federal Oversight of Communication in the Securities Markets, c. 1955



The final diagram conveys the nature of consumer fraud regulation around 1975 (discussed in both Chapter Ten and Chapter Eleven of *Fraud*), and represents an even greater degree of institutional complexity, as well as heightened regulatory competition. The rule-makers in this regulatory environment ranged from the FTC and Congress (not pictured) at the national level, to state legislatures, city councils, and county governments, to state and local consumer protection agencies. The Better Business Bureaus continued their work of public education, joined now by a slew of consumer non-governmental organizations, as well as the growing number of state and local consumer protection bureaucracies. Ongoing monitoring of retail sales of goods and services involved not just the FTC, state and local prosecutors, and the new state and local consumer protection bureaus, but also the BBBs and consumer NGOs. All of these groups received complaints and undertook investigations; all engaged in efforts to persuade wayward firms to clean up their ways; most offered to serve as mediators between disgruntled consumers and the businesses against whom they made accusations of deceptive practices. The consumer NGOs took on increasingly important roles as advocates for more stringent anti-fraud policies; along with the BBBs, they also served as key directors of referrals to government officials. In this era, local media outlets (newspapers and especially television stations), developed their own complaint phone lines, investigative corps, and de facto mediators, amplifying the possibilities for naming and shaming deceptive businesses. Thus the local press in this era took on more direct forms of anti-fraud regulation, moving beyond the dissemination of sensible practices for consumers and investors and coverage of enforcement actions brought by one or another governmental authority. With the profusion of anti-fraud institutions within and outside the state, the creation of robust regulatory networks to share information became even more important; the potential for confusion among consumers also grew.

REGULATORY ECOLOGY: RETAIL GOODS & SERVICES MARKETING, c. 1975



One can relate each of these depictions of a regulatory ecology to the levels in the legal pyramid. Although structured by understandings of law as determined at its upper reaches, the vast majority of commercial and financial transactions implicated in these diagrams stayed at its base – they occasioned no controversy or dispute. In every era, moreover, most initial allegations of misrepresentation or fraud did not move up very far up the pyramid. Whether brought to state officials, the representatives of self-regulatory organizations, or media consumer watchdogs, most complaints either did not convince investigators to take any action, or resulted in some form of informal agreement or settlement. Keep in mind as well that a significant percentage of fraud incidents did not result in any accusations, either because victims did not realize that they had been had, or because they chose to keep their losses to themselves. Only a small fraction of allegations prompted formal legal process; a small fraction of those instances led to the completion of process in an administrative, civil, criminal setting; and a small fraction of those controversies led to higher-level appeals. When regulatory frameworks constrained business fraud, they often did so more by changing norms and basic commercial practices than they did through the operation of deterrence.

At the same time, of course, one must be alert to the possibility that the degree of commitment to anti-fraud enforcement can shift over time, as can the societal priority placed on fashioning effective modes of combatting economic deception, or the creativity of anti-fraud professionals in adapting to new problems. The emergence of effective new anti-fraud tools can stem the incidence of business fraud (though also stimulate more sophisticated modes of commercial imposture). The weakening of credible enforcement mechanisms can encourage the spread of schemes and scams (though also, over time, make at least some investors and consumers more skeptical and discerning).

A final theme worthy of attention concerns how specific regulatory ecologies emerge and then recede in the face of new socio-economic developments and new legal/political configurations. In any given era, prevailing assumptions about the appropriate role of government in structuring markets and economic activity tend to set the parameters for anti-fraud policy. Within those constraints, new ideas about how to respond to the problem of business fraud typically have come in the wake of widespread perceptions that the incidence of commercial/financial deception was on the rise, creating significant economic harms and injustices.

Especially in the nineteenth-century, the perceptions that counted most in building pressure for policy experimentation/reform were those of the business establishment – farmers and agricultural societies in discussions around fertilizer regulation; wholesalers and auction houses in debates over auction-related frauds; manufacturers and wholesalers in deliberations over credit fraud. Representatives of business continued to have an outsized influence over anti-fraud debates in the twentieth-century, but other voices, such as investor organizations investors, consumer groups, or labor unions, had more sway, reflecting the expansion of democratic politics. In all eras, some business interests have also taken the lead in opposing proposals for more stringent anti-fraud regulation, or in seeking to redirect action toward self-regulatory approaches. In addition to firms that embraced outright deception, opponents of anti-fraud proposals have included businesses that wished to maximize the leeway for aggressive marketing, conservatives suspicious of more vigorous government oversight of economic activity and worried about the costs imposed by regulatory schemes, and lawyers who saw some anti-fraud regulatory tools as corrosive of due process and the rule of law.

Throughout the two centuries covered by the book, elected officials and governmental bureaucrats brought their own perspectives and interests to bear on debates over anti-fraud

policy. So too did a growing array of professionals and experts, including journalists/editors, agricultural chemists, postal inspectors, and accountants, and then, in the twentieth-century, credit investigators, Better Business Bureau officials, leaders of the American Medical Association, and fraud auditors. Government officials and experts offered took the lead in fashioning specific reform proposals and in implementing those ideas, whether enacted through statute, formal administrative mechanisms, strategies of public education, or informal kinds of moral suasion.

One can again helpfully think about such regulatory interventions as targeted primarily as different locations on the legal pyramid. All anti-fraud campaigns of public educations, as well as legal disclosure requirements, aim at the bottom of the pyramid in the hopes of fortifying consumers and investors before they get into trouble. State false advertising laws expanded criminal prohibitions in the early twentieth-century, but chiefly to arm the new Better Business Bureaus with sharper threats as they sought to convince wayward firms to clean up their marketing – a form of mediation still fairly fair down the pyramid. The invention of consumer class actions in the 1960s and 1970s sought to give victims of fraud greater capacity to pursue claims through the courts, including through appeals processes if necessary. Similarly, opponents of specific anti-fraud policies often had some version of the legal pyramid in mind. Complaints about the fraud order in the late nineteenth- and early twentieth century, for example, centered on its imperviousness to legal oversight, and by implication, the difficulty in challenging specific fraud orders on legal grounds by moving consideration of a disputed enforcement action up the pyramid.