From the First World War to the National Recovery Administration (1917-1935)

The Case for Regulated Competition in the United States during the Interwar Period

Thierry Kirat
CNRS- IRISSO, Université Paris Dauphine PSL

Frédéric Marty
CNRS – GREDEG, Université Côte d'Azur
OFCE – Département Innovation et Concurrence

The experience of the war economy during the First World War in the United States reinforced the influence of arguments in favour of managed competition. By extending the principles of scientific management to the economy as a whole, this approach aimed to coordinate firms through the exchange of information, which was seen as a necessity both in terms of economic efficiency and response to cyclical fluctuations. Such a stance greatly reduced the application of competition rules. Nevertheless, the proposals that emerged during the 1929 crisis – leading to the reproduction of the war-economy experience in peacetime at the risk of steering the US economy towards the formation of cartels under the supervision of the federal government – were rejected by President Herbert Hoover, despite his defence of a model for regulated competition in the 1920s. The paradox was President Franklin D. Roosevelt's resumption of these projects within the framework of the First New Deal. This paper deals with the arguments that were put forward to evade competition rules and explains why the Democratic administration ultimately decided to return to a resolute enforcement of the Sherman Act.

Keywords: war economy, cartelization, competition rules, scientific management, information exchange

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I – Introduction

The experience of the war economy during the First World War was essential in shaping and re(structuring) industrial institutions in the United States, as well as in France and Germany. In the end, however, these countries followed different trajectories in terms of the proposals of what an organized economy should be (Fourgaud, 1919; Brady, 1933; Kirat, 1990). In France, it was corporate ideals that marked the period between the two world wars (Kuisel, 1984). The German case provides the most developed example of coordination between the government and the *Konzerns*, inherited from the war economy (Fourgaud, 1919; Brady, 1933). Although a specific case, in the sense that its economy already included cartels in the prewar period, the German example was very quickly adopted during the war in France (with the backing, in particular, of Louis Loucheur, Under-Secretary of State for Artillery and Ammunition, and Albert Thomas, Minister of Armaments and War Manufactures), even if France was more concentrated on scientific management (Taylorism) rather than economic rationalization, more generally (Kirat, 1990). This experience was particularly influential in shaping the interwar period: impossible to return to the laissez-faire of the *Belle Époque*, the great "captains of industry" became increasingly involved in the political debates of the 1920s and 1930s to defend the option of "coordinated capitalism" under the guardianship of large companies, as shown, for example, by the *Redressement Français* created by Ernest Mercier in 1925. The latter, founder of a large production group and electricity distribution company in 1919, was a former member of Louis Loucheur's cabinet.

This paper, however, is not about analysing the French or German cases, but a paradoxically very similar case from which specific comparisons can be drawn: the experience of the United States during the 1920s and 1930s. Although the US experience takes place in a cultural, political and institutional context very different from that of Europe – in particular, as regards the role of government in society – the experience of the Great War influenced the United States in a comparable way regarding the balance between free competition and government intervention in economic affairs. As in Europe, companies were largely the initiators of these debates in the United States.

The aim of this text is to show how the experience of the war economy in the United States was able to support proposals for the regulation of competition, which, in fact, originated from the prewar period. These proposals for regulated competition were based on a mistrust

of the impact of antitrust laws[1] on economic efficiency and on the coordination of firms from a managerialist perspective, in other words, a managed or planned economy. Thus, the coordination between the government and large companies – as implemented within the framework of the War Industries Board (WIB) – was defended as a model to be followed in order to extend the scope and secure, from a legal point of view, the actions of trade associations. The latter can be defined as professional organizations set up by industries during the interwar period in order to organize the conditions of competition through various forms of cooperation, including the exchange of information between their members. These information exchanges fell, however, under Section 1 of the Sherman Act. In the 1920s, the future President Herbert Hoover, then Secretary of Commerce, defended such coordination between firms in the face of unfavorable rulings by the Supreme Court. One of the paradoxes that arose from the interwar period was Hoover's later refusal of the Swope Plan, which proposed to extend the logic of coordination defended in the 1920s towards projects of competition under the coordination of large firms and having the support of the government, at the height of the crisis between 1929 and 1933. Hoover's refusal should not have come as a surprise given his earlier stances, and it echoed the position upheld by the acclaimed champion of legal realism, Supreme Court Judge Louis Brandeis, against the National Industry Recovery Act (NIRA) in 1935. Indeed, the NIRA, emblematic of the First New Deal, can only be understood in the continuity of Gerald Swope's proposals: that the coordination of companies through trade associations should both be immune from antitrust lawsuits and binding for all companies in a given industrial sector. Hoover found this kind of coercion unacceptable, but so did Brandeis, known as the great defender of codes of good conduct regarding competition issues (formulated in the creation of the fair trade leagues) and the pooling of information on prices per sector (through the intermediary of open price associations). Nevertheless, trade associations' *modus operandi* did not resemble in any way that of a cartel operating for the benefit of large companies and with the support of the government.

The paper is structured as follows. The first section shows that the competition model supported by the Sherman Act was neither unanimously supported by large firms nor by the community of US economists. The second section presents the experience of the war economy in the United States. The third analyses the debates on regulated competition in the

[1] We have grouped together here the Sherman Act of 1890 and the FTC Act and the Clayton Act of 1914.

1920s by showing how the Supreme Court's opposition gradually faded. The fourth section shows that President Franklin Delano Roosevelt's first term in office was characterized by the implementation of this model of coordinated competition under the supervision of the government and explains the decisive return to a voluntarist application of antitrust laws during his second term.

II – The case for regulated competition before the First World War

Although competition law was enacted very early on in the United States compared to other industrialized countries, there was no consensus among economists, especially regarding the wide-held view that concentration was a necessary condition for economic efficiency (a). Such reservations against competition laws were, in a much more predictable way, shared by the industrial players themselves. As a result, trade associations developed to allow large companies to coordinate their actions and thus escape the radical uncertainty inherent in competition (b). Nevertheless, these trade associations were hardly aimed at equitably sharing with other stakeholders the expected gains from coordination. What ensued, in the lead-up to the First World War, was the development of fair trade leagues, whose aim, through the coordination of economic actors, was to limit the risks of "cut-throat" competition and to rebalance the terms of certain inter-company (c) contractual relationships. Finally, we will show how the presidential campaign of 1912 crystallized the different approaches to competition (d).

A) A still weakly-accepted Sherman Act a quarter century after its promulgation

Despite the promulgation of the Sherman Act in 1890, the defense for competition was hardly acquired in the United States of the pre-First-World-War period, whether in the world of business, government or academics. The concept of antitrust law was seen as the product of a vision based on how the *English* economy worked. Such a conception was not, however, unanimous among economists (Bougette et al., 2015). Indeed, a portion of them, dominant within the young *American Economic Association*, was more influenced by the German historical school than by marginalism. They were skeptical, to say the least, of what was being touted as a "blackboard economy".[2] Concentration was indeed conceived as a guarantee of efficiency; the coordination of firms appeared to be a way of avoiding ruinous competition

[2] An expression coined by Nobel economist Ronald Coase in the 1970, meaning "a system which lies in the minds of economists but not on earth (Coase, 1970, p. 119).

(Kirat and Marty, 2020). At the same time, legal scholars were reluctant to deal with Antitrust. The more conservative saw it as a risk to the fundamental rights of property rights and contractual freedom. Progressives harbored a distrust of antitrust based both on how it was implemented by general common law courts rather than government agencies and in the market model on which it was based (Young, 1915).

Such conceptions can be interpreted in two ways during the period before the United States entered into the war. First, many proposals emerged to replace antitrust law, as it had existed since 1890, with regulatory commissions that could reconcile economic efficiency with reasonableness of profit distribution, based on the model of public utility commissions. It was through these commissions that prices and investments were regulated. Theodore Roosevelt, after resolutely applying the Sherman Act while President of the United States (under the colors of the Republican party), defended instead the solution of a federal agency during the presidential campaign of 1912 (under the Progressive Party label). Democrat Woodrow Wilson won the election and partially took up the idea for himself in 1914 with the creation of the Federal Trade Commission (FTC) (Crane, 2015). The essence of the approach defended by Roosevelt was to accept concentration as a condition of efficiency, as long as there was also control by a strong federal authority to guarantee the fair sharing of its gains. Second, the firms themselves could rely on trade associations to circumvent the sanction of cartels by the Sherman Act. This involved inter-firm coordination, which was originally set up to deal with the crisis of the late 19th century. After this first phase, whose operating logic was similar to that of crisis cartels, these associations favored a more discreet mode of coordination through the exchange of information.

B) Trade associations: Ensuring economic efficiency through the coordination of large companies

The large US firms with high fixed costs defended cooperation of different firms within the same sector to prevent inefficiencies and instability attributed to competition. Trade associations, in general, and the initiatives taken by Judge Elbert Gary, CEO of US Steel between 1901 and 1927, in particular, illustrate the efforts of companies to ensure if not coordination in their decision-making, at least decentralized decisions based on the least imperfect information possible (Page, 2009).

The exchanges of information between competitors were initially seen, by their instigators, as a way to escape the perverse effects of competition without falling within the scope of the Sherman Act (Browning-Carrott, 1970). Nevertheless, the sanction of these exchanges by the antitrust rules pushed companies to move towards a hub-and-spoke kind of collusion model with statistical offices that allowed for the rapid centralization/decentralization of information. At the end of the reporting period, these strategies, aimed at reducing uncertainty, would take the form of a collusive equilibrium produced by unilateral signals sent by the firms that made up the oligopoly. This was the case, for example, of the Gary Diners organized by the president of US Steel. In these periodic meetings between company executives, each of them unilaterally announced their plans, without discussion or engagement of any kind. Even if there was no reciprocal monitoring of compliance with commitments or possible sanction mechanisms, these declarations allowed the executives to identify a focal point necessary for their companies' coordination. The announcements given were all the more engaging as they were made within a small professional community that shared common values. Although these practices were initiated during the first decade of the 20th century, they did not become the subject of a Supreme Court ruling until 1920 (Page, 2009).

C) Fair trade leagues: An alternative model to inter-firm coordination for preventing ruinous competition

On the eve of the Great War, it was also important to distinguish trade associations from the development of fair trade leagues, which, in the 1920s, gave rise to the creation of open-price associations. These new forms of coordination could be distinguished from trade associations by their purpose. Fair trade leagues were not concerned with helping members of an oligopoly to escape competition: their purpose was to promote a more reasonable functioning of the market for the benefit of companies deprived of market power and suffering from an informational disadvantage vis-à-vis their customers, competitors or business partners.

Open price associations aimed to protect firms from destructive competition linked to aggressive pricing strategies, not to eliminate competition by aligning the market strategies of all players as a trade association would do. The object was to pool price and cost information to avoid both unbalanced conditions, to the detriment of customers and business partners, and unsustainable, long-term pricing strategies. There was also a standardization of knowledge between competitors, large and small, by neutralizing the advantage of the former. There were

no horizontal agreements between large firms as in trade associations, but a strengthening of the relative position of firms devoid of market power through the reduction of their information disadvantage. The "open" nature of the associations had to be understood both as a guarantee of transparency, but also as an absence of coercion. The participation of firms was voluntary and their market behavior remained free.

Inspired by the publication of Arthur Eddy's 1912 book, *The New Competition*, fair trade leagues gave rise to the formation of the American Fair Trade League (AFTL) created by Louis Brandeis, Gilbert Montague and William Ingersoll that same year. Brandeis, a future Supreme Court judge, would be one of the promoters of such information exchanges between competing firms, which, he said, made it possible to escape destructive competition without leading to a concentration of economic power. It is important to note that these information exchanges had a dual aim: to increase efficiency (built on the idea that market decisions are all the more effective when they are based on perfect information) and to structure competition (based on the notion that compensation for the disadvantage suffered by small firms makes it possible to prevent concentration).

The AFTL should, indeed, be put into perspective in relation to the rulings of the Supreme Court. In 1911, in the *Dr Miles v Park & Son* case, the Court sanctioned the principle of resale price maintenance (RPM).[3] For Brandeis, this jurisprudence could also lead to sanctioning cooperation aimed at preventing price wars and foreclosure practices. The consequence could encourage concentration.

Conversely, open leagues would stabilize practices on the basis of "public" knowledge of prices and costs. The idea was that prices were based on the addition of a margin on costs and that it was, therefore, a question of stabilizing the competition via better collective knowledge of costs through technical, as well as accounting, standardization.

Brandeis's approach was inseparable from the debates on ruinous competition and on the reasonableness of the functioning of the economy (giving long-term prospects to firms, their business partners, employees, consumers, and so on). Brandeis' objective was to prevent

[3] This Supreme Court decision (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 US 373 (1911)) was the subject of a dissenting opinion by Judge Holmes, testifying to his prejudices in relation to the competitive model driven by the Sherman Act: "I cannot believe that, in the long run, the public will profit by this Court's permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get".

unfair competition, seen as the result of price competition – viewed as destructive – and unbalanced transaction conditions resulting from informational advantages or market power imbalances (hence his support for RPM agreements). Brandeis, therefore, agreed with Eddy's recommendations: associations could avoid strategies based on excessively large differences between prices and costs; information needed to be "perfect" in modern terms, that is, as complete as possible and as symmetrical as possible; competition could not be established when there was too significant an informational advantage for large firms; and competition could be reasonable and "self-regulated" through transparency.

D) A decisive moment for the future of US Antitrust law: The presidential election of 1912

The 1912 election, which granted Woodrow Wilson the presidency, offers a panoptic view of the different conceptions of competition and the various options of government action vis-à-vis competition (Crane, 2015). The four candidates: Woodrow Wilson for the Democrats, William Howard Taft for the Republicans, Theodore Roosevelt for the Progressives[4] and Eugene Debs for the Socialists, indeed, presented programs particularly characteristic of the different possible options.

Roosevelt, who emerged as a trust-buster during his Republican presidency (1901–1909), had come to doubt the effectiveness of the Sherman Act. He proposed, under the progressive label, the passage to a Hamiltonian model that relied on government agencies to strike a balance between Big Business and Big Government[5]). If Wilson (advised during his campaign by Louis Brandeis) won, it was decided that he would take up, to the letter, some of Roosevelt's proposals, which he later did in creating the FTC in 1914. The FTC Act and Clayton Act, both enacted in 1914, were part of Wilson's desire to strengthen antitrust laws. This position was reinforced by the viewpoints of certain US economists, in particular J.M. and J.B. Clark (1912) and A. Young (1915), who tended to defend the Sherman Act,

[4] The latter, President of the United States until 1908, ran against Taft, his successor, whose presidency he had not appreciated. This "dissident" candidacy provoked the defeat of the Republican Party.

[5] Himmelberg (1976) notes that Roosevelt's discussions with the Morgan Group, on the one hand, and on the Hepburn Bill of 1906, on the other hand, foreshadowed this development: "The Hepburn Rate Act was intended to give power to the Interstate Commerce Commission (ICC) to regulate railroad shipping rates. The legislation was strongly endorsed by President Theodore Roosevelt - who firmly believed that the Federal government must increase its supervision and regulation of the railways engaged in interstate commerce" (National Archives, 24 January 1906 (HR 12897), https://www.archives.gov/legislative/features/hepburn). The attitude of the Roosevelt Administration in the face of the 1907 crisis regarding the relaxation of the implementation of Antitrust rules may also be of interest to consider here (Winerman, 2008).

foreshadowing the shift of institutionalist economists of the early 1930s.[6] While it was not yet unanimously supported, the competitive model seemed to have been relatively accepted before the outbreak of the First World War.

The mandate of the FTC was ambiguous, however: it could be viewed both within the perspective of coordination between companies, as well as their cooperation with the government. Among the first presidents of the FTC, Edward Hurley (1916–1917) and Nelson Gaskill (1920–1925) aligned themselves with this perspective (see Berk, 1996). At the beginning of the 20th century, therefore, a trend favorable to cooperation between firms developed, which found its first manifestation in the establishment of the War Industries Board (WIB). This transported the scientific-organization-of-work approach from the level of the workshop to the economy as a whole. For many US engineers, scientific management – a guarantee of efficiency and stability in a microeconomic framework – could be extended to the macroeconomic level (Bruce and Nyland, 1993; Bruce, 1995). The view was that the coordination of firms allowed for stable and long-term plans, producing better results than competition while avoiding value-destroying economic fluctuations. A coordination was seen as preferable than a market organization in which individual firms take their decisions only on individual expectations derived from short-term price signals.

II – The experience of the War Industries Board and reflections on the place of competition law in the context of exiting the war economy (1917-1918)

The application of competition rules was put on hold during the two years that the United States participated in the war in France; instead, coordination between the government and large companies was implemented within the framework of a model close to that set up by the belligerent Europeans (a). The fear, however, of a postwar recession at the end of the war gave rise to arguments in favor of a continuation of the post-war experience, particularly rich in lessons with regard to the projects developed in the 1920s (b).

A) The War Industries Board, 1917-1918

The relative consensus reached around the implementation of competition rules by the Wilson administration was quickly overturned by the necessities of the war economy. Initially, an

[6] Increasingly skeptical from the 1920s on of the merits of concentration in terms of economic efficiency, many institutionalist economists signed the 1932 Fetter petition in support of maintaining antitrust laws (Fetter, 1932; Kirat and Marty, 2020).

advisory Council of National Defense (CND) was set up in 1916, based on the model of the Naval Consulting Board, which had been set up by civilian companies in 1915 with a view to entering the war from the United States (Bruce, 1995, p. 42). Following the US' entry into the war, the WIB was created in July 1917. It was an organ of the CND for its first few months, before becoming an executive agency by the presidential decision of March 4, 1918 (Kester, 1940, p. 659-660). Its main tasks were to coordinate defense purchases and organize the production of military equipment. The functioning of the WIB corresponded *de facto* to the wishes of the trade associations: coordination of investments, market sharing and price control. The main purpose was to counteract inflationary trends (Browning-Carrot, 1970). Each industry had its War Services Committee, "which treated industry as a whole rather than a collection of firms" (Himmelberg 1965, p. 60). Before becoming an executive agency, the WIB did not have the legal means to impose low and stable prices on companies (Kester, 1940, p. 676). It thus had to rely on preexisting trade associations and influential industry leaders to implement price stabilization agreements (Sawyer, 2016, p. 12).

The WIB was made up of several divisions and offices, each in charge of a precisely defined function (Bruce, 1995, p. 44). Among them were a "Division of Planning and Statistics" and a "Price-Fixing Division". The first grouped together 500 "commodity sections", in which industry representatives participated; it was based on the work of the group responsible for research and production of statistics, under the direction of several specialists, including Wesley Mitchell (Bruce, 1995, p. 46). The Price-Fixing Division was chaired by Bernard Baruch, president of the WIB, who defined the issue of price control in these terms: "(w)hen a demand in the nature of war demand… enters the field, there is no force tending naturally to adjust the market value to the cost of production. Hence it was found necessary to… measure just compensation by its primary cause, cost of production, including a reasonable profit" (Baruch, 1921, cited by Bruce, 1995, p. 47).

This price control mechanism, via production costs and margins, was implemented through price agreements with industrial branches. As the WIB's main concern was to ensure price stability, which could vary with changes in production costs, the Fixing Price Division opted for a flat rate for each branch (Bruce, 1995, p. 47), thus giving an incentive to efficiency: the more companies controlled their costs, the more they increased their profits.

The CND and, above all, the WIB effectively promoted cooperation between the federal administration and industrialists, but also between the industrialists, thus marking a real break in US economic history. This experience of the functioning of the WIB brought to an end the short-lived "antitrust" period, along with its lessons on the efficiencies that could come from such coordination. The consequence was the legitimization of a managerialist approach, which advocated for the substitution of "conscious" management (intelligent handling) of industrial activities for the governance of competition supported by antitrust laws.

Trade associations naturally represented a vector for the implementation of such an approach. They only worked, however, if, and only if, all the firms participated and played the game. The classic risks of moral hazard between members, or of price reduction strategies undertaken by mavericks from the competitive fringe, remained high, particularly in the prospect of a crisis of overproduction, which appeared inevitable at the end of the war. This was the result of the companies' wish to have any agreements validated by a government agency, such as the FTC, in order to generalize them and make them binding. This was the *de facto* role of the WIB in 1917–18. Its justification was of a "cooperative" nature: the idea was that companies would think not only of their own interests, but also of a kind of general interest linked to investment incentives, which was linked to better information, or even to a stabilization of the conditions of competition.[7] The notion of commonwealth business, defended by US engineering associations, set the backdrop. The ideas was that firms participate in the general interest, and, as such, should be helped by the government to sanction companies that cheat (or refuse to join the agreements).

It should be noted that the search for managed competition went well beyond the mere regulation of the competition on the market. It involved thinking about the organization and regulation of the economy, in the sense of rationalization – a keyword of the interwar period – in other words of the economic planning.[8] The analysis developed by J.M. Clark in the *American Economic Review* in 1917 is fully representative of the consciousness of economists of a necessary – if not desirable – setting aside of competition rules. For J.M. Clark (1917), the scientific expert must replace the market in order to guarantee economic efficiency. The

[7] According to the Taylorist conceptions of the working hour, the self-conscious management of the engineer replaces blind adjustment through market prices (Soule, 1967).

[8] Due to lack of space, we cannot develop this point further here. Let us note that Taylorian ideas lay at the center of the reflections on and the proposals made for the passage to an organized, rationalized economy in France (Kirat, 1990). In the United States, the Taylor Society was similarly very influential: Herbert Hoover (and economists like Irving Fisher and Wesley Mitchell) were members (Bruce & Nyland, 1993).

purpose,for him, was to avoid waste and duplication of investments, specific to competition. The experience of the war economy, therefore, appeared to him to be instructive for a more effective management of the economy in the post-war period.[9] Nevertheless, like Hoover later, J.M. Clark was mindful of the importance of competition in preserving individual incentives. He thus drew up a path of conciliation based on the sharing of economic knowledge, which could possibly be implemented by a federal agency...,[10] a position that Herbert Hoover would also defend during the early 1920s.

B) The immediate post-war period: 1918–1919

The fear of a collapse in prices due to the postwar recession and ruinous competition for companies that had invested heavily in the war effort led, in the immediate post-war period, to proposals that extended the experience of the war economy, putting competition rules on hold once again.

In November 1918, President Wilson refused the request of Bernard Baruch, head of the WIB, to extend the WIB's mandate immediately following the war, until the signing of the Peace Treaty.[11] Baruch used this period to his advantage, taking a particularly broad interpretation of the delegation of power given by the legislature. Baruch's aim was to prevent the sharp fall in prices after the war; he had anticipated a period of industrial restructuring. The issue was no longer one of thwarting inflationary risks and supporting investments, but, on the contrary, of thwarting a deflationary effect resulting from an excess in supply linked to production overstock inherited from the war economy.

In line with his refusal to extend the WIB's mandate (November–December 1918), in December 1918, Wilson refused Baruch's proposal (supported by the US Chamber of Commerce and the National Association of Manufacturers) to reform the antitrust laws in order to grant antitrust immunity to price stabilization agreements, and, if nothing else, to the

[9] "And as a result of all such departures, far from sacrificing the possibility of growth of efficiency in future, we are rapidly putting ourselves in the way of acquiring, from a few years of war, more genuine experimental knowledge of the condition of economic efficiency in the large than we could probably have gained in as many decades of individualism, business competition, and the venture in social-economic experimentation that can be argued through legislative assemblies in time of peace" (Clark, 1917, p. 777).

[10] "The diffusing of information about prices is an important service which may in some cases be well rendered by private enterprises but is by no means certain to be rendered at all unless some public agency takes the responsibility" (Clark, 1977, p.781).

[11] With Wilson in Paris for the preparation of the peace treaties, the United States entered into a period of government by telegraph. Long decision loops and "autonomous" strategies of certain stakeholders ensued. Baruch was part of the US delegation in Paris and wrote a note for Wilson on the economic clauses of the Treaty of Versailles that were then under discussion.

information sharing systems between competitors. It was proposed that part of these coordination tasks be entrusted to the FTC (Sawyer, 2016). These requests, nonetheless, took place in a favorable context. In fact, the Webb–Pomerene Act of 1918 had just provided US companies with the possibility of exchanging information and forming export cartels (Fournier, 1932).

The decommissioning of the WIB did not mean the end of all its activities. For example, one of its offices, the Conservation Division, was transferred to the Department of Commerce. The argument for preventing the waste of resources was central to the Taylorist argument and occupied an important place in the minds of the defenders of the scientific-management approach to the economy. The latter also found resolute support in the US Department of Commerce, soon to be led by Herbert Hoover.[12] In February 1919, he created an industrial board, foreshadowing business cooperation supported by government, which would be implemented in the 1930s (Himmelberg, 1968).

These initiatives were part of a vast campaign by organizations that brought together large companies (the US Chamber of Commerce,[13] the National Association of Manufacturers, and so on) in favor of prolonging the peace generated from the mechanisms for stabilizing the economy and coordinating companies. Their aim was twofold: economic efficiency and the smoothing of business cycles. Notably among the proposals was the organization of trade conferences under the supervision of the FTC to set minimum prices. Trade agreements were defended by William Redfield, Secretary of Commerce. The latter, advised by Baruch and other former leaders of the WIB (see Miller et al., 1984), considered that a rule of reason should be applied to trade agreements – as the courts did for Section 2 of the Sherman Act – to the extent that their net effect could be favorable in terms of collective interest. Banning the implementation of Section 1 of the Sherman Act on the sole grounds of the agreements' anticompetitive purpose was, therefore, seen as economically inefficient. It was not, however, a question of granting antitrust immunity, in principle.[14] The purpose of these projects was to support price reductions to avoid destructive competition without destroying competition…,

[12] Trained as an engineer, Hoover headed the Food Administration in 1917 and served as Secretary of Commerce from 1921 to 1928 under the presidencies of Warren Harding and Calvin Coolidge. He was President of the United States from 1929 to 1933.

[13] Founded in 1912, it played a fundamental role, according to Sawyer (2016), in the development of federal regulation (the administrative state) in economic matters in the 1920s.

[14] He thus prefigured the position that would be held by his successor Herbert Hoover…, also explaining, as we will see, the latter's opposition to the Swope Plan.

or exposing oneself to prosecution under Section 1 of the Sherman Act. As the purpose could be either to hinder competition or to avoid ruinous competition, it required a case-by-case analysis. Such analysis could be performed, on the basis of the reasonableness of the terms of the agreements. It could lead the courts to state that coordination does or does not violate Section 1 of the Sherman Act. The fact that coordination can be welfare-enhancing led to the recommendation of models of inter-firm agreements to be validated by the government: the reasonableness of their terms would be attested by the monitoring of costs by the FTC. These proposals, however, had to be accepted by buyers, especially public buyers.

It was in this context that in March 1919, Redfield sought the support of Alexander Palmer (Attorney General of the US Department of Justice from 1919–1921) and William Colver (Chairman of the FTC from 1918 to 1919) to stop systematically applying to these coordinations the legal qualification of restraint on trade. Nevertheless, the first opposition to abandoning the systematic prosecution of trade association agreements came from the Railroad Administration. The latter, which represented, among other things, the interests of the railway companies, saw in this proposal to weaken the Sherman Act a strategy of the steelmakers to increase prices. It is worth noting here that the proposal for a bill to relax antitrust laws – and mainly Section 1 of the Sherman Act – was concomitant with the end of the proceedings against the Gary Diners. The Supreme Court ruling would, in fact, be delivered in 1920. The bill also met with opposition from Carter Glass, the Secretary of the Treasury. The bill was ultimately rejected by President Wilson, along with all of the proposals that had been made to relax antitrust rules since November 1918.

This activism in the immediate postwar period (November 1918 – April 1919) testifies to the rejection of the competition principle by business leaders and government. The “natural” law of competition appeared to them to be characterized by cooperation, or, at least, by decisions made in a situation of perfect information rather than radical uncertainty and a strategic interdependence specific to the market model underlying the Sherman Act. This position was upheld in the speech delivered by Redfield before the US Chamber of Commerce in April 1919: in the market, the natural law is that of cooperation and not of competition, and the Statutory Law must be molded on the Natural Law and not the other way around.

III – The model of regulated competition 1920–1929

The rejection of proposals for a relaxation of competition rules immediately following the war was followed by a two-fold movement. The first was the confirmation by the Supreme Court of the anticompetitive nature of information exchanges between competitors. This hardening led the Republican administration, and, in particular, Herbert Hoover, then Secretary of Commerce, to favor these coordinations and to support the evolution of the Court's rulings (a). Nevertheless, at the end of the reversal in jurisprudence by the Supreme Court, the evolution of managerialist ideas towards a coercive logic was rejected by Hoover, in the meantime elected President of the United States, insofar as they led to the formation of cartels under the supervision of the federal government (b).

A) Pathways to an Antitrust-Free Economy: Hoover in the Face of Adverse Supreme Court Decision-Making

The antitrust period opened by the war economy did not end after the war. The first reason was due to the post-war recession and the second, less cyclical, to the persistence of very conservative rulings by the Supreme Court. As a result, the 1920s saw a low level of implementation of antitrust rules by the federal government. In addition, the experience of the war economy led to the emergence of two movements that should be treated separately despite their similar aim of defending inter-company coordination to the detriment of antitrust rules.

The first movement was initiated by Herbert Hoover, then Secretary of Commerce (from 1921 to 1928), on the basis of his experience of the war economy (he was head of the Food Administration beginning in 1917). It advocated for cooperation between the government and large companies to ensure the efficient functioning of the economy within the context of the post-war recession.

Hoover published in 1922 a work entitled, *American Individualism* (which Wesley Mitchell most likely edited), in which he argued that a cooperative path may exist for reconciling collective well-being and economic freedom. Hoover's approach lied in the belief that firms – and, in this case, their associations – have a legitimate collective interest that goes beyond that of their members (Hawley, 1974). In other words, group norms can thwart collectively destructive individual interests. There is, therefore, both a notion of far-minded business and

of paternalism. This approach was supported by WIB alumni, such as Bernard Baruch and Hugh Johnson, as well as economists like Edgar Heermance and Philip Cabot.

As such, Hoover departed from an approach that advocated that the Sherman Act sanction all coordination between competitors, whatever their actual effect. He would never, however, go so far as to accept the neutralization of competition, or in other words, the formation of cartels. Hoover's future opposition to the Swope Plan was consistent with his refusal to support the initiatives to suspend the Sherman Act in November 1918. For Hoover, the role of competition law was to counteract agreements that were not made in the general interest.[15]

The second movement that followed Hoover's initiatives was led by another engineer, Gerald Swope, then CEO of General Electric. Swope's proposals followed a managerialist perspective, similar to those of the same period in Europe. They were distinct, however, from those advocated by Hoover in the early part of the decade, in that Swope's Plan relied on government intervention rather than the voluntary participation of firms.

Hoover had not supported the initiatives launched during the dismantling of the WIB to suspend antitrust laws. He would remain consistent thereafter in his refusal to suspend antitrust laws. The idea was not to encourage coordination aimed at restricting trade. Ironically, the model he advocated led horizontal competitors to exchange strategic information, which must have had consequences on competition. His preferences, however, would be met in the first half of the 1920s with unfavorable decisions by the Supreme Court.

Indeed, from 1919 to 1925, the Court's rulings greatly restrained the practices of trade associations. The *American Column* decision of 1921 was likely to put an end to the strategy advocated by the managerial movement. For the Supreme Court, the exchanges of information by trade associations were anticompetitive in themselves, insofar as firms, in the context of market interactions, have *a priori* no reason to reveal such information to their competitors.

In the *American Column* decision, two dissenting opinions are essential to consider: that of Oliver Holmes and that of Louis Brandeis. Hostile to the Sherman Act from its inception, Holmes' position was "economic" in nature. He considered that the decisions of agents on the

[15] The cooperation between competitors advocated by Hoover had to be associated with an ethical conception (inspired by the Quakers). It was up to the leaders of the firms to develop an intelligent self-interest going beyond the individual's interest, so that such cooperation would not lead to restrictions on competition.

market were best when they were as informed as possible. Transparency of information was seen as a condition for efficiency.[16] Brandeis' position was typical of the positions he held in promoting the Fair Trade Leagues during the pre-war period. He insisted, in the context of his dissenting opinion, that this was not about information exchanges between powerful firms in the market, as was the case, for example, with the Gary Diners. In this case, the exchanges were carried out by small firms operating in a sector in which fixed costs were particularly high. For Brandeis, the pooling of information enabled them to correct their informational disadvantage compared to their larger competitors (the cumulative market shares of the companies concerned by the exchanges did not reach 30%), in particular, those which had several establishments and could gain better knowledge of market conditions. In Brandeis' argument, broader and more equitably distributed knowledge among firms stabilizes the conditions of competition and avoids blind and destructive competition.

The open competition plan, from which the mechanism originated, had the effect of reducing the competitive pressure exerted on firms. For Brandeis, this did not, however, lead to a restraint on trade as sanctioned by the Sherman Act. According to him, the latter did not impose blind competition. Citing the Supreme Court decision *Chicago Board of Trade*,[17] Brandeis considered that the Supreme Court had accepted that competition could be regulated to some extent. In the *American Column* case, cooperation provided agents with information that they otherwise did not have and that was, at the same time, produced by the government for other industries. For Brandeis, the lack of public information created an advantage for large operators. The production and sharing of information allowed for the intelligent conduct of business, as Holmes pointed out in his dissenting opinion. In addition, for Brandeis, this cooperation made it possible to avoid anticompetitive practices to the detriment of small firms, such as evictions through strategic price reductions or exploitative operating practices in inter-company contracts. He argued that the dissemination of information not only stabilized the market, it also helped to prevent concentration. Finally, it is important to note a central element in Brandeis' reasoning: the functioning of the association was not based on any type of coercion whether in the form of a contract or involving the risk of retaliatory measures or moral hazard.

[16] In addition, Holmes questioned the very sanction of the exchange of information in relation to the defense of free speech, that is, in relation to the guarantees provided by the First Amendment to the United States Constitution.
[17] *Chicago Board of Trade v US* 246 US 231, 1918

A clear distinction should be made between the type of coordination defended by Brandeis and the exchanges of information between firms in oligopolistic competition, as was particularly the situation in the US Steel case. It was hoped that the openness (transparency and third-party access to information) and the lack of coercion inherent in open price associations would escape sanctions under the Sherman Act. For Brandeis, openness and transparency were the guarantees of reasonableness.[18] In addition, the growing focus of exchanges on costs, and no longer on prices, starting in the 1920s, made it possible to insist on the freedom left to market players and on the preservation of competition, which was enlightened and not neutralized.

It should be noted, as Berk (1996) shows, that Brandeis' approach would be championed by two of the early FTC presidents: Edward Hurley (1916–1917) and Nelson Gaskill (1921–1922). The first insisted on the prevention of unsustainable long-term price reduction strategies that could result from accounting standardization. The second denounced the failings of excessive price competition. This would likely reduce customer confidence in market signals and encourage producers to form cartels to deal with price instability resulting from competitive decisions made under conditions of uncertainty. Gaskill defended inter-firm exchanges in order to prevent unfair methods of competition and to provide firms with the necessary information for avoiding ruinous competition, which could induce a destructive spiral for firms deprived of economic power.

Despite these arguments, by 1920, the Supreme Court had closed this possibility for future FTC action. In the *FTC v Graz* case,[19] the Supreme court ruled that it was not within the scope of responsibility of the FTC, through its Trade Practice Conference, to define what determined an unfair method of competition. In addition, the FTC would exceed its statutory powers, that is, a delegation of legislative powers,[20] by contributing to the development of codes of conduct between firms and by validating them. It should be noted that Brandeis had already drafted a dissenting opinion. For him, the very purpose of the FTC was to prevent damage to the market. By restricting its freedom of action, the *Graz* decision risked, in his view, nullifying the FTC Act.

[18] Light (that is, transparency) as a disinfectant (Brandeis, 1933).
[19] *FTC v Graz*, 253 US 421, 1920.
[20] It should be noted that the NIRA would be declared unconstitutional in 1935 on the same legal grounds.

Attorney General Palmer's opposition to trade associations as expressed after the *American Column* decision in 1921 echoed the Court's majority opinion. Trade associations raised concerns about competition when there was a disclosure of information to competitors that could reduce uncertainty about future behavior. By helping to neutralize price competition to the detriment of consumers and commercial partners, these exchanges induced an undue transfer of welfare to producers.[21]

A) The reversal of the US Supreme Court's stance on trade association activities

It took only four years for decision-making practices to evolve. The reversal came from the Supreme Court itself. This was patiently prepared, however, by the actions of the US government and, in particular, of Herbert Hoover. Let us first consider the reversal of jurisprudence before focusing on the work of the Secretary of Commerce.

The *Maple Flooring* decision[22] overturned a decision by a federal appellate court in which members of a trade association had been sanctioned under Section 1 of the Sherman Act. Citing unusual references in terms of economic analysis[23] with regard to its previous rulings, the Court considered that these exchanges had the merit of stabilizing the market, of promoting the formation of fair prices, participating in an "intelligent conduct of business operation".[24] The Supreme Court, therefore, opened the way in 1925 to a trade-off between competitive imperfection (through the reduction of the radical uncertainty inherent in competition) and the prevention of market failure. The arguments in favor of the *intelligent handling* of competition, put forward in the immediate postwar period, thus seemed to have been accepted.[25] This development was rooted in the efforts made since 1921 by Herbert Hoover.

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[21] It should be noted that it is possible to interpret the Sherman Act in terms of preventing undue transfers of welfare between economic agents through the imposition of transaction conditions that could not prevail under competitive conditions (Lande, 1982).

[22] *Flooring Manufacturers' Assn. v. United States*, 268 U.S. 563 (1925)

[23] Notably, Alfred Marshall (*Readings on Industrial Society*, published in 1918), John Hobson (*The Evolution of Modern Capitalism – A Study of Machine Production*, published in 1894) and Irving Fisher (*Elementary Principles in Economics*, also released in 1918).

[24] For the Court, the Sherman Act did not lead to sanctioning per se these exchanges "because the making available of such information tends to, stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise".

[25] "Where the competitive ideal called for the free action of the individual in his own interest, the 'new competition' required that the individual conform to group standards and refrain from engaging in any form of competition that might be destructive to the group as a whole (Hawley, 1966, p.38)

Hoover, through his actions during the First World War, his responsibilities within the American Federation of Engineers and finally his appointment as Secretary of Commerce, could only have been favorable to such a reversal of jurisprudence. For him, trade associations could have a legitimate collective interest that went beyond that of their individual members (Hawley, 1974). He believed that group norms could thwart collectively destructive individual interests.

A second particularity about Hoover should also be underlined here. For him, the role of government was essentially that of a facilitator for coordination. It could protect trade associations or even substitute for them in the collection and dissemination of information, but in no way should it become a regulator of cartels. It was not the government's role to make compulsory the membership of a firm in these associations nor to sanction any deviations from agreements between firms. Trade associations, therefore, were to behave in a fair manner towards each of their participants, be open to the various agents present on the market, and, finally, act on a voluntary basis. It was through these points that Hoover believed they should distinguish themselves from the trusts and trade associations of the first generation embodied by the Gary Diners model, whose objective was not to search for efficiency and stabilize the economy, but to maximize the profits of their members.

Finally, a third characteristic particular to Hoover can be underlined here: he wanted to find a way to reconcile the emergence of a bureaucratic state and his distrust of "big government". The promotion of a "private government" (Hawley, 1974) through trade associations and other cooperative institutions had to be understood in the light of the tensions felt by Hoover between the need to regulate and the concern to limit the scope of government action The belief that a corporatist and technocratic approach could help bring about a socioeconomic order superior to what individualism or economic planning could offer (Hawley, 1974) was the last dimension of this approach.

Hoover's action in the 1920s must be seen within the evolution of the thinking of many US engineers, notably the members of the Taylor Society. For them, the experience of the WIB provided proof that a rational organization of the economy was possible. In the logic of the analyses of Jevons (1931), the members of the Taylor Society considered that the US economy had entered into a second Industrial Revolution[26]. According to them this industrial

[26] "The essence of the new industrial revolution is the search for exact knowledge, and the planning of processes: from the minutiae of manual operation (based on motion study) to the lay-out of the machinery of a gigantic

revolution required that collective decision-making should prevail over decentralized choices to achieve even greater efficiency (Person, 1930).

Hoover's projects, therefore, embodied the associationalist school of thought, which should be distinguished from the Hamiltonian managerialism defended by the Swope Plan. Both, however, must be placed within the US tradition of scientific management. This concern for the scientific management of the economy can also, according to Himmelberg (1965), be linked to the heritage of Thorstein Veblen, in particular, through his distinction between industrial interest and business interest. Bruce and Nyland (1993) stress the importance of the Taylor Society in moving from a rational organization from the workshop to that of the economy as a whole. Competition between firms and the economic cycle were both viewed as sources of waste and the inefficient organization of the economy. It was believed that the rational management of industry and the US economy as a whole could not be left to the price mechanism alone (Barber, 1985).

The Secretariat of Commerce, headed by Hoover from 1921 to 1928, took over, as we have seen, some of the divisions of the WIB, and notably that relating to the prevention of the waste of resources. This function would be extended in the 1920s with a view to promoting the rational management of the economy. Another part of the division would focus on the dissemination of information to allow firms to act within the framework of the most complete and symmetrical information possible in the face of the Supreme Court's decision in the *American Column* case.

In fact, as early as 1921, Hoover tried to alleviate the consequences of the Supreme Court's decision through the provision of information and statistics by the various offices of the Secretariat of Commerce (Browning-Carrott, 1970). As early as May 1921, he tried to ask Attorney General Harry Daugherty to take a stand on the compliance of open price associations with antitrust rules. The latter declined, arguing that the Department of Justice did not have to rule on the legality of the action of private entities outside of court. Hoover thus initiated legal proceedings with the Attorney General in 1922. His efforts, however, were unsuccessful until 1925. The 1921 and 1922 FTC reports remained critical for trade associations. Just one year after, in 1923, with its *Linseed Oil* decision,[27] the Supreme Court upheld its 1921 ruling. In May 1922, in cooperation with Nelson Gaskill, Chairman of the

plant – even of a whole industry throughout the country" (Jevons, 1931, p. 1).
[27] *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923)

FTC and a senator from New Jersey (Walter Edge), Hoover attempted to draft a bill seeking to obtain antitrust immunity for trade associations.

Despite the failure of this attempt in the fall of 1922, Hoover again approached Attorney General Daugherty in December 1923 to secure a position in favor of trade associations. Hoover's initiative was based on a favorable trade-association ruling handed down by the US District Court for the Southern District of Ohio in *US v Tile Manufacturers Credit Association*.[28] The Court considered that the collection of information was possible as long as it was not shared among the members, but transmitted to the government. Hoover was attentive to the conditions of publication of those data by the Department of Commerce.[29] If the Justice Department's response seemed once again too restrictive, things changed for the better in March 1924 when Daugherty, in office since 1921, was replaced by Harlan Stoke. The latter was a former corporate lawyer, close to Hoover and to President Coolidge, and sympathetic to trade associations. As the new Attorney General of the Justice Department, he prepared an amendment to the antitrust laws (in collaboration with the US Chamber of Commerce) and the *Maple Flooring* case, which would go to the Supreme Court as a test case.

The reversal in jurisprudence took place in 1925 with the *Cement Manufacturers*[30] case and especially the *Maple Flooring*[31] case. The Court now recognized that the exchange of information between competitors could be admissible as long as it avoided destructive competition in industries characterized by high fixed costs. The Court thus departed from its interpretation of 1921, effectively adopting the argument, which was that of the dissenting opinions of Brandeis and Holmes…, on the basis of the motivation for the exchange of information: "Trade associations or combinations of individuals or corporations, which, as in this case, openly and fairly gather and disseminate information as to the cost of their product, the actual prices it has brought in past transactions, stocks on hand, and approximate cost of transportation from the principal point of shipment to points of consumption, and meet and

[28] 26 November 1923, see https://www.justice.gov/atr/page/file/1104776/download
[29] Hoover also believed that the FTC could play the role of a support and advisory body for the coordination of firms. He wanted it to be able to give prior approval to information exchange practices. This idea of making the FTC into something "other than a sanctioning body" was widely held at the time. For example, in January 1925, Senator Wadworth of New York and Representative Williams of Michigan attempted to pass an amendment giving the FTC the role of amicably settling unfair methods of competition through informal proceedings before legal action was sought.
[30] *Cement Manufacturers' Assn. v. United States*, 268 U.S. 588 (1925)
[31] *Maple Flooring Manufacturers' Assn. v. United States*, 268 U.S. 563 (1925)

discuss such statistics without reaching or attempting to reach any agreement or concerted action respecting prices, production, or the restraining of competition, do not thereby engage in an unlawful restraint of commerce".

It should be noted that Justices William Taft[32] and Edward Sanford wrote a dissenting opinion on this case, considering that the facts in question corresponded to those analysed by the Court in *American Column* and in *Linseed Oil*. Among the explanations for the shift in jurisprudence was the arrival of a new judge appointed by President Coolidge, Harlan Fiske Stone, who, as we noted, was Attorney General when the case was first brought to court.[33] This reversal would be all the more strengthened when William Donovan[34] arrived to head the Antitrust Division of the Department of Justice in 1925. The latter, favorable to Hoover's approach, considered that the voluntary exchange of information between competitors was part of a "scientific" management model. This development within the administration would be enshrined in the 1929 annual report of the FTC, which, unlike the positions taken in 1921 and 1922, would insist on the fact that trade associations could not be considered as anti-competitive *per se*.

Thus, the 1920s indeed represented the low tide of antitrust law enforcement, and the NIRA seemed to be part of this trend without any particular break. The paradox was that Hoover – the champion of trade associations – once he became President of the United States and faced with the onset of the Great Depression, would be far more cautious than F.D. Roosevelt during his first term in office.

IV – From the WIB to the NIRA: The Swope Plan and Its Rejection by the Hoover Administration

The lax implementation of antitrust laws to trade associations would, during Hoover's presidency, come up against proposals inherited from the experience of the war economy, which resembled the proposals then formulated in Europe, combining the formation of cartels with government support. This approach could not be reconciled with the associationalism championed by Hoover. Its objectives were distinguished from those of European corporatism

[32] Former President of the United States, he was appointed Chief Justice to the Supreme Court from 1921 to 1930.
[33] He, nevertheless, did not take himself off the case, and even wrote the Court's majority opinion.
[34] After leaving the private sector in 1929, Donovan returned to government in 1941; he was one of the founders of the Central Intelligence Agency (CIA).
https://www.justice.gov/criminal/history/assistant-attorneys-general/william-j-donovan

– which was authoritarian and state-controlled, as in Italy, Portugal or Germany – in particular, in that associationalism did not suspend competition. In France, the paths of corporatism were quite different. They were inspired by fascism in the socialist–trade union doctrine or by the Catholic doctrine. In these two cases, no room was left for considerations of competition (Boussard, 1993; Kuisel, 1984; Dard, 2016). From Hoover's perspective, trust in ethical corporate values coexisted with distrust of public policy. Businesses, he believed, were supposed be self-regulating, and the operation of this cooperation had to be based on voluntary membership without any coercion.[35]

As such, Hoover was led to oppose the proposals of Gerald Swope, then CEO of General Electric. The plan he proposed in 1931 in response to the crisis led to the formation of trade associations in each industry, administered by a joint office, comprising representatives of employers and employees.[36] It was not just a question of protecting member firms of the trade associations, but of implementing redistribution for the benefit of employees. The Swope Plan was, of course, based on government intervention. The trade associations had to be supported by the government, and the FTC, itself, was to supervise these coordinations.

Supported by the US Chamber of Commerce, the Swope Plan resembled the proposals made in Europe and France during the interwar years. Despite the major institutional and historical differences between Europe and the United States, it is, nonetheless, possible to draw parallels between US reflections on coordinated competition and European reflections on the managed economy or even economic planning (Henri de Man for Belgium, for example). In fact, in Swope's proposal, there was a structuring of the governance of trade associations by joint committees. Their articulation on social mechanisms were not very far from the corporatist schemes thought out in Europe, especially in France: professional unions bringing together the labor and capital in the management of branches, along with social benefits for their employees (Boussard, 1993).

Personal career paths (initial training, entry into ministerial cabinets during the conflict, executive positions in large industrial companies, participation in the political arena, and so on) were comparable on both sides of the Atlantic. In addition to the case cited above

[35] We must note the clear convergence of this conception with that defended by J.R. Commons regarding the establishment of an unemployment benefit system in Wisconsin. See Bazzoli and Kirat (2018).

[36] The Swope Plan was viewed as "a program designed to coordinate production and consumption by forcing medium and big firms to join trade associations which would in turn be empowered to favour price stability and distribute information on business practices" (Anthony, 1932).

concerning Ernest Mercier, it is also possible to compare the recommendations of Gerald Swope with those formulated by Auguste Detoeuf in 1936 within the framework of the X-Crisis Group in France. Then CEO of Alsthom, Detoeuf presented an analysis on the *end of liberalism*, exposing the destructive nature of competition and insisting that only inter-firm coordination allowed for the efficient functioning of the economy. The specificity of Detoeuf's proposal was that this coordination should be organized by the firms themselves, without government intervention. Seen as a threat by Detoeuf, Swope, on the other hand, viewed government supervision as an indispensable condition for the success of his project of reorganizing the economy.

This difference raises the more general question of the place of government in the corporatist rationalization projects of the interwar period. These possibilities were also at the center of debates in Europe, whether in France (with two paths, socialist–trade union and right-wing) or in Germany (where the *Konzerns* were supported by the government).

This corporatism promoted by businessmen mostly through the US Chamber of Commerce, corresponded less to a "Soviet of technicians" as imagined by Veblen than to a technocracy largely originating from the business world (in the United States: Gerald Swope, the CEO of General Electric; in France: Ernest Mercier; Auguste Detoeuf; on the corporatist side, Eugène Marthon, CEO of a woolen company in the North and President of the French Chamber of Commerce and Industry (CCI) of Roubaix; and Paul Chanson, President of the union of maritime employers of Calais (Boussard , 1993).

In Hoover's approach, coordination at the source of a business commonwealth could rely – in a subsidiary way – on a government agency as the facilitating agent. The Swope Plan radically changed the nature of the intervention. It involved the formation of cartels (Gressley, 1964) through compulsory codes whose sanctions were enforced by the government. Hoover's inherently anti-bureaucratic approach lent itself poorly to this operation. The Swope Plan involved eliminating all competition in a logic of coercion in favor of the technocratic management of the economy.[37] Hoover's qualification of the Swope Plan as "the most gigantic proposal of monopoly ever made in history" should therefore come as no surprise. We will see in our last section that the position of Louis Brandeis in the *Schechter Poultry*

[37] Hoover's logic was close to that defended from 1934 to 1936 by Henry Simons: the model of private regulation, which stems inexorably from this associationalism under state supervision, leads to price rigidities, which result in transferring the cost of the crisis to other sectors and other actors, and, therefore, prolonging and worsening it.

case,[38] which would bring to an end the NIRA experiment in 1935, would be linked to the same logic.

Hoover's support for the action of trade associations was based on a few characteristics presented above: the search for efficiency, the absence of coercion and volunteerism vis-à-vis the general interest. Swope's proposal stands in opposition to these three characteristics. If it also aimed at stabilizing the conditions of competition, it nevertheless led to compulsory coordination between firms through government supervision and compliance, and to the *de facto* securing of a collective dominant position. Thus, Hoover's argument that trade associations should be "flexible, responsive to challenges, and innovative" could not be expected in this case.

To understand the return of antitrust policy during the Hoover presidency, it is also possible to look at the treatment of fair trade leagues. The initial model, as we have seen, was developed on the basis of the New Competition promoted by New York lawyer Arthur Ely and strongly supported by Louis Brandeis, before becoming a member of the Supreme Court. The aim was to allow the exchange of information on costs between small firms and to promote standardization in order to reduce information asymmetries between the different market players. The case of the Bolt, Nut and Rivet Association (BNRA), founded in 1917 on the model of the New York Bridge Builder's Society, is particularly interesting for analysing the competition policy carried out by the Hoover Administration.

The association disappeared in the form of a trade association after the *American Column* decision in 1921. It was reborn in 1925 under the leadership of Charles Graham (a relative of Eddy who died in 1920). To take into account the *American Column* ruling, discussion had to be focused on costs, not prices. The BNRA was viewed as a model at the National Distribution Conference of 1928: with better information on industry costs, it was hoped that pricing policies would become reasonable (Lyon and Ambramson, 1936). It was shown above that the FTC had considered, since 1929, that information exchanges were legal as long as they did not lead to an agreement or to a concerted action that would hinder competition. In

[38] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)

fact, in 1928, FTC President William Humphrey[39] revived the trade practice conferences that had stopped since the Supreme Court ruling of 1921.

Despite this favorable context, the FTC and the Department of Justice initiated a joint investigation against the BRNA. In September 1929, formal proceedings were initiated by the FTC. The BRNA was accused of RPM (resale price maintenance) practices and discriminatory prices. For the defendant, there was no infringement, because the exchanges did not concern prices. In addition, there was no enforcement mechanism, and prices were dispersed despite the exchanges. The Department of Justice, nevertheless, brought the case to court and the BRNA ended its activities by a consent decree on March 17, 1931.

Thus, while the 1920s were indeed the low tide of antitrust law enforcement, once Hoover became President and was faced with the Great Depression, he was paradoxically more cautious than is successor F.D. Roosevelt would be.

V - The 1st New Deal : A hallmark of the corporatist movement (1933–1935)?

The logic proposed by the Swope Plan provided the foundations for the National Recovery Administration (NRA), which was put in place after the enactment of the National Industrial Recovery Act (NIRA).[40] This corresponded to the vision of economists close to F.D. Roosevelt, such as Rexford Tugwell and Gardiner Means. This did not lead, however, to the acceptance of projects that promoted private-interest-led regulation of the economy, which it would, in fact, become, but rather to a cooperative approach of the kind found in the Swope Plan. Tugwell-style planning was based on industrial councils, which were to bring together representatives of companies (not just large ones), labor and consumers, and whose management would be ensured by "voluntary" engineers. The failure of the NIRA corresponded to the materialization of the regulatory capture that Hoover had anticipated.[41] Thus, the position taken by Brandeis in 1935 in the Supreme Court decision that put an end to the NIRA experiment was consistent with the principles he upheld both in 1912 for the

[39] Appointed to the FTC in 1925 by President Coolidge, Humphrey was appointed for another six years in 1931 before being ousted by President Roosevelt in 1933. He appealed the decision to the Supreme Court, resulting in the *Humphrey* decision (*Humphrey's Executor v. United States*, 295 US 602 (1935), which established that the President had exceeded his mandate.

[40] Browning-Carrott (1970) quotes Felix Frankfurter as saying that the NRA is simply a matter of formalizing the opportunities for cooperation authorized by the Supreme Court in 1925.

[41] Hoover's advisers rejected early drafts as "the most gigantic proposal of monopoly ever made in history", "Memorandum on the Swope–Young Plan" (1931), *Herbert Hoover Papers*, Presidential file 92, see Gordon (1994, p. 168) and Hawley (1966).

creation of fair trade leagues and in 1921 in his dissenting opinion in the *American Column* case. The NRA implemented state coercion mainly for the benefit of large firms. This section, therefore, will first consider the corporatist nature of the First New Deal and will be followed by an analysis of the reasons for the shift in jurisprudence represented in the Second New Deal.

When he was elected President of the United States in the fall of 1932, F.D. Roosevelt did not present positions that would herald a significant break with antitrust policies. This ambiguity in terms of competition policy would mark his entire mandate (Kirat and Marty, 2020). This indeterminacy stemmed both from a lack of personal interest in these issues and from strong discord among his advisers. The latter were divided between supporters of a resolute application of antitrust policies – institutionalist economists, attached to a model of fair competition much more than to one of free competition – and economists who believed in government-directed planning, such as Means and Tugwell, who were much more open to corporatist arguments, as was the lawyer Adolf A. Berle, also a close adviser to F.D. Roosevelt (Gordon, 1998, Waller, 2004, Crane, 2007).

The enactment of the NIRA reflected the initial victory of the latter advisers (Barber, 1994). Within this framework, however, the federal government only made binding agreements concluded by large companies for their benefit (to the detriment of small companies, employees, consumers, and so on). When the 1935 Supreme Court decision on the *A.L.A. Schechter Poultry Corp. v. United States* case put an end to this experiment, it appeared that it had, in fact, prolonged the crisis and led to a functioning of the economy that was anything but free, fair and efficient.

Title 1 of the NIRA suspended antitrust rules and invited manufacturers to propose fair competition codes, which, according to Gordon (1998), amounted to giving the force of federal law to the past efforts of trade associations. No compensatory power could be exercised, however, whether that of competitors, obliged to adhere to codes, consumers or the federal government (Crane, 2007). Contrary to the analysis made by Ackerman (1998), the NIRA was not in opposition to the capitalism of the 1920s, it was, on the contrary, the result of the proposals made by trade associations. Coordination between private firms took the place of industrial policy (Himmelberg, 1976), with the administration not being able to exercise significant control. For Gordon (1998, p.2038), the NRA was only “a business

proposal rooted in the Hoover Administration's practice of encouraging and abetting trade associations in lieu of industrial policy".

The influence of the debates of the 1920s on the ability to prevent destructive competition through coordination that ensured the sound management of the economy was clearly present in President Roosevelt's speech to the US Chamber of Commerce on May 4, 1933: "You and I acknowledge the existence of unfair methods of competition, of cut-throat prices, and of general chaos. You and I agree that these conditions must be rectified and that order must be restored. The attainment of that objective depends on your willingness to co-operate with one another to that end, and also your willingness to co-operate with your Government".

For Gordon (1998, p. 2038), the functioning of the NRA was not an assault on a restrictive conception of the *Commerce Clause,* which limited the government's powers of economic intervention, but "in reality it was a hasty and ill-conceived delegation of public power to private interests". It was not, therefore, a question of Big Government supervising the actions of Big Business to guarantee the efficiency of the management of the economy and its fairness (which is, in fact, what Theodore Roosevelt proposed in 1912), but of the formation of cartels that benefit large firms and have the support of the government.

Therefore, far from monitoring the conformity of agreements (that is, codes of fair conduct) with the general interest, the NRA took control of their compliance by all firms.[42] The FTC, itself, could sanction a company that did not comply in order to reduce its prices.[43] In fact, according to Gordon (1998), the federal government did not have the resources to oversee the agreements of the NRA due to their number (600) and complexity. Consequently, "the administration did little to ensure compliance with the law and delegated enforcement to private code authorities".

There was, thus, a large gap between the claimed spirit of the NIRA – tripartite coalitions bringing together businesses, unions and the government – and its actual application. Companies, through trade associations, controlled the system for their own profits, mainly to the detriment of consumers, and, ultimately, as we will see below, to the detriment of economic recovery. As Sawyer (2019, p.13) points out: "Almost immediately, the NRA

[42] For Crane (2007, p.4), the NRA was "a rational, cartelized business order in which the industrialists would plan and direct the economy, profits would be insured, and the government would take care of recalcitrant chiselles".

[43] As Crane (2007, p.11) notes: "Between 1933 and 1938, antitrust enforcement was sporadic and, ironically, often centred on enforcing the anticompetitive NIRA and Agricultural Adjustment Act codes".

became a lightning rod of controversy for approving overlapping and contradictory codes and for raising consumer prices without ensuring higher wages".

Indeed, the rigidification of prices in certain sectors that were well protected by codes of fair conduct had the effect of reducing their incentives to modernize and enabled them to pass the costs of the crisis on to those who could not enjoy such protection.[44] Thus, even beyond any consideration of distributive justice, the NIRA led the US economy towards a pattern of stagflation (Emmett and Van Horn, 2012). Simons (1941, p.209) considered that "the National Industrial Recovery inaugurated an orgy of price-fixing and invited businessmen to do, as patriots, what they had been doing before – on a vast scale, to be sure, but stealthily and with slightly bad conscience".

The end of the NIRA experiment was not, however, the result of a political decision taken on the basis of an assessment of its effects, but of the Supreme Court ruling, *Schechter Poultry*.[45] The latter, unlike the rulings in the *American Column* (1921) or *Maple Flooring* (1925) cases, was not based on the law's compliance with the Sherman Act, but on the question of the delegation of regulatory power. If it is possible, however, to read this decision within the context of the opposition between the Court and the Roosevelt administration, it is interesting to see it through the prism of associationalism itself. Indeed, Louis Brandeis voted with the "conservative" majority of the Court to annul the NIRA, considering that the coordination between government and big companies carried with it inefficiencies and risks of regulatory capture by big firms.[46] Thus, Brandeis, author of the dissenting opinion in *American Column* in 1921, emerged as one of the opponents of the First New Deal. This opposition, however, was anything but unpredictable given the differences between the associationalist and the corporatist approaches.

The model of the fair trade leagues differed, as we saw, from that of the trade associations defended by Hoover, and even more significantly from that of the NIRA. The latter was largely based on the Swope Plan and, by extension, to a managerial model whose war

[44] As Henry C. Simons wrote in 1943: "During depressions, the stabilization of particular prices against a general decline serves to shift the burdens of depression heavily upon other groups and, thus, to increase the difficulties of effective monetary and fiscal counteraction. Sustaining such prices means larger curtailment of employment, and, thus, of spending. It means drawing off a larger share of spending to the particular enterprises, and thus, deepening the depression in other areas of the economy" (Simons, 1943, p.343).

[45] *Schechter Poultry Corp. vs. US*, 295 US 495, 1935. The Agricultural Adjustment Act (AAA) was nullified the following year, the Farm Relief Bill. See *United States v. Butler*, 297 U.S. 1 (1936). See, in particular, Hamilton (1990).

[46] See, in particular, his work, *The Curse of Bigness,* published in 1934.

economy had convinced some that it could be transposed from the optimal management of a firm to that of the efficient management of the economy. Associationalism has its roots in US history and Federalist debates. It is anchored in a Jeffersonian tradition, in which economic freedoms and political freedoms are seen to be threatened when private economic power is concentrated. In this context, the NRA signified both the formation of cartels for the benefit of large firms and the implementation of coercion – for the latters' benefit – by government. What appeared to be a guarantee of efficiency, inherited from the war economy and consolidated by the corporatist arguments of the interwar period, was viewed as politically unacceptable and economically inefficient by the associationalists.

The rejection of the NIRA did not immediately lead to a shift in favor of the resolute implementation of antitrust laws. This would be observed only from 1937 and especially 1938, onward (see Kirat and Marty, 2020). In the meantime, the Democratic administration would continue to be divided between the arguments of the government-directed economic planning school of thought, proposing a new initiative in this direction,[47] and those of the associationalists, promoting a model of fair competition. The Robinson–Patman Act of 1936 relating to discriminatory practices would embody the brief moderate hegemony of this approach.

Conclusion

The logic proposed by the Swope Plan was embodied in the NRA. Nevertheless, the aim was not to promote private-interest-led regulation of the economy – which is what it became in the end – but rather a cooperative approach. Tugwell-style planning was based on industrial councils bringing together representatives of companies (not just big ones), labor and consumers. The management was to be ensured by "volunteer" engineers. The failure of the NRA was the result of the regulatory capture that Hoover had anticipated. The position taken by Brandeis in 1935 was based both on questions of efficiency[48] and those of principle. The NRA put in place state coercion mainly for the benefit of large firms.

It should be noted that Hoover's criticisms of the evolution of trade associations as proposed by Swope would be taken up by F.D. Roosevelt within the framework of the Second New

[47] Rutherford (2011, p.1393) points out that some institutionalist economists close to the Democratic administration, such as Hamilton, although disappointed with the NIRA's results, had not given up on plans for the intelligent handling of the economy.
[48] This was an economic failure even before the Supreme Court declared it unconstitutional.

Deal, whether expressed through his declaration against economic monarchies in his Presidential inaugural address of 1936 or in his *Message to Congress on Curbing Monopolies* in 1938. Hoover's fears did, in fact, materialize into the NIRA. Government agencies were captured by private interests; adjustments were delayed, and the competitive process was blocked to the detriment of firms without market power as well as those of their stakeholders. Roosevelt's criticism of big business after the failure of the NIRA was of a moral nature: "Businesses did not play fairly" and maximized their sole interest. It is interesting to link this ethical dimension with that which motivated Hoover: a commonwealth business implied social responsibility.

Thus, in April 1938, in his speech to Congress (*Curbing Monopolies*), President Roosevelt put a definitive end to the brief period of regulated competition and initiated a shift towards a more resolute application of antitrust policy. Thurman Arnold, who in 1938 became Assistant Attorney General of the Department of Justice, had taken over as head of the Antitrust Division. Between 1938 and 1941, a large number of antitrust proceedings were initiated; they were often based on inter-firm agreements that had been entered into between 1933 and 1935, and which had been presented to the NRA to obtain a binding force.[49]

Nevertheless, the arrival of World War II resulted in the resumption of coordination "habits" in favor of large companies, putting to sleep once again antitrust policies. Hamilton (1957) would even consider that the regulatory capture of the administration by the interests of big firms would be even stronger during the Second World War with the creation of the War Production Board (WPB) than under the NRA. For him, if the interests of consumers and employees were at least theoretically taken into account in the First New Deal, in the WPB, "it was the business interest alone which was enthroned" (Hamilton, 1957, pp. 97-98).

[49] As Waller (2004) notes, the years in which firms registered their agreements with a federal agency were at the origin of many "low-hanging fruits to be plucked by the Antitrust Division". Simons (1941, p. 210) made a similar observation: "Arnold has skimmed off a rich cream of prosecution opportunities".

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