THE ORIGINS OF THE FTC: CONCENTRATION, COOPERATION, CONTROL, AND COMPETITION

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> Concentration and co-operation are conditions imperatively essential for industrial advance; but if we allow concentration and co-operation there must be control in order to protect the people, and adequate control is only possible through the administrative commission. Hence concentration, co-operation, and control are the key words for a scientific solution of the mighty industrial problem which now confronts this nation.
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> —*Theodore Roosevelt, quoting Charles Van Hise, in accepting the 1912 Progressive Party nomination.*[1]

> [*Standard Oil Co. v. United States*[2]] will be a signal for the voluntary breaking up of all combinations in restraint of trade within the inhibition of the [Sherman Act].
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> —*William Howard Taft, September 18, 1911.*[3]

> [T]he proper role of the government is to encourage not combination, but co-operation.
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> —*Letter of Louis D. Brandeis, November 11, 1911.*[4]

> I don't want a smug lot of experts to sit down behind closed doors in Washington and play providence to me.
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> —*Woodrow Wilson, September 17, 1912.*[5]

> [A]n attempt was very properly made . . . to provide tribunals which would distinctly determine what was fair and what was unfair competi-

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[1] *Confession of Faith,* Aug. 6, 1912 Theodore Roosevelt, 17 Works of Theodore Roosevelt 254, 276 [hereinafter TRW].

[2] 221 U.S. 1 (1911).

[3] Speech, Sept. 18, 1911, 22 Taft Addresses 51, 58 *in* Reel 568, William Howard Taft Papers, Library of Congress.

[4] Brandeis to Charles Richard Crane, Nov. 11, 1911, *in* 2 Letters of Louis Brandeis 511, 512 (Melvin I. Urofsky & David W. Levy eds.) [hereinafter LBL].

[5] 25 Papers of Woodrow Wilson 148, 154 (Arthur S. Link ed.) [hereinafter PWW].

> tion; and to supply the business community, not merely with lawyers in the Department of Justice who could cry, "Stop!", but with men in such tribunals as the Federal Trade Commission, who could say, "Go on," who could warn where things were going wrong and assist instead of check.
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> —*Woodrow Wilson, October 5, 1916.*[6]

I. INTRODUCTION

From the Sherman Act's passage in 1890 through the passage of the Federal Trade Commission and Clayton Acts in 1914, antitrust was a "movement" that inspired public agitation, not the specialized "enterprise" that it later became.[7] Yet it took nearly a decade of this formative period to establish that the Sherman Act prevented manufacturers from joining price-fixing cartels. When Theodore Roosevelt became President in 1901, it remained unclear if the law even applied to mergers.

Roosevelt began a second phase of the formative period. He proceeded, in part, by litigation. *Northern Securities Co. v. United States,*[8] which dissolved a J.P. Morgan holding company, held that the Sherman Act did reach mergers. With Roosevelt's prompting, 1903 became the year when antitrust was institutionalized.[9] On February 14, Roosevelt secured a Bureau of Corporations, the precursor to the Federal Trade Commission.[10] The day the Bureau opened its doors, February 25, he secured the first antitrust appropriation and, with it, the seeds of the Antitrust Division.[11]

The formative period's second phase entered its home stretch in 1911, when William Howard Taft was President and *Standard Oil* announced the rule of reason. It culminated in 1914, when Woodrow Wilson was President and Congress passed the Federal Trade Commission and Clayton Acts. This study examines the Presidents, advisers, and legislators, part of a "second golden age of American politics,"[12] who grappled

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[6] 38 PWW, *supra* note 5, at 336, 340–41.

[7] Richard Hofstadter, *What Happened to the Antitrust Movement?, reprinted in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1965).

[8] 193 U.S. 197 (1904).

[9] HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 560 (1954). *See also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA ch. 6 (1965; Phoenix ed. 1981) (Sherman Act matured between late 1901 and 1904).

[10] Act of Feb. 14, 1903, ch. 552, § 6, 32 Stat. 825.

[11] Act of Feb. 25, 1903, ch. 755, 32 Stat. 854, 903; REPORT OF THE COMMISSIONER OF CORPORATIONS 7–8 (1904).

[12] JOHN MILTON COOPER, JR., PIVOTAL DECADES xv–xvi (1990) (period second only to that of the Founding Fathers).

with questions of whether and how, consistent with prosperity, business opportunity, and global competitiveness, to control corporate growth.

Roosevelt's role remained crucial throughout these years. The cases brought by his administration made credible a law whose premises, as then construed, he openly disdained. In place of litigation, Roosevelt envisioned an expanded Bureau of Corporations that would rationalize the economy, tame rather than dissolve the trusts, and accommodate rather than challenge both concentration and interfirm cooperation. All this would take place under government auspices, and the government's ultimate backstop would be direct price regulation.

Other participants in the national debate were in some sense responding to Roosevelt and, after 1911, to *Standard Oil*. The debate posed fundamental questions. To what extent had business grown through efficiencies and to what extent through unfair competition? To the extent growth reflected efficiencies, had businesses nonetheless become so large as to undermine the competitive market? If so, how could the government protect consumers and competitors? To the extent past growth reflected misconduct, should it be reversed? If so, how? Should firms be forcibly dissolved or could the market reverse past growth once future misconduct was stopped? Should Congress refine the definitions of misconduct in the Sherman Act and, if so, what practices should it proscribe? However precise the statutory standards, should Congress entrust their application (in the first instance) to courts or to an administrative agency? If Congress relied on an administrative agency, how should the agency operate? Should it challenge conduct after-the-fact, perhaps through administrative proceedings? Should it opine on proposed conduct in advance, and should its advice provide a shield against (at least) criminal prosecution? Various nuances and permutations were possible in responding to these questions. Advocates might converge on similar remedies after starting from very different premises, or diverge on their remedial prescriptions after starting from similar premises. Many routes led to a commission, moreover, albeit to potentially quite different visions of a commission.

Though he was Roosevelt's hand-picked successor, William Howard Taft had a fundamental commitment to a judicially applied rule of reason, and he promised dramatic deconcentration under that rule. For Woodrow Wilson's adviser Louis Brandeis, the benchmark was the "curse of bigness." Brandeis denied the efficiency of massive enterprise, sought to promote smaller enterprises, and saw antitrust as key to that promotion. Brandeis showed more enthusiasm than Taft, though less than Roosevelt, for an administrative commission. Further, he focused more

than Roosevelt, Taft, or Wilson on specific antitrust issues, such as resale price maintenance and interlocking directorates.

Wilson himself ran against both Roosevelt (heading a third party) and Taft (the Republican) in 1912. The candidate reached out both to the Democrats' traditional agrarian base, which broadly distrusted combinations, as well as to business interests. Wilson approved of concentration that resulted from efficiencies, but suggested that consolidations rarely generated efficiencies. Although he questioned business growth, however, Wilson resisted forced dissolutions; he trusted the market to reverse past growth if future misconduct was stopped. To stop that misconduct, he declared that Congress should enunciate precise standards, backed by criminal sanctions targeting both firms and individuals within those firms.

Soon after the election, though, Wilson reversed course on the dissolution question. He made more substantial reversals in 1914. The House of Representatives had taken up his antitrust initiative and his program for criminally enforced definitions was proving problematic. After a meeting with Brandeis and three future Commissioners, most significantly George Rublee, Wilson then retreated from a strong "definitions" bill (the Clayton bill) and endorsed instead a strong commission bill. He embraced a provision, which became Section 5 of the FTC Act, authorizing the agency to issue administrative orders proscribing "unfair competition" (soon changed to "unfair methods of competition").[13] Wilson did not, however, embrace Roosevelt-style regulation. As the legislative package finally emerged, the Commission could enforce both Section 5's general prohibition and specific prohibitions that survived in the Clayton Act. But it could neither set prices nor immunize conduct from Sherman Act prosecutions, and Wilson even fought to require broad judicial review of the agency's determinations.

Because the House had passed its bill for an investigatory commission before Wilson embraced a prosecutorial agency, the principal debate on Section 5 occurred in the Senate. Senator's views were wide-ranging. Some opposed Section 5 because they preferred the status quo. Some strong antitrust advocates continued to prefer strict statutory standards backed by criminal sanctions; distrusting the proposed commission, they either opposed Section 5 or at best supported it half-heartedly. Those who affirmatively embraced a commission, though, approved an agency that could apply a flexible standard that prohibited "incipient" law violations and that could reach where the Sherman Act did not.

Spokesmen for Section 5 converged from different directions. Democrat Francis Newlands had earlier been open to Roosevelt-style regula-

[13] 15 U.S.C. § 45.

tion, while Republican Albert Cummins had earlier expressed an agrarian disdain for trusts. Newlands and Cummins differed in other respects, and Henry Hollis, another Democratic spokesman for the bill, differed from both. Newlands would have transferred all antitrust enforcement to a commission, operating under a general standard; Hollis did not go that far, but considered Congress's effort to develop specific definitions in the Clayton bill to be fundamentally flawed; Cummins deemed Section 5 merely one tool—and not the most important tool—for Congress to direct antitrust policy. The three also approached "unfair competition" from different, if not necessarily incompatible, perspectives. Newlands emphasized a moral basis of the standard, although he drew support for his moral standard from law and economics. Hollis and Cummins focused more directly on economics; for Hollis, unfair competition was competition that succeeded for reasons other than efficiency and, for Cummins, Section 5 would protect the "competitive force." The bill's advocates also differed on the subject of judicial review of agency determinations. Cummins fought for narrow review, but the issue mattered less to Newlands and even less to Hollis. (All three, moreover, accepted a more fundamental weakness; the Commission's sole recourse when a respondent violated its order was, and remained until 1938, to seek an injunction).

Part II of this article describes the industrial backdrop to the formative period's second phase. Part III discusses the principal judicial benchmarks of the formative period. Part IV turns to Roosevelt, Taft, Brandeis and Wilson, describing their differing ideas in 1912 and, for Roosevelt and Taft, the ways they already had implemented their ideas during their Presidencies. Part V describes Wilson's and the Democrats' victories in 1912, the post-election antitrust package that the President-elect secured while still Governor of New Jersey, and his appointment of a known trustbuster as Attorney General. Part VI explores the 1914 legislative process that culminated with the enactment of a federal antitrust package. Finally, Part VII describes the launching of the Commission, when Wilson emphasized assistance to business (a function not even mentioned in the statute) rather than the investigative functions highlighted in the House or the prosecutorial functions highlighted in the Senate, and selected a complement of Commissioners that reflected distrust of lawyers and economists alike. The Commission's early history would soon play out against a new backdrop, as wartime mobilization would encourage, and to some extent legitimate, unprecedented coordination under government auspices. That backdrop would mold future debates over antitrust policy, as well.

The Commission's own powers would also be supplemented in later decades. Nonetheless, there emerged in 1914 a Commission with a broad

and flexible mandate, wide-ranging powers, and the ability, at its best, to respond to the needs of changing times.

II. PRELUDE: CONSOLIDATIONS AND THE MERGER WAVE

During the early twentieth century, the United States enjoyed unprecedented prosperity accompanied by unprecedented corporate consolidation. Competition policy moved toward center stage as the country sought to preserve the benefits of the one without the costs of the other.

The roots of consolidation led back into the nineteenth century. Standard Oil controlled substantial petroleum refining as early as 1880, and the whiskey and sugar trusts were formed in 1887.[14] New Jersey became the "traitor state" when it facilitated consolidations in 1889, most significantly by allowing corporations to own stock in other firms.[15] By 1890, Congress was sufficiently concerned with the problem of "trusts"[16] to pass the Sherman Act, forbidding in Section 1 "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," and making it illegal in Section 2 "to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[17] States passed antitrust laws as well, and some enforced them vigorously.[18]

Neither federal nor state law, however, deterred a merger wave that crested from 1898 to 1902. During those years at least 303 firms disappeared annually through mergers; 1,208 disappeared in 1899.[19] Many consolidations simultaneously united multiple firms; 136 united five firms

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[14] LETWIN, *supra* note 9, at 69–70.

[15] HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836–1937, at 257–58 (1991); Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 J. ECON. HIST. 677 (1989).

[16] "Trust" originally meant an arrangement transferring stock in multiple corporations to a common trustee. HOVENKAMP, *supra* note 15, at 249–51. Various bills and laws, though, simply defined wrongful combinations as "trusts." *See, e.g.*, S. 1 as Amended by the Senate, 51st Cong., 1st Sess. (Mar. 25, 1890); Sess. Laws, N.J., ch. 13 (1913), *reprinted in* HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, LAWS ON TRUSTS AND MONOPOLIES 229 (rev. ed. 1914) [hereinafter LAWS].

[17] 15 U.S.C. §§ 1, 2.

[18] James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918,* 135 U. PA. L. REV. 495, 498–501 (1987) [hereinafter May, *Reach*].

[19] RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895–1956, at 37 (1959). Only 69 or fewer firms had disappeared annually through consolidations in the three years before 1898. Only once did the number exceed 200 between 1903 and 1919.

or more.[20] Consolidation piled on consolidation, as the American Tobacco Company, for example, absorbed what once had been 250 firms.[21] Enterprise assumed massive scale. United States Steel, formed in 1901, was capitalized at $1.4 billion (over $25 billion in current dollars).[22] According to Naomi R. Lamoreaux, at least 72 consolidations led to the formation of entities that controlled over 40 percent of an industry, and 42 to entities that controlled over 70 percent.[23] Finally, as highlighted by Congressional hearings and a muckraking book that Brandeis subsequently wrote in 1913, a so-called "money trust" had organized consolidations across multiple industries, and its representation on multiple boards of directors was perceived to create cross-industry interconnections short of merger.[24]

III. EARLY SHERMAN ACT JURISPRUDENCE

A. First Phase Cases

By 1899, the Supreme Court had established that the Sherman Act broadly prohibited price-fixing cartels, but the law's application to other forms of interfirm cooperation, and more importantly its application to business consolidations, remained in doubt.[25]

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[20] Naomi R. Lamoreaux, The Great Merger Movement in American Business: 1895–1904, at 1–2 (1985). Six consolidations united 5 or more firms in 1897. During the succeeding five years, the numbers were 16, 63, 21, 19, and 17, respectively. The number of such consolidations dropped to 5 in 1903 and 3 the following year. *Id.* at 2.

[21] *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce, Report of the Committee on Interstate Commerce, U.S. Senate, 62d Cong., pursuant to S. Res. 98.* at 1203 [hereinafter *1911 Hearings*] (Brandeis testimony). *See also* Thorelli, *supra* note 9, at 304.

[22] *See* Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share,* 1901–1938, 49 J. Econ. Hist. 593, 593 (1989) (noting possible excess capitalization of 40%); Department of Labor, Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers (May 16, 2003), *available at* ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (more than 18-fold increase in the CPI-U since the index began in 1913).

[23] Lamoreaux, *supra* note 20, at 2.

[24] *See* Louis Brandeis, Other People's Money and How the Bankers Use It (1913).

[25] Important studies of the cases and thought of this period, as well as the legislative history of the 1890 Sherman Act that these cases construed, include May, *Reach, supra* note 18; James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 Ohio St. L.J. 257, 293–300 (1989) [hereinafter May, *Theory*]; Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 Hastings L.J. 65 (1982); Letwin, *supra* note 9; Hovenkamp, *supra* note 15; Thorelli, *supra* note 9; Rudolph J.R. Peritz, Competition Policy in America, 1880–1992: History, Rhetoric, Law (1996); Martin J. Sklar, The Corporate Reconstruction of American Capitalism, 1890–1916 (1988); Alan J. Meese, *Liberty and Antitrust in the Formative Era,* 79 B.U. L. Rev. 1 (1999).

The 1895 decision in *United States v. E.C. Knight Co.*[26] seriously undermined antitrust enforcement. By an 8–1 margin, the Court rejected a challenge to the sugar trust's acquisitions of four Pennsylvania plants. Although the trust obtained a 98 percent share of the national market, the Court held that the Commerce Clause placed the transactions outside federal law because they affected commerce "only incidentally and not directly." The trust was primarily engaged in manufacture, and "[c]ommerce succeeds to manufacture, and is not part of it."[27]

Two years later, *United States v. Trans-Missouri Freight Ass'n*[28] became the Court's first case to find a Sherman Act violation. The Court held a railroad price-setting agreement unlawful. Speaking through Justice Rufus Peckham, it declared that the law required "free and open competition" and forbade "all" contracts in restraint of trade.[29] The majority also articulated a rationale for the Sherman Act. Discussing combinations of manufacturers, the Court found harmful those whose "purpose . . . is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold."[30] Even if a combination lowered prices, the Court explained, danger lay "in the power of the combination to raise it, and the result in any event is unfortunate for the country, by depriving it of the services of small but independent dealers . . . ." (also termed "small dealers and worthy men").[31] Antitrust thus protected both consumers and competitors from economic harm and, in protecting small dealers from economic harm, simultaneously averted social harm.[32] Here, at least, the Court reflected a classical paradigm that, in James May's words, deemed "opportunity, efficiency, competition, fair distribution, and political freedom" to be "largely consistent" and "capable of vigorous implementation through 'nondiscretionary' judicial decisionmaking."[33]

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[26] 156 U.S. 1 (1895).

[27] *Id.* at 12.

[28] 166 U.S. 290 (1897).

[29] *Id.* at 328, 339.

[30] *Id.* at 323. The Court also described combinations of manufacturers as having, for this purpose, "the same nature" as combinations of railroads. *Id.* at 324.

[31] *Id.* at 323, 324.

[32] These social and industrial effects are similar to the two meanings that David W. Barnes detects in references to what he calls "entrepreneurial freedom": "The first would protect small businesses in order to increase the freedom of individuals to be self-employed and self-reliant and the second would protect small businesses in order to promote an economic system that better satisfies consumer demands." David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 841 (1989).

[33] May, *Theory*, *supra* note 25, at 299 (emphasizing roots of the paradigm in both economic and political thought). *See also* HOVENKAMP, *supra* note 15 (emphasizing roots in economic thought). Peckham here dismissed lower prices because of the threat that the combination

However, *Trans-Missouri* hardly suggested a settled state of law. First, four Justices dissented in an opinion by Justice Edward White, who would later author the *Standard Oil* decision. White argued that the Sherman Act incorporated a common law meaning of "restraint of trade," that the common law allowed reasonable restraints, and that agreements to fix "reasonable" rates (including defendants' agreement) were themselves reasonable.[34] Second, qualifying the assertion that the Sherman Act prohibited "all" contracts in restraint of trade, the Court acknowledged a possible exception for covenants collateral to the sale of a business.[35] This raised the question of whether the law would reach the actual contract to sell a business—the core of merger activity. Third, the *E.C. Knight* limits were undisturbed, since the *Trans-Missouri* defendants were interstate railroads and reachable under a narrow reading of "commerce." Indeed, drawing on *E.C. Knight*, the Court explained that a violation resulted because the agreement's "direct, immediate and necessary effect is to put a restraint on trade or commerce as described in the act."[36]

A year later, the Court further developed its directness test in three decisions, all authored by Justice Peckham, that were delivered on the same day. The only decision to find a violation was another railroad case. The 5–3 decision in *United States v. Joint Traffic Ass'n*[37] held unlawful a railroad agreement whose "natural and direct" effect was to maintain higher rates than otherwise would prevail.[38] Both *Anderson v. United States*[39] and *Hopkins v. United States,*[40] in contrast, rejected challenges to

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could later raise them. *See Trans-Missouri Freight*, 166 U.S. at 335 (prices might be lowered to drive out rivals, "in order that rates might thereafter be advanced"). The decision contains a more ambiguous reference to combinations that "perhaps permanently" reduce prices by reducing "the expense inseparable from the running of many different companies for the same purpose." However, the Court went on to deem inevitable, if unfortunate, the displacement of small dealers because of "great industrial changes." *Id.* at 322. While not entirely clear, the changes the Court deemed inevitable if unfortunate might include all those based on efficiencies.

[34] *Id.* at 343–57. White described the carrier agreement as "securing fairness in their dealings with each other, and tending to protect the public against improper discrimination and sudden changes in rates." *Id.* at 357. *See also* Rudolph Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285, 316–17 (1989) (minority position grounded in the logic of "property" and a fair return on investment, rather than "competition").

[35] *Trans-Missouri Freight*, 166 U.S. at 329 (such contracts "might not be included within the letter or spirit of the statute").

[36] *Id.* at 341–42.

[37] 171 U.S. 505 (1898).

[38] *Id.* at 565.

[39] 171 U.S. 604 (1898).

[40] 171 U.S. 578 (1898).

association rules that governed livestock sales in Kansas City. None of the rules was found to control price or output directly. The Court held that some of the rules affected commerce that was not interstate, and those that did affect interstate commerce had an effect that was remote, small, and unintended.[41]

Finally, the 1899 case of *United States v. Addyston Pipe & Steel Co.*[42] held that the Sherman Act did reach a manufacturers' cartel. The case came to the Court with a prescient lower court opinion by William Howard Taft, then a Circuit Court judge. Taft followed White's *Trans-Missouri* dissent in concluding that the statute incorporated common law limits on "restraint of trade," but, developing the *Trans-Missouri* majority's reference to constraints collateral to sales of property, Taft offered a more nuanced view of the common law. The common law deemed a restraint unreasonable if its sole object was to restrain prices, he wrote. Even if those prices were reasonable, impropriety resulted from the "power to charge unreasonable prices." But if an agreement had a proper purpose to which a restraint was ancillary —for example, if it facilitated sale of a business by limiting future competition by the seller—the restraint was lawful so long as it was no wider than needed. Taft essentially distinguished naked restraints that were per se violations from ancillary restraints that would be allowed only if reasonable.[43]

However accurate Taft's reading of past law,[44] the Supreme Court did not follow his lead. Its unanimous decision (like the circuit court's) limited *E.C. Knight*, and applied the Sherman Act to a conspiracy among manufacturers.[45] However, the Court found the pool illegal because its

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[41] In *Anderson*, cattle purchasers agreed to do business only with members of their exchange, which was found to do no business of its own, not to meddle with prices, and to be open to anyone following its rules. *Anderson,* 171 U.S. at 614. The Court held the agreement was lawful even if it affected interstate commerce; seeking only transaction of business "upon a proper and fair basis," its effect on commerce was "quite remote, not intended and too small to be taken into account." *Id.* at 618–19. In *Hopkins,* the Court rejected most challenges to the practices of commission merchants on an exchange, relying primarily on the *E.C. Knight*-like rationale that they were outside "interstate" commerce. *Hopkins,* 171 U.S. at 597.

[42] 175 U.S. 211 (1899).

[43] 85 F. 271 at 278–79, 281–83, 293 (6th Cir. 1898).

[44] *Compare* May, *Theory*, *supra* note 25, at 330 (a "brilliant effort to extract analytically coherent tendencies from the aggregate mass of nineteenth century American common law precedent," despite understating toleration of nonancillary restraints), *with* HOVENKAMP, *supra* note 15, at 286–87 (historically dubious, but facilitated law's development), *and* ROBERT H. BORK, THE ANTITRUST PARADOX 26 (1978, 1993 ed.) (perhaps the greatest antitrust decision ever).

[45] The Court held that the Sherman Act reached independent manufacturers who agreed to restrain interstate sales (even if it might not reach mergers of those same manufacturers). *Addyston Pipe*, 175 U.S. at 238–41.

"direct and immediate" effect was to destroy competition and raise prices and, even under a directness test, it sidestepped Taft's conclusion that an agreement would be unlawful if it fixed "reasonable" prices.[46]

B. Second Phase Cases

After *Addyston Pipe* (and though the decision left open an argument that cartels could fix "reasonable prices"), the Court reached a consensus about price fixing. Antitrust advocates during the rest of the formative period might object that enforcement against cartels was inadequate and ineffective,[47] but not about the substantive standards applied when a cartel was challenged. The Court further showed its distaste for price fixing mere weeks before *Standard Oil*, when it condemned the vertical restraints of resale price maintenance in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[48] The Court ignited a separate controversy in *Loewe v. Lawlor*,[49] a private action for treble damages that struck not at business but at labor. The labor movement's subsequent efforts to secure antitrust exemptions bore fruit in the Clayton Act, but the labor story is peripheral to the one told in this article.[50]

The core antitrust concerns as Roosevelt took office, though, were whether the law could deal with consolidations and the firms created by past consolidations.[51] Consolidations implicated an owner's right to sell his business. With no merger case having reached the Court since *E.C. Knight*, and with states unable to check corporate growth,[52] parties who hesitated to cartelize may have even felt driven to "the most extreme and complete form of consolidation"—as when the *Addyston Pipe* defendants merged after they lost in court.[53]

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[46] *Id.* at 238 (finding the prices unreasonable), 247 (upholding the injunction, except as applied to purely intrastate transactions).

[47] *1911 Hearings, supra* note 21, at 182 (Samuel Untermeyer declaring that the country was "honeycombed" with secret price-fixing agreements).

[48] 220 U.S. 373 (1911).

[49] 208 U.S. 274 (1908).

[50] *See infra* note 335 and accompanying text.

[51] *See* JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 4 (1912, 1914 reprint) (the public "reconciled itself" to pooling and contracts controlling prices, "though it did not make the payment altogether willingly. It was the appearance of consolidations that were firmer and more complete that caused the menacing shadow of general monopoly to deepen.").

[52] *See* Charles McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporate Law, 1869–1903*, 53 BUS. HIST. REV. 304 (1979) (arguing that states could have used corporate law to prevent firms from joining out-of-state holding companies, but were unwilling to drive away business); HOVENKAMP, *supra* note 15, at 262–64 (questioning extent of states' authority under corporate law).

[53] *See* FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT 8–9 (1948) (discussing *Addyston Pipe*); TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST

1. Northern Securities Co. v. United States.[54]

Northern Securities found that a holding company violated the Sherman Act by taking control of two railroads that had previously competed. However, the Court was split. Justice John Marshall Harlan, who had been the sole dissenter in *E.C. Knight* and who would again become the sole dissenter in *Standard Oil*, here spoke for a plurality of four Justices, for whom the holding company was illegal for the simple reason that it directly eliminated competition.[55] But Justice David Brewer, the critical fifth vote, relied on the nature of the railroad industry to find the consolidation "unreasonable."[56] Finally, Justices White and Peckham (authors of the *Trans-Missouri* decision and dissent) now united with two other Justices in two dissents. The first, by White, denied federal authority to regulate ownership of stock in state-chartered firms.[57] The second, by Oliver Wendell Holmes, Jr., literally and provocatively announced that the Sherman Act "says nothing about competition" and did not apply to "fusions."[58] In 1904, four Justices thus deemed federal antitrust irrelevant to mergers.

2. Standard Oil v. United States[59] *and* United States v. American Tobacco Co.[60]

The 1911 cases were decided by a dramatically changed Court. Taft had been President only twenty-six months, but had named four new Justices and elevated Justice White to Chief. On May 15, 1911, White authored the *Standard Oil* decision that announced the rule of reason. Two weeks later, White wrote the *American Tobacco* decision that reaffirmed it. Each decision was joined by all save Harlan.

Standard Oil declared that the Sherman Act proscribed only those restraints that the common law made unenforceable, that the common law's specifics mattered less than its "standard of reason," and that the

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IN GREAT BRITAIN AND AMERICA, 1880–1990, at 26–35 (1992) (contrast to Britain, which encouraged looser combinations). *But see* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 315–44 (1977) (vertical integration as basis for successful mergers); SKLAR, *supra* note 25, at 157–66 (noting large feasible scale of American business, and intense, impersonal competition).

[54] 193 U.S. 197 (1904).

[55] *Id.* at 331–32.

[56] *Id.* at 363 ("under present conditions a single railroad is, if not a legal, largely a practical, monopoly," and defendant holding company "broadens and extends such monopoly").

[57] *Id.* at 369–70.

[58] *Id.* at 403, 410.

[59] 221 U.S. 1 (1911).

[60] 221 U.S. 106 (1911).

standard of reason condemned practices that led to the evils Taft had identified in *Addyston Pipe*: the power to fix price or to limit production (or a related deterioration in quality).[61] In the language of freedom of contract, the Act limited the freedom of contract by some to protect the contractual freedom of others. A Sherman Act analysis would consider whether conduct undermined this broadly understood right to contract, but not whether the Act unreasonably undermined it;[62] White thus abandoned his prior view that cartels could fix reasonable prices. Applying the rule of reason, *Standard Oil* held that defendant's 90 percent market share, obtained after forty-one years of reorganizations, acquisitions, "unfair practices," and "unfair methods of competition," justified a presumption of illegality. The facts reinforced the presumption.[63]

3. *The Reaction*

The *Standard Oil* decision had been anxiously awaited, and its significance has been compared to such cases as *Roe v. Wade*.[64] Signaling business satisfaction with the rule of reason, stock prices rose despite the Court's dissolution order.[65] But William Jennings Bryan, three-time Democratic Presidential nominee and spokesman for agrarian interests within the party, declared "The Trusts Have Won."[66] Five Senators, "radical Democrats and Republican insurgents," introduced bills to proscribe all contracts, combinations and conspiracies in restraint of trade.[67]

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[61] *Standard Oil*, 221 U.S. at 51–52, 60. *See also American Tobacco*, 221 U.S. at 179 (law forbade "acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade . . .").

[62] *Standard Oil,* 221 U.S. at 62 ("the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly . . . . [F]reedom to contract was the essence of freedom from undue restraint on the right to contract"), 69.

[63] *Id.* at 42–43, 75.

[64] *Asks Court to Hurry Antitrust Decision,* N.Y. TIMES, May 13, 1911, at 1 (describing letter that declared business "at a standstill" as it awaited the decision); NATHAN GASKILL, THE REGULATION OF COMPETITION 15 (1936) ("startling conclusions aroused the country like no decision since [*Dred Scott v. Sandford,* 60 U.S. 393 (1856)]"; PERITZ, *supra* note 25, at 61 (case's "cultural significance" compared to *Brown v. Board of Education,* 347 U.S. 483 (1954), and *Roe v. Wade,* 410 U.S. 113 (1973)).

[65] *Business Likes Oil Decision,* N.Y. TIMES, May 17, 1911, at 1; *Decision Opens a New Era—Carnegie,* N.Y. TIMES, May 17, 1911, at 6.

[66] THE COMMONER, May 26, 1911, at 1. Bryan asked "When did a court interpret a statute against murder . . . on the theory that the legislature meant undue murder . . . ?" *Id.* at 2. Though White's decision was turgid, Bryan detected in it the triumphant strains of the "Battle Hymn of the Republic." William Jennings Bryan, *The Reason*, 194 N. AM. REV. 10, 11 (July 1911).

[67] *May Amend Sherman Law,* N.Y. TIMES, MAY 16, 1911, at 4; S. 2158, S. 2370, S. 2374, S. 2375, S. 2433, 62d Cong, 2d Sess. (1911), *reprinted in* 3 BILLS AND DEBATES IN CONGRESS

Critics often ignored the differences between White's 1911 rule and the rule he advanced in 1897; his authorship of both predisposed many to equate them.[68] For example, Senator Cummins wrote in 1913 that the Sherman Act had "wisely" incorporated common law limits on restraint of trade. Properly understood, it reached "such unreasonable restriction of competition as impaired substantially, and to the public injury, the freedom of trade or the freedom to trade," but not restrictions that "left the competitive force as an adequate protection to the people.[69] Cummins equated the rule White sought in 1897 to the rule he announced in *Standard Oil*, though, and said that both would allow not only "a reasonable interference with competition . . . which did not . . . constitute a restraint of trade," but also a "reasonable restraint of trade," that is, a restraint the left the competitive force inadequately preserved.[70]

Critics also cried "judicial legislation." Harlan charged that his brethren legislated by adopting the rule,[71] Cummins that they would legislate in applying it. For Cummins, the law should allow "some, but not great latitude for difference of opinion upon . . an inquiry."[72] *Standard Oil,* as he read it, would test each restraint "by the economic standard which the individual members of the court may happen to approve," and by each Justice's "individual opinion as an economist or sociologist."[73] More broadly, the perception was that the balance of power had shifted in antitrust. Seven years after the Sherman Act passed, four Justices had been willing to allow reasonable price-fixing cartels. Seven years after that, four Justices would have held that the Sherman Act had no application to mergers. Although a bare majority had held in *Northern Securities* that the law reached merger activity, seven more years had passed without

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RELATING TO TRUSTS, 57TH CONG., 2D SESS. TO 63D CONG., 1ST SESS., INCLUSIVE, at 2411–2415. The "insurgents" included "about ten Republican Senators [who] regularly acted together on a whole range of national issues, meeting constantly to plan strategy in private, openly defying the party's established leadership in public." JAMES HOLT, CONGRESSIONAL INSURGENTS AND THE PARTY SYSTEM, 1909–1916, at 2–3 (1967). They largely represented a rural progressivism, rooted mainly in north-central agrarian states: Wisconsin, Minnesota, Iowa, Kansas, Nebraska, and the Dakotas. *Id.* at 6, 9.

[68] *See* Allyn Young, *The Sherman Act and the New Anti-Trust Legislation: I*, 23 J. POL. ECON. 201, 204 (1915) (describing "a very general impression" that "possibly even price agreements were permissible, if the prices agreed upon were 'reasonable'").

[69] S. REP. NO. 1326, 62d Cong., 3d Sess. 2 (1913) [hereinafter *Cummins Report*] (noting that common law was "not always stated with exact accuracy"). *See also id.* at 8 (finessing question of how well prior decisions had accorded with his analysis).

[70] *Id.* at 7, 9.

[71] *Standard Oil,* 221 U.S. at 90.

[72] *Cummins Report, supra* note 69, at 8.

[73] *Id.* at 10, 11. For Nathan Gaskill, this was "a Congressional declaration of war on the Supreme Court." GASKILL, *supra* note 64, at 22.

systematic reversal of corporate growth. Now, antitrust plaintiffs seemed to face a new hurdle.

Critics also condemned the remedies. Standard Oil and American Tobacco shareholders each received shares in the firms' successors.[74] Common ownership of the successors at least delayed the emergence of effective competition.[75] The aggregate value of the oil trusts's post-dissolution stock soared,[76] so shareholders reaped a reward, while critics like Brandeis deemed it offensive to even leave "these rich breakers of the laws of God and of man left in undisturbed enjoyment of all their ill-gotten wealth."[77] To Roosevelt, the remedy made the Court's "bitter condemnation" a "farce."[78]

IV. ROOSEVELT, TAFT, BRANDEIS, AND WILSON

The antitrust question was central to the 1912 Presidential race between Roosevelt and Taft, who had already shaped antitrust policy, and Wilson, whose turn was yet to come, with Wilson adviser Louis Brandeis adding his own voice both publicly and privately. The four were near-contemporaries, each born between 1856 and 1858. Each was trained in law, though Roosevelt left law school and Wilson abandoned its practice. Each brought a voice to the antitrust debate that would resonate through 1914 and beyond.

A. THEODORE ROOSEVELT

Roosevelt's antitrust policy reflected his broad activism. Born to wealth, Roosevelt entered the disreputable world of New York politics after graduating from Harvard. He was an adventurer, particularly in the face of disappointment or tragedy.[79] His attainments were both scholarly and

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[74] BUREAU OF CORPORATIONS, TRUST LAWS AND UNFAIR COMPETITION 16–21 (1915).

[75] A contemporary observer, for example, said that "formal dissolution was illusory as a remedy, unless coupled with supervision which would prevent secret understandings from taking the place of open combination . . . ." Henry R. Seager, *The New Anti-Trust Acts*, 30 POL. SCI. Q. 448, 450 (1915).

[76] *See* William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1299 (1999) (value increased 47% in a year, and nearly quadrupled in six years).

[77] *1911 Hearings*, *supra* note 21, at 1163.

[78] *Confession of Faith*, *supra* note 1, at 254, 281 (remedy produced not "one particle of benefit to the community at large;" rather, "prices went up to consumers, independent competitors were placed in greater jeopardy than ever before, and the possessions of the wrong-doers greatly appreciated in value").

[79] He retreated west at age 25 when his wife and mother both died the day after his daughter's birth. He would undertake an African safari when he left office in 1909, and charted an unexplored Brazilian river after the 1913 election.

political,[80] but the man of action predominated when he organized and led the Rough Riders in the 1898 Spanish-American War. Roosevelt's fame in combat catapulted him to the New York governorship in 1899 and the Vice Presidency in 1901. When William McKinley was assassinated seven months later, Roosevelt became America's youngest President.[81] The Rough Riders included both Ivy Leaguers and cowboys, and Roosevelt as President pursued what he deemed a conservative program to resist class division.[82] He took pride in using "every ounce of power there was in the office . . . [I]n showing the strength of, or in giving strength to, the executive, I was establishing a precedent of value."[83]

1. *The Skeptical Trust Buster*

In antitrust, Roosevelt's activism manifested itself in part through the litigation that earned him the "trustbuster" sobriquet. McKinley had brought three antitrust cases in more than four years. Roosevelt brought forty-five in less than eight.[84] His 1902 challenge to Northern Securities announced a new turn in antitrust enforcement. His target was J.P. Morgan, who, after spearheading the U.S. Steel megamerger, had worked with his partner George Perkins to create the Northern Securities company.[85] Roosevelt also challenged the meat packers' cartel (the beef trust), Standard Oil, the American Tobacco Company, and DuPont (the powder trust). He secured an appropriation earmarked for antitrust

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[80] Before 1898, Roosevelt held offices as a New York City Police Commissioner, federal Civil Service Commissioner, and Assistant Secretary of the Navy. With respect to his scholarly attainments, *compare* JOHN M. BLUM, THE PROGRESSIVE PRESIDENTS 28 (1980) ("a historian's sense of the past . . . an amateur authority on military and naval tactics and strategy . . . a creditable student of the biological sciences . . .") *with* RICHARD HOFSTADTER, AMERICAN POLITICAL TRADITION 225 (1948) ("a tissue of philistine conventionalities").

[81] *See generally* EDMUND MORRIS, THE RISE OF THEODORE ROOSEVELT (1979); DAVID GRUBIN & GEOFFREY C. WARD, THEODORE ROOSEVELT (PBS Home Video) (1997).

[82] *See, e.g.*, 1902 Annual Message to Congress, 15 MESSAGES AND PAPERS OF THE PRESIDENTS (1917), 6709, 6711 [hereinafter MESSAGES] (wise evolution a "sure safeguard against revolution"). His response to a 1902 coal strike was revealing. His predecessors' interventions in labor disputes had all favored management. Roosevelt mediated and, when the owners were intransigent, was prepared to seize the mines. EDMUND MORRIS, THEODORE REX 155–69 (2001).

[83] Roosevelt to George Otto Trevelyan, June 19, 1908, *in* 6 LETTERS OF THEODORE ROOSEVELT 1085, 1087 (Elting Morrison ed.) [hereinafter TRL]. John Milton Cooper termed Roosevelt a "Dionysian artist" of power, favoring the primacy of emotion in contrast to Wilson, an "Apollonian artist" who favored the primacy of reason. JOHN MILTON COOPER, THE WARRIOR AND THE PRIEST 134 (1983).

[84] UNITED STATES, FEDERAL ANTITRUST LAWS 71–82 (1926) [hereinafter ANTITRUST LAWS]. Although this source is useful to compare administrations, its raw numbers are problematic. Parallel civil and criminal proceedings count twice, and at least two Roosevelt cases challenged labor activity (items 39 and 40).

[85] LETWIN, *supra* note 9, at 184–95.

enforcement, and created an antitrust unit within the Justice Department in 1903.[86]

But from the outset, Roosevelt's cases were at least in part intended to prove the government's—his government's—primacy.[87] In 1899, he deemed fear of trusts "largely irrational."[88] In 1900, he declared attempts to reverse concentration not "one whit more intelligent than the medieval bull against the comet."[89] In 1901, he said that much "legislation directed at the trusts would have been exceedingly mischievous had it not also been entirely ineffective;" he noted the need to confront global competition, and added that "combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled."[90]

2. *The Bureau of Corporations*

The first step in implementing a new relationship between government and business was a 1903 "trust bill" establishing a Department of Commerce and Labor, and within it a Bureau of Corporations.[91] As a first step, the Bureau's statutory authority was limited to collecting information, using compulsory process as needed. The President could publicize that information or base further legislative recommendations upon it.[92]

The Bureau was soon buffeted, as William Kovacic noted with respect to the Commission that succeeded it, by interactions with the President, Congress, and the courts.[93] For example, though nothing in the law creating the Bureau mentioned Congressional directives, its first report,

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[86] 1902 Message, 15 MESSAGES, *supra* note 82, at 6712. Theodore P. Kovaleff, *Introduction, Symposium: In Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division*, 39 ANTITRUST BULL. 813, 814 (1994) (commemorating antitrust's elevation to status as a "division" under an Assistant Attorney General). The unit's 5-year appropriation was $500,000, and its average size was 5 lawyers under Roosevelt, rising to 18 under Wilson. TEMP. NAT. ECON. COMM., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, MONOGRAPH NO. 16, 76TH CONG., 3D SESS. 23 (1940). Although U.S. Attorneys could also bring cases, *see, e.g., More Antitrust Workers,* N.Y. TIMES, Sept. 20, 1913, at 5, and special assistants were hired for specific cases, *see, e.g., J.C. McReynolds, The New Preceptor for the Trusts,* N.Y. TIMES, Mar. 9, 1913, at 56, the Department handled massive litigation. The Department's brief to the Supreme Court in the *Standard Oil* case, for example, was 1071 pages.

[87] 1905 Annual Message to Congress, *supra* note 82, at 6973, 6975–76 ("moral effect" of the prosecutions). *See also* LETWIN, *supra* note 9, at 183 (suits a way to shock "voters into recognizing the nature of the trust problem").

[88] Roosevelt to Bellamy Storer, Sept. 11, 1899, 2 TRL, *supra* note 83, at 1068, 1068–69.

[89] Annual Message, Jan. 30, 1900, *in* 15 TRW, *supra* note 1, at 30, 45.

[90] 1901 Annual Message to Congress, 15 MESSAGES, *supra* note 82, at 6641, 6646–48.

[91] MORRIS, REX, *supra* note 82, at 196, 206–07. *See also* 1901 Message, *supra* note 90, at 6649.

[92] Act of Feb. 11, 1903, ch. 544, § 6, 32 Stat. 823.

[93] *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, 17 TULSA L.J. 587 (1982).

a study of the meat-packing industry, was directed by a House resolution.[94] Deputy Commissioner of Corporations Herbert Knox Smith doubted the legality of the resolution, and also hesitated because the Justice Department was already investigating the industry.[95] After the Bureau obtained company documents, Roosevelt in fact directed the Bureau to share files with Department litigators. The denouement was not happy. The Bureau's dry report was widely criticized, and the court relied on the information sharing to immunize individual defendants in the litigation.[96]

Subsequent Bureau studies were more successful. In particular, its report on petroleum transportation found substantial rebating despite existing anti-rebating law and recommended a legislative fix that Congress adopted.[97] The Bureau later completed a series of wide-ranging reports, often in response to House or Senate resolutions.[98]

3. *The Bureau, "Anti-Trust" versus "Unfair Competition," and the 1908 Hepburn Bill*

Pursuing Roosevelt's vision of broader economic supervision, the Bureau and the President soon recommended substantial expansion of the agency's authority. For Roosevelt, the Sherman Act as then construed was "profoundly immoral," seeking "to forbid honest men from doing what must be done under modern business conditions . . . ."[99] "Affirmative" provisions should replace its prohibitions, and reasonable restraints

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[94] REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE BEEF INDUSTRY xviii (1905) (resolution directing study). The FTC Act expressly provides for studies directed by Congress. 15 U.S.C. § 46(d). *See also* 15 U.S.C. § 46a (1933 amendment requiring concurrent resolution by both Houses).

[95] GERALD LEINWAND, A HISTORY OF THE UNITED STATES FEDERAL BUREAU OF CORPORATIONS (1903–1914) at 173–74 (1962) (unpublished Ph.D. dissertation, New York University) (noting that the Secretary of Commerce and Labor directed the Bureau to proceed). The Bureau had anticipated from the first, though, that its information might be used in litigation. REPORT OF THE COMMISSIONER OF CORPORATIONS 35–36 (1904) (though the Bureau's work was "primarily" directed to investigate business conditions as basis for "intelligent legislative action," evidence of illegality would be given to the President).

[96] Arthur M. Johnson, *Theodore Roosevelt and the Bureau of Corporations*, 45 MISS. VALLEY HIST. REV. 571, 580–83 (1959); United States v. Armour & Co., 142 F. 808 (N.D. Ill. 1906) (finding Fifth Amendment immunity because defendants had provided information under conditions amounting to compulsion); LETWIN, *supra* note 9, at 242–44.

[97] *See* REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE TRANSPORTATION OF PETROLEUM xxvi–xxvii (1906); Johnson, *supra* note 96, at 583–85.

[98] Bureau reports included studies of the petroleum, tobacco, steel, and lumber industries, cotton exchanges, state taxation of corporations, water transportation, and water-power development.

[99] 1907 Annual Message to Congress, 16 MESSAGES, *supra* note 82, at 7070, 7074.

should be distinguished from unreasonable.[100] The Bureau of Corporations should regulate industry as the Interstate Commerce Commission (ICC), created in 1887 and given authority to set maximum rates during the Roosevelt years, regulated common carriers.[101]

The Bureau's annual reports contributed to the development of these plans. Its 1904 report distinguished "anti-trust" from "unfair-competition" laws. The former futilely sought to maintain "a condition of competition"; the latter accepted that combination was inevitable and regulated "methods of competition" so that process would "be attended by as little injustice as may be."[102] To accomplish such regulation, Corporations Commissioner James R. Garfield suggested licensing or franchising corporations in interstate commerce (and considered, but found serious impediments to, federal incorporation).[103] The Bureau continued to advance such proposals in later years, albeit more tentatively after Herbert Knox Smith succeeded Garfield as Commissioner.[104] These procedures, which in some variants would allow the government to deny firms access to interstate commerce, were means that could be harnessed to various ends. The Democrats in 1908 proposed registration as a way to limit corporate size.[105] For the Bureau, such mechanisms were a way to regulate, rather than dissipate, concentrated economic power.

In 1908, Roosevelt worked to develop an extensive regulatory plan with Garfield, Smith, and the National Civic Federation (an association of business, labor, and other leaders, including the ubiquitous Morgan partner George Perkins).[106] The Federation sought procedures dramatically to lessen antitrust exposure, including a rule of reason for all transactions and advance approval for proposed transactions submitted

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[100] Special Message, April 27, 1908, *in* 16 MESSAGES AND PAPERS OF THE PRESIDENTS (1927 ed.), at 7189, 7194 (executive oversight should replace the "occasional and necessarily inadequate and one-sided action of the federal judiciary"); Roosevelt to Seth Low, Apr. 1, 1908, 6 TRL, *supra* note 83, at 986, 987.

[101] Most significantly, the 1906 Hepburn Act (different from the 1908 Hepburn Bill, discussed *infra*) empowered the ICC to replace existing rates, upon complaint, with "reasonable" maxima. *See generally* ARI & OLIVE HOOGENBOOM, A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE 51–52 (1976).

[102] REPORT OF THE COMMISSIONER OF CORPORATIONS 40–41 (1904).

[103] *Id.* at 46–47.

[104] *See* ANNUAL REPORT OF THE COMMISSIONER OF CORPORATIONS (1907) (publicity and "prompt efficiency of . . . public opinion" might be an adequate substitute for licensing).

[105] Their platform called for registration of corporations with a 25% market share and a ban on those with a 50% share. DONALD BRUCE JOHNSON, COMPILER, NATIONAL PARTY PLATFORMS 144, 146 (1978 ed.).

[106] *See* SKLAR, *supra* note 25, at 205 n.35, 228–85.

to the Bureau.[107] Roosevelt offered less carrot and more stick. The 1908 Hepburn bill provided for firms to "voluntarily" register and submit contracts and consolidations to the Bureau.[108] The Bureau might disapprove a proposal (the statute did not mention approval), but even proposals that escaped disapproval might be challenged later; submitters, however, would benefit from a rule of reason in any subsequent challenge.[109] Perhaps most significantly, though, existing arrangements by registered firms would be immunized once a year had passed.[110] Despite Roosevelt's avowal that corporations would have "to show they have a right to exist,"[111] the bill aroused intense opposition. Roosevelt soon retreated.[112]

4. *Morgan, Perkins, and the Steel and Harvester Trusts*

Roosevelt never precisely explained how his rule of reason would distinguish good from bad. An important component may have been a firm's willingness to accept broad government oversight. His dealings with Morgan's "good" interests, which evolved through the offices of the Commissioner of Corporations, illustrate the nature and pitfalls of the approach.

Morgan responded to the *Northern Securities* case by asking Roosevelt, in the future, to resolve problems by sending "your man" to "my man."[113] Roosevelt demurred at the time, but their relations soon improved. Morgan's U.S. Steel acted differently than other trusts, in part hoping to forestall antitrust challenge.[114] By 1905, Roosevelt reached a "gentlemen's

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[107] NCF representatives wanted a "rule of reason" applied to all restraints of trade (and that rule, like the rule in White's *Trans-Missouri* dissent, likely would have allowed fixing of reasonable prices). They also sought blanket immunity for agreements submitted to the Bureau that were not disapproved. Draft from Francis Lynde Stetson, Feb. 26, 1908, James R. Garfield collection, Library of Congress, Box 128, File 45.

[108] H.R. 19745, 60th Cong., 1st Sess. (1908), *reprinted in* 2 BILLS AND DEBATES, *supra* note 67, at 2066–68, §§ 1, 4. Roosevelt said that "every combination or agreement not . . . approved should be treated as in violation of the law and prosecuted accordingly." Special Message, *supra* note 100, at 7193. The (effectively) mandatory submission requirement in some ways anticipated the premerger notification provisions of the 1975 Hart-Scott-Rodino Act. 15 U.S.C. § 18a.

[109] H.R. 19745, *supra* note 108, § 1.

[110] *Id.* § 4. If a registration was not cancelled within a year after the registration was made, the amnesty would become effective a year after the bill became law.

[111] Special Message, *supra* note 100, at 7193.

[112] Arthur M. Johnson, *Antitrust Policy in Transition, 1908: Idea and Reality*, 48 MISS. VALLEY HIST. REV. 425, 428–33 (1961). Sklar concludes that Roosevelt quickly realized that the bill would fail, but developed it to influence future deliberations. SKLAR, *supra* note 25, at 231.

[113] COOPER, *supra* note 83, at 83; LETWIN, *supra* note 9, at 202–04.

[114] Knowing that the firm lived in a "fragile glass house," its managers "coddled their competitors, forbore to build a modern administrative structure for their own company,

agreement" with U.S. Steel's Elbert Gary at a meeting arranged by Commissioner Garfield. The arrangement, later extended to Morgan's International Harvester, gave the targets a chance to correct problems without court orders.[115]

To Roosevelt the arrangement represented mutual recognition of parallel interests, with the government predominant.[116] Still, when the Attorney General considered suing International Harvester, Commissioner Smith detected a "practical question" because Morgan interests supported the "advanced policy of the administration." After meeting with Perkins and Smith, Roosevelt directed the Attorney General to see them and not to sue without Presidential clearance.[117]

The biggest flashpoint, though, occurred during a 1907 financial panic. Lacking a central bank (Wilson would create that in 1914), Roosevelt turned to Morgan, even giving him federal funds to deposit in banks as needed.[118] Morgan then proposed that U.S. Steel acquire Tennessee Coal & Iron (TC&I) from an investment firm that was teetering on bankruptcy. Concerned about the Sherman Act, though, he secured Roosevelt's acquiescence. The acquisition stabilized the stock market, and to that extent served the public well.[119] But it also served Morgan well.[120] TC&I became a campaign issue in 1908 and 1912, the subject of a 1909 confrontation with Congress and 1911 legislative hearings with Roosevelt as star witness, and part of the Taft Administration's 1911 suit

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took special pains to issue informative annual reports, and often made their corporate records public—sometimes even including their own cost data." McCraw & Reinhardt, *supra* note 22, at 618.

[115] Robert H. Wiebe, *The House of Morgan and the Executive*, 65 AM. HIST. REV. 49, 52–53 (1959).

[116] *Id.* at 55.

[117] Johnson, *Bureau of Corporations, supra* note 96, at 589–90; Roosevelt to Charles Joseph Bonaparte, Aug. 22, 1907, 5 TRL, *supra* note 83, at 763.

[118] JEAN STROUSE, MORGAN 574–97 (1999).

[119] *Id.* at 584–88; JOHN A. GARRATY, RIGHT-HAND MAN: THE LIFE OF GEORGE W. PERKINS 210–14 (1957).

[120] *See* United States v. United States Steel Corp., 223 F. 55, 148–50 (D.N.J. 1915), *aff'd*, 251 U.S. 417 (1920). Strouse asserts that TC&I had been so unprofitable and ineptly managed that it was excluded when U.S. Steel was formed, and that the trust's Elbert Gary even resisted the purchase in 1908; once the decision was made to proceed with the acquisition, though Morgan "took care not to make it a commercial sacrifice." STROUSE, *supra* note 118, at 584–85. McCraw and Reinhardt, *supra* note 22, at 604, find that U.S. Steel's investment and pricing strategy consistently sought to stabilize the industry, even to the detriment of its market share, and the acquisition consistent with this approach. Gabriel Kolko concludes that the acquisition increased the steel trust's reserves by 40% and that the trust paid no more than a quarter of what TC&I was worth. GABRIEL KOLKO, THE TRIUMPH OF CONSERVATIVISM 117 (1963).

against U.S. Steel.[121] TC&I was an object lesson in the risks of Roosevelt's approach, during years when Roosevelt became further associated with Morgan interests in the public eye through his developing ties to George Perkins. By 1912, Perkins became Executive Chairman of Roosevelt's Progressive Party.[122]

Roosevelt left office in 1909. In the flush of his 1904 victory, he had pledged not to seek reelection.[123] He picked Taft to succeed him, fought for Taft's election, then embarked on a year-long African safari.

5. *The "New Nationalism" and the 1912 Campaign*

Upon Roosevelt's return, he was disillusioned with Taft. Republicans were split between progressive "insurgents" (like Senator Cummins) and an "old guard,"[124] and Taft seemed increasingly beholden to the latter. In 1912, Taft's Administration challenged Roosevelt by its suit against U.S. Steel, based in part on the TC&I takeover.[125] Roosevelt, in turn, challenged Taft for their party's nomination. After Roosevelt decisively won the delegates selected in primaries but Taft secured the nomination, Roosevelt mounted a challenge in the general election.[126] "We stand at Armageddon," he told the Progressive Party convention.[127] He then pursued a vigorous challenge, although it soon became clear that his

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[121] Roosevelt to William Jennings Bryan, Sept. 8, 1908, 6 TRL, *supra* note 83, at 1259, 1260–61; Roosevelt to Kermit Roosevelt, Jan. 23, 1909, *id.* at 1480, 1481 & n.2 (reporting that he had told Congress to press for TC&I documents only if they were ready to impeach him); *Hearings before the Committee on Investigation of United States Steel Corporation,* H. REP. No. 12, at 1369–92 (1911) (testimony). The Taft Administration also publicized charges about Roosevelt's role in aborting litigation against International Harvester. *Roosevelt Held Back Trust Suit,* N.Y. TIMES, Apr. 25, 1912, at 1; *Asserts Roosevelt Did Aid the Trust,* N.Y. TIMES, May 18, 1912, at 2.

[122] As New York Governor, Roosevelt named Perkins to a Palisades Interstate Park Commission. Roosevelt to Perkins, May 18, 1900, 2 TRL, *supra* note 83, at 1301. In 1900, Perkins played an intermediary role in convincing Roosevelt to accept the Vice-Presidency. Roosevelt sought Perkins's views on trust-related speeches. After 1910, Perkins devoted both money and time to Roosevelt's causes and, later, his Progressive Party, continuing his interest in the party even after Roosevelt's own interest waned. GARRATY, *supra* note 119, at 83–84, 221–23, 272–352.

[123] There was as yet no constitutional limit on a President's tenure. There was a traditional two-term limitation, but its application was somewhat unclear in Roosevelt's case. Never before had a President taken office on the death of a predecessor and then won election in his own right (although Roosevelt had served all but seven months of William McKinley's term).

[124] *See supra* note 67.

[125] Taft insisted that he did not see in advance the U.S. Steel pleadings that challenged TC&I. George Mowry concludes that Taft deliberately avoided reviewing the documents. GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA 289–90 (1958).

[126] ARTHUR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA 14 (1954).

[127] *Confession of Faith, supra* note 1.

chances were slim. The Democrats' choice of the progressive Wilson made it unlikely that Roosevelt could draw sufficient Democratic votes to win.[128] The campaign reached a dizzying crescendo when a would-be assassin shot Roosevelt on October 14. With a bullet lodged near his lungs and blood staining his shirt, he delayed treatment and delivered an extended oration.[129]

Roosevelt's "New Nationalism" included a challenge to the judiciary. Roosevelt did not see judges as decision makers who could apply the law without using discretion.[130] He horrified conservatives and even many of his supporters by advocating popular "recall" of state judges or, in a more moderate variant articulated by George Rublee (the future architect of Section 5), of state court decisions that struck down laws as violating the federal Constitution.[131]

Roosevelt now deemed the Sherman Act "rural toryism," as antiquated as "the flintlocks of Washington's Continental." He sought a commission whose regulation "we should not fear, if necessary, to bring to the point of control of monopoly prices, just as in exceptional cases railway rates are now regulated." Its broad mandate would protect not only consumers, but also shareholders and workers.[132]

At his most extreme, his most "statist-tending,"[133] Roosevelt pointed approvingly to German law governing a fifty-four-firm potash cartel. The law set quantities, maximum prices, and labor conditions, all subject to biannual judicial evaluation. Roosevelt saw a model that the United

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[128] Roosevelt wrote, ". . . I think it probable at present that Wilson will win. . . . However, win or lose, the fight had to be made, and it happened that no human being could make it except myself." Roosevelt to Horace Planchet, Aug. 3, 1912, 7 TRL, *supra* note 83, at 591, 593.

[129] *See Leader and the Cause,* Oct. 14, 1912, 17 TRW, *supra* note 1, at 320. A biographer said the "speech would have made a superb dying declaration, and one cannot help suspecting he was disappointed that the cup of martyrdom passed him by." COOPER, *supra* note 83, at 202.

[130] In 1908, he wrote that "decisions of the courts on economic and social questions depend upon their economic and social philosophy" and too often represented " a long outgrown philosophy, which was itself the product of primitive economic conditions." Special Message, *supra* note 100, at 7204.

[131] *See The Recall of Judicial Decisions*, Apr. 10, 1912, 17 TRW, *supra* note 1, at 190. According to John Garraty, Roosevelt's threat to the judiciary was so serious that Taft's antitrust prosecutions were a "petty annoyance" in comparison. GARRATY, *supra* note 119, at 255. *See also* GERALD GUNTHER, LEARNED HAND 209–25 (1994); Marc Eric McClure, Earnest Endeavors: The Life and Public Work of George Rublee 112 (2000) (unpublished Ph.D. dissertation, George Washington University) (book publication forthcoming).

[132] Theodore Roosevelt, *The Trusts, the People, and the Square Deal,* 99 OUTLOOK 649, 653, 655, 656 (Nov. 18, 1911).

[133] *See* SKLAR, *supra* note 25, at 35.

States, using the Bureau of Corporations, could adapt to manage firms like Standard Oil and avoid corporate dissolutions.[134] Dissolutions would merely lead to collusion among successor firms; the better answer was to "[d]emand the right to know what they're doing; if they're doing wrong, hit them; if they continue to do wrong, clap a receivership on them, keep it on until they're straightened out, and restore them to a chastened ownership—fine, growing concerns, but growing in the right direction."[135] Here, at least, he argued that "bad" trusts could be chastened rather than dissolved. With proper regulation, he could even tolerate a firm like U.S. Steel if it were an "absolute monopoly."[136]

In accepting the Progressive nomination, Roosevelt said that antitrust "has occasionally done good, has usually accomplished nothing, has generally left the worst conditions wholly unchanged, and has been responsible for a considerable amount of downright and positive evil." He would make antitrust "genuinely . . . effective against every big concern tending to monopoly or guilty of antisocial practices," but also would also use a commission to supplement (or supersede) antitrust. Protecting America's global competitiveness, the commission would have "complete power to regulate and control all the great industrial concerns engaged in interstate business." It could stop labor, shareholder, and competitive abuses, the latter including "the artificial raising of prices, the artificial restriction on productivity, [and] the elimination of competition by unfair or predatory practices." Firms that "voluntarily" accepted its regulation and obeyed its orders in good faith would be shielded from antitrust prosecution. The commission could also "interpret in advance, to any honest man asking the interpretation, what he may do and what he may not do in carrying on a legitimate business."[137]

The candidate was more popular than these ideas. Many who rallied around him were drawn by his charisma, political viability, and other

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[134] *Nationalism and Special Privilege,* 97 OUTLOOK 145, 147 (Jan. 28, 1911). If a firm had the power to "fix prices of labor and commodities," the government should regulate it "as freely as . . . so-called natural monopolies . . . I do not believe in a system of law in which the object of Governmental proceeding requires the dissolution of the corporation or the confiscation of its property, which may be ruinous to the public as well as the corporation. The proceeding should be, in substance, to declare any corporation an injurious monopoly, and when that declaration shall be definitely affirmed by the proper body, . . . to subject the corporation to thoroughgoing Governmental control as to rates, prices, and general conduct." The supervision and control would be the same as "that which is, and still more as that which will be, exercised by the Inter-State Commerce Commission over our railroads." *Id.* at 147.

[135] Roosevelt to William Jennings Bryan, Oct. 22, 1912, 7 TRL, *supra* note 83, at 629, 630.

[136] *Id.*

[137] *Confession of Faith, supra* note 1, at 279–80.

positions, not his plans to deal with concentration.[138] Consider Herbert Knox Smith. Smith had grown so wary of regulation that in 1911 he dampened Senator Newlands's support for "positive directory powers over industrials"[139]—yet, having remained Corporations Commissioner under Taft, he resigned to work for Roosevelt. The antitrust issue even led to a platform battle within Roosevelt's own Progressive Party. Roosevelt resisted proposed language calling for legislation to "strengthen the Sherman law" (although he then called for such strengthening in his acceptance speech). Party activists revised the platform *after* the election.[140]

Perhaps recognizing a tepid response to price regulation, Roosevelt muffled the theme. But his words were carefully measured. After the attempted assassination, he said of government orders to set price: "I do not want now to provide that. I fancy the commission would be so busy for a time in enforcing laws that it would not want to concern itself with prices."[141]

For Roosevelt, modern industry depended on efficiencies that rendered competition, at least in some markets, obsolete. The government should domesticate rather than limit size, and price regulation was (at a minimum) a backstop for such domestication. Interfirm cooperation, presumably including price-setting cartels, should be tolerated under government auspices.[142] Roosevelt feared neither big business nor big government, trusting the latter to tame the former.

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[138] HOLT, *supra* note 67, at 52–53.

[139] A week after *Standard Oil*, Smith wrote Garfield that he had persuaded Newlands to drop such power, "the really dangerous feature" of [Newlands's] proposed commission," from proposed legislation. Herbert Knox Smith to James R. Garfield, May 23, 1911, James R. Garfield Collection, Library of Congress, Box 120. *See generally* SKLAR, *supra* note 25, at 300–09; S. REP. No. 597, 63d Cong., 2d Sess. 27–32 28–29 (1914) (quoting Smith's view that agency should only have authority to deny a "registration," so that firm could not identify itself as registered).

[140] The disputed language called for "strengthening the Sherman law by prohibiting agreements to divide territory or limit output; refusing to sell to customers who buy from business rivals; to sell below costs in certain areas while maintaining higher prices in other places; using the power of transportation to aid or injure special business concerns, and other unfair trade practices." It was rejected as "needless amplification" by Roosevelt, included when the platform was read at the convention, deleted from the text distributed by the press, and "restored" in December. JOHN GABLE, THE BULL MOOSE YEARS 100–03 (1978); GARRATY, *supra* note 119, at 268–70, 288; Roosevelt to Amos Pinchot, Dec. 5, 1912, 7 TRL, *supra* note 83, at 661, 665–68.

[141] *Political Talks Tire Roosevelt,* N.Y. TIMES, Oct. 20, 1912, at 1, 2.

[142] The Hepburn bill of 1908 presumably would have allowed price-setting agreements. Roosevelt likely agreed with the "ruinous competition" argument that Justice White accepted in *Trans-Missouri Freight. See supra* note 34 and accompanying text.

6. *The Legacy of 1912*

Wilson won the electoral college in a landslide, with 42 percent of the popular vote. Roosevelt ran better than Taft, receiving 27 percent of the vote to Taft's 23 percent.[143] The vote was influenced by factors extraneous to competition policy, though, and may have understated Roosevelt's personal popularity but overstated the popularity of his economic plans.[144]

The charismatic ex-President was only fifty-four in 1912, young enough that he was exploring the uncharted River of Doubt in Brazil as Congress geared up for the antitrust debate.[145] Though he died in January 1919, he remained so powerful a presence that, despite his prior apostasy, he had become a serious contender for the 1920 Republican nomination.[146] Yet despite Roosevelt's personal popularity, most politicians, including most Commission advocates, distanced themselves from his economic program. Roosevelt's calls for price-setting authority drew a practical line, and his embrace of the most massive firms a theoretical line, that others would not cross.

Still, there were potential convergences between Roosevelt and those would not cross these lines. A commission could serve goals other than Roosevelt's, to prevent or help reverse the growth of monopoly power, rather than to regulate its use. Substantively, many could join his call to ban "unfair practices" (although they might differ on the specifics of unfairness). For their own reasons, Brandeis to some extent shared Roosevelt's admiration of German cartels (and Roosevelt likely would have joined Brandeis in supporting resale price maintenance), and Wilson shared Roosevelt's reluctance to dissolve existing firms.[147] Conversely, Charles Van Hise, whom Roosevelt quoted on behalf of "concentration, co-operation and control,"[148] was prepared to presume that a firm with a 40 percent market share unreasonably restrained trade.[149] There was a spectrum of possibilities and, along that spectrum, there was much

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[143] Socialist Eugene Debs received 6%. *See also supra* Part V.A.

[144] Roosevelt likely lost votes because of the traditional two-term limit, for example, and his bolting from the Republicans. His vote also may have been affected by his aggressive foreign policy.

[145] JOSEPH S. ORNIG, MY LAST CHANCE TO BE A BOY: THEODORE ROOSEVELT'S SOUTH AMERICAN EXPEDITION OF 1913–1914 (1994). Roosevelt returned in May 1914.

[146] COOPER, *supra* note 83, at 259, 332–33. Roosevelt returned to the Republican fold in 1916. *Id.* at 305–06. In 1917, he implored Wilson for a military command in World War I. *Id.* at 324–35.

[147] *See infra* text accompanying notes 212, 262.

[148] *See supra* note 1.

[149] CHARLES R. VAN HISE, CONCENTRATION AND CONTROL 227 (1912, rev. 1914).

in Roosevelt's program that others could accept. The challenge (and opportunity) for the Democrats was to adapt his ideas to their own ends, to associate with his progressivism while distancing themselves from its most controversial ramifications.

B. William Howard Taft

1. *The Jurist as Reluctant President*

Taft served before his Presidency as Solicitor General, circuit court judge, Governor-general of the Philippines, and Secretary of War. After his Presidency, he taught law at Yale (his alma mater) and, in 1921, became Chief Justice. His Presidency was unsuccessful, his administrative skills offset by political debacles.[150] He made no secret that he had not wanted the job. Taft publicly called his 1908 candidacy a fall from the "respectable business of trying to administer justice."[151] He explained his 1912 candidacy more poignantly. He responded to Roosevelt's challenge, he said, because "[e]ven a rat in a corner will fight."[152] It was the law and the judicial role that he loved, and his faith in the courts and their ability to implement the *Standard Oil* rule of reason was the key to his view of antitrust policy.

2. *President Taft and Antitrust*

Taft's involvement with antitrust extended over four decades.[153] During his Presidency, antitrust was emblematic of his problems. As Taft captured his own dilemma, he was "in the remarkable position of being charged with an attempt to destroy business by enforcing the anti-trust statute and of having set up the Supreme Court to emasculate the statute in the interests of the trusts."[154]

As a judge, Taft's *Addyston Pipe* decision contained the seeds of later antitrust jurisprudence. In 1906, while a member of Roosevelt's cabinet, Taft vaguely approved of federal action, where there was a "probability

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[150] Robert H. Wiebe, Businessmen And Reform: A Study of the Progressive Movement 68 (1963); Cooper, *supra* note 12, at 151.

[151] Judith Icke Anderson, William Howard Taft: An Intimate History 111 (1981). Both Roosevelt and Taft's wife were more anxious to see Taft President than he was.

[152] *Taft in Maryland Trails Roosevelt,* N.Y. Times, May 5, 1912, at 1. *See generally* 2 Henry Pringle, The Life and Times of William Howard Taft 782–83 (1939).

[153] He was Acting Attorney General for the government's first antitrust case in 1890, *United States v. Jellico Mountain Coke and Coal Co.*, 43 F. 898 (M.D. Tenn. 1890). He participated in the Supreme Court's antitrust decisions through the 1920s.

[154] *Taft Will Enforce Law to the Letter,* N.Y. Times, Oct. 28, 1911, at 1.

of abuse," to "assume control, not by way of initiation and administration but by way of effective regulation."[155]

As President, Taft pursued an active agenda of antitrust cases. His targets included U.S. Steel, International Harvester, and the Motion Picture Patent Company. Ending a dearth of prosecutions against trade association rules after *Hopkins* and *Anderson*,[156] the administration challenged a rule of the Chicago Board of Trade.[157] Roosevelt had averaged less than six "antitrust" cases per year; Taft averaged twenty.[158] Taft brought fifty-eight cases in just twenty-two months after *Standard Oil*.[159]

More than a dutiful prosecutor, Taft called the Sherman Act "a good law that ought to be enforced."[160] He staunchly defended *Standard Oil*, a case decided by a Court he had shaped by naming four Justices and elevating White to Chief. After initial hesitation, Taft decided that the rule of reason the Court announced in 1909 was more like his own *Addyston Pipe* test than it was like the rule of reason White had advocated in *Trans-Missouri*.[161] *This* rule, Taft said, incorporated a common law so

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[155] WILLIAM HOWARD TAFT, FOUR ASPECTS OF CIVIC DUTY 12 (1906). Taft, who declared the topic too complex to explore at that time, explained that he still approved the "*laissez faire* doctrine that the least interference by legislation with the operation of natural laws was, in the end, the best for the public"—but only if the doctrine is not carried to "such an extreme as really to interfere with the public welfare." *Id.* at 11–12.

[156] *See supra* text accompanying notes 39–41.

[157] The rule, which required after-hour sales to be at the same price as the last pre-close sale, was later upheld in a decision by Justice Brandeis. Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918).

[158] *See* ANTITRUST LAWS, *supra* note 84, at 83–105. This counts as separate cases several parallel civil and criminal cases, and also includes at least four prosecutions of labor activities (items 38, 41, 42, and 75).

[159] *Id.* at 88–105 (noting 18 cases after the 1912 election); SKLAR, *supra* note 25, at 376. Senator James Reed had a jaded view of these numbers. "[T]here are now pending 46 cases, whereas we are told that there are over a thousand trusts and monopolies in the United States. . . . There ought to be 400 cases." 51 CONG. REC. 14,519–20 (1914). The increased enforcement after *Standard Oil* might have been an attempt to prove *Standard Oil* was compatible with vigorous enforcement, as William Jennings Bryan charged that the rule of reason undermined antitrust and Roosevelt that antitrust undermined the economy.

[160] PRINGLE, *supra* note 152, at 656.

[161] 1911 Annual Message to Congress—Part 1, MESSAGES AND PAPERS OF THE PRESIDENTS 7644, 7645–46. Taft's early reactions to *Standard Oil* were captured by two headlines. On May 16, focusing on the verdict, the *New York Times* called the President "please[d]." *Standard Oil Must Dissolve in a Month, Only Unreasonable Restraints of Trade Forbidden,* N.Y. TIMES, May 16, 1911, at 1. The next day, focusing on the rule of reason, it headlined a different message. *President Disappointed*, N.Y. TIMES, May 17, 1911, at 1. Before *Standard Oil*, White had equated the Court's "directness" test to his own ancillary restraints test and criticized White's 1897 rule of reason. Special Message (Jan. 7, 1910), 17 MESSAGES, *supra*, at 7441, 7452–54. *Cf.* Cline v. Frink Dairy Co., 274 U.S. 445 (1927) (Taft, C.J.) (state law allowing fixing of prices if they were reasonable—the result White advocated in 1897—was unconstitutionally vague).

clear that courts would need no discretion to apply it.[162] There was neither judicial legislation in declaring the rule, nor would there be in applying it.

Believing the law sound and clear and responding to twenty years of "lawlessness,"[163] Taft had little sympathy for violators. He privately called "Wall Street, as an aggregation, . . . the biggest ass that I have ever run across."[164] In the flush of *Standard Oil,* Taft (unlike Roosevelt or Wilson) embraced corporate restructuring. In September 1911, four months after the decision, he called it a "signal for the voluntary breaking up of all combinations in restraint of trade within the inhibition of the statute," and hoped it would "lead to a complete revulsion of feeling on the part of the business men of the country and to a clear understanding by them of the limitations that must be imposed by them upon any business combinations made by them in the future."[165] Taft's speech acknowledged that some consolidations produced efficiencies, but, in language he may not have delivered, the printed text promised wholesale reorganizations, by litigation if needed, within eighteen months.[166]

President Taft also called for national incorporation, but his calls were equivocal. In 1910, he deemed it a way to prevent harms, rather than correct them after the fact, when correction would burden employees, stockholders, and business confidence.[167] Taft also saw federal incorporation as a way to protect business from "undue" state interference.[168]

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[162] 1911 Message, *supra* note 161, at 7646.

[163] *Taft Will Enforce Law to the Letter*, *supra* note 154.

[164] PRINGLE, *supra* note 152, at 655. As to an indicted executive, "He violated the law and has to pay the penalty for it. That is all!" *Id.* at 656. Despite such comments, the only defendants incarcerated on Taft's watch were members of a longshoreman's association, each confined for four hours. U.S. v. Haines (S.D. Fla. 1911), *cited in* ANTITRUST LAWS, *supra* note 84, at 93–94; Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. ECON. 365, 391 (1970) (all Sherman Act imprisonments until the 1920s were in labor cases, and all until the 1960s were in cases involving labor or violence).

[165] Sept. 18, 1911 Speech, *supra* note 3, at 58–59.

[166] *Id.* at 59. The printed text says: "if Congress shall continue needed appropriations, every trust of any size that violates the statute will, before the end of this administration in 1913, be brought into court to meet and acquiesce in a degree of disintegration by which competition between its parts shall be restored and preserved under the persuasive and restrictive influence of a permanent and continuing injunction." However, a line appears above this passage and a series of x's through it. Further, no such remark appears in a *Wall Street Journal* report or a *New York Times* report that quoted much of the speech. *Trust Decisions Defended by Taft,* N.Y. TIMES, Sept. 19, 1911, at 5; *Taft Opposed to Any Amendment of Sherman Anti-trust Law,* WALL ST. J., Sept. 19, 1911, at 1.

[167] 1910 Special Message, *supra* note 161, at 7455–58. *See also* Sept. 18, 1911 Speech, *supra* note 3, at 60 (describing federal incorporation as a way, if constitutional issues could be resolved, to free firms from "the constant fear of prosecution").

[168] 1910 Special Message, *supra* note 161, at 7456. *See also* Stanley I. Kutler, *Chief Justice Taft, National Regulation, and the Commerce Power,* 51 J. AM. HIST. 651 (1965) (tracing

However, while the grant of a corporate charter presumably would constitute approval of the chartered firm's structure, Taft rejected Roosevelt's plans that an agency be empowered to approve subsequent conduct in advance.[169] Further, shortly after he proposed national incorporation, he declared that he had merely "suggested" it, and it was not a "party matter" because it fell outside the 1908 platform.[170]

There were other indicia of Taft's preference for judicial resolution of disputes. The Bureau of Corporations, the framework for Roosevelt's regulatory plans, suffered leaner years under Taft, and for Commissioner Smith the years were particularly lean.[171] Taft also showed his preference for limiting administrative agencies by obtaining a Commerce Court, created by the 1910 Mann-Elkins Act. That law generally strengthened the ICC, but Taft insisted that it create a specialized court to hear appeals from ICC decisions, succeeding over strenuous opposition by Senator Cummins and others who feared that the court often would rule against the agency. Those fears would be vindicated, and the court was abolished in 1913.[172] Taft's efforts on behalf of the Court showed, despite his nominal support of national incorporation, his continued hesitancy about administrative decision making.

3. *1912 and Beyond*

Although he defeated Roosevelt for the Republican nomination, Taft entered the general election campaign demoralized and rarely gave speeches.[173] Also, his ambiguous support of administrative regulation

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Taft's support of broad federal powers from *Addyston Pipe* to decisions he authored as Chief Justice).

[169] 1911 Message, *supra* note 161, at 7655 (consultations "would offer [a firm] as great security against successful prosecutions . . . as would be practical or wise").

[170] Speech, Feb. 12, 1910, PRESIDENTIAL ADDRESSES AND STATE PAPERS OF WILLIAM HOWARD TAFT 568, 582 (1911). His private pronouncements sometimes (but not always) evinced a lack of interest. James C. German, Jr., *The Taft Administration and the Sherman Antitrust Act,* 54 MID-AMERICA 172, 183–84 (1972).

[171] Wiebe, *House of Morgan, supra* note 115, at 58. Wiebe concludes that the Secretary of Commerce bypassed Smith to press investigations of Morgan's U.S. Steel and International Harvester, working directly with Smith's subordinates, and that Smith "wielded no power." *Id.*

[172] Shortly before the Mann-Elkins Act, the Supreme Court began to accord more deference to the ICC. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective,* 38 STANFORD L. REV. 1189, 1233–34 (noting that the "once beleaguered agency was suddenly granted the respect it had long sought," particularly in the pivotal case of *ICC v. Illinois Central Railroad Co.*, 215 U.S. 452 (1910)). With a former ICC Chairman as Chief Judge, the Commerce Court was a brake on the ICC; it frequently reversed agency rulings, though its own rulings often were reversed in turn by the Supreme Court. ELIZABETH SANDERS, THE ROOTS OF REFORM 203–09 (1999); HOOGENBOOM & HOOGENBOOM, *supra* note 101, at 61, 64, 66–68.

[173] *See* PRINGLE, *supra* note 152, at 815–42.

now took a new twist. The Republicans gave him a platform that called for a trade commission with enforcement authority.[174]

Later years showed the extent to which Taft's more fundamental commitment was to the judicial process and not to the structural remedies he endorsed as President.[175] Unlike progressives who distrusted *Lochner*-era courts, Taft said in 1911, "I love Judges and I love courts. They are my ideals on earth that typify what we shall meet afterward in Heaven under a just God."[176] He admitted in 1911 that courts were slow and their penalties lax in antitrust cases,[177] but in a series of 1914 articles, later collected in a book, he defended the Court's decisions under the rule of reason and dismissed the need for new antitrust laws.[178]

Perhaps Taft's enthusiasm for dissolution in September 1911 began to wane when the remedial talks in *American Tobacco* proved problematic, and the order issued in November drew heavy criticism.[179] By 1914, Taft would discern in the complexities of dissolutions a reason to prefer judicial resolution of antitrust questions; the courts' "elastic and many-sided remedies" could "squeeze the unlawfulness out of a trust and retain for the benefit of society those features of it that great business energy and genius have created and that can be continued entirely within the law."[180] Taft also shifted gears in defending *United States v. Terminal*

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[174] "In the enforcement and administration of Federal Laws governing interstate commerce and enterprises impressed with a public use engaged therein, there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the law and avoid delays and technicalities incident to court procedure." JOHNSON, PLATFORMS, *supra* note 105, at 183, 184.

[175] *See* SKLAR, *supra* note 25, at 35 (focusing on Taft's preference for a judicial mechanism to associate him with "a minimalist regulatory corporate liberalism on the center-right").

[176] *Taft Again Defends the Supreme Court*, N.Y. TIMES, Oct. 7, 1911, at 6.

[177] Sept. 18, 1911 Speech, *supra* note 3, at 59. *See also* TAFT, FOUR ASPECTS, *supra* note 155, at 52–53 (antitrust defendants can "secure the most acute counsel and make every possible point that the looseness of the present criminal procedure affords").

[178] WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914). The articles appeared weekly in the *New York Times* between May 17 and June 14, 1914. Taft defended the rule of reason as so clear that "any one who gives it sincere attention can understand." *Id.* at 5. He called the Court "as progressive as possible," said those who denied it "speak in ignorance," and declared that *Standard Oil* "brought out the condemnation of everybody of demagogic tendencies prominent in politics." *Id.* at 5, 42, 94.

[179] Taft defended the order, calling it the most effective for its purpose "in the history of American law." 1911 Annual Message, Part 1, *supra* note 161, at 7649. *See generally id.* at 7647–51; TAFT, ANTI-TRUST ACT, *supra* note 178, at 118–25. However, the tobacco dissolution proved more complex than that of Standard Oil, which had been so structured that component entities could simply be broken off the holding company. Attorney General George Wickersham was particularly frustrated with the process. *See* German, *supra* note 170, at 178–84.

[180] TAFT, ANTI-TRUST ACT, *supra* note 178, at 117–18.

Railroad Ass'n of St. Louis.[181] The Court rejected his administration's request to dissolve a joint venture by which some railroads passing through St. Louis controlled all Mississippi River crossings, imposing instead a strong conduct remedy that required defendant to treat every railroad equally. Although his administration had sought structural relief, Taft cited the case to show how "the remedial processes of equity can effect exactly the right result."[182]

Taft's fundamental commitment was to enforcing the Sherman Act under a rule of reason. As noted above, a classical paradigm assumed that "opportunity, efficiency, competition, fair distribution, and political freedom" were "largely consistent" and "capable of vigorous implementation through 'nondiscretionary' judicial decision making."[183] When the growth of large-scale corporations produced an anomaly by seeming to create tension between efficiency and other values, including opportunity, many politicians (far more than the economists of the day) clung to the hope that antitrust could still accommodate all these goals without necessitating trade-offs.[184] Roosevelt did not. He deemed large-scale business, even to the extent of monopoly, a natural product of economic evolution, and he embraced a new paradigm less dependent upon a competitive market. Taft held to the old. Though he acknowledged that modern production would increase corporate size, he thought that much existing growth could be reversed without sacrificing efficiency. More fundamentally, and although he muddied the message with his half-hearted support of national incorporation, Taft trusted the courts as Roosevelt had not. He affirmed that questions of economic concentration could be resolved by non-discretionary judicial decision making, as courts interpreted the Sherman Act under a common law that Taft himself had helped to explicate.

C. Louis D. Brandeis

1. *People's Attorney and President's Adviser*

As Roosevelt touted the virtues of (controlled) trusts, Louis Brandeis was an advocate for a small-business community that could not protect

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[181] 224 U.S. 383 (1912).

[182] TAFT, ANTI-TRUST ACT, *supra* note 178, at 101. Senator James Reed had a different view of the case, condemning the decision for allowing the survival of a "miserable monopoly" whose "extortionate rates" had stifled growth on the city's western bank. 51 CONG. REC. 15,865 (1914).

[183] May, *Theory*, *supra* note 25, at 299.

[184] May points out that politicians acted like scientists who, confronting anomalous data, seek to integrate it into their existing paradigm. *Id.* at 294. *See also* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS ch. 6 (2d ed. 1970).

itself from unfair practices.[185] Brandeis was born in Kentucky. His immigrant father was a successful small businessman, although the family relocated to Germany for three years during an economic downturn. Returning to America, Brandeis attended Harvard Law School, graduating first in his class in 1877.[186] He had practiced law for thirty-five years when he met Wilson in 1912, and his career then extended twenty-seven more years, all but four on the Supreme Court. He began to represent public causes in the 1890s, moving to national triumphs before the ICC and Supreme Court after 1908.[187] Entering the antitrust debate after *Standard Oil*, Brandeis helped draft legislation for progressive Republican Robert La Follette, and testified for three days before a Senate committee about the bill and antitrust.[188]

Brandeis supported La Follette's bid for the 1912 Republican nomination, and his subsequent endorsement of Wilson was itself newsworthy.[189] Scott James concludes that Wilson responded to Brandeis in order to appeal to progressive supporters of La Follette and former Democratic nominee William Jennings Bryan.[190] Whatever Wilson's motives, he met Brandeis for three hours on August 28, after which they held a joint press conference.[191] They met again on September 27, after which Wilson telegraphed Brandeis for advice on how to better "spike" the enemy guns.[192] Brandeis spoke and wrote on Wilson's behalf, and gave Wilson

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[185] *Interstate Trade Commission, Hearings Before the Comm. on Interstate and Foreign Commerce, House of Representatives,* 63d Cong., 2d Sess. (1914), at 98.

[186] PHILLIPA STRUM, LOUIS D. BRANDEIS, JUSTICE FOR THE PEOPLE 1–14 (1984).

[187] His "Brandeis Brief" convinced the Supreme Court to uphold a law limiting the hours women could work. Muller v. Oregon, 208 U.S. 412 (1908). The Court earlier had struck down a New York law limiting bakers' hours, *see* Lochner v. New York, 198 U.S. 45 (1905), but Brandeis cited state and foreign laws, and evidence from social and economic studies, to persuade the Court that Oregon's law was within the state's police power (and thus did not unconstitutionally restrict liberty of contract). Brandeis's reputation grew when he joined a challenge to the Taft Administration's conservation policy (the Ballinger-Pinchot affair), and in 1910 convinced the ICC to deny a general railroad rate increase on the basis that railroads could use "scientific management" to lower costs. STRUM, JUSTICE, *supra* note 186, at 133–45, 160–66.

[188] Brandeis to Wilson, Sept. 30, 1912, 25 PWW, *supra* note 5, at 289; *1911 Hearings*, *supra* note 21, at 1146.

[189] *Brandeis for Wilson*, N.Y. TIMES, July 11, 1912, at 1.

[190] *See* SCOTT JAMES, PRESIDENTS, PARTIES AND THE STATE: A PARTY SYSTEM PERSPECTIVE ON DEMOCRATIC REGULATORY CHOICE, 1884–1936, at 158–59 (2000). Brandeis continued to advise La Follette in 1913. Brandeis to La Follette, May 27, 1913, 3 LBL, *supra* note 4, at 100–02. La Follette sought Brandeis as a running mate when he ran a third-party Presidential campaign in 1924. STRUM, *supra* note 186, at 157.

[191] *Gov. Wilson Agrees with Mr. Brandeis*, N.Y. TIMES, Aug. 29, 1912, at 3 (calling Brandeis a "lawyer-economist").

[192] Telegram, Wilson to Brandeis, Sept. 27, 1912, 25 PWW, *supra* note 5, at 272.

"a tactical opening and live ammunition."[193] Wilson adopted his rallying cry that competition, not monopoly, should be regulated. But though Wilson would seek Brandeis's counsel, consider naming him Attorney General, offer him a seat on the FTC,[194] and eventually nominate him to the Supreme Court, Wilson never fully embraced Brandeis's philosophy. Brandeis had an aversion to big business that Wilson did not fully share, and Wilson had a distrust of experts that Brandeis did not fully share.

2. *Brandeis and Competition*

Though Brandeis advocated smaller scale in business, he knew that some businesses required substantial scale. He conceded in 1911 that a firm could control "considerably more than" 10 percent of *any* market, irrespective of absolute size, "with perfect safety."[195] Yet, by supplementing and interpreting the antitrust law, and creating presumptions to bias its application, Brandeis sought to redress a balance that, to his eyes, unduly favored large enterprise.[196] He tried to recapture, to the extent possible, a past in which business was dominated by smaller merchants like his father.

Brandeis backed his preference with economic arguments. "The economies of monopoly are superficial and delusive," he wrote, and "[t]he efficiency of monopoly is at best temporary."[197] The failure of some trusts proved the inefficiency of all.[198] Size dulled the competitive edge,

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[193] COOPER, *supra* note 83, at 194 ("tactical opening"); STRUM, *supra* note 186, at 199–202 (speeches, as well as articles and unsigned editorials that appeared in *Colliers*).

[194] 1929 Interview, Ray Stannard Baker collection, Library of Congress, Reel 72.

[195] *1911 Hearings, supra* note 21, at 1175 (10% figure). Also, despite his sympathy for small retail shops, Brandeis praised the owners of Filene's, a large Boston department store, as "great merchants." Louis Brandeis, *Business—A Profession* 10 (1912), *reprinted in* LOUIS BRANDEIS, BUSINESS—A PROFESSION (1914) (noting, for example, the store's program for worker participation in management). *See also* Gerald Berk, *Neither Markets Nor Administration: Brandeis and the Antitrust Reforms of 1914*, 8 STUD. AM. POL. DEV. 24, 33–35 (1994) (noting in particular work on public utilities regulation after 1903).

[196] *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting) (describing need for legislative "experimentation in the fields of social and economic science").

[197] Louis Brandeis, *Shall We Abandon the Policy of Competition?* (Feb. 1912), *reprinted in* LOUIS BRANDEIS, THE CURSE OF BIGNESS 104, 105 (1934). See also *1911 Hearings, supra* note 21, at 1147–51; Louis D. Brandeis, *The Democracy of Business,* 2 NATION'S BUSINESS 31, 32 (Feb. 16, 1914) ("limit of efficiency is reached at a fairly early stage"); *To Prevent Discrimination in Prices and to Provide for Publicity of Prices to Dealers and the Public, Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives,* 63d Cong., 2d and 3d Sess. 41 [hereinafter *1915 Hearings*] (department stores quickly passed point of efficiency).

[198] *1911 Hearings, supra* note 21, at 1148. This aspect of Brandeis's thought is at the root of a critique by Thomas McCraw. THOMAS MCCRAW, PROPHETS OF REGULATION 95–101 (1984).

blunting innovation and resulting in inferior goods; Brandeis blamed U.S. Steel for inadequate products that hurt America in global markets.[199] He discounted any efficiencies that huge firms did obtain because he denied they led to reduced consumer prices.[200] Monopolies were artificial and unnatural; corporate dissolutions removed "a cancer from the body industrial."[201]

Brandeis's concerns further extended to "social" efficiency.[202] He believed that competition policy should encompass individuals as producers as well as consumers. Brandeis aimed another attack at the steel trust for eighty-four-hour work weeks, and for subjecting employees to "a life so inhuman as to make our former Negro slavery infinitely preferable . . ."[203] "[T]he 'right to life' guaranteed by our Constitution is now being interpreted according to demands of social justice and of democracy as the right to *live*, and not merely to exist. In order to live men must have the opportunity of developing their faculties; and they must live under conditions in which their faculties may develop naturally and healthfully."[204] Defending resale price maintenance in 1915, he said:

> The public interest is made up of a number of things. . . . [T]he consumer . . . should get a good article at the lowest price that he reasonably can, consistently with good quality and good business. . . . But there is another interest that the public has, . . . the interest of the rest of the public, the dealer and his clerks and the producer and his employees. We are all part of the public and we must find a rule of law that permits a business practice which is consistent with the welfare of all the people.[205]

Even more broadly, an efficient firm might be "too large to be tolerated among the people who desire to be free."[206] Brandeis's opposition to

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[199] *1911 Hearings, supra* note 21, at 1150–51. *See also* Louis Brandeis, *Competition* (1913), *reprinted in* BRANDEIS, CURSE, *supra* note 197, at 112, 118. Brandeis singled out U.S. Steel because of its association with Roosevelt and Perkins. Perkins had testified immediately before Brandeis in the 1911 hearings, and much of Brandeis's testimony was a rebuttal.

[200] *1911 Hearings, supra* note 21, at 1157.

[201] *Competition, supra* note 199, at 116.

[202] *1911 Hearings, supra* note 21, at 1151.

[203] Louis Brandeis, *Big Business and Industrial Liberty* (1912), *reprinted in* BRANDEIS, CURSE, *supra* note 197, at 38.

[204] Louis Brandeis, *Efficiency and Social Ideals* (1914), *reprinted in* BRANDEIS, CURSE, *supra* note 197, at 51.

[205] *1915 Hearings, supra* note 197, at 10–11. *Cf.* Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918) (Brandeis, J.) (using multifaceted analysis to identify benefits of a trading rule found to have no appreciable effect on volume or price).

[206] *1911 Hearings, supra* note 21, at 1174. *Cf.* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 568 (1933) (Brandeis, J., dissenting) (targeted state tax might reflect not merely attempt to preserve competition, but the view that "the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American

concentrated economic power led to his special concern that with the "money trust" of financiers with wide-ranging corporate interests.[207]

When asked, Brandeis had positive words for German cartels. Even when a cartel set prices and limited output of unfinished goods (the cartel at issue left manufacturers free to turn as much product into finished goods as they chose), it left smaller enterprises "absolutely independent as to internal management." The cartel "leaves competition free—that is, you have competition in production."[208] Their shared admiration for German cartels was one area where the views of Brandeis and Roosevelt, for differing reasons, converged. Despite these words of praise, though, Brandeis was uncertain that cartels advanced German prosperity and, when asked if he supported horizontal agreements to divide markets and fix prices in the United States, he seemed to require more than a "competition in production." Brandeis in 1911 conceded only "that a state of affairs might arise under which it might be necessary, in order to preserve competition, to allow some kind of trade agreements."[209]

Brandeis was more enthusiastic about other types of trade agreements, agreements that did not divide markets or set prices. He was at the vanguard of the associational movement that would flourish in the 1920s,[210] although in 1913 he called only for studies to determine when trade agreements restrained competition reasonably, when they restrained it unreasonably, and when they restrained it not at all.[211] Here, as elsewhere, Brandeis sought to construe, bias, or supplement the antitrust laws in ways favorable to smaller businesses. Thus, while lawmakers in 1914 were more inclined to proscribe conduct rather than to legalize conduct already proscribed by law, Brandeis argued that Congress should reverse *Dr. Miles* and allow resale price maintenance (so long as the seller of trademarked goods neither controlled markets nor made agreements with its competitors); he asserted that the practice

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ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that it is sapping the resources, the vigor and the hope of the smaller cities and towns").

[207] *See supra* note 24.

[208] *1911 Hearings, supra* note 21, at 1182. *Cf.* JOHN BATES CLARK, THE PHILOSOPHY OF WEALTH 214 (1886) (railroad pools encourage "competition" by which firms strive for efficiency).

[209] *1911 Hearings, supra* note 21, at 1249–50. *See also* Berk, *supra* note 195, at 43–46.

[210] *See generally* ROBERT F. HIMMELBERG, THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION, BUSINESS, GOVERNMENT AND THE TRADE ASSOCIATION ISSUE 1921–1933 (1976).

[211] Brandeis to William Cox Redfield, May 27, 1913, 3 LBL, *supra* note 4, at 102. *See also* American Column & Lumber Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) (plan disseminating information about completed sales should be permitted so long as the participants were not coerced, because "the essence of restraint is power").

would benefit not only small retailers, but consumers and manufacturers as well.[212] To further protect smaller businesses, Brandeis proposed in 1911 to bias litigation against huge enterprise; under his proposal, a restraint of trade would be presumed illegal when a firm controlled 40 percent of a market.[213] He also proposed to create a "bureau of industrial research," which would extend to smaller businesses the benefits of research and development that larger enterprises could themselves afford.[214]

3. *Regulatory Procedures*

Although Brandeis distrusted a Roosevelt-style commission, he shared with Roosevelt (but neither with Wilson nor with many of the Senate's most vocal opponents of the trusts[215]) a comfort with expert decision making. Brandeis resisted when Senator Cummins sought, during 1911 testimony, to elicit an endorsement of a commission empowered to approve business plans in advance. However, he then seemed primarily concerned that an agency was not yet ready to assume the task; after an agency had first acquired a "large volume of information, daily added to, in respect to each of the important industries in the country," it might be a "comparatively simple thing for the commission to pass quickly upon a question as to whether a given combination is legal or illegal."[216] Having practiced before the ICC and other agencies, Brandeis was at ease with administrative procedures.[217] Further, Brandeis saw specific use

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[212] *See* Brandeis to Robert La Follette, May 27, 1913 3 LBL, *supra* note 4, at 100, 101; *1915 Hearings, supra* note 197, at 1–2, 26; MCCRAW, *supra* note 198, at 331 n.47 (citing 1912 testimony); Louis Brandeis, *Competition that Kills* (1913), *reprinted in* BRANDEIS, BUSINESS, *supra* note 195, at 243. With the stated conditions met, Brandeis said that the market would adequately protect consumers because manufacturers who charged too much would lose profits. Price maintenance redressed an imbalance against smaller manufacturers, whose larger competitors could set resale prices by establishing exclusive agencies; it protected "mom and pop" retail shops from chain store discounting; and it protected consumers who could buy goods with an assurance of reliable quality.

[213] S. 3276, 61st Cong., 1st Sess. (1911), *reprinted in* 3 BILLS AND DEBATES, *supra* note 67, at 2415, 2416. *See also 1911 Hearings*, *supra* note 21, at 1175. *Standard Oil* had applied such a presumption where the defendant had a 90% market share. *Standard Oil*, 221 U.S. at 33, 75.

[214] *1911 Hearings*, *supra* note 21, at 1169. *See also* Brandeis to Franklin Knight Lane, Dec. 12, 1913, 3 LBL, *supra* note 4, at 218, 219.

[215] *See supra* text accompanying notes 417–447.

[216] *1911 Hearings*, *supra* note 21, at 1269–70. Brandeis had second thoughts when he discussed non-binding "advance advice" before the FTC in 1915. He then declared that the Commission, despite the best of intent, would inevitably be "hoodwinked" by businesses seeking approval of a specific transaction. *Statement of Louis Brandeis Before the Federal Trade Commission* at 5 (Apr. 30, 1915) (available in FTC library).

[217] Also, though Brandeis very much cared about workers, he broke with unions in his willingness to entrust them to experts who employed "scientific management." Unions

for a commission. A purely investigatory commission, for example, could obtain information about when trade agreements properly "regulated" competition, and that information could be used to determine which agreements should be allowed. Brandeis wrote in January 1913:

> The question, "Shall we regulate competition or regulate monopoly?" assumes that there will be some regulation, and it is clear that in order to regulate either . . . an administrative board of some kind, and with fairly broad powers, must be created to supplement the powers of the courts in dealing with this subject.
>
> The only fundamental difference as between the New Party's program and that of its opponent relates to the economic policy to be enforced. All other differences are differences in degree or of emphasis.[218]

Because Brandeis denied that the largest firms were efficient, he saw no need to sacrifice other goals, including opportunity, competition, fair distribution, and political freedom, for the sake of efficiency. He continued to believe, consistent with the classical paradigm, that these goals could be pursued in tandem.[219] Brandeis would have subordinated efficiency to other goals had it been necessary, but he denied the need would arise. However, the classical vision also encompassed a trust in judicial decision making, an important aspect of Taft's thought that Brandeis did not share. Despite their opposing views on the merits of size, Brandeis was closer to Roosevelt than to Taft (or Wilson) in his skepticism about the courts. His views on this score would prove important at a critical juncture in 1914.

D. Woodrow Wilson

The FTC was created to Wilson's specifications. When he proposed an investigatory commission in January 1914, the House adopted his proposal. When he endorsed a prosecutorial commission in June, the Senate bill and final law embraced that proposal. When he later emphasized the agency's assistive functions, his selection of Commissioners reflected that orientation.

This section explores Wilson's views, through the 1912 campaign, on Presidential leadership, economics, concentration, trusts, and experts—all of which impacted the 1914 legislation. It examines the consistency

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feared that scientific management might be used to justify lower wages. STRUM, *supra* note 186, at 165.

[218] Brandeis, *Competition, supra* note 199, at 113. Brandeis also wrote that judicial mechanisms "must be supplemented by other adequate machinery to be administered by a federal board or commission." Louis Brandeis, *The Solution of the Trust Problem* (1913), *reprinted in* BRANDEIS, CURSE, *supra* note 197, at 129, 130.

[219] *See supra* text accompanying notes 183–184.

of the core assumptions that were at the heart of his antitrust program through January 1914: antitrust violations could and should be defined clearly; responsible individuals should be harshly punished for corporate transgressions; and authority should be kept away from "experts." It explores as well his skepticism about corporate dissolutions and the faith in potential competition on which, at least in 1912, he predicated that skepticism.

1. *Moralist, Political Scientist, and Politician*

Wilson, the son and grandson of ministers, graduated from Princeton and the University of Virginia Law School, practiced law briefly, and earned a doctorate in political science from Johns Hopkins. In 1902, he became president of Princeton, then better known for the lineage of its students than the education they received, and gained national renown as an academic reformer. Wilson began to address political issues, and emerged in 1905 as a spokesman for conservative Democrats. He was elected governor of New Jersey in 1910 (succeeding progressive Republican and future FTC Commissioner John Franklin Fort). Though nominated by a machine opposed to reform, Wilson quickly emerged as a progressive. Capping his meteoric rise, he was President two years later.[220]

Wilson was for decades, according to John Milton Cooper, America's finest political scientist.[221] As a scholar, Wilson admired the British system, where a prime minister exercised power through his party in Parliament.[222] He applauded the growth in Presidential power under Roosevelt, affirming that a President should initiate legislation and lead his party.[223] When he became President himself, he would implement his theories with remarkable success.

2. *Wilson on Economics, Economists, and Experts*

Wilson studied economics under Richard Ely, and analyzed the history of American economic thought as part of a projected book that Ely planned to co-author.[224] Since "political economy" was then ensconced in the same departments as political science, Wilson taught the subject

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[220] *See generally* AUGUST HECKSCHER, WOODROW WILSON (1991).

[221] COOPER, *supra* note 83, at 54.

[222] WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885). Wilson then found American politics wanting because power had devolved to unaccountable Congressional committees.

[223] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908), *reprinted in* 18 PWW, *supra* note 5, at 69, 115 (finding admirable that the President's office was then anything he "has the sagacity and force to make it").

[224] 4 PWW, *supra* note 5, at 628–29 and 631–63 (editorial note and Wilson draft). With respect to Ely's work, *see, e.g.,* THORELLI, *supra* note 9, at 123–25, 314–15.

as late as 1892, and he served on the first council of the American Economic Association.[225] He wrote John Bates Clark in 1886 that Clark's recent work, which included a chapter on "The Economic Role of the Church," had "fertilized [his] own thought."[226]

Wilson, like the young Ely, preferred a culturally based, inductive "new school" economics in place of a deductively based classical economics.[227] He appeared unreceptive when a new deductive economics, a "neo-classical" economics based on marginal utility theory, emerged.[228] Wilson's distaste for deductive economics was part of a broader dismay at extending scientific models, and particularly deductive models from the physical sciences, to other disciplines.[229] Indeed, whereas Roosevelt and Brandeis expected science to validate their (conflicting) views, Wilson's skepticism towards the social sciences had deep roots. In 1896, he saw "a certain degeneracy" in the scientific spirit. Surveying "the work of the noxious, intoxicating gas which has somehow got into the lungs of the rest of us," he would "tremble to see social reform led by men who had breathed it: I should fear nothing better than utter destruction from a revolution conceived and led in the scientific spirit."[230]

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[225] *See, e.g.,* 5 PWW, *supra* note 5, at 602 (noting lectures, 1888–1891); WILLIAM DIAMOND, ECONOMIC THOUGHT OF WOODROW WILSON 38 n.1 (1943).

[226] Wilson to John Bates Clark, Aug. 26, 1887, 5 PWW, *supra* note 5, at 564; CLARK, *supra* note 208.

[227] Wilson described economics in 1891 notes as not "a science of absolute truths, but of historical conditions and stages of development; of social conditions (from the economic point of view) their cause and cure." Woodrow Wilson Collection, Library of Congress, Reel 489. Deductive economic models were like statutes and constitutions. Studying each furnishes "crude body colors" but not the "finer luminous and atmospheric effects;" a complete economics must account for "how a man's wife affects his trade, how his children stiffen his prudence [and] how his prejudices condition his enterprise." *On the Study of Politics* (1886), 5 PWW, *supra* note 5, at 395, 403–04.

[228] Alfred Marshall published his seminal work in 1890. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS (1st ed. 1890). The earlier work by Clark that Wilson praised, *supra* text accompanying note 226, did include explorations in marginal utility theory; however, Diamond notes that Wilson's praise focused exclusively on Clark's view of morality and reform. *See* DIAMOND, *supra* note 225, at 34. Aside from philosophical predispositions, Wilson likely followed developments in economics less closely once his career advanced sufficiently that he could focus on his primary interest in political science rather than a distinctly secondary interest in "political economy."

[229] Wilson wrote that the Constitution was based on a "Newtonian" model of balanced forces, but had proved adaptable to a proper model based on the cooperation that takes place in organic life. CONSTITUTIONAL GOVERNMENT, *supra* note 223, at 104–05. *See also* WOODROW WILSON, THE NEW FREEDOM 18 (1913) ("Society is a living organism and must obey the laws of life, not of mechanics; it must develop.").

[230] *Princeton in the Nation's Service,* Oct. 21, 1896, 10 PWW, *supra* note 5, at 11, 29–30. A draft of that speech added "[we] deem the newest theory of society the likeliest . . . . [Science] has made the legislator confident that he can create and the philosopher sure that God cannot." *Id.* at 29.

3. *Wilson on Concentration and Trust: 1905–1911*

Until 1905, Wilson rarely discussed such political controversies as the treatment of trusts.[231] Then the minister's son, emerging in national politics as a foe of Bryan's agrarian populism within the Democratic party, declared, "We can't abolish the trusts. We must moralize them."[232] In 1907, he invoked the trio of economics, morality, and law on which Senator Newlands, in particular, would later rely in 1914. In Wilson's view:

> Our thinkers, whether in the field of morals or the field of economics, have before them nothing less than the task of translating law and morals into the terms of modern business; and inasmuch as morals cannot be corporate, but must be individual . . . that task in simple terms comes to this: to find the individual amidst modern circumstances and bring him face to face once more with a clearly defined personal responsibility.
> * * *
> The law, both civil and criminal, can clearly enough characterize transactions, can clearly enough determine what their consequences shall be to the individuals who engage in them in a responsible capacity. New definitions in that field are not beyond the knowledge of modern lawyers or the skill of modern lawmakers, if they will accept the advice of disinterested lawyers. We shall never moralize society by fining or even dissolving corporations; we shall only inconvenience it. We shall moralize it only when we make up our minds as to what transactions are reprehensible, and bring those transactions home to individuals with the full penalty of the law.[233]

New standards presumably would entail new constraints because "modern business has brought into use transactions novel to our older practice and almost unknown to our present legal definitions, which are in contravention both of good morals and sound business."[234] Further, while economic changes necessitated the reformulation of law, morality, and notions of sound business practice, the moralist had a seat at the table in developing that reformulation. While Wilson said that certain practices "are to be desired in the interest alike of efficiency and economy,"[235] he commented soon after (albeit in a sermon) that "[t]he tendency to be

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[231] In a rare comment, Wilson wrote in 1898 that socialists erred in thinking that it was "competition that kills." The killer was such "unfair competition" as the use of child labor; the state could "equalize" competition by forbidding such practices. WOODROW WILSON, THE STATE 632, 635–36 (1898).

[232] Speech, Feb. 27, 1905, 16 PWW, *supra* note 5, at 14. *See also* Speech, Apr. 13, 1906, *id.* at 358, 361 ("[n]o doubt the great corporations have come to stay; no doubt a certain degree of monopoly is inseparable from their size and accumulated might; but they may, by scrutiny and regulation, be freed from the spirit of monopoly").

[233] *Politics* (1907), 17 PWW, *supra* note 5, at 309, 322–23, 325.

[234] *Credo,* Aug. 6, 1907, 17 PWW, *supra* note 5, at 335, 336.

[235] *Law or Personal Power,* Apr. 13, 1908, 18 PWW, *supra* note 5, at 263, 265.

'practical' will not conquer the tendency to be moral . . . . The moralist will dictate both to the lawyer and to the man of business."[236]

Whatever the roles of moralist, economist, and lawyer in developing standards, Wilson rejected broad Roosevelt-style regulation as a means to implement them. Wilson distinguished regulation mandating conduct from regulation prohibiting it: the latter was "regulation of the transaction" and proper, and the former "direct administrative regulation" and socialist. The answer to "unrighteous" corporate behavior was not to "substitute the wrong of tyranny for the wrong of private oppression," but—again the essential themes—to pass clear laws and punish individual transgressors.[237] Wilson added another theme in 1910, as he asked an audience if it wanted "big business to beneficently take care of you, or do you want to take care of yourselves? Are you wards or are you men? . . . Are you old enough to take care of yourselves?"[238]

Wilson as governor did secure "one of the most thoroughgoing [public utilities laws] in the nation."[239] Except for public utilities regulation, though, the governor did little to address questions of concentration. He drafted platform language calling for repeal of New Jersey's notorious corporate laws,[240] but did not actually try to change them until 1913. In discussing trusts, Wilson continued to focus on definitions and personal liability.[241] He attacked Taft's prosecutions for "hav[ing] everyone guessing," since "you cannot conduct sound business upon a test of guessing."[242] And Wilson continued to oppose corporate dissolutions. He declared in 1910 that they would "throw great undertakings out of gear," and, unlike Brandeis, Wilson thought shareholders to be worth protect-

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[236] *Baccalaureate Address,* June 7, 1908, *id.* at 323, 330–31. *But see* SKLAR, *supra* note 25, at 413 (detecting a trinity in which law and morals would "work their way in the world to suit the naturally, perhaps preternaturally, evolving requirements of modern business: father (economy), son (law), holy spirit (morals).").

[237] *The Government and Business,* Mar. 14, 1908, 18 PWW, *supra* note 5, at 35, 38–39, 42–43, 50. *See also* CLARK, *supra* note 51, at 96 (ways in which "a trust can crush an efficient competitor" are "nearly all now well known").

[238] Speech, Nov. 4, 1910, 21 PWW, *supra note* 5, at 543, 551.

[239] Editor's comments, *id. at* 578, 580 n.4. The New Jersey commission could investigate, evaluate corporate property, fix rates, establish standards of service for electric companies, require railroads to establish junction points and intersections with other lines, and preapprove issuances of stocks and bonds. *Id. See also* Speeches, Jan. 17, 1911, 22 PWW, *supra* note 5, at 345, 349, and Feb. 28, 1911, *id.* at 456, 461.

[240] Draft Platform, Aug. 9, 1910, 21 PWW, *supra* note 5, at 43, 45; *supra* note 15 (New Jersey laws).

[241] *See, e.g., The Lawyer and the Community,* Aug. 31, 1910, 21 PWW, *supra* note 5, at 64, 71.

[242] *Wilson Says Taft Disturbs Business,* N.Y. TIMES, Oct. 12, 1911, at 18.

ing.[243] When the Supreme Court decided *Standard Oil*, Wilson deemed it wrong to "wreak vengeance by destroying the machines," rather than punish financiers who took "joy rides" in corporations.[244]

4. *The 1912 Campaign*

a. Substantive Views

Wilson's tone changed in 1912. The Democratic platform reflected the agrarian populism of William Jennings Bryan, a populism that opposed any rule of reason,[245] and Wilson was tied to both the platform and Bryan: the future Secretary of State had made his peace with Wilson and thereby facilitated Wilson's nomination, and Wilson needed the votes of Bryan's supporters.[246] The platform began with a then-traditional rallying cry: "A private monopoly is indefensible and intolerable."[247] It called for laws on price discrimination, holding companies, and interlocking directorates (thus providing a blueprint for the Clayton Act), as well as legislation to directly limit corporate size (a provision that John Bates Clark singled out for particular praise). Further, it nearly demanded reversal of the rule of reason.[248]

In accepting the nomination, Wilson deemed trusts "another chapter in the natural history of power and of 'governing classes.' The next chapter will set us free again."[249] He interwove antitrust with banking reform, tariff reform, and labor unrest to attack a privileged few, forming trusts and "vast confederacies . . . of banks, railways, express companies,

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[243] *The Lawyer and the Community, supra* note 241, at 71. Brandeis saw shareholders as investors seeking to maximize their return, and deemed immoral "the idea of such persons being innocent in the sense of not letting them take the consequences of their acts . . . ." *1911 Hearings, supra* note 21, at 1177.

[244] Speech, May 17, 1911, 23 PWW, *supra* note 5, at 59.

[245] *See, e.g., supra* note 66 and accompanying text.

[246] HECKSCHER, *supra* note 220, at 242, 247–48, 250. *See supra* text accompanying note 232 (Wilson's emergence in 1905 as a foe of Bryan).

[247] *See* JOHNSON, *supra* note 105, at 112, 114 (1900), 130, 132 (1904), 144, 146 (1908), 168, 169 (1912) (Democratic platforms).

[248] The platform provided: "We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions . . . . We regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficiency and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation." *Id.* at 168, 169. *See also* John Bates Clark, *The Parties and the Supreme Issue*, 73 INDEPENDENT 891, 894 (Oct. 17, 1912).

[249] Speech Accepting the Democratic Presidential Nomination, Aug. 7, 1912, 25 PWW, *supra* note 5, at 3, 11.

insurance companies, manufacturing corporations, mining corporations, power and development companies, and all the rest of the circle . . . ."[250] Their efforts produced economies "[u]p to a certain point (but only up to a certain point)," and they produced prosperity, "if by prosperity you mean vast wealth no matter how distributed."[251] His automotive metaphor soon changed. Firms were no longer benign vehicles in which greedy executives took joy rides, but "cars of Juggernaut" in which no man should take a joy ride—and which no commission should license.[252] Wilson proclaimed, "I have seen these giants close their hands upon the workingmen of this country already, and I have seen the blood come through their fingers."[253]

Despite this strident tone, though, Wilson elsewhere modulated his message. After promising to "set us free" from trusts, his acceptance speech declared, in very un-Brandeis-like terms:

> I am not one of those who think that competition can be established by law against the drift of a world-wide economic tendency; neither am I one of those who believe that business done on a grand scale by a single organization . . . is necessarily dangerous to the liberties, even the economic liberties, of a great people like our own, full of intelligence and indomitable energy.[254]

After Wilson met Brandeis on August 28, he took from his adviser specific terms ("regulating competition" versus "regulating monopoly") and examples.[255] But Wilson had, in Neils Thorsen's words, a "capacity for comprehending and absorbing new ideas, new methods, and even new areas of scholarship [that] was strikingly matched by his ability to adapt them to his original political loyalties and dispositions."[256] Despite Wilson's borrowing, the seeds of "regulating competition" (as Wilson understood it) had been in his acceptance speech.[257] The remedies he espoused after he met Brandeis were those he had long espoused: per-

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[250] *Id.* at 12.

[251] *Id.* at 9, 10.

[252] Speech, Sept. 2, 1912, *id.* at 69, 74.

[253] Speech, Oct. 7, 1912, *id.* at 369, 373.

[254] Acceptance Speech, Aug. 7, 1912, *id.* at 4, 11.

[255] *Compare* Speech, Sept. 20, 1912, *id.* at 198, 207–08, *and 1911 Hearings, supra* note 21, at 1161 (Wilson's and Brandeis's discussions of tying clauses used by United Shoes Machinery Co.).

[256] NIELS THORSEN, THE POLITICAL THOUGHT OF WOODROW WILSON, 1875–1910, at 188 (1988).

[257] Acceptance speech, Aug. 7, 1912, 25 PWW, *supra* note 5, at 4, 11 (competition "can in large measure be revived by changing the laws and forbidding the practices that killed it").

sonal penalties (a theme from which Brandeis distanced himself) and clear laws.[258]

Further, unlike Brandeis, Wilson declared himself "for big business, and . . . against the trusts."[259] "I am not jealous of any process of growth, no matter how huge the result, provided the result was obtained by the processes of growth which are processes of efficiency, of economy, of intelligence, and of invention."[260] On the other hand, he condemned business that had not "grown big" but been "made big."[261] He thus seemed to assume that mergers rarely generated efficiencies and, by 1912, a condemnation of firms "made big" reached broadly.

However, Wilson also continued to oppose dissolution proceedings. He hesitated to tamper directly with business structure and said that potential competition made such tampering unnecessary.[262] Despite his skepticism about classical economics and deductive science, Wilson hoped to promote antitrust's various goals in tandem, and to do so with relatively limited government intervention; he would simply free the "pygmies" of small business to redress market distortion, and thereby restore a balance between opportunity (at least to the extent of disciplining market behavior), efficiency, competition, fair distribution, and political freedom.

b. The Role of a Commission

A commission was, at best, peripheral to Wilson's 1912 vision, and a Roosevelt-style commission, which he attributed to George Perkins and

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[258] For example, Wilson said there had been disclosed "all the processes by which monopoly is established and competition prevented," and declared himself "not desirous of putting everyone in jail,"since "selected specimens will do." Speech, Oct. 28, 1912, *in* JOHN WELLS DAVIDSON, CROSSROADS OF FREEDOM 484, 491 (1956); N.Y. TIMES, Aug. 29, 1912, *reprinted in* 25 PWW, *supra* note 5, at 56, 58 (Brandeis's view).

[259] Speech, Sept. 17, 1912, 25 PWW, *supra* note 5, at 148, 152.

[260] Speech, Sept. 18, 1912, *id.* at 164, 168.

[261] Speech, Sept. 17, 1912, *id.* at 148, 152. *See also* Speeches, Sept. 18, 1912, *id.* at 164, 167 (trusts will crush competitor "as long as his market is local . . . , and when his market becomes general then he may be taken in or bought out") and Sept. 20, 1912, *id.* at 203, 206–07.

[262] Wilson said: "[I]t hasn't seemed to make much difference whether [trusts were] dissolved . . . that is to say, nominally dissolved. But I would be perfectly willing to let them go without dissolution; because if we can make competition fair and prevent the giants from killing the pygmies, then I am perfectly willing to let the brains of the pygmies compete with the brains of the giants. . . . Trusts can't stand competition, let me tell you." Speech, Sept. 26, 912, *id.* at 257, 265–66. Wilson did see a need in "to disentangle" and "gently, but firmly and persistently, dissect," a "colossal community of interest." WILSON, NEW FREEDOM, *supra* note 229, at 189. However, this passage referred to the "money trust," *see supra* note 24, "a series of boards of directors . . . more formidable than any conceivable single combination that dare appear in the open." *Id.* Wilson feared the result "when all

U.S. Steel's Elbert Gary, was in Wilson's view dangerous.[263] Under that plan, Wilson charged, monopolies would be "adopted and regulated" in "a consummation of the partnership between monopoly and government." Nor would business stop at partnership. "Once the government regulates monopoly, then monopoly will have to see to it that it regulates the government."[264]

Consistent with his earlier skepticism of scientific models, Wilson decried government by "a smug lot of experts."[265] He chided the "so-called economic experts" around whom he had spent his life.[266] "God forbid that in a democratic country we should resign the task and give the government over to experts. What are we for if we are to be scientifically taken care of by a small number of gentlemen who are the only men who understand the job?"[267] The antitrust violations he intended to outlaw would not be identified by experts employing deduction. Rather, "we have been having trials and investigations by Congress, and we know the processes of unrestricted competition by which these men have accomplished the setting up of their monopolies. And if we don't know how to stop them, then the lawyers of this country have lost their ingenuity and their intelligence."[268]

But Wilson hedged his bets. He said on September 25: "We want to see the law administered; we are not afraid of commissions. . . . We may have to have special tribunals, special processes, . . . But I am absolutely opposed to leaving it to the choice of those tribunals what the processes of law shall be and the means of remedy."[269] Two days later, after meeting with Brandeis, he approved (in a particularly opaque passage) a commission that did not "exercise the power of the government through the trusts" but was rather "the instrument of a free government, a government free to serve the interests of the people and quickly responsive to the opinions of the people, with no intermediaries to interpret the interests

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the combinations are combined and this final combination is not disclosed by any process of incorporation of law, but is merely an identity of personnel, or of interest . . . " *Id.*

[263] Speech, Sept. 17, 1912, 25 PWW, *supra* note 5, at 158, 160.

[264] Speech, Sept. 2, 1912, *id.* at 69, 73.

[265] Speech, Sept. 17, 1912, *id.* at 148, 154. *See also id.* at 151 ("beware of commissions of experts," who "don't see anything except what is under their microscope, under their eye").

[266] Speech, Sept. 4, 1912, *id.* at 98, 103.

[267] Speech, Sept. 2, 1912, *id.* at 69, 78.

[268] Speech, Sept. 17, 1912, *id.* at 158, 159.

[269] Speech, Sept. 25, 1912, *id.* at 245, 251.

of business and to check the rise of new industries and the entrance into the field of initiative of the individual himself."[270]

c. The Challenge for Wilson

As a candidate, Wilson's condemnations of trusts were modulated by a substantial caveat. "Trusts" were bad, "big business" good. And, though Wilson apparently saw the trust problem as widespread (since he implied that many large enterprises were "trusts"), his 1912 program contemplated that antitrust, supplemented by tariff and banking reform, could remedy the problem. Once future misconduct was deterred by clearly defining violations and personally sanctioning corporate officers, past misconduct could be remedied, without resort to dissolutions, as potential competitors entered the market. Fully sharing neither Roosevelt's conviction that size correlated to efficiency nor Brandeis's conviction that it did not, Wilson was torn, in John Morton Blum's words, between an "ambivalent fear at once of big business and of regulating it."[271]

d. The Challenge of Wilson

Within months, Wilson would retreat from his assertions that dissolutions were unnecessary. Events of 1914 would then undermine his confidence that clear prohibitions were possible, or at least politically feasible. He would finally accept a prosecutorial commission, although he to some degree anticipated that acceptance in 1912. A challenge of explaining these changes is that Wilson had many sides. Among his personae, he was a shrewd politician whose periodic reorientations, however sincerely motivated, added to his political luster and his party's viability.[272] However, he was also a moralist for whom principled compromise depended

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[270] Speech, Sept. 27, 1912, DAVIDSON, *supra* note 258, at 284, 286–87. *See also* Brandeis to Wilson, Sept. 30, 1912, 25 PWW, *supra* note 5, at 289, 293 (Brandeis text noting, "We need for the enforcement of the Sherman law and regulation of competition an administrative Board with broad powers;" Wilson edits changing the first words to "We probably need").

[271] JOHN MORTON BLUM, WOODROW WILSON AND THE POLITICS OF MORALITY 20 (1956).

[272] Wilson's move leftward in 1910 had added to his viability in 1912. His modulated progressivism of 1912 positioned the Democrats as a party of responsible reform. He would move rightward as he completed his New Freedom package with antitrust reforms in 1914; he had already obtained a succession of other reforms, the economy was in recession, and he needed to quell business concerns. *See infra* note 334 and accompanying text. Still later, as the 1916 election approached, Wilson lurched back to the left; he nominated Brandeis to the Supreme Court and embraced a child labor act, a farm loan act, and a workmen's compensation law for federal employees, although he also courted business by securing a tariff commission and advancing legislation, which eventually emerged as the Webb-Pomerene Act of 1918, to permit export cartels. *See* ARTHUR S. LINK, WILSON: CONFUSION AND CRISES 1915–1916, at 319–62 (1964); SANDERS, *supra* note 172, at 367–86.

on knowing and disclosing "whither you are bound"[273]—but who sometimes failed his own standard.[274]

Congress's inability to develop clear and comprehensive definitions of antitrust violations in 1914 would deny Wilson a bearing that told him "whither he was bound." Did he then abandon his principles in embracing a regulatory commission? The analysis below concludes that his retreat was expedient and ambivalent, but not unprincipled. However, its ambivalence would have an impact on both the framing of the 1914 legislation and, later, the makeup of the Commission.

V. THE 1912 ELECTION AND THE PRESIDENT-ELECT

A. Election Results and Party Alignment

The 1912 election was an electoral college landslide, as Wilson carried forty of forty-eight states. The Democrats widened their House majority (they had taken control of the chamber in 1910) to 290–127, and took control of the Senate with a 51–44 majority.[275] But the silver lining barely covered some clouds. Wilson received 42 percent of the popular vote, a respectable showing in a race with a significant third party (and a nontrivial fourth party), but his support was under 39 percent outside the Democrats' "Solid South."[276] Further, the Democrats' success depended in part on the Republican's fission when Roosevelt left his party. The Democrats traditionally were the minority party,[277] and when the Republi-

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[273] Speech, Nov. 2, 1909, 19 PWW, *supra* note 5, at 471, 476–77 (address at a seminary explaining: "The individuals who have the vigor to lead must content themselves with a slackened pace and go only so fast as they can be followed"—although "that is not inconsistent with telling the world in very plain terms whither it is bound and what the ultimate and complete truth of the matter, as it seems to them, is. You cannot make any progress unless you know whither you are bound.").

[274] As Governor, for example, Wilson split from the New Jersey machine. As President, he allowed his lieutenants to reward that very machine with patronage when he needed to strengthen his party for Congressional elections. Arthur S. Link, *Woodrow Wilson and the Democratic Party, reprinted in* THE HIGHER REALISM OF WOODROW WILSON 60, 69–70 (1971).

[275] GEORGE B. GALLOWAY, HISTORY OF THE HOUSE OF REPRESENTATIVES 368 (2d ed. 1976); ROBERT C. BYRD, 4 THE SENATE: 1789–1989, at 418 (1994). One Senate seat was held by Progressive Miles Poindexter, on a two-year sabbatical from the Republicans. Eighteen seats in the House were held by third parties, mostly Progressives.

[276] Roosevelt received 27% of the vote, Taft 23%, and Socialist Eugene Debs 6%. Scott James finds that Wilson received 58% of the vote in fifteen "Southern" states, and fewer than 39% in the Northeast, the Midwest, and the South. JAMES, *supra* note 190, at 135.

[277] Only one other Democrat (Grover Cleveland) had been elected President since the Civil War. Democrats had controlled the Senate for only four years in that time and, though they had a better record in the House, the Republicans had controlled that chamber, as well, from 1896 to 1910.

cans reunited they in fact recovered the House, Senate, and Presidency between 1916 and 1920.[278]

Still, in 1912, the Democrats held a strong hand. Further, they reinforced their numerical strength with a caucus that formed a nearly united front on Wilson's four key initiatives in 1913 and 1914, including the FTC and Clayton Acts.[279] Using the caucus, and seeking to build a firm base for his party, Wilson emulated the British system he had long admired and led the nation by leading his party.[280] With the significant exception of the FTC Act, the Democrats generally spurned help from progressive Republicans and received little.[281]

B. New Jersey's Seven Sisters

In moves that presaged his Presidential plans, Wilson turned quickly to antitrust—while still Governor of New Jersey. Stung by Roosevelt's attacks on the state's laws,[282] Wilson called for new corporate and antitrust laws on January 14, 1913. With the Presidential transition then on March 4, Wilson secured seven bills, the "Seven Sisters," on February 19.[283]

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[278] The Democrats' House majority would drop from 163 to 38 in 1914, and the party returned to minority status in 1916. *See* GALLOWAY, *supra* note 275, at 368. Direct election of Senators would buoy the Democrats to a 5-seat gain in 1914. *See* BYRD, *supra* note 275, at 418; Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 552 (1997) (prior method of electing Senators by state legislatures generally favored Republicans). However, the Republicans made inroads in 1916 and recovered the Senate in 1918. Wilson himself barely survived the Republicans' reunification in 1916, with a 277–254 electoral college victory over former Justice (and future Chief Justice) Charles Evan Hughes. By 1920, the Democrats lost the Presidential vote in every state north of Virginia and every state west of Texas. COOPER, *supra* note 12, at 253, 371.

[279] JAMES, *supra* note 190, at 141–43. Under caucus rules, a two-thirds vote by a caucus of the Democrats serving in the House or Senate bound all the Democrats in that chamber, with limited exceptions, on the subsequent floor vote. Wilder H. Haines, *The Congressional Caucus of Today*, 9 AM. POL. SCI. REV. 696, 696–97 (1915); GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES 476 (1938).

[280] *See supra* text accompanying note 223.

[281] Among non-Democratic Senators, only Republican Robert La Follette and Progressive Miles Poindexter supported Wilson's first major initiative, the tariff bill. Although opposition to Taft's tariff program had been a major dispute between progressives and Old Guard Republicans, progressive Republicans, who had sought greater tariff reductions under Taft, now attacked Wilson's tariff reductions for disproportionately affecting farmers. HOLT, *supra* note 67, at 89–91. Wilson also had little Republican support on the banking bill, his second major initiative. *Id.* at 108–12. *See also infra* notes 549, 563, and accompanying text (discussing Clayton bill).

[282] *Governor Wilson and the Trusts,* Nov. 2, 1912, 17 TRW, *supra* note 1, at 341. *See also supra* text accompanying note 15 (New Jersey laws).

[283] *See* Joseph F. Mahoney, *Backsliding Convert: Woodrow Wilson and the Seven Sisters*, 18 AM. Q. 71, 73–78 (1966). The bills were Chapters 13–19 of the New Jersey Session Laws (1913), *reprinted in* LAWS, *supra* note 16, at 229–35.

The President-elect did not turn to Brandeis, but rather to New Jersey jurists.[284] Those jurists drew heavily on existing state laws, largely from agrarian states with strong antitrust movements. One of the Sisters prohibited most new stock acquisitions by corporations, although it allowed corporations to retain previously acquired stock.[285] Another prohibited intrastate price discrimination with an improper intent or effect, though allowing price differences based on grade, quality, transportation costs and (more unusually) quantity.[286] Yet another, seemingly a frontal attack on both the rule of reason and the Supreme Court's earlier "directness" test, criminalized any agreement whose participants "directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any article or commodity, either by pooling, withholding from the market or selling at a fixed price, or in any manner by which the price might be affected."[287] "Free and unrestricted competition" language was not novel; similar text appeared in other states' laws, and Senator John Sherman had sought such language in the bill that ultimately bore his name.[288] The Supreme Court had upheld such laws, while suggesting that they might be overbroad in some applications.[289] Whatever the precedent, though, the New Jersey language was particularly strong in rejecting any agreement by which prices might directly or indirectly be affected, and its language seems hard to reconcile with Wilson's calls for clarity. And, when Wilson prepared to turn to federal antitrust legislation, he sent the Seven Sisters to Congressman Henry Clayton as a model.[290]

C. The McReynolds Appointment

Wilson may have reconsidered his opposition to corporate dissolutions before the 1912 election, in response to a letter written on behalf of

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[284] ARTHUR S. LINK, WILSON: NEW FREEDOM 34 (1956).

[285] Session Laws, N.J., ch. 18 (1913). The Sisters did not prohibit mergers through asset acquisitions, but regulated the issuance of bonds to finance such acquisitions. *Id.* ch. 17.

[286] *Id.* ch. 15. *See also infra* notes 324, 326, and accompanying text (discussing state price discrimination laws).

[287] Session Laws, N.J., ch. 13 (1913).

[288] State laws include, for example, Kansas L. 1897, ch. 265, *reprinted in* LAWS, *supra* note 16, at 122; Arizona L. 1912, ch. 73, § 1, *reprinted in id.* at 45, 46. Kansas law still retains such language. KAN. STAT. ANN. § 50-112 (2001). *See also* SC CODE ANN. § 39-3-10 (2001); TENN. CODE ANN. § 47-25-101 (2001); OHIO STAT. § 1331.01 (2001). Sherman's bills include *S.1 as Reported by the Senate Committee on Finance,* 51st Cong., 1st Sess. (Jan. 14, 1890).

[289] Smiley v. Kansas, 196 U.S. 447, 456–57 (1905); National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905).

[290] Wilson to Henry Clayton, Oct. 20, 1913, 28 PWW, *supra* note 5, at 420.

John Bates Clark.[291] Whenever Wilson's views changed, though, he did not publicly signal his retreat until he chose James McReynolds as Attorney General. McReynolds had been the government's lead attorney in *American Tobacco*, but resigned to protest Taft's acquiescence to the dissolution plan.[292] McReynolds soon justified his trustbuster reputation. He proposed a graduated excise tax targeting the successor firms under the tobacco decree (a proposal from which Wilson quickly distanced himself), and announced his opposition to dissolutions that left successor firms under common ownership.[293] The McReynolds appointment showed that Wilson was now reconciled to dissolution proceedings.[294]

VI. FEDERAL ANTITRUST LEGISLATION

Wilson took office on March 4, 1913. Congress went into session on April 7, 1913, and remained in continual session for eighteen months, adjourning three weeks before midterm elections.[295] During that remarkable period, the political scientist-turned-President sequentially addressed a series of initiatives. He broke a century-old precedent by addressing Congress personally, and he made a personal address at the start of each initiative.[296]

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[291] Prompted by reports of Wilson's views, Benjamin Anderson, Jr. wrote Wilson on behalf of himself and Clark. Clark, though Republican, had endorsed Wilson. Anderson explained that Clark had trusted potential competition in 1901, but now thought that nothing could "regulate" competition short of "*actual* competition, on a considerable scale, and in all important markets;" only "dynamite" could break an existing trust. Anderson to Wilson, Oct. 5, 1912, 25 PWW, *supra* note 5, at 420, 421. The letter said that Clark had endorsed Wilson in the belief that Wilson would pursue effective antitrust remedies. *See* Clark, *supra* note 248, at 894.

[292] According to a press report, McReynolds had wanted a receiver appointed to sell parts of American Tobacco's business. When defendant's counsel objected that a receiver's sale would be confiscation, McReynolds replied: "Since when has property illegally and criminally acquired come to have any rights?" *See, e.g., J.C. McReynolds, the New Preceptor for the Trusts,* N.Y. TIMES, Mar. 9, 1913, at 56. *See also* LINK, NEW FREEDOM, *supra* note 284, at 116–17 (Wilson appointed McReynolds "knowing only that he had the reputation of a bitter foe of monopoly").

[293] *To Hit Tobacco Trust by Taxing,* N.Y. TIMES, June 4, 1913, at 1; *Wilson Passed on Tobacco Tax Plan,* N.Y. TIMES, June 7, 1913, at 1; *M'Reynolds to Ask Real Dissolutions,* N.Y. TIMES, Dec. 10, 1913, at 5.

[294] Wilson also rebuffed U.S. Steel's attempt, soon after he took office, to settle the pending case in a way that would leave the firm intact. LINK, NEW FREEDOM, *supra* note 284, at 419. Fewer antitrust cases would in fact be initiated under Wilson than under Taft. Taft's last twelve months in office had witnessed 28 new cases. Perhaps reflecting the time to start new litigation or perhaps reflecting the weight of the litigation bequeathed by Taft, Wilson's first year witnessed only 13 new cases, and his second year only 10. ANTITRUST LAWS, *supra* note 84, at 106–13.

[295] James Miller Leake, *Four Years of Congress*, 11 AM. POL. SCI. REV. 252, 254 (1917).

[296] LINK, NEW FREEDOM, *supra* note 284, at 152–53.

Wilson first secured tariff reform. He called tariff protection "the soil in which trade combinations and combinations of manufacturers most readily grew, and most rankly;" domestic competition could be more readily suppressed when a tariff shield limited foreign competition.[297] Then, with key input from Brandeis, he obtained a banking law that created the Federal Reserve Board.[298] This, he said, "created a democracy of credit," "a currency which comes into existence in response to the call of every man who can show a going business and a concrete basis for extending credit to him, however obscure or prominent he may be, however big or little his business transactions."[299] Next he turned to antitrust.[300]

A. WILSON'S CALL TO ARMS

Wilson announced his antitrust initiative to Congress on January 20, 1914. Quoting multiple Democratic platforms, he declared: "We are all agreed that 'private monopoly is indefensible and intolerable.'"[301] But as he sometimes had softened his 1912 rhetoric, Wilson now said "[t]he antagonism between business and government is over."[302] Wilson repeated his calls for individual liability (his most popular line) and for definitions to "explicitly and item by item" describe violations with such clarity as to "practically eliminate uncertainty, the law itself and the penalty being made equally plain."[303] Tracking the 1912 platform, he proposed to address holding companies, price discrimination and interlocking directorates (but dropped the demand to limit corporate size).[304] Further, he proposed an investigatory and advisory agency that would aid courts (in formulating dissolution decrees), and he particularly highlighted aid that it would give to business.

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[297] Wilson to House Speaker Oscar W. Underwood, Oct. 17, 1914, 31 PWW, *supra* note 5, at 168, 169.

[298] LINK, NEW FREEDOM, *supra* note 284, at 212.

[299] Wilson to Underwood, *supra* note 297, at 171–72.

[300] Significant prior analyses of this legislative history include Lande, *supra* note 25, at 106–26; Eugene R. Baker & Daniel J. Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962); SANDERS, *supra* note 172, ch. 8; JAMES, *supra* note 190, ch. 3; George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 PROC. ACAD. POL. SCI. 114 (1926); Gilbert Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980).

[301] H.R. DOC. NO. 625, 63d Cong., 2d Sess. 5 (1914). *See also supra* note 247 and accompanying text (platforms).

[302] H.R. DOC. NO. 625, *supra* note 301, at 4.

[303] *Id.* at 6–7; *Five Trust Bills in Wilson Plan,* N.Y. TIMES, Jan. 21, 1914, at 1.

[304] H.R. DOC. NO. 625, *supra* note 301, at 6–8. *See also supra* note 248 (platforms).

> And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.
>
> The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.[305]

Indeed, Wilson so convincingly touted the proposed agency's role as an aid to business that he would later have to deny that the commission could immunize conduct from Justice Department prosecution.[306]

B. THE "FIVE BROTHERS" AND THE LEGISLATIVE HEARINGS

1. *The Participants*

Although Wilson asked Chairman Henry Clayton of the House Judiciary Committee to draft a unified antitrust package, both chambers bifurcated responsibility for the legislation. Each referred a commission bill to its Commerce Committee and provisions of the future Clayton Act to its Judiciary Committee. Each had separate debates and two sets of managers. The Senate Judiciary Committee even met as the full Senate debated the commission bill.[307]

There were also cross-currents within the administration. Attorney General McReynolds, presumably fearing interference with his Justice

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[305] *Id.* at 6.

[306] Wilson would note "surprise over suggestions that there was considerable confusion as to just what the functions of the commission would be, and as to whether there would be a conflict between its duties and those of the other branches of the Government." *Trade Commission to "Smell Around," Wilson's Homely Phrase for Pursuit of the "Anti-trust Rat" by the Proposed Board,* N.Y. TIMES, Jan. 27, 1914, at 7. The confusion extended to Senator Newlands. Newlands to Wilson, Mar. 5, 1914, 29 PWW, *supra* note 5, at 317, 318 (seeking clarification). Representative Harry Covington said on May 19, as the House debate began, that "certain big business men and their lawyers . . . began to hail the message as the forerunner of a statute that would enable them to propose to a Government commission their plans for exploitation . . . and obtain, perchance, that individual approval which would mean individual immunity at a later date . . ." 51 CONG. REC. 8840 (1914).

[307] *See* Allyn A. Young, *The Sherman Act and the New Anti-Trust Legislation: II,* 23 J. POL. ECON. 305, 308–09 (1915), 51 CONG. REC. 11,534 (1914).

Department, was among those who urged delay.[308] His hostility (which would plague the Commission after Wilson placed him on the Supreme Court[309]) was no secret. The press soon reported that he doubted the agency's constitutionality.[310]

Joseph E. Davies, Wilson's Commissioner of Corporations, advocated a commission that he expected to head. Davies, who had undergraduate training in economics, had been a district attorney and private practitioner. He moved to the national stage when he helped Wilson win the Wisconsin primary, and then managed his western campaign.[311] In 1913, Davies recommended a series of proposals, including various specific prohibitions.[312] He also proposed a commission to investigate Sherman Act violations, conduct hearings, "prescribe such reformations as are necessary, . . . serve notice on the offending corporation to comply with such findings within sixty days or more," and report non-compliance to the Justice Department.[313]

Louis Brandeis, whose sole government position at the time was as special counsel to the ICC in a national railroad rate case, nonetheless became an administration spokesman for antitrust legislation. In December 1913, he provided advice on antitrust legislation to Interior Secretary Franklin Knight Lane (a former ICC Chairman) and Treasury Secretary

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[308] *See* LINK, NEW FREEDOM, *supra* note 284, at 446. A potential for interference was in language (which survived into the final act and remains today) that authorized the commission to investigate and report on antitrust orders, perhaps second-guessing the Department. H.R. 15613, 83d Cong., 2d Sess. (Apr. 13, 1914), § 13; 15 U.S.C. § 46(c). Representative Covington even declared that the Commission's investigative power would prevent Justice Department "laxity." 51 CONG. REC. 8845 (1914). Another likely concern was Wilson's statement that the commission might propose orders in Department litigation "by independent suggestion." A far narrower provision survived in the final bill, under which a court could appoint the commission a special master to address antitrust remedies. 15 U.S.C. § 47. In practice, this narrow provision was used only once, by Judge Learned Hand. *See* United States v. Corn Prods. Ref. Co, 234 F. 964, 1018 (S.D.N.Y. 1916).

[309] McReynolds rejected the FTC's position in whole or large part during each of the Commission's first eight appearances before the Court, between 1920 and 1926. During those years, he wrote four majority decisions in whole or large part adverse to the agency. *See, e.g.*, FTC v. Gratz, 253 U.S. 421 (1920); FTC v. Western Meat Co., 272 U.S. 554 (1926). He also wrote two dissents from holdings favorable to the Commission. *See, e.g.*, FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

[310] *Flaw in Trade Board?,* N.Y. TIMES, Feb. 20, 1914, at 1.

[311] ELIZABETH K. MACLEAN, JOSEPH E. DAVIES: ENVOY TO THE SOVIETS 10–13 (1992). *See also* Elizabeth K. MacLean, Joseph E. Davies 57–58 (1986) (unpublished Ph.D. dissertation, University of Maryland) [hereinafter Davies].

[312] For example, adopting a Brandeis proposal, he tentatively suggested that restraints of trade be presumed illegal where a firm controlled 40% of a market. Joseph E. Davies to Wilson, Dec. 27, 1913, 29 PWW, *supra* note 5, at 78, 82.

[313] *Id.* at 84. Davies did not make explicit whether the commission order would affect a subsequent case.

William McAdoo.[314] He later counseled McReynolds.[315] Brandeis was the first witness before the House Commerce Committee, and he spoke for the administration before the Chamber of Commerce.[316] His ICC commitment was time-consuming and much of his work on antitrust was accomplished by proxy,[317] but Brandeis would provide pivotal input in the spring, and would later became a strong Commission advocate on the Court.[318]

2. *The Product*

With the Administration having less than a unified vision, Clayton developed four bills of a series dubbed the "Five Brothers." (The fifth would be the commission bill). The bills included numerous procedural provisions, as well as substantive provisions governing price discrimination, exclusive contracts and tying clauses, interlocking directorates and holding companies. They provided for Justice Department civil enforcement, but the focus was on their criminal sanctions. In keeping with Wilson's philosophy of individual accountability, those sanctions could be directed not only at firms but also at their individual directors, officers, or agents.[319]

The bills caused substantial consternation. One would have proscribed agreements, arrangements, or understandings whose participants "directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity."[320] This "free and unrestricted competition" provision did not refer to effects on price and was, if anything, broader than its analog in New Jersey's Seven Sisters. Like New Jersey's law and many other state laws,[321] its terms seemed to frontally attack both the *Standard Oil* rule of

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[314] *See* Brandeis to Lane, Dec. 12, 1913, 3 LBL, *supra* note 4, at 218; Brandeis to Alice Brandeis, Dec. 5, 1913, THE FAMILY LETTERS OF LOUIS BRANDEIS 227 (Melvin I. Urofsky & David W. Levy eds., 2002) [hereinafter FLB] (describing meeting with McAdoo and noting that Senator Newlands had wanted to meet with Brandeis and Davies, but Brandeis "commuted this sentence to a luncheon with him & House members some time next week.").

[315] *See* Brandeis to Alice Brandeis, Mar. 2, 1914, *id.* at 242 (describing his future colleague on the Supreme Court as a "great time waster").

[316] *ITC Hearings, supra* note 185, at 3; Brandeis, *Democracy, supra* note 197, at 31.

[317] *See infra* text accompanying notes 382–387.

[318] *See, e.g., FTC v. Gratz*, 253 U.S. at 428 (Brandeis, J., dissenting).

[319] *See, e.g., No. 2—Comm. Print. Tentative Bill* § 4. (The tentative bills are reprinted in 2 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1074–80 (1978).)

[320] *No. 2—Comm. Print. Tentative Bill* § 1.

[321] *See supra* notes 287–288 and accompanying text.

reason and the Court's earlier "directness" test. Though Wilson had invited Clayton to use the Seven Sisters as a model,[322] the Administration soon distanced itself from the text. Brandeis told the Chamber of Commerce that the Brothers were "not Administration bills"; reflecting his own views, he declared that Wilson sought "regulated," not "free and unrestricted," competition.[323]

Another source of concern was the price discrimination provision. "Local price cutting" was among the "unfair methods of competition" in *Standard Oil*; the Democrats had pledged to address the practice; and many states already restricted in-state price differentials.[324] The new provision would apply nationwide, though, and the devil was in its details. What injury should be proscribed? The January bill reached differentials intended to "injure or destroy a competitor, either of the purchaser or of the seller;" a version reported by the House Judiciary Committee in May backtracked to cover only those intended to cause "wrongful" injury, but still focused on injury to "a competitor" and not competition.[325] Also, what exemptions should be allowed? Most state laws allowed price differentials to reflect differences in transportation costs, grade, or quality, and a few allowed quantity discounts or expressly allowed sellers to lower prices to meet competition.[326] The Brothers bill allowed all of these except a defense for meeting competition,[327] although Edwin Webb (who became Judiciary Committee Chairman when Henry Clayton became a judge on May 25) would say that no such provision was needed because a price reduction to meet competition would not show wrongful

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[322] Wilson to Henry Clayton, Oct. 20, 1913, 28 PWW, *supra* note 5, at 420. Clayton's response to the invitation was not surprising; he was "a follower of Bryan and something of a deep-South liberal." Dewey W. Grunthal, Jr., *Southern Congressional Leaders and the New Freedom, 1913–1917*, 13 J. S. HIST. 4 (1947) 439, 448 (Clayton's politics).

[323] Brandeis, *Democracy*, *supra* note 197, at 31.

[324] *Standard Oil*, 221 U.S. at 43; JOHNSON, PLATFORMS, *supra* note 105, at 169; H.R. REP. No. 627, Pt. 1, 63d Cong., 2d Sess. 9 (1914); LAWS, *supra* note 16, at 54 (Arkansas), 64 (California), 87 (Idaho), 127–28 (Kansas), 142 (Louisiana), 154–55 (Massachusetts), 168 (Michigan), 191–92 (Missouri), 205–06 (Montana), 211–12 (Nebraska), 232 (New Jersey), 256 (North Carolina) 266–67 (North Dakota), 288–89 (Oklahoma), 342–43 (Utah), 355–56 (Wisconsin) and 359–60 (Wyoming). Arkansas, Montana, New Jersey, North Carolina, North Dakota, Oklahoma, and Utah all passed price discrimination laws during February and March 1913. *See id. But see* John S. McGee, *Predatory Price Cutting: The* Standard Oil (N.J.) *Case*, 1 J.L. ECON. 137 (1958) (arguing that the case record does not establish that Standard Oil achieved its position through predatory price cutting).

[325] *No. 1—Comm. Print. Tentative Bill*; *H.R. 15657 as Reported by the House Committee on the Judiciary* (May 6, 1914) § 2.

[326] Wyoming allowed a meeting competition defense, New Jersey allowed quantity discounts, and California allowed both. *See generally* LAWS, *supra* note 16.

[327] *See No. 1—Comm. Print. Tentative Bill.* These provisions survived into the final House bill. *H.R. 15657 as Agreed upon in the Committee of the Whole House* (June 2, 1914).

intent.[328] The result was a potentially complex provision that threatened to criminalize routine transactions.

In addition to problems of inclusion, there were questions of exclusion. Wilson's comprehensive "item by item" definitions never emerged. Perhaps most glaringly, Section 7 of the Clayton Act was (and would remain until 1950) a "holding company" provision, limited to stock and not asset acquisitions.[329] Though the House Report reserved special opprobrium for holding companies,[330] it remains notable that Congress made no attempt to set standards for asset acquisitions in an antitrust package touted as comprehensive.[331]

3. *The Fading Momentum*

Business quickly became skeptical that the Clayton bill would lead to clarity.[332] Smaller business, supposedly beneficiaries of the legislation, came to fear that its criminal sanctions might be turned on them.[333] The bill's problems were further exacerbated because a recession began when Wilson took office and was now worsening.[334] With the bills' progress

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[328] 51 CONG. REC. 9389 (1914).

[329] *See* FTC. v. Western Meat Co., 272 U.S. 554 (1927) (Commission could not reach asset acquisitions under Clayton Act § 7, even if acquirer first purchased the stock of the acquired corporation); Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934) (Commission could not order divestiture if it challenged a stock acquisition and, during litigation, the companies effected an asset acquisition); FTC v. Eastman Kodak Co., 274 U.S. 619 (1927) (Commission could not order divestiture in a § 5 challenge to an asset acquisition). The Celler-Kefauver Act of 1950 finally amended § 7 to reach asset acquisitions. Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125.

[330] The report denounced them as "an abomination." H.R. REP. NO. 627, *supra* note 324, Pt. 1, at 17. Senator Cummins noted that a pyramid of holding companies might allow majority owners in the top firm to leverage control over firms at the bottom, and he observed that a holding company could manage as a unit firms that the public mistakenly took to be competitors. *1911 Hearings*, *supra* note 21, at 1114; 51 CONG. REC. 14,316 (1914).

[331] Senators Reed and Cummins did attempt unsuccessfully to add provisions to the Senate bill that would limit corporate size. (Reed proposed an absolute limit and Cummins proposed to limit firms so large as to prevent substantially competitive conditions). These amendments would have effectively limited corporate acquisitions, but Senator Reed's amendment drew only 16 votes, and Senator Cummins's amendment was defeated without a recorded vote. *See infra* notes 420, 502, 534, and accompanying text.

[332] H.R. REP. NO. 627, *supra* note 324, Pt. 3, at 1 (views of Rep. John Nelson); GASKILL, *supra* note 64, at 43.

[333] Rublee, *Original Plan*, *supra* note 300, at 115; LINK, NEW FREEDOM, *supra* note 284, at 434. A Chamber of Commerce referendum, reported on July 15, overwhelmingly opposed (among other provisions) a price discrimination law. 51 CONG. REC. 12,737 (1914). The vote against the price discrimination provision, endorsing the recommendation by the committee conducting the referendum, was 531–22. (A tying clause provision was similarly rejected, but the referendum overwhelmingly supported a relatively narrow prohibition of interlocking directorates.)

[334] LINK, NEW FREEDOM, *supra* note 284, at 445–46 (suggesting the recession might have become a depression had war not intervened).

further confounded by the question of a labor exemption,[335] the *New York Times* reported on March 1 that disclaimers from high quarters had "reduced what little momentum for passage the measures had . . . ."[336] On March 12, Wilson retreated from his commitment to precise definitions, telling the press that some definitions might introduce uncertainty where the law had become clear.[337] With elections approaching, the Chairman of the Democratic National Committee asked Wilson to delay antitrust legislation. Wilson declined. The matter was "debatable as a question of political expediency," he said, but beyond debate "as a question of party courage and energy."[338]

C. The House Debates

1. *The Clayton Bill*

The House Judiciary Committee's version of the Clayton bill included prohibitions of price discrimination, exclusive and tying contracts, holding companies, and interlocking directorates. Violations were punishable by criminal sanctions, which could reach corporate officers, directors, and agents.[339]

Consistent with Wilson's declaration that business and government were no longer antagonists, the committee managed to derive satisfaction from its observation that the "atmosphere of antagonism which such legislation might ordinarily be expected to encounter has not always been present . . . ."[340] The majority report denounced specific practices for victimizing both competitors and consumers[341] but did not denounce large-scale business per se. The bill's stated intent was "to help business and the whole people of the country who are related to or affected by it."[342] Three minority reports represented differing strands of opposition.

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[335] After *Loewe v. Lawlor,* 208 U.S. 274 (1908), applied the Sherman Act to labor activities, *see* text accompanying notes 49–50, the labor movement sought an antitrust exception. That campaign became part of the Clayton Act debates, and Wilson resisted the broad an exemption that labor sought. *See generally* LINK, NEW FREEDOM, *supra* note 284, at 427–33.

[336] *Trust Bills' Fate Depends on Wilson,* N.Y. TIMES, Mar. 1, 1914. at 12.

[337] Press Conference, Mar. 12, 1914, 29 PWW, *supra* note 5, at 335. *See also* Press Conference, Mar. 5, 1912, *id.* at 313, 316 ("definition is always a risky business," since inclusion of some practices might imply that others were meant to be allowed under existing law).

[338] Wilson to William Franklin McCoombs, Apr. 7, 1914, *id.* at 409.

[339] H.R. 15657, 63d Cong., 2d Sess. (May 6, 1914), §§ 2, 4, 8, 9, 12.

[340] H.R. REP. NO. 627, *supra* note 324, Pt. 1, at 7.

[341] For example, price discrimination, as practiced by Standard Oil Co., the American Tobacco Co., and "others of less notoriety," was "manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public." *Id.* at 8–9.

[342] *Id.* at 7.

One sought "a rest from further legislation,"[343] another sought Roosevelt-style regulation,[344] and a third attacked the "so-called antitrust bill. . . . Like a Don Quixote the committee sallied forth valiantly to overthrow the giant monopoly, but under the pressure of political expediency it turned aside to assail the windmills of little business."[345]

The House began debate on May 25, and on June 5 it approved the bill in substantially the form recommended by the Committee. The margin of victory was 277–54, with a near-unanimous Democratic vote.[346]

2. *A (Moderately) Expanded Bureau of Corporations*

The House began debating the commission bill on May 22. That bill was approved, by voice vote, on June 5.[347]

Consistent with Wilson's January message (as subsequently clarified), the commission bill envisioned a slightly expanded Bureau of Corporations, an investigative and "advisory" body whose advice would afford only limited protection to its recipient. The bill's prime innovation was to remove the Bureau "entirely from the control of the President and the Secretary of Commerce."[348] It would become an independent agency headed by multiple commissioners (no more than a bare majority from any party) with staggered terms and relatively high pay.[349] Writing to a senator who opposed a commission, Wilson said that business wanted one and his proposal would "gratify them without launching out upon a dangerous experiment."[350] In fact, the proposed commission would have little real power. It could investigate, issue subpoenas, demand

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[343] *Id.,* Pt. 2, at 1. The report by Rep. George Graham and two others argued that business needed to adjust itself to existing laws, as construed by the Court.

[344] *Id.,* Pt. 4, at 1–4. The report by Rep. Dick T. Morgan argued that many businesses "have become of public consequence, . . . from a national viewpoint have become impressed with a public use, and in the interests of the Nation should be placed under strict Federal supervision and control." *Id.* at 2–3.

[345] *Id.,* Pt. 3, at 1–2 (report by Rep. John M. Nelson).

[346] 51 CONG. REC. 9911 (1914). The Democrats' vote on the Clayton bill was 218–1, 71 not voting. JAMES, *supra* note 190, at 194.

[347] *Id.* at 9910.

[348] H.R. REP. NO. 533, Pt. 1 (Apr. 14, 1914), at 3. An investigation could be triggered, though, at "the direction of the President, the Attorney General, or either House of Congress." H.R. 15613, 63d Cong., 2d Sess. § 10.

[349] The House bill provided for 3 commissioners; the Senate for 5. *Id.* at § 1; H.R. 15613 AS REPORTED BY THE SENATE COMMITTEE ON INTERSTATE COMMERCE, 63d Cong., 2d Sess. (June 13, 1914). Their pay would be $10,000, roughly $180,000 in current dollars. *See* note 22, *supra.* That compared to salaries of $7500 for Senators, BYRD, *supra* note 275, at 675, and $5000 for the Commissioner of Corporations, Act of Feb. 11, 1903, ch. 544, § 6, 32 Stat. 823, but $10,000 for ICC Commissioners and $12,000 for Federal Reserve Board members, S. REP. 597, *supra* note 139, at 11 (advocating $12,000 figure for commissioners).

[350] Wilson to John Sharp Williams, Jan. 27, 1914 29 PWW, *supra* note 5, at 184, 184–85.

annual reports from business, provide information to the Executive, and produce its own reports for the public or Congress.[351] It also could serve as a master in equity to advise a court about remedies in a government antitrust case, a potentially significant but still advisory role.[352]

Democratic spokesman Harry Covington deemed the commission's prime weapon "pitiless publicity," to "make the man of devious ways an object of reproach among his fellow men.[353] When that failed, it had "ample powers to promote beneficent legislation."[354] Frederic Stevens, the principal Republican spokesman for the commission bill in the House, viewed the agency differently. For him, this bill was a stepping-stone. In the short term, Wilson's commission would study pressing questions, such as the proper treatment for antitrust purposes of trade agreements, unions, and exporters, and the benefits of national incorporation. Eventually, the Republican Stevens anticipated that it would become a Roosevelt-style commission.[355]

Unlike Frederic Stevens, though, two Representatives, both of whom were then running unsuccessfully for the Senate and both of whom later became FTC Commissioners, proposed a stronger commission during the floor debates.

Victor Murdock of Kansas, a journalist who came to Congress as a Republican in 1903, now led the small Progressive Party delegation; he would later serve seven years as a Commissioner, including four as Chairman.[356] Mocking Covington's promise of "pitiless publicity," Murdock saw only an agency that could "go hunting in the trust jungles—with a camera . . .".[357] He declared "the evil of the pool, the trust, the

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[351] H.R. 15613, 63d Cong., 2d Sess., §§ 8–11, 13. The House bill mandated reports from corporations capitalized at more than $5 million.

[352] *Id.* at § 12. *See also* note 308, *supra* (noting that the provision has only been used once).

[353] 51 CONG. REG. 8849 (1914).

[354] *Id.*

[355] "If most of us thought that this measure would remain as it now stands, as a finality, I have no doubt that none of us would approve it." *Id.* at 8850. The commission would study what could be done "to allow such cooperation as shall preserve the good without encouraging the bad elements of society, . . . Negative prohibitory legislation has not proved effective or satisfactory." *Id.* at 8851–52. After § 5 had been added to the FTC Act, Stevens opposed the Clayton bill for attempting specifically to define any unlawful practices, rather than relying on the Commission to sets such parameters. *Id.* at 16,329–30

[356] After his unsuccessful Senate bid, Murdock endorsed Wilson in 1916 and became a Commissioner in 1917. He later returned to journalism. *See Murdock of Kansas Comes Out for Wilson,* N.Y. TIMES, Oct. 23, 1916, at 8; *V. Murdock Dead; Wichita Editor, 74,* N.Y. TIMES, July 9, 1945, at 11; DICTIONARY OF AMERICAN BIOGRAPHY 544 (Supp. 3) (noting that Murdock introduced baseball slang to sports reporting).

[357] 51 CONG. REC. 8973 (1914).

holding company, and the merger" to be the same,[358] and denounced "money overlords" who "plundered the public estate, fed upon the substance of labor, taxed the people, polluted the public service," and "perverted the benefactions of the principle of cooperation [and] preyed upon human life itself . . . ."[359] His answer, the Progressive Party's legislation, was drafted by a committee that included former Corporations Commissioners Garfield and Smith.[360] It would be endorsed by Roosevelt, and reflected a version of Roosevelt's regulatory program that emphasized a continuing role for antitrust.[361] Murdock's bill would empower a commission to issue orders against certain specific practices and other forms of "unfair or oppressive competition."[362] As under the 1914 version of Section 5, the agency could obtain injunctions for violations of these orders.[363] Not merely anticipating Section 5, though, the Progressive legislation would have required the commission to trace the source whenever "substantially monopolistic power" existed to determine prices. If that source was "artificial" (a product of unfair or oppressive conduct), the commission would use its power to prohibit unfair or oppressive practices and thereby "terminate" the monopolistic power.[364] If the source was "natural," the bill provided that the commission should "most effectively and promptly terminate such monopolistic power, while at the same time safeguarding property rights and business efficiency."[365] This might require, Murdock explained, "the separation of one factor of the business, establishing either its independence or its subjection to the obligation of public service" (that is, obligations like those imposed on railroads).[366] Murdock himself apparently doubted that such remedies

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[358] *Id.* at 8976.

[359] *Id.* at 8973.

[360] DONALD RICHBERG, MY HERO 52–54, 56 (1954). The amendment was originally introduced as a series of bills. H.R. 9299, 9300, 9301, 63d Cong., 1st Sess. (1913), *reprinted in* 3 BILLS AND DEBATES, *supra* note 67, at 3172–78.

[361] *Colonel Assails Wilson Policies,* N.Y. TIMES, July 1, 1914, at 2. *See generally supra* notes 139–140 (Progressive Party disputes).

[362] Murdock explained, "The courts have defined, in great variation and elaboration, numerous business dealings as 'unfair competition.' There is that in the common sense of fairness and right dealing which indicates plainly the distinction between close bargaining and oppression—between 'puffing' of goods and fraudulent misrepresentation. The developing moral sense in the community adds constantly to the number of outlawed business practices." 51 CONG. REC. at 8979 (1914).

[363] Violations of orders under the FTC Act were not made punishable by civil penalties until the Wheeler-Lea Act. Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111.

[364] 51 CONG. REC. 8979 (1914).

[365] *Id.* at 9051.

[366] *Id.* at 8980. (Murdock also said that the commission could divide a business into two or more competing companies, although it is unclear how that could have been accomplished for a natural monopoly). *Id.*

would often be needed,[367] but the bill's expansive definition of "natural bases" for monopolistic power left open the possibility of wider use.[368] In any event, fewer than one in six Representatives even voted on his amendment, and it failed, 14–49.[369]

Democrat Raymond Stevens, who briefly became a Commissioner in 1933,[370] then introduced his own amendment to authorize the commission to prohibit "unfair or oppressive methods of competition." It was ruled out of order.[371] By then, though, Murdock, Stevens, Brandeis, and George Rublee had held a critical meeting with Wilson—and Murdock, at least, was convinced that Wilson would support the Stevens proposal when the bill reached the Senate.[372]

D. George Rublee and Wilson's New Direction

The Senate version of the commission bill, introduced on June 13, included a proscription of "unfair competition" and authority for the commission to issue orders to stop "unfair methods of competition." Soon after, the Senate version of the Clayton bill would substitute administrative enforcement of that bill's specific prohibitions for the criminal enforcement in the House bill.

What prompted Wilson's change of heart? In part, perceived necessity. His 1912 campaign had trumpeted "regulated competition," and he wanted an antitrust package before November—and preferably with time

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[367] Murdock was a "rugged individualist, and therein he differed from many of his Insurgent colleagues who welcomed the trend toward collectivism in government." KENNETH W. HECKLER, INSURGENCY: PERSONALITIES AND POLITICS OF THE TAFT ERA 37 (1940). *See also Government Control of Meat-Packing Industry, Hearings Before the Comm. on Interstate and Foreign Commerce of the House of Representatives*, 65th Cong., 3d Sess. 2378–79 (1919) (Murdock's testimony as a Commissioner on behalf of a recommendation to license meatpackers, in which he approved the remedy only because "the conditions . . . . compel us to take that step, because we are moving economically in some new, strange, rather forbidding fields, and individually I am anxious that we proceed with caution.").

[368] "Natural bases" included control of natural resources, control of terminal and transportation facilities, control of financial resources, and "[a]ny other economic condition inherent in the character of the industry, including, among other such conditions, patent rights." 51 CONG. REC. 9051 (1914).

[369] *Id.* at 8980, 9055.

[370] After his unsuccessful Senate bid, Stevens became special counsel to the FTC from 1915–1917. He later worked for the Government of Siam (Thailand), even serving on that country's Supreme Court. He was briefly a Commissioner during a break in his service to Siam. Stevens subsequently became a member of the Tariff Commission, resigned to work for Franklin Roosevelt's court-packing plan, and was soon reappointed to the Tariff Commission as Chairman. 31 CYCLOPEDIA OF AMERICAN BIOGRAPHY 365 (1944); *Humphreys Ousted from Trade Board,* N.Y. TIMES, Oct. 8, 1933, at 24.

[371] 51 CONG. REC. 9059–60 (1914).

[372] *Id.* at 9061 ("lively suspicion" that Senate bill would include the amendment).

for Democrats to campaign.[373] The Clayton bill was proving unsatisfactory. The economy was deteriorating. An augmented commission, defining standards through orders that had, at most, indirect punitive significance, offered a palatable quick fix.

This commission might appeal to Roosevelt supporters, both those who preferred Roosevelt's own regulatory approach and those who viewed antitrust more favorably. Roosevelt himself was back from Brazil and agitating for progressive reform. When Senator Henry Hollis asked Wilson to defer antitrust legislation, Wilson replied on June 2 that they could afford not "the least hesitation or lack of courage on this point which is going to be the point of attack during the campaign, as Mr. Roosevelt has kindly apprised us."[374] One way to draw progressive voters was to adopt a part of the Progressive Party program reflected in the Murdock bill.[375]

A commission also held appeal to the business constituency that Wilson had courted in January—and was continuing to court, in June 1914, when he selected controversial nominees to the new Federal Reserve Board.[376] Many businessmen supported a commission, often hoping for a business-friendly agency that might (despite Wilson's disclaimers) approve contracts and agreements in advance.[377] While the business community had many components,[378] Wilson might appeal broadly to that community by strengthening the commission bill and weakening a worrisome Clayton bill.

The immediate impetus for Section 5, though, came from Rublee. Rublee had been a brilliant dilettante. He graduated from Harvard College and Law School, taught at the Law School, and worked on the creation of U.S. Steel. He then became independently wealthy and periodically relocated to Europe for extended leisure or study.[379] Rublee

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[373] *See, e.g., Pass Trust Bills by July 1, The Plan,* N.Y. TIMES, May 5, 1914, at 12 (noting Wilson's hope for adjournment by July 1, although others expected the session to run through July).

[374] Wilson to Henry French Hollis, June 2, 1914, 30 PWW, *supra* note 5, at 134.

[375] Scott James argues that the principal appeal of what James called a "Progressive Party commission" was its attraction to Roosevelt voters. JAMES, *supra* note 190, at 176–78, 183.

[376] Wilson's nominees included businessman Thomas Jones and Wall Street banker Paul R. Warburg. Democratic opposition from Senators like James Reed proved so strong that Jones withdrew, apparently at Wilson's behest, and Wilson lashed out at members of his own party on July 20. Wilson stood by Warburg and the Senate confirmed him on August 7, as it turned to the Clayton bill. LINK, NEW FREEDOM, *supra* note 284, at 450–57.

[377] LINK, NEW FREEDOM, *supra* note 284, at 435.

[378] *See* WIEBE, *supra* note 150.

[379] McClure, *supra* note 131, chs. 1–3. Rublee and his wife received $40,000 (approximately $750,000 in current dollars) from her father, and made fortuitous investments. *Id.*

was a "knight errant" who became energized when he was caught up in the progressive movement in 1910.[380] After he assisted Brandeis in progressive causes, Rublee was brought into Roosevelt's camp as an adviser by two college friends: Herbert Croly (who coined the phrase "New Nationalism" and later founded the *New Republic*) and Learned Hand.[381]

Rublee contacted Brandeis seeking more unpaid "public work" in September 1913.[382] Brandeis anticipated time-consuming ICC hearings, which would lead him to begrudge "the time which trusts & kindred legislation are taking."[383] He did not seem troubled by Rublee's ties to Roosevelt. Roosevelt partisans did not necessarily share their candidate's hostility to the Sherman Act[384]; Rublee himself appears to have accepted the statute's goals,[385] although his views are obscured by his tendency to tailor his presentation to his audience.[386] In any event, Brandeis decided

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at 64–66. The Rublee's social acquaintances included the Wilsons. *See* Ellen Axxon Wilson to Wilson, Oct. 20, 1913, 28 PWW, *supra* note 5, at 391, 392 (Wilson's wife dined with Rublees despite her "fierce indignation" over Juliet Rublee's bad behavior).

[380] McClure, *supra* note 131, at 144 (quoting Dean Acheson).

[381] *Id.* at chs. 4–5.

[382] *See* Brandeis to Norman Hapgood, Sept. 30, 1913, 3 LBL, *supra* note 4, at 183.

[383] Brandeis to Alfred Brandeis, Feb. 22, 1914, 3 LBL, *supra* note 4, at 246. *See also ITC Hearings, supra* note 185, at 3 (apologizing for not scrutinizing the bill about which he testified); note 314, *supra*.

[384] *See supra* notes 138–140. Brandeis's own 1912 campaign writings on Wilson's behalf were published, as articles and unsigned editorials, by *Collier's* editor Norman Hapgood—who had supported Roosevelt during the primaries. GUNTHER, *supra* note 131, at 228–29; STRUM, *supra* note 186, at 201–02.

[385] Rublee wrote Hand that he agreed with all the Supreme Court's decisions prohibiting conduct under the Sherman Act. Rublee to Hand, May 8, 1914, Learned Hand Collection, Harvard Law School, box 107, folder 2. (The letter was apparently misdated; it refers in the past tense to a meeting with Wilson that took place on May 21). Although this appears an overstatement in light of Rublee's efforts to legalize resale price maintenance, *see* 51 CONG. REC. 14,786–89 (1914), it likely does suggest some affinity for antitrust. Further, Rublee, Hand, and Herbert Croly earlier had worked on a proposed Progressive Party platform. A typed text, perhaps prepared by Rublee, said that "The Sherman Act was passed to establish such control and to prevent the exploitation of the consumer by monopolies and oppressive combinations. Its purpose is beneficial and it should be preserved, . . ." The typed text then objects to the way the act was implemented, but not to its goal: "but control cannot be successful which only operates after the event and by means of litigation. Besides, it is a just complaint that capital cannot know in advance the limits of lawful cooperation and combination." Progressive Party platform drafts, folder 6, Progressive Party Archives, Harvard University. (One of the authors crossed out the latter text and substituted language more critical of the Sherman Act).

[386] For example, to Wilson, Rublee described a commission as a way to regulate competition and not monopoly, fulfilling the President's campaign promises. George Rublee, Memorandum Concerning Section 5 of the Bill to Create a Federal Trade Commission, Wilson Papers, Lib. Cong., File 60, Reel 208. To Hand, he wrote that his goal was to "put[] over the [Progressive Party] idea of giving the Trade Commission power to prevent unfair competition," and to "kill the nonsense in the other bills." Rublee to Hand, May 31, 1914, Hand Papers, *supra* note 385, box 107, folder 2, *quoted in* McLure, *supra* note 131, at 158.

to take advantage of his friend's skills.[387] He asked Rublee to assist on antitrust legislation.

Perhaps disingenuously, Rublee claimed to focus on a regulatory agency only when he saw the Clayton bill's deficiencies.[388] He drafted the bill introduced by Raymond Stevens, a friend to both himself and Brandeis,[389] and sought Section 5 as a substitute for, not a supplement to, the substantive provisions of the Clayton Act.[390] He tried to interest McReynolds in the bill, but the Attorney General discouraged him.[391] Commissioner of Corporations Davies was cool to the proposal despite his past support for a prosecutorial commission (support likely unknown to Rublee).[392] Having failed to win over subordinates, Rublee said that he arranged through Stevens to meet with Wilson himself; that he first alerted Brandeis to his efforts on behalf of a prosecutorial commission when he invited Brandeis to the meeting; and that Brandeis reserved the right to object to the proposal—but was then so impressed by Rublee that he joined Rublee in persuading Wilson to support Section 5.[393]

Rublee's recollections are imprecise in specifics,[394] and he may have overestimated Brandeis's initial resistance to a prosecutorial agency.[395]

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[387] A biographer sums Rublee up thus: "When aroused by the opportunity to affect a meaningful change, Rublee's unyielding determination led him to heroic efforts and allowed him to hazard unconventional, even daring methods to win a contest. Combined with his influential relations on Wall Street, his association with leading journalists and publishers and with progressive members of both the major political parties, Rublee was a resourceful and resilient competitor who did not shrink from openly or surreptitiously challenging industrial magnates, senators and even presidents for control of public policy. His ability to survive such contests was often the result of thoughtful strategy and quiet influence." McClure, *supra* note 131, at 4–5. Hand wrote, "I should not want to have to cooperate with [Rublee] in matters about which he felt strongly. I should be submerged by a stronger will, and a kind of concentration of purpose, which I have never experienced in another." Hand to Felix Frankfurter, Jan. 10, 1916, Hand Papers, *supra* note 385, box 104, folder 5.

[388] *Original Plan, supra* note 300, at 115–16.

[389] Rublee had persuaded the New Hampshire Progressives not to challenge Stevens's Democratic candidacy in 1912. McClure, *supra* note 131, at 130. After the election, Brandeis wrote the House Majority Leader to recommend Stevens's advancement. Brandeis to Oscar Underwood, May 10, 1913, Brandeis Papers (Louisville collection), reel 32.

[390] *Original Plan, supra* note 300, at 116.

[391] George Rublee, The Reminiscences of George Rublee 109, Columbia University Oral History Project (1972; transcribing interviews conducted in 1950–1951).

[392] *Id.* at 110 (deeming Davies "timid"). *See also supra* note 313 and accompanying text (Davies's earlier efforts).

[393] Rublee, Reminiscences, *supra* note 391, at 111–15.

[394] Rublee was over 80 when he gave his Columbia reminiscences. For example, Rublee's account that he obtained the meeting through Stevens, a first-term Congressman, is at best an oversimplification; at a minimum, a letter from Norman Hapgood, by then editor of *Harpers*, smoothed his path. Norman Hapgood to Wilson, Apr. 21, 1914, 29 PWW, *supra* note 5, at 481.

[395] *See supra* text accompanying notes 216–218.

Still, Rublee was the driving force behind the Commission's prosecutorial authority, and he clearly made an effective presentation when he first met with Wilson and Brandeis on May 21.[396] Brandeis was troubled by the state of the antitrust legislation by the time of the meeting,[397] and was apparently persuaded at the meeting that Section 5 held more promise than any other program for which he could hope.[398] Wilson himself was soon offering specifics to justify retreating from his earlier calls for specifically defined antitrust violations.[399]

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[396] *See supra* note 372 and accompanying text (Murdock's remark that Wilson likely would support a prosecutorial commission). Further, Senator Hollis wrote Wilson between the first meeting, which he did not attend, and the second, which he did attend. Wilson answered that Brandeis, Rublee, and Stevens had shown him how to address the "only really debatable" part of the Clayton bill. Wilson to Hollis, May 30, 1914, 30 PWW, *supra* note 5, at 134.

[397] Brandeis called the Clayton bill "very bad legislation." Brandeis to Alice Brandeis, June 10, 1914, FLB, *supra* note 314, at 252, 253. Likely specifics include the following. First, he openly criticized the bill's interlocking directorate provision. Having recently written a muckraking book about the so-called "money trust," *see supra* note 24 and accompanying text, Brandeis wanted to condemn interlocking directorships not only among horizontal competitors (which the Clayton bill did), but also among firms in a buyer-seller relation (which the bill addressed only when one of the firms was a bank or common carrier). *See Trust Legislation, Hearings Before the Committee on the Judiciary, House of Representatives,* 63d Cong., 2d Sess. 679–82 (1914); Brandeis to James McReynolds, Feb. 22, 1914, 3 LBL, *supra* note 4, at 246. Second, the bill's price discrimination provision allowed quantity discounts. *See supra* note 327. Discounts for large buyers were anathema to Brandeis. (Though he sought to legalize resale price maintenance, he would have denied protection when manufacturers offered quantity discounts. Brandeis to Rublee, Nov. 18, 1913, 3 LBL, *supra* note 4, at 216.) Third, Brandeis may have shared the growing fears of small business that criminal sanctions for violating the Clayton Act could be turned on them. *See supra* note 333. Brandeis might also have been frustrated that the bill failed to legalize price maintenance.

[398] Brandeis detected in Wilson an "apparent lack of courage in some industrial lines," although he deemed it "a fault of the mind and not of the heart." Brandeis to Alice Brandeis, May 21, 1914, FLB, *supra* note 314, at 248. Thomas McCraw calls Brandeis's reliance on Rublee, leading to Brandeis's support of § 5, an "abdication." MCCRAW, *supra* note 198, at 122. But several factors vitiate McCraw's criticism. First, Brandeis's inability to secure modification of the interlocking directorship provision, *see supra* note 397, undermines any assumption that he could have changed specific provisions of the Clayton bill by more active efforts. Second, Brandeis had earlier recognized value in a trade commission. *See supra* notes 215–219 and accompanying text. Perhaps he hoped by 1912 that a strong commission might advance his campaigns for resale price maintenance and limited trade agreements. Third, Rublee apparently did sympathize with antitrust, *see supra* note 385, and also supported Brandeis's campaign for resale price maintenance. *See* 51 CONG. REC. 14,789 (1914). Finally, general rate hearings were matters of national import, *see, e.g., Brandeis Files His Brief,* N.Y. TIMES, Jan. 3, 1911, at 4, and Brandeis had committed months before to serve the ICC as special counsel. Brandeis to James Harlan, Aug. 21, 1913, 3 LBL, *supra* note 4, at 163.

[399] In March, Wilson had begun to retreat publicly from specifically defining antitrust violations. *See supra* note 337 and accompanying text. In July, he gave the example of exclusive agency arrangements, arguing that such arrangements might have little impact on competition in urban markets, but shut out competition in rural districts where there

Once he gained Wilson's sympathies, Rublee apparently worked to line up congressional support, and then met with Wilson and Brandeis again (with Senator Hollis but not Victor Murdock now in attendance) on June 10.[400] He articulated a justification for Section 5 in a memo sent to Wilson on July 10.[401] That memo became the basis for a floor speech by Senator Hollis on July 15, and, through Hollis, a significant part of the FTC Act's legislative history.[402] Rublee asserted that he wrote the conference report, and he apparently wrote Covington's remarks about judicial review during the later debates.[403]

The July 10 memo explained that the last election had settled that the trust problem would be solved by regulating competition rather than monopoly, and that Section 5 was directed to that end.[404] Rublee justified use of an unfair competition standard to further that end by fusing economics and morals in a passage that could have come from a 1912 Wilson speech.

> [T]he only effective means of building up and maintaining monopoly, where there is no control of a natural resource, or of transportation, is the use of unfair competition.
>
> Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position solely through superior efficiency is ordinarily no menace to the public interest.[405]

But, despite Wilson's prior assumptions, specific definitions could not encapsulate all wrongful practices. The list would be long and soon incomplete. "Unfairness" would depend on industry-specific facts, which would change over time. Definitions would necessarily use, as the Clayton

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were a limited number of potential agents. Press Conference, July 9, 1914, 50 PWW, *supra* note 5, at 508.

[400] In a misdated letter that was written between the two meetings, *see supra* note 385, Rublee wrote Hand that his approach was backed by Wilson, a majority of the Senate Commerce Committee, and House Commerce Committee Chairman Covington (although, consistent with observations by others, *see* infra note 473, Rublee said success was delayed by Senator Newlands's incompetence.). *See also Plan to Strengthen Trade Board,* N.Y. TIMES, June 12, 1914, at 7.

[401] Rublee, *Memorandum, supra* note 386.

[402] 51 CONG. REC. 12,141–49 (1914) (Hollis speech).

[403] Rublee to Brandeis, Oct. 6, 1914, quoted in LINK, NEW FREEDOM, *supra* note 284, at 441; *infra* note 557. His efforts drew both praise and denunciations. 51 CONG. REC. 11,299, 11,537–38, 14,786–89 (1914).

[404] Rublee, *Memorandum, supra* note 386, at 6.

[405] *Id.* at 3.

bill showed, "language which would present very difficult problems of construction to the Courts."[406]

A general prohibition like the Sherman Act's was preferable, but the Sherman Act itself might not reach "the mere use of an unfair method, without more, by a corporation of no conspicuous size." Even if it did, the Justice Department focused on large cases, and "[c]ountless competitors succumb before relief is obtained." The Department "deals with monopoly as an established fact;" a commission could relieve it "of a load of burdensome work which it is not well fitted to perform." Further, as Rublee explained it, "unfair competition" was a meaningful standard. He provided the theoretical underpinning that the term denoted competition succeeding for reasons other than efficiency, and also pointed to the term's use in *Standard Oil,* the Seven Sisters, other state laws, and cases that construed those laws.[407]

Perhaps most importantly, by emphasizing constraints on the agency's authority, Rublee implicitly addressed Wilson's concerns about empowering a "smug lot of experts."[408] The commission would have only limited authority to determine that conduct was unlawful; under the Stevens bill (and the 1914 Act), its orders would lack force until "enforced" by a court. Likewise, the commission would be restrained in finding that conduct was lawful. A Sherman Act violation was independent of a Section 5 violation, he argued, so the commission could not immunize conduct from prosecution under the existing statute.[409]

E. The Commission Bill in the Senate

Most House members were likely unmindful of Wilson's change of heart when they approved an antitrust package on June 5. However, Section 5 surfaced publicly when the Senate Commerce Committee reported its commission bill on June 13.[410] In addition to powers provided in the House bill, Section 5 now proscribed unfair competition, and authorized the commission to issue orders prohibiting "unfair methods of competition."

Section 5 became the focus of the subsequent debate on the commission bill, submerging any concerns with such matters as interfirm cooper-

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[406] *Id.* at 7–11.

[407] *Id.* at 3–6, 17–20. *See also supra* text accompanying note 63 (use of term in *Standard Oil*).

[408] *See supra* text accompanying note 265.

[409] Rublee, *Memorandum*, *supra* note 386, at 12 (court would enforce FTC order only if it was "just"), 22.

[410] A letter from Hollis suggests that he was lining up Committee members until the last minute. Henry French Hollis to Wilson, June 13, 1914, 30 PWW, *supra* note 5, at 181.

ation. The new section drew varying responses, even (perhaps especially) among proponents of strong antitrust enforcement. Elizabeth Sanders has analyzed patterns of support from different parts of the country, with Senators from "core" manufacturing states tending to prefer no new legislation (or, if legislation were inevitable, a commission that could pre-approve business plans); those from "periphery" agricultural states tending to prefer a strengthened Sherman Act; and those from "diverse" states (including Nevada and Iowa, homes to Newlands and Cummins) most likely to favor a trade commission that would conduct a more calibrated analysis of competition problems.[411] The analysis below focuses primarily on individual, sometimes idiosyncratic, Senators. The first part briefly explores several opponents and reluctant supporters of the bill. The parts that follow focus on Section 5's principal supporters, Senators Newlands, Cummins, and Hollis, examining both their substantial commonalities and their divergences.

1. *Surveying the Landscape: Six Senators*

Most of Section 5's opponents criticized the broad discretion they understood the statute to convey. However, following Henry Lippitt, Republican of Rhode Island, some would concede at least limited utility for the agency if it could shield business activities, providing protection akin to that which the National Civic Federation had sought in 1908 and Roosevelt had embraced (to different degrees) in 1908 and 1912.[412] The idea had a substantial business constituency,[413] and Lippitt unsuccessfully proposed a limited shield, under which the commission could immunize submitters from criminal prosecution.[414]

Section 5 also drew opposition or half-hearted support from antitrust proponents, primarily from agricultural states, who distrusted the proposed agency. The Democrats among these, in particular, were associated

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[411] SANDERS, *supra* note 172, at 1, 22, 25, 278–83. Sanders deemed Nevada and Iowa diverse because they were in economically interdependent "trading areas" for San Francisco and Chicago.

[412] *See* notes 105–112, 137, and accompanying text.

[413] A Chamber of Commerce Committee (on which Rublee served) had conducted a referendum of member organizations to determine their views on a trade commission, posing seven questions and making specific recommendations. Most of its recommendations (e.g., that there be a commission, and that it reach all firms except common carriers that were engaged in interstate commerce) were approved by margins of 4–1 or higher. The only recommendation that failed (303–308) was one that opposed agency authority to advise in advance whether conduct violated the law. *Referendum on an Interstate Trade Commission,* NATION'S BUSINESS, June 18, 1914, at 5.

[414] 51 CONG. REC. 13,217–19 (1914). The amendment was defeated, 18–47. *Id.* at 13,307. Lippitt was the ideal Senator to promote what Sanders called a "core constituency" approach. Rhode Island led the country in per capita value added. *See* SANDERS, *supra* note 172, at 22.

with the views of William Jennings Bryan, who was now Secretary of State.[415] Bryanite interests were well-represented in the Senate, where less populous states had a disproportionate voice. Their votes made them, in Sanders' term, "the foot soldiers that saw reform through the legislature," although, in the commission bill and elsewhere, Senators from agrarian states often settled for less than they had hoped.[416]

Consider James Reed, Democrat of Missouri, a maverick who infuriated Wilson.[417] Reed denounced wealthy men scheming "to rob entire communities, to crush great business concerns, to bankrupt States, to put out the fires in the furnaces of a hundred factories, and in the end to pilfer and filch with monopoly's cruel fingers from the pockets of the poor and the needy."[418] His most lasting contribution to the 1914 debates was an amendment that made it easier to challenge holding companies under Section 7 of the Clayton Act, changing a prohibition on mergers whose effect "is" to substantially lessen competition to one prohibiting mergers whose effect "may be" to have such impact.[419] He also proposed to ban corporations from interstate commerce if they were capitalized at more than $100 million; to set minimum antitrust fines at 10 percent of defendant's assets (taken first from interests of responsible officers, directors, and agents); and to authorize states to bring Sherman Act cases in the name of the United States when the Attorney General did not.[420] Reed criticized Section 5 as vague and its procedures as weak, and he hesitated to support the commission bill but ultimately did so.[421] However, he

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[415] *See supra* text accompanying notes 66, 245. Bryan would resign in 1915, protesting Wilson's policies towards Germany.

[416] SANDERS, *supra* note 172, at 4.

[417] Reed worked against Wilson's appointments to the Federal Reserve Board in the midst of the antitrust debates. *See supra* note 376; Wilson to Cleveland Hoadley Dodge, July 19, 1914, 30 PWW, *supra* note 5, at 288 (Reed and other Democratic Senators who opposed the nominations acted with "malevolent ardour"). After Reed later broke with Wilson in the battle for the League of Nations, Wilson would denounce him as "a discredit to the party to which he pretends to belong." Reed ran for President rather than seek reelection in 1928. DICTIONARY OF AMERICAN BIOGRAPHY (Supp. 3) 621, 622.

[418] 51 CONG. REC. 15,861 (1914) (Clayton Act debate). *See also supra* note 159 (Reed on antitrust enforcement), 182 (Reed on *Terminal Railroad Ass'n* case).

[419] 51 CONG. REC. 14,464 (1914).

[420] *Id.* at 14,526–28. These amendments failed 16–36, 13–36, and 21–39.

[421] When he decided to vote for the Senate bill at the end of the debate, Reed said he did so in the hope that it would be improved by the House-Senate conference. *Id.* at 13,313. (He did not actually cast his intended vote, though, out of deference to a "pair" with a Republican opponent of the bill who was absent. *Id.* at 13,318). He later expressed disgust that the conference version did not fulfill his expectations: "Who ever heard of creating a commission to determine, first, whether a man has been guilty of committing burglary, then to order him to stop, then to give him a right to appeal to a court, and in the end if he be defeated to solemnly adjudge that he must now stop?" *Id.* at 14,790, 14,802. *See also infra* note 454 (efforts to define "unfair competition").

voted against the conference version of the Clayton bill, after first moving to recommit it to a second conference that he hoped would produce legislation more to his liking.[422] The direct substitution of administrative enforcement for the bill's criminal sanctions particularly offended Reed, because it would take "the sword from the hand of justice . . . and supinely turn the monopolists over to a commission that can not even issue a civil decree that it can itself enforce."[423]

Harry Lane, Democrat of Oregon, attacked the "[u]nmuzzled criminals who are engaged in robbing other and better people."[424] He was outraged for the "hundreds of thousands and millions of people" who were being "robbed" as they were "compelled to accept arbitrarily fixed and unjustly low prices for products of their toil, while . . . compelled to pay arbitrarily fixed and unjustly high prices for what they consume."[425] He supported the three unsuccessful Reed efforts described above, and himself proposed a ten percent informant's fee in antitrust cases.[426] Lane thought a commission "illogical" and "unworkable,"[427] but finally supported the commission (though not the Clayton) bill. He explained that the commission bill would "no doubt pass with all its indirection and lack of virility, and I, among others, who hoped for better things along these lines, will be compelled to vote for it. May God have mercy on our souls."[428]

John Sharp Williams, Democrat of Mississippi,[429] earlier had introduced bills to make it unlawful to "stifle fair competition," to provide up to five years in jail for individuals who broke the law "with intent to defraud or to create a monopoly or unfairly to stifle competition," and (with a states' rights twist) to require firms in interstate commerce to

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[422] 51 CONG. REC. 16,152 (1914) (bill should be returned to conference with instruction to restore criminal sanctions); 16,170 (unsuccessful motion to recommit followed by Reed's opposition to the final bill).

[423] *Id.* at 14,227.

[424] *Id.* at 13,223.

[425] *Id.*

[426] *See supra* note 420 and accompanying text (Reed amendments); 51 CONG. REC. 14,591–97. Lane's amendment, which failed, 14–38, would have provided a reward of 10% of the fines and penalties recovered in an antitrust case to the first person who furnished evidence of the violation.

[427] 51 CONG. REC. 11,541 (1914).

[428] *Id.* at 13,222 (1914). *See also id.* at 16,166 (Clayton Act offered no effective relief against "enormous combinations, who are literally rotting this country, rotting its government, rotting its citizenship").

[429] Williams's efforts are discussed in George Cullom Davis, Jr., The Federal Trade Commission: Promise and Practice in Regulating Business, 1900–1927, at 118–22 (1969) (unpublished Ph.D. dissertation, University of Illinois), and SANDERS, *supra* note 172, at 278–79, 286.

incorporate in the state where they had their chief office.[430] Williams supported Senator Reed's amendment to exclude firms capitalized at more than $100 million from interstate commerce.[431] But he lobbied Wilson against any commission in January 1914.[432] Privately, he wrote on July 27 that the commission bill "thoroughly disgusted" him, but "I believe in team play . . . . I have quit as far as this bill is concerned and shall stay quit for fear lest I do more harm if I open my mouth than by keeping it shut."[433] Publicly, he defended the program vigorously but generically, announcing that the Democrats would "destroy what is plutocratic, exploitative, and industrially tyrannical."[434] Williams voted for the commission bill, as did most Southern Democratic Senators.[435] He also voted for the Clayton bill, but first showed his displeasure by supporting Reed's motion to recommit it.[436]

Moses Clapp, Republican of Minnesota and an insurgent like Cummins, had headed the Commerce Committee before Newlands. He disliked a commission for the Wilsonian (and agrarian) reason that he feared the influence business would exert over it.[437] However, he advocated a prohibition on unfair competition to be enforced by the Justice Department and private litigants in treble damage actions.[438] He later

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[430] *See, e.g.*, S. 4747, 62d Cong., 2d Sess. (1912), *reprinted in* 3 BILLS AND DEBATES, *supra* note 67, at 2423. *See also 1911 Hearings*, *supra* note 21, at 2503–34 (Williams's testimony). The chartering state would have a "sovereign right" to allow "evil" within its own borders, but not beyond. *Id.* at 2507.

[431] 51 CONG. REC. 14,527 (1914).

[432] *See* Wilson to John Sharp Williams, Jan. 23, 1914, 29 PWW, *supra* note 5, at 184 (Wilson's response).

[433] John Sharp Williams to Robert R. Reed, July 29, 1914, John Sharp Williams Papers, Lib. Cong., Box 7.

[434] 51 CONG. REC. 11,175 (1914) (characterizing program as "constructively conservative").

[435] Most of the 22 Senators from the former confederate states, the Solid South, supported the commission bill. (Fourteen voted for the Senate version; 7 cast no vote, but 6 of those supported the conference bill; and one opposed the Senate bill but supported the conference bill). While there was a Southern progressive tradition, *see* Dewey W. Grantham, *The Contours of Southern Progressivism*, 86 AM. HIST. REV. 1035 (1981), it is unclear how many of these Senators were persuaded by the commission's merits and how many voted out of party loyalty, caucus unity (*see supra* note 279), or to protect the national party so they could keep the prerogatives of Senate control. (Southern Democrats chaired three-fourths of the 28 Senate committees. LEWIS L. GOULD, REFORM AND REGULATION: AMERICAN POLITICS, 1900–1916, at 151 (1978)).

[436] Of the 25 Senators who voted for the motion to recommit (including Williams, Reed, Lane, Moses Clapp, and William Borah), only Williams then voted for the final bill. *See* 51 CONG. REC. 16,170 (1914).

[437] *See id.* at 13,063.

[438] *Id.* at 13,065. *See also id.* at 13,050 (complaining party should have a right of appeal if commission did not issue an order).

proposed to create a private treble damage action for conduct declared unfair by the commission,[439] and he voted for the commission bill because a commission-enforced prohibition was better than none.[440]

William Borah, Republican of Idaho, despised "the unnatural, irregular and illegal combinations which are the result, not of legitimate and natural growth and development, but monsters born of deceit, fraud, overreaching, overcapitalization, and criminal combinations."[441] Borah had been a Roosevelt partisan at the 1912 Republican convention and had flirted with Roosevelt-style regulation.[442] By 1914, though, he criticized Section 5 because, whatever Congress's intent, the agency would succumb to "propaganda" about the risk of disturbing business, and then "regulate" monopoly and "somewhat modify its extortions."[443] A commission could only "dull the edge of our activities and our desire to destroy monopoly," and Borah opposed both the commission and Clayton bills, in the latter case objecting to the lodging of enforcement authority in the commission.[444] The commission bill attempted to "kill cancer with cologne water."[445] Unusually for a strong foe of "monopoly," Borah now followed Taft in defending the Supreme Court. *Standard Oil* and *American Tobacco* had stopped the formation of new monopolies, Borah declared.[446] Once public opinion stirred up by *Standard Oil* "settled down," it was now "known that [the Court] had really condemned every conceivable form of monopoly against which the people have ever complained . . . ."[447]

James May has observed that legislators who embraced classical economics, which saw no tensions between the multiple goals of antitrust,

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[439] *Id.* at 13,113–14. The amendment failed, 18–41. *Id.* at 13,150.

[440] *Id.* at 13,301.

[441] *Id.* at 11,233 (also decrying a "property class, living in luxury and power, and another class, . . . literally living upon the crumbs which fall from the rich man's table").

[442] For Borah's support of Roosevelt, *see* MARIAN C. MCKENNA, BORAH 118–21 (1961). (Borah declined to follow Roosevelt out of the party. *Id.* at 125–26.) Borah had spoken of Roosevelt-style regulation with approval in 1911. In the aftermath of *Standard Oil* and *American Tobacco,* Borah had supported a resolution directing the government to institute criminal prosecutions against the defendants for the stated reason that an effort should be made fully to enforce the Sherman Act, even though he then expressed skepticism about the Act, declaring that, "we have indeed passed from the age of competition to the age of regulation and control." 47 CONG. REC. 3218 (1911).

[443] 51 CONG. REC. 15,947 (1914). *See also id.* at 11,186 (bill would mark "the beginning of the time when the business of the country will be regulated and controlled through bureaus and commissions, and . . . when the question of competition will be eliminated entirely").

[444] *Id.* at 11,233, 15,986.

[445] *Id.* at 15,956.

[446] *Id.*

[447] *Id.* at 15,983.

might devote disproportionate attention to specific concerns, and stand silent on possible tradeoffs, without "necessarily indicat[ing] a desire to protect only one part of the natural system while leaving aside or sharply subordinating the rest."[448] Save for Lippitt, all the Senators discussed above may well have been among those who implicitly or explicitly accepted the substance of the classical vision, which saw "monopolies" as abnormal constraints, and antitrust, in removing those constraints, as simultaneously promoting opportunity, efficiency, competition, fair distribution, and political freedom.

2. *The Commission's Advocates: Overview*

Like some opponents of Section 5, its principal supporters criticized twenty-four years of experience under the Sherman Act. Whether the fault was intrinsic to the statute, or lay with courts or prosecutors, the law had not stopped corporate abuse, and it had neither prevented nor reversed the merger wave.[449] The bill's advocates disclaimed an intent to change the Sherman Act or undermine Justice Department enforcement.[450] They saw merit in the law's approach of proscribing conduct in general terms[451] (although they diverged as to whether specific prohibitions were appropriate as well). But they wanted a new agency that would prosecute if the Department faltered, enforcing a flexible new standard that could reach where the Sherman Act might not. Newlands said Section 5 would "check monopoly in the embryo," Cummins that it would "seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have," and Hollis that it would reach "the mere use of an unfair method, without more, by a corporation of no conspicuous size."[452]

The bill's spokesmen also shared a common legislative imperative. "Unfair competition" and related terms had some common currency,[453] but opponents charged that Section 5 was so vague it unconstitutionally delegated legislative authority. Even many supporters backed an effort

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[448] May, *Theory*, *supra* note 25, at 299. May particularly associated such views with references to supracompetitive pricing as "theft," "robbery," and "extortion," *id.* at 291, as appeared in numerous statements quoted above. *See also supra* text accompanying notes 183–184.

[449] *See, e.g.,* 51 CONG. REC. 12,030–31 (1914) (Newlands).

[450] *Id.* at 11,529 (Cummins), 12,623 (Newlands).

[451] *See, e.g., id.* at 12,024 (Newlands); 12,146–47 (Hollis); 11,455–56 (Cummins's reference to unfair competition's "myriad" forms).

[452] *Id. at* 12,030 (Newlands); 12,146 (Hollis) (using language of the Rublee memo); 11,455 (Cummins).

[453] *See supra* text accompanying notes 63, 95, 102, 231, 324.

by Senator Reed to define the term.[454] Although advocates did not argue that every application of the term was clear (if it were, why have an expert commission?), and although part of their justification was that laws already included terms like "reasonable rates" or "unreasonable time,"[455] they endeavored to show that Section 5's standard itself was clear, with meaningful guides to its application.

Thus, they pointed to economic bases for the term. Hollis, using Rublee's language, said "unfair competition" was competition by which firms grew for reasons other than efficiency.[456] Reference was made to a recent article by future FTC economist William Stevens, which declared, "fair competition in an economic sense signifies a competition of economic or productive efficiency."[457]

Section 5 advocates also pointed to two fields of law. The first was antitrust. *Standard Oil* had used "unfair competition" to describe some abuses with which the trust was charged; courts had issued injunctions that prohibited specific practices and other forms of "unfair competition;" and the term appeared in state laws, albeit generally price discrimination laws.[458] Even when courts gave no specific content to the term, its use in court orders was evidence that the term *had* content.[459] The

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[454] Reed repeatedly criticized § 5 and repeatedly was challenged to improve it. *See, e.g.,* 51 CONG. REC. 12,938 (1914). He eventually proposed to define unfair competition as "those acts, devices, concealments, threats, coercions, deceits, frauds, dishonest practices, false representations, slanders of business, and all other acts or devices, whether of like nature to those herein enumerated or not, done or used with the intent or calculated to destroy or unreasonably hinder the business of another or prevent another from engaging in business, or to restrain trade or to create a monopoly;" the effort failed, 30–32. *Id.* at 13,234, 13,235. He then proposed a second amendment changing the final clause to read "done or used with the intent, or the effect of which is to destroy or unreasonably hinder the business of another or prevent another from engaging in business." That effort failed, 29–33, with affirmative votes coming from 12 Democrats and 5 Republicans who eventually voted for the Senate bill. *See id.* at 13,312, 13,314.

[455] *See, e.g., id.* at 11,388–89 (Cummins).

[456] *Id.* at 12,146.

[457] William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 282 (June 1914). *See also* William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 460 (Sept. 1914); 51 CONG. REC. 11,230–31, 12,145, 16,329 (1914) (quoted by Sen. Joseph Robinson, Sen. Hollis, and Rep. Frederic Stevens). The article lent a professional imprimatur to a list of eleven species of unfair competition, including local price cutting (which Stevens thought too dangerous to allow), bogus "independent" concerns, "fighting brands" (e.g., low-priced brands, secretly made by manufacturers of high-priced brands, brought into a market to repel new entry), and tying arrangements. Stevens was blunt: "If there be a sound basis for competition, it lies in the preservation of the economically efficient and the destruction of the inefficient." *See also id.* at 11,300 (critique by Sen. Borah).

[458] *See supra* text accompanying note 63 (*Standard Oil*); 51 CONG. REC. 11,228–31; 12,142–45; 12,219–20; 12,997–99 (1914) (discussions of antitrust decrees and state laws).

[459] *See, e.g., id.* at 11,452 (1914) (Cummins's remark).

second field was business torts. There, "unfair competition" once had been limited to a practice whereby a seller, perhaps by naming a product similarly to that of a better-known competitor, sought to "palm off" goods. Section 5 advocates declared that the Act was not so narrow.[460] Some courts had broadened the offense to reach other business torts, and the bill's advocates cited Harry Nims's treatise on "unfair competition," whose premise was that the term now reached more broadly.[461]

The bill's spokesmen shared these substantial points of agreement. Further, in their very reliance on an expert agency, they tended to break from the faith of those, like Taft and Borah, who trusted the courts to construe a flexible antitrust standard. At the same time, there were significant differences in emphasis, at the least, among the bill's spokesmen, as acknowledged by Cummins and criticized by Senator (later Justice) George Sutherland.[462] It is to the concerns of Newlands, Hollis, and Cummins that the discussion now turns.

3. *Francis Newlands*

a. A Senator and His Commission

Francis Newlands of Nevada, the Democratic Chairman of the Commerce Committee, had arrived in the House in 1893, moved to the Senate in 1903, and served there until he died in 1917.[463] Anticipating Roosevelt's call for a Bureau of Corporations, he had advocated administrative scrutiny of business in 1899.[464] He had worked with George Perkins and others in 1911, contemplating a commission with broad licensing authority. While he had then settled on a more modest proposal under which a commission would award a seal of approval to firms not guilty of "unfair methods of competition," he had declared himself agnostic about whether the future lay in preserving competition or in Roosevelt's

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[460] *Id.* at 12,142–45, 12,211 (Hollis and Newlands).

[461] *See, e.g.,* HARRY D. NIMS, LAW OF UNFAIR BUSINESS COMPETITION (1st ed. 1909) (citing abuse of trade secrets, confidential business relations, unfair interference with contracts, libel and slander of merchandise, trade names, business credit, and reputation); 51 CONG. REC. 11,228 (1914) (quoting Nims). *See also* BUREAU OF CORPORATIONS, TRUST LAWS AND UNFAIR COMPETITION (1915). *Cf.* RESTATEMENT (THIRD) OF UNFAIR COMPETITION xi (1995); International News Serv. v. Associated Press, 248 U.S. 215 (1918) ("unfair competition" in transmitting reports taken from Associated Press).

[462] 51 CONG. REC. 11,103, 12,980–84 (1914). Sutherland, who argued in 1914 that the proposed Commission was unconstitutional, later wrote the seminal decision rejecting a challenge to that very constitutionality. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[463] *See* ALBERT W. ATWOOD, FRANCIS G. NEWLANDS, A BUILDER OF THE NATION (1969).

[464] 1 PUBLIC PAPERS OF FRANCIS NEWLANDS 395 (1932) (Sept. 20, 1899 speech).

program to regulate monopoly.[465] Indeed, while Newlands spoke out squarely for Wilson's approach in 1914, the Senator might then have felt bound to Wilson by party unity (and by his dependence on the President to secure the commission that he had long sought). Thus, Newlands might still have harbored doubts about whether Wilson or Roosevelt was on the right track.

Newlands's exemplar was the ICC, an agency under the oversight of his Commerce Committee. He deemed the ICC "a tribunal second in importance only to the Supreme Court," and credited it with making "transportation a science."[466] He also justified his confidence in agency decision making by pointing to administrative procedures, specifically the guarantees of a hearing and of judicial review.[467] Newlands's personal preference would have been to transfer all antitrust enforcement to a commission from a changing, politicized Justice Department,[468] but he was a pragmatist. His immediate goal was to establish some sort of commission and start a regulatory process that could later expand.

b. Substantive Goals and Unfair Competition

Whatever personal doubts he may have harbored, Newlands promised in 1914 that the proposed commission would "destroy" monopoly, "check monopoly in the embryo," and secure "pygmies" against "giants."[469] His committee report declared monopoly to be "intolerable, unscientific, and abnormal,"[470] and he said the commission would halt abuses that had sufficient import "between the parties and with reference to the public interest."[471] Newlands sometimes seemed reconciled to growth that resulted from past abuse,[472] but he anticipated that the commission would prevent similar abuse in the future.

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[465] Davis, *supra* note 429, at 72 (Perkins input); 51 CONG. REC. 11,094 (1914) (quoting Newlands's 1911 opposition "at present" to agency authority to set prices, and declaring it "too early to say" whether Roosevelt's approach would or should prevail). *See generally* Davis, *supra* note 429, ch. 4 (documenting Newlands's efforts from 1911 to 1914). *See also supra* note 139 (Herbert Knox Smith's role in turning Newlands away from "positive" regulation).

[466] *Cummins Report, supra* note 69, at 20.

[467] 51 CONG. REC. 11,108 (1914).

[468] *See, e.g., id.* at 11,234–35; *see also id.* at 14,274 (applauding Senate action, later reversed in conference, to delete price discrimination and tying clause provisions from the Clayton bill and leave enforcement to the commission under § 5).

[469] *Id.* at 12,030, 12,867, 12,939.

[470] S. REP. NO. 597, *supra* note 139, at 10.

[471] 51 CONG. REC. 11,109 (1914).

[472] Newlands said in 1913 that the results of prior abuse were "so interwoven with the general business of the country as to make men tremble at their disruption." *Cummins Report, supra* note 69, at 19 (quoting his own remark on Jan. 11, 1911). He may have

The agency would proceed under its unfair competition authority. Newlands did not seem to ponder deeply on the term,[473] and explained that he initially spoke little on the matter because he "did not think it required much discussion."[474] His intuitive understanding was grounded in morality. Unfair competition encompassed practices "against good morals in trade and that tend to give competitors unfair advantage and dishonest advantage."[475] Certain practices "shock the universal conscience of mankind."[476] The moral element appeared in his expectation that the commission would challenge deceptive advertising claims.[477] While Newlands's benchmark was morality, though, he equated morality to legal and economic authority, particularly as the debate advanced and others cited specific authorities (largely supplied by Rublee) in defending Section 5.[478] Before the debate ended, Newlands found "the very meaning of 'stifling competition by unfair methods'" in economics and the law, and he declared that "unfair competition" in its "legal significance is the same as the economic significance."[479]

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trembled himself. *Compare* 51 CONG. REC. 11,109 (1914) ("Either you have to break up these great combinations of capital, . . . or you must adopt some social machinery which will protect the individual from oppression and wrong") *with id.* at 12,866 (bill tended to destroy and not maintain monopoly).

[473] Several commentators disparaged Newlands. Brandeis called him "the despair of mankind" and attributed his shortcomings to senility. Brandeis to Alice Brandeis, June 6, 1914, FLB, *supra* note 314, at 250, 251. Rublee's views were harsh. *See supra* note 400. John Sharp Williams, a political foe within his own party, compared Newlands's thought to a hummingbird's movements, never alighting in one place for long. Williams letter, *supra* note 433. These comments seem generally consistent with Newlands's comments during the debate. He spent little time discussing specific cases, appending a written analysis of the cases but declining to discuss it so that he need not "weary" the Senate. 51 CONG. REC. at 11,084 (1914). On the other hand, when a member of the Commerce Committee repeated Cummins's argument that equated White's *Trans-Missouri* dissent to the *Standard Oil* decision, *see supra* text accompanying note 70, Newlands did perceptively argue that *Standard Oil* in fact reflected the common law that Cummins criticized the Court for rejecting. 50 CONG. REC. 482–83 (1913).

[474] 51 CONG. REC. 11,107 (1914).

[475] *Id.* at 11,084. *See also id. at* 11,109 (society's interest in "the maintenance of good morals").

[476] *Id.* at 12,980. *See also id.* at 11,108 ("You can not take a body of five men, intelligent men, composed as this body will be of lawyers, economists, publicists, and men experienced in industry, who will not be able to determine justly whether the practice is contrary to good morals or not.").

[477] *Id.* at 11,109. Newlands predicted that future growth would be fueled not by amalgamation but by "the devices of deceit and of cunning and of fraud." *Id.* at 12,939.

[478] Newlands showed hesitation at first, when he said that the words "have a legal significance, and . . . if they have not Congress can give them a legal significance," and "I imagine that possibly there would be remedies for all those things either at law or in equity." *Id.* at 11,084, 11,113.

[479] *Id.* at 12,211, 12,220 (1914). *See also id.* at 12,024.

Newlands also defended Section 5's clarity, perhaps tempted to overstate that clarity because it faced constitutional attack. "I think almost every well-regulated mind can determine it, particularly where you get together five men of capacity and learning and experience . . . . I see no difficulty about such an organization determining what is fair and what is unfair . . . in such a way as to satisfy the universal judgment of mankind . . . ."[480]

If the standard was so clear, though, why have a commission at all? First, though an "unfair competition" standard was clear, Newlands conceded that its application to specific practices was not always clear. Some practices were "on the borderland between fair and unfair."[481] Second, the commission would bring cases and vindicate rights that "the individual, because of his poverty or of his insignificance, is often unable to assert against these great organized powers."[482] Finally, Newlands's committee report brought out a point that tended to get submerged as the Senate focused on Section 5: the commission would combine nonadjudicative with adjudicative functions, and in its judicial role could draw on expertise acquired elsewhere.[483]

Newlands's confidence reposed in the agency itself, its ability to interpret a standard that Newlands himself had trouble articulating. Although there is reason to question the depth of his commitment to the "regulation of competition" as opposed to the "regulation of monopoly," his stated position in 1914 was similar to that of Brandeis. He wanted to stop "abnormal" growth but, unlike such Senators as Reed or Borah, he trusted a commission to further that goal.

4. *Henry Hollis*

Henry Hollis, the first Democratic Senator from New Hampshire since 1852,[484] served a single term. Hollis apparently interjected himself into the process of developing antitrust legislation after Rublee's and Brandeis's first meeting with the President, became part of the subsequent efforts to win over the Commerce Committee (of which he was not even a member), and attended the second meeting that Rublee and Brandeis

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[480] *Id.* at 12,980.

[481] *Id.* at 13,149.

[482] *Id.* at 12,030.

[483] S. REP. NO. 597, *supra* note 139, at 9.

[484] CONGRESSIONAL DIGEST, 63d Cong., 2d Sess. 63 (May 1914).

held with Wilson.[485] He then became a spokesman for the commission bill.

Much of what Hollis said came, often *verbatim*, from Rublee. He adopted Rublee's argument that a general unfairness standard was preferable to the specific definitions attempted in the Clayton bill. He repeated as well Rublee's view that fair competition was "competition which is successful through superior efficiency," and adopted Rublee's and Wilson's dichotomy that business success was either the product of a firm's efficiency (and good) or its misbehavior (and bad).[486] Hollis also observed, in his own words, that unfair competition would not be discerned exclusively from economic sources; rather, the commission would look to court decisions and to "dictionaries or other authorities," and the law of unfair competition would develop through precedents as did other areas of law.[487] Hollis appeared to share Newlands's essential faith in the workings of a commission. He seemed indifferent to the standard for court review of commission determinations, presumably because he expected those determinations to be supported so convincingly that the standard of review would matter little.[488]

Adopting the Rublee memo's most evocative phrase, Hollis condemned those who competed unfairly as "pirates of business," the sort of language, frequently used by Senators like Reed, Lane and Borah, that suggested an opprobrium and moral content extending beyond the mere absence of efficiency.[489] Further, Hollis took one more step, which Rublee had not. He declared, "when you have all the monopoly out of the way the little fellows are there to do business."[490] His terminology suggests that Hollis (like Brandeis and like Wilson in 1912) assumed that unfairness underlay much corporate growth, and that once unfairness was eliminated, those left to compete would be "little fellows." Perhaps Hollis followed Brandeis in discounting the efficiency of massive firms, and assuming that markets constrained to operate fairly would be markets of relatively small competitors. As with Newlands, though, Hollis broke with Senators like Reed and Borah in trusting a commission to further his goal.

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[485] *See supra* notes 374, 400, 410, and accompanying text; CONGRESSIONAL DIGEST, *supra* note 484, at 174 (not a member of Commerce Committee).

[486] 51 CONG. REC. 12,146–47 (1914). *See also supra* text accompanying notes 404–409.

[487] 51 CONG. REC. at 11,178–79 (1914).

[488] *Id.* at 11,179 (describing as "extremist" the position that commission orders "be made absolutely binding unless the court should think there is bad faith or that the commission had not used its honest judgment").

[489] *Id.* at 12,147.

[490] *Id.* at 12,146.

5. *Albert Baird Cummins*

Albert Cummins, Republican of Iowa, gained local fame in litigation against a barbed wire trust. He became governor in 1901, reached the Senate in 1908, and sought the Republican Presidential nomination (along with Roosevelt and Taft) in 1912.[491] He remained a progressive through most of Wilson's first term.[492] However, like most of the insurgents, he voted more closely with his fellow Republicans after Wilson became President.[493] As reflected in part by his opposition to Brandeis's nomination to the Supreme Court, he had drifted to the right (as he made another Presidential bid) by 1916.[494] As Commerce Committee Chairman in 1920, Cummins pressed for railroad legislation that "differed sharply from Progressive-era regulatory practices."[495] He served six years as President Pro Tem of the Senate and became a staunch ally of Calvin Coolidge. Cummins died in 1926, shortly after he was defeated by a progressive in a primary challenge.[496]

In 1914, Cummins served on both the Judiciary Committee that prepared the Clayton bill and the Commerce Committee that prepared the commission bill. The Democrats tightly controlled the former bill, as they had other Wilson initiatives, but things proved different on the

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[491] Elbert W. Harrington, *A Survey of the Political Ideas of Alfred Baird Cummins*, 39 IOWA J. HIST. POL. 339 (1941).

[492] Howard Allen examined Senate votes from 1911 through 1916. Howard W. Allen, *Geography and Politics: Voting on Reform Issues in the United States Senate, 1911–1916*, 27 J.S. HIST. 216 (1961). He first analyzed final votes on 12 issues. However, the results were distorted by the small number of votes and by Democratic caucus unity; half the Democrats scored over 90% "reform" voting records. Allen then examined every roll-call vote for the covered years and identified 135 as "reform votes" that were not decided on essentially party-line votes. (These included 53 votes that concerned trusts). When applied to Republicans, who were not bound by caucus unity, the second scale has a close correlation to final votes on the antitrust bills. *See infra* notes 541, 549. Cummins rated 60% on Allen's first (final vote) scale and 80% on the second scale. (Newlands ranked 93% and 58%; Hollis 100% and 65%.)

[493] Jerome M. Clubb & Howard W. Allen, *Party Loyalty in the Progressive Years: The Senate, 1909–1915* (1967), 29 J. POL. 567, 578 n.13, 580 n.15 (in the Congress that sat from 1909 to 1911, Cummins voted with the Republican majority only 34% of the time; in the Congress that sat from 1913 to 1915—and passed the FTC Act—he voted with the Republican majority 80% of the time).

[494] *See* HOLT, *supra* note 67, at 155–58, 166 (discussing Cummins in 1916 and after). Cummins was joined in his opposition to the nomination by 21 Republicans and one Democrat—Francis Newlands. ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 501, 504 (1946).

[495] Harrington, *supra* note 491, at 370–75; HOOGENBOOM & HOOGENBOOM, *supra* note 101, at 92–94. The bill dealt with the industry after it operated under federal control during World War I. Cummins proposed, among other things, compulsory mergers of weak railroads with strong.

[496] *Cummins' Life One of Battle,* N.Y. TIMES, July 31, 1926, at 8.

Commerce Committee.[497] Although Democrats initially rebuffed Cummins, by March 7 *The New York Times* reported his role as "a curious instance of the dominant Republican member of a committee bending his efforts to induce the Democrats to go further than they wish in the direction of trust control."[498] On July 6, Newlands described Cummins to Wilson as "clear, just and temperate" in his presentation—although Cummins had just published an article ("The President's Influence a Menace") denouncing Wilson's legislative efforts.[499] Cummins also may have spoken for many of the eleven other Republicans, mostly insurgents and mostly Midwestern, who supported the bill.[500]

a. Cummins's Pre-1914 Program

If Newlands's earlier pronouncements suggested that he was open to a Roosevelt-style commission, Cummins's views were more in line with a typical agrarian's. In 1913, Cummins supported a special tax rate for corporations that controlled more than one-fourth of a national market, explaining it would target "the accumulation of so much dishonest wealth."[501]

Cummins offered several proposals to address the trust problem. He would establish a commission, give its determinations the same effect in a subsequent proceeding "as though made by Congress," and authorize it to enforce a ban to exclude from interstate commerce a firm that was so large that its "capital destroys or prevents substantially competitive conditions."[502] His commission would also enforce prohibitions of below-

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[497] *See* HOLT, *supra* note 67, at 112 (commission bill was the only New Freedom initiative that Republican insurgents helped frame—and the only one that a majority of them supported).

[498] *Wants Trade Board Stronger,* N.Y. TIMES, Mar. 17, 1914, at 2; Francis Newlands to Wilson, Feb. 16, 1914, 29 PWW, *supra* note 5, at 227 (Cummins and Clapp "withdrew from the committee").

[499] 78 THE INDEPENDENT 350 (June 1, 1914); Newlands to Wilson, 30 PWW, *supra* note 5, at 266.

[500] Although the insurgents hardly held uniform views, *see, e.g., supra* notes 437–447 and accompanying text, they tended to vote together during the debates on the FTC Act. On Cummins's amendment to narrow judicial review of commission orders, *see infra* notes 510–517 and accompanying text, 10 of the 33 affirmative votes came from the 12 Republicans who supported the Senate version of the commission bill. (The other two did not vote). *See* 51 Fed. Reg. 13,109 (1914) (vote on narrow review). When Cummins sought a strong prohibition in the FTC bill against holding companies, 8 of his 16 votes came from those Republicans, with 4 not voting (although one subsequently opposed a similar amendment to the Clayton Act). *See id.* at 12,993, 14,476. *See also id.* at 13,319 (final vote on the Senate version of the Commission bill, against which the votes on amendments were compared); *supra* note 67 (definition of insurgents).

[501] 50 CONG. REC. 4283 (1913).

[502] S. 1730, 63d Cong., 1st Sess. (1913), 3 BILLS AND DEBATES, *supra* note 67, at 3112–14.

cost pricing and excess capitalization.[503] Still other prohibitions would be enforced by courts. Where businesses were "competitive" or "of the same general character," he would forbid both interlocking directorships and ownership by a single person or corporation (unless voting rights were not exercised) of more than 10 percent of the stock in each.[504] He would ban *all* shareholding by corporations.[505] However, Cummins drew the line at Roosevelt-style regulation, opposing government approval of prices and, by extension, approval of trade agreements that (he assumed) would entail review of prices they set.[506]

b. Cummins and a Commission

Unlike Newlands, Cummins did not suggest that the Commission should be the sole antitrust enforcer.[507] Further, unlike Newlands, he had no objection to supplementing the Sherman Act and Section 5 with more specific statutory prohibitions (although Cummins objected to the actual definitions in the Clayton bill).[508] For Cummins, Commission enforcement of Section 5 was simply one way to effectuate antitrust policy under the "power of Congress" and the "eye of the people."[509]

On one Section 5 matter, moreover, Cummins was far more aggressive than Newlands or Hollis. The question was judicial review, and the struggle extended through the Senate debates and into the conference. The final version of the 1914 Act would require courts to treat commission factual findings as conclusive "if supported by evidence"[510]; it would be silent on the degree of deference to be accorded to findings of law (including findings that a given practice was an "unfair method of competition"). The latter findings would receive, as Representative Covington observed, "the respect due to those of an expert body."[511]

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[503] *Id.*

[504] S. 1617, 63d Cong., 1st Sess. (1913), 3 BILLS AND DEBATES, *supra* note 67, at 3110–12.

[505] *Id.*

[506] *See, e.g., 1911 Hearings, supra* note 21, at 187, 195.

[507] *See, e.g.,* 51 CONG. REC. 14,228, 14,253 (1914) (role for criminal law when violation sufficiently clear).

[508] *Id.* at 14,228 (Clayton bill's price discrimination, holding company and interlocking directorate provisions would create "a refuge for lawbreakers and monopolists"); 14,253 (bill's tying clause provision might reach conduct that should be lawful); 14,263 (would not object to criminal enforcement of a price discrimination provision, along with Commission enforcement).

[509] *Id.* at 11,236, 13,047 (1914).

[510] The standard of review established in 1914 remains in force today. 15 U.S.C. § 45.

[511] 51 CONG. REC. 14,932 (1914) (quoting Charles Prouty, formerly a member of the ICC). *See also, e.g., id. at* 12,147 (Hollis); FTC v. R.F. Keppel Bros., Inc., 291 U.S. 304, 314 (1934). Cummins was prescient in his concern that courts would soon rein in the agency, although it is unclear if the agency would have fared much better, at least initially, under

Cummins had sought more. "[W]hen we enlist in a man's war we ought to carry a man's weapons. . . ," and an FTC order should thus have "all the effect . . . that we can constitutionally give it."[512] The Supreme Court was starting to accord increased deference to the ICC,[513] and Cummins proposed that the law require that courts extend the same level of deference to the FTC. The Commerce Committee, with Newlands acquiescing for pragmatic reasons, disagreed. It supported a proposal by Senator Atlee Pomerene that addressed only the agency's factual findings, making them "prima facie evidence of the fact stated therein."[514] The precise meaning of this standard was not entirely clear,[515] but Pomerene's intent was different from Cummins's.[516] When the Senate had to choose between them, apparently acting without clear guidance from Wilson, Cummins prevailed with bipartisan support.[517]

c. Unfair competition and the substance of antitrust

As discussed previously, Cummins wrote in 1913 that the Sherman Act was intended to reach restraints that failed to leave "the competitive force as an adequate protection to the people," but a *Standard Oil* analysis would instead test each restraint "by the economic standard which

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narrow review. (In *FTC v. Gratz*, 253 U.S. 421 (1920), for example, the Court held that the challenged practices fell squarely outside § 5; no amount of deference would have saved the agency.)

[512] 51 CONG. REC. 13,004, 13,045 (1914). Under questioning by Newlands, Cummins agreed that "narrow" review would allow a court to reverse the commission "if the facts were such as not, in the judgment of the court, to constitute unfair competition," but he likely meant, as he said elsewhere, that a court could reverse the commission "if the facts established . . . clearly, unmistakably show that these facts do not constitute unfair competition." *Id.* at 13,007, 13,046.

[513] The ICC was then 27 years old, its organic statute had been strengthened three times in 11 years, and the Court was coming to terms with its regulatory power. *See supra* note 172.

[514] 51 CONG. REC. 11,108, 13,066, 13,316 (1914) (Newlands's initial preference for narrow review, his later acquiescence in broader review to parallel the review he understood the Clayton Act would provide, and his assertion that he was reverting to narrow review—albeit one where that in his view would leave the court to determine "whether the facts stated in the order constituted the offense of unfair competition"—when he learned that his information about the Clayton bill was wrong).

[515] Cummins said it would reduce the commission to an "open door for reaching the court." *Id.* at 13,004. Newlands argued that the Pomerene and Cummins proposals might differ little in practice. *Id.* at 13,066.

[516] Pomerene said, "I object to getting five men together, calling them a commission, accepting in good faith the fact that they are thereby clothed with omniscience, and allowing them to create all of this new growth of the common law or to extend it into new fields which heretofore have not been covered." *Id.* at 12,874.

[517] The vote was 33–25. Democrats supported Cummins 20–16, Republicans 13–9. The uncertainty about Wilson's position is shown by the fact that Wilson's Corporations Commissioner, Joseph E. Davies, later wrote a brief supporting Cummins. *See infra* note 552.

the individual members of the court may happen to approve," by each Justice's "opinion as an economist or sociologist."[518]

The prohibition on "unfair competition," which for Cummins was a somewhat narrow term that did not reach (for example) merger activity,[519] was similarly intended to preserve the competitive force. Section 5 would stop the kind of competition "which has for its object the destruction of competition. There is no unfair competition that is consistent with the endurance of any competition."[520] Competing unfairly was like using brass knuckles in a fight.[521] Like Newlands, Cummins sometimes emphasized the clarity of both the standard and its application,[522] but elsewhere emphasized the need for a rule of reason: "[e]verything must be determined by the rule of reason."[523] His organizing principle was that "prices shall be determined by honest competition among those who are engaged in commerce."[524]

For Cummins, a Section 5 analysis would require consultation of a wide range of converging sources, both legal and non-legal.[525] Cummins was less confident than Newlands in the reliability of morality as a guide. On the one hand, to Cummins's way of thinking, the United States was (then) virtually alone in adopting a policy of competition. Antitrust laws

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[518] *See supra* text accompanying notes 69–70.

[519] In Cummins's view, holding companies "destroy competition entirely"and interlocking directorates "suppress" competition, but neither was "unfair competition." 51 CONG. REC. at 11,103 (1914). (Newlands disagreed. *Id.* at 11,106). Cummins wanted a commission to address these threats to competition, but thought that the commission would require authority (which he sought to provide) beyond § 5. *See id.* at 12,987, 12,993, 13,112–13.

[520] *Id.* at 11,385.

[521] *Id.* at 11,448.

[522] *Id.* at 12,917 (any businessman could identify "a particular act as fair or unfair competition"), 12,913 (denying that a court or commission in a § 5 case would be "at liberty . . . to use its own peculiar economic or social opinions with regard to the character of the conduct under examination").

[523] *Id.* at 12,914.

[524] *Id.* at 12,920.

[525] *See id.* at 12,873 (1914) (no "difference between the technical meaning of unfair competition, as that meaning may be derived from the decisions of the courts, and the so-called popular meaning"), 13,048 (board would "consult the decisions of the courts, the learning of the time, the custom of merchants, the habits of trade, the writings of studious and thoughtful men, all of which go to make up our understanding of the words 'unfair competition.'"), 12,653 ("Our language is not made up by the courts . . . . 'Unfair competition' means what the people who use the English language commonly believe that those words mean. . . . Business men are just as potent in determining what unfair competition means as are the courts; the writers who make our literature, after observing the affairs of men, are just as influential in determining the meaning of unfair competition as are the courts.").

might thus be violated by practices that other countries might tolerate or even encourage, and that might be undertaken "without any sense of moral wrong, without any consciousness of moral turpitude."[526] On the other hand, a moral concept, the "civilized sense of mankind," was a benchmark to identify "unfair competition."[527] A seemingly moral concept also appeared reflected in his explanation of why Section 5 reached a "palming off" offense. Although Cummins did not think that Section 5 would apply if a railroad terminal diverted business by misrepresenting its competitor's facilities, he asserted that, "If one goes into a store and desires a thing and through a misrepresentation . . . he takes another thing he is injured, and the people generally are injured if the same thing is practiced on them, without regard to the price, without regard to the quality, of the goods involved."[528]

Cummins also saw sheer size as a competitive problem. He acknowledged that "some kinds of business must be carried on in large units," and seemed reconciled by 1914 to markets with only two competitors.[529] But when U.S. Steel controlled over half a market and its competitors were all smaller producers, those competitors existed at its sufferance. "Size means power; and whenever you reach the power that the United States Steel Corporation has, you have already touched monopolistic power; you have touched the power to suppress real, substantial competition. . . . The company does it merely because it is so big."[530] The proper rule should be "fair, reasonable competition, independence to the individual, and dissociation among the corporations."[531] Though business should benefit from economies and efficiencies, "[w]hatever those economies and efficiencies may be, they must, however, stop short of one thing, that is, the power to rule that field of commerce which they attempt to occupy."[532] Cummins had said in 1911 that what needed to be promoted was "[f]air competition among business institutions of

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[526] *Id.* at 11,379–80. Although mergers were not within Cummins's definition of "unfair competition," for example, Cummins highlighted the difficulties of determining when businesses are competitive for purposes of a merger analysis. He also asked how a court would decide if a merger of 6 firms in a field of 12 violated the Sherman Act. *Id.* at 11,380.

[527] *Id.* at 11,104.

[528] *Id.* at 11,106. Cummins's explanation for why the railroad's misrepresentation differed from the soap manufacturer's was less than satisfactory. The latter, but not the former, was "tinctured with unfairness to the public." *Id.* at 11,105.

[529] *Id.* at 11,455–56. The previous year, he had declared that no firm should have more than 25% of a national market. 50 CONG. REC. 4283 (1913).

[530] 51 CONG. REC. 11,457 (1914).

[531] *Id.* at 11,455.

[532] *Id.* at 11,456.

substantially equal advantages."[533] In 1914, he again proposed to ban firms so large as to prevent substantially competitive conditions.[534]

Even an economic analysis, then, had to balance the benefits of efficiencies against the harms attendant to size. Although Section 5's "unfairness must be tinctured with unfairness to the public; not merely unfairness to the rival or competitor,"[535] the preservation of smaller enterprises was integral to protecting the competitive force. Further, despite his critique of *Standard Oil* for incorporating "sociological" views, Cummins had explained in 1911 that antitrust would not only prevent unduly high consumer prices (and thus "secure that distribution of wealth which arises or comes about from fair and decent rivalry"). It would also address "another object of danger": the "sociological one—the desirability of having as many men as possible who are their own masters, rather than having a few masters and a good many employees . . . . building up and maintaining the manhood and character necessary to sustain a nation like ours."[536] Cummins thus echoed Justice Peckham's concern about "small dealers and worthy men" and Brandeis' views of the goals of antitrust.[537] Indeed, he declared:

> [T]he people . . . have long ago reached a conclusion—and I think it is practically a unanimous opinion—that we must do something to preserve free, fair competition in the business life of the United States; that we must do something to preserve the independence of the man as distinguished from the power of the corporation; that we must do something to perpetuate the individual initiative.
>
> We often go wrong, I believe, in assuming that because a great corporation, a vast aggregation of wealth, can produce a given commodity more cheaply than can a smaller concern, therefore it is for the welfare and the interest of the people of the country that the commodity should be produced at the lower cost. I do not accept that article of economic faith. I think we can pursue cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind.[538]

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[533] *1911 Hearings, supra* note 21, at 524. *Cf.* 51 CONG. REC. 11,456 (1914) (need for "competent and efficient competitors").

[534] 51 CONG. REC. 14,543 (1914). The amendment was defeated without a recorded vote. *Id.*

[535] *Id.* at 11,105.

[536] *1911 Hearings, supra* note 21, at 1584. *See also id.* at 1110 (while consumers were "chiefly interested in getting a good article at a fair price," they were also "interested in another indirect way, namely, the trying to have the business of this country carried on so that independent men shall be in business whose characters will be developed by the responsibility which they must bear").

[537] *See supra* text accompanying notes 31, 185–214.

[538] 51 CONG. REC. 12,742 (1914). *See also id.* at 11,379 (need to protect "individualism in business, individualism in society, individualism in every field in which energy and initiative are required").

Despite Cummins's emphasis on competition as a regulator of prices, then, even "cheapness" might be suspect—and not merely because large firms might manipulate the market and ultimately deny consumers the benefits of efficiencies, but also due to social harms attendant to industrial concentration.[539]

6. *The Commission's Advocates: Summary*

Just as Roosevelt and his opponents could converge in support of specific programs, the Commission's principal advocates converged in their support of Section 5. Newlands had at least flirted with Roosevelt-style regulation and the attendant embrace of large-scale business in 1911, and the sincerity of his later rejection of such regulation is subject to question. Cummins, in contrast, shared the distrust of concentrated wealth reflected by other agrarian Senators, as well as by Louis Brandeis. Yet they converged, along with Hollis, in supporting a prosecutorial commission that would enforce a prohibition on unfair competition. Further, although Newlands emphasized a moral dimension to unfairness, Hollis an economic dimension, and Cummins an economic vision with a social component, they also converged in seeing Section 5 as a way to stop incipient Sherman Act violations or, more broadly, undeserved growth.

7. *Senate Passage of the Commission Bill*

On August 5, the Senate passed the commission bill, 53–16, and sent it to conference. Voting under a caucus resolution,[540] forty-one Democrats supported the bill, two opposed it, and ten cast no vote. Twelve of the more progressive Republicans supported the bill, fourteen Republicans opposed it, and sixteen cast no vote.[541]

F. THE CLAYTON BILL IN THE SENATE

The Senate them turned to the Clayton bill. Since Congress now contemplated that the commission would be an enforcement agency,

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[539] Cummins did assert that an unfair competition analysis would not depend on "such broad" sociological and industrial conditions and consequences as would a restraint of trade analysis. *Id.* at 12,915. However, he did not thereby preclude more limited consideration of those conditions in analyzing unfair competition, and his understanding of unfair competition, as noted above, did not include merger activity. *See supra* note 519.

[540] *See supra* note 279.

[541] Under Howard Allen's second scale for measuring "reform" votes, *see supra* note 492, the Republicans who voted for the Senate commission bill scored 58% or above; the 13 who were rated and voted no scored 51% or less.

the central questions became what substantive provisions, if any, to retain in the Clayton bill, and how any retained provisions should be enforced.[542]

The Judiciary Committee first removed all the substantive provisions from the Clayton bill,[543] as Wilson had perhaps intended. Had that action stood, price discrimination, the creation of holding companies, and other affected conduct might still have been challenged under the Sherman Act to the extent they violated that law; otherwise a federal challenge could have rested only on the FTC Act. But the Committee reversed course before it reported the bill to the full Senate. It restored all the substantive provisions of the Clayton Act, but substituted administrative enforcement of Clayton Act provisions by the FTC (or the ICC in the case of common carriers[544]) for criminal enforcement. The bill did create new criminal liability for corporate officers, defendants, and agents, who could be sanctioned for their firms' violations of the Sherman Act. However, the substantive provisions of the Clayton Act itself could only be enforced by Justice Department civil proceedings (a possibility often ignored during the debate) or by administrative proceedings. This was the change that most aroused the ire of Senators Reed and Borah.[545]

Then, when the bill reached the Senate floor, the Committee recommended an intermediate approach. At its behest, the Senate voted to retain, with provisions for civil and administrative enforcement, prohibitions on holding companies and interlocking directorates. The other substantive provisions were deleted.[546] Thus the matter stood early in the Senate debate, although a limited tying clause provision would be restored in the Senate and most of the deleted provisions would be restored, in some form, in conference.

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[542] Much of the debate also turned on the labor exemption. As noted before, that exemption is beyond the scope of this study.

[543] *See* 51 CONG. REC. 14,089 (1914).

[544] Before the bill became law, the Conference Committee also made the Federal Reserve Board the enforcement authority against banks. Act of Oct. 15, 1914, ch. 323, § 11, 38 Stat. 730 (codified as amended at 15 U.S.C. § 21). For purposes of this discussion, reference to enforcement by "the commission" should be understood to include enforcement by any of these agencies.

[545] *See supra* text accompanying notes 417–423, 441–447; S. REP. No. 698, 63d Cong., 2d Sess. 43–44, 47–49 (July 22, 1914) (explaining that "experimental stage of this legislation" warranted substitution of administrative for criminal enforcement). While FTC Act violations became subject to civil penalties in 1938, *see supra* note 363, the Clayton Act made no such provision until 1959. Act of July 23, 1959, Pub. L. 86-107, § 1, 73 Stat. 243 (codified as amended at 15 U.S.C. § 21(l)).

[546] 51 CONG. REC. 13,848–49 (1914). The Senate also deleted a provision forbidding mine owners from arbitrarily refusing to sell to a responsible buyer; that provision was never restored.

Other changes were made as well, some narrowing a prohibition and some broadening one. For example, the House's price discrimination language had express exemptions for price differentials that reflected different transportation costs, quality, grade, and quantity. The provision recommended by the Senate Committee (before it was deleted entirely) added a meeting competition defense, as well as provision for differences in selling costs.[547] While this language arguably weakened the bill, the holding company provision came to the Senate with a prohibition on acquisitions whose effect "is to eliminate or substantially lessen competition;" after multiple changes on the Senate floor, it reached more widely, prohibiting acquisitions whose effect "may be to lessen competition."[548]

The bill passed on September 2 by a vote of 46–16. The thirty-eight Democrats who voted all supported the bill. Only seven Republicans and the Senate's lone Progressive joined them in that support.[549]

G. The Conference Bills

1. *The Federal Trade Commission Act*

But for Section 5, the House and Senate versions of the commission bill differed little. The House, with some encouragement from Wilson,[550] acquiesced in the critical addition of Section 5, subject to two changes. The first change, largely cosmetic, was to use "unfair methods of competition" to describe both the conduct that violated the law and the conduct the Commission could prohibit; thus, it was made clear that Section 5 was not limited to "palming off" offenses.[551]

The second revisited the standard for judicial review. The issue split the conferees and, on August 20, Corporations Commissioner Davies filed a brief supporting a narrow standard of review.[552] Perhaps because

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[547] *H.R. 15657 as Reported by the Senate Committee on the Judiciary*, 63d Cong., 2d Sess. § 2 (July 22, 1914).

[548] *See* 51 Cong. Rec. 14,463–64 (1914).

[549] *Id.* at 14,610. On Howard Allen's second scale, *see supra* note 492, the rated Republicans who voted for the Senate bill scored 60% or higher. With one exception—Senator Borah—the 15 rated Republicans who voted against the bill scored 58% or less.

[550] For example, Wilson discouraged Charles Culberson, Chairman of the Senate Judiciary Committee, from seeking to define "unfair competition;" according to Wilson, the term maintained "elasticity without real indefiniteness." Wilson to Culberson, July 30, 1914, 30 PWW, *supra* note 5, at 320.

[551] Senator Hollis had proposed this change earlier. 51 Cong. Rec. 12,145 (1914). The Senate version of the commission bill had proscribed "unfair competition," although it had authorized the Commission to issue orders to stop "unfair methods of competition."

[552] *Brief by the Bureau of Corporations Relative to Section 5 of the Bill (H.R. 15613) to Create a Federal Trade Commission,* 63d Cong., 2d Sess. (Aug. 20, 1914). When power to determine whether a law has been complied with is delegated to an administrative officer, the brief

of personal and international crises then absorbing Wilson,[553] Davies did not solicit the President's advance input; he did, however, send Wilson a memo urging his position the next day.[554] Anticipating later Rublee-Davies disputes on the Commission, though, Rublee submitted his own brief on August 25, arguing that Cummins's amendment neither could nor did accomplish what Cummins sought.[555] Rublee argued for "broad review," or, at least, broad review of agency determinations that a practice was unfair.[556] Wilson sided with Rublee, and intervened to "convert" Newlands.[557] Since Rublee's view was in tune with Wilson's distrust of experts, Wilson's alignment with Rublee was hardly surprising. The final bill, as noted above, required deference to Commission findings of fact but was silent on deference to findings of law, and those findings received, as Representative Covington observed, "the respect due to those of an expert body."[558] Thus, Wilson's last intervention in the legislative process was to broaden judicial oversight of the Commission, and to limit the potential impact of the "smug experts" he had earlier denounced.

After brief debate, the conference bill passed the Senate 43–5. The Democrats were united, 34–0. Eight Democrats who had not voted on the Senate bill supported the final bill (as did one of the two Democratic Senators who had opposed the Senate bill).[559] The House passed the

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said, "the courts have declared (a) that the findings of fact by such officer or body are final, (b) that the decision of a mixed question of law and fact is final unless the question of law may readily be separated from the question of fact, and (c) that a decision of a question of law, unless clearly wrong, will not be set aside." *Id.* at 17.

[553] Wilson's wife died on August 6, and European governments began to declare war on each other on July 28. LINK, NEW FREEDOM, *supra* note 284, at 461–62; ARTHUR S. LINK, WILSON: THE STRUGGLE FOR NEUTRALITY 3–4 (1960). Wilson had virtually no staff working on legislation, *see* Marshall E. Dimock, *Woodrow Wilson as Legislative Leader,* 19 J. POL. 3, 13 (1957), so his personal withdrawal from the legislative process was tantamount to withdrawal by the White House. Perhaps Davies decided to approach Wilson on August 21 because the press reported that Wilson had met with Covington, and was thus again addressing the antitrust package. Press Conference, 30 PWW, *supra* note 5, Aug. 20, 1914, at 404.

[554] Davies to Wilson, Aug. 21, 1914, 30 PWW, *supra* note 5, at 427.

[555] *Brief by George Rublee Relative to the Court Review in the Bill (H.R. 15613) to Create a Federal Trade Commission,* 63d Cong., 2d Sess. (Aug. 25, 1914). Rublee argued Congress could not constitutionally limit court review of commission findings within the narrow confines that Cummins sought, and that, properly applied to commission proceedings, the ICC standard that Cummins proposed to incorporate would itself lead to broad review.

[556] *Id.* at 5.

[557] *See* Wilson to Harry Covington, Aug. 27, 1914, 30 PWW, *supra* note 5, at 454, 455. Rublee's brief was the basis for Covington's remarks on judicial review during the final debate. 51 CONG. REC. 14,931–33 (1914).

[558] *See infra* note 511.

[559] *See* 51 CONG. REC. 14,803 (1914). Eight Republicans voted for the final bill, including seven of the twelve who had supported the Senate bill (the other five failed to vote), and

act without a recorded vote,[560] and the bill became law on September 26.

2. *The Clayton Act*

The Senate and House versions of the Clayton bill differed in many respects, and the conference bill emerged with multiple compromises and changes. Thus, the conference restored a price discrimination provision, retaining most of the exemptions in the bill reported to the Senate but replacing the test of intent to wrongfully injure a competitor with a test of whether a differential's "effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[561] The holding company provision reflected a compromise between the stronger Senate provision and the weaker House provision.[562] Still, the Senate change that was perceived to be most important survived. The conference accepted the Senate's replacement of criminal with administrative enforcement, leaving intact the Justice Department's civil enforcement authority (and allowing the Department to challenge the same practice under both the Sherman and Clayton Acts). The result, almost inadvertently, was dual jurisdiction under the Clayton Act.

The conference version proved controversial in the Senate. The debate extended over seven days before the bill passed, 35–24, on October 5. The margin was far narrower than the 46–16 vote that sent the bill to conference. Three Democrats (including Lane and Reed) and four Republicans (including Clapp) reversed prior support, registering their disappointment that the bill was not further strengthened in conference.[563] Three days later, the House approved the conference version of the Clayton bill, 245–52.[564] The bill became law on October 17.

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one who had previously opposed it. Progressive Senator Miles Poindexter, who failed to vote on the Senate bill, voted for the conference bill.

[560] *Id.* at 14,943.

[561] Act of Oct. 15, 1914, *supra* note 544, § 2. *See also supra* text accompanying notes 324–328, 547. One exemption in the reported bill, allowing price differences for different selling costs, was not in the final bill.

[562] The House version forbade acquisitions whose effect "is to eliminate or substantially lessen competition" in a relevant market. The Senate version applied when that effect "may be to lessen competition." The conference bill used the Senate language, but with the word "substantially" reinserted. Further, the House and Senate bill also had another clause, forbidding holding companies that "create a monopoly in any line of [trade or commerce]." The Conference Committee instead applied where the transaction's effect was "to restrain . . . commerce in any section or community, or tend to create a monopoly of any line of commerce." *See H.R. 15657 with Senate Amendments Numbered*, 63d Cong., 2d Sess. at 9 (Sept. 3, 1914); Act of Oct. 15, 1914, *supra* note 544, § 7.

[563] *See* 51 CONG. REC. 16,170 (1914).

[564] *Id.* at 16,344.

VII. A ROCKY START

A. Wilson's Plans for the Commission

While Section 5 enforcement authority was the most debated part of the FTC Act, the agency's mandate extended well beyond litigation. The Commission's information-gathering and reporting functions survived from the House bill. Wilson, for his part, highlighted assistance to business, a function not even mentioned in the Act, as he had highlighted such assistance in his January 1914 speech.[565] In 1916, Wilson would make grandiose, if expressly ambiguous, claims for the Commission. Its "[p]owers of guidance and accommodation . . . have relieved businessmen of unfounded fears and set them on the road of hopeful and confident enterprise."[566] "It is hard to describe the functions of [the] Commission. All I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business."[567] He compared, as well, the Commission's helpful men to the Justice Department's litigious attorneys.[568]

B. The First Wilson Commission

Wilson's most immediate impact would come from his selection of Commissioners. The Commission's broad but mixed mandate would have challenged the best complement of Commissioners in the best of times. The Commission would not, however, start in the best of times. World War I would temporarily result in virtual abandonment of antitrust. The exigencies of wartime mobilization drove the country to embrace broad economic regulation under the lead of Bernard Baruch's War Industries Board and Herbert Hoover's Food Administration.[569] The Commission itself would struggle to find a role, and would largely serve as a cost-finding agency for the government.[570]

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[565] *See supra* text accompanying note 306.

[566] Speech accepting the Democratic Nomination, Sept. 2, 1916, 38 PWW, *supra* note 5, at 126.

[567] Address, Sept. 25, 1916, 38 PWW, *supra* note 5, at 261, 265.

[568] *See supra* text accompanying note 6. At the same time, Commissioners were quoting from Wilson's January 1914 speech about the Commission's role in offering guidance to industry. *See* Edward Hurley, *Some Business Problems of Today*, Dec. 1, 1915, and William Harris, *The Work of the Federal Trade Commission,* Apr. 4, 1916, FTC General Records, Box 146, National Archives.

[569] *See, e.g.,* Robert D. Cuff, The War Industries Board: Business-Government Relations During World War I (1973); Robert A. Himmelberg, *The War Industries Board and the Antitrust Question in November 1918,* 52 J. Am. Hist. 59, 60 (1965).

[570] W.H.S. Stevens, *What Has the Federal Trade Commission Accomplished*, 15 Am. Econ. Rev. 625, 636–37 (1925).

Nor were Wilson's initial selections the best complement of Commissioners. When Brandeis declined an appointment,[571] the Commission lost the chance to gain the instant stature that the ICC had obtained in 1887 when its initial Commissioners included Thomas M. Cooley, a distinguished law professor, former Chief Justice of the Michigan Supreme Court, and author of some of the most significant treatises of the nineteenth century. Most significantly, as the contrast between Commission men and Justice Department lawyers shows, the President had not shaken his distrust of attorneys.[572] Nor did economists fare better. Wilson dismissed those "tedious persons,"[573] and, though he appointed some to other agencies, he named none to the Commission.[574] Wilson's selections were driven in part by geographic diversity,[575] and at least one primarily by patronage.

Wilson's favored selection (as shown by his receipt of the longest term) was Corporations Commissioner Joseph E. Davies. Although Davies's appointment was widely expected,[576] his credentials were hardly those of a Cooley or Brandeis; he had been a district attorney and built a private practice before joining Wilson's campaign. The other lawyer was Rublee. Rublee was nominated to the short three-year seat and, although his efforts to secure Section 5 showed him legally and politically astute, he, too, lacked a national reputation.

Among the non-lawyers, Edward N. Hurley received a six-year term. Hurley was a self-made man, an elementary school drop-out who built successful businesses.[577] He had played an intermediary role in recruiting

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[571] 1929 Interview, *supra* note 194.

[572] When Huston Thompson, whom Wilson had invited to identify a government position that interested him, approached Wilson about a Commission seat in 1917, Thompson felt compelled to ease Wilson's "fear at placing lawyers on the several Commissions because they as a rule immediately tie their hands or powers up in technical legal limitations." Thompson explained that he was not that sort of lawyer—but Wilson confirmed that he in fact would not put a third lawyer on the commission. Thompson to Wilson, Jan. 15, 1917, 40 PWW, *supra* note 5, at 490; Wilson to Thompson, Jan. 16, 1917, *id.* at 493.

[573] Speech, Sept. 27, 1912, DAVIDSON, *supra* note 258, at 284, 291.

[574] Wilson placed Frank W. Taussig of Harvard on the Tariff Commission and Winthrop Daniels of Princeton on the ICC. *For the Commerce Board*, N.Y. TIMES, Jan. 31, 1914, at 10; *Professor Taussig Accepts,* N.Y. TIMES, Jan. 7, 1917, at 3.

[575] As late as the 1950s, geographic diversity factored significantly even in Supreme Court appointments. Thomas R. Marshall, *Symbolic Versus Policy Representation on the U.S. Supreme Court*, 55 J. POL. 140, 141 (1993).

[576] *See, e.g., President Holds Up Trade Commission,* N.Y. TIMES, Dec. 29, 1914, at 4.

[577] Hurley organized the pneumatic tool industry in America in 1896, retired to raise livestock in 1902, and became president of a bank and re-entered business in 1906, manufacturing (and, according to the *National Cyclopaedia of American Biography,* helping to invent) the electric washing machine. 40 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 8–9 (1955).

Wilson for the 1910 gubernatorial race, and had studied South American banking and credit on Wilson's behalf.[578] Will Parry had held a succession of significant local posts in northwestern politics, business and journalism.[579] Davies located Parry because Wilson wanted a Progressive West Coast businessman for the agency.[580] Finally, William J. Harris had been in the insurance business and president of a bank. After he ran Wilson's Georgia campaign, Wilson had named him Director of the Census in 1913.[581]

After a tumultuous period in which personal animosities led to a *coup d'etat* against Chairman Davies, all five Commissioners were soon gone.[582] Because of his efforts in Raymond Stevens's 1914 Senate campaign, Rublee was never confirmed; he served as a recess appointee and left in sixteen months.[583] Hurley returned to the private sector in 1917, although he later become Chairman of the United States Shipping Board and President of the Emergency Fleet Corporation.[584] Parry's health deteriorated, apparently from overwork, and he died on April 21, 1917.[585] Harris resigned to run for the Senate in 1918, won, and served there until he

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[578] Wilson to John Maynard Harlan, June 11, 1910, 20 PWW, *supra* note 5, at 519; EDWARD NASH HURLEY, THE BRIDGE TO FRANCE (1927).

[579] Parry had been president of the Seattle City Council, the Seattle and Lake Washington Water Company, and the Seattle Chamber of Commerce. He had managed a firm that built a battleship and (fulfilling Senator Newlands's vision that the Commission include publicists) had been a journalist and editor. 18 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 116–17 (1922).

[580] MacLean, Davies, *supra* note 311, at 57–58.

[581] *Trade Commission Named by President,* N.Y. TIMES, Feb. 23, 1915. at 1, 3. In 1929, Brandeis dismissed Harris as "small caliber, with no grasp of the real problems." 1929 Interview, *supra* note 194.

[582] From 1914 until 1950, the Commissioners chose a Chairman from among the agency's members. At the first meeting, Davies secured a vote naming him Chairman "so long as he was a member of the Commission." Commission Minute, Mar. 16, 1915. By 1916, Rublee, Hurley, and Harris joined to remove Davies from the Chairmanship, and passed it to Hurley. *See* Commission Minute, May 31, 1916.

[583] Rublee tried unsuccessfully to persuade the New Hampshire Progressive Party not to run a Senate candidate in the race. When Rublee failed, he focused his energies on attacking the Republican incumbent, Jacob Gallinger. Gallinger won, though, and invoked the doctrine of Senatorial courtesy to block Rublee's confirmation. MCCLURE, EARNEST ENDEAVORS, *supra* note 131, at 171–85. Rublee's career after he left the Commission included appointments under Presidents Wilson, Calvin Coolidge, Herbert Hoover, and Franklin Roosevelt, one of which led to a highly regarded 1938 effort to assist German Jews, and private practice with Covington, Burling, Rublee, Acheson, and Shorb.

[584] HURLEY, *supra* note 578.

[585] When he returned to Seattle for a vacation, Parry was "betrayed" by a friend to the newspapers. Once word got out that the "West Coast Commissioner" was available in Seattle, he was so beset by petitioners there that he fell back into a "rut" of ten-hour workdays. Parry Letter to Commissioners, FTC General Records, Box 38, File 8117-1, National Archives.

died in 1932.[586] Davies also resigned to run for the Senate in 1918, but he lost.[587]

VI. CONCLUSION

The candidates, advisers, and legislators who debated competition policy in the wake of *Standard Oil* confronted the reality of unprecedented business growth. That growth challenged classical assumptions that business efficiency was compatible with opportunity, competition, fair distribution, and political freedom, and that all could be secured by non-discretionary antitrust adjudication. Participants in the debate, lacking any roadmap from countries that had previously responded to such growth with competition-based policies, debated how much of the traditional model could and should be retained. They also considered alternatives that were largely untested in the United States (although some would soon be tested under the spur of war), including government-business cooperation, government encouragement of interfirm cooperation, and direct government regulation.

The legislative resolution of 1914 was a milestone in competition policy and the start—but only the start—of the Commission's story. In 1938, the Wheeler-Lea Act would expand the Commission's Section 5 authority to encompass "unfair or deceptive acts or practices" as well as "unfair methods of competition"; additionally, it would subject violations of Commission orders to civil penalties.[588] Later legislation would modify the specific prohibitions of the Clayton Act, as when the Celler-Kefauver Act of 1950 expanded Section 7 to reach asset acquisitions, and the Hart-Scott-Rodino Act of 1975 added Section 7A to require premerger filings.[589] Numerous special statutes would expand the Commission's powers, beginning with the 1918 Webb-Pomerene Act.[590] Even the Commission's internal organization would be changed, as Reorganization Plan No. 8 of 1950[591] would authorize the President to select the Chairman from among the Commissioners and would make that Chairman the executive and administrative head of the agency.

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[586] 24 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 266.

[587] Davies returned to private practice, and later became Ambassador to Russia under Franklin Roosevelt.

[588] Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111.

[589] Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18).

[590] That law authorized the Commission to receive certain filings from export trade associations organized under the Act, investigate association activities that might adversely affect domestic competition, advise businesses of adjustments the agency deemed necessary to comply with the law; and recommend law enforcement to the Attorney General in appropriate cases.

[591] 15 Fed. Reg. 3175 (1950).

Still, much of the 1914 framework has remained intact. Then, as now, the Commission could issue orders to prohibit unfair methods of competition. Then, as now, its general statutory mandate was supplemented by enforcement authority over specifically defined law violations, initially those under the Clayton Act. Most importantly, then, as now, the agency combined formal powers to investigate (those emphasized in the House debate), formal powers to prosecute (those emphasized in the Senate debate), and informal authority to educate and work with business to facilitate compliance with the law (those emphasized by Wilson). These authorities would provide fertile ground for the agency to grow and adapt as it addressed changing times and, at its best, to shape its broad mandate to the needs of those times.