

# THE STATES AS LABORATORIES OF FEDERALISM: THE INNOVATIVE VENTURES OF THE CALIFORNIA ATTORNEY GENERAL INTO HEALTHCARE AND COMPETITION-RELATED ISSUES



BY EMILIO E. VARANINI<sup>1</sup>



<sup>1</sup> Emilio E. Varanini was a Deputy Attorney General in the Antitrust Section of the California Office of the Attorney General from 2000-2020 before becoming Supervising Deputy Attorney General in the Healthcare Rights and Access Section. His responsibilities include healthcare-related antitrust cases that will be handled by the new section. His prior background in healthcare-related antitrust work includes serving as lead counsel in the case of State in California *ex rel. Becerra v. Sutter Health*, No. CGC18565398 (Cal. Super. Ct. Mar. 29, 2018), a case in which the State of California challenged the alleged anticompetitive practices of a health care system. Emilio was also the Co-Chair of the Health Care Working Group of the National Association of Attorneys General, Antitrust Task Force until 2018 and is now the Co-Chair of the PBM Working Group of the National Association of Attorneys General, Antitrust Task Force.

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## I. INTRODUCTION

In his dissent in *New States Ice Co. v. Liebmann*, Justice Brandeis made the following powerful point: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>2</sup> Nowhere should this point hold more true than healthcare. Healthcare has been recognized as involving local concerns such that the exercise of state police power has been blessed, whether it be through cooperative measures with the federal government or it be direct.<sup>3</sup> In turn, insofar as antitrust is concerned, healthcare involves quintessential local markets<sup>4</sup> and as such has historically been the subject of state antitrust enforcement.<sup>5</sup>

Healthcare in California involves multiple challenges in terms of access, affordability, and equity that have deepened over time. Healthcare access to providers has been reduced over time.<sup>6</sup> Market concentration of providers and even insurers has increased in the state, leading to price increases<sup>7</sup> without any corresponding increase in quality.<sup>8</sup> And while the federal government passed the Affordable Care Act ("ACA"),<sup>9</sup> expanding access to insurance and incentivizing innovative collaboration among providers, the implementation of the ACA's various provisions has led to a

<sup>2</sup> *New State Ice Co. v. Liebmann*, 285 U.S.262, 311 (1932) (dis. op. of Brandeis, J.).

<sup>3</sup> See, e.g. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); Department of Health and Human Services, *Health Insurance Market Rules*, 78 FED. REG. 13406, 13435 (Feb. 27, 2013); Department of Health and Human Services, *Establishment of Exchanges and Qualified Health Care Plans et al.*, 77 FED. REG. 18310, 18413, 18417-19, 18443 (Mar. 27, 2012). The respect of the courts for the exercise of state police power in the healthcare space has recently been demonstrated in the U.S. Supreme Court's denial of a First Amendment request for a preliminary injunction against the California Governor's emergency COVID-19 regulations as they applied to religious services. *South Bay United Pentecostal Church et al. v. Newsom et al.*, 140 S.Ct. 1613, 1613-14 (2020) (conc. op. of Roberts, C.J.).

<sup>4</sup> See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 679-80 (2003).

<sup>5</sup> See, e.g. Steve Tenn, *A Case Study of the Sutter Summit Transaction*, FEDERAL TRADE COMMISSION WORKING PAPER No. 293, 1-2 (Nov. 2008).

<sup>6</sup> Glenn Melnick, Katya Fonkych & Jack Zwanzinger, *The California Competitive Model: How Has it Fared and What's Next?*, 37 HEALTH AFFAIRS 1417, 1420-21 (2018).

<sup>7</sup> See, e.g. Nicolas Petris Center Institute on Health Care Markets and Consumer Welfare, School of Public Health, University of California, Berkeley, *Consolidation in California Healthcare Market 2010-16: Impact on Prices and ACA Premiums* (Mar. 26, 2018) (hereinafter "Petris Consolidation Report").

<sup>8</sup> See, e.g. Nancy D. Beaulieu et al., *Changes in Quality of Care after Healthcare Mergers and Acquisitions*, THE NEW ENGLAND JOURNAL OF MEDICINE 51 (Jan 2, 2020) (hospital acquisitions by other hospitals or hospital systems lead to modestly worse patient experiences and no significant changes in readmission rates or mortality); Brady Post, Tom Buchmueller & Andrew M. Ryan, *Vertical Integration of Physicians: Economic Theory and Empirical Evidence on Spending and Quality*, 75 MEDICAL CARE RESEARCH AND REVIEW 399, 417-18 (2018) (showing how studies of vertical mergers do not show any systematic improvement in quality as a generalized matter).

<sup>9</sup> The Affordable Care Act or ACA refers to the Patient Protection and Affordable Care Act, Pub. L. No. 11-48, 124 Stat. 119 (2010).

hard-fought slog on competition-related issues that go beyond its individual mandate.<sup>10</sup> Meanwhile, pharmaceutical prices continue to escalate in ways that remain difficult to address due to, among other issues, institutional opacity at all levels of the manufacturing and supply chain<sup>11</sup> — notwithstanding the path-breaking decision of the United States Supreme Court in *Federal Trade Commission v. Actavis* on reverse payment settlements.<sup>12</sup> The storm caused by these challenges has been amplified by issues raised by California's fight against the COVID-19 pandemic, such as the following: (1) the continued application of antitrust law to healthcare markets as exemplified by the requested — but just rejected — postponement of the approval process of the path-breaking settlement of the *Sutter* antitrust litigation;<sup>13</sup> and (2) the need to address the further entrenchment of providers with market power as exemplified by the disproportionate flow of federal support funds as a result of the CARES Act<sup>14</sup> to those providers who already benefit more from market concentration and from a disproportionate share of commercial insurer business.<sup>15</sup>

Under the leadership of its current Attorney General, Xavier Becerra, California has responded to these challenges by novel and innovative ventures that include the following: (1) unparalleled litigation across the vast range of healthcare access and equity issues, including in the healthcare antitrust space; (2) multiple state legislative initiatives, including last year's A.B. 824 on anticompetitive pay-for-delay settlements by pharmaceutical companies<sup>16</sup> and this year's S.B. 977 on the acquisition, and abuse, of market power by healthcare systems;<sup>17</sup> and (3) institutional reorganization — culminating in the creation of the Healthcare Rights and Access Section of the California Office of the Attorney General. That section will be responsible for all healthcare-related matters that involve the investigation and filing of lawsuits on behalf of the public interest to protect healthcare equity and access, including all antitrust matters that arise in the healthcare space.

## II. HEALTHCARE LITIGATION BY THE CALIFORNIA ATTORNEY GENERAL: WORKING TOWARDS CHANGE IN STATE AND FEDERAL FORUMS

California's novel responses to the swarm of healthcare issues raised as to affordability, access, and equity can be seen first and foremost by the increased litigation activity under the leadership of the current Attorney General. That litigation involves first and foremost the filing of landmark healthcare antitrust cases in state and federal court, as well as other landmark cases that affect healthcare affordability, accessibility, and equity, in order to work towards change in the healthcare system to the benefit of patients.

For example, on July 29, 2019, the Attorney General announced the federal settlement of lawsuits involving four collusive pay-for-delay settlement agreements, that otherwise allowed branded drug manufacturers to continue their monopolies. These settlements involved the payment of \$70 million, the largest settlement amount ever achieved by a state, as well as the imposition of injunctive relief, also unprecedented for a state, against future pay-for-delay agreements.<sup>18</sup> More recently, on July 20, 2020, the Attorney General announced the filing of a lawsuit to enforce the ACA's guarantee against discrimination in healthcare *vis-à-vis* proposed rules that weaken those protections for marginalized populations, including the LGBTQ community, women, communities of color, and individuals with disabilities.<sup>19</sup>

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10 For example, there has been litigation over the degree of transparency of provider prices required by the ACA. See *Am. Hosp. Ass'n v. Azar*, No. 1:19-cv-03619, 2020 WL 3429774 (D.D.C. June 23, 2020).

11 See, e.g. Robin Feldman, *DRUGS, MONEY, AND SECRET HANDSHAKES*, 1-4 (CAMBRIDGE UNIV. PRESS 2020).

12 *FTC v. Actavis*, 570 U.S. 136 (2013).

13 Order Denying Mot. for Continuance of Preliminary Approval Hearing, *UFCW v. Sutter Health/State of California v. Sutter Health*, Nos. CGC 14-538451, 18-56538 (July 10, 2020) (document in possession of author).

14 The CARES Act refers to the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (2020). Congress also passed, and the President signed into law, the Paycheck Protection Program and Healthcare Enhancement Act, Pub. L. No. 116-139 (2020), as part of the CARES Act.

15 Richard Scheffler, Daniel Arnold, Surina Khurana & Brent Fulton, *The Distribution of Provider Relief Payments Among California Providers*, THE NICOLAS C. PETRIS CENTER ON HEALTHCARE MARKETS AND CONSUMER WELFARE (July 17, 2020), <https://petris.org/wp-content/uploads/2020/07/The-Distribution-of-Provider-Relief-Payments-Among-California-Health-Systems-FINAL.pdf>. This study was prepared at the request of the Office of the California Attorney General.

16 A.B. 824, 2019-20 Leg. Reg. Sess. (Cal. 2019).

17 S.B. 977, 2019-20 Leg. Reg. Sess. (Cal. 2020).

18 Press Release, California Office of the Attorney General, Attorney General Becerra Secures Nearly \$70 Million against Several Drug Companies for Delaying Competition and Increasing Drug Prices (July 29, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-secures-nearly-70-million-against-several-drug>.

19 Press Release, California Office of the Attorney General, Attorney General Becerra Files Lawsuit Challenging Trump Administration's Rule Rolling Back ACA Healthcare Anti-Discrimination Provisions (July 10, 2019).



Of special note is the Attorney General's landmark *Sutter* litigation, which is the second-ever litigation filed in a state or federal court to address alleged anticompetitive conduct by a dominant healthcare system in local intrastate markets that allegedly raise prices for consumers of healthcare. Brought in March of 2018, that lawsuit in state court was quickly consolidated with an ongoing private plaintiff lawsuit in that same court.<sup>20</sup> *Sutter* is a large healthcare system of which almost all of its providers and facilities are located in Northern California. The Attorney General, and private plaintiffs, alleged *Sutter's* anti-competitive restraints — involving “all-or-nothing” conduct, limitations on health plans and employers from incentivizing employees to choose other hospitals, other anti-steering and anti-tiering practices, and prohibitions on health plans from disclosing *Sutter's* prices to enrollees of those plans — amounted to illegal price tampering, unlawful combinations to monopolize, and/or unreasonable restraints on trade (including *per se* illegal tying).<sup>21</sup> The case survived three motions for summary judgment and ultimately settled minutes from opening statement — after a jury had been already selected.<sup>22</sup> The prospective injunctive relief under consideration for the Court's approval as part of this settlement includes far-ranging measures, lasting for a minimum of 10 years, designed to halt *Sutter's* alleged anticompetitive conduct and restore competition to healthcare markets in Northern California. Those measures include limits on out-of-network charges, stopping all-or-nothing conduct and preventing conditional participation — most acutely for those providers who have the most market power, halting measures that hinder or eliminate patient access to lower-cost plans or higher quality providers, ceasing anticompetitive bundling with stand-alone pricing being required, and improving transparency of *Sutter's* pricing for patients — with all of these provisions to be enforced through a compliance monitor to be appointed by the court.<sup>23</sup>

Following the filing of the unopposed motion for preliminary approval in December of 2019,<sup>24</sup> *Sutter* filed a motion to delay the preliminary approval hearing due to COVID-19 (the hearing was already delayed to June of 2020 due to the COVID-19 pandemic with answers to the wide-ranging questions of the Court on injunctive relief not being filed until May 29, 2020). Raising issues about the intersection of antitrust law with the issues raised by the pandemic, as well as the Attorney General's ability to speak on behalf of the public interest, the Court ultimately denied that motion in a lengthy order on July 10, 2020.<sup>25</sup>

However, litigation is about more than just filing cases in court. The Attorney General's Office has continued its long practice of providing assistance on, and joining, federal appellate amicus briefs in healthcare antitrust cases such as *Federal Trade Commission v. Sanford*, involving a joint challenge by the Federal Trade Commission and the State of North Dakota to a healthcare provider merger.<sup>26</sup> The Office of the Attorney General also recently played a key role in helping craft the multistate comments on what were then the draft Vertical Merger Guidelines of the federal antitrust authorities<sup>27</sup> — comments that were praised by the federal antitrust authorities as influencing the final version of those guidelines<sup>28</sup> and that in part rested on the experience of states like California with healthcare markets.<sup>29</sup> And more recently, the Attorney General himself

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20 *UFCW & Employers Benefit Tr. v. Sutter Health*, Nos. CGC-14-538451, CGC-18-565398, 2018 Cal. Super. LEXIS 1859 (S.F. Cnty. May 8, 2018).

21 The contours of *Sutter's* conduct were litigated as early as a demurrer filed against the private plaintiffs. See, e.g. *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, 2016 Cal. Super. LEXIS 5187 at \*1-4, 2016 WL 3459451 at \*1-2 (S.F. Cnty. Apr. 15, 2016).

22 See, e.g. Order on Mot. for Summary Judgment, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398, 2019 Cal. Super. LEXIS 88 at \*\*1, 5, 13, 14, 22, 2019 WL 2372274 at \*\*1, 2, 4, 5, 8 (S.F. Cnty. Mar. 14, 2019); Order on Mot. for Summary Judgment, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398, 2019 WL 3856011 at \*\*1, 4, 7, 8, 9, 10 (S.F. Cnty. Jun. 13, 2019). The court also ruled on briefing concerning the applicable antitrust standards, Order re: Antitrust Standards at 1, 8-9, 10-12, 13 & n.4, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398 (S.F. Cnty. Aug. 12, 2019) (document in possession of author), and concerning jury instructions, Order re: Jury Instructions at 1, 6-7, 8, 14-15 & n.15, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398 (S.F. Cnty. Sep. 16, 2019) (document in possession of author).

23 See, e.g. Press Release, California Office of the Attorney General, Attorney General Becerra: State, Unions, Employers, and Workers Reach Settlement to Address Alleged Anticompetitive Practices by Sutter Health that Increased Healthcare Costs.

24 Notice of Motion and Motion for Preliminary Approval of Settlement, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398 (Super. Ct. S.F. Cnty. Dec. 19, 2019) (document in possession of author).

25 Order re: *Sutter's* Motion to Continue Preliminary Approval Hearing, *UFCW & Emp'rs. Benefit Trust v. Sutter Health*, No. CGC-14-538451, CGC-18-565398 (Super. Ct. S.F. Cnty. July 10, 2020) (document in possession of author).

26 Brief of the States of Minnesota et al. as Amicus Curiae in Support of Appellees, *Federal Trade Commission v. Sanford*, No. 17-3783, 2018 WL 1414322 (Mar. 13, 2018).

27 U.S. Dep't of Justice and Fed. Tr. Comm'n, Public Comments from 28 State Attorneys General on Draft Vertical Merger Guidelines (Feb. 26, 2020), [https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/state\\_ags\\_final\\_vmg\\_comments.pdf](https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/state_ags_final_vmg_comments.pdf).

28 See Fed. Tr. Comm'n, Statement of Chairman Joseph Simmons, Commissioner Noah Phillips, and Commissioner Christine S. Wilson Regarding Joint Department of Justice and Federal Trade Commission Vertical Merger Guidelines at 3 (June 30, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577507/vmgmajoritystatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577507/vmgmajoritystatement.pdf) (encouraging further study and assessment on the effects of vertical mergers as a possible precursor to further refinements of the vertical merger guidelines).

29 See Public Comments of 28 States Attorney General on Draft Vertical Merger Guidelines, *supra* note 28, at 1, 7, 10, 12-13, 14-15, 16, 19-20.

submitted comments on the Federal Trade Commission's approval, with conditions, of the proposed *AbbVie-Allergan* merger, pointing out that the Federal Trade Commission should study pharmaceutical merger divestitures and that there are current gaps and vulnerabilities in the Federal Trade Commission's analysis of pharmaceutical mergers.<sup>30</sup>

### III. HEALTHCARE LEGISLATION SUPPORTED BY THE ATTORNEY GENERAL: APPLYING THE LESSONS LEARNED FROM INVESTIGATIONS AND CASES INVOLVING HEALTHCARE MARKETS

Congress has considered legislative fixes to the federal antitrust laws to reflect the increasingly concentrated nature of American markets and the resulting lessening of competition.<sup>31</sup> However, California has not stood still in this regard. Building on legislative successes in mandating transparency of healthcare costs for enrollees in healthcare plans<sup>32</sup> and mirroring the ACA's former individual mandate as a matter of state law,<sup>33</sup> the Attorney General supported novel healthcare competition legislation both last year and this year in applying lessons learned from investigations and cases involving healthcare markets in our state.

Last year, the Attorney General supported legislation — A.B. 824 — that prohibits collusive pay-for-delay agreements as a matter of state law. This legislation, which was enacted into law, presumes these agreements are anticompetitive if there is delay and the receipt of consideration for that delay and establishes a stronger platform for prosecuting these agreements.<sup>34</sup> A constitutional attack against the newly enacted statute was just rejected this month on standing grounds.<sup>35</sup>

This year, the Attorney General is supporting legislation — S.B. 977 — that would set up a review and approval process for healthcare providers and facilities by healthcare systems, private equity groups, and hedge funds as well as applying updated legal standards to the abuse of market power by healthcare systems.<sup>36</sup> This bill, if enacted, would provide a mechanism to further halt anticompetitive healthcare acquisitions in the state as well as reduce anticompetitive conduct that leads to higher prices.<sup>37</sup> The California Senate voted in favor of this legislation on the floor and it is now in the California Assembly in the Appropriations Committee.<sup>38</sup>

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30 Letter from State of California, Office of the Attorney General, Attorney General Xavier Becerra, to Acting Secretary April Tabor, Federal Trade Commission, *AbbVie and Allergan*, FTC File No. 191-0169 (June 11, 2020), <https://www.regulations.gov/document?D=FTC-2020-0042-0042>.

31 E.g. Consolidation Prevention and Competition Promotion Act, S 307, 116<sup>th</sup> Cong. (2019-2020), available at <https://www.congress.gov/bill/116th-congress/senate-bill/307?q=%7B%22search%22%3A%5B%22klobuchar+mergers%22%5D%7D&s=1&r=3>.

32 2011 Cal. Stat. 244 (previously S.B. 751); 2012 Cal. Stat. 869 (previously S.B. 1196); 2014 Cal. Stats. 83 (previously S.B. 1340); 2019 Cal. Stat. 247 (previously S.B. 343).

33 On June 27, 2019, Governor Newsom signed into law SB 78, which imposes an individual mandate similar to the now-defunct mandate under the federal ACA. See CAL. GOV'T. CODE, § 100700 *et. seq.*

34 See *Assoc. for Accessible Medicines v. Xavier Becerra*, No. 20-15014, slip. op. at 4 n.1 (9th Cir. July 24, 2020) (document in possession of author); Press Release, California Office of the Attorney General, Attorney General Becerra, Assemblyman Wood: California Enacts First-in-the-Nation Law to Combat Pay-for-Delay Agreements that Inflate Drug Prices (Oct. 7, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-assemblymember-wood-california-enacts-first-nation-law>.

35 *Assoc. for Accessible Medicine*, *supra* note 34.

36 Press Release, California Office of the Attorney General, Attorney General Becerra and Senator Monning Announce That Legislation to Reduce Healthcare Costs, Increase Access to Affordable Care Passes Senate Health Committee (May 13, 2020), <https://www.oag.ca.gov/news/press-releases/attorney-general-becerra-and-senator-monning-announce-legislation-reduce>.

37 *Id.*

38 See [http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201920200SB977](http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200SB977).

## IV. INSTITUTIONAL REORGANIZATION IN THE OFFICE OF THE ATTORNEY GENERAL: BRINGING A SYNERGISTIC APPROACH TO BEAR ON HEALTHCARE MARKETS

Enhancing healthcare access and equity while holding down costs and improving quality requires a synergistic, collaborative approach in applying the law as it does in medicine itself given the panoply of state and federal laws, agencies, forums, and regulations that are involved. As discussed *supra* in this article, achieving these goals requires the use of litigation, legislation, and policy comments, all of which require close coordination.

Accordingly, the California Office of the Attorney General has formed the Healthcare Rights and Access Section as a new section in the Public Rights Division. That section will be responsible for all antitrust, consumer protection, charitable trust, and health equity matters that relate to healthcare going forward.<sup>39</sup> The benefits of such coordination have already been demonstrated in such matters as addressing the constitutional challenge to A.B. 824, supporting S.B. 977, and addressing the scope of the Attorney General's power to speak on behalf of the public interest in healthcare matters in *Sutter* in addressing Sutter's motion to continue the preliminary approval hearing based on COVID-19.

## V. CONCLUSION

The novel approaches of the California Attorney General in addressing healthcare and competition, so as to achieve the goals of better access, better equity, more affordability, and better quality of healthcare, are not a zero-sum federalist approach that excludes cooperation with federal and other state antitrust and healthcare agencies where appropriate. Indeed, healthcare antitrust has historically been marked by cooperation between federal and state antitrust authorities, including those in California, on such cases as *Anthem-Cigna*<sup>40</sup> and *CVS-Aetna*.<sup>41</sup> And that course of action will only continue with the new Healthcare Rights and Access Section even as it builds on it in the best tradition of antitrust federalism with these novel and innovative approaches.

However, only relying on the federal government is not conducive to robust healthcare markets that achieve these important goals, rather states must be given room to innovate in our federalist system — especially on local issues like healthcare.<sup>42</sup> In that vein, the ventures of the California Attorney General, taken together, demonstrate the wisdom of Justice Brandeis' additional observation in his dissent in *New Ice Co.* that “[t]here must be power in the states and the nation to remould [*sic*], through experimentation, our economic practices and institutions to meet changing social and economic needs.”<sup>43</sup>

<sup>39</sup> See California Office of the Attorney General, Division of Public Rights (July 28, 2020), <https://oag.ca.gov/careers/descriptions/publicrights>.

<sup>40</sup> See, e.g. *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 186 (D.D.C. 2017).

<sup>41</sup> See, e.g. Complaint, *United States v. CVS Health Corp.*, No. 18-cv-02340 (D.D.C. Oct. 10, 2018) (document in possession of author).

<sup>42</sup> See Kathleen Sebelius, Ned Sebelius, *Bearing the Burden of the Beltway: Practical Realities of State Government and Federal-State Relations in the Twenty-First Century*, 3 HARV. L. & POL'Y REV. 9, 10-11, 30-32 (2009).

<sup>43</sup> *New State Ice Co.*, 285 U.S. at 311 (dis. op. of Brandeis, J.).

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