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OUTPOST YEARS FOR A START-UP AGENCY: THE FTC FROM 1921–1925

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This study examines the Federal Trade Commission during the Presidential term that began in March 1921,[1] which Warren G. Harding started and Calvin Coolidge finished after Harding died. In its first six years, the Commission had already been shaken by high turnover at the Commission level and by American participation in the First World War—participation which produced a virtual suspension of antitrust, a diversion of the agency from its contemplated tasks, and dramatic swings in staff size. Now it confronted, as well, its first change in Presidential leadership.

We see the distant events of this era as having considerable significance for current policymaking, especially for the design and operation of new competition policy systems. In this article, we focus on events in the latter part of the agency's first decade, with brief summaries of its earlier years. This was a period in which the agency faced tremendous challenges in building a relatively novel institutional framework and applying the agency's new powers to address specific commercial phenomena. Today the number of jurisdictions with competition systems exceeds 110, and over half of these systems have been formed since

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[1] Until 1937, the Presidential transition took place on March 4. *"I Do Solemnly Swear . . . ," Presidential Inaugurations*, http://memory.loc.gov/ammem/pihtml/pimenu.html. The date was moved to January 20 by Constitutional Amendment. U.S. Const. amend. XX § 1.

1980. In the past five years alone, there have been major additions to the roster of new systems (e.g., China and Egypt) and the substantial reformulation of older competition regimes (e.g., India and Pakistan). These and many other nations now face many of the same institutional challenges that confronted the FTC in the Commission's first decade.

Reflecting on the FTC's experience and those of other authorities suggests that there is an identifiable life cycle that characterizes the development of a competition agency. In the early phase of this lifecycle, competition agencies encounter many of the same fundamental questions about how to design a new system of law and create institutions to apply the law effectively. In its first decade, the FTC struggled to set priorities, to establish an effective internal structure and operating procedures, to gain acceptance for its judgments before reviewing courts, the public, and Congress, and to define how it would exercise a broad, elastic mandate amid a multiplicity of expectations about what it should seek to accomplish. These are precisely the issues that face new agencies today in the early phase of their existence, but, unlike later national agencies with broad competition (and sometimes consumer protection) mandates, the FTC confronted them without prior national templates to which it could look.[2]

The Commission's experience in its first decade sheds light on how an agency might go about facing problems that we now know to be predictable features of a competition agency's first years. Several lessons from the decade ring true today. For example, a major determinant of an agency's success is its ability to sustain a good fit between its program commitments and its capacity to execute the programs skillfully. An agency also must pay close attention to how decisionmaking authority is assigned. The FTC unwisely adopted the custom of rotating the chairmanship annually among its five Commissioners. This arrangement came at a high cost in operational effectiveness, for it prevented a single Chair from engaging in the longer-term planning and prioritizing that an agency needs to prosper. Early efforts to sustain the FTC's decisions before the federal courts suffered from a tendency to issue opinions consisting of little more than some description of facts and a cryptic statement of the rationale for the outcome. The FTC's early experiences thus suggest how new agencies can improve their effectiveness.

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[2] The FTC would itself provide a template for other national agencies, including those that combined broad sectoral reach with both competition and consumer protection work. The FTC was preceded as a national regulatory Commission by the Interstate Commerce Commission, but that agency was engaged in sector-specific public utility regulation that raised far different issues than did the FTC's broad regulatory authority.

In the context of a longer-term project to explore the FTC's history, we also touch in this study on three related questions.

First, how did the Commission function during these years? How was it organized, what were its internal fault lines, and where were its tensions and alliances with external stakeholders and collateral public institutions, such as the Departments of Commerce and Justice?

The answers turn in part on the fate in the 1920s of the Progressive movement that spawned the FTC. Though the crusading progressivism of the 1910s was in retreat, the Commission remained an outpost for both collective and individual actions by Wilson-appointed Progressives of differing stripes. Most discussions of the FTC in the 1920s focus on William Humphrey, a controversial ex-Congressman who drew headlines with his arrival in 1925, his removal by Franklin Roosevelt in 1933, and his posthumous vindication when the Supreme Court held, in 1935, that his removal had been unlawful.[3] Although Humphrey's arrival would play a galvanizing role, the FTC was no stranger to political disputes before he came; Huston Thompson, a Wilson holdover, was in some ways his mirror image.

Further, progressivism was neither dead nor dormant in the 1920s. Elements survived in both parties' Congressional delegations and in the Administration, providing institutional allies for Commissioners. In the cabinet, Secretary of Commerce Herbert Hoover pursued a variety of "associational" progressivism, whose adherents included Louis Brandeis and FTC Commissioner Nelson Gaskill. The Commission also found occasional allies in the Justice Department, particularly, on at least some issues, under Attorney General Harlan Fiske Stone (1924–25).

The answers also depend on the early Commission's skill in maneuvering through an existing structure of public institutions that, by law or by their own initiative, exercised policymaking functions that overlapped directly with the FTC's charter or strongly affected its programs. For example, in 1914 Congress gave both the FTC and the Justice Department power to enforce the Clayton Act without specifying a mechanism for allocating tasks between them. With its array of authorities, the FTC Act created the possibility (soon to become a reality) that the Commission would be evaluating and commenting upon the adequacy of the Department's work, and, in at least some cases, sharing enforcement responsibility with the Department. By all of these measures, Congress

[3] *See, e.g.*, ELLIS W. HAWLEY, THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER 85 (2d ed.1992) [hereinafter GREAT WAR]; Humphrey's Executor v. United States, 295 U.S. 602 (1935).

made the agency a rival to the Department, a development that top DOJ leadership did not welcome in 1914 and would disapprove in the years to come. The wisdom of the experiment with a decentralization of antitrust policymaking between two federal institutions would depend on how rivalry and cooperation between these bodies unfolded. The experience of the FTC's first decade revealed tensions that persist to this day.

Second, a related question explores conceptual frameworks that drove or divided the agency. What were the interweaving ideas that, in many cases, transcended party lines? Various visions that competed within the Commission during these years all had earlier roots. Some traced back to, among other visions, Woodrow Wilson's "New Freedom"; Theodore Roosevelt's "New Nationalism"; and the associationalism of Brandeis and others.[4]

Third, how well did the FTC accomplish the tasks that it set for itself, or that others set for it? Past studies have tended to denigrate its performance broadly and accuse the agency, among other faults, with having a preoccupation with insignificant matters; later characterizations of those studies have tended to magnify negative assessments.[5] Our view of the early FTC experience is more favorable. Most notably, we find that the FTC had an ambitious agenda. It tackled issues in movies and radio, the "new economy" industries of the day. It addressed competitive conditions in prospering industries that had been subjects of past antitrust cases, including oil, tobacco, aluminum, and steel. It studied industries like the coal and agriculture sectors that did not share in the general prosperity. It opposed efforts to stifle what it saw to be new and promising modes of distribution. The agency challenged basing point pricing, starting a saga that would extend for decades, and that, at the outset, pitted Pittsburgh and the East against other regions. It challenged major oil companies, U.S. Steel, RCA, Eastman Kodak, and the National Biscuit Company.

The FTC also developed what today is called its consumer protection authority. The establishment of a substantial consumer protection function was largely unanticipated in the 1914 debates. The FTC's development of a distinctive, national consumer protection program was a major innovation with great commercial and legal significance because

[4] *See* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY, INTRODUCTION (2d. ed. 1995) [hereinafter NEW DEAL]; HAWLEY, GREAT WAR, *supra* note 3, at 9.

[5] *See, e.g.*, *Report of the ABA Commission to Study the FTC* 9–11 (1969). Robert Himmelberg asserts that the agency "very rarely" challenged big firms during these years. ROBERT HIMMELBERG, THE ORIGIN OF THE NATIONAL RECOVERY ADMINISTRATION 49 (1976). *See generally* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 600 (1982) [hereinafter *Oversight*].

competitors were the most likely to be in a position to challenge misleading advertising, and, at common law, there was no remedy available to competitors for most forms of consumer deception.[6]

Nearly a century of experience has shown that the Commission functions best when it uses the range of policy instruments available to it and when it integrates its economic and legal functions.[7] In the early 1920s the agency was quite successful on the first score. It combined statutory functions of investigating, reporting, litigating, and referring cases to the DOJ (usually for criminal or contempt proceedings) with a "trade practice submittal" procedure, independent of a statutory warrant, that solicited public input for policymaking. Measured by the second criterion of interdisciplinary policymaking integration, however, its record was mixed.

Ultimately, though, some of its substantive efforts were misguided and many foundered. Though the FTC faced statutory impediments and a hostile judiciary, key elements of its work were flawed. A comparison of its adjudicative decisions to its briefs defending those decisions on judicial review, for example, highlights instances where it failed to put its best foot forward or adequately explain what its cases sought to achieve. At the root of some of these self-inflicted wounds is the fact that it simply tried to do too much with a staff of less than 320 and some 35 litigators.[8] A core problem, the product of both internal misjudgments and exogenous factors, was its failure to set priorities and match commitments to capabilities.

I. PRELUDE

New public institutions are shaped by an intellectual and political context that encompasses both the technical authority granted to an agency in its enabling legislation and expectations about how the authority will be exercised. In many instances, the surrounding context is complex, for it presents an amalgam of sometimes consistent, sometimes complementary, and sometimes conflicting views about what the agency should do. The amalgam is embedded in the legislation through compromises that seldom directly reconcile competing points of view

[6] Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 192–96, 251 (1936).

[7] For further development of these themes, see WILLIAM KOVACIC, FTC CHAIRMAN, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 141–42 (2009) [hereinafter FTC AT 100], *available at* http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf.

[8] FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1924, at 5, 14 (numbers) [hereinafter 1924 ANNUAL REPORT]; FTC Staff and Budget Information, 1915–2000, http://www.antitrustinstitute.org/Antitrust_Resources/FTC_Staff_and_Budget_Information.ashx.

and instead depend heavily on open-ended commands that enable competing interests and factions to see an acceptable image of what the agency might come to be.

One of the most daunting tasks for new leadership at a new competition agency is to accurately identify the multiple policy impulses that brought the agency to life, to assess the relative intensity and importance of individual ideas, and to formulate a program that is coherent; that remains, in some convincing way, faithful to the aims that animated the agency's formation, and that adapts to some degree as the intellectual and political environment around it changes. As we review below, the intellectual and political context that surrounded the adoption of the FTC Act in 1914 featured multiple visions for the new agency, and the challenge to the FTC's early leadership to reconcile them was formidable.

A. Multiple Visions at the Origin

The Progressive Era was a time of broad reform, some but not all of which anticipated modern liberalism.[9] Certain historians have sought coherence in progressivism by focusing on specific groups or themes; others deny that there was a "movement" at all.[10] Daniel Rodgers identifies three distinct and sometimes contradictory languages or clusters of ideas that different Progressives embraced: "Antimonopolism" (the most distinctly American); an "emphasis on social bonds and the social nature of human beings"; and a "language of social efficiency."[11]

Various strands of progressivism entered into the debate about trust policy. The Sherman Act was already two decades old when the Supreme Court ordered the breakup of Standard Oil and announced the rule of reason.[12] Trust policy was a major issue in the 1912 election, leading into the legislative debates that produced the FTC and Clayton Acts

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[9] Thus, Constitutional amendments of the era addressed taxing authority, direct election of Senators, prohibition, and women's suffrage. At least some Progressives addressed trust policy, food and drug safety, jurisprudential reform, protective labor legislation, and conservation. *See, e.g.*, Peter G. Filene, *An Obituary for the "Progressive Movement,"* 22 AM. Q. 20 (1970); Daniel T. Rodgers, *In Search of Progressivism*, 10 REV. AM. HIST. 113 (1982); JAMES H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900–1920 (1963).

[10] *See, e.g.*, RICHARD HOFSTADTER, THE AGE OF REFORM 137–38 (1955) (focusing on "civic leaders of a former era" who felt threatened); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATIVISM (1963) (honing in on the very people who threatened Hofstadter's leaders of a former era); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920 (1967); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920 (2003). Filene, *supra* note 9 (denying there was a movement).

[11] Rodgers, *supra* note 9, at 123–27.

[12] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

in 1914. Debates turned on both substance and process. What role, if any, should antitrust play in economic ordering? What role, if any, should a commission play in implementing either competition policy or an alternative to such policy?[13] Even among Progressives, there were substantial differences in the responses, and those differences echoed through the 1920s. Further, differences among politicians also paralleled those among economists. Particularly in the early years, many economists thought antitrust to be fundamentally misguided because they believed it failed to account sufficiently for scale economies and the problem of fixed costs—the belief that firms with high fixed costs would be driven to marginal cost pricing and face "ruinous competition."[14]

Theodore Roosevelt (TR), the former Republican President, was now standard-bearer for a new Progressive Party. Though known as a "trust-buster," TR publicly doubted antitrust as early as 1899. He associated size, however obtained, with efficiency. By 1912, he spoke favorably of German cartels and decried the structural remedy in *Standard Oil*; TR argued that the Court should have instead put the firm under a receivership to reform its conduct. His "New Nationalism" advocated an agency to enforce fair competition, even to the point of setting prices, and also protect consumers, investors, and employees. To that end, he secured a 1903 law that created the Bureau of Corporations within the Commerce Department; the Bureau was the FTC's predecessor in the sense that it would eventually be absorbed into the FTC. He promoted a 1908 initiative that would provide certain protections to mergers and agreements that were cleared through the Bureau. Finally, in 1914 his party's small House contingent, led by future Commissioner Victor Murdock, advanced legislation to create an agency that would identify substantial monopolistic power. If the source of that power was "artificial," the agency would proscribe the "unfair and oppressive" practices that produced it. If "natural," the agency would address it by other means. Those might include, Murdock said, "the separation of one factor of the business, establishing either its independence or its subjection to the obligations of public service [including price regulation]."[15]

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[13] *See generally* Marc Winerman, *The Origins of the Federal Trade Commission: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003) [hereinafter *Origins*].

[14] *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, ch. 23 (1991); Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311 (2009). Hovenkamp notes that a consensus began to emerge by the 1920s that such problems were restricted to a few industries and highlights the role of developments in the 1930s relating to product differentiation and monopolistic competition. For a sympathetic treatment of "ruinous competition," see GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932 (2009).

[15] 51 CONG. REC. 8980 (1914); Winerman, *Origins, supra* note 13, at 15–27 (discussing TR and his antitrust philosophy), 60–62 (discussing the 1914 Progressive Party legisla-

The other major candidates were more skeptical of the desirability of commissions and large firms. William Howard Taft, the Republican incumbent, and Woodrow Wilson, the successful Democratic challenger, both advocated deconcentration, though differing in how to attain it. Taft was a former judge and future Chief Justice. For Taft circa 1912, courts should administer trust policy and wield remedial authority aggressively.[16] For Wilson, Congress should work with the President to formulate a legislative agenda. In antitrust, that agenda should include precisely defined violations and harsh punishments, including jail, for individual violators. Wilson, who dubbed his program "The New Freedom," was suspicious of firms that grew through consolidations, but he emphasized the ingenuity of new entrants and anticipated that they would thrive once incumbents, however entrenched in the past, had to compete fairly in the future. Though his later actions suggest that he may have changed on this score, in 1911, he even opposed breaking up Standard Oil, so confident was he that upstarts could topple the giant once it had to compete fairly. Wilson in 1912 had little stake in a commission and criticized government by a "smug lot of experts." Still, the commission idea had sufficient traction that he said that he was "not afraid" of one.[17]

Two prominent Wilson allies, William Jennings Bryan and Louis Brandeis, represented other "anti-monopoly" views that were often conflated with Wilson's. Both tended to emphasize more than did Wilson the preservation of small business—although, from their perspective, this was (at least generally) not inconsistent with an efficiency-focused antitrust.[18] Bryan, a three-time Presidential nominee, spoke for many agrarian anti-monopolists who talked of "theft" in discussing trusts; his party's 1908 platform proposed to bar firms with a 50 percent market

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tion). The article also discusses various theories about why TR, despite his doubts, became a "trustbuster." *Id.* at 17. The 1908 proposal anticipated, in part, the Hart-Scott-Rodino Act, 15 U.S.C. § 18a.

[16] *See* Winerman, *Origins*, *supra* note 13, at 27–32 (discussing Taft and his antitrust philosophy). As a circuit court judge, Taft had written the leading antitrust decision in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

[17] *See* Winerman, *Origins*, *supra* note 13, at 46–48; Campaign Speech of Sept. 17, 1912, *in* 25 PAPERS OF WOODROW WILSON 148, 154 (Arthur S. Link ed., 1978) [hereinafter PWW]; Campaign Speech of Sept. 25, 1912, *id.* at 245, 251; *see also* JOHN MILTON COOPER, WOODROW WILSON 226–36 (2009).

[18] *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1910*, 50 OHIO ST. L.J. 257, 299 (1989) (discussing classical paradigm that assumed consistency of opportunity, efficiency, competition, fair distribution, and political freedom). See *id.* at 309, 391–95 (detailed discussion of this paradigm and its importance for antitrust (and constitutional law) in the Progressive Era).

share from interstate commerce.[19] Brandeis, a more subtle and idiosyncratic thinker, fused antimonopolism with commitments to various forms of efficiency, both economic and "social." Though he conceded that an efficient firm might be "too large to be tolerated among the people who desire to be free,"[20] his primary theme was that the largest firms were inefficient. He sought to "regulate competition" and not "regulate monopoly."[21]

Brandeis also advocated collective activities through trade associations. For Brandeis, smaller firms could use associations to neutralize advantages of larger competitors, particularly advantages involving access to information. To that end, he wanted the FTC to promote uniform cost accounting so firms could better understand their cost structures, and he contemplated that competitors would learn by sharing information about costs and prices.[22]

Another important associationalist, though less prominent in the debates of 1912 and 1914, pressed even broader themes, and is important to our story for his later influence. Arthur Jerome Eddy argued that "open prices" were essential to "true" competition. To deal with both trusts and "ruinous competition," he proposed full disclosure of prices paid and a concomitant ban on secret rebates; a ban on below-cost pricing along with uniform cost accounting to measure cost; a price umbrella to protect less efficient competitors; and, to deal with trusts, a requirement that integrated firms disclose information about their individual units and face sanctions, perhaps with treble damages, if they sold materials to their own units for less than they charged others.[23]

Even before the legislative debates, the FTC thus had multiple parents with multiple visions. Comparable differences divided its Congressional advocates. Some were in a Bryanite tradition (although many in that

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[19] *See* Winerman, *Origins, supra* note 13, at 19, n.105.

[20] U.S. SENATE COMM. ON INTERSTATE COM., 62D CONG., CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE 1174 (1911) (Report of the Committee pursuant to S. Res. 98).

[21] *See generally* Winerman, *Origins, supra* note 13, at 32–38 (for Brandeis); *see also* MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE ch. 13 (2009) (concluding that the core of Brandeis's views on trusts was moral, not economic).

[22] Statement of Louis D. Brandeis Before the Federal Trade Commission 9–20 (Apr. 30, 1915) (available in FTC library). *See also* Am. Column & Lumber Co. v. United States, 257 U.S. 377, 413–19 (1921) (Brandeis, J., dissenting).

[23] *See, e.g.*, ARTHUR JEROME EDDY, THE NEW COMPETITION 116, 251, 292, 353–57 (4th ed. 1915). While Eddy did not define the term "below cost," one commentator concludes that the term was often meant to cover fixed costs, variable costs, and a "fair rate of return" on investment. Butler D. Shaffer, *In Restraint of Trade: Trade Associations and the Emergence of "Self Regulation,"* 20 SW. U. L. REV. 289, 317 (1991).

tradition distrusted a commission). Francis Newlands, the Democrats' principal spokesman, argued for a New Freedom approach while scarcely hiding his attraction to TR's New Nationalism. Albert Cummins, a progressive Republican, advocated a relatively sophisticated antimonopolism. Others of course opposed the bill—also anticipating a position that would have strong advocates in the next decade.[24]

The 1914 legislation resolved these debates at most in part. The Clayton Act forbade certain conduct, including certain price discriminations, vertical arrangements, and mergers, with greater specificity and (seemingly) broader scope than the Sherman Act. The FTC Act created an "independent" commission.[25] It was empowered to enforce a new prohibition, in Section 5 of the Act, against unfair methods of competition (UMC or unfair methods); share enforcement authority under the Clayton Act with the DOJ and others; conduct investigations; and issue reports. It would draw expertise and be shielded from political pressures, the theory went, by its multi-member, bipartisan composition. No more than three of its five members could come from any political party. The meaning of UMC was sufficiently unclear, though, and the FTC's mandate sufficiently broad, that different progressives could hope that the agency might evolve in different ways. These aspirations were reflected, in the 1920s, in various approaches (or reactions) to antitrust, each with roots in the Progressive years.

In discussing these approaches, though, we note that their content sometimes blurs. Thus, Brandeis and Wilson both spoke for the New Freedom, though their ideas differed; Wilson's own ideas likely evolved over time. Further, the boundaries separating them often blurred. Thus, Brandeis spoke for both the New Freedom and associationalism; the New Nationalism shared with some associationalists a concern with ruinous competition. The New Freedom and the New Nationalism might both accept strong conduct remedies, though perhaps with differing degrees of enthusiasm. TR, Taft, Wilson, and Bryan might disagree about the proper remedy for Standard Oil's conduct, but all agreed that its conduct warranted some remedy. For all of these reasons, many enforcement initiatives might be compatible with more than one program.

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[24] Winerman, *Origins*, *supra* note 13, at 74–88. *See also* ELIZABETH SANDERS, THE ROOTS OF REFORM (1999).

[25] The principal characteristic of its independence was that Commissioners could be removed only for cause. *See* 15 U.S.C. § 41. Then as now, members of Congress have tended to view "independence" primarily as freedom from political control by the executive branch. *See* 51 CONG. REC. 13,047–48 (1914) (Senator Albert Cummins declaring the agency "always subordinate to Congress. . . . Congress can always destroy the Commission").

There were, however, some markers that distinguish the programs. Highly regulatory solutions suggest the New Nationalism; aggressive divestiture cases were most compatible with a Bryanite program and some variants of the New Freedom. Strong restraints on information sharing tend to be objectionable to associationalists and most compatible with the New Freedom. New Freedom advocates rarely referred to "ruinous competition"; associationalists or New Nationalists often did so. Even for Bryanites, it was rare expressly to reject efficiency as a goal,[26] but, eventually, such rejection would be most likely from the descendants of the early agrarian antimonopolists.

The multiplicity of conceptions about the purposes to be served by the FTC and the varied expectations about how it would use its authority had major, lasting implications for the Commission and underscore an important point about the formation of new competition systems. The establishment of the FTC introduced a phenomenon that has recurred in many other countries in the adoption of a competition law. Legislatures seldom enact a competition law with a clear, coherent vision about its appropriate aims. Instead, the original law is likely to embody a mix of objectives—some complementary, others conflicting. Given an often wide array of policy aims, it is left to the agency to reconcile objectives and formulate an effective program. This inevitably is a difficult and, at times, bewildering assignment, particularly in a multi-member commission whose members have their own divergences. As we will see below, the Commission experimented with a variety of approaches to implement the open-ended, multifaceted mandate of the 1914 legislation. This yielded some policy successes, yet also produced some activities that, in hindsight, cannot be said to be consistent with a fully coherent policy or animating philosophy.

B. THE WILSON-ERA COMMISSION

It fell to Wilson to select Commissioners to give content to these varying views, sorting out the agency's goals from the ambiguities in its creation. Unfortunately, the original agency lineup had no superstar. (Brandeis declined a spot and soon got a better offer.[27]) Distrusting lawyers and economists alike, Wilson included in his original Commission-

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[26] *See* James May, *supra* note 18 (noting that classical paradigm saw efficiency as consistent with other goals antitrust sought to promote).

[27] 1929 Interview, Ray Stannard Baker Papers, Reel 72, Manuscript Collection, Library of Congress, Washington, D.C.

ers only two of the former and none of the latter.[28] Further, despite significant Republican support for the FTC Act, Wilson did not consult with Republicans about his appointments and, for the seats that could not go to Democrats in 1915, he chose two members of TR's not-yet-moribund Progressive Party.[29]

Starting an agency with the Commission's broad but mixed mandate would have been a challenge under the best of circumstances, and conditions in the FTC's early years were far from ideal. The expected benefits of governance by a board whose members served fixed seven-year terms were elusive in practice. High turnover among the Commissioners marred the agency's first years.[30] The FTC, moreover, was created in the shadow of war. World War I erupted during the 1914 debates. After the United States became a belligerent in April 1917, antitrust was virtually suspended through November 1918. Wartime mobilization required broad economic regulation under such agencies as Bernard Baruch's War Industries Board and Herbert Hoover's Food Administration and even nationalization of the railroads; further, the cooperation of businesses with each other and with the government under Baruch's board was a catalyst for subsequent cooperation, and blunted somewhat the antimonopoly tradition during the 1920s.[31] The FTC played a secondary role in these efforts. Though its staff quadrupled (only to halve again after the war), it served largely as a cost-finding agency for other agencies.[32]

Unexpectedly rapid turnover on the board diminished the stability and effectiveness of the agency's leadership, and the regulatory demands of the war mobilization imposed unanticipated duties that absorbed substantial FTC resources. Nonetheless, the Wilson-era FTC undertook important initiatives. Some yielded substantial policy results. Its 1916 report on foreign trade led to the Webb-Pomerene Act, which created an antitrust exemption for export trade activities by associations

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[28] *See* Samuel Huston Thompson to Wilson (Jan. 15, 1917), 40 PWW (1982), *supra* note 17, at 490 (noting Wilson's concern that lawyers "as a rule immediately tie the hands or powers up in technical legal limitations"); *see also supra* note 17.

[29] Scott James detects in this an appeal for purposes of the 1916 election to voters who had backed TR in 1912. SCOTT C. JAMES, PRESIDENTS, PARTIES AND THE STATE ch. 3 (2000).

[30] The original five were gone within thirty-nine months, and two more departed while Wilson remained President. *See* Commissioners and Chairman of the Federal Trade Commission, *available at* http://www.ftc.gov/ftc/history/commisionerchartlegal2010.pdf.

[31] *See, e.g.*, ROBERT D. CUFF, THE WAR INDUSTRIES BOARD: BUSINESS-GOVERNMENT RELATIONS DURING WORLD WAR I (1973); Robert A. Himmelberg, *The War Industries Board and the Antitrust Question in November 1918*, 52 J. AM. HIST. 59, 60 (1965).

[32] *See* W.H.S. Stevens, *What Has the Federal Trade Commission Accomplished*, 15 AM. ECON. REV. 625, 636–37 (1925); FTC Staff and Budget Information, 1915–2000, *supra* note 8.

that properly registered with the agency;[33] by 1918, the FTC had an export trade division (a precursor to its current international office), which handled Webb-Pomerene filings, responded to complaints against U.S. firms, and recommended enforcement actions, under the Act, for UMC in international trade.[34] Some FTC programs inspired sharp controversy. Its meatpacking investigation, discussed further below, led into its first political buzz saw and a struggle that would echo for years. Some measures were largely failures, including key portions of its early adjudicative program. Finally, some measures echoed one or more or the visions that produced the agency. A 1919 report, for example, recommended legalizing resale price maintenance, but with heavy regulation that was reminiscent of the New Nationalism: agreements and prices would have to be filed with a designated agency, with authority to review them.[35]

II. THE 1920s IN ECONOMIC CONTEXT

The 1920s began with post-war price swings and recession, but the post-war doldrums ended in 1922. The country then entered a period of prosperity that lasted until 1929, though the prosperity was uneven; the coal sector and substantial portions of the agricultural sector, for example, shared less or little in improved times.[36] The consumer economy expanded broadly.[37] Growth continued from the Progressive Era,[38] but with sufficient magnitude to change the national landscape dramatically. Car ownership more than tripled over the decade, for example, reaching over half of American families, and a wider variety of models,

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[33] 40 Stat. 516 (1918); FED. TRADE COMM'N, REPORT ON COOPERATION IN FEDERAL EXPORT TRADE (1916).

[34] *See, e.g.*, FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1923, at 80, 87 [hereinafter 1923 ANNUAL REPORT]; 15 U.S.C. § 64 (1918 provision extending FTC's authority to UMC "used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States").

[35] REPORT ON RESALE PRICE MAINTENANCE, H.R. DOC. NO. 165, 66th Cong., 1st Sess. (1918).

[36] *See generally* MICHAEL PARRISH, ANXIOUS DECADES, AMERICA IN PROSPERITY AND DEPRESSION, 1920–41, at 81–85 (1992); ROBERT H. FERRELL, THE PRESIDENCY OF CALVIN COOLIDGE ch. 5 (1998).

[37] *See generally* PARRISH, *supra* note 36, at 29–46.

[38] *See, e.g.*, MORTON G. KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933, at 11 (1990) (traditional historical focus on politics and the tone of culture obscured continuities in economic experience, perception, and policy); Arthur S. Link, *What Happened to the Progressive Movement in the 1920s?*, 64 AM. HIST. REV. 833 (1959) (summarizing work done even before relevant Presidential records were available).

with annual style changes, were used to create new demand.[39] Electrical power came to more and more homes. Mass entertainment developed in radio and movies.[40] Advertising trumpeted the virtues of a growing number of branded products, and new forms of credit facilitated sales.[41]

Meanwhile, industry became increasingly concentrated. A new merger wave generally saw "mergers to oligopoly," unlike the earlier "mergers to monopoly" that produced such giants as U.S. Steel.[42] Further, while mergers to monopoly were not the rule, the burgeoning electrical industry quickly consolidated under holding companies. Retailing and distribution also changed, as national "chain stores" like the Great Atlantic and Pacific Tea Company (A&P) expanded.[43]

These developments had major implications for the FTC. This was a period of extraordinary technological and organizational dynamism. The forces reshaping the U.S. economy in the 1920s seemed no less astonishing or challenging than those today. FTC officials strained to analyze markets amid technological upheaval that displaced older products and processes. Revolutionary changes in transportation and communication altered market boundaries. Broad ownership of cars altered shopping habits and helped inspire the emergence of new forms of retailers to serve increasingly mobile customers. Radio networks would make it possible for advertisers to reach ever larger bodies of potential customers with great speed.

In theory, the FTC was well positioned to address these developments. Its data collection, research, and reporting powers gave it valuable tools for studying new commercial developments and understanding their significance. The agency's elastic mandate positioned it to apply existing rules to new phenomena, or to establish principles not previously embodied in Sherman Act or common law jurisprudence. Its mandate also permitted the formation of programs to treat what we now call consumer protection problems arising from new methods of advertising and marketing. In many instances, the specific Commission programs we discuss below sought to use the agency's broad collection of policy instruments to achieve these ends.

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[39] HAWLEY, GREAT WAR, *supra* note 3, at 71. General Motors, which introduced a variety of styles and annual changes, overtook Ford because Henry Ford resisted such changes. THOMAS K. MCCRAW, AMERICAN BUSINESS, 1920–2000: HOW IT WORKED 11–27 (2000).

[40] Between 1922 and 1929, sales of movie tickets rose from 40 million weekly to nearly 100 million. The radio industry began in 1920 and, by 1929, about 40 percent of households owned a radio. HAWLEY, GREAT WAR, *supra* note 3, at 71.

[41] KELLER, *supra* note 38, at 13–14.

[42] *See* George J. Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 23 (1950).

[43] *See, e.g.*, PARRISH, *supra* note 36, at 75.

III. THE FTC AND THE 1920s IN POLITICAL CONTEXT

The Progressive Era began under the Republican Roosevelt; by 1912, the Democrats controlled both the White House and Congress, a rarity in the post-Civil War Era. The Democrats, though, lost Congress by 1918 and the White House in 1920.[44] 1920 also saw the end of the Progressive Era. While important Progressive elements survived into the 1920s,[45] the Era had embroiled the country in crusades—a crusade to manage industrialization, a crusade against alcohol, a war that Wilson trumpeted as a crusade to make the world safe for democracy. The last overwhelmed the others and ended with Wilson's failed attempt to create an international order around a League of Nations. By 1920, Wilson had been crippled by a stroke, the country faced economic downturn, and (in part because Wilson's refusal to compromise) the Senate refused to ratify the treaty creating the League.[46]

A. WARREN G. HARDING AND THE 1920 ELECTION

Theodore Roosevelt seemed poised to dominate the 1920 election when he died in January 1919.[47] It is unclear that even TR, had he returned to office, could have roused America to further crusades. Without him, the time had passed. A divided Republican convention ratified a deal struck in the proverbial smoke-filled room and nominated Ohio Senator Warren G. Harding; then the delegates asserted their independence by selecting Massachusetts Governor Calvin Coolidge as his running mate.[48] The two won in a landslide, with over 60 percent of the popular vote, and the Republicans emerged with 302 of 435 House seats, and 59 of 96 in the Senate.[49]

Harding, who promised a return to "normalcy," had been a newspaper editor and a relatively inconsequential Senator.[50] He did have firm

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[44] Wilson prevailed in the three-way contest with 42 percent of the popular vote. He barely withstood a challenge in 1916 from Charles Evan Hughes, while the Democrat's Congressional majorities steadily eroded. *See* http://www.presidency.ucsb.edu/elections.php; http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm; http://clerk.house.gov/art_history/house_history/partyDiv.html [hereinafter Election Results].

[45] *See, e.g.*, Link, *supra* note 38.

[46] *See* PARRISH, *supra* note 36, at 6.

[47] EUGENE P. TRANI & DAVID L. WILSON, THE PRESIDENCY OF WARREN G. HARDING 21 (1977). Despite his apostasy in 1912, TR returned to the Republicans in 1916.

[48] *Id.* at 22–23. The Coolidge nomination was triggered by an impassioned nominating speech.

[49] Election Results, *supra* note 44.

[50] PARRISH, *supra* note 36, at 8 (Harding "had not written a single piece of important legislation, been hanged in effigy, or been raked by opponents on either the right or left of the political spectrum"). For views as to how he was nominated, compare TRANI &

commitments, particularly to cutting war-time tax rates, managing government spending, and paying down the war-time deficit; in these he aligned with Treasury Secretary Andrew Mellon (1921–32). However, he also made gestures to progressives,[51] and, aside from Mellon, his most impressive appointees had progressive credentials. Over the objections of more traditional elements in his party, he chose Charles Evan Hughes as Secretary of State and Henry C. Wallace for Agriculture,[52] and, most importantly for the FTC, Herbert Hoover as Secretary of Commerce. Hoover, who was close to Harding, was then a noted progressive.[53] He had risen from poverty to international success as a mining engineer and businessman, contributed to TR's 1912 campaign, been Food Administrator in Wilson's war cabinet, and, before and after the War, organized food relief for Europe. He joined Wilson at the Versailles peace negotiations, where he impressed John Maynard Keynes; Franklin Roosevelt and Louis Brandeis backed him for the Democratic nomination in 1920.[54]

Although Harding chose many able leaders, others became embroiled in scandal. The most famous scandal (involving bribes for oil leases at Teapot Dome) did not touch the FTC, but other scandals involving Attorney General Harry Daugherty did. Daugherty, Harding's friend from Ohio and campaign manager, was never convicted of a crime, though he was tried twice. However, his friend Jess Smith committed suicide in Daugherty's apartment as rumors spread about Smith's influence ped-

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WILSON, *supra* note 47, at 22–23 (ran for President mainly to strengthen his position for his Senate race) with JOHN W. DEAN, WARREN G. HARDING 43–44 (2004) (in politics as in poker, Harding "was always congenial and enjoyed himself, but he, too, played the game more seriously than most realized—and he seldom lost").

[51] For example, Harding pardoned the socialist Eugene Debs, who had been jailed for anti-war activities, and invited him to the White House. With Hebert Hoover, he persuaded U.S. Steel to cut its work day from twelve hours to eight. PARRISH, *supra* note 36, at 25. Hoover's influence as Secretary of Commerce during the Harding Administration is discussed in Robert K. Murray, *Herbert Hoover and the Harding Cabinet*, *in* HERBERT HOOVER AS SECRETARY OF COMMERCE, 1921–28, at 17–40 (Ellis W. Hawley ed., 1974).

[52] On Harding's cabinet, see PARRISH, *supra* note 36, at 11–21; TRANI & WILSON, *supra* note 47, at 38–45; Murray, *supra* note 51. Hughes was a former Supreme Court Justice, Presidential nominee, and private practitioner, and a future Chief Justice. Wallace, a former farmer and publisher of an agricultural journal, was a moderate progressive who often worked closely with the farm bloc, as discussed below. DONALD L. WINTERS, HENRY CANTWELL WALLACE AS SECRETARY OF AGRICULTURE 78–79 (1970); TRANI & WILSON, *supra* note 47, at 39, 66, 69–70.

[53] Murray, *supra* note 51, at 34 (close relationship with Harding); Ellis W. Hawley, *Herbert Hoover and Modern American History: Sixty Years After*, *in* HERBERT HOOVER AND THE HISTORIANS 1 (Mark M. Dodge ed., 1989) (placing Hoover's early progressivism in context, and noting, at 2, that Hoover's own later writings tended to obscure that progressivism).

[54] PARRISH, *supra* note 36, at 20; KENDRICK A. CLEMENTS, HERBERT HOOVER: IMPERFECT VISIONARY 25 (2010).

dling. In the midst of Congressional hearings, with an FTC Commissioner as a prominent witness, Coolidge asked Daugherty to resign.[55]

Congress's confrontations with the Administration went beyond scandals, moreover, and relations between Congress (particularly the Senate) and Harding would also have an impact on the FTC. The key was a Congressional bloc—mostly Republican, Midwestern, and (at least in some sense) progressive. In 1921, they coalesced in a bi-partisan "farm bloc," sometimes working with Secretary Wallace; some Senators from agrarian states also formed a less formal progressive bloc. The bipartisan farm bloc often made a mockery of nominal Republican control.[56] Institutional prerogatives added to interbranch tension. The Senate had been troubled by TR's and Wilson's aggrandizement of the Presidency. Former Senator Harding was at first sympathetic to such complaints, though he was soon asserting his positions in disputes with the Hill.[57]

The Republicans suffered significant midterm losses in 1922.[58] The next August, with scandals erupting, Harding died.

B. Harding and the FTC

Early in his Presidency, Harding sought the FTC's views on how to address "The High Cost of Living," and the FTC replied by letter.[59] By late 1922, though, the FTC's relations with the Justice Department, at least, had deteriorated. Representative Oscar Keller prepared a bill to impeach Daugherty, and its first counts detailed FTC referrals that the DOJ had not yet pursued.[60]

Many of these referrals involved trade associations, the treatment of which weaves through the decade in an intricate dance involving the FTC and the Justice and Commerce Departments. Under Daugherty, the DOJ actually pursued a sometimes aggressive course (if insufficiently aggressive for the FTC) over Hoover's objections. Hoover was a Progres-

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[55] FERRELL, *supra* note 36; *see also infra* note 74 and accompanying text.

[56] WINTERS, *supra* note 52, at 73–77; FERRELL, *supra* note 36, at 42 (suggesting that the bloc as a whole was *essentially* "conservative on everything but the problems of farmers"); *id.* ch. 5 (discussing tensions throughout the Coolidge years). According to a 1921 press report, the farm bloc guarded the agency from efforts to abolish it. *Farm Bloc Guards Trade Commission*, CHRISTIAN SCI. MON., Oct. 22, 1921, at 1.

[57] *See generally* TRANI & WILSON, *supra* note 47, ch. 3.

[58] They dropped 77 seats from their 1920 House total to retain 225 seats out of 435, and 6 seats from their 1920 Senate total to retain 53 of 96. Election Results, *supra* note 44.

[59] Letter of the Federal Trade Commission to the President of the United States (1921).

[60] *Charges of Oscar E. Keller Against the Att'y Gen. and the Att'y Gen.'s Answers Thereto, Hearing on H.R. Res. 425 Before the H. Comm. on the Judiciary*, 67th Cong., 3d Sess. (1922).

sive of the associational variety. From his post at Commerce, he encouraged private information sharing and developed a substantial government program to collect and disseminate data. When the Justice Department, prodded by the FTC and others, sought to interpret the Sherman Act to strictly limit information sharing, Hoover sought to expand those boundaries. On the other hand, he highlighted that cooperation was needed to preserve individual initiative and rejected price fixing and similar conduct.[61]

Meanwhile, progressives in Congress frequently turned to the FTC. During this Presidential term, Senate resolutions triggered numerous FTC investigations. Some Senators, among them Robert La Follette, were important allies.[62]

Harding filled one FTC vacancy in early 1922.[63] His first choice, George Upton of Ohio, drew fire for reasons that have hardly been consistently applied: he was unqualified and named to pay a political debt.[64] Harding withdrew the nomination, and then chose Vernon Van Fleet.

C. CALVIN COOLIDGE AND THE 1924 ELECTION

Calvin Coolidge was born and raised in Vermont and graduated from Amherst. He practiced law in Massachusetts, where he read for the bar, and later became Governor. He gained national fame in 1919 after a strike by Boston police that he helped break. Refusing to reinstate the strikers, Coolidge then declared: "There is no right to strike against the public safety by anybody, anywhere, any time." This was the basis for the

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[61] For Hoover's ideas, see HERBERT HOOVER, AMERICAN INDIVIDUALISM 9–10, 33–34 (1922) (individual initiative key to stimulating innovation); CLEMENTS, *supra* note 54, at 196–201; HIMMELBERG, supra note 5, at 10–11. For the interactions of Justice, Commerce and the FTC during these years, see generally HIMMELBERG, *supra*, chs. 1–4; CLEMENTS, *supra* note 54, at 202–05. The Supreme Court's decision in *American Column and Lumber Co. v. United States*, 257 U.S. 377 (1921), rejected a plan under which, among other things, information was disseminated on a weekly basis about specific past sales. A later case, initiated by Daugherty but decided against the government, would ultimately find substantial room to share aggregated statistics. Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

[62] In 1963, former Commissioner Thompson noted four "genuine allies" in the Senate (La Follette, George Norris, Hiram Johnson, and Thomas J. Walsh. George Cullom Davis). The Federal Trade Commission, Promise and Practice in Regulating Business (1969) (unpublished Ph.D. dissertation, University of Illinois). *See also infra* note 221 and accompanying text (discussing source of FTC's studies).

[63] Commissioners' terms expire on September 26, the anniversary of the FTC Act. Since the five Commissioners serve seven year terms, vacancies occur by reason of expired terms five years of seven. None occurred in 1922 or 1923.

[64] *Harding Withdraws Nomination of Upton*, N.Y. TIMES, May 21, 1922, at 17. On the subject of unqualified Commissioners, see William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915 (1997).

1920 delegates' rebellion, when they rejected party leaders' choice and ran Coolidge for Vice President. Though known as "Silent Cal," Coolidge had cordial relations with the press. He had a strong work ethic at first, though that seems to have changed after his son died during the 1924 campaign.[65]

Coolidge's rectitude and actions provided damage control for Harding's scandals.[66] Like Harding, he was committed to limiting government expenses and lowering taxes; also, he was less inclined to interfere with business than Harding had been.[67] At the cabinet level, Wallace soon died, Hughes left, and Coolidge asked Daugherty to leave. Mellon's influence waxed and Hoover's waned; Coolidge called Hoover the source of non-stop bad advice, though he did little to interfere with Hoover's work at Commerce.[68]

To replace Daugherty, Coolidge named Harlan Fiske Stone, who had attended Amherst with Coolidge and was Dean of Columbia Law School. Stone's integrity brought to the DOJ the same corrective that Coolidge brought to the White House. During his short stay, Stone signaled an intent to bring aggressive antitrust cases, including a possible challenge to the Aluminum Company of America that the FTC was pressing. Such a step would have indirectly challenged Mellon, who was deeply associated with the firm. There was speculation that Stone was named to the Supreme Court in 1925 as a roundabout way to stop his aggressive antitrust agenda.[69]

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[65] FERRELL, *supra* note 36, chs. 1–2; DAVID GREENBERG, CALVIN COOLIDGE chs. 1–2 (2006); Kerry W. Buckley, *A President for the "Great Silent Majority": Bruce Barton's Construction of Calvin Coolidge*, 76 NEW. ENG. Q. 593 (2003) (role of Barton, an Amherst graduate and partner in the advertising firm of BBD&O, as a Coolidge adviser); ROBERT GILBERT, THE TORMENTED PRESIDENT (2003) (arguing that his son's death left Coolidge clinically depressed); ROBERT SOBEL, CALVIN COOLIDGE 309 (1998) (Coolidge's changed work habits after his son died). *See generally* THOMAS B. SILVER, COOLIDGE AND THE HISTORIANS (1983) (challenging early histories of Coolidge).

[66] FERRELL, *supra* note 36, at 44–51.

[67] Coolidge's views were more nuanced, however, than suggested by the partial quote often attributed to him. In explaining why it was not worrisome that journalism was a business, Coolidge said that,"[t]he chief business of America is business," and continued: "[W]e want wealth, but there are many other things we want much more. . . . The chief ideal of the American people is idealism. . . . No newspaper can be a success which fails to appeal to that element of our national life." Calvin Coolidge, President of the United States, Address to the American Society of Newspaper Editors (Jan. 17, 1925), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=24180.

[68] SOBEL, *supra* note 65, at 241–43, 264–67; FERRELL, *supra* note 36, at 28–32, 64–66. Ferrell argues, though, that Hoover was implementing Coolidge's policies, and Coolidge turned against him only because of Hoover's personal ambition. *Id.* at 66.

[69] ALPHEUS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 179–85 (1956); SOBEL, *supra* note 65, at 318. FDR would name Stone Chief Justice in 1941.

Coolidge won re-election by a landslide in 1924. La Follette mounted a third-party campaign under the name of TR's 1912 Progressive Party, though the effort was less successful than TR's.[70] The Republicans also enjoyed electoral success in Congress, particularly in gaining 22 House seats above their 1922 total to control 247 seats.[71]

D. Coolidge and the FTC

During Coolidge's short first term, relations between the White House and the FTC deteriorated. Coolidge did ask the Commission for an investigation that led quickly to litigation and another into sharp increases in gasoline prices, though in his first State of the Union address he declared "[r]evision of procedure of the Federal Trade Commission will give more constructive purpose to this department."[72]

In addition to the FTC's aggressive agenda, four incidents in 1924 point to strains between the White House and the agency, with Huston Thompson at the center. In February, Thompson's testimony at a Senate hearing forced Coolidge to withdraw a nominee to a Commission seat.[73] Next, he testified at the Daugherty impeachment hearings.[74] Then, when the White House asked about the FTC's progress in investigating gasoline prices, his reply as FTC Chair documented the agency's budget woes, laying blame on the recently created Bureau of the Budget.[75] Finally, a month before the election, the FTC recommended that the DOJ seek contempt against the Aluminum Company of America for violating a 1912 consent order. Reporting on the story, the

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[70] TR had held Wilson to 42 percent of the popular vote, himself receiving 27 percent and running second. Coolidge won 54 percent with La Follette a distant third at 16 percent. Election Results, *supra* note 44.

[71] *Id.* They also emerged with 54 (of 96) Senate seats.

[72] *See infra* note 184 and accompanying text (coal case); 1924 ANNUAL REPORT, *supra* note 8, at 192; Calvin Coolidge, President of the United States, First Annual Message (Dec. 6, 1923), http://www.presidency.ucsb.edu/ws/index.php?pid=29564.

[73] Coolidge nominated George Christian, who had been an associate of Harding's from Ohio and the President's Secretary (a position somewhat akin to Chief of Staff) during Harding's Presidency. Thompson accused Christian of pressuring the FTC in May 1921 about the FTC's investigation of the motion picture industry. *Christian Favored for Trade Board,* N.Y. TIMES, Jan. 17, 1924, at 5; *Accuse Harding Aid of Trying to Help Film Firm,* CHI. DAILY TRIB., Feb. 17, 1924, at 3; *Coolidge Recalls Christian's Name,* N.Y. TIMES, Feb. 21, 1924, at 1.

[74] *Investigation of the Att'y Gen., Hearings Pursuant to S. Res. 157 Before the S. Select Comm. on Investigation of the Att'y Gen.*, 68th Cong., 1st Sess. at 1692–744 (1924); *Investigation of Harry M. Daugherty, Formerly Att'y Gen. of the United States, Hearings Pursuant to S. Res 157, Before the S. Select Comm. on Investigation of the Att'y Gen.*, 68th Cong., 1st Sess. at 1805–25 (1924); *Charges Daugherty Let "Trusts" Alone*, N.Y. TIMES, May 1, 1924, at 3.

[75] Huston Thompson, Chairman, Fed. Trade Comm'n to C. Bascom Slemp (Mar. 25, 1924), Calvin Coolidge Papers, File 100, Reel 68, Manuscript Collection, Library of Congress, Washington, D.C.

Chicago Tribune focused on Thompson, calling him a "radical Democrat," noting that he had been considered for the La Follette ticket, and deeming the challenge political because of Mellon's connection with the firm.[76]

IV. THE FTC'S OUTPOST YEARS: THE CONDUCT OF AGENCY BUSINESS

The formation of the FTC raised enduring issues about the governance mechanism for a competition agency. Should it be headed by a single executive or governed by a college? How are its operating units and key functions to be organized, and what is to be the relationship among them? If a college is the chosen leadership method, what allocation of decisionmaking tasks among the board members will provide the most effective form of management? For an independent agency, what is the appropriate relationship with the executive and legislature? How should priorities and strategies be set? In this part of the article we address how the FTC sought to address important matters of governance within a regulatory structure—a multi-member "independent" agency—that was still relatively novel within the federal government.

A. THE CONDUCT OF BUSINESS BY THE COMMISSIONERS

The early conduct of FTC business was different from today. The agency Chairmanship was inherently weak. Until 1950, the Commissioners chose their own Chair and, after 1916, they rotated the position annually.[77] The Chair presided over meetings, but was not yet the executive and administrative head of the agency. Each Commissioner oversaw one or more offices,[78] and Commissioners often deliberated (and sometimes dissented) on such matters as office space allocation and individual employees' pay.[79] Until the 1960s, they conducted collective business only at meetings.[80] They met often, sometimes for twenty or

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[76] *Mellon Company Hit in Federal Trade Report*, CHI. DAILY TRIB., Oct. 6, 1924, at 21.

[77] Joseph E. Davies was elected Chair at the first meeting for his full term, but his colleagues later removed him and established the rotating Chairmanship. ELIZABETH K. MACLEAN, JOSEPH E. DAVIES: ENVOY TO THE SOVIETS 10–13 (1992); 1 FTC Min.1 (Mar. 16, 1915). Since 1950, the President chooses a Commissioner to serve as Chair and can shift the position at will. Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (1950). FTC Minutes are available at the National Archives in College Park, Maryland, RG-122, Docket Section, Official Minutes of the Commissioners, 1915–49. Some are also available at http://www.ftc.gov/os/minutes/index.shtm.

[78] *E.g.*, 3 FTC Min. 660 (Mar. 17, 1920).

[79] *E.g.*, 5 FTC Min. 354–58 (Oct. 21, 1921).

[80] Most deliberations today are conducted by written circulations. The Commissioners rarely hold a formal meeting more than twice per month. At most meetings, they sit on one side of a long table, joined by the Chief of Staff and an adviser to each Commissioner.

more hours in a week.[81] They had no personal advisers, and (with rare exceptions) voted only if physically present.[82] Commissioners could make public their objections to specific actions, but they did not have to, and often declined to do so.[83] Also, until 1938, there was no provision for a Commissioner to stay in office after his term expired and before a successor was confirmed.[84]

B. Agency Staff: Size, Budget, Workload, and Integration of Functions

The agency's limited resources provide important context for the 1920s. In 1924 it had a staff of 309. This was before modern technology reduced the number of support staff; thus, of this relatively small number, only ninety were lawyers, thirty economists, and twenty-nine accountants. The lawyers were organized into functional units. The Chief Examiner's office handled pre-complaint investigations and housed the hearing examiners (predecessors to today's Administrative Law Judges). The Chief Counsel's office handled litigation, and in 1924 only thirty-five lawyers were attached to that office.[85] Further, big cases could be a drain. Of twenty-eight trial lawyers in 1922, twenty-one were tied up on seven major cases (often facing a "battery" of elite lawyers).[86]

This staff handled a substantial workload. First, the Commissioners for a time assumed that they had to issue a formal complaint when they had reason to believe that the law was violated and that a complaint

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On the other side of the table are representatives of the relevant Bureaus and the General Counsel's office. Representatives of smaller Commission offices, such as the press office, are also in the room, and staff can sit in the audience. Commissioners who are not physically present can participate by electronic hook-up, or they can authorize an adviser to cast a proxy vote.

[81] Thus, during the week of December 6, 1920, the Commissioners met for over twenty-five hours, including over eight and a half hours of nonpublic meetings (five of them on a Saturday) and sixteen hours of public hearings about basing point pricing. 4 FTC Min. 403–14 (Dec. 6–11, 1920). In 1921, they voted to meet regularly on Mondays, Wednesdays and Fridays at ten o'clock, with a recess at half past noon. 5 FTC Min. 43–44 (May 24, 1921).

[82] 5 FTC Min. 211 (Aug. 22, 1921) (rescinding prior motion authorizing each Commissioner to hire a "special expert" to be attached to his own office, because none had done so). The minutes for each day began by listing Commissioners who were present and those who were absent. In recording votes on specific matters, there was, in general, no reference to the absent Commissioners. *See, e.g.,* 8 FTC Min. 211–16 (Dec. 21, 1923).

[83] 4 FTC Min. 472–73 (Jan. 13, 1921) (authorizing certain dissents to be made public). *See also infra* note 167 (Gaskill declining to make public his dissent on a major case).

[84] Act of Mar. 21, 1938, ch. 49, § 1, 52 Stat. 111.

[85] 1924 Annual Report, *supra* note 8, at 4, 14, 22–25.

[86] *Independent Offices Appropriation Bill, 1924, Hearing Before the Subcomm. of the H. Comm. on Appropriations*, 67th Cong., 4th Sess. at 76–77 (1923) (testimony of Commissioner Murdock).

would be in the public interest.[87] Second, the agency often undertook investigations at the behest of a single House of Congress (generally the Senate)—and a single House could not provide supplemental funding.

Most staff recommendations were funneled through a Board of Review, which contained, at various times, three to six staff members. The Board would forward its recommendation to the Commissioner assigned to a matter, who would in turn present the Board's views and his own to the Commission.[88] Early on, the Board included three lawyers and three economists, but this was soon changed to two lawyers and one economist. Around 1923, the economist's spot was taken by a third lawyer; when the Board was expanded to five in 1925, the new spots went to lawyers as well,[89] suggesting a reduction in the influence of economists.

This suggests a declining value placed on the integration of the agency's functions at the staff level, though other signals are mixed.[90] Even more problematically, despite occasional advocacy for such an appointment (and the expectations of many early advocates for a Commission), no economist was named a Commissioner.[91]

C. AGENCY PROCESSES

The FTC Act authorized two main functions: administrative litigation under Section 5, and studies and reports under Section 6. Section 6, then as now, authorized the Commission to obtain data and (subject to

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87 *See, e.g.*, Press Release, Fed. Trade Comm'n (June 29, 1921) (on application for a complaint, the FTC has issued such complaint "as required by law, the public interest appearing . . .") (Press releases are available at the National Archive, College Park, Maryland, RG-122, Division of Legal and Public Records, Press Clippings, Notices and Releases, 1918–1959. Box 148 covers September 1920 through the end of 1922, and Box 149 covers 1923 and 1924.) Better Business Bureaus and others filed repeated complaints. *E.g.*, 7 FTC Min. 203 (Apr. 26, 1923) (Unfair Competition Bureau of the Paint and Varnish Industry). The Commissioners eventually rejected the position that they lacked discretion to issue a complaint in these circumstances. *See* 7 FTC Min. 526 (Jan. 9, 1925).

88 *See* FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1921, at 7.

89 Stevens, *supra* note 32, at 638 n.33 (1925).

90 For example, the 1924 Annual Report noted that seventeen members of the economic staff (including accountants) worked that year on litigation projects. 1924 ANNUAL REPORT, *supra* note 8, at 3. However, a 1920 minute noted the assistant Chief Economist's protest "against the action of the Chief Counsel's office in allowing the Commission to go to the Circuit Court of Appeals in resale price maintenance cases on arguments which" developed "little or nothing of the Economic practices." 3 FTC Min. 589 (Jan. 23, 1920).

91 Senator Henry Cabot Lodge urged the nomination of Francis Walker, head of the Bureau of Economics, and Harding had apparently made tentative commitments. File memo (Apr. 27, 1922), File 100-A, Microfilm Roll 177, Warren G. Harding Papers, Archives and Manuscript Division, Ohio Historical Soc. This failed effort was paralleled by later attempts to obtain a seat for Willard F. Mueller in the 1960s and 1970s. *See* WILLARD F. MUELLER, FIGHTING FOR ANTITRUST POLICY ch. 16 (2009).

confidentiality constraints) publish reports. The procedures for adjudication, though, have changed substantially. Numerous changes affecting hearing processes were mandated by the Administrative Procedure Act.[92] Also, until 1938 (for Section 5) and 1959 (for the Clayton Act), respondents who violated an FTC order for which they had not sought judicial review could face, at most, a court order (not civil penalties) in an enforcement proceeding. Only if the court issued an order and they later violated *that* order could they face sanctions with more teeth.[93]

V. THE COMMISSIONERS

As we have suggested above, the challenges facing the first generation of FTC leadership were immense. The exceptional breadth of the agency's charter and the diversity of its policymaking tools created a wide array of possible applications of the Commission's authority. Add to this the certainty that the early leadership of a new agency plays a critical role in getting the institution off to a good start by assembling a capable professional staff, building public awareness of the agency's purpose and work, setting priorities, and implementing programs. A new institution needs both an initial team of skillful leaders and a process of succession that sustains a high level of performance. All of these considerations placed a premium on the appointment of skilled analysts and effective leaders for the early FTC.

Seven Commissioners served during the Presidential term that began in 1921. Significantly, Wilson's nominees stopped racing to leave. Of the seven who took office between March 1915 and March 1917, none stayed more than thirty-nine months.[94] The five he chose thereafter all remained when Harding took office; four stayed through their terms; and all but one (whose term expired) served at least five years. To give a

[92] The Act, initially passed in 1946, among other things establishes the independence of the Administrative Law Judge (initially called "hearing officers") who, other than Commissioners, are the only persons who can conduct the FTC's administrative trials. 15 U.S.C. §§ 551–559.

[93] 15 U.S.C. §§ 45, 46. Under Section 5, as amended in 1938, the FTC can obtain civil penalties for violations of orders under the FTC Act, including orders for which respondents do not seek timely review. 52 Stat. 11 (1938); *see also* 15 U.S.C. § 21, *as amended by* Pub. L. 86-107, 73 Stat. 243 (1959) (analog in Clayton Act). Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), as added at 87 Stat. 592 (1973), the FTC can seek injunctions and equitable remedies for law violations. The Commission often seeks preliminary injunctions (to preserve the status quo during an administrative trial) in merger cases, and permanent injunctions (with such equitable remedies as redress) in fraud cases.

[94] *See* Commissioners and Chairman of the Federal Trade Commission, *supra* note 30. Among the reasons for departure were health (one died in office) and ambition (two ran for the Senate.)

better sense of the agency's evolving membership in the 1920s, we discuss the Wilson holdovers in the order that they left the agency.

A. JOHN GARLAND POLLARD (1920–21)

John Garland Pollard graduated from Columbian, now George Washington, Law School. He had a long career in Virginia politics, serving as Attorney General (1914–18) and Governor (1930–34), and was the first Director of the School of Government at William and Mary. He corresponded with William Jennings Bryan, suggesting a Bryanite affinity but also drawing on connections developed through their activities as Southern Baptists. For more than a decade after his term at the FTC expired, he drew on other connections in efforts to return.[95]

B. VICTOR MURDOCK (1917–24)

Victor Murdock of Kansas was a journalist before he came to Congress as a Republican in 1903. In 1909, he helped lead an "insurgency" that limited the powers of House Speaker Joseph Cannon. He joined TR's Progressive Party in 1912, was reelected under that party's banner, and for two years headed its small contingent in the House. In that role, he presented the party's version of FTC legislation, and attended a meeting where George Rublee and Louis Brandeis persuaded Wilson to embrace administrative litigation for the FTC. After a failed Senate bid in 1914, Murdock became the party's national chair. In 1916, when TR abandoned the party, there was an effort to run Murdock for President. Murdock declined and soon endorsed Wilson. Wilson nominated him to the FTC for a short term in 1917 and a full term in 1918. Though Murdock could not have declared himself a Democrat (three other Commissioners were Democrats), Huston Thompson pressed him in 1920 for that party's Vice Presidential spot.[96]

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[95] *See* http://scrc.swem.wm.edu/wiki/index.php/John_Garland_Pollard; John Stanley Hopewell, An Outsider Looking In: John Garland Pollard and Machine Politics in Twentieth Century Virginia (1976) (unpublished Ph.D. dissertation, University of Virginia); *Governor-Elect's Career Colorful*, WASH. POST, Nov. 6, 1929, at 3; *Ex-Gov. Pollard; Virginian Was 65*, N.Y. TIMES, Apr. 29, 1937, at 2; *Ask Office for Virginian*, N.Y. TIMES, Oct. 3, 1926, at E7; "Brought to the Pres. Attention by Sec. Roper, 5/15/34," File 100, Box 8, Franklin D. Roosevelt Library, Hyde Park, N.Y.; John Garland Pollard Papers, File 177, Manuscript Collection, College of William and Mary Library, Williamsburg, Va. (correspondence with Bryan); *id.* at File 179 (efforts to return to the Commission in the 1920s).

[96] *See* DICTIONARY OF AMERICAN BIOGRAPHY, SUPP. 3: 1941–45, at 544 (1973); *Victor Murdock Dead; Wichita Editor, 74,* N.Y. TIMES, July 9, 1945 (noting his groundbreaking work as sports reporter); JAMES HOLT, CONGRESSIONAL INSURGENTS AND THE PARTY SYSTEM, 1909–1916, at 135–43 (1967) (1909 insurgency); Winerman, *Origins*, *supra* note 13, at 60–62 (role in 1914 legislative debates); GEORGE MOWRY, THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT 359 (1947); *Moose Elect Murdock*, WASH. POST, June 11, 1916, at 1; *Victor Murdock Favors Wilson*, N.Y. TIMES, Oct. 22, 1916, at 8; Huston Thompson to Mur-

Although Murdock had been a Progressive Party spokesman, like many Progressives he may have been drawn more to TR as a transformative figure rather than to specific TR policies.[97] In any event, as a Commissioner, he was skeptical about large firms and government price regulation, both hallmarks of the New Nationalism.[98] Though hailing from a wheat-producing state, he was also skeptical about a key farm bloc proposal that would have authorized an agency to buy surplus agricultural products at high prices and dump them overseas for less.[99] Commissioner Gaskill called him a "born, inherent, constitutional rebel,"[100] and Murdock showed an independent streak at the FTC—sometimes but not always advocating a more aggressive stance than his colleagues. When he left in January 1924, Murdock returned to journalism. He edited the *Wichita Daily Eagle* (and resisted blandishments to return to politics) until he died in 1945.[101]

C. HUSTON THOMPSON (1918–26)

Huston Thompson, whose actions in 1924 were already noted,[102] graduated from Princeton in 1897. While there or soon after, he developed a relationship with Professor Woodrow Wilson. Huston played college football, and then coached college ball (as a stern disciplinarian) for several years before he became a lawyer in Colorado. He backed Wilson when Wilson became embroiled in battles to make Princeton less aristocratic.[103] Although Thompson was then a Republican, Wilson made him

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dock, July 7, 1920, Victor Murdock Papers, Box 69, Library of Congress, Washington, D.C.; *Victor Murdock Being Urged for Second Place on Democratic Ticket*, BALT. SUN, June 18, 1920, at 3.

[97] *See generally* SIDNEY MILKIS, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2009) (noting that the party was "leadership-centered," and its diverse membership of reformers had "different and sometimes conflicting reasons" for joining.). *Id.* at 9.

[98] *Gov't Control of the Meat-Packing Indus., Hearings Before the H. Comm. on Interstate & Foreign Com.*, 65th Cong., 3d Sess. 2361 (1918) (after "a great deal of hesitating mental travel . . . I am back in the old camp of no trusts and competition"); *High Cost of Living as Affected by Trust and Monopolies, Hearings Before the H. Comm. on the Judiciary*, 66th Cong., 1st Sess. 22 (1919) [hereinafter *High Cost of Living*] (expressing concern about whether there was "a legitimate economic limit to beneficial magnitude"); *Stabilizing Prices of Farm Products, Hearings Before the H. Comm. on Agric.*, 67th Cong., 2d Sess. 95 (1922).

[99] *Stabilizing Prices of Farm Products, supra* note 98, at 95. The proposal came to be known as "McNary-Haugen," after two legislators who pressed the proposal.

[100] Davis, *supra* note 62, at 215.

[101] *V. Murdock Dead; Wichita Editor, 74*, N.Y. TIMES, July 9, 1945, at 11; William Ayres to Victor Murdock (Mar. 18, 1924), Murdock Papers, *supra* note 96 (offer of support by Congressman Ayres, a future Commissioner, for a Murdock Senate bid).

[102] *See supra* text accompanying notes 73–76.

[103] W. BARKSDALE MAYNARD, WOODROW WILSON, PRINCETON TO THE PRESIDENCY 221 (2008).

Assistant Attorney General in charge of litigation before the Court of Claims. Thompson sought a judgeship in 1917, but Wilson told him it was the wrong career direction for him; Wilson also declined, that year, to name Thompson to the Commission, explaining that the agency did not need another lawyer. Thompson got his seat the next year.[104]

Thompson was now a Democrat, politically active and ambitious. His 1920 maneuvering on Murdock's behalf was noted above. In 1923, Wilson urged the Governor of Colorado to name him to a Senate vacancy. Thompson was mentioned as a possible running mate for La Follette in 1924 and a possible dark horse candidate for President in 1928. A press report called him a "militant aggressive antimonopoly follower of the Woodrow Wilson school." Perhaps adding to his political luster, he was active in the Boy Scouts and YMCA, and a presenter at Bible study.[105]

Thompson's interests included "Blue Sky" cases involving deceit in the sale of stocks (the SEC would not be created until 1934), and commercial bribery, where manufacturers paid fees to a seller's employees, not necessarily with their employers' knowledge. Thompson compared this to tipping, which he deemed reprehensible. He was also interested in international matters. He directed a study on European cooperatives in 1923, seeking insights from foreign models to inform domestic policy, and over several decades advocated an international commission to investigate trade disputes.[106]

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[104] Wilson to Samuel Huston Thompson, Aug. 1, 1912, 24 PWW (1978), *supra* note 17, at 579 (letter to Thompson's father, noting long friendship with Huston); *Huston Thompson, Headed FTC Under Two Presidents*, WASH. POST, Feb. 18, 1966, at B3; BOBBY HAWTHORNE, LONGHORN FOOTBALL: AN ILLUSTRATED HISTORY 8 (2007) (noting Thompson's 14–2 record, including an undefeated season, at University of Texas); Huston Thompson, *The Nineteen Hundred Champions,* 2 THE ALCADE 349–52 (available on Google Books; describing how he imposed "physical chastisement" on a player who drank water at practice); *id.* at 507 (letter from Attorney General T.W. Gregory); Thompson to Wilson, Sept. 17, 1920, 21 PWW (1976), *supra* note 17, at 132 (noting Republican affiliation); Thompson to Wilson (Jan. 15, 1917), 40 PWW (1982), *supra* note 17, at 490; Wilson to Thompson (Jan. 16, 1917), *id.* at 493; Wilson to Thompson, June 28, 1917, 43 PWW (1983), *supra* note 17, at 33 (lifetime appointment "would tend to . . . narrow your development").

[105] *Wilson Brings Out a Senate Candidate*, N.Y. TIMES, Mar. 27, 1923, at 1; *La Follette Group Favors Democrat for Vice-President*, CHRISTIAN SCI. MON., July 5, 1924, at 1; *Democrats Have 8 Dark Horses for Nomination*, WASH. POST, Feb. 27, 1928, at 1; *Wilson Helps Boy Scouts*, WASH. POST, July 7, 1918, at 13; *Huston Thompson Again Heads "Y,"* WASH. POST, Apr. 20, 1919, at 22; *Pulpit Addresses by Prominent Men*, WASH. POST, Nov. 19, 1921, at 11.

[106] *Proposed Federal "Blue-Sky" Law, Hearing on H.R. 188 Before the H. Comm. on the Judiciary*, 66th Cong, 1st Sess. 25–65 (1919); *High Cost of Living, supra* note 98, at 56–76 (supporting a bill to require filings with the Treasury Department with the FTC retaining a role in challenging misconduct); BOY'S LIFE, June 1922, at 54 (available on Google Books); *Deplores Business Bribes*, N.Y. TIMES, May 13,1922, at 2 (tipping as "un-American"); Huston Thompson, *Reconstruction of International Good Will,* 102 ANNALS AM. ACAD. POL. & SOC. SCI. 162 (1922). *See also, e.g., World Held in Need of Trade Tribunal,* WASH. POST, June 11,

D. NELSON GASKILL (1920–25)

Nelson Gaskill also graduated from Princeton while Wilson taught there, and went to Harvard Law School.[107] He became an Assistant Attorney General for New Jersey, where he consulted with Governor Woodrow Wilson.[108]

Gaskill favored some expansive interpretations of the FTC's powers, including a potentially broad interpretation of Section 5.[109] He was also an ardent associationalist. Consistent with associational ends, he sought authority for the FTC "to approve at least temporarily and protectively, proposed conduct, to authorize agreements [in the first instance and subject to judicial review]."[110] He also argued that selling below cost was a UMC, and an agreement not to do so should be legal.[111] On other matters, he advocated legalizing resale price maintenance, with the moderately regulatory conditions that a fixed price be published and be both a maximum and minimum.[112] Gaskill anticipated some procedural reforms that would later be associated with Humphrey. In February 1923, for example, he persuaded his colleagues to adopt a settlement procedure in deception cases. The process was abandoned that October, when Thompson and Nugent joined Murdock in opposition.[113]

1931, at 5; discussion *infra* notes 238, 239, and accompanying text (discussing report on foreign cooperation).

[107] Gaskill to Wilson (June 26, 1907), 17 PWW (1974), *supra* note 17, at 230 (writing to Wilson, then President of Princeton, to support Wilson's challenge to "eating clubs"); *Col. Nelson Gaskill*, WASH. POST, Oct. 9, 1964, at C7.

[108] *See* Wilson to James Fairman Fielder, Mar. 30, 1913, 27 PWW (1978), *supra* note 17, at 240 (advising his successor as Governor to "consult with Gaskill" on a bill).

[109] For example, he argued (though he did not use these precise terms) that the Sherman Act could not be used to challenge unilateral conduct by a firm whose market share was under 45 percent, but Section 5 of the FTC Act might reach conduct by firms with smaller market shares. Nelson Gaskill, *The Quantity Rule in the Anti-trust Laws*, Herbert Hoover Papers, Dep't of Commerce Papers, Box 199 (1924), Herbert Hoover Library, West Branch, IA. He also took an aggressive view on the application of Section 5 to merger challenges. *See infra* note 194.

[110] Nelson Gaskill, *Business and the Law* (May 11, 1922), *in* NELSON B. GASKILL SPEECHES 1922–35, at 12 (unpublished collection) (on file in FTC Library) [hereinafter GASKILL SPEECHES].

[111] Nelson Gaskill, *Some Aspects of Price Cutting* (June 9, 1922), *in* GASKILL SPEECHES, *supra* note 110, at 6; *Cost Accounting*, 27 FACTORY: THE MAGAZINE OF MGMT. 485 (Oct. 1921) (available on Google Books).

[112] *Resale Price Fixing Advocated by Gaskill*, N.Y. TIMES, May 10, 1923, at 12; Nelson Gaskill, *Address to the American Trade Association Executives* (May 9, 1922), *in* GASKILL SPEECHES, *supra* note 110, at 7.

[113] 7 FTC Min. 682–86 (Feb. 7, 1923) (approving process whereby the agency would not issue a complaint if a target stipulated that it would abandon its practice); 8 FTC Min. 639–40 (Oct. 17, 1923) (dropping process). Thompson and Nugent said they approved the process to relieve crowded dockets. Murdock missed the February 7 meeting, and routinely dissented to actions taken under the process approved that day. *E.g.*, 7 FTC Min.

Gaskill's interest in trade associations intersected those of Secretary Hoover, and Gaskill responded to specific requests from associations, routed through Hoover, with his views on the legality of various practices. He and Hoover corresponded, and Hoover suggested in 1924 "a session with you and such people as are like minded in the administration, to see if we could not produce a real analysis and a proposition for an entire revision of the restraint of trade laws."[114]

While Gaskill's interest in associations was hardly a pretext to curry favor with Hoover—he later headed the Lead Pencil Institute—the Hoover connection could doubtlessly have proved useful when he sought reappointment. Gaskill did, indeed, call upon Hoover soon before his term was to expire. Unfortunately for Gaskill, Hoover had less influence on Coolidge than he would have had on Harding. Then, when Gaskill sought the key endorsement of his home-state Senator Walter Edge, Edge called him "a trifle too hard on business" and a "Wilson Republican." Gaskill received a recess appointment in 1924, but Coolidge soon displaced him with Humphrey.[115]

E. JOHN NUGENT (1921–27)

John Nugent of Idaho had worked in mines when young and then became a lawyer. Early in his career, he had joined with Clarence Darrow to defend union leader William Haywood against charges of murdering the former state governor; Senator William Borah was a prosecutor in the case. Nugent, described as a "Bryan Democrat," was appointed to a Senate vacancy in 1918. When he faced the voters in 1920, though, Nugent lost. Wilson, a lame duck President, then named the lame duck Senator to the FTC. On Borah's motion, the Republican-

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255 (May 11, 1923). The Commission in those days would accept stipulated findings of facts, but not stipulated orders.

[114] David L. Wing to Herbert Hoover, Aug. 5, 1922, Hoover Papers, *supra* note 109, Dep't of Commerce Papers, Box 148 (1922), David L. Wing to Herbert Hoover, Feb. 8, 1924, Hoover Papers, *supra,* Dep't of Commerce Papers, Box 199 (1924). Significantly, Hoover wrote before *Maple Flooring Mfrs. Ass'n v. United States,* 268 U.S. 563 (1925), expanded the scope of trade association information exchanges.

[115] Gaskill to Hoover, Sept. 4, 1924 (enclosing correspondence with Senator Edge, and a Gaskill dissent against the basing point pricing order), and Gaskill to Hoover, Dec. 4 and 6, 1924, Hoover Papers, *supra* note 109, Dep't of Commerce Papers, Box 199; Edge to Gaskill, Sept. 3, 1924, and Edge to C. Bascom Slemp, Sept. 3, 1924, Coolidge Papers, *supra* note 75, File 100, Reel 68; *No More Cabinet Changes in View Before March 4*, WASH. POST, Jan. 14, 1925 (reporting recess appointment and noting uncertainty about longer-term appointment); NELSON B. GASKILL, PRICE CONTROL IN THE PUBLIC INTEREST 1 (1931) (noting affiliation with the Lead Pencil Institute). Some of Gaskill's behavior seems curious for someone lobbying for reappointment, though; in particular, FTC minutes show that he began a three-month vacation a month after Harding died. *See* 7 FTC Min. 521 (Sept. 5, 1923); 8 FTC Min. 64 (Dec. 4, 1923) (first meeting after his return).

controlled Senate quickly confirmed him. This added to the Commission a Wilson appointee who would stay through 1927. While still a Commissioner, he ran for his old Senate seat in 1926. Nugent died in 1931.[116]

F. VERNON VAN FLEET (1922–26)

Vernon Van Fleet had served for eight years on the Superior Court of Indiana and was a special assistant to the Attorney General when he became a Commissioner. He was a favorite of Senator James Watson of Indiana, a harsh critic of the FTC and particularly its meatpackers investigation.[117] Van Fleet's arrival likely changed the outcome in some matters where he joined with Murdock and Gaskill. He dissented publicly from FTC orders more than any other Commissioner during his first years; for example, he dissented from a challenge to a merger of three relatively small steel firms.[118] But he also joined his colleagues in supporting some controversial actions and reports, including a report on the meatpackers, which he signed as Chairman, that reiterated variants of the FTC's earlier recommendations.[119] He was also unavailable for certain key votes—perhaps deliberately in at least one instance—although the published reports give no indication that Van Fleet had not supported the agency action.[120]

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[116] *Boise Ready for the Haywood Trial . . . Military Is Reinforced*, N.Y. TIMES, May 6, 1907, at 2; *Nugent Idaho Senator*, WASH. POST, Jan. 23, 1918, at 1; *Will Hold Up All Wilson's Nominees*, N.Y. TIMES, Jan. 18, 1921, at 3 (noting that Nugent's appointment was a matter of "Senatorial Courtesy"); *Nugent on Trade Board*, N.Y. TIMES, Dec. 21, 1920, at 22; *J.F. Nugent Dead; Once Idaho Senator*, N.Y. TIMES, Sept. 19, 1931, at 17; John Frost Nugent, http://bioguide.congress.gov/scripts/biodisplay.pl?index=N000169.

[117] THOMAS BLAISDELL, THE FEDERAL TRADE COMMISSION 80 (1932) (noting Van Fleet's relation with Watson); *Charges Reds' Nest in Federal Employ*, WASH. POST, Oct. 23, 1919, at 1 (accusations by Watson); Press Release, Fed. Trade Comm'n, *supra* note 87, Nov. 30, 1924 (biography and announcement that Van Fleet had become Chairman).

[118] For an example of a matter where Van Fleet joined with Murdock and Gaskill, see, e.g., 7 FTC Min. 259–60 (May 14, 1923). For a discussion of the steel mergers, see *infra* note 194 and accompanying text.

[119] *See, e.g.*, 6 FTC Min. 622 (Jan. 26, 1923) (Western Meat); 9 FTC Min. 38–39 (July 11, 1924) (U.S. Steel basing point pricing); PACKER CONSENT DECREE, S. DOC. NO. 219, 68th Cong., 2d Sess. (1925). The basing point pricing vote might have been influence by its regional importance to the Midwest. These matters are discussed in detail in Part VI, *infra*.

[120] Thus, Van Fleet was absent for several votes leading to significant orders, which were subsequently reversed, and are all discussed below. These included votes in two cases charging price discrimination on the basis of trade status by National Biscuit Co. and Loose-Wiles Biscuit Co. 8 FTC Min. 111–12 (Dec. 21, 1923). The votes in the *Kodak* case, also discussed below, are perhaps the most curious. Van Fleet and Gaskill both voted against the original complaint. (Van Fleet had first moved, without getting a second, that the Commission meet with the parties before issuing a complaint.) 6 FTC Min. 616 (Jan. 24, 1923). When the Commission later voted to issue a final order after trial, Van Fleet left

Van Fleet did not have Thompson's or Humphrey's flair for publicity. An incident from 1923 suggests a high degree of integrity. Though appointed by Harding, Van Fleet alone dissented from naming a staff member to receive contributions to a Harding memorial fund, citing "moral coercion" such appointment could make.[121] He left in 1926, before his term expired, and denied leaving because of tensions in the Commission.[122]

G. CHARLES W. HUNT (1924–32)

At a time when farmers faced serious economic issues and formed an important bloc in Congress, Charles Hunt had been a farmer and past President of the Iowa Farm Bureau Federation. A graduate of the Iowa State College, he had served briefly in the state legislature. His supporters included Herbert Hoover, with whom he had dealt during the war, and Iowa Senator Albert Cummins, a leader of the fight to create the FTC who had become president *pro tem* of the Senate.[123]

Hunt arrived in June 1924, with the election approaching in five months and his term due to expire in fifteen. His arrival likely had some impact on voting patterns (although Victor Murdock, who Hunt replaced, had his own idiosyncratic voting history). On matters where Van Fleet and Gaskill aligned, Hunt never broke publicly with them, and a common pattern of dissents was soon "Commissioners Nugent and Thompson dissenting."[124] However, Hunt did not vote in lockstep with Van Fleet and Gaskill. For example, he provided a key vote for a merger challenge from which Van Fleet publicly dissented, with Gaskill missing the vote;[125] he aligned with Nugent and Thompson on a vote to include

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during the discussion. 8 FTC Min. 439 (Apr. 2, 1924). Public documents of the time gave no indication of these absences and dissents. *See, e.g.*, Press Releases, Fed. Trade Comm'n, *supra* note 87, Jan. 26, 1924 and Apr. 21, 1924.

121 8 FTC Min. 60 (Dec. 10, 1923).

122 *Leaves Trade Commission*, N.Y. TIMES, July 18, 1926, at E8.

123 *C.W. Hunt, Ex-Member of Trade Commission*, N.Y. TIMES, Aug. 18, 1938, at 19; ANNALS OF IOWA (1939), at 480; *Pension Plea Bill Heard by Coolidge*, BALT. SUN, Apr. 24, 1924, at 2 (Cummins praising Hunt as "a real dirt farmer, experienced in business, and . . . in every way well qualified for the place"); Cummins to Coolidge, Apr. 25, 1924, and Hoover to Coolidge, May 2, 1924, Coolidge Papers, *supra* note 75, File 100BU, Reel 70.

124 For example, Commissioners Van Fleet, Gaskill, and Hunt prevailed on 3–2 votes to dismiss several challenges to guarantees against price declines; immediately after, the same Commissioners prevailed on a vote to modify the findings and order provisions in a deception case against the Don-O-Lac company, so that both turned in part on standards adopted by a trade association. 8 FTC Min. 259–62 (Oct. 10, 1924). For further discussion of these cases, see *infra* text accompanying notes 181–183 and notes 215–219.

125 *See* Fisk Rubber Co., 10 F.T.C. 433, 433 n.1 (1926) (dismissing complaint that had been issued under Section 7 of the Clayton Act and reprinting in a footnote Van Fleet's

additional counts in a deception complaint.[126] When he was renominated in 1926, a newspaper reported a charge "that he was supposed to be 'progressive' in tendency when appointed, [but] exhibited reaction in his votes and activities after assuming office."[127]

VI. ADMINISTRATIVE LITIGATION: AN AMBITIOUS AGENDA, JUDICIAL HOSTILITY, AND SELF-INFLICTED WOUNDS

Turning to the FTC's program, we examine first its administrative litigation. The creation of an administrative adjudication process was a critical attribute of the new institution. Using administrative adjudication, the Commission was intended to bring its distinctive analytical tools—including the fusion of economics and law, recourse to information gathering and study functions, and decisionmaking by a multi-member board with diverse, complementary backgrounds—to bear on the examination of business conduct and the formulation of legal rules. Without a substantial, effective administrative litigation program, the aim of making the Commission an influential competition policy tribunal could not be accomplished.

The new agency challenged a wide range of practices. Some of its cases were championed by industry, through trade practice submittals or through complaints (sometimes by predecessors to today's Better Business Bureaus) against individual firms.[128] Some were championed by the Senate, either by directly urging the FTC to issue a complaint or by calling for a report that might lead to law enforcement. One case, discussed below, was requested by President Coolidge. With these and other promptings, the Commission brought an ambitious range of enforcement actions. Further, while many of these were consistent with an array of approaches, some markers suggest a particular affinity to elements of the New Freedom.

The early Commission's win-loss record, though, was disappointing. Some of its problems, stemming from statutory limits, were not complete surprises; indeed, Commissioners sought legislative fixes for many

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earlier dissent to issuing the complaint); 9 FTC Min. 393, 395 (Nov. 29, 1924) (showing Gaskill absent for the vote to issue the complaint).

[126] 9 FTC Min. 390–91 (Nov. 25, 1924) (including in a series of complaints involving "Sheffield Silver" counts that went to misrepresentation as to place of origin as well as misrepresentation as to quality).

[127] *Trade Board's Policy Attacked in Senate*, N.Y. TIMES, Mar. 6, 1926, at 26. He was confirmed by a 48–20 vote. *Senate Approves Hunt on Federal Trade Board*, CHI. DAILY TRIB., Mar. 11, 1926, at 8.

[128] *See* http://memory.loc.gov/ammem/coolhtml/coolenab.html (Associated Advertising Clubs of the World [a frequent complainant] was a predecessor to Better Business Bureaus.).

of them in 1919.[129] Some initiatives, such as a monopolization challenge to Western sugar interests, ran aground on courts' narrow constructions of "interstate commerce," a problem we rarely note today.[130] But its principal obstacles stemmed from a combination of exogenous and internal factors: a too-ambitious agenda, hostile courts, and frequently poor articulation of its theories, rarely citing economic testimony and rarely accompanied (except when provoked by dissents) by legal citations.

Though some cases suggest that it would have had problems even had it better explained its actions, the agency's opacity doubtlessly undermined its litigation posture. Further, when Wilson proposed a Commission, he promised business "the advice, the definite guidance and information which can be supplied by an administrative body . . . .[131] Then as now, transparency was critical if the agency was to do its job.[132] Here, the Commission's performance was deficient. It not only failed to explain adequately its adjudicative orders, but also (unlike trends in FTC practice today) rarely explained decisions not to prosecute cases; further, unless provoked by dissents, the Commission generally offered at best a skeletal explanation when it dismissed a complaint after trial.[133] However stretched its resources, that failure is particularly striking.

A. VERTICAL RESTRAINTS

FTC challenges to vertical restraints produced most of its early encounters with the Supreme Court. These cases generally alleged violations of both Section 5 of the FTC Act (which it had exclusive authority

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[129] *High Cost*, *supra* note 98, at 25–26. Victor Murdock proposed a dozen changes. Anticipating the 1938 Wheeler-Lea Act, for example, he sought authority to obtain civil penalties for violations of FTC orders and to supplement the FTC's authority over UMC with separate authority over unfair acts. Anticipating the 1950 Celler-Kefauver Act, he proposed that Section 7 of the Clayton Act be amended to reach asset purchases as well as stock acquisitions.

[130] The FTC initially had jurisdiction over acts or practices "in commerce" (expanded in 1975 to "in or affecting commerce"). This limit, as well as the Constitutional Commerce Clause, U.S. CONST., Art. 1, Sec. 8, Cl. 3, often confounded early antitrust cases. *See, e.g.*, United States v. E.C. Knight, 156 U.S. 1 (1895) (holding that manufacturing is not interstate commerce); Utah-Idaho Sugar Co. v. FTC, 22 F.2d 122 (8th Cir. 1927).

[131] H.R. DOC. NO. 625, 63d Cong., 2d Sess. 6 (1914).

[132] *See, e.g.*, Kovacic, FTC AT 100, *supra* note 7, at xxi.

[133] *See* Cases in Which Orders of Discontinuance or Dismissal Have Been Entered, 2 F.T.C. 461–66 (1920–21) (including as explanations "Charge not sustained" and "No reason assigned"). After Humphrey arrived, this began to change in cases where Nugent and Thompson publicly explained their dissents from some dismissals, sometimes provoking the majority to respond. *E.g.*, Chicago Retail Lumber Dealers' Ass'n, 9 F.T.C. 517, 517–21 (1925) (Nugent and Thompson dissent to a dismissal); *id.* at 521–24 (response by Humphrey, Hunt, and Van Fleet).

to enforce), and Section 3 of the Clayton Act (which it enforced jointly with the DOJ and private litigants).[134]

1. *Exclusive Dealing and Tying Clauses*

In its first case to reach the Supreme Court, the FTC's order forbade a tying arrangement.[135] It had found that Gratz (as agent for another firm) had 75 percent of a regional market for steel ties; that buyers were "many times unable" to buy the ties elsewhere; and that Gratz used this position to make buyers purchase bags as well as ties from it. The Commission offered little conceptual analysis, and it confused matters by alleging both FTC and Clayton Act violations in the complaint, but—without explanation—basing the order solely on the former.[136] The disappearance of the Clayton Act count makes it particularly glaring that the decision offered no explanation of the criteria for applying Section 5, although its brief to the Supreme Court did articulate an efficiency-based standard for UMC.[137]

In a decision issued while Wilson was still President, the Court reacted with scorn.[138] It ignored the FTC's evidence of market share and its belated explanation of UMC. The decision for seven Justices was written by James McReynolds, who as Attorney General had opposed the creation of a commission; a dissent for two Justices was written by Louis Brandeis, who had pressed for the FTC's establishment.[139] The Court's decision turned on the fact that the *pleadings* did not allege market share, and it evaluated the case solely by those pleadings; in this context (a tying arrangement with no reference to market position), it declared that Section 5 did not reach "practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[140]

The agency did little better in its challenge to the exclusive dealing practices of Curtis Publishing Company. The FTC issued an order under the FTC and Clayton Acts, but ignored an issue raised at the trial: Were

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[134] Then as now, Section 3 proscribed such arrangements if their effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[135] Anderson Gratz & Benjamin Gratz, 1 F.T.C. 249, 255–57 (1918).

[136] *Id.*

[137] Brief for the Petitioner 45–52, FTC v. Gratz (Oct. Term 1919). The FTC still did not explain why it dropped the Section 3 count.

[138] FTC v. Gratz, 253 U.S. 421 (1920).

[139] For background on the Justices, see Winerman, *Origins*, *supra* note 13, at 53–55.

[140] *Gratz*, 253 U.S. at 427.

these arrangements contracts of sale or agency?[141] Again, the agency clarified its position in its brief to the Court; there it argued that they were contracts of sale and thus violated Section 3, and, if contracts of agency, they still violated Section 5 because of their effect on competition.[142] The Court disagreed. Again writing for seven Justices, James McReynolds said that the Clayton Act count failed because these were contracts of agency; the Section 5 count collapsed because "[e]ffective competition requires that traders have large freedom of action when conducting their own affairs," and could engage "competent agents obligated to devote their time and attention to developing the principal's business, to the excluding of all others, where nothing else appears . . . ."[143] Again, Section 5 added nothing to other antitrust laws. Further, the Court (with good reason) criticized the FTC's meager findings, and "in the interest of justice" chose not to follow the normal procedure, a remand, where the agency had not considered key evidence.[144] This triggered a "doubting" opinion by Chief Justice Taft, joined by Brandeis, that highlighted the need to "scrupulously comply with the evident intention of congress that the Federal [Trade] Commission be made the fact-finding body."[145]

FTC v. Sinclair Refining Co.[146] stemmed from dozens of FTC challenges to arrangements whereby oil companies provided inexpensive tanks and pumps to retailers. The contracts with the refiners required that each firm's equipment be used to store and pump only that refiner's brand of gasoline. The complaints challenged the impact of these practices in retail markets, though some also challenged its impact in markets for tanks and pumps. As to the retail markets, some but not all of the decisions found that some competing refiners did not, or could not afford to, subsidize tanks and pumps for a network of retailers.[147] The agency tried each case individually, although its theory seemed to be based in part on the aggregate effect of multiple retailers adopting these arrangements. However, it apparently tired of writing multiple decisions. After

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[141] Brief for the Respondent 113–20, Curtis Publ'g Co., 2 F.T.C. 20 (1919). The brief is available at National Archives, RG-122, Docket Section, Docketed Case Files, 1915–43, Box No. 15.

[142] Brief for the Petitioner 25–59, FTC v. Curtis Publ'g Co. (Oct. Term 1920).

[143] Curtis Publ'g Co. v. FTC, 260 U.S. 568, 582 (1923).

[144] *Id.* at 577 (extensive testimony yielded "a brief and rather vague report of two pages . . ."), 580.

[145] 260 U.S. at 583. Taft had himself been no friend of the FTC in 1914. Winerman, *Origins*, *supra* note 13, at 31.

[146] 261 U.S. 463 (1923).

[147] Sinclair Ref. Co., 2 F.T.C. 127, 136–37 (1919); Maloney Oil & Mfg. Co., 2 F.T.C. 346 (1920).

one, it appended a list of seventeen respondents and said that it "has also issued similar orders in other cases involving substantially the same facts . . . ."[148]

Multiple respondents challenged the orders, and four consolidated cases reached the Court. Again, the Commission now explained itself better. For some but not all of the respondents, it discussed indicia of market power that it had not mentioned before.[149] On the other hand, it no longer made the point that some retailers were at a competitive disadvantage because they were unwilling or unable to invest in networks of retailers. In a decision by Justice McReynolds, a now-unanimous Court rejected the FTC's findings. In addressing a Section 3 count, it found that retailers retained substantial commercial freedom under the arrangements and, in any event, could buy their own equipment for "a comparatively small sum."[150] The Court then acknowledged Section 5's broader reach in a backhanded way, by considering the respondents' justifications more broadly; it found that the arrangements protected refiners' interest in safety and that the public benefited from ease of entry into the retail market.[151]

After these defeats, the Commission brought fewer Section 3 cases.[152] Its case against the film industry, discussed below, would focus on "full line forcing" before it was decided in 1927, but that was not the thrust of the original agency complaint.[153] On balance, the Commission's program on nonprice vertical restraints, like much of its program, was ambitious but flawed.

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[148] Maloney Oil & Mfg. Co., 2 F.T.C. 246, 357 (1920). The list included such giants as the Standard Oil Companies of Ohio, New Jersey, and New York.

[149] Brief for the Petitioner 35–36, 40, FTC v. Sinclair Refining Co. (Oct. Term, 1922) (noting, for example, that Standard Oil of New Jersey had the challenged arrangements with about 42 percent of the dealers in its territory and "practically all the dealers in some districts").

[150] FTC v. Sinclair Ref. Co., 261 U.S. 463, 473–75 (1923).

[151] *Id.* at 475–76.

[152] A series of earlier cases in some ways similar to the tank and pump cases failed. B.S. Pearsall Butter Co., 5 F.T.C. 127 (1922), *rev'd*, B.S. Pearsall Butter Co. v. FTC, 292 F. 720 (7th Cir. 1923). Pearsall and scores of competitors developed exclusive dealing arrangements. The FTC's four-page decision did not explain why the practice violated the law when there were so many consumer options on the market. The agency soon dismissed a series of parallel cases. 6 F.T.C. 517 (1924) (listing seven cases). In contrast, *Butterick Co.*, 6 F.T.C. 310 (1923), *aff'd*, 4 F.2d 910 (2d Cir. 1925), was an (unsurprising) success. The FTC's detailed decision set forth, among other things, that respondent and its affiliates had exclusive dealing contracts with nearly 40 percent of the distributors in the country. However, this was a follow-on to an earlier case where the Supreme Court had previously sustained a private Clayton Act suit. *See* Standard Fashion Co. v. Magrane Houston Co., 258 U.S. 346 (1922).

[153] *See infra* text accompanying note 185.

2. *Resale Price Maintenance*

In 1919, the FTC proposed to legalize resale price maintenance (RPM) under a highly regulatory framework.[154] That approach went nowhere, and RPM prosecutions became a mainstay of its enforcement program. During the four years covered by this study, the Commission brought seventy-eight RPM cases (including cases where the impetus for the RPM seemed to come from distributors' cartels).[155] These constituted 14 percent of the 549 cases during these years and nearly 35 percent of the 223 cases that did not involve what would now be deemed "consumer protection."

The Commission's 1919 decision in a challenge to Beech-Nut laid out a theory: Beech-Nut's RPM protected relatively inefficient distributors, and distributors, themselves benefitting from higher prices, pressed Beech-Nut's competitors to adopt the practice.[156] However, the agency cited neither expert testimony nor case law to support this analysis. The failure to discuss case law is particularly striking given the finding that respondent's conduct "does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced."[157] That finding had particular salience in light of the timing of the agency decision. Four weeks earlier, the Supreme Court had punched a hole in the per se prohibition against RPM announced in *Dr. Miles*.[158] In *United States v. Colgate & Co.*,[159] it held that a manufacturer would not violate the rule of *Dr. Miles* if it unilaterally announced a policy of not dealing with discounters and then terminated retailers that would not comply with its terms.

As it had in cases dealing with nonprice vertical restraints, the FTC's briefing offered some further analysis. It argued in the alternative that there was a tacit agreement in violation of the Sherman Act and that the FTC Act would have forbidden Beech-Nut's conduct even if there were not.[160] In its 1922 decision, the Court's analysis was itself opaque.[161] It upheld the agency's finding of liability, but changed its order by limiting

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[154] *See supra* text accompanying note 35.

[155] For distributor cartel cases, see, e.g., The Am. Tobacco Co., 7 F.T.C. 546 (1924) (dismissing complaint); 1923 ANNUAL REPORT 180–81, *supra* note 34 (fuller description of the complaint and three other complaints, each naming as respondents a different tobacco company and the same trade association).

[156] Beech-Nut Packing Co., 1 F.T.C. 516, 527–28 (1919).

[157] *Id.* at 528.

[158] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[159] 250 U.S. 300 (1919).

[160] Brief for the Petitioner at 25–48, FTC v. Beech-Nut Packing Co. (Oct. Term 1921).

[161] FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

its proscriptions to "cooperative methods" between the respondents and its distributors, customers, and agents. This was generally consistent with *Colgate*'s analysis and suggests an intent to read Section 5 in conjunction with the Sherman Act. The FTC's victory was narrow, a 5–4 decision with both McReynolds and Brandeis among the dissenters (Brandeis had long advocated RPM.[162]) It was also a highly qualified win, as suggested by the fact that, in the aftermath of its "victory," the Commission (citing the age of the cases) dismissed a slew of pending RPM cases.[163]

B. Other Pricing Practices

The FTC's efforts during these years to confront important problems and grapple with difficult issues is shown in other pricing cases. We explore below FTC challenges during these years to two forms of price discrimination and guarantees against price decline.[164]

1. *Discrimination*

The Commission brought its price discrimination cases under Section 5 and the original Section 2 of the Clayton Act. Section 2 prohibited, subject to several provisos, discrimination in prices for commodities whose effects "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[165]

a. Discrimination Based on Trade Status

Several FTC cases challenged discriminations based on trade status, a practice that would later be called "secondary line discrimination." One case challenged The Mennen Co., which gave a preferred price to wholesalers but refused to extend the preference to retailers who

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[162] *See* Louis Brandeis, *On Maintaining Maker's Prices* (1913), *reprinted in* THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Fraenkel ed., 1934).

[163] 1924 ANNUAL REPORT, *supra* note 8, at 162–69. The Commission asserted that it might reopen the cases if respondents engaged in conduct inconsistent with the Court's decision.

[164] The Commission had earlier brought challenges to below-cost pricing. *E.g.*, Ward Baking Co., 1 F.T.C. 388 (1919), *rev'd*, Ward Baking Co. v. FTC, 264 F. 330 (2d Cir. 1920) (order forbidding sale of bread on basis of buy one loaf, get one free; reversed for lack of interstate commerce). However, it brought only one such case and issued no orders against such pricing during the years discussed in this article. *See* NATIONAL INDUSTRIAL CONFERENCE BOARD, PUBLIC REGULATION OF COMPETITIVE PRACTICES 60–66 (1929 ed.) [hereinafter NICB]; Balt. & Phila. S.S. Co., 6 F.T.C. 512 (1923) (dismissing the sole complaint, Commissioner Gaskill dissenting). Additionally, during these years it brought two cases, both dismissed, charging respondents with bidding up, to an excessive level, the prices of raw materials. F.M. Stamper Co., 7 F.T.C. 546 (1924); Ohio Dairy Co., 8 F.T.C. 525 (1924).

[165] Pub. L. 63-212, 38 Stat. 730 (1914). Provisos allowed price differences based on grade, quality or quantity, and for differences "in good faith to meet competition."

pooled their orders through cooperative societies. The FTC's decision noted that most of Mennen's competitors did give their preferred prices to such societies; it made limited findings about Mennen's market position; and it found that the effect of the practice "may be to substantially lessen competition on the sale and distribution of respondent's products, or between distributors thereof."[166]

Similarly, in a pair of cases against the National Biscuit Co. and Loose-Wiles Co., the respondents gave quantity discounts and allowed branches of chain stores, but not individual retailers purchasing collectively, to aggregate their orders for purposes of qualifying. In detailed findings in these two cases, the Commission found that National Biscuit had about a 50 percent national market share (and Loose-Wiles 15 percent); that there were no cost savings in deliveries to branches of chain stores; that the disadvantaged retailers lost customers for purposes of other sales; and (unlike in Mennen) that other manufacturers followed National Biscuit's practices.[167]

Though the Commission seemed to touch all the bases to make a credible showing of anticompetitive effects, the Second Circuit reversed it in all three cases, with a key finding being that the Clayton Act did not reach secondary line discrimination and (citing *Colgate* and other cases) that the FTC's order conflicted with Mennen's right to set prices as it chose.[168] The FTC's trial of these cases, and particularly the biscuit cases, do not suffer the flaws of some early Commission cases. Indeed, though the Supreme Court denied certiorari in the *Mennen* case, five years later it declared in private litigation that the Second Circuit decisions were wrong.[169]

b. Basing Point Pricing

The Commission's 1921 challenge to "Pittsburgh Plus" pricing, also known as basing point pricing, was one of its signature efforts of this

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166 The Mennen Co., 4 F.T.C. 258, 276, 280–82 (1922), *rev'd*, The Mennen Co. v. FTC, 288 F. 774 (2d Cir. 1923). One of Mennen's products was unique, and the firm's aggregate sales were $1.5 million, about $20 million in 2010 dollars. 4 F.T.C. at 282; http://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt [hereinafter Historical CPI data].

167 Nat'l Biscuit Co., 7 F.T.C. 206, 210–11 (market share), 214–15 (1924) and Loose-Wiles Biscuit Co., 7 F.T.C. 218, 223 (1924), *both rev'd sub. nom* Nat'l Biscuit Co. v. FTC, 299 F. 733 (2d Cir. 1924). Van Fleet was absent from the meeting; Gaskill dissented, but chose not to make his dissent public. 8 FTC Min. 187, 190 (Jan. 21, 1924).

168 The Mennen Co. v. FTC, 288 F. 774, 778–81 (2d Cir. 1923).

169 George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 254 (1929) (*Mennen* "was based on the premise that the statute was ambiguous and required the aid of committee reports, etc., to determine its meaning, a premise which we have rejected as unsound.").

period—and the start of a battle that would extend for decades. U.S. Steel produced 50 percent of the rolled steel in the country, approximately $1.5 billion annually or $20 billion in 2010 dollars. It had plants in several cities, but, wherever steel was produced, U.S. Steel and its competitors billed buyers for transportation as if it came from Pittsburgh (the largest production center). Steel manufacturers with plants in or near Pittsburgh could thus price competitively in certain markets where they otherwise might not have, while many customers outside Pittsburgh paid more than they otherwise might have. The regional resentment was reflected by the daily appearance, on the editorial page of the *Chicago Tribune* over a series of years, of the demand, "Abolish Pittsburgh Plus," and the 1924 order drew a banner headline across that paper's front page.[170]

The case had an extended pre-complaint history. The Commissioners held six days of public hearings in 1919, before declining to issue a complaint in 1920. Commissioners Gaskill, Murdock, and William Colver were in the majority; Pollard and Thompson dissented; and (uniquely for early FTC's history) each Commissioner publicly explained his vote. After further investigation and the replacement of Colver by John Nugent, the agency reversed course in 1921, voting 3–2 to issue a complaint. After an extended trial (with thirteen hours of oral argument), the agency issued an order in 1924. That vote was 4–1. Nugent and Thompson were now joined by Hunt and Van Fleet, whose Indiana and Iowa ties perhaps influenced their votes. Gaskill alone opposed the order.[171]

The Commission heard testimony from top economists—W. Z. Ripley of Harvard, John R. Commons of the University of Wisconsin, and Frank A. Fetter of Princeton. Two of them soon published on the subject. The reason for the top-flight economic testimony was itself unusual, though: the economists were funded by states that were adversely affected by the practice.[172]

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[170] U.S. Steel Corp., 8 F.T.C. 1, 19 (1924); Historical CPI data, *supra* note 166; 1 SIMON N. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 261 (1958); *Pittsburgh Plus Outlawed*, CHI. DAILY TRIB., July 23, 1924, at 1.

[171] 3 FTC Min. 294 (July 1919), 501–06 (Dec. 3–6, 1919) (hearings); Press Release, Fed. Trade Comm'n, *supra* note 87, July 24, 1920. 4 FTC Min. 372–74 (Nov. 16 and 17, 1920) and 407–09 (Dec. 8–10, 1920) (reporting public hearings), 629 (Mar. 29, 1921) (reporting vote to issue complaint); *United States Steel Corp.*, 8 F.T.C. at 1 (majority decision), 27 (reference to impact of the system on Indiana and Iowa), 61 (Gaskill dissent); 8 FTC Min. 694 (June 23, 1924) (noting oral argument). At no point did a Commissioner involved in more than one action on the case substantially reverse an earlier position.

[172] John R. Commons, *The Delivered Price Practice in the Steel Market*, 14 AM. ECON. REV. 505 (1924); Frank A. Fetter, *The Economic Law of Market Areas,* 38 Q.J. ECON. 520 (1924);

The Commission's complaint characterized the practice as "extort[ion]."[173] Its order was based on findings that respondents had violated the prohibition on UMC under Section 5 of the FTC Act and the prohibition on price discrimination under Section 2 of the Clayton Act. There was a vertical component to the case—some of the Pittsburgh manufacturers that benefited from the pricing practices of U.S. Steel's mills were U.S. Steel's own subsidiaries—but much of the case was based on the pricing practices independent of U.S. Steel's downstream role. In part, the Commission's reasoning was that pricing based on the point of manufacture ("free on board" or "f.o.b." pricing) was the result expected by the "law of supply and demand." Pittsburgh Plus pricing's survival, according to the Commission, showed that supply and demand was not determining prices, and this was possible because U.S. Steel's competitors' followed its pricing lead. The "grotesque" practice of Pittsburgh Plus pricing, according to the FTC, made it easier for U.S. Steel's competitors to determine the precise price to charge in every locale.[174] The general approach in the Commission's decision—to seek an explanation for a seemingly unexpected price pattern—in fact remained at the core of subsequent debates about basing point pricing.[175] Commissioner Gaskill's dissent, moreover, seemed to concede, at least for the sake of argument, that the majority's analysis might have had economic merit. Gaskill argued that the FTC does not have a mandate to require "the observance of sound economic principles," and if the law allowed unsound practices, the response had to come from the legislature.[176]

U.S. Steel did not contest the Commission's order, but it apparently flouted that order in part; it did not abolish all basing points, but rather added additional points. One was in Chicago (although the basing point price for Chicago was higher than that for Pittsburgh).[177]

The Supreme Court, though, soon cast doubt over the FTC ruling in a case involving DOJ's challenge to the Cement Institute.[178] Justice Stone, writing for six Justices, upheld basing point pricing in that industry. The

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Postpones "Pittsburgh Plus" Case, N.Y. TIMES, July 24, 1923, at 6 (trial delayed when states decided to develop economic testimony in mid-trial).

[173] *United States Steel Corp.*, 8 F.T.C. at 6.

[174] *Id.* at 38–39, 48.

[175] *E.g.*, Dennis W. Carlton, *A Reexamination of Delivered Pricing Systems*, 26 J.L. & ECON. 51 (1983). Carlton argues that basing point pricing could be collusive under certain circumstances, but in other cases may be justified on the basis of efficiencies.

[176] *United States Steel Corp,* 8 F.T.C. at 61–65.

[177] WHITNEY, *supra* note 170, at 262–63; Frank Albert Fetter, *Exit Basing Point Pricing*, 38 AM. ECON. REV. 815 (1948) (characterizing the order as "mockingly accepted by the corporation" and "negligently left unenforced").

[178] Cement Inst. Protective Ass'n v. United States, 268 U.S. 588 (1925).

Court dismissed the basing point pricing challenge—part of a broad challenge to facilitating practices—in two paragraphs. The market structure in cement was far different from the high concentration in the steel industry, but the Court did not rely on specifics of the market structure that might have made it more (or less) likely that the pricing structure was collusive.[179]

The struggle over basing point pricing would renew within a decade. During the era of the National Recovery Administration from 1933 to 1935, the N.R.A. embraced the practice and Franklin Roosevelt would intervene as the Commission questioned the Steel Code before the President.[180] After the N.R.A. era, the battle would resume in the courts.

There were many unusual elements to the Pittsburgh Plus case. In the short term, the case appeared an undoubted success, perhaps the FTC's greatest success of the era. The Commission's process also drew on the agency's strengths. It solicited public input before issuing a complaint. It relied on sophisticated economic testimony for its time. Its decision was a lengthy exposition (sixty-five pages, including the complaint and a five-page dissent) and set forth a detailed analysis. It is true that high-quality economists appeared only because affected states paid for their testimony. Still, the case showed an unusually effective Commission, and, if the experience was imperfect, it constitutes the FTC's most significant antitrust success of the era.

2. *Guarantee Against Price Decline*

Another pricing practice that the FTC challenged in early complaints was guarantees against declining prices, risk-shifting provisions by which manufacturers agreed to absorb post-sale price drops. The Commission brought several cases against the practice in 1918 and 1919, then solicited views through thousands of questionnaires and initiated a trade practice submittal procedure in 1920.[181] The FTC never completed the submittal. Starting in 1923 (when a change in views by Commissioner Murdock made the difference) and continuing in 1925 (when two dismissals triggered written dissents by Commissioners Nugent and Thompson), the agency dismissed the cases, several by 3–2 votes. Two of

[179] Chief Justice Taft and Justices Sanford and McReynolds dissented. Fetter asserts that an economic witness at the trial, who was not cross-examined, testified and cited to the views of seventeen other economists, and that the Supreme Court was misled into concluding that its analysis was supported by "[a] great volume of testimony . . . by distinguished economists." Fetter, *supra* note 177, at 820.

[180] HAWLEY, NEW DEAL, *supra* note 4, at 94–95.

[181] NICB, *supra* note 164, at 112–16; FED. TRADE COMM'N, TRADE PRACTICE SUBMITTALS 27–33 (1920).

these dismissals, shortly before and shortly after Humphrey arrived, included dissenting statements by Nugent and Thompson; one was a fourteen-page statement in a case where the party offering the guarantee was alleged to be a dominant firm.[182] This did not put the issue to rest, though. Later in the decade, these practices would be questioned again in trade practice conferences.[183]

C. ABUSIVE BEHAVIOR BY A MONOPOLIST: *MADEIRA HILL*

The FTC's case against Madeira Hill was unusual in several respects. The first was its source. President Coolidge, in office for barely a month, requested the investigation on September 15, 1923, in response to a report by the (short-lived) U.S. Coal Commission on coal prices during a recent strike. That Commission had questioned why anthracite coal passed through so many hands before reaching the consumer, asking if this was a device to unduly raise prices. Second, the case was tried by the full Commission, which sat for five consecutive days in December to hear testimony, followed by argument on a motion to dismiss. Third, the allegations were unusual. The FTC charged Madeira and several wholesalers with a conspiracy (which seemed to benefit only Madeira). Allegedly, Madeira had pledged to a state agency not to exceed a certain price and circumvented that pledge by obtaining secret rebates through its wholesalers. The complaint placed this in the context of a shortage that gave "monopoly" power to Madeira and a handful of other firms. On December 14, with Murdock dissenting and Thompson not participating, the Commission granted the motion to dismiss, announcing the dismissal several weeks later with a press release saying that the facts alleged had not been proven.[184]

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[182] Helvetia Milk Condensing Co., 6 F.T.C. 514 (1923); 6 FTC Min. 531–32 (Dec. 22, 1922) (initial vote in Helvetia to issue an order, with Van Fleet and Gaskill dissenting); Globe Soap Co., 8 F.T.C. 535 (1925) (including a dissent by Thompson, joined by Nugent, noting that some felt, among other things, that the practice tended to produce overbuying and speculation by jobbers, and put "a premium on ignorance, inefficiency, inexperience and incompetency to the detriment of the ultimate consumer"); Corn Prods. Ref. Co., 9 F.T.C. 483 (1925) (including the extended statement by Nugent and Thompson, arguing that the practice prevented consumers from reaping the benefits of price drops).

[183] The Commission still would not find that such guarantees violated Section 5, but it would accept provisions in industry-submitted codes that condemned the practice as aspirational, but unenforceable, "expressions of the trade." *E.g.*, Millwork Industry Conference Rule 8 (1928), FED. TRADE COMM'N, TRADE PRACTICE CONFERENCES 141, 142 (1929).

[184] 7 FTC Min. 554 (Sept. 15, 1923), 8 FTC Min. 63–68 (Dec. 3 through 7, 1923), 8 FTC Min. 84–85 (Dec. 14, 1923); Press Release, Fed. Trade Comm'n, *supra* note 87, Feb. 2, 1924. Gaskill wrote Coolidge that had the case not failed on the facts, the FTC might have found a violation. Gaskill to Stephen P. Davis, Dep't of Commerce (Jan. 30, 1924), enclosing Gaskill to Coolidge (Jan. 24, 1924), Hoover Papers, *supra* note 109, Dep't of Commerce Papers, Box 199.

D. MONOPOLIZATION

1. *Famous Players-Lasky*

In August 1921, the Commission charged Famous Players-Lasky Corporation with efforts, domestically and internationally, to monopolize the film industry. The press release announcing the complaint asserted that the respondent had become the largest concern in the motion picture industry and the biggest theater owner in the world, with operations in Europe, South America, Australia, India, China and Japan; within the United States, two-thirds of the admissions to movies were for theaters showing Paramount films. The original complaint pled violations of Section 5 of the FTC Act and Section 7 of the Clayton Act, but the case would evolve as the long trial proceeded; allegations were not borne out, and respondents' market power eventually dropped. The Commission's eventual order would focus on "block booking," respondent's efforts to require theaters that it did not own to purchase a full block of its films to get the ones that they actually wanted. Respondents did not appeal the order and, when the Commission sought enforcement years later, its efforts failed. During the period under study here, though, the Commission's case was indicative of an aggressive law enforcement schedule, reaching into the "new economy" of the day.[185]

2. *Eastman Kodak*

The Commission's ambitious monopolization program also included a case against Eastman Kodak. The DOJ suggested the case to the FTC in 1922 and, in a process that masked internal controversy, the FTC brought it in April 1923 and decided it on a stipulated record a year later.[186] Kodak's near monopoly of the film market had begun to erode in the face of foreign competition. In response, Kodak acquired three laboratories. When competing labs then agreed to buy only American

[185] The case also had star power. Some hearings were held in California, and witnesses included Mary Pickford and Douglas Fairbanks. Press Release, Fed Trade Comm'n, *supra* note 87, Aug. 31, 1921; *Mary Pickford Tells of Sharp Competition; Big Producers Bottle Them Up, Fairbanks Also Tells Trade Commission*, N.Y. TIMES, Nov. 11, 1923, at 56 (Pickford and Fairbanks were part owners of United Artists, which competed with respondents); Famous Players-Lasky Corp., 11 F.T.C. 187 (1927), *petition to enforce denied*, 57 F.2d 152 (2d Cir. 1932). Under the FTC Act as originally passed, if a respondent did not initially seek judicial review of an FTC order, the Commission could (as it did here) later institute a proceeding to "enforce" the order when the respondent violated it. The Commission could seek, in that proceeding, a court order to enforce its own order. *See supra* note 93 and accompanying text.

[186] 6 FTC Min. 271 (Aug. 8, 1922) (DOJ referred case as "peculiarly appropriate" for the FTC); Eastman Kodak Co., 7 F.T.C. 434 (1924). The internal disagreements (which were not reflected on the public record of the proceeding) are discussed *supra* note 120.

films, Kodak backed off its plan to operate the three labs, but retained its interest in them. The FTC found that Kodak had thereby retained and extended its monopoly, and, among other steps, ordered Kodak to cease and desist from maintaining its ownership interest in those labs. When the case reached the Supreme Court three years later, Justice Edward Sanford wrote for seven members, and Justice Stone wrote a dissent that was joined by Justice Brandeis. The Court agreed with the Commission on liability, but held, in a decision that undermined the agency's effectiveness, that Section 5 gave the FTC no authority to order divestiture.[187]

3. *The Radio Case (General Electric)*

In February 1924, with Van Fleet absent, the Commission alleged one conspiracy to monopolize the radio manufacturing industry through the creation and use of a patent pool, and another to monopolize domestic and transoceanic radio communications and broadcasting. Respondents included the Radio Corporation of America and its owners (General Electric Co., Westinghouse Electric & Manufacturing Co., American Telephone & Telegraph Co.); the United Fruit Company was also a respondent because of its stations in Central and South America. The case grew out of a report published two months before in response to a House resolution.[188] Attorney General Stone was apparently considering a parallel DOJ case, but the DOJ did not bring one at this time.[189] The Commission eventually dismissed its complaint with a terse statement in 1928; several years later, the DOJ brought (and eventually settled) its own case.[190]

4. *Aluminum Company of America*

As noted above, the FTC also developed a case against the Aluminum Company of America during this period, publishing a report a month before the 1924 election to urge the Justice Department to bring a contempt case under a 1912 order—and Attorney General Stone was apparently receptive to such a case before he moved to the Supreme Court. The DOJ eventually declined to proceed (after the FTC refused to pro-

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[187] FTC v. Eastman Kodak Co., 274 U.S. 619 (1927).

[188] Press Release, Fed. Trade Comm'n, *supra* note 87, Jan. 28, 1924; 8 FTC Min. 190 (Jan. 21, 1924).

[189] Memorandum for the Secretary, June 10, 1925, RG 122, Docket Section, Auxiliary Case Files, Box No. 562, File 1115-3-1, National Archives, College Park, Md. (reporting the DOJ's request about status of investigation); *Stone Presages Action on Radio Companies*, N.Y. TIMES, Aug. 1, 1924, at 26.

[190] Gen. Elec. Co., 12 F.T.C. 510 (1928); ERIC P. WENAAS, RADIOLA, THE GOLDEN AGE OF RCA, 1919–1939, at 388–90 (2007).

vide documents that Stone requested), and the FTC would bring its own case in 1925—which it would dismiss with a typically terse statement in1930.[191]

E. MERGERS

The FTC pursued an aggressive merger program in its early years. Insofar as these cases sought to limit market concentration, they were markers of a New Freedom approach, despite Wilson's early doubts about divestiture orders.[192] The FTC's merger enforcement, though, labored under severe challenges. Until 1976, there was no premerger reporting regime or effective mechanism for pre-consummation challenges. Further, merger litigation during these years occurred in the shadow of the Supreme Court's rejection of the government's challenge to U.S. Steel, a monopolization case under the Sherman Act against a firm that had grown through numerous consolidations.[193]

The FTC's most high-profile challenges, with a rare premerger component, grew out of subsequent mergers proposed by U.S. Steel's competitors. Seven firms initially proposed to merge, creating a firm comparable in size to U.S. Steel. The Senate asked both the FTC and DOJ to examine the matter. The planned consolidation soon broke into two, one combining Bethlehem and Lackawanna Steel, the other a three-party transaction centered around Midvale Steel. The transactions still were not consummated when, in May 1923, the parties to the former agreed to await the review by the DOJ (but not the FTC). On June 6, the FTC challenged that transaction; two weeks later, the DOJ suggested it had no problem with either. The FTC then challenged the Midvale merger in late August. In a separate statement, Commissioner Gaskill defended the use of Section 5 to challenge the merger. Dissenting, Commissioner Van Fleet noted that the combined firm could have a possible 7.5 percent market share when U.S. Steel already controlled 45 percent; he declared: "We strain at the gnat and swallow the camel." The Midvale challenge was a qualified "success." Midvale abandoned the deal a week later, explaining that the FTC's case had undermined its

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[191] Aluminum Co. of Am., 13 F.T.C. 333 (1930). The Commission had initially denied the request soon before Commissioner Humphrey replaced Gaskill. 9 FTC Min. 635–36 (Feb. 11, 1925) (Nugent and Thompson dissenting). These events would be explored in Senate hearings. *Aluminum Co. of Am., Hearings Before the S. Comm. of the Judiciary Pursuant to S. Res. No. 109*, 69th Cong., 1st Sess. (1926) [hereinafter *Aluminum Hearings*].

[192] *See supra* text accompanying note 17.

[193] United States v. U.S. Steel Corp., 251 U.S. 417 (1920). For a discussion of the firm's last major acquisition in 1907 and its impact on the later litigation, see Marc Winerman, *Antitrust and the Crisis of '07*, ANTITRUST SOURCE, Dec. 2008, http://www.abanet.org/antitrust/at-source/08/12/Dec08-Winerman12-22f.pdf.

financing. However, it soon joined the Bethlehem-Lackawanna transaction, which the parties consummated. The Commission eventually suspended its case in 1927, after its loss in *Eastman Kodak,* but waited twelve more years to dismiss it.[194]

More generally, the FTC issued twenty-one such complaints before March 4, 1921, and eighteen more during the next four years.[195] Only six of these led to agency orders, three of which reached the Court in a consolidated case in 1926. The Justices all agreed to uphold one of them, a challenge to an acquisition by the Western Meat Company of another packer.[196] But the Court rejected the other orders in a decision by Justice McReynolds from which Justices Brandeis, Holmes, Stone and Chief Justice Taft dissented.[197] The quality of the market analysis had surprisingly little impact on the results. The key issue was a statutory limitation that (as it further developed in later cases) would make Section 7 of the Clayton Act useless until it was amended in 1950. Specifically, Section 7 then applied by its terms only to stock acquisitions. The *Western Meat* order differed from the others in that the respondent continued to hold the acquired firm's stock, and had not absorbed its assets, before the FTC's complaint issued.[198]

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[194] WHITNEY, *supra* note 170, at 265–66; *Delay Steel Merger for Federal Inquiry*, N.Y. TIMES, May 23, 1922, at 30; *Complaint of Steel Merger*, N.Y. TIMES, June 6, 1922, at 1; *Daugherty Finds Lack of Anti-Merger Facts*, N.Y. TIMES, June 22, 1922, at 2; *Trade Commission Attacks Merger*, N.Y. TIMES, Sept. 1, 1922, at 6; *Merger of 3 Steel Plants Is Dropped*, WASH. POST, Sept. 29, 1922, at 1; Press Release, Fed. Trade Comm'n, *supra* note 87, Aug. 31, 1922 (including statements by Gaskill and Van Fleet). Victor Murdock urged in August that the Commission seek a preliminary injunction to block the merger. 6 FTC Min. 280 (Aug. 30, 1922). Van Fleet also dissented when the Commission issued a new complaint challenging the Bethlehem-Lackawanna-Midvale transaction. Press Release, Fed. Trade Comm'n, *supra* note 87, Jan. 28, 1923.

[195] These cases are summarized in a chart that lists all complaints that the FTC issued under Clayton Act Section 7 through 1931. William Humphrey Papers, FTC File, Box 2 (1932–34), Library of Congress, Washington, D.C.

[196] Western Meat Co., 5 F.T.C. 417 (1923).

[197] One of these grew out of Swift's acquisition of two other packers, where the agency presented limited market share data and relied, in one market, on the possibility that Swift might have entered another market. Swift & Co., 5 F.T.C. 143, 143, 166, 168 (1922) (noting, for example, that respondent's post-acquisition market share was more than one-fifth of the cattle and hogs and one-third of the calves and sheep slaughtered under federal inspection). The other had challenged a series of acquisitions in the milk bottle industry by which respondent raised its market share from 40 to 70 percent, in a market where (though the Court did not use the term) patents created an effective barrier to entry. Thatcher Mfg. Co., 6 F.T.C. 213 (1923). Thatcher had the exclusive right to use one of two best available technologies for making milk bottles; the four acquired firms had exclusive rights to use the other available technologies.

[198] FTC v. Western Meat Co., 272 U.S. 554 (1926). The decision was based solely on Section 7, *id.* at 556, although one of the underlying orders had expressly premised divestiture on Section 5 as well. *Swift & Co.*, 5 F.T.C. at 170.

The Court thus rejected two of the FTC's six merger orders. The Commission itself subsequently reversed two others. And the other two—including the *Western Meat* order that survived Supreme Court scrutiny—proved useless. Western Meat, as had the Aluminum Company of America in an earlier case, effectively circumvented the orders through transactions that survived court challenges.[199] In essence, the abandoned Midvale acquisition of 1922 was the closest the FTC came to a victory in a merger case for over four decades.

F. Horizontal Conspiracy

The Commission's challenges to horizontal conspiracies were among its most successful (if least innovative) efforts.[200] Further, whatever the merits of dual enforcement for these cases, the FTC itself seemed to recognize the merits of DOJ enforcement in its repeated referrals of conspiracy cases to the Department.[201]

One case that deserves particular mention involved information sharing by United Typothetae, a printers' trade association. The case went to the heart of an issue that split the administration and also the Commission. As noted previously, the Commerce and Justice Departments were at odds over the limits of such sharing, and, at the Commission, Nelson Gaskill was a firm advocate of associationalism and open price associations.[202] Huston Thompson, in contrast, was highly skeptical of such associations.[203] The history of the case went back to one of the FTC's original Commissioners, Edward Hurley, a businessman and a strong advocate for uniform cost accounting procedures. Under his influence the FTC published a widely distributed brochure about the procedures. However, Hurley went further. In letters he signed as FTC Chairman

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[199] Western Meat, for example, insisted that it could not find a buyer. It then lent money to the acquired firm (in part to enlarge the firm's plant), sued on the loan, purchased the assets at an execution sale, and *then* transferred the now-worthless stock. Noting that the Commission did not challenge the good faith of Western Meat's efforts at divestiture, the court found no problem in these transactions. Western Meat Co. v. FTC, 33 F.2d 824 (9th Cir. 1929). *See also* Aluminum Co. of Am. v. FTC, 299 F. 361 (3d Cir. 1924).

[200] NICB, *supra* note 164, at 213 (through 1929, agency had been upheld on every order challenged).

[201] Indeed, Commissioner Thompson's testimony at Daugherty's impeachment hearing focused on the DOJ's failure to follow through on FTC referrals. *See id.* at 212; *supra* discussion at note 74 and accompanying text.

[202] *See supra* discussions at notes 110, 114 and accompanying text.

[203] Huston Thompson, *Open Price Associations* (undated speech), *in* THOMPSON, SPEECHES 1919–1940 (unpublished collection) (on file in FTC Library) (though many trade associations had "a fine spirit" and tried to address misconduct, as to open price associations, "I have never found one that did not either fix prices or cause curtailment of production to the point where it ultimately paralyzed the market.").

without consulting his colleagues, he wrote Typothetae and others approving specific plans for uniform cost accounting and information sharing. Although the Commission disavowed Hurley's letter to the respondent before issuing its complaint, the respondent continued to rely on it.[204] Ultimately, Gaskill drafted the Commission's unanimous order. The findings of fact (which addressed practices of numerous local associations who were also named respondents) described numerous instances where an association had suggested a specific price, and a typical order provision forbade respondents from compiling average figures "with instructions or suggestions for the translation of such standard costs into selling prices."[205]

G. "CONSUMER PROTECTION"

Under the original FTC Act, the FTC could challenge only unfair methods of competition. It did not have separate authority to challenge "unfair or deceptive acts or practices" until 1938.[206] However, the agency used its UMC authority to challenge deception aimed at consumers, and was early sustained in its efforts in a decision that Justice Brandeis wrote for eight Justices, with only Justice McReynolds in dissent.[207] While some individual cases may have been trivial, the program as a whole was important because the remedies at common law for deception were inadequate.[208] Over 60 percent of the FTC's cases during these years (326 of 549) involved deception of consumers, including some cases involving business purchasers. These included "blue sky" cases, in which the Commission challenged deception in the sale of securities[209]; this work would later be the province of the Securities and Exchange Commission, as the FTC served as an incubator for a new agency. It included an occasional case involving deception in export trade, brought under Section 4 of the Webb-Pomerene Act.[210] The FTC focused on print ads. "Direct advertis-

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[204] *See* Memorandum for the Chief Counsel, Nov. 28, 1921, National Archives RG-122, Auxiliary case files, Box 190; *see also* Thomas Lane Moore, II, The Establishment of a "New Freedom" Policy: The Federal Trade Commission, 1912–1918, at 109–14 (1980) (unpublished Ph.D. dissertation, University of Alabama).

[205] United Typothetae of Am., 6 F.T.C. 345 (1923); 8 FTC Min. 400 (July 2, 1923) (noting that order was prepared by Gaskill).

[206] Wheeler-Lea Act, 52 Stat. 111 (1938).

[207] FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).

[208] *Supra* note 6 and accompanying text.

[209] *E.g.*, Non-Derrick Drilling Mach. Co., 6 F.T.C. 43 (1923).

[210] Caravel Co., 6 F.T.C. 198 (1923); 40 Stat. 516 (1918). *See supra* note 34 and accompanying text.

ing" as part of commercial sponsorship of radio developed only gradually, and at first very cautiously, during the early years of the decade.[211]

While most consumer protection cases involved deception, some did not. A treatise by the National Industrial Conference Board listed deception cases as a species of "regulation of sales promotion practices." Into this broad category also fell cases challenging lotteries and numerous challenges to commercial bribery.[212] Many lottery cases turned on deception, though in some cases the FTC (for decades) also challenged the element of chance as itself immoral.[213] Commercial bribery involved payments to a buyer's employees, sometimes but not always without the employer's knowledge.[214]

One series of cases, involving varnish manufacturers, touched in part on the consumer protection activities of trade associations. The fullest statement of the issue was set forth in *The Don-O-Lac Co.*[215] The Commission found in1923 that the firm had sold as "shellac" a product with a relatively small proportion of genuine shellac.[216] A year later, it issued revised findings that discussed standards set by a large trade association in 1922 and a revised order that also incorporated specific standards, although not quite the same standards.[217] In an unusual twist, Commissioners Thompson and Nugent (perhaps less enamored than their colleagues with the potential of industry self-regulation) both objected to the more precise standard that the Commission adopted. Thompson, moreover, made a further point that sounds quite modern. An industry group had adopted a standard, "[b]ut, there is no testimony as to what the ultimate consumer understand by the word 'compound'" as used by

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[211] ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM 88–94 (1985). Marchand attributes the slow embrace of "direct advertising" on radio to the medium's "mystique of gentility." "Direct advertising" was product-specific advertising that went beyond, for example, naming a musical group "the A & P Gypsies." *Id.* at 93–94.

[212] NICB, *supra* note 164, at x. The Commission brought thirty-three commercial bribery cases during these years.

[213] For example, in *Budd Tailoring Co.*, 5 F.T.C. 207 (1922), the complaint challenged (among other practices), a lottery system with no allegation of fraud, though the findings of fact found fraud in the operation of the lottery, and that the goods were inferior. *Id.* at 217. The order went solely to misrepresentations. *See also* Bear Shoes Co. v. FTC, 362 F.2d 96 (7th Cir. 1966) (upholding order barring lottery sales).

[214] In 1926, the FTC modified prior orders to reach only payments without the knowledge of the employer. Memorandum, 10 F.T.C. at 338–42 (July 19, 1926).

[215] 6 F.T.C. 283 (1923), *modified,* 8 F.T.C. 235 (1924).

[216] *The Don-O-Lac Co.*, 6 F.T.C. 283.

[217] *The Don-O-Lac Co.*, 8 F.T.C. 235, 239, 240, 242. Under the FTC order, if the term "shellac" was used for a product for which shellac gum was not the "principal and predominant element," it had to be qualified by the word "compound." If the term was used for a product with less shellac gum, it had to be qualified by the word "substitute."

the association and the FTC's order.[218] Thus, Thompson grappled with a problem that remains under current Section 5, which now contains "unfair or deceptive acts or practices" as well as UMC authority: How to address consumer confusion, using the FTC Act, by essentially setting standards for terms for which consumers lack clear understanding.[219]

H. SUMMARY: THE FTC'S LITIGATION AGENDA

The Commission's litigation program during these years was ambitious. Unfortunately, the program was so ambitious that it often overextended the agency. The Commission did face a hostile Supreme Court, whose jurisprudence construing the FTC's authority was often dominated by Justice McReynolds, and likely would have had difficulties even had it been more transparent; still, the Commission's overextension contributed as well to frequent flaws in its performance.

Substantively, the Commission's litigation program suggests a New Freedom bias. While many of its cases would have been equally compatible with other approaches, its divestiture litigation and concerns with information exchange addressed areas where the New Freedom (or at least variants of the New Freedom) came in conflict with other approaches.

VII. STUDIES

While an effective litigation program is an essential component of the program for an effective competition agency, it does not stand alone. For the FTC, studies have been, since the agency's inception, another critical element of the agency's program. Indeed, its predecessor agency, the Bureau of Corporations, focused entirely on studies. FTC studies were generally done by the economic unit, though some were under the chief counsel.[220] Most responded to Senate resolutions; consistent with the ties between the FTC and Senators from agricultural states, the majority of these involved agriculture. An occasional study was done at the behest of the House, the President, or the Attorney General. Others were done at the Commission's own initiative.[221]

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[218] *Id.* at 245.

[219] *Cf.* 44 Fed. Reg. 50,218, 50,222–23 (1979) (failure to disclose R-Value for home insulation as a deceptive and unfair act or practice); 16 C.F.R. 460 ("Labeling and Advertising of Home Insulation").

[220] 1923 ANNUAL REPORT, *supra* note 34, at 14.

[221] Sixteen Senate resolutions directed FTC studies these years, and the FTC submitted reports responding to sixteen (not-quite-overlapping) resolutions. The House directed only one study during these years, and two published studies responded to prior House resolutions. President Coolidge directed a study of gasoline prices, which led to a non-

Although there were exceptions, most FTC studies in the 1920s were sectoral studies. They examined competitive conditions in one or more industries, generally using accounting data and evidence of illegal agreements. A few found no problems; most led to FTC litigation, referrals to the DOJ, or legislative proposals. They were thus part of a broader Commission program to address competitive problems.

A. THE MEATPACKING INVESTIGATION: A LEGACY OF CONTROVERSY

The most important early FTC study was its report on meatpackers. The study, initiated at Wilson's request, led to a preliminary report in 1918 and a six-volume report in 1919. The report found that five packers had collective market shares between 61 and 86 percent in various lines of commerce and exercised collective control through "amazing and devious ramifications." Producers, competitors, and consumers were "at [their] mercy," because they controlled key components of distribution.[222] The Commission proposed a government takeover of all refrigerator cars and all rolling stock used to transport meat; "the principal and necessary" stockyards; and such branch houses, cold-storage plants, and warehouses as needed for "competitive marketing and storage of food products in the principal centers of distribution and consumption."[223] The divestiture component might be seen as an expression of the New Freedom, but the highly regulatory approach was reminiscent of the New Nationalism, particularly as described during Victor Murdock's remarks during the 1914 debates.[224]

The report led to Justice Department litigation that resulted in a public confrontation between the FTC and the Department. The DOJ soon sued the packers and reached a settlement to dissolve their interests in the stockyards (but without government control). The FTC objected to specific plans that packers later proposed, and the Department presented the FTC's objections to the packers' first two proposals. Then, in February 1921, the parties submitted a third plan, which the court

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public report that he forwarded to the DOJ. The Attorney General did not request any studies during these years, though the FTC submitted several reports responding to an earlier request about lumber trade associations. Senate resolutions during these years led to later studies of the national wealth (a report focused on taxation issues), bread, and consolidation in electric power. *See* FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1929, at 229–33 [hereinafter 1929 ANNUAL REPORT]. For the Commission's relation with Senate Progressives, see *supra* notes 56, 57, 61, and accompanying text.

[222] FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY, SUMMARY AND VOLUME 1 at 109–14 (1919).

[223] *Id. at* 77.

[224] *See supra* text accompanying note 15.

immediately approved. The Commission learned about this through the press, and asked the DOJ to request that the court vacate the approval. Attorney General Mitchell Palmer refused, but said that the Commission could send its own counsel. The Court ruled that the DOJ represented the public in the matter (after the Department stated that it did not object to the sale) and declined to hear the Commission.[225]

That August, Congress passed the Packers and Stockyards Act,[226] which subjected the stockyards (still in private hands) to public utility regulation. Responsibility for that regulation, as well as primary responsibility for regulating UMC in the industry, was assigned to Henry Wallace's Department of Agriculture; for the first time, the FTC served as an incubator for a program later moved elsewhere. The FTC, however, continued numerous cases, including the *Swift* and *Armour* cases discussed above. The experience left a legacy of tensions, including tensions with Senator James Watson of Indiana (Van Fleet's reported patron).[227]

In a 1924 Report signed, surprisingly, by then-Chair Van Fleet, the FTC declared that the 1921 consent order had failed to end the big packers' control of the stockyards and refrigerator cars. In connection with a proceeding to modify the decree, the FTC argued for further steps to separate the packers that ownership; for the cars to be placed under control of a single firm; and for the cars as well as the stockyards to be regulated as public utilities.[228]

B. AGRICULTURE

As noted above, many FTC reports that responded to Senate requests involved agriculture. The FTC was generally asked to study low prices for agricultural goods, high prices for agricultural inputs such as fertilizer, and perceived foreign threats to U.S. agricultural interests. As with studies generally, some found limited or no problems, others found competitive issues to address through litigation, and some led to recommendations for legislation (or, in some cases, for actions that could be

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[225] 1921 ANNUAL REPORT, *supra* note 88, at 42–46. *See also* Press Release, Fed. Trade Comm'n, *supra* note 87, Sept. 17, 1920 (announcing FTC's views).

[226] Packers and Stockyards Act, 42 Stat. 159 (1921).

[227] *See supra* note 117 and accompanying text (Watson's concerns during the meatpacking investigation).

[228] PACKER CONSENT DECREE, S. DOC. NO. 219, 68th Cong., 2d Sess. (1925). The report declined "without [further] study" to offer a definitive recommendation about whether the covered packers should continue to be excluded from selling "unrelated lines" like fruits and vegetables. *Id.* at 32. Commissioner Gaskill, in a separate statement noting the need to protecting "competition" rather than "competitors," argued that such a restriction, if appropriate at all, should not apply solely to the packers who were under the consent order. *Id.* at 35–36.

taken by self-regulatory bodies).[229] One set of studies looked at commodities futures markets, addressing issues that would someday be done by the Commodities Futures Trading Commission.[230]

C. Energy: Coal and Oil

Coal, like agriculture, was a depressed industry in the 1920s. In a self-initiated 1922 report, the FTC recommended greater dissemination of information about bituminous coal. This was similar to statistical work that the FTC itself had earlier attempted (though the Commission had encountered obstacles in its efforts to obtain information[231]) and that Herbert Hoover's Commerce Department encouraged and undertook as well. According to the Commission, "means of Federal supervision and publicity" could "avoid periods of *excessively* high prices and severe depression."[232]

The Commission was also asked repeatedly to study the oil industry and sometimes did so on its own initiative. In a 1922 report, it urged legislation to make antitrust decrees more effective. One problem with the *Standard Oil* decree was that the firm's previous owners received proportional shares in its successor corporations; the FTC proposed legislation to abolish such common ownership.[233] In 1921, it recommended further development of foreign sources of production; developing technology to better conserve supplies, and a system of reporting to the government on market conditions, so the government could publicize the information and make the market function more smoothly.[234] In 1923, it addressed foreign ownership of U.S. oil resources. That report described the start of foreign ownership of U.S. resources (in part through acquisitions of U.S. firms); discrimination against U.S. firms abroad; and

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[229] Thus, no problems were found in a 1921 report on commercial feeds and a 1925 report on the challenge to U.S. interests from Britain's Empire Cotton Growing Corporation. *See generally* 1929 ANNUAL REPORT, *supra* note 221, at 229, 231. In contrast, a 1922 report directed to the low price of leaf tobacco and high selling prices to consumers focused on conspiracies between large firms and jobbers to enhance the selling price of tobacco. FED. TRADE COMM'N, PRICES OF TOBACCO PRODUCTS (1922).

[230] *E.g.*, FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE GRAIN TRADE, VOL. VI, PRICES OF GRAIN AND GRAIN FUTURES (1924).

[231] *See* BLAISDELL, supra note 117, ch. 8.

[232] FED. TRADE COMM'N, REPORT ON INVESTMENT AND PROFIT IN SOFT-COAL MINING 12 (1922).

[233] FED. TRADE COMM'N, PETROLEUM TRADE IN WYOMING AND MONTANA 4 (1922). *See also* FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE PACIFIC COAST PETROLEUM INDUSTRY, PART II, at 132–33 (1921) (highlighting problems from continuing parallel ownership).

[234] FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE PACIFIC COAST PETROLEUM INDUSTRY, PART I, at 15 (1921).

1920 legislation (the Mineral Leasing Act) that required reciprocity if foreign interests were to continue to acquire U.S. assets. Though acknowledging that it was unclear "how far the antitrust laws may be effective" to address such problems, the report concluded that domestic resources were being rapidly depleted and highlighted that "a nation having widely distributed supply and storage facilities and owning the means of distribution will have certain advantages in world trade . . . ."[235]

D. Home Furnishings

The Commission's study of the aluminum industry was perhaps its most well-publicized report after the meatpacking study. As part of a broader study of home furnishings industries, the FTC concluded that the Aluminum Company of America was violating a 1912 consent order and recommended that the DOJ sue for contempt. As noted above, this recommendation, which directly challenged the interests of Treasury Secretary Mellon, was announced a month before the 1924 election. Nonetheless, Attorney General Stone was sufficiently interested to request the FTC's investigative file—a request that the Commission felt compelled to deny as to key documents (the target's voluntary submissions to the agency), even before Commissioner Humphrey arrived.[236] The DOJ would decline to bring a case in the 1920s; the FTC would bring (and ultimately dismiss) its own; and the Senate would hold hearings in 1926 to scrutinize the earlier events.[237]

E. Cooperatives in Foreign Countries

On its own initiative, the Commission reported on the cooperative movement, focusing on, among others, agricultural and consumer cooperatives.[238] Cooperatives were organizations through which farmers, small business, or consumers joined together, among other purposes, to buy and sell in the market, and were viewed as models to protect smaller entities. Agricultural cooperatives were a component of the farm bloc's agenda, and the FTC also took steps to promote, or protect, various

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[235] FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON FOREIGN OWNERSHIP IN THE PETROLEUM INDUSTRY ix–x (1923).

[236] 9 FTC Min. 636 (Feb. 11, 1925) (Commissioners Thompson and Nugent dissenting).

[237] *See generally Aluminum Hearings*, *supra* note 191.

[238] FED. TRADE COMM'N, FEDERAL TRADE COMMISSION COOPERATION IN FOREIGN COUNTRIES (1924) [hereinafter COOPERATION]. *See also Co-operatives Aid in Reviving Europe*, CHRISTIAN SCI. MON., Aug. 28, 1923, at 4 (cooperatives as role models to protect small businesses and consumers). An odd note is that the report treats post-Revolutionary Russia surprisingly lightly.

types of cooperatives.[239] This report is a detailed study of cooperatives in Europe and elsewhere, a unique FTC document in that it reports exclusively on foreign models as possible guides for domestic policy.

VIII. TRADE PRACTICE SUBMITTALS

The FTC in 1919 began its "trade practice submittal" process (later to evolve into a "trade practice conference" process). This was a process by which the full Commission or an individual Commissioner met representatives of an industry (generally dozens or more). During these meetings, the industries formulated rules that the Commission described in its first conference as "a formally expressed judgment of the industry."[240]

This was a significant and positive step for the agency, insofar as it involved an element of outreach (albeit outreach limited to industry representatives) in formulating policy. Further, the Commission integrated these conferences with its litigation program. This was a two-way street. The agency sought to encourage industry self-regulation, thus leveraging its limited resources; it also used some conferences to identify UMC that it then pursued in litigation. In one unusual instance, focusing on a problem, rather than a sector, it used a conference to explore the merits of guarantees against price declines. In other instances, industry sought a conference as an exercise in standard setting.[241]

While the concept was sound, the implementation was sometimes problematic. For example, the first submittal from 1919, covering the creamery industry, forbade untrue statement about "the business policies or methods of a competitor" (it did not address other deception); it forbade, as "against public policy," the payment of certain commissions in excess of three cents; and it proscribed, "as a tremendous waste," the furnishing of free cream cans to farmers.[242] The program, however much an advance, thus led to some problematic results in the early 1920s—and the problems would grow, later in the decade, when the program dramatically expanded.

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[239] *See, e.g.*, *The Mennen Co.* case discussion *supra* at text accompanying notes 166–167. The FTC generally was not concerned about the potential competitive problems that joint actions posed, although the 1924 report did note possible divergent interests between consumer cooperatives that sought low prices and producer cooperatives that sought high prices. FED. TRADE COMM'N, COOPERATION, *supra* note 238, at xiii–xiv.

[240] *E.g.*, Report of Meetings with Members of the Creamery Industry, Held at Omaha, Nebraska on Oct. 3, 1929 and Nov. 3, 1919 [hereinafter Creamery Industry Report], *in* FED. TRADE COMM'N, TRADE PRACTICE SUBMITTALS 1, 2–3 (1923).

[241] Guarantee Against Price Declines (1920) and Sheffield Silver Plated Hollow-Ware (1922), *in* TRADE PRACTICE SUBMITTALS, *supra* note 240, at 27–33, 40–44.

[242] Creamery Industry Report, *supra* note 240, at 1, 4–6.

IX. CONCLUSION

The core challenges for any competition agency are to set priorities and execute them.[243] These tasks can be complicated by external stakeholders who pressure the agency or impose demands on it, as Congress did frequently, and the White House infrequently, during the early 1920s. Further, the task of setting priorities is particularly complicated where an agency is new and must sort among the goals, frequently disparate, of the legislators (and others) who created it. As discussed above, the programs advanced in the debates from which the FTC emerged included Wilson's New Freedom, TR's New Nationalism, and, to a lesser extent, an associationalism advocated by (among others) Louis Brandeis.

The challenge of setting and implementing priorities is further heightened by political transitions. In the United States, this is most stark when, as in 1921, the Presidency shifts from one party to another. However, legislative shifts, and even cabinet shifts such as the arrival of a new Attorney General, can have an impact on agency priorities.[244] The FTC faced all these pressures in the 1920s. It remained, in a real sense, a start-up agency. The legislature and executive had both shifted from Democratic to Republican control after the 1920 election. The political scene was complicated by two incarnations of a "Progressive Party," and there were cross-currents in thinking about competition policy within the main parties. Against this backdrop, the timing of vacancies left Wilson appointees to dominate the agency through 1924. Further, while most Commission initiatives were compatible with more than one of the visions that had initially animated the Commission, a number of initiatives suggest a particular bias toward a "New Freedom" program. In its efforts, the Commission had an important constituency in Progressive Senators from both major parties who could use (and be used by) the agency, but not necessarily provide the funding and resources to meet their various demands.

While the challenges that the FTC faced would have been daunting for any agency, the Commission was in some ways poorly organized to meet them. Its staff was small, making prioritization particularly important. It lacked centralized leadership, making it particularly hard to im-

[243] The most obvious way an agency can successfully execute a goal is to take action that effectively stops the practice, such as issuing a cease-and-desist order. However, for an adjudicative agency like the Commission, we suggest a somewhat broader definition of "success." An agency may succeed, for example, if it challenges a practice that raises complex analytical issues and ultimately dismisses the complaint, but does so in a manner that adds to the understanding of the merits of the practice and withstands the test of time.

[244] *See* Kovacic, *Oversight*, *supra* note 5.

pose, or encourage, such prioritization. Congress had allowed the Commissioners to choose their own Chairman and given the Chairman only limited authority beyond that shared by his fellow Commissioners. The Commissioners' process for implementing their discretion to choose a Chair was to rotate the position annually, a procedure that made it difficult for a strong manager to take the lead in trying to set priorities.[245] All collective business was done in meetings. While in-person collective deliberations have an important function in a multi-member agency,[246] the Commission's early processes tied up Commissioners in excessive meetings, often dealing with routine matters. Further, no Commissioners were professional economists and, during the Harding and Coolidge years, all but Murdock and Hunt were lawyers. The lawyers who generally dominated the agency, moreover, often failed to sufficiently integrate the agency's legal and economic functions.

Much to the early Commission's credit, though, the agency did take on tough issues, such as basing point pricing and price discrimination based on trade status. It confronted competitive issues in the "new economy"' industries of its day. Beginning with multiple statutory tools, it used its various authorities, and it supplemented its statutory tools with an innovative trade practice submittal procedure that drew heavily on public input. At its best, the agency integrated its investigatory and its prosecutorial functions (as when it held extended public hearings on basing point pricing before bringing a case) and economic and legal reasoning (as when it almost accidentally received testimony from top-flight economists during that case).

But, at least in part because it was stretched too thin by its inability to set priorities, the FTC failed too often to execute its plans effectively. The Commission faced a hostile judiciary and had an uphill battle to implement a successful enforcement program. But it compounded its problems by failing to explain adequately the rationales for many of its early orders. It generally failed, as well, to explain decisions not to issue orders after litigation, or not to prosecute in the first place. Its failure to explain affirmative actions, at the least, contributed to its dismal record

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[245] Even William Humphrey, who would dominate the agency by the force of his personality when he first arrived, would be publicly denouncing his colleagues, before Coolidge left office, as "men clothed with a little brief authority" who "become drunk with their own greatness." *Trade Board Report on Du Pont Deals*, N.Y. TIMES, Feb. 3, 1929, at 19.

[246] Indeed, the limits on nonpublic in-person deliberation imposed by the Government in the Sunshine Act, 5 U.S.C. § 552b, often constrain optimal agency functioning. *See* Prepared Statement of the Federal Trade Commission Presented by Stephen Calkins, Gen. Counsel, Fed. Trade Comm'n, Before the Special Committee to Review the Government in the Sunshine Act, Administrative Conference of the United States (Sept. 12, 1995), *available at* http://www.ftc.gov/speeches/other/suntest.shtm.

before the Supreme Court. The FTC was intended to enforce the law, to develop the law, and to clarify it for businesses. Its failure to explain adequately both affirmative actions and decisions not to proceed were fundamental shortcomings.

Broad grants of authority create broad political hazards, and the exercise of expansive and open-ended mandates always permits opponents to claim that the agency has overreached. This dictates care and caution in delineating enforcement intentions and standards. In part because it failed to prioritize, the agency confronted a severe mismatch between capabilities and commitments, ultimately contributing to a failure to execute. In this, it serves cautionary lessons for other new agencies.