MANAGERIALISM VERSUS FREE AND FAIR COMPETITION: THE ECONOMISTS' AGGIORNAMENTO ON THE SHERMAN ACT ON THE EVE OF THE 1932 ELECTIONS

Thierry Kirat

Frédéric Marty

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ABOUT THE AUTHORS

Thierry Kirat, CNRS – Université Jean Monnet, Saint-Etienne - CERCRID
Email Address: thierry.kirat@univ-st-etienne.fr
Frédéric Marty, CNRS – Université Côte d'Azur – GREDEG, OFCE-Sciences Po, Paris
Email Address: frederic.marty1@sciencespo.fr

ABSTRACT

This contribution discusses the historical background of the Fetter Petition, published in 1932 by a committee of American economists who came together to defend the Sherman Act. Until then, different schools of thought had held conflicting views on the relevance of the Sherman Act from an economic perspective, with some even defending the option of managed competition. The Fetter Petition, however, shows a convergence around the defence of the Sherman Act and support for its stronger enforcement. The paper sheds light on the moment of consensus building among economists around antitrust rules as a result of proposals to reform and amend them between 1928 and 1932. It also draws a parallel between some of the recommendations of the Fetter Petition and the policy pursued by Thurman Arnold from 1938 onwards and opens a discussion on the contributions of the 1930s debates to current discussions on the theoretical foundations of competition policy.

KEYWORDS

Antitrust, managed competition, New Deal, information exchanges

JEL

K21, L13, L22, L51, N42

RESUME

Cette contribution examine le contexte historique de la pétition Fetter, publiée en 1932 par un comité d'économistes américains qui se sont réunis pour défendre le Sherman Act. Jusqu'alors, différentes écoles de pensée avaient défendu des points de vue contradictoires sur la pertinence du Sherman Act d'un point de vue économique. Certains d'entre eux défendaient même l'option de la concurrence dirigée. La pétition Fetter montre toutefois une convergence de la communauté universitaire autour de la défense du Sherman Act et d'un soutien à son application plus stricte. Ainsi, l'article met en lumière le moment où les économistes ont abouti à un consensus sur les règles antitrust dans le contexte de propositions de réforme et d'amendement de ces règles entre 1928 et 1932 émanant des milieux d'affaires. Il établit également un parallèle entre certaines des recommandations de la pétition Fetter et la politique menée par Thurman Arnold à partir de 1938, et ouvre une discussion sur les contributions des débats des années 1930 aux discussions actuelles sur les fondements théoriques de la politique de la concurrence

MOTS CLES

Antitrust, concurrence régulée, New Deal, échanges d'informations.

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Managerialism versus free and fair competition: The economists' aggiornamento on the Sherman Act on the eve of the 1932 elections[1]

Thierry Kirat

CNRS – Université Jean Monnet, Saint-Etienne - CERCRID

Frédéric Marty

CNRS – Université Côte d'Azur – GREDEG

OFCE, Sciences Po., Paris

Abstract

This contribution discusses the historical background of the Fetter Petition, published in 1932 by a committee of American economists who came together to defend the Sherman Act. Until then, different schools of thought had held conflicting views on the relevance of the Sherman Act from an economic perspective, with some even defending the option of managed competition. The Fetter Petition, however, shows a convergence around the defence of the Sherman Act and support for its stronger enforcement. The paper sheds light on the moment of consensus building among economists around antitrust rules as a result of proposals to reform and amend them between 1928 and 1932. It also draws a parallel between some of the recommendations of the Fetter Petition and the policy pursued by Thurman Arnold from 1938 onwards, and opens a discussion on the contributions of the 1930s debates to current discussions on the theoretical foundations of competition policy.

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[1] This paper was presented at the Rethinking Competition conference organised by the Centre for Competition Policy at the University of East Anglia. The proceedings of the conference will be published in 2024 by Cambridge University Press. An updated version of this paper will be included in the proceedings. The authors would like to thank the conference participants for their comments and suggestions, especially Elias Deutscher and Justin Lindeboom. This text also owes much to work and discussions with Patrice Bougette, Marc Deschamps, and Andrew Shy. Any errors or imprecisions remain the full responsibility of the authors.

Résumé

Cette contribution examine le contexte historique de la pétition Fetter, publiée en 1932 par un comité d'économistes américains qui se sont réunis pour défendre le Sherman Act. Jusqu'alors, différentes écoles de pensée avaient défendu des points de vue contradictoires sur la pertinence du Sherman Act d'un point de vue économique. Certains d'entre eux défendaient même l'option de la concurrence dirigée. La pétition Fetter montre toutefois une convergence de la communauté universitaire autour de la défense du Sherman Act et d'un soutien à son application plus stricte. Ainsi, l'article met en lumière le moment où les économistes ont abouti à un consensus sur les règles antitrust dans le contexte de propositions de réforme et d'amendement de ces règles entre 1928 et 1932 émanant des milieux d'affaires. Il établit également un parallèle entre certaines des recommandations de la pétition Fetter et la politique menée par Thurman Arnold à partir de 1938, et ouvre une discussion sur les contributions des débats des années 1930 aux discussions actuelles sur les fondements théoriques de la politique de la concurrence.

Mots clés : antitrust, concurrence régulée, New Deal, échanges d'informations

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In September 1932, the American Economic Review published a statement signed by Frank Fetter on behalf of a committee of American economists convened to defend the Sherman Act against an American Bar Association (ABA) committee's opposition to antitrust and free competition.

This economists' committee brought together participants from different schools of thought such as Fetter, a Mengerian, Jacob Viner, one of the prominent figures of Old Chicago, and John Rodgers Commons, the leading institutionalist economist. Until then, these different schools of thought had hardly shared the same views on the economic relevance of the Sherman Act. Some economists even defended the option of managed competition, arguing that economic efficiency required economic concentration, which was incompatible with the economic model of the Sherman Act. However, ensuring that the decisions of powerful firms are rational requires oversight by regulatory commissions.

Finally, the Fetter Statement shows a convergence around the defence of free and fair competition through the advocacy of the Sherman Act and resolute support for its stronger enforcement.

Forty years after the Sherman Act enactment, this late convergence of the economic profession is explained by the context of the 1932 presidential election. Since the experience of the wartime economy and especially that of the War Industries Board from 1917 to 1918, arguments in favour of a regulated competition had developed in American business circles. The model of the scientific organisation of labour could be applied to business-to-business relations to increase efficiency and to avoid destructive competition. This model could be achieved through the exchange of information or even the unification of business policies through trade associations. However, these exchanges of information between companies were sanctioned by antitrust[2].

A political and legal battle ensued in the 1920s, led in particular by Herbert Hoover, then on office as the Secretary of Commerce. A reversal of the Supreme Court's case law finally supported the trade associations' activity of stabilisation through the exchange of information. This will mark, in the 1920s, the importance of a strategy to promote a rational management of the economy, which the pure price system was unable to achieve (see Schmidt, 1930 and Kirat & Marty, 2020).

With the crisis of 1929, however, the proposals of the industrial trade associations, supported in 1929 and again in 1931 by the ABA's Committee on Commerce, went much further. The idea was not to repeal the Sherman Act, but to give the Federal Trade Commission (FTC) the power to pre-clear business-to-business agreements and give them antitrust immunity. Many proposals to reform the Sherman Act have been put forward by ABA members.

The plan is evolving, but in the sense that its proponents are now seeking the support of the state rather than its benevolent neutrality or its indirect support through the FTC's action through trade conferences. Nevertheless, one essential point must be borne in mind: the demands are not simply for a temporary suspension of antitrust law in the form of temporary immunity for crisis cartels. They are about a permanent transformation of the economy towards an organised but non-statist model. In this respect, public intervention should make private regulation possible and effective, in the spirit of the industrial recovery plan proposed in 1932 by General Electric's CEO, Gerard Swope.

The Swope Plan proposed that firms should be required to join trade associations and that failure to comply with their orders should be sanctioned by a public authority. The 1929 crisis

[2] According to the Attorney General W.D. Mitchell: “The machinery of some trade associations seems to have been made use of for transactions that come dangerously near price fixing”. Mitchell (1930)

was ultimately blamed, at least in part, on the inadequacy of anti-trust laws, which led to destructive competition and economic instability. President Hoover rejected these proposals[3]. While the "associationalist" model he had defended in the 1920s was based on voluntary information exchange to improve the informational framework in which decisions were made, these projects were based on a cartelisation of the American economy. Moreover, the coercion that would be exerted on firms would be achieved through public action.

The Fetter Committee was set up to oppose these plans, which were put forward by the ABA's Commerce Committee in March 1931 at a meeting in New York[4] and to take a position in favour of preserving the Sherman Act and strengthening its enforcement. The solution to the crisis is presented as requiring fighting monopolistic price controls rather than stabilising the market for the benefit of firms.

The diversity of contributors reflects some particularly important trends in the American economists' community. The first is the growing scepticism of some institutional economists since the 1920s about the efficiency gains resulting from concentration and the possibility of ensuring their fair distribution (see Panhans and Schumacher, 2021). The second is a surprising rapprochement of economists whose theoretical backgrounds are very different but who worked together in the 1920s in major FTC investigations of price-fixing practices. So, a surprising *aggiornamento* happened, as revealed for instance by the closeness, despite their differences in terms of schools of thought, between Commons and Fetter through their FTC experience in 1923 and 1924.

However, although this convergence of American economists around antitrust can be dated back to 1932, it was not translated into practice until 1937 or 1938 when Jackson and then

[3] President Hoover's rejection appeared in his annual message to Congress on December 2, 1930. While he supported the principle of a specific investigation of sectors in which competition could take on the characteristics of destructive competition, he reaffirmed his opposition to the withdrawal of antitrust rules, insisting on the need to prevent the appearance of monopoly situations both from the point of view of protecting consumers and preserving economic incentives (Hoover, 1930). The former President Calvin Coolidge took similar positions in November 1930. He rejected the arguments according to which "old economic principles are outgrown and do not fit modern conditions of trade" and supported a preservation of antitrust laws not only for economic but also for political purposes.
https://coolidgefoundation.org/wp-content/uploads/2021/01/November-13-1930.pdf

[4] It would be possible to trace this back to a resolution adopted in 1929 by the American Bar Association in Memphis, which was reproduced in the Journal of the American Bar Association in May 1931 under the title 'Sentiment Crystallizing in Favor of Amendment of Antitrust Laws'. The purpose of the letter was to support a proposed amendment to the antitrust rules which would have enabled the FTC to rule on voluntary plans to restrict competition between firms in order to protect them from criminal and civil prosecution (see US Congress, 1934). Some Committee members, such as a former assistant to the United States Attorney General, argued in favor of a major institutional innovation: a Commerce Court which would give an a priori opinion about the coordination agreements proposed by the industrial firms (Donovan, 1930).

Arnold were successively appointed to head the Antitrust Division of the DoJ. Indeed, while the Democratic Party had accepted in its electoral platform - as indicated in the American Economics Review article published in September 1932 - the principles defended in the Statement of the Committee coordinated by Frank Fetter, the Roosevelt administration made a choice in promulgating the NIRA that led it to adopt the policy that the Hoover administration had rejected. Indeed, because of the influence of managerialists such as A. Berle in the brain trust (Thompson, 2018), it was a solution close to the Swope plan that was initially imposed. The large dominant firms in the trade associations imposed their pricing policies and their competitors had to comply, with enforcement of the codes of conduct being imposed by the federal government. The rejection of the NIRA by the Supreme Court in *Schechter Poultry Corp. v. United States 2*95 U.S. 495,1935 as unconstitutional resulted in, two years later, a return to the implementation of the Sherman Act in terms that were close to those advocated in the 1932 Fetter statement.

These various projects can be envisaged in terms of three dynamics, each of which underwent a decisive inflection point during the period under consideration. These are a case law dynamic, an economic policy dynamic and finally a theoretical dynamic in the field of economics and competition law.

Let us consider the inflection points within these three trajectories, which we analyse further in our development.

As regards the dynamics of the case law, the interpretation of the provisions of the Sherman Act relating to the coordination of companies in times of crisis changed substantially between *Appalachian* in 1933[5] and *Schechter* and *Socony* in 1935 and 1940[6] respectively.

In the field of economic policy, there was also a clear break between the first New Deal in 1933, which partly reflected the logic of the Swope Plan, and President Roosevelt's "Curbing Monopoly" speech in 1938.Finally, in the academic field, the Fetter petition seems to us to be a candidate for the inflection point. This turning point obviously precedes the later developments in jurisprudence and politics. In some respects, the Fetter Petition foreshadowed the positions advocated by Henry C. Simon at the University of Chicago in 1934, which were gradually adopted by institutional economists (as evidenced by Hamilton's participation in Arnold's cabinet when the latter became Assistant Attorney General, see Rutherford (2011)).

[5] Appalachian Coals, Inc. v. United States 288 U.S. 344, 53 S. Ct. 471 (1933).
[6] United States v. Socony-Vacuum Oil Co. 310 U.S. 150, 60 S. Ct. 811 (1940).

The aim of this contribution is therefore to shed some light on this moment of consensus building among economists around the effective enforcement of antitrust rules and owing to the ABA proposals to reform and amend them, between 1928 and 1932.

The paper is structured as follows. The first section highlights the distrust of U.S. economists towards the Sherman Act in its first decades. The second section presents the solutions advocated during the 1910s and the 1920s to promote a regulated competition model and to what extent they had paved the way to the Swope Plan which consisted in a proposal of a cartelisation of the American economy based on a nominal public supervision to tackle the economic difficulties induced by the 1929 crisis. The third section analysis the 1932 Fetter's petition and underlines to what extend economists' arguments announced the difficulties that will be encountered during the President F.D. Roosevelt's NIRA. The fourth and final section puts into perspective the recommendations of the 1932 Fetter's petition with the guiding principles of the1938 Sherman Act revival.

I – In Antitrust, they did not trust.

The community of American economists at the end of the 19th century was particularly reluctant to defend a Manchesterian model of economics that could lead to prescriptions in the direction of perfect competition and that preconise a laissez-faire based approach in terms of market regulation as opposed to 1930s' neoliberalism (Bougette & al., 2015, Reinhoudt and Audier, 2018).

Pre-Civil War American economists advocated protectionist solutions against British competition which had direct echoes of Friedrich List's theory of educational protectionism (Fetter, 1943). The influence of the German Historical School was most significant. This influence included the development of a part of the academic curriculum of economists in Wilhelmian Germany, whether they were institutionalist or marginalist, such as A. Fetter.

The institutionalist tradition of economics dominated the American academic and institutional landscape from the end of the 19th century to World War II. This approach could not initially provide theoretical support for antitrust policy for at least two main reasons.

Firstly, institutional economists held that concentration was both inevitable and desirable. It was seen as a necessary condition for achieving efficiency gains. Their redistribution was also held to be more effectively achieved through the consideration of stakeholders' interests in

corporate governance (in other words, self-regulation) or through regulatory commissions than through the possible concretisation of a trickle-down effect. In other words, in terms of political theory, the institutionalists were Hamiltonians. Big Business was seen as a necessary evil that had to be balanced by Big Government. However, the latter was not conceived in a purely statist sense, but as being based on committees that would represent all stakeholders and reach compromises that would guarantee that capitalism would function in a way that could be described as reasonable and therefore socially acceptable.

Secondly, institutional economists expressed a deep distrust of the judiciary. This mistrust was common to contemporary American legal realists[7]. In a period marked by the predominance of classical legal thought, the courts tended to block any governmental or regulatory intervention based on a rigid defence of property rights and the principle of freedom of contract[8].

The Sherman Act, which was the result of a hard-fought compromise, rapidly experienced difficulties because of the legal conservatism of the judiciary. Its enforcement involved these courts insofar as it was based on common law standards, such as the Restraint of Trade. This model of enforcement by the courts soon led to a clear restriction of antitrust enforcement scope through the Supreme Court's decision in *United States v. E. C. Knight Co* (156 US 1; 1895)[9].

The resources of action offered by the Sherman Act were only really grasped under the Republican presidency of Theodore Roosevelt and above all under Howard Taft's one[10]. While the latter, President from 1909 to 1913, initiated the most proceedings, it was his predecessor, President from 1901 to 1909, who revived public enforcement by obtaining the landmark Supreme Court decision *Northern Securities Co. v. United States,* 193 U.S. 197 (1904). However, Taft's victories, notably in *Standard Oil Co. of New Jersey v. United States*, 221 U.S.

[7] See Horwitz (1992), notably pp. 214-215.Horwitz evokes "Progressive and Legal Realist attacks on the inefficiencies of the judicial process and on the inability of judges…. To bring either consistency or deep social understanding to the task of regulation".

[8] The Supreme Court decision McChord v. Louisville & Nashville R. Co. 183 U.S. 483 (1902) is characteristic of this Lochner era. Chief Justice Fuller had held that requiring a private company to obtain only a fair and reasonable rate of profit through the prices charged amounted to extortion... The Lochner era refers to a very conservative period in terms of judicial acceptance of governmental intervention or regulations. The defence of economic liberties, and particularly the freedom of contract, had led to counteract regulatory initiatives.

[9] It may be worth adding that the doctrine in E.C. Knight was substantially limited already in 1905 by Swift & Co. v. United States, 196 U.S. 375.

[10] This pattern can be discerned in the data produced by Richard Posner in his seminal 1970 article 'A statistical study of antitrust enforcement', which traces public enforcement of the Sherman Act on the basis of cases brought before the courts by the DoJ (Posner, 1970, p.366).

1890-1894	1895-1899	1900-1904	1905-1909	1910-1914	1915-1919	1920-1924	1925-1929	1930-1934	1935-1939	1940-1944
9	7	6	39	91	43	66	59	30	57	223

1 (1911), appeared to be undermined by the Court's adoption of the rule of reason (for a discussion on the origins of the implementation of the rule of reason for the Section 1 of the Sherman Act, see Handler (1957)).

The resource of activating the Sherman Act, still supported by President Taft, who was running for his own succession in 1912 under Republican colours, was viewed with great suspicion by Theodore Roosevelt, who was once again running for the progressive party. His disaffection for Antitrust was rooted in his experience of the 1906 crisis and in particular the U.S. Steel affair. Not only was this the cause of his rupture with his successor (German, 1972), but for Roosevelt the U.S. Steel case and its consequences demonstrated the inadequacy of the Sherman Act for the economic problems of the day. From then on, Roosevelt advocated negotiated settlements handled by administrative agencies having the appropriate technical capacities.

The 1912 election campaign (Chace, 2004), in which four candidates were competing (Democrat, Republican, Progressive and even Socialist), placed great emphasis on antitrust issues and resulted in the victory of W. Wilson. Wilson was advised by Louis Brandeis[11]. Brandeis' positions were *a priori* far from those of Th. Roosevelt and from the institutionalist economists' whose recommendations were particularly convergent with those of the progressive candidate. Brandeis espoused a Jeffersonian political philosophy (Brietzke, 1988). The dispersal of economic power was seen as desirable not only in political terms[12] but also in economic ones. Indeed, Brandeis considered that dominance could not be acquired on its own merits and once acquired carried with it the seeds of productive inefficiency (Brandeis, 1914).

[11] Wilson's positions (like those of F.D. Roosevelt later) were hardly assured in economic matters. However, as Fetter (1944, p.889) notes, they were far from laissez-fairist in that, particularly under the influence of Brandeis, he supported "legislation to prevent the use of unfair means to injure and destroy honest and efficient competition in American industry and commerce".

[12] In this perspective democracy can only be maintained if a certain equality of conditions prevails. The leading economists of the First Chicago School shared such a view. Indeed, according to Van Horn et Emmett (2015, p.1445): « […] the liberal revolution had several flaws in Knight's estimation. It over-estimated the ability of markets to constraint concentrations of economic power and under-estimated the potential for economic concentration to be wedded to political power". The risks that excessive concentration of economic power entails for democracy (even if this concentration results only from the merits and not from monopolisation practices) are periodically highlighted in debates on antitrust policy. To provide just a few historical benchmarks relevant to the period we are analysing, we could cite the debates in the US Senate that preceded the enactment of the Sherman Act in 1890, President Roosevelt's 'Curbing Monopoly' speech to Congress in 1938 and, finally, *the Northern Pacific Co* Supreme Court ruling in 1958.
A statement by Robert Jackson (Assistant Attorney General – Antitrust Division, appointed in 1936) foreshadowing the change in direction taken by President Roosevelt from 1938 onwards, Jackson R.H., (1937), "Should Antitrust Laws Be Revised?', *United States Law Review*, vol.71, pp.575-582. R. Jackson's paper is even more important, considering our purpose, it was, at the origin, a speech delivered in September 1937 before the Trade and Commerce Bar Association Executives.

So, Wilson's creation of the FTC Act in 1914 was not, strictly speaking, a political triangulation in which he adopted the agenda of his progressive opponent. If the FTC was indeed a government agency, if it was a way of circumventing the conservatism of the courts, then the purpose of the FTC was to prevent anti-competitive market practices in the first place. The goal was then preventive rather than curative. It was by no means a negotiated settlement of competition. Rather, it was a matter of making all companies, especially the smallest ones, more aware of market practices. By the same token, it was a question of ensuring that the market functioned transparently and fairly, fairness being understood in terms of compliance with market norms designed to protect the weakest players.

Several of Brandeis's dissenting opinions at the Supreme Court clarify the vision of the Wilson team. This is true of the FTC's purposes in the decision issued in *FTC v. Gratz*, 253 U.S. 421 (1920), and of the importance given to market rules that are less oriented towards efficiency than towards the preservation of the weakest players in the ruling in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918[13]). The common feature of these different initiatives is the lack of backing on the economic thought of the Washington decision-makers. The former recognized the merits of economic concentration in terms of efficiency and of social income; they were arguing in favor or a regulation of the economic power. The latter devoted a long article providing an acute analysis of the Sherman Act enforcement, stressing its vagueness and the heterogeneity in courts' rulings, from lower courts to the Supreme Court (Young, 1915).

II – 1910s-1920s: in search for alternatives to antitrust laws - from information exchanges between competitors to a state-backed cartelisation

The 1910s, and then the period from the end of the war economy in the winter of 1918-1919 to the depression of 1929, were characterised by a plethora of proposals to relax the antitrust rules (see, for example, Kirat and Marty (2020) for an overview of post-war proposals). Public enforcement was also particularly low during this period. It was only in the first half of the 1920s that the activities of trade associations were sanctioned. At the same time, the economic literature was characterised by two features. The first was a weak influence on political and legal debates. The second was the persistence of antitrust views, particularly among

[13] It is worth considering two aspects of the stand taken by Brandeis in his dissenting opinion in Chicago Board, as they shed light on his antitrust positions. Firstly, his position is explained by the fact that the rule has the effect of favoring small operators over large ones (Handler, 1957). Secondly, it reflects a broader vision of antitrust law which gives it a purpose that goes beyond economic efficiency by interpreting it in the sense of guaranteeing the reasonable functioning of markets according to usage. This notion is notably the one defended in our contemporary era by Paul (2020).

institutionalist economists, for whom the productive efficiency hypothesis of concentration still prevailed.

Two successive initiatives, both of which aimed to stabilise market conditions by promoting information exchange between competitors, are worth considering. In both cases, accepting 'market imperfections' was seen as necessary either to preserve a desirable market structure or to prevent destructive competition and to ensure the 'efficient' functioning of the market.

The first example was the fair-trade leagues (Bougette and Marty, 2020) which were advocated by Louis Brandeis. They involved allowing small firms with no market power to share information to offset their weak bargaining power or their information deficit in comparison with the largest firms. Brandeis' position on this point can be illustrated by one of his dissenting opinions to the Supreme Court in *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921). This dissenting opinion was expressed in a case related to a judgment against trade associations, in which Holmes also dissented (see Handler, 1957). However, both dissents highlighted the similarities between trade associations and fair-trade leagues regarding the issue of information sharing and market transparency. Nevertheless, a distinction must be made between the two institutional arrangements, since the latter also concerned large firms and were part of a logic of stabilisation of the various industrial branches.

The second case to be considered relates to trade associations, which were central to the judgment in question. It was about promoting intelligent handling of competition (Kirat and Marty, 2020). From an engineer's perspective, it was considered possible to extend the scientific management methods used in the factories to inter-firm relations. The projects were supported by the American engineers' association and backed by the most influential of them, the future President Hoover, who was at the head of the Commerce Department in the early 1920s. The latter spared no effort to obtain a reversal of this adversarial case law at the end of the 1920s from the Supreme Court to prevent the exchange of information from being sanctioned on the grounds of the Sherman Act.

The case for a managed economy, free from the inherent instability attributed to competition, was strengthened in the 1920s and took on a much more important dimension with the advent of the Great Depression and the subsequent deflationary spiral[14]. To cope with overproduction

[14] The inflation rate in the Us is available on https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1913-
The NIRA implementation was concomitant to an inflationary trend.

1928	1929	1930	1931	1932	1933	1934	1935	1936	1937

in certain sectors, to stabilise prices and to amortise investments, it was felt necessary to coordinate the decisions of competing firms. At least this was the opinion that was growing in the business community, which in the immediately preceding period advocated the exchange of information between firms. These recommendations were translated into the Swope Plan.

The logic behind the Swope Plan was based on the previous experience of the War Industries Board which had been in operation between 1917 and the end of 1918. The latter had been a first experiment, deemed successful, of co-ordinating the activities of firms in co-operation with the federal authorities. It had, of course, resulted in the suspension of the application of anti-trust rules. In the winter of 1918-1919, proposals were made to extend the experiment to avoid the anticipated instability associated with the end of the war economy. A post-war industry restructuring crisis was being anticipated and the absence of possible coordination between firms was seen as a potential aggravating factor. The argument of cut-throat competition was then decisive in the debate.

A second point should be emphasised. Swope's recommendations were in line with a movement in Europe that had its roots in the ideas of economic planning. In France, for example, it was echoed in the position taken in 1936 by Auguste Detoeuf, then CEO of Alsthom (now renamed Alstom), at one of the conferences organised by the X-Crise group (the Polytechnician Centre for Economic Studies) entitled *the end of liberalism* (Detoeuf, 1932).

In both cases, the diagnosis was that market signals were incapable of effectively coordinating the decisions of firms. Faced with the resulting instability, the only solution was for the managers of the various industrial branches to conduct their operations jointly. This was the only way to guarantee rational management that would reconcile efficiency[15] and stability[16]. Moreover, this cartelisation was seen as the last bastion against the State's control of the

-1,2%	0%	-2,7%	-8,9%	-10,3%	-5,2%	3,5%	2,6%	1,0%	3,7%
1938	1939	1940	1942						
-2,0%	-1,3%	0,7%	5,1%						

[15] See for instance Brookings (1925) proposing to revise antitrust laws to permit firms' cooperation in order to secure a better productive efficiency. In the same vein, antitrust laws were denounced after the 1929 crash, as "practical obstacles to intelligent planning and concerted efforts in dealing with the problems of overproduction […]" (see Mr. Door's address before the US Chamber of Commerce meeting of Atlantic City, 29th April 1931, Paper Trade Journal, 28th May, 1931).

[16] In this case, it is not a case of a 1970s-style crisis cartel (industry restructuring related questions) or of a transitional suspension of the rules of competition (resulting from a short-term economic crisis), but rather a proposal for the development of a new model of competition regulated by the firms themselves, with the State not overhanging but rather subordinate - this is appropriate in view of the title on managerialism.

economy. However, in each of its proposals, the public authorities were not expected to simply ignore competition rules. Instead, governments were required to patronise information exchange fora and even to enforce agreements against third parties. This means that the *laissez-faire* approach should be abandoned, and that the government will assume responsibility for enforcing cartel agreements by making bidding adherence to them.

While these proposals were implemented in Europe in the 1930s and the first part of the 1940s, as shown by some of the Organising Committees set up by the Vichy regime in France (see Caldari and Dal Pont Legrand, 2024), they were rejected by President Hoover on two main grounds (Hoover, 1930). Firstly, despite the support he constantly gave to the activity of trade associations, he never intended to abandon the anti-trust rules. Exchanges of information between competitors do not appear to be an unreasonable restriction of competition insofar as decisions are better informed and therefore more rational. However, these exchanges must not lead to quasi-cartels that would restrict the strategic autonomy of companies. Furthermore, introducing public action to make membership of these compulsory quasi-cartels and possibly sanctioning non-compliance with their injunctions.

The 1932 Democratic Party convention did not support these proposals either[17]. The Convention defended antitrust as a response to the crisis. However, the year 1932 was punctuated by numerous recommendations for a temporary suspension of the Sherman Act, or even the outright withdrawal of antitrust rules. As we have noted, these last ones were depicted as unsuited to the reality of the American economy and likely to hinder practices presented as essential to overcome the crisis.

Among these initiatives was that of an ABA committee, which led to a response from academic economists coordinated by A. Fetter. Thus, while the Fetter petition was a response to specific recommendations of an ABA committee, it should be stressed that these were by no means isolated in the American debates of 1932. We shall see below that the National Manufacturers Association had similar plans. These proposals preceded the onset of the crisis, as the position of the ABA's Commerce Committee in 1928 had already shown.

This position was detailed in an unsigned article published in the *New York Law Review* under the title "Shall the Anti-trust Law Be Amended[18]? This proposal was a continuation of the trade associations' initiatives to obtain antitrust immunities. It proposed a statutory cap on cartel

[17] See “1932 Democratic Party Platform”, https://www.presidency.ucsb.edu/documents/1932-democratic-party-platform.
[18] Volume 6, n°4, pp.146-154 (anonymous article).

profits by setting a "reasonable" target of 8% per year. The Supreme Court's decisional practice, in particular *Cline v. Frink Dairy Co*. 274 U.S. 445 (1927), was denounced as an obstacle to this model of regulated competition. The crisis led to an exacerbation of these proposals leading to the solutions proposed by Swope. In particular, production restriction agreements between competitors were proposed ... to ensure the continuation of price competition (Handler, 1932, p.267).

Arguments in favour of a Sherman Act withdrawal were advanced at the same time as the Fetter petition was being drafted. At the symposium organised at Columbia (Handler, 1932, p.266), this position was defended by Professor H. Parker Willis, for whom the imprecision of the Supreme Court's decision-making practice argued in favour of the establishment of a statute making it possible to define ex ante the authorised and prohibited practices[19]. Proposals made by M.W. Watkins at the same conference suggested transforming the FTC into a guardian of inter-firm cooperation by reorganising it into four departments (Handler, 1932, p.268): a bureau in charge of trade associations whose mission would be to approve their codes of conduct and pricing policies, a bureau of trade practices to sanction *dishonest* commercial practices[20], a bureau of industrial coordination in charge of facilitating inter-firm cooperation, and finally a bureau of corporations whose mission would be to regulate issues relating to corporate law. In Watkins' view (quoted in Handler1932, p.268), the withdrawal of the Sherman Act was all the more necessary as “our national psychology has changed perceptibly. The public has come to demand economic security rather than free and open competition. Our task today is to organize competition”.

III – The Fetter’s petition

Faced with these proposals to suspend the competition rules, A. Fetter, a marginalist economist, initiated a petition in the summer of 1932 that brought together several academic economists,

[19] One of the proposals made at the American Bar Association conference in Memphis in 1929 was to establish a mechanism for reporting to the FTC for antitrust immunity. Several proposals aimed at transforming the FTC into such a Federal Trade Court (72nd Congress Committee on the Judiciary, Senate bills 2626, 2627,2628). See also, for the ex-ante approach, the position of the National Association of Manufacturers (24 March 1931), which proposed the establishment of a tribunal or advisory body to guarantee the conformity of companies' strategies with antitrust rules (New York Journal of Commerce, 25 March 1931). In the same vein, the vice-president of Texas Co. advocated "a change in the machinery of enforcement of the Sherman Antitrust Act, so that businessmen may determine before, instead of after, an act whether it is unlawful" (Journal of Commerce, 20 March 1930). Thus, the replacement of an ex ante notification model was seen as a way to ensure efficiency-enhancing cooperation, avoid ruinous competition, and provide legal certainty for firms.

[20] One might ask what is meant by "dishonest commercial practices" in this context. Are they practices that do not follow the codes of conduct imposed by the trade associations?

including Jacob Viner, one of the leading figures, along with Frank Knight, of the early Chicago School, and John Commons, the most influential institutional economist.

Institutionalists' support for antitrust enforcement gradually emerged between the late 1920s and the 2nd New Deal (see Burns, 1936 and Rutherford, 2013). This support was based on increasing scepticism as to the economic efficiency of concentration. However, the institutionalists' support was only gradual. The case of W. Hamilton is emblematic of this progressive convergence. He remained opposed to Antitrust for a long time, as his 1932 book shows[21]. He did not change his position until 1938 when he joined Thurman Arnold's team at the DoJ's ATR (Waller, 2005).

It should be noted that Arnold himself had published a strongly critical piece of work on antitrust just one year before his appointment. Then a professor at Yale University Law School, he had published a rather satirical book on the Sherman Act's enforcement, entitled The *Folklore of Capitalism* (Arnold, 1937). He described Antitrust as a pointless ritual to make acceptable the radical transformation of the American economy towards a model of very large firms and high concentration by giving the impression that a decentralised economic power was still possible. Not only did the Antitrust Act almost never led to companies being dismantled, but it also hindered any regulatory action by the federal government by maintaining a fiction of possible control by the courts (Fowler, 2021, p.273). In this respect, Thurman Arnold appeared a year before his appointment to be in full accordance with the approach advocated by the institutionalists[22].

[21] The case of the Columbia Symposium on the Antitrust Laws organised in 1932 is particularly interesting to consider in this respect in that it opposed Hamilton and Fetter (Handler, 1932). Hamilton insisted on the underlying model of Antitrust, which is based on a textbook conception of competition that no longer corresponds to the actual operating conditions of the American economy. According to Hamilton, this maladjustment was reinforced by the implementation of antitrust rules by the judiciary. The result was a policy described as spotty and ineffective. The solution that appeared to be the most appropriate to Hamilton was thus to adopt the path of regulation for companies enjoying monopoly situations and to favour private self-regulation practices for the others. This position was criticised by Fetter who considered that the problems did not result from the antitrust laws but from the lack of application of these laws.

[22] Returning to the institutionalists' attachment to antitrust, it is worth asking about the particularly early involvement of John Rodgers Commons. This can be explained by his collaboration with Fetter in 1923-24 in the FTC's work against anticompetitive practices in the cement industry and in the steel market (the Pittsburgh plus system) through the parity point system. The shared experience of Commons and Fetter in the FTC's work on the parity point system is an important step in explaining their proximity and shared commitment to antitrust. This system, introduced by the cement industry at the beginning of the 20th century, allowed transport costs to be included in the price of cement and made sense as long as cement was transported by rail. However, it gradually lost its relevance as soon as road transport became possible. In the end, maintaining it meant stabilising prices and limiting geographical competition between the companies concerned. The case was not finally decided by the Supreme Court until 1948, but the work of the FTC began in the 1920s. The saga of the parity point was an enduring conflict between Fetter and J.M. Clark (Dumez and Jeunemaître, 2001). For an understanding of these debates in the American economic literature, see Watkins (1962).

The progressive nature of the rallies must in any case be seen in the context of the political situation and the reversals of the Democratic administration to which many economists of the institutionalist tradition were committed[23]. It should be remembered that Roosevelt's entourage was characterized by the opposition of very different factions in the field of economics and that his preferences in this area were, to say the least, vague and changing. Even the Supreme Court's overturning of the NIRA in 1935 did not lead to an immediate shift in favor of antitrust. This point illustrates the insufficiency of a single inflection among the intellectual, jurisprudential and finally political trajectories to bring about an inflection.

The support for Sherman Act enforcement among early Chicago School economists is less surprising, but needs some explanation. Although the market model underlying the logic of antitrust is less distant from their views than that of the institutionalists, they were also sceptical about the ability of antitrust alone to respond to the risks posed by increasing concentration. Concentration seemed to them to be harmful in two ways. First, of course, it impedes the price signals of competition. Second, they believed that it was impossible to separate the economic and political spheres. Excessive concentration in the former inevitably led to the risk of dispersion of power in the latter. This means that even if concentration might be desirable in terms of economic efficiency, it could create problems in the political sphere by providing private economic powers with the capacity and incentives to avoid regulatory risks (see, for example, on Frank Knight's views, Sally (1997)).

Antitrust enforcement was therefore logically indispensable to guarantee the dispersion of these two powers, as Simons showed in his 1934 book and in a 1936 article. Whether in his *Positive Program for Laissez-Faire* or in his "Prerequistes for competition," Simons offered a synthesis of the First Chicago School's position on antitrust policy. In contrast to classical Manchesterian liberalism and the post-war positions of the Chicago School, Simons considered that markets are not self-regulating. The trend towards concentration of economic power was, however, damaging in both economic and political terms. Antitrust must play a preventive role to counteract the risks of monopolisation but also, if necessary, a curative role by serving as a tool for deconcentration (Simons, 1936).

[23]These hesitations should be seen in the light of the shifting balance among Roosevelt's advisers between those who favoured a return to the logic of the NIRA and those who gradually came around to the solution of reviving public antitrust enforcement. It should be noted that the turning point would be manifested a little later in the support given to Thurman Arnold by institutionalist economists, whether W. Hamilton in the Antitrust Division of the DoJ or W. S. Mitchell, who then headed the NBER (from 1920 to 1945) and who reviewed his book *The Bottlenecks of Business*.

The Fetter petition can thus be grasped as a decisive step in this twin academic dynamic of the 1930s, which saw institutionalists on the one hand and liberal economists on the other rallying around the solution of a determined implementation of antitrust rules by the federal government[24].

The Fetter petition was prepared in the late spring of 1932 and published in the *American Economic Review* in September of that year. It was a reaction to the outcomes of a committee meeting of the ABA in New York in the winter of 1931-32[25]. These attributed a significant part of the depression to the constraints of the Sherman Act. It must be stressed that the proposal of the ABA commerce committee was not that of the ABA per se. The ABA was then a conservative association (Matzko, 1984), certainly preoccupied by the development of corporate power but without really taking a clear position on antitrust. The central figure in the Commerce Committee's proposals for antitrust reform was its chairman Rush C. Butler, who set up a new committee in 1932[26]: the Trade and Commerce Committee, whose members included New Deal activists (Shamir, 1995).

The Fetter Petition is a rebuttal to this thesis and aims to ward off the risk of pro-monopoly plank views being incorporated into the platforms of the Democratic and Republican parties. Arguing against any form of planning, the Fetter Petition denounces the main lines of the Swope Plan: « the pending proposal to confer upon trade associations the right to make monopolistic agreements, to exercise monopolistic control over conditions of production, and to fix prices even though linked with some nominal public supervision by the Federal Trade commission or some similar body » (Fetter, 1932, p.467).

Indeed, the very argument for state supervision was a dimension of aggravating the effects of cartelisation. If the public authorities were effectively able to exert influence on the companies' decisions, this supervision would amount to state control. If, on the other hand, the public authorities limit themselves to ratifying and making obligatory the results of negotiations between private actors, the mechanism would amount to a regulatory capture. This would be

[24] it may be useful to compare these positions with those defended at exactly the same time in the Ordoliberal Manifesto. See https://link.springer.com/chapter/10.1007/978-1-349-20145-7_2

[25] See "Sentiment Crystalising in Favor of Amendment of Antitrust Laws", quoted earlier. It is worth noting how acute were the debates about the reforms of antitrust laws within the ABA Commerce Committee meetings around 1928-1932 (for instance: "Shall the Anti-Trust be Amended?" New York Meeting, 1928; Proposed amendments to the Anti-Trust laws, New York Meeting, 1929) The Chair of the Commerce Committee published in 1930 an article in *the Annals of the American Academy of Political and Social Science*, 147(1), 189-194.

[26] Note that the Fetter petition predates the publication of the Report of the standing committee on commerce, published in 1933, which contains the most comprehensive proposals for reform. But it is true that the ABA commerce committee had started the process at the ABA meeting in New York in March 1929. The ABA Journal regularly published summaries of ABA committee meetings.

private-led regulation, relying on the public authorities to monitor the activities of the cartel and to sanction any deviation to its requirements.

In contrast to these positions, the Fetter petition argued not only for the preservation of antitrust rules but also for stronger public enforcement. The preamble of the petition emphasises that it is oriented towards a rebuttal of the demand for withdrawal or suspension of the Sherman Act, it does not oppose the implementation of additional measures to the latter which could be of a more regulatory nature and informed by the experience gained in public enforcement whether in the form of regulatory commissions or even nationalisation. In this respect, the Petition suggests a compromise with the long-standing positions of the institutionalists, echoing the position adopted by Henry Simons in his 1934 and 1936 pieces.

The content of the petition itself highlights the dangers of relaxing the competition rules enforcement.

Firstly, it stresses that government oversight of business-to-business agreements can only be futile as public agencies may not have adequate resources to assess their effects. The risks associated with cartels are not limited to the economic sphere but must also be considered in the political sphere. In so doing, the Fetter petition takes up the principles of the First Chicago School, notably those defended by Frank Knight (Van Horn and Emmett, 2015).

Second, as the NIRA example will unfortunately prove, such agreements may more closely reflect the interests of large firms than those of smaller ones. The undue protection offered to large firms results in a loss of opportunity for more innovative firms. This point was made in Fetter's response to Hamilton's arguments at the Columbia symposium on antitrust laws in 1932. In his view, antitrust laws should do restrict the freedom of firms but that ensure that dominant firms comply with the rules and behave in a 'decent' manner (Handler, 1932, p.265).

Third, in the absence of a price regulation performed by adequate public commissions, the petition insists that free competition is the only way to ensure the fair functioning of markets.

Fourth, the petition rejects, as stated in its preamble, the idea that competition rules are the cause of production overcapacity. Depression is not a consequence of the prohibition of coordination of investment and prices between firms, as argued by the trade-associations

advocates, but, on the contrary, is the result of an excessive prices rigidity stemming from market powers that are insufficiently eroded by competition rules[27].

Fifth, the petition emphasises that the Sherman Act has been episodically and inadequately enforced since its enactment. Hence, the difficulties cannot be attributed to its core purpose, but rather to its insufficient enforcement.

Sixth, the petition calls for vigorous enforcement of competition rules and their reinforcement, if necessary, with additional safeguards to counteract the concentration of economic power[28]. It should be noted that the closing sentences of the Fetter petition directly evoke positions similar to those of Louis Brandeis by focusing directly on firm size and structure[29]: « Pledge of further legislation to remedy widespread evils manifestly resulting from the abuse of the corporate fiction, and from the enormous excesses of the holding company devices » (Fetter, 1932, p.468).

A response to the Fetter petition was published in the Annals of the American Academy of Political and Social Science in January 1933 by J. Harvey Williams (Williams, 1933). Williams was a typical example of the business community advocating a suspension of the antitrust laws. He was vice-president of an industrial trade association, had been president of the Brooklyn Chamber of Commerce in the early 1920s, and in 1933 was director of the New York State Economic Council.

This reply illustrates the proposals to suspend the competition rules through a motion made by the National Association of Manufacturers (NAM) and no longer by the ABA committee against which Fetter had protested. The NAM also attributed the crisis to the impossibility of inter-firm co-ordination ... linked not to the Sherman Act but to a restrictive interpretation by the courts (Williams, 1933, p.83). Therefore, the argument is similar to those made by the trade associations in the 1920s: agreement between producers on prices and output is necessary for

[27] This will be the position championed by the First Chicago School to explain the economic failure of NIRA a couple of years later, see Simons (1943).

[28] In this the Fetter petition foreshadows some of the Chicago School's positions that would be pursued in the immediate post-war period by Aaron Director, notably at the first Mont Pèlerin Society conference in 1947, before he turned away from Simmons' positions. As Van Horn and Emmett (2015, p.1449) point out: “Although [Director] expressed qualified praise for the enforcement of American anti-trust laws, he also suggested that greater anti-trust enforcement was necessary to disperse existing concentrations of market power in Europe and in the United States”. See also Caldwell (2022) for a transcript of the first Mont Pèlerin Society conference.

[29] However, considering the size of firms as a problem in itself was not exclusive to Louis Brandeis at the time and also corresponded to a concern of liberal economists, as Simons' positions shown in his 1934 seminal book

the stability of the productive system. It is a necessary condition for the amortization of investments.

The legislator was therefore called upon to suspend the application of the rules of competition in order to allow the conclusion of agreements between producers in so far as these were necessary to stabilise prices. The inability to coordinate was thus presented as the source of ruinous competition, the very source of the growing concentration of markets against which antitrust was theoretically directed. Thus, the NAM's proposals proposed a temporary suspension of antitrust rules in the form of an Emergency Industries Preservation Act, supervised by the FTC, pending revision of the Sherman Act.

Williams' arguments in favour of this temporary suspension (which of course echoes the NIRA that F.D. Roosevelt would put in place a few months later) followed several lines of argumentation (Meese, 2013).

The first is a progressive corruption of the common law foundations of the Sherman Act. According to Williams (1933, p.73), the Act was not intended to merely 'put into statutory form [...] the old doctrine of the common law'. The restrictive meaning of the interpretation of the Sherman Act would have led to its distortion by making it an instrument for reducing the freedom of contract of firms...by preventing them from concluding agreements. The crisis is thus attributed to the limitation of individual freedoms that the concept of restraint of trade did not carry. Thus, the NAM can argue that it is not opposed to antitrust rules but to an interpretation of the latter that does not allow for the establishment of voluntary agreements that would prevent destructive competition.

The second strand of the argumentation is that antitrust rules lead to a result opposite to their very purpose. By preventing legitimate cooperation between firms, they expose them to ruinous competition which results in an increasing concentration of the economy[30]. On the contrary, we would be tempted to write, consultation between competitors avoids concentration...

The NAM then refers to the precedent of the Emergency Industries Preservation Act which has just been adopted by the Australian Parliament. The latter allows competing companies to enter into transitional stabilisation agreements. These agreements are presented as indispensable for

[30] In the context of the symposium on antitrust laws organised at Columbia in 1932, the argument that the constraints induced by the Sherman Act resulted in incentives for concentration was defended by A.R. Burns and A.A. Berle in particular. As Handler (1932, p.269) notes: "the conclusion was that the anti-trust laws have been a failure insofar as their effect upon the merger movement is concerned". To put it another way, "enlarging the freedom of trade associations" could meet the challenges of increasing concentration by removing some of its necessity and limiting the effects of ruinous competition.

collective decisions aimed at stabilising prices and volumes produced, insofar as no firm can take such decisions unilaterally in the uncertainty of its competitors' actions. Government supervision, therefore, has a role to play, but it must take the form of regulation, which is only legitimate for public utilities or for industries for which an assignment with a public interest status can be established[31].

The rest of Williams' contribution is even more interesting for our purposes, since it is presented as a refutation of the Fetter petition. First, he insists on a distinction already introduced by the trade associations in the 1920s between legitimate competition, understood as freedom of choice, and the ruinous and blind cut-throat competition that would result from the courts' misinterpretation of the common law principles contained in the Sherman Act. The latter principles, Williams argued, did not preclude legitimate cooperation between competitors that did not in itself cause collective harm. According to Williams, such cooperation would not be likely to jeopardise the interests of small firms because it would make it possible to avoid the increasing concentration of the industry due to the weakening or even failure of firms induced by destructive competition! This last statement is consistent with earlier analyses of destructive competition, which emphasised the socially negative effects of cut-throat competition (J.B. & J.M. Clark, 1912; Mayhew, 1998).

It is important to note the extraordinary continuity of the arguments against the application of competition rules before and after the crisis: obstacles to inter-firm cooperation create dynamics that are collectively detrimental to economic stability and to the interests of small firms themselves, as they lead to increasing concentration, resulting in bankruptcies linked to cut-throat competition and concentration strategies. It is therefore necessary to put an end to this restrictive interpretation of the Sherman Act, which departs from common law standards. Public oversight of inter-company agreements would not only guarantee their reasonableness, but also increase the certainty that all companies will respect them.

Fetter published a response to Williams' arguments in the same January 1933 issue, entitled "The truth about competition". He showed the same aptitude for controversies, even polemics, that he displayed against J.M. Clark in the case of parity points in the cement industry (Dumez and Jeunemaître, 2001). It shows that the Sherman Act is rooted in an American tradition of economic freedom and competition, which is not in itself blind or destructive competition. Calls for the suspension of antitrust rules would, if heeded, have the consequence of protecting the

[31] See Kirat and Marty (2022) on the U.S. notion of affectation with a public interest.

dominant firms of the day from legitimate and desirable competition from new entrants. These calls are described by Fetter (1933, p.95) as all the more illegitimate because the Sherman Act has been only slightly enforced.

He also denies the claim that the Sherman Act was unfavourable to small firms and even counterproductive with regard to its initial objectives insofar as it favoured concentrations by making cooperation impossible. Thus, according to the reasoning of Williams (1933) as analysed by Fetter (1933, p.97), for the member firms of the NAM, mergers are aimed more at acquiring market power than at achieving efficiency gains: “In plain words, the prime motive for mergers has been to evade and defeat the Sherman law enacted to prevent monopoly”.

Fetter then focuses on the very objective of the cooperative ventures for which the companies wish to benefit from antitrust remoteness: the concerted fixing of prices. He shows that this cannot proceed from any other logic than what we would call in today's language a private interest-led regulation. The stabilisation provided by the large firms can only result in transferring the cost of adjustments to other economic actors. Suspending the Sherman Act would thus be tantamount to securing the positions that the firms have been able to maintain thanks to its inadequate application. In Fetter's opinion, suspending or withdrawing the Sherman Act and the Clayton Act would lead to an aggravation of the depression and threaten the foundations of the American economic system.

IV – From the Fetter petition to the resurrection of the Sherman Act (1932-1938)

As noted above, the petition marked an important stage in the appropriation of antitrust by American economists. This rallying did not have any practical political effect in the short term, as President Roosevelt, who was very much influenced by the promoters of a ‘command and control’ planning strategy faction of his cabinet, opted for a policy inspired by the Swope Plan. The NIRA was a radical move away from the 1932 Democratic Party platform. It led to a cartelisation to the advantage of big business through codes of conduct that were validated and made mandatory by the federal government.

The invalidation of the NIRA in 1935 by the Supreme Court in the 1935 ruling *Schechter* led to a period of uncertainty in federal policy regarding competition[32]. There were, however,

[32] It can be noticed that, unlike Schechter, in 1937 the Supreme Court upheld the constitutionality of the Wagner Act, which instituted the NLRB. In *National Labor Relations Board v Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), the Court upheld the constitutionality of the Wagner Act by considering not competition per se but the scope of the Commerce Clause. This case put an end to judicial resistance to the New Deal economic legislation. Unlike Schechter, in 1937 the Supreme Court upheld the constitutionality of the Wagner Act, which instituted the NLRB. In National Labor Relations Board v Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937), the majority of the Court upheld the constitutionality of the Wagner Act

initiatives that showed a gradual re-appropriation of the instrument, such as the Robinson-Patman Act of 1936. However, as Watkins (1942, p.90) noted, if the NIRA left few regrets, the adherence to antitrust was only because it was the only public policy lever available: "Antitrust policy was invoked again, not because it promised stability and 'plenty', but because it was the only alternative at hand".

Antitrust also reappeared on the agenda with the appointment of Robert Jackson as Assistant Attorney General in 1936 Although Jackson gave the impetus for a return to antitrust and was directly responsible for the appointment of Thurman Arnold, his positions on antitrust in the autumn of 1937 reflected the period of uncertainty in which the Democratic administration still found itself. A speech he made on September 17, 1937 before the Trade and Commerce Bar Association illustrates both the uncertainties of the time as to the policy to be followed and the main lines of force that would structure Thurman Arnold's action the following year (Jackson, 1937).

Firstly, consistent with the many criticisms that were made of antitrust in 1932, the Assistant Attorney General deplores the uncertainty that results from the implementation of the Sherman Act through the courts. This implementation does not allow for clear standards and rules whose application is fairly predictable. Both the public authorities and the companies are therefore placed in a situation of legal uncertainty. Moreover, judicial enforcement hinders the federal government in implementing regulations negotiated with companies[33].

Secondly, Jackson revisits a view that was advocated by Brandeis in his dissent in *Gratz* as to the purposes of the FTC: antitrust is not just about law but also about economics. Practices must be captured by their effects and the results of antitrust must be measured by this criterion. In his words, enforcement must be carried out with a sense of proportion. This means both not pursuing practices whose economic effects may be desirable and considering the potential effect that public enforcement could have: “I have no interest in ‘trust busting’ for the sheer joy of ‘trust busting’ or in legal assaults on combinations which have economic necessity on their side. We should not spend great sums to obtain decrees which are economically unenforceable and, when carried out in form, are often only lessons in futility. Antitrust suits provide spectacular

by considering not competition per se but the scope of the Commerce Clause. This case put an end to judicial resistance to the New Deal economic legislation.

[33] With this argument, Jackson bridges the gap between the path outlined by Th. Roosevelt in his presidency (with the US Steel case) and in his 1912 programme, and the practice of his successor Thurman Arnold in the following years.

legal battles and ‘famous victories’. But this exercise for legal theoreticians often fail to produce economic effect”.

It is appropriate to associate this scepticism about the enforcement of competition rules in the courts with the positions taken at the same time by his successor Thurman Arnold in his book “The Folklore of Capitalism”. It is also particularly important, in our view, to highlight the continuity between these positions and those taken by President Theodore Roosevelt in his 1912 campaign regarding the effects of the Sherman Act: “[Antitrust] has occasionally done good, has usually accomplished nothing, has generally left the worst conditions wholly unchanged, and has been responsible for a considerable amount of downright and positive evil” (Roosevelt, 1912).

Nonetheless, Jackson's position was fundamentally different from the recommendations of 1932 and the policy implemented under the NIRA between 1933 and 1935. The Sherman Act is now seen as a tool, admittedly imperfect, but which had the merit of protecting the United States from the throes and consequences of European-style cartelisation[34]. It is not, however, seen as the only tool for controlling the economic power of firms.

Jackson takes up the arguments of the Chicago institutionalists and liberal economists and the dimensions present in the Fetter petition. While antitrust is a tool to keep the federal government out of the regulation of prices and business strategies, it should not be the driver of political indifference to market outcomes. As such, it represents “the lowest degree of government control that business can expect” (Jackson, 1937, p.576). The alternative that is presented to firms is therefore the following: the enforcement of antitrust rules, and an additional degree of governmental supervision when necessary[35], or a government control of the economy taking a much more dirigiste form than that experienced during the NIRA.

Two additional points must be emphasised, which connect some of the recommendations of the Fetter petition with what Thurman Arnold will achieve. Firstly, the price rigidity that results from inter-firm 'cooperation' cannot stabilise the economy. It can only prolong the crisis. Second, as Jackson (1937, p.579) writes, "size is no offense". Contrary to the Brandesian position, Antitrust should not be understood as a tool for deconcentrating but as a tool for the

[34] It will be one of the core arguments of his successor in his piece *The Bottlenecks of business* (Arnold, 1940). For an analysis of the cartel issue during the 1930s see Hewitt (2023).

[35] Jackson (1937, p.581) insists on the complementary role of antitrust enforcement (possibly amended) and public control or supervision in industries related to a collective interest, to natural resources or where competition is impossible.

search for productive efficiency. Stabilization at the initiative of existing firms is however not a lever for greater efficiency but for the preservation of acquired situations and current rents.

The positions taken by Jackson in 1937 foreshadowed the inflection that would come in 1938. The appointment of Thurman Arnold combined with F.D. Roosevelt's "Curbing Monopolies" speech of 29 April 1938 (which offered the necessary political support) marked a renaissance of American antitrust (Kirat and Marty, 2021b) after the short-lived impetus given at the beginning of the century by Republican presidents Th. Roosevelt and H. Taft (Cheffins, 2021).

The Fetter petition was characterised basically by the search for a consensus between the different sensibilities of American economists. At least three of them could be distinguished. The first is neoclassical and corresponds to the vision of signatories such as Fetter or Viner. The crisis stems from the insufficient application of the Sherman Act, which does not guarantee sufficient price flexibility. This is the only way to achieve efficiency gains and above all to pass them on to consumers. A second sensitivity is emerging with the opening in favour of regulatory commissions in specific sectors. The reference to institutionalists such as Commons is direct. The final paragraph of the petition, as noted in the previous section, is much more directly Brandesian in that it considers that additional legislative initiatives should be aimed at limiting the scope for firm growth through complex financial arrangements. These three visions are not mutually exclusive but are difficult to implement in parallel as a matter of public policy. The petition ultimately supports two ideas. Firstly, the solution to the crisis cannot come from suspending competition rules. Secondly, the criticisms that could be levelled at the Sherman Act had less to do with its possible effects than with the fact that it was not sufficiently applied.

The Thurman Arnold era was indeed characterised by a predominance of the first over the other two, even though his sensitivity and the presence of Walton Hamilton at his side gave a strong institutionalist tone to his action, as shown by the empirical analyses of competition in many industrial sectors, such as the experience of the Temporary National Economic Council (TNEC[36]). Thurman Arnold's action was not Brandeisian in the sense that he did not consider

[36] It should be noted that the TNEC reports were not very positive about the effectiveness of competition enforcement through the activation of the Sherman Act. In Note No. 38, Study of the Construction and Enforcement of the Federal Antitrust Laws, Handler (quoted in Watkins, 1942, p. 109) argued that the courts' decision-making practice did not allow for the coherence and consistency of antitrust policy and ultimately led to the oligopolisation of the economy, which argues in favour of accompanying a more resolute application of antitrust rules with the development of complementary regulatory policies. It should be noted, as the Burns study shows (Burns, 1936), that the highly empirical and not very formalised methodology used in these reports borrows heavily from the approach of institutional economists.

the size of firms as a problem in itself[37]. What was important was that competitive pressure should be sufficient for firms to be forced to redistribute efficiency gains to consumers.

Thus, Thurman Arnold's action was targeted at the objective of economic efficiency. It is therefore opposed to the structuralist approach of the Warren Court in the post-war period. However, it also differs radically from the approach of the Second Chicago School in that it considers that it is necessary to implement a resolute public enforcement[38]. It additionally contrasts with the policy of the Supreme Court during the Warren era in that it adopted negotiated procedures rather than per se rules[39] as its primary vehicle.

Conclusion

In conclusion, if we were to adopt the perspective of the Law and Political Economy movement, we would consider that Thurman Arnold's views on efficiency might lead us to regard him as a forerunner of the Law and Economics approach (Britton-Purdy & al., 2020).

However, Arnold, like Fetter, seems to us to be at the confluence of two traditions rather than a harbinger of a purely Chicagoan approach. The idea that concentration may be necessary for efficiency gains, but that public action is necessary for a fair distribution of those gains, and that negotiated action can effectively and legitimately achieve this, is closer to the positions of the progressives who supported Theodore Roosevelt than to the antitrust minimalism of the Second Chicago School. In this respect, as Panhans and Schumacher (2021) show, institutionalist conceptions emphasised the unrealism of perfect competition, the diversity of industries in terms of competition and consolidation, and above all the need for social control.

[37] The question of firm size was never a problem for Thurman Arnold, as long as it was based on efficiency and not monopolistic behaviour. In this respect, it is important to distinguish the position of the Roosevelt administration and, earlier, of the economists united in the Fetter Petition, from the vision initially defended by Louis Brandeis and later taken up by Oliver Douglas at the Supreme Court (Rogers, 2008). The issue remains that of qualifying the behaviour of firms, not that of a market structure deemed preferable. It should therefore be stressed that the model advocated by Theodore Roosevelt is more influential than the one defended by Brandeis, if we take the categories of the political debate of 1912. This difference explains the distance of the proponents of the neo-Brandeisian current from Thurman Arnold's approach. As Teachout and Khan (2014, p. 63) note: 'Ironically, the greatest burst of antitrust enforcement - as distinct from the antitrust laws themselves - was accompanied by an effort to tone down the political content. Thurman Arnold, who placed antitrust and competition policy at the centre of the Roosevelt Administration's economic policy, downplayed the political problems of scale and concentration, and focused on the economic harms".

[38] S. Waller (2004) provides significant data about the huge strengthening of DoJ antitrust enforcement while Arnold was on duty in the head of the Antitrust Division: "the number of Antitrust Division employees grew from eighteen to nearly five hundred, and the budget more than quadrupled (…). New cases jumped from eleven in 1938 to ninety-two in 1940 and investigations jumped from fifty-nine to two hundred fifteen in the same period. By February 1941, the Antitrust Division had ninety total criminal and civil cases pending involving 2909 defendants with thirty additional grand juries authorized or in progress" (p. 582).

[39] As Kauper (2002, p.1873) states, Warren era judgements "were more consistent with civil rights thinking than economic analysis".

Depending on the industry, this could range from self-regulation to state regulation through arrangements such as trade associations. Ultimately, however, the institutionalists favoured regulated competition and even the government of industry by commissions of experts.

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