The U.S. Chamber of Commerce and the Modern Administrative State, 1912-1925: Trade Associations, Codes of Fair Competition, and State Building

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Abstract:

From its founding in 1912 through the interwar years the Chamber's history shows a persistent preoccupation with progressive economics and policy-making. Rather than flouting the new ideas of institutional economics, which favored federal regulators overseeing data collection and dissemination among businesses so as to stabilize prices and facilitate inter-firm cooperation instead of so-called cut-throat competition, many members of the Chamber embraced these progressive prescriptions for public-private regulation. This essay explains how a subset of USCC members fostered industry-wide "codes of fair competition" by participating in experimental studies like those undertaken at the Harvard Bureau of Business Research and by supporting new collaborative efforts with government agencies, including the Department of Commerce and the Federal Trade Commission. Both the private and public initiatives at industry rationalization challenged existing ideas of antitrust law, which had favored either corporate consolidation or free market competition. The codes, instead, popularized third way, an alternative vision for American capitalism that partnered private trade associations with government agencies. The codes of fair competition discussed at the Chamber and other trade association meetings, supported by academic literature on systematized trade practices, and promulgated by FTC trade practice conferences through the 1920s eventually became a lynchpin in the New Deal competition policy. Ultimately, a new understanding of fair competition redefined American government by pushing administrative agencies into their modern role as intermediaries in determining the lawful parameters of trade practices.

The U.S. Chamber of Commerce (USCC), an "organization of organizations," was conceived in 1912 in coordination with administrators at the Department of Commerce and Labor to promote the collection of commercially-valuable trade information. A critical, though often neglected, aspect of administrative state-building has been the information-gathering and dissemination practices spearheaded by the Department of Commerce and later the Federal Trade Commission (FTC) in conjunction with the USCC.[1] Rather than a strictly adversarial relationship, in the early twentieth century business-government relations created mutually-constitutive administrative capacities within both private trade associations and public administrative agencies.[2]

An important impetus to the Chamber's formation as a partner to government was the widespread sense of uncertainty regarding the future of US competition policy and its effect on the structure of American capitalism. While the Supreme Court maintained a strict prohibition on overt price-fixing contracts, in 1912, it remained unclear how the Court would interpret the Sherman Antitrust Act against more ambiguous cooperative agreements that effected downstream pricing, such as labor agreements, product standardization, or information-sharing on output, orders, or costs.[3] Chamber documents and litigation records reveal a formidable campaign to extend the more permissive "rule of reason" antitrust interpretation from the analysis of inter-firm agreements to the analysis of trade association rule-making as well.[4] Rather than pursuing "self-regulation" as such, the Chamber endorsed the creation and expansion of government administrative agencies as an alternative to judge-made law regarding competition policy.[5] The result was an outpouring of trade manuals published by the Department of Commerce and the FTC on standardized accounting techniques, waste reduction in production methods, and marketing practices for a variety of industries. Ultimately, these practices fostered a technocratic approach to managing competitive markets, steering American governance towards a stronger administrative state.[6] In the 1910s and ‘20s, the development of the US Chamber of Commerce and the modern administrative state appeared complementary – not always in opposition to one another and, at least at times, fostering similar technocratic and administrative visions for economic development.[7]

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On February 12, 1912, representatives from various commercial organizations met to create something new from existing parts. The formation of the US Chamber of Commerce brought together a multitude of organizations – national industry-specific associations, local and municipal business associations, and state chambers of commerce.[8] Municipal business leaders, among them Lucius Wilson (Detroit), W. Mitchell Bunker (San Francisco), and John Fahey and James McKibbon (Boston), spearheaded discussions with administrators from the Bureau of Manufacturers of the Department of Commerce, represented by Albertus Baldwin and D.A. Skinner. Department of Commerce provided stenographic records of the meeting and agreed to contact hundreds of national trade associations and chambers of commerce to solicit their approval of the new, national organization.[9]

What made this organizational effort exceptional was the commitment on behalf of private business and federal officials to forming a partnership between business and government.[10] Lucius Wilson, one of most prominent and frequent speakers at the inaugural meeting, exemplified the overlapping that came to characterize the Chamber. As the president of the American Association of Commercial Executives and the secretary of the Detroit chamber of commerce Wilson urged the Chamber to not only bring together these private organizations but also to foster collaboration with the federal government. The Chamber, he urged, should be the "official child of the Department of Commerce and Labor" or, put another way, "it ought to exist in such close relationship with the Department that there could never arise any schism between the two."[11] A reciprocal exchange of business information would function through the various overlapping but uncoordinated trade organizations and the Department of Commerce.

The executive summary distributed to potential members and associations made explicit the intention to collaborate with administrative officials in order to rationalize business methods and promote best practices at home and abroad. Similar to the Department of Agriculture in solving the problems of rural America, the USCC founding documents argued, the Department of Commerce and Labor should contribute to the formation of an extra-governmental organization to represent national commercial interests. Herbert Miles, director of the National Association of Manufacturers (NAM), explained that the US Chamber would act as "a clearing-house for these questions which to-day [sic] the separate organizations are very busy on, and [have] no means of communicating with each other."[12]

The nascent Chamber sought public endorsement from President William Howard Taft, solidifying the USCC relationship with executive agencies "to protect and promote their common interests."[13] In an open letter to the President the delegates emphasized their desire to bolster US competitiveness through strengthened government-business collaboration. The letter read:

> It is significant that in each European country, which has made notable advances in commerce and industry, the business organizations of every section work

> together through a strong central organization, and that there is also, in turn, effective cooperation between this central body and the branches of government.[14]

These voluntary associations would remain autonomous and self-sustaining, unlike the German system wherein the state coordinated and funded trade groups through taxes, Wilson explained. The US government, they argued, should collaborate with the Chamber to gather and disseminate business information, much like that which was being done in Europe. The following month Taft agreed and instructed Charles Nagel, Secretary of Commerce and Labor, to issue a call for a national meeting to be held in Washington, DC.[15] Nagel sent three delegates to the first Chamber meeting and mailed over 2,000 circulars to various commercial organizations, inviting members to attend the upcoming DC conference.

Secretary Nagel played an important role promoting the Chamber as a progressive partner with government regulators to solve current problems in both law and economics. At the Chamber's inaugural meeting he recounted that commerce and industry had undergone "something of a revolution" in its relationship to government. In the early twentieth century, "we abandoned the old *laissez-faire* doctrine, and began to realize that somehow some system and order must be put into this great development."[16] His address highlighted on several current issues in political economy; however, focused on antitrust reform and administrative law. The Interstate Commerce Commission of 1887, he began, had emerged to limit the monopoly power of railroads and, similarly, the Sherman Antitrust Act of 1890 arose to address the "industrial problems involve[d] in the use of power." Existing antitrust law provided only negative restraints on business actions, he explained. Instead, administrative agencies could be empowered to provide advice and approval for proposed business arrangements, including consolidations, trade association information-sharing as well as employee liability programs, pension plans, and the development of export markets. This partnership could reduce the uncertainty that surrounded antitrust enforcement.[17]

While the Sherman Antitrust Act had empowered the judiciary to determine questions regarding competition policy, the Court lacked a clear legislative mandate and floundered in its early antitrust rulings. The Act provided broad prohibitions of "every contract, combination . . . or conspiracy . . . in restraint of trade" and of any attempt to "monopolize any part" of trade or commerce, which did little more than signal towards a preference for open competition. Nor had the government created any administrative agency to interpret and enforce the act; thus, litigation arose from the under-staffed Department of Justice and private litigants. Early antitrust precedent, what came to be known as the "literalist" interpretation, prohibited any interstate contracts that restrained trade. In an effort to protect "small dealers and worthy men," the Court restricted combinations and trade association practices that affected prices or restricted output; however, these did not affect large scale, vertically-integrated industrial corporations.[18] By 1911, a reconstituted Court emerged and laid down the basic rules that would govern antitrust law.[19] Chief Justice Edward White fostered a political consensus around the "rule of reason," which prohibited only contracts found to be "unreasonable" according to common law, statutory regulations, and the constitutional limitations on the "liberty of contract."[20] Under this governing maxim, the Court could break apart large corporations or combinations if their actions were found to unreasonably restrain trade, such as for the purpose of driving competitors out of business and monopolizing an industry. Nevertheless, it still remained unclear whether these rulings were the final word on antitrust. White had only just been elevated as chief justice and throughout the previous ten years his position on antitrust had been relegated to dissenting opinions.

The election of 1912 revolved around issues relating to competition policy, in addition to tariffs and monetary policy. A divided Republican Party – President Taft and the unexpected contender former-President Theodore Roosevelt – vied against Democratic Party nominee Woodrow Wilson. Eugene V. Debs also ran on the Socialist Party ticket and won nearly 6 percent of the popular vote (although no electoral votes). While Taft won his party's nomination, it was Roosevelt who aggressively campaigned under the Progressive Party banner, dividing Republican voters. He stumped for minimum wages, child labor laws, workplace safety standards, and regulating monopolies through a bureaucratic commission much like the Interstate Commerce Commission governed railroad rates. Wilson gradually came to endorse a commission to regulate competition and ensure fair practices, though he feared that it might ultimately legitimize big business and promote "big government." Wilson appointed Louis D. Brandeis as his economic advisor. Brandeis, a lawyer who in the preceding years had crusaded against "bigness," advocated an expansion of the "rule of reason" doctrine to allow small proprietors to pool their resources in order to protect if not enhance their market share. Brandeis lamented that US antitrust law encouraged corporate consolidations and he hoped that a regulatory commission could protect small proprietors. Although his political rhetoric focused on protecting competitors, rather than ensuring market efficiencies, a stance that gained him the denigration of a generation of historians, Brandeis's promotion of what ultimately became the FTC also focused on information-sharing practices as a legitimate form of rationalization and regulation.[21]

At the Chamber's February 1914 meeting, Brandeis explained to the general assembly that the creation of the Federal Trade Commission signified a potential path to "industrial democracy" – "not a program of free and unrestricted competition, but [rather] a program of regulating competition instead of regulating monopoly."[22] Brandeis and others at the Chamber believed that the Courts had interpreted antitrust law to the detriment of independent proprietors, the backbone of American liberal democracy. Despite his and Wilson's distrust of big government, their plan embraced a new administrative agency to right the course of that misguided jurisprudence. He believed antitrust reforms could ensure a level playing field among competitors by diminishing the threat of "ruinous competition," where prices chronically did not cover costs. He believed that corporate consolidations resulted from "predatory pricing" during economic downturns when smaller businesses were most vulnerable. Thus, consolidation did not necessarily bring greater efficiencies, but did threaten to concentrate economic power, which in turn had dire political consequences.

Brandeis gained a following among members who supported regulatory reforms that would facilitate new avenues for managing competitive markets. Brandeis proposed revised accounting methods to avoid over-production and falling retail prices. Widespread uniform cost accounting coupled with information-sharing and federal monitoring would ensure that businesses adhered to new standards that prohibited discriminatory pricing and other unfair practices. The "broad question of equality and opportunity" in America required exhaustive study of industrial statistics and business practices, such as the work he pioneered in the discriminatory railroad rates case.[23] He wanted two things. First, he wanted stricter scrutiny given to big businesses, which he believed threatened liberal democracy as well as allocative efficiency. Secondly, he wanted the rule of reason extended to small and medium sized firms by overturning the *per se* prohibition on Resale Price Maintenance contracts. RPM, he argued, provided a contractual vehicle for like-minded producers and retailers to protect against a "race to the bottom."[24] Brandeis saw the FTC as an opportunity to reform the decision-making processes of business managers and enact administrative law that would effectively manage the managers. No doubt he hated bigness, but too much attention to that political rhetoric obscures his contributions to constructive policies that empowered proprietary business associations as well as regulators.

University of Wisconsin president and leading Progressive Charles Van Hise provided a foil to Brandeis's optimism on business associations and FTC cooperation. In contrast to the jurist, Van Hise promoted "regulated monopoly." In his role as one of TR's key advisors in 1912, Van Hise held that many industries gained efficiencies through economies of scale and scope and those efficiencies could be passed on to consumers, such as in the case of steel production. Such corporations, however, posed a problem only in so far as their market power could be used to the detriment of the public interest or translated into undue political power. Like TR's Progressive Party platform, Van Hise was a "trust buster" in that he believed that the federal regulation and control of certain large scale industries would benefit the public, such as in telephone and telegraph lines. Expert commissions could judge whether certain monopolistic industries required greater government oversight – not breaking them apart and ruining the economies they had established, but rather regulating the existing monopolies in the public interest.[25]

That said, Van Hise was not entirely opposed to cooperation of businesspeople when deemed by government experts to be in the public interest. He advocated relaxing antitrust laws to promote business group cooperation, coupled with greater administrative oversight to safeguard against price-fixing, territorial divisions, or other unfair practices that were not in the public interest.[26] In industries such as lumber and coal, greater conservation could result from cooperation on output, pricing, and selling, he argued. While he initially focused on promoting this form of cooperation in natural resource industries, he also advocated its spread to other areas of manufacturing in hopes to curb "cut-throat competition" and waste.[27] Although not an economist by training, Van Hise penned one of the most important books on industrial organization and antitrust policy for the period, *Concentration and Control* (1912)[28] According to Raymond Moley, who was a member of President Franklin Roosevelt's original "brains trust," Van Hise's approach to cooperation ultimately influenced the development of the National Industrial Recovery Act.[29]

The rhetoric of "regulated competition" and "regulated monopoly" captured antitrust debates for the next decades. While Brandeis influenced the framing of the FTC and Clayton Acts, which prohibited "unfair competition" and exempted labor unions from antitrust prosecution. He could not dictate juridical interpretation. The Court continued along a path more akin to the vision espoused by TR and Van Hise. The Supreme Court limited the FTC's jurisdiction and authority to determine what constituted "unfair practices."[30] Also, it continued to circumscribe attempts at associational management of marketplace competition.[31] Consensus at the Chamber resolved that the Court's stringent antitrust enforcement had encouraged corporate consolidations to the detriment of other business group arrangements.[32] The desired partnership between the Chamber and federal agencies to manage domestic competition appeared increasingly tenuous.

It should be noted that opposition interest groups formed to block Brandeis's proposals for "regulated competition" – both within the Chamber of Commerce and in Congress. In 1914, for example, R. H. Macy of New York helped form the National Retail Dry Goods Association, which adamantly opposed the U.S. Chamber of Commerce lending approval to the FTC language regarding “fair competition.”[33] The 1916 FTC Report also contained a minority report that rejected the pro-competitive effects of resale price maintenance, a tactic used by independent proprietors to set retail services and prices. Borrowing from classical economics texts the report stated that “monopoly and competition being the exact opposites, anything tending to destroy competition tends to monopoly.”[34] The immutable laws of supply and demand determined market prices and any previous litigation that allowed resale price-fixing, for example, had been superseded by the U.S. Supreme Court’s prohibition of loose combinations.[35] Nevertheless, the Chamber continued to pass resolutions in favor of legislation to enable various forms of managed competition.

When Brandeis joined the US Supreme Court, in 1916, it appeared that little headway had been made towards institutionalizing his version of “regulated competition.” However, this was not altogether true: inroads were being made at the FTC. Edward Hurley, chairman of the FTC, built on Brandeis’s notion that fair competition depended upon reliable cost information. Hurley, who had been the president of the Illinois Manufacturers’ Association, endorsed cost accounting programs to be taught by trade associations. Although he held the chairmanship for only two years (1914-1916), he popularized cost accounting practices by circulating over 230,000 cost accounting manuals through Congressional members to their constituents.[36] Hurley and the FTC manual provided important correctives to conventional cost accounting practices, which had valued volume over other goals. Namely, the report urged producers and retailers to determine costs and revenues of each specific product line and distribute the overhead expenses accordingly (i.e. to actuate product-line expense reports).[37] Hurley continued Brandeis’ mission to rationalize independent proprietors' book-keeping, which he believed would enable smaller concerns to compete with their large-scale competitors and facilitate better FTC oversight to protect against price-cutting and destructive competition.

During World War I, the federal government depended on trade associations in its efforts to regulate wartime production. Rather than create a fully developed institutional order, it left an ambiguous legacy due to the war's exceptional circumstances.[38] The War Industries Board (WIB), established in July of 1917, lacked sufficient statutory power to institute compulsory price-fixing to keep prices during the war stable and low. As a result, WIB administrators relied upon trade associations and industry leaders to administer price stabilization agreements. Smaller firms through the auspices of the Chamber of Commerce and industry associations led these efforts, despite resistance from larger, mass-producers, such as U.S. Steel. Perhaps because President Wilson refused to sanction outright price-fixing by WIB administrators, the war's legacy strengthened the appeal public-private solutions to managed economic competition and stabilizing markets.

From the policy-making perspective, the wartime experiments were inconsistent and contradictory. But, from the vantage point of business associations, the wartime experience animated a movement for greater statistical information-sharing and coordination. While very few businesspeople endorsed continued intervention in the economy at wartime levels, most did not want a return to so called free market competition. All were concerned about postwar adjustments, and many believed that managed competition offered a middle ground between the wartime controls and the return of unbridled market competition. The USCC leadership was quick to seek out guidance from public policy-makers, administrative regulators, and academic experts. They wanted to know how to navigate new rules of competition and how best to exploit these new opportunities.

It was out of this context that Herbert Hoover emerged as the most powerful proponent of public-private cooperation on information-sharing practices. Like Van Hise, he had been an engineer and he believed in rationalizing industries in the public interest. Like Brandeis, however, he also demonstrated a distrust of "big government" despite his promotion of regulatory agencies. He tempered these conflicting impulses by promoting a public-private regulatory approach.[39] Hoover sought to encouragevoluntary trade associations to coordinate industry standards of production, service, and prices first during wartime and later as Secretary of Commerce. He effectively promoted a new socioeconomic order by advocating a technocratic vision wherein federal administrators played a key role in gathering and disseminating useful business information for the purpose of better management of the competitive economy. What regulatory powers this vision would confer on private associations or public administrators was yet to be fully realized in peacetime.

During the war, Hoover used the USCC to encourage voluntary participation to raise production but maintain stable prices on products vital to the war effort. He warned that shortages during the war could lead to price spikes and cause discontent at home. "We are thus between two fires – to control prices or to readjust the income of the whole community. The verdict of the whole of the world's experience is in favor of price control as the lesser evil."[40] The movement to conserve, stimulate production, and regulate distribution had already begun, Hoover explained, through the organization of 250 volunteer representatives of business and academic experts. To date, over 200 production conferences had been held. That year, the Chamber passed a unanimous resolution in support of President Wilson exercising executive authority to fix prices and control distribution. By 1918, the many of the Chamber's members hoped to replicate the wartime success of agricultural combinations. In his 1917 address to the Chamber he outlined the process by which agricultural cooperatives controlled sales and distribution. Sometimes through a local chamber of commerce or another organization, farmers in remote areas established sales agents in larger eastern cities who monitored prices and supply in their vicinity. Farmer cooperatives collaborated to save on advertising and shipping costs, which gave the group greater flexibility to guide their products to markets with highest prices and stabilize distribution.

The following year, George Peek, an agricultural economist for the WIB, explained the role of the Chamber's War Services Committees. With over three hundred committees, the Chamber helped coordinate government orders for various products with the WIB Requirements Division; then, it distributed output and price information to members each day.[41] The purpose of the plan was to handle raw materials and finished products so as to avoid actual or threatened shortages and to control wartime inflation.[42] The Chamber resolved to continue its on-going study of price-fixing and "the conditions relating thereto and [to] provid[e] a formula upon which costs and investments may be ascertained, and reasonable prices fixed."[43] Information-sharing on costs, output, and government orders had sufficiently created a coordinated market economy.

When the war ended and President Wilson allowed the WIB to dissolve, the USCC frantically organized an emergency meeting to address fears that deflation would set in as surplus goods reentered the market and consumer goods rebounded in production. In Atlantic City, New Jersey, the leadership of the USCC met to address several potential impending changes – cancellation of wartime government purchasing contracts, rapid deflation caused by over-production, and a return of antitrust prosecutions. A few days prior to the reconstruction meeting, Bernard Baruch wrote to Harry Wheeler, the Chamber's president, to assuage fears of canceled government contracts or dumping on the American market.[44] The Chamber then redoubled its efforts for greater legal freedom for industrial cooperation. A resolution passed by the group stated their conclusions drawn from the wartime experience:

> The war has demonstrated that through industrial cooperation great economies may be achieved, waste eliminated, and efficiency increased. The nation should not forget, but rather should capitalize [on] these lessons by adapting effective war practices to peace conditions through permitting reasonable cooperation between units of industry under appropriate federal supervision. It is in the public interest that reasonable trade agreements should be entered into, but the failure of the government to either clearly define the dividing line between those agreements which are, and those which are not, in unreasonable restraint of commerce, or to provide an agency to speak for it on application of those proposing to enter into such agreement in effect restricts wholesome cooperation and deprives both industry and the general public of its benefits.[45]

This resolution held that the war had positively affected American capitalism by permitting cooperative combinations of producers and retailers to control output and prices. The role of the government, the Chamber concluded, should be to facilitate such productive arrangements, namely through FTC oversight and Congress codifying "the fair-trade decisions of the American and British courts."[46] Return to pre-WWI antitrust policies, they argued, would be most disastrous.

The Chamber's warnings helped to shape postwar policy, which turned toward permitting trade associations a greater role in collecting and sharing information about production. During the 1920s, the USCC received help in this effort from a new group of scholars: the institutional economists. A heterodox group, these economists dissented from neoclassical models of perfect competition. Instead they led efforts at data collection through government agencies, such as the WIB, and private groups, ranging from the Brookings Institution (a Washington DC think-tank) to academic centers like Harvard Business School. These economists-*cum*-regulators envisioned a system of competition that managed production and consumption so as to maintain price stability, facilitate innovation, and ensure fair play among competitors. Finding ways to balance competing interests, or countervailing powers, was a hallmark of the institutionalists.[47] Within his first year as Secretary of Commerce, Hoover headed two major initiatives – coordination of the President's Conference on Unemployment and publication of the *Survey of Current Business* – both of which relied upon these new social science research methods as guiding principles for businesspeople and regulators. In the fall of 1921, the Conference on Unemployment produced a new agenda for economic stabilization that embraced institutionalist economics as a guiding paradigm.[48] Similar to the preceding years' Chamber of Commerce deliberations, new social science research on the theory of business cycles influenced proposals to reverse the recession. The conference relied on data compiled by the National Bureau of Economic Research, the social science research agency founded by Wesley Mitchell, who also chaired the conference committee on unemployment statistics. Ultimately, the conference recommended the use of public works projects to accelerate the up-turn in the business cycle; public funds, however, were designated for "productive" commercial purposes, such as construction projects and highway work, though not direct payments for unemployment relief.[49] The recommendations of the conference reflected the ideals espoused by Mitchell, Hoover, and other institutionalists – uncoordinated economic activities could lead to problematic social consequences, like unemployment and waste of natural resources, which required government oversight and coordination of private sector business decisions.

In August, the Department of Commerce began monthly publications of the *Survey*, which provided information regarding changes in wholesale and retail prices, production outputs, and general price trends.[50] Hoover's Advisory Committee on Statistics, a group of academic economists and regulators, compiled tables on current trends from standardized surveys collected from firms across the country.[51] On that Committee, Mitchell acted as leading economic advisor to Hoover – both men envisioned a system of disseminating business information so as to foster rational planning by businessmen and, therefore, promote macroeconomic stabilization.[52] That Hoover turned to Mitchell is no coincidence. Mitchell's work studying this history of modern business cycles had earned him a reputation as an expert in statistical analysis and business management, which would prove critical in negotiations with businesspeople and regulators.

Still, the legal status of trade associations and the question of whether sharing economic information was a violation of antitrust laws remained ambiguous. Even as the Department of Commerce partnered with trade associations for the collection and dissemination of statistical data regarding production standards and price information, at the same time, the Department of Justice continued to bring suits against private organizations carrying out these tasks.[53] Attorney General Harry Daugherty maintained an active hostility to information-sharing practices especially concerning prices. For Daugherty, any price agreements made by similar competitors constituted an unjust restraint of the free market. Daugherty brought the first criminal prosecution of open price plans against the Cement Manufacturers' Protective Association. This case emerged from an initiative begun by New York state legislature, in 1920, to investigate prices of New York City's building trades. A postwar housing shortage had contributed to rising rents and political figures sought an explanation.[54] While the investigation focused on prosecution of labor leaders, it also encouraged federal prosecutors to take legal action against the construction industry as well. The association coordinated cement manufacturers throughout the mid-Atlantic region, from Pennsylvania to New York. Daugherty, a former Republican Party boss and Harding booster, stepped in with gusto, despite protests from Secretary Hoover.[55]

Daugherty had reason to be confident as he built the government's case against the cement manufacturers. In December 1921, the Court had upheld federal prosecution of the American Column and Lumber Company and the American Hardwood Manufacturers' Association.[56] Although the government did not uncover formal written agreements to restrain trade, the Court's majority held that the circulation of sales reports amongst members allowed individual firms to effectively raise the price of hardwood products. Justice John Clarke, writing for the majority, inferred that monthly meetings and market letters had been used as tactics to keep prices high and supply low. The prosecution used letters written by association members thanking the statisticians and association leadership for help to eliminate destructive competition as evidence of restraint of trade. Not all of the Justices, however, agreed with the majority.

Justices Oliver Wendell Holmes and Louis Brandeis, joined by Joseph McKenna, wrote dissenting opinions – later theirs would become the dominant position on the Court.[57] Both Holmes and Brandeis argued that these kinds of information-sharing practices could in fact help smaller businesses compete on an equal basis with larger manufacturers who already possessed privileged market information and should be legalized as a legitimate business practice. Far from being a restraint of trade, Holmes referred to these practices as "common sense." Brandeis firmly believed that Hardwood Association had not sought to form a monopoly or control prices but instead had encouraged decentralized competition by avoiding corporate consolidation in that industry. In fact, inter-brand competition continued to exist within the industry and among its members.

In response to these Court decisions, trade association efforts at monitoring and enforcing trade rules that affected prices became more subtle.[58] Instead of written agreements, association members exchanged information "relating to prices actually quoted or charged, terms of payment, manufacturing and selling costs, purchases, stocks, production, orders, shipments, inquiries, bids, contracts, returned goods, cancellations, advertising, and credits."[59] Still, the trend remained toward economic coordination. The open price associations in the cotton textiles coordinated to maintain so-called reasonable profits and market stability through trade information on prices and production levels; the result was to lessen competition.[60]

For Secretary Hoover, governmental oversight and enforcement would help protect against the both collective action problems and antitrust prosecution in order to "secure more regular production, more regular employment, better wages, the elimination of waste, the maintenance of quality or service, decrease in destructive competition and unfair practice, and oft times to assure prices or profits."[61] The U.S. Chamber of Commerce shared this disposition and its members helped arrange a test case to challenge the Department of Justice prosecution.[62] Colonel George T. Buckingham, a member of the Cement Manufacturers' Association litigation team, explained the purpose of the trade association had been to balance production and consumption "in order that the results and the evils that follow over-production may not occur."[63] In part, this meant keeping low quality cement off the market to guard against destructive competition that might bring depressed profits and wages. First, it collected standardized price surveys, called "blank forms," from manufacturers across the country. Next, trade association secretaries prepared tabulated and condensed statistics. The result, Buckingham argued, was to "iron out or make flatter the curves" of business cycles.[64] The "chief controversy" arose when statistical information covered "*prices* at which commodities have been sold, and have given out statistical information about the prices at which sales have been made."[65] In thinly veiled terms, he lambasted the attorneys at Justice for enforcing an "archaic" vision of business practices and economic models of unfettered competition – "like a battle royal, in the dark, where every competitor was unintelligent, uninformed."[66] Yet, he ended on a positive note, anticipating his team's victory. He predicted that "new economic principles will prevail" and in fifteen years the Chamber will wonder "that anybody would have been discussing so elementary a thing" as trade association information-sharing on price points.[67]

After years of litigation on behalf of open price associations and collaboration with the Department of Commerce and the FTC, the US Supreme Court finally reversed course in 1925. The appointment of Harlan Fiske Stone to the Court solidified the switch.[68] That year, , the Court handed down two important antitrust decisions that changed the trajectory of trade association information-sharing. Justice Stone wrote that "the gathering and dissemination of information by trade associations on costs, prices, production and stocks do not necessarily constitute restraint of trade in violation of antitrust laws."[69] The Court upheld the standard sales contracts used by the Cement Manufacturers' Protective Association. The association had standardized cement production methods and contracting and established a monitoring system through producer disclosure rules. Members were required to submit monthly reports detailing all sales contracts, delivery, and cancellations.[70] The association secretary then sent daily reports to members regarding new job contracts, completed jobs, and the freight rates in between.

In the *Maple Flooring* case, the Court found that the sales contracts allowed for the legitimate refusal to deal with disreputable contractors. The association's publication of freight rates, calculated according to a basing point system for standard deliveries, allowed manufacturers to adhere to a "one-price" base rate determined by each mill and to which transportation costs were more easily added.[71] Ultimately, the Court found that the information-sharing practices had the effect of reducing fraudulent contracts and the government had failed to establish a concerted action by the association to fix prices *per se*.[72] This case significantly advanced the trade practice rule-making and monitoring procedures developed in conjunction with trade associations and the FTC. Where the *Colgate* case of 1919 had validated individual firm price policies, the *Cement Manufacturers'* and the *Maple Flooring* rulings legitimized association tactics.

Similar to earlier opinions by Holmes and Brandeis, Stone held that the association-guided information-sharing merely constituted "intelligent conduct of business."[73] He wrote:

> It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, 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.[74]

Greater intelligence in business trades did not disturb free competition, he reasoned. He only cited Leon Marshall, who later joined the National Recovery Administration, and JA Hobson's *The Evolution of Modern Capitalism.*[75]

As a complement to Stone's promotion from Attorney General to Associate Justice, William Humphrey joined the FTC, where he instituted significant changes to antitrust investigations. As he explained to the Chamber of Commerce general assembly, the FTC would no longer issue public announcements listing companies against which complaints of "unfair trade practices" had been alleged. The Commission instituted this change because of the bad publicity and loss of goodwill created by those public announcements, especially in cases where formal charges were not issued after FTC investigations. Instead, the Commission would use its investigatory powers to urge settlements between firms and to guide trade association rule-making outcomes. All documents and evidence submitted to the FTC would remain confidential.[76] Additionally, Secretary Hoover helped the FTC coordinate trade practice conferences, whereby trade association members laid out in precise by-laws defining the rules of fair competition.

These voluntary meetings of trade associations resulted in both informal and formal rules of conduct internal and external to the firm. Informal rules might dictate conduct or procedures in the distribution system, but did not carry legal enforcement. Formal rules, on the other hand, enjoyed FTC oversight and enforcement at law. Charged with the responsibility to distinguish between fair and unfair practices, FTC regulators considered whether or not competition had been substantially lessened or if certain business practices constituted a tendency to monopolize.[77] Otherwise, trade associations enjoyed greater leeway to create industry-wide rules regarding standardized production methods, quality standards, accounting methods, and sales practices. Commission regulators, mostly composed of economists and antitrust attorneys, through the late 1920s sanctioned some price stabilization efforts, such as prohibitions on price discrimination, secret rebates, and sales below cost; however, the FTC never accepted association attempts to institute price-fixing agreements.[78]

As Hoover explained it, new economic ideas about competition had significantly influenced the administration of antitrust law. The "growth of a cooperative sense" represented a movement toward "more efficient, more ethical business practice and better synchronizing of the parts" of the economy as a whole.[79] "It is a long cry," he continued, "from the conceptions of the old economist."[80] Gradually, the social sciences had become a tool for explaining and implementing trade practices rules.

The following year Congress approved the creation of a new division of the FTC to oversee trade practice conferences, where trade associations "presented, and the Commission approved, complete codes of fair practice."[81] Hoover explained that these bureaucratic changes supported constructive information-sharing meant to mitigate "destructive competition," and preserve competitive freedom. Where conflict had once existed between the Departments of Commerce and Justice, a new spirit of cooperation and promotion of "self-regulation" emerged, he stated.[82] The following year, the Department of Commerce published *Trade Association Activities* (1927) to clarify the Court's shifting interpretation of trade association information-sharing.

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It was perhaps no coincidence that the founding of the US Chamber of Commerce occurred at the same time as the expansion of federal administrative agencies. In the early twentieth, the direction of US competition policy was up for grabs. Rather than adopting a strictly adversarial stance toward the growing federal state, USCC records demonstrate that members overwhelmingly supported the creation and expansion of the administrative capacities of the Department of Commerce and later the Federal Trade Commission. This partnership between private business associations and public administrative agencies developed before the First World War and despite the limitations imposed by the judicial branch on the development of administrative law. When the Department of Justice increased its litigation against trade association in the 1920s, these efforts, though adversarial to be sure, had the effect of encouraging USCC support for public-private collaboration. Similarly, administrators and businesspeople alike appeared undeterred by US Supreme Court rulings that circumscribed administrative powers or struck down associations' trade rules.[83] During and after WWI, the Chamber of Commerce became an embedded intermediary capable of coordinating business practices and regulatory prerogatives. Federal agencies, although still in their infancy relative to post-WWII, held considerable regulatory power when partnered with business organizations. Leaders in these public agencies shifted towards strategies that borrowed from and expanded upon trade association procedures in an effort to foster what they believed were public interest goals, such as governing competition, eliminating waste, and stabilizing prices. This public-private governance strategy was less concerned with market efficiencies and lowest consumer prices than it was with promoting an abstract notion of fair competition and administrative capacities. The Great Depression, of course, fundamentally challenged whether any public interest could be surmised from this close relationship between business and government and the experiment largely broke down by the time of the Second New Deal and Thurmond Arnold's revival of antitrust prosecutions.[84]A new type of adversarial relationship between business and government emerged as both sides worked to develop their own capacities to govern. Nevertheless, the story of American state-building requires attention to the early twentieth century efforts at public-private cooperation, which has produced both a robust administrative state and an equally formidable national organization of private businesses.

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[1] On the Department of Commerce, see: Ellis W. Hawley, "Herbert Hoover, the Commerce Secretariat, and the Vision of an 'Associative State,' 1921-1928," *Journal of American History* 61 (June 1974): 116-140. On the FTC, see: Gerald Berk, *Louis D. Brandeis and the Making of Regulated Competition, 1900-1932* (Cambridge, 2009). See also: Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Networks, and the 'New Competition:' 1890-1940* (Cambridge, forthcoming).

[2] On the adversarial relationship see: Thomas K. McCraw, "Business and Government: The Origins of the Adversary Relationship," *California Management Review* 36 (Winter 1984): 33-52, 38. Robert Wiebe, *Businessmen and Reform: A Study of the Progressive Movement* (Cambridge, Mass., 1962): 220. On the Chamber's influence on anti-regulation politics in the post-WWII era, see: Benjamin Waterhouse, *Lobbying America: The Politics of Business from Nixon to NAFTA* (Princeton, 2014).

[3]26 Stat. 209, (1890).

[4] See footnote 19 infra.

[5] Legal and business historians have dismissed early administrative reforms as resulting in very little regulatory change and portrayed antitrust law as settled by 1911. See: Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge, 1988): 106; Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, MA, 1984). However, USCC documents demonstrate a continued sense of uncertainty and persistent discussion of antitrust reforms that lasted through the New Deal. See: Berk, *Brandeis*, 111. Berk argues that the FTC, rather than ending the debate on competition policy, fostered continued debate.

[6] See: Richard John, *Network Nation:Inventing American Telecommunications* (Cambridge, Mass., 2010): 122-4, 350-1, 370. John demonstrates that telephone and telegraph corporations developed public relations campaigns in order to thwart public demands for government ownership of telecommunication utilities. By contrast, the industries that dominated the USCC in the early twentieth century were largely from the "ordinary trades" rather than utilities.

[7] On the public interest literature on public-private governance, see: David Moss and Michael Fein, "Radio Regulation Revisited: Coase, the FCC, and the Public Interest," *Journal of Policy History* 15 (2003): 389-416.

[8] Wiebe, *Businessmen and Reform*, 33-41.

[9] Letter to G. Grosvenor Dawe (Southern Commercial Congress) from A. H. Baldwin (Department of Commerce), Chamber of Commerce of the United States Records, Accession No. 1960, Box 1, (Feb. 20, 1912) Hagley Museum and Library. [Hereinafter Chamber Records.]

[10] Richard Hume Werking, "Bureaucrats, Businessmen, and Foreign Trade: The Origins of the United States Chamber of Commerce," *Business History Review*, 52 (Autumn, 1978): 321-41,

322. In this prescient article, Werking argued that government bureaucrats not only administer but also create regulatory policy, thereby participating in "bureaucratic entrepreneurism" [322]. There has not been a systematic study performed on the early years of the USCC; however, Gerald Berk emphasizes the role of the USCC and National Association of Cost Accountants in supporting trade association information-sharing practices in the 1920s. Berk, *Brandeis*, 184. Werking emphasized export promotion, not domestic trade rules.

[11] Chamber Records, Box 1 (Feb. 12, 1912): 4-5.

[12] "Notes for the Conference of February 12, 1912," *Ibid*.: 2.

[13] Open letter released to President Taft, April 1912, *Ibid*., leaflet.

[14]*Ibid*..

[15] Meeting Minutes, *Ibid*., (April 22-23, 1912): 5-6.

[16] Charles Nagel, *Ibid*., (April, 1912): 34-8.

[17]*Ibid*..

[18]*US v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897), 323; *US v. Joint Traffic Association*, 171 U.S. 505 (1898). *Addyston Pipe and Steel Co. v. US*, 175 U.S. 211 (1899), extended the literalist interpretation to manufacturers.

[19]*Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911); *U.S.v. American TobaccoCompany*, 221 U.S. 106 (1911).

[20] Owen Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (New York, 1993); Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880-1990* (Cambridge, 1992): 25, 33.

[21] Thomas K. McCraw, *Prophets of Regulation*. "Brandeis offered regulatory solutions grounded on a set of economic assumptions that were fundamentally wrong" [84]. It should be noted that,

in 2006, the Supreme Court overturned its previous ruling striking down RPM contracts, which allow manufacturers to set retail prices on brand name goods.

[22] Brandeis, "The Democracy of Business," Chamber Records, (Feb. 12, 1912): 168- 172, 168.

[23]*Ibid.*, 169-170. See also: Berk, *Brandeis*, 21, 77-78.

[24] See: Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 63rd Cong., 2nd sess., January 9, 1914; Brandeis, "Cutthroat Prices—The Competition that Kills," *Harper's Weekly* (Nov. 15, 1913): 67.

[25]Charles Richard Van Hise, "Co-operation in Industry," an Address to the National Lumber Manufacturers Association (Chicago, 1916): 1-15, 6-7.

[26] Van Hise repeated the conventional theory that the Court's attack on loose combinations encouraged corporate consolidation and later holding companies. Prof. Charles Van Hise, "Concentration of Industry in the United States," Chamber Records, Box 7, (Feb. 12, 1914), 111-121, 116-117.

[27] Van Hise, "Cooperation in Industry," 13. Van Hise was also a member of a joint committee of the USCC and the American Federation of Labor, which he urged the lumbermen's association to work alongside.

[28]Charles Van Hise, *Concentration and Control: A Solution of the Trust Problem in the United States* (New York, 1912). See: "Van Hise on the Trusts: Nation Must Control Without Bridling Industrial Genius," *The New York Times*,Oct. 14, 1912, p. 14; McCraw, *Prophets of Regulation*, 128, 139.

[29] Raymond Moley, *AfterSeven Years* (New York, 1939, 4th ed.): 184, 24. Van Hise's text served as a precursor to Rexford Tugwell, *Industrial Discipline and the Governmental Arts*, (New York, 1933).

[30]*Federal Trade Commission v. Gratz*, 253 U.S. 427 (1920).

[31]*Infra* fn 56. The Court did relax the *per se* prohibition on RPM contracts, *U.S. v. Colgate& Co.*, 250 U.S. 300 (1919).

[32] McCraw, *Prophets of Regulation*, 144-5; Anne Mayhew, "How American Economists Came to Love the Sherman Act," *History of Political Economy* 30. Supplement (1990): 179-201.

[33] "Report of the Federal Trade Commission on Resale Price Maintenance," (Washington, 1945): 41-44. R. H. Macy led opposition to the fair trade bills, along with R. H. Macy & Co., represented by Edmond A. Wise (atty) & Percy S. Straus (VP.); National Retail Dry Goods Association, represented by Lew Hahn (Managing Director); O'Neill & Co., Baltimore, Md., represented by R. C. Hudson; National Grange, represented by A. M. Loom; Frank C. McKinney, Homemakers' Association (NJ).

[34] Appendix III: "Statement of Law Annexed to Minority Report," Chamber Records, Box 7, (Feb. 10, 1916): 240-288, 255.

[35]*Ibid.*, 256. The report states, "the situation changed … [when] the people themselves believed combinations, and particularly combinations regulating prices, [were] against public policy."

[36] Berk, *Brandeis*, 121-130. Hurley sent out the FTC publication, *Fundamentals of the Cost System* (Washington, 1916).

[37]*Annual Report of the Federal Trade Commission* (Washington, 1916): 15.

[38] Cuff, *War Industries Board*. Cuff argues that "the WIB and its administrative program were a bundle of paradoxes. . ." [148-149].

[39] Hawley, "Hoover, the Commerce Secretariat," 117.

[40] Herbert Hoover, Chamber Records, Box 8, (Sept. 19, 1917): 129. Veblen served on the Food Administration with Hoover before joining Mitchell at The New School for Social Research. Rutherford, "Understanding Institutional Economics," 282.

[41] George Peek, "Government Organization in Relation to War," Chamber Records, Box 8 (April 9, 1918): 94-121, 97.

[42] *Ibid.*, 98.

[43] Resolution: "Price Fixing and Cost Accounting," *Ibid.*, 151.

[44] George Peek, *Ibid.*, 227. Peek, who represented the WIB, read the letter from Baruch to the Chamber assembly.

[45] Resolution: "Industrial Cooperation," *Ibid.*, 230. This language was repeated in the formal resolution that passed the Chamber. See also: Chamber Records, Box 1, (Dec. 3-6, 1918): 5.

[46] Resolution: "Trade Marks and Copyright," Chamber Records, Box 8 (April 9, 1918): 257.

[47] Walton H. Hamilton, "The Institutional Approach to Economic Theory," *American Economic Review* 9 (Mar., 1919): 309-18; William J. Barber, *From New Era to New Deal: Herbert Hoover, the Economists, and American Economic Policy, 1921-1933* (Cambridge, 1985): 2-4; Arthur E. Swanson, "The Harvard Bureau of Business Research," *Journal of Political Economy*, 22 (Nov. 1914): 896-900. See also: Kyle Bruce, "Activist Management: Henry S. Dennison's Institutional Economics," *Journal of Economic Issues* 40 (Dec., 2006): 1113-1136.

[48] "Guesswork Blamed for Business Slump," *New York Times*, Oct. 6, 1921, p. 3.

[49] "Would Spur Public Works To Aid Idle," *Washington Post*, Sept. 28, 1921, p. 5; "To Meet Needs of Unemployed," *Los Angeles Times*, Sept. 30, 1921, p. 6. See also: "Engineers Endorse Hoover Work Plan," *New York Times*, Sept. 11, 1921, p. 30. Between 1921 and 1928, state and local government provided approximately ninety percent of public spending outlays, which the

federal government supported by exempting state and municipal bonds from income taxes. Barber, *New Era to New Deal*, 20-21.

[50] "Country's Business Continues to Increase," *Wall Street Journal*, Dec. 8, 1921, p. 2.

[51] Barber, *New Era to New Deal*, 8. Hoover's Advisory Committee on Statistics included Mitchell, "Edwin R. A. Seligman ([Professor of Economics] Columbia University), Allyn A. Young ([Professor of Economics]Harvard), Walter F. Willcox ([Professor of Economics and Statistics]Cornell), Carroll W. Doten ([Professor of Economics] Massachusetts Institute of Technology), Edwin F. Gay (then president of the *New York Evening Post*, who had formerly served as the first dean of the Harvard Business School), and William S. Rossiter (formerly the head of the U.S. Census Bureau)."

[52] Jeff Biddle, "Social Science and the Making of Social Policy: Wesley Mitchell's Vision," in *The Economic Mind in America: Essays in the History of American Economics*, ed. Malcolm Rutherford, (New York, 1998): 43-79, 59.

[53] "Cement Men Face Trial as a Trust," *New York Times*, April 5, 1922, p. 13.

[54] "The Lockwood Housing Investigation in New York City," *Domestic Engineering and the Journal of Mechanical Contracting* 94 (Feb., 1921): 364-365. Samuel Untermeyer's prosecution focused on Robert P. Brindell, leader of the Building Trade Employers' Association, despite Untermeyer's admission that the mortgage finance industry had more to do with the housing shortage in New York City.

[55] M. Browning Carrott, "The Supreme Court and American Trade Associations, 1921-1925," *Business History Review* 44 (Autumn, 1970): 320-338, 329.

[56] 263 Fed. 156. *American Column and Lumber Co. v. U.S.*, *Records and Briefs of the United States Supreme Court*, 257 U.S. 377, contains information on the type of data exchanged by

members of the association. “Court Dissolves Cement Combine,” *New York Times* Oct. 24, 1923, p. 21. *U.S. v. American Linseed Oil Co.*, 262 U.S. 371 (1923), similarly striking down information-sharing through the Armstrong Bureau of Related Industries in Chicago.

[57] 257 U.S. 412.

[58] National Industrial Conference Board, *Trade Associations: Their Economic and Legal Status* (Washington, 1929): 16; Milton N. Nelson, “The Effect of Open Price Association Activities on Competition and Prices,” *American Economic Review* 13 (June 1923): 258-275.

[59] Milton N. Nelson, *Open Price Associations* (Urbana, IL, 1923): 10; Carrott, “American Trade Associations,” 322.

[60] Louis Galambos, *Competition and Cooperation: The Emergence of a National Trade Association* (Baltimore, 1966): 79.

[61] Hoover, Chamber Records, Box 11, (May 7, 1924): 169-180, 173.

[62] “Report of the Committee on Trade Associations,” Chamber of Commerce, Referendum 41(Feb. 1923): 1.

[63] Col. George T. Buckingham (of the Defrees, Buckingham & Eaton Co. of Chicago, IL), “The Opportunities and Responsibilities of Trade Associations,” *Ibid.*, (May 7, 1924): 214-225, 219.

[64]*Ibid.*, 220.

[65]*Ibid.*. Emphasis added.

[66]*Ibid.*, 224.

[67]*Ibid.*, 225.

[68] Ellis W. Hawley, “Herbert Hoover and the Sherman Act, 1921-1933: An Early Phase of a Continuing Issue,” *Iowa Law Review* 74 (1988-1989): 1067-1104, 1082-3.

[69] "Court Upholds Trade Alliance," *Los Angeles Times*, June 2, 1925, p. 11. (Quoting Justice Harlan Fiske Stone majority opinion for the Court.)

[70]*Cement Manufacturers' Association. v. United States*, 268 U.S. 588 (1925), 602.

[71] 268 U.S. 598.

[72] 268 U.S. 606.

[73] 268 U.S. 583.

[74] 268 U.S. 582-583.

[75] 268 U.S. 583.

[76] Humphrey, Chamber Records, Box 11, (May 19, 1925): 58-65. The Chamber passed a resolution in support of these changes to the FTC (*Ibid.*, 177). See also: Robert F Himmelberg, *The Origins of the National Recovery Administration: Business, Government, and the Trade Association Issue, 1921-1933*, 2nd ed. (New York, 1993): 49.

[77] Thomas Blaisdell, *The Federal Trade Commission: An Experiment in the Control of Business* (New York, 1932): 44.

[78]*Public Regulation of Competitive Practices* (Washington, 1929, rev. ed.). This publication of the National Conference Board categorized the complaints received and issued by the FTC. See: Richard Tedlow, "From Competitor to Consumer: The Changing Focus of Federal Regulation of Advertising, 1914-1938," *Business History Review* 55 (Spring 1981): 35-58.

[79] Hoover, Chamber Records, Box 11, (May 10, 1926): 191-207, 195.

[80]*Ibid.*, 196.

[81] Himmelberg, *Origins*, 62.

[82] Hawley, "Hoover and the Sherman Act," 1084. See also: Himmelberg, *Origins*, 48-51, 54-67; FTC, *Annual Report*, (Washington, 1926): 5, 47-48; FTC, *Trade Practice Conferences* (Washington, 1929): v-vii.

[83] For example, the US Supreme Court held that the Court and not the FTC would determine what constituted "unfair competition" in *FTC v. Gratz*. The Court circumscribed the *Maple Flooring* decision in *US v. Trenton Potteries*273 U.S. 392 (1927), reiterating that any explicit price-fixing contract was illegal *per se*.

[84] See: Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York, 1995).