

On: 14 December 2012, At: 01:39

Publisher: Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Review of Political Economy

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/crpe20>

When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation

Luca Fiorito ^a

^a University of Palermo, Italy

To cite this article: Luca Fiorito (2013): When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation, *Review of Political Economy*, 25:1, 139-163

To link to this article: <http://dx.doi.org/10.1080/09538259.2013.737129>

PLEASE SCROLL DOWN FOR ARTICLE

Full terms and conditions of use: <http://www.tandfonline.com/page/terms-and-conditions>

This article may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The accuracy of any instructions, formulae, and drug doses should be independently verified with primary sources. The publisher shall not be liable for any loss, actions, claims, proceedings, demand, or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation

LUCA FIORITO

University of Palermo, Italy

ABSTRACT *The aim of this paper is to analyze John Bates Clark's influence in the passing of the Clayton and Federal Trade Commission Acts of 1914. It is argued that Clark was important to the passage of these acts in two ways. First, he exercised an indirect influence by discussing in academic journals and books problems concerning trusts, combinations, and the measures necessary to preserve the working of competitive markets. At least as importantly, Clark took an active role in the reform movement, both contributing to draft proposals for the amendment of existing antitrust legislation and providing help and advice during the Congressional debates that led to the passage of the FTC and Clayton Acts.*

1. Introduction

Writing shortly after the passage of the Federal Trade Commission (FTC) and Clayton Acts in 1914, Allyn Young commented: 'it is significant that in much of the more serious discussion, both the analysis of the problem and the proposals of the specific remedies involved the recognition of certain principles that for some years had been very generally accepted among economists.' In the following passage, still in relation to the debates that paved the way to the new antitrust package, Young insisted: 'specific instances of the direct influence of economic writing and teaching have not been lacking, and it is fair to infer that through a process of gradual diffusion the indirect influence has been considerable' (Young, 1915, p. 204). Subsequent historians have in general confirmed Young's contention, maintaining that American economists did influence the passage of the FTC and Clayton Acts in a way that cannot be said of the Sherman Act (Klebaner, 1964; Mayhew, 1998). Economists influenced the legislation *indirectly* by discussing problems concerning trusts and combinations in academic journals and books, and by proposing policies designed to preserve the working of competitive markets. Some economists

Correspondence Address: Dipartimento di Studi Europei e della Integrazione Internazionale. Università di Palermo. Via Maqueda, 324, 90134 Palermo, Italy. Email: luca.fiorito@unipa.it

played a *direct* role in the reform movement, providing expert testimony in the Congressional debates and contributing to draft proposals for the amendment of existing antitrust legislation.

The aim of this paper is to assess and document the role played by John Bates Clark in these processes. When the groundwork for the 1914 antitrust legislation was being laid down, Clark made a key contribution in many respects. His academic and popular writings on the so-called ‘trust problem’ significantly invigorated the discussion of unfair competition that followed the 1911 dissolutions of the Standard Oil and American Tobacco. Given his professional visibility, Clark was increasingly sought out by official bodies for advice on the question of trusts and large consolidations. In 1911 Clark was among the experts invited to present their views on possible amendments to the Sherman Act before the Senate Interstate Commerce Committee. He also served on a committee established in 1911 by the National Civic Federation (NCF) to draft a revision of the Sherman Act. The NCF draft largely reflected Clark’s views, and although the NCF proposal was not the one eventually chosen, some of its key provisions were incorporated into the 1914 antitrust legislation.

The paper is organized as follows. The next section presents Clark’s view on trusts prior to 1911. Section 3 discusses the impact of the 1911 courts decisions. Section 4 analyses Clark’s post-1911 position on trusts as presented in his Senate Committee testimony and in the second edition of *The Control of Trusts* (Clark & Clark, 1912). Section 5 offers a digression on Clark, Wilson, and the 1912 electoral campaign. Section 6 deals with Clark’s involvement in the NCF proposal to amend the Sherman Act. Section 7 reconstructs the legislative history of the 1914 antitrust package. Section 8 draws some conclusions.

2. Clark’s Early Views on Trusts

This paper is not the place for an exhaustive treatment of Clark’s discussion on trusts prior to 1911. For the scope of this essay, a brief analysis of the views he presented in the first edition of *The Control of Trusts* (Clark, 1901) will be more than sufficient. We begin, however, with the closing passages of *The Distribution of Wealth* (Clark, 1899), where Clark poses several rhetorical questions pertinent to our topic:

To many persons any theory based on competition may seem to have somewhat of the character of theoretical romance. Will not competition itself soon be a thing of the past? There are forming on every side trusts and other consolidations of capital that threaten to extinguish competition and to introduce a régime of monopoly within much of the business field. Have we, then, completed the theory of competitive distribution, only to find that the fact on which the whole of it is predicated has ceased to be? If, when competition was at its best, theories of natural values, natural wages and natural interest seemed to have a character of unreality, what is to be said of them when competition appears to be a vanishing element?

To phrase it differently, how to reconcile the static idea of competition as permanent condition with the factual evidence showing a continuous wave of mergers and acquisitions such as that which was cresting exactly during those years?¹

According to Clark, it is the task of 'economic dynamics' to bridge the widening gap between *economics* and the actual conditions of the economy—and to show that competition is still an 'inextinguishable force' even in such rapidly evolving environment. As he explained:

The consolidations of the present period change the mode of . . . action [of competition], but they do not destroy it; and therefore they in no ways invalidate a theory that assumes the existence of it Everywhere in life are there variations from results that static theory alone calls for. Dynamic theory, if it were quite complete, would give results from which, in actual life, there would be no variation; for it is a part of the function of this division of the science to account for every element of friction, as well as for every change and movement that actual life shows. (Clark, 1899, pp. 444–445)

Moving from these premises, *The Control of Trusts* can be seen both as an exercise in economic dynamics and as an attempt to sketch an effective policy agenda for the domestication of large economic conglomerates. In this connection, it is worth pointing out that while Clark's position on the nature of competition underwent significant changes over the years, his general views on trusts, and oligopolistic organizations in general, do not show any considerable discontinuity at least after 1911 (Fiorito & Henry, 2007).

In *The Control of Trusts* Clark took the position that trusts, and combinations of various kinds, were a 'natural' phenomenon and should be conceived as the outcome of technological change coupled to increasing returns to scale that could be captured by large industrial organizations. To put it bluntly, for Clark the contest was not between big and small business but 'honest' (or 'beneficial') and 'dishonest' (or 'predatory') capital. Honest capital secures gains through advancing technology, thereby increasing productivity and reducing costs—a benefit to consumers—while dishonest capital is garnered through speculation, financial manipulation and assorted other nefarious activities. Proper policy, then, aims to assure that the efficiency gains due to scale are preserved, while pricing power based solely on size is reduced or eliminated (for all this and what follows, see Henry, 1995, pp. 117–126; Morgan, 1993).

Clark generally saw government policy as largely ineffectual, mainly because of bureaucratic problems, but also because it would be difficult, if not impossible, for officials to discover the 'correct' competitive price that large firms should charge. Moreover, if governments were to intervene in the pricing decision, this would no doubt stifle technological change as it would interfere with firms' search for profit. His fundamental solution to the problem of monopoly was 'potential competition,' a concept he had described some years earlier in an essay on 'The Limits of Competition' (Clark, 1887), where he presented it as a modification of a similar argument first enunciated in John Elliott Cairnes in

¹From 1898 to 1902 at least 303 firms disappeared annually through mergers; 1208 disappeared in 1899 (Nelson, 1959, p. 37). According to Lamoreaux (1985, pp. 1–2), in those same years at least 72 consolidations led to the formation of entities that controlled over 40% of an industry, and 42 to entities that controlled over 70%.

1874. Essentially, potential competition is what would develop if monopolies actually used their economic power to raise prices much above the competitive level. Were this to happen, new competitors would appear to take advantage of the higher profits associated with monopoly pricing and this would force price down to the near-competitive level. In other words, if we do not observe entry into a particular industrial field, existing large corporations are not unduly exercising pricing power. In Clark's own words:

When prices are unduly high, owing to the grasping policy of some trusts, what happens? New competition usually appears in the field. Capital is seeking outlets, but it has become hard to find them. Readily, and sometimes almost recklessly, does it build new mills and begins to compete with trusts, when these consolidated companies do not know enough to proceed on a conservative plan. Let any combination of producers raise the prices beyond a certain limit, and it will encounter this difficulty. The new mills that will spring into existence will break down prices; and the fear of these new mills, without their actual coming, is often enough to keep prices from rising to an extortionate height. The mill that has never been built is already a power in the market; for if it surely will be built under certain conditions, the effect of this certainly is to keep prices down. (Clark, 1901, p. 13)²

While Clark relied generally on competitive forces to keep monopoly power in check, he was not a strict *laissez-faire* economist. As he put it: 'What is needed is a *laissez faire* policy in one sense of that term, but not in another sense. It involves no dull letting alone of an evil tendency, but it does involve allowing a natural development to go on unhindered' (Clark, 1901, p. 84). Clark did see limited scope for government intervention, in particular in those cases where monopolies sold below cost to drive out a rival, where monopoly firms producing various types and qualities of a good would charge a lower price for a particular variety sold by the smaller firm, and where 'factor agreements', in which firms forced merchants to refuse to purchase a rival's product, were in effect.

The one area where Clark did call for fairly strenuous government regulation was the railroad industry. As railroads serve all industries and no close substitutes

²Clark's idea of potential competition, although profoundly influential among American economists at the turn of the last century, was not immune from criticism. Arthur Cecil Pigou, reviewing *The Control of Trusts* for the *Economic Journal*, objected that there are no reasons for the monopolist to reduce prices in advance of entry. When a potential competitor is deciding whether to enter, it will rationally look at the market conditions that may prevail after entry as a consequence of the incumbent's reaction, not at the price level before entry. As Pigou (1902, p. 66) noted: 'It is not enough for a potential rival to be able to compete with the prices at which the trust at any time chooses to sell; he must be able to meet those at which, by abandoning all "monopoly revenue" and contenting itself with "normal profits" it could sell.' Otherwise, Pigou continued, 'even though all "illegitimate" competition were made impossible, the risks before independent producers would still be so great, that prices might be kept well above the point at which they could reap a profit, without ever inducing them to come into the field. The latent power of the Trust to fix a new price level, high enough to maintain itself, but low enough to ruin them, would frighten them away.'

for their services existed, government should exercise its regulatory hand in administering prices, although in a rather interesting fashion. At that time, railroad corporations were notorious in using their monopoly power to reward and punish firms through a pricing policy that featured different prices to different firms for carrying the same tonnage over the same distance. These prices were not public knowledge but, rather, were arranged unilaterally and secretly. Firms doing business with a particular railroad line were accorded favorable price treatment, while those seeking alternative transport arrangements were punished. Through varieties of price discrimination, companies attempted to increase market share and profits. Clark argued that pools should be organized under government sponsorship in which the various companies would agree upon a single, common price, divide markets among themselves, and eliminate competition. The cartelized price would be higher than that of a competitive industry, to be sure, but it would be public knowledge. Secret price agreements, the bane of consumers of railroad services, would be eliminated and government would then have a much simpler job in regulating that price to a closer approximation of the competitive standard.

3. The 1911 Court Decisions

Major concern over monopolies and trusts was one of the distinguishing marks of the American Economic Association since its foundation and lasted well into the early 1900s (Coats, 1960). The failed merger attempt of the Northern Securities Company and the subsequent panic of 1902–1903, the 1907 financial crisis and its aftermath, as well as the ostensibly illegal financial practices of many conglomerates, all contributed to keep the trust issue alive in academic circles. But it was only after the 1911 courts decisions that the debate on the trust problem and on how to amend the existing antitrust legislation acquired new vigor.

Up to 1911, the most important pre-1914 cases concerning the legality of combinations brought about by either stock or asset acquisition involved the oil and tobacco industries. The American Tobacco Company was primarily the result of a series of asset acquisitions, although it also involved the acquisition of competitors' stock. The Standard Oil Company of New Jersey was primarily a combination brought about as a holding company by the acquisition of stock. The government won both cases, thus demonstrating that under the Sherman Act a combination of manufacturing concerns could be dissolved, whether organized under the corporate form of a holding company or as a single corporation. These high-profile decisions, which were issued by the Court on the same day, introduced the so-called 'rule of reason' principle as a new benchmark for antitrust action. This required a case-by-case approach where only combinations that 'unduly restrained' trade would be deemed in violation of the Sherman Act. Any form of agreement for legitimate economic ends that only incidentally led to a restraint of trade could be considered 'reasonable' and lawful. Both Standard Oil and American Tobacco were found, under the 'rule of reason,' to have engaged in anticompetitive practices involving discriminatory pricing and marketing practices (see Sklar, 1988, pp. 146–154).

In addition, the 1911 Supreme Court rulings against the American Tobacco Company and the Standard Oil Company clarified state economic policy

concerning actions of a holding company. Both trusts used the pyramided holding company to control several subsidiary corporations and gain market control. As noted by one interpreter (Prechel, 2000, p. 64), these decisions showed that ‘the state was becoming more concerned about the use of the pyramided corporate structure to gain market control than about market control per se. It was the ability of corporations to control markets by controlling the assets of subsidiaries they did not fully own that the state managers found problematic.’ As a consequence of the Supreme Court rulings, the Standard Oil and American Tobacco companies were dissolved.

The reactions to the Standard Oil and American Tobacco cases by economists were immediate and widespread. In 1912, the *Journal of Political Economy* devoted two full issues and much of a third to the trust problem. In the same year, the American Academy of Political and Social Science devoted their *Annals* to the topic of ‘Industrial Competition and Combination.’ The following year the AEA organized a round table discussion on ‘Recent Trust Decisions and Business’, which appeared in the 1914 supplement of the *American Economic Review*. Economists were, for the most part, critical of the court decisions. According to Henry Seager (1911) from Columbia University—a colleague and friend of Clark—the decisions had left uncertain the legal definition of when a firm can be said to hold a dominant position in the market. In other words, the ‘rule of reason’ introduced a new unpredictability as to which business practices were permissible and which not. In a similar vein, Jeremiah Jenks—perhaps the most noted industrial organization economist of his day—criticized the ‘rule of reason’ as a vague concept and lamented the neglect of economic considerations by the courts in forging their decisions. In a 1912 paper published in the *Journal of Political Economy* he pointed out that the Supreme Court ‘has failed to take sufficiently into account the economic benefits that come from the saving of industrial energy and the promotion of industrial efficiency by industrial combination’ (Jenks, 1912, p. 357). Jenks was also highly skeptical about the efficacy of the remedies applied by the courts. In his opinion, the dissolution of the Standard Oil trust and the creation of several quasi-independent refining companies, were not just destructive of productive efficiency but also ineffective as an attempt to restore competition: ‘it will be a failure if the separate parts divide territory or make price agreements’ (Jenks, 1912, p. 354).

Clark did not publicly comment on the court decisions (aside from a passing remark on the post-dissolution reorganization of the Standard Oil and American Tobacco companies). But in *The Control of Trusts* (Clark, 1901, p. 52) he had openly opposed dissolutions as ineffective. John Maurice Clark—John Bates’ son and coauthor of the then forthcoming second edition of *The Control of Trusts* (1912)—did, however, actively participate to the debate. In John Maurice Clark’s opinion, recent attempts ‘to break up the so-called trusts and restore competition’ had accomplished ‘little more than to reveal obstacles ... that to many seem insuperable.’ ‘Our dissolutions,’ he continued, ‘dissolve nothing: combinations are Protean, and we are baffled by shadowy communities of interest which seem to have no body we can grasp’ (Clark, 1913, p. 114). In his contribution to the AEA roundtable devoted to the Standard Oil and American Tobacco decisions, Clark (1914, pp. 192) denied that market dominance made

abuses inevitable and warned about the outcome of ‘active competition,’ which, in his own words, ‘tends to bring prices down to a cutthroat level and so to end in [collusive] agreements. . . .’ Ultimately, he argued, the ‘potential competition’ would function as a dependable safeguard. Beyond the prohibition of unfair practices, the younger Clark maintained that a crucial objective of any proposed amendment to the existing antitrust legislation should be to halt problems in their incipiency: ‘we need to be sure that unfair competition shall be attacked as soon as it appears, not taken as evidence of illegal intent after it has done its work. We need to save competitors alive, not try to revive them after they are dead’ (Clark, 1914, p. 193). Like most of his colleagues, Clark called for more precise standards than the rule of reason the Court pronounced in the Standard Oil and American Tobacco cases.

Although too heterogeneous to define a definitive professional consensus, the economists’ reactions to the 1911 Supreme Court decisions were nevertheless sufficiently cohesive to delineate a prevalent uneasiness about the dissolution of large conglomerates, and a general tolerance for some ‘reasonable’ degree of restraint of trade subject to governmental regulation. Economists, by and large, recognized that the new large-scale production organization of American capitalism required a ‘trustified,’ or ‘administered,’ competitive market regime and a corresponding adaptation of the law.

4. Clark’s Post-1911 Position on Trusts

4.1. *The 1911 Senate Testimony*³

Reactions to the 1911 Standard Oil and American Tobacco dissolutions were not limited to academic circles. A growing apprehension had emerged in the political arena as well, as many opinion leaders began to fear that the recent decisions would increase the uncertainty concerning the legality of certain business practices designed to undercut the Sherman Act’s efficacy as a tool to eradicate monopolies. These fears reached the steps of the United States Congress, and on November 15, 1911, hearings began before the Senate Committee on Interstate Commerce for the purpose of investigating ‘what changes are necessary or desirable in the laws of the United States relating to the creation or control of corporations engaged in interstate commerce’ (US Senate Report No. 1326, Sixty-third Cong., 3d Sess., 1913). As we learn from William Letwin (1965, pp. 267–268), lengthy testimony was taken from over 100 experts in the field, including leading businessmen such as the steel tycoons Elbert H. Gary, Andrew Carnegie and James A. Farrell; lawyers who had been serving as consultants in previous antitrust cases such as Victor Morawets and Louis D. Brandeis; labor leaders and public affair specialists such as Samuel Gompers and Lyman Abbott; and eminent economists such as John Bates Clark and J. Laurence Laughlin.

In his Senate testimony, Clark first openly introduced the contention, which he would develop in his subsequent writings, that in the current period the force of

³This section draws on Fiorito & Henry (2007).

potential competition as a check to monopolistic power had lost much of its original vigor because of the unfair advantages of the trusts. ‘Bullying’ tactics by dominant conglomerates could prevent the emergence of new competitors and therefore limit the check of potential competition on monopoly power. There is a clear change in tone and emphasis from his earlier contributions on the subject. In Clark’s own words:

During the more recent periods the public has had less confidence in the efficacy of potential competition; and while I would not for a moment give the opinion of other economists than myself, my judgment is that economists have somewhat less confidence in it. What it . . . can do under existing conditions is less than it was at an earlier time. The fact is that this potentiality of competitors was neutralized by another potentiality, namely, the power of the great consolidation to drive the competitor out of the field by unfair means whenever he actually made his appearance. It was the swing of the club in the hands of the trust which terrorized the competitor and prevented his actual appearance. It was bullying on the threat of ‘slugging’ which means attacking the competitor unfairly, and using weapons which the competitor does not possess. (Clark, 1911, p. 973)

What Clark now advocates is government promotion of ‘actual competition’—not just potential competition—largely through the banning of certain unfair practices and, when necessary, through the dissolution of the ‘perilous’ trusts (distinguished from those labeled ‘harmless’). This conclusion was founded on the assumption that only actual competition in a concentrated industry will create new capacity, exert downward pressure on prices, and make collusion more difficult by creating the conditions for an actual increase in the number of competitors:

without a fair amount of actual competition merely potential competition is not practically worth very much. There must be some actual competitors in the field. When prices are high many a man would like to enter the field, if he could safely do it. If then no one actually enters it, it is fair to infer that they are all under terrorism. The presence of actual competition on that ground alone is quite essential. But it is also essential that there should be some competition in order to produce a direct effect on prices, and in this connection small local producers perform a valuable function. (Clark, 1911, pp. 974–975)

In his testimony, Clark also repeatedly invoked what he termed ‘tolerant competition,’ by which he meant a live-and-let-live form of competition where big firms and small firms face the same pricing conditions and only efficiency determines the profit outcome. While the honest trust may well win this contest, such an outcome is not assured. Both large and small producers would face the same external constraints and both (or either) would succeed based upon their ability to advantage themselves through gains in efficiency.

Clark’s conception of tolerant competition was reflected in his policy proposals. In his testimony he advanced four main points that would later be elaborated and refined in the 1912 edition of the *Control of Trusts*: (1) the necessity of supplementing the Sherman Act with more specific statutory prohibitions of certain unfair practices such as predatory price discrimination and factor agreements; (2) the need for a new regulatory commission to ‘rescue’ ‘actual competition’

from the power of monopoly; (3) the regulation of holding companies; and (4) the argument that the degree to which a firm is harmful is not its total capitalization, but the 'fraction of the entire capital of an industry' which it holds. It is significant that in his testimony, Clark placed a great deal of emphasis on this fourth point, which is only briefly mentioned in the 1912 edition of the *Control of Trusts*. Clark's exchange with Senator Albert Cummins is particularly enlightening. Cummins, a leading progressive Republican from Iowa, asked Clark whether, in his opinion 'a limitation, a fair and proper limitation, upon the amount of capital which any one corporation can employ would not be a stop toward the preservation and maintenance' of the 'tolerant competition' of which he had spoken in his testimony. The subsequent exchange between Clark and Cummins is worth quoting in its full length:

PROFESSOR CLARK. I may say, sir, that this is one of the cases in which I have found myself demanding a thing on economic grounds and being opposed on legal grounds. I think it is desirable to treat the capital of one company, as compared with the total capital engaged in the industry, as an element in shaping a policy in dealing with it. On economic grounds no fixed amount of capital would apply to the wide range of different cases. Between a little yeast-cake monopoly which once existed and the Steel Trust there is such an enormous range of difference that what would be an excessive capital in one case would not make an impression at all on the necessary capital in the other case.

SENATOR CUMMINS. I do not mean a capital fixed by Congress, but a capital limited by the act of some governmental board which would survey the field and determine what amount of capital could be employed without unduly restraining trade.

PROFESSOR CLARK. I am perfectly free to say that that is what I do believe in. I should not appreciate the difficulty arising from the fact that the total capital in an industry is a changeful amount. Of course it is. It does not change so rapidly that, if a governmental bureau had a record of the real capital of each of the various corporations of which it takes cognizance in a certain year, this might not properly be made the basis of action for a short term of years following that date. In my view, the amount of capital which one corporation can have without danger to its rivals varies in different cases, but may always be defined as the fraction of the entire capital of an industry which experience shows that it may have without unduly restraining competition. It might be a large part of the whole, but it would become too large a part whenever we should discover that actual competitors were being unfairly crowded to the wall, so that potential competition could not do what we expect of it. (Clark, 1911, p. 977)

After the Standard Oil and American Tobacco dissolutions, then, Clark came to see sheer size as a competitive problem. Still acknowledging the efficiencies of large-scale production, Clark now saw excessive concentration of capital in a specific industry as a threat to both actual and potential competition. In his view, the fixing of the proper limits of capital concentration according to each industry's characteristics should be among the tasks of a Federal Commission with powers—as he stated in his testimony—similar to those of the Interstate Commerce Commission (Clark, 1911, pp. 982–984).

This was how Clark had presented his views in late 1911. More than a year later, on February 26, 1913, the Senate Committee issued its final report which, quite significantly, largely reflected Clark's views. Accordingly, the Committee declared that 'the progress of the world depends in large measure upon that fair, reasonable rivalry among men' and announced 'that the Sherman Act should stand as the "fundamental law" on the issue of the nation's competitive landscape.' At the same time it proposed, among other minor amendments, new legislation that would 'specifically prescribe certain conditions upon which persons and corporations shall be permitted to engage in commerce.' The Committee also called for the Creation of a new commission to (1) administer and enforce the proposed laws; (2) serve as a reference for information about corporations' management and practices; (3) handle issues that require 'administrative promptness ... rather than judicial deliberation'; and (4) supervise dissolutions ordered by the courts (US Senate Report No. 1326, Sixty-third Cong., 3d Sess., 1913). As noted by one interpreter, the Committee's final resolutions played a decisive role in setting the stage for the newly elected President Woodrow Wilson to urge the legislative package that evolved into the FTC and the Clayton Act (Ward, 1986, p. 5).

4.2. *Clark's Post-1911 Academic Contributions*

The second edition of *The Control of Trusts* appeared in early 1912 and was written together by John Bates Clark and his son John Maurice. In the second edition the emergence of great consolidations is still seen as the natural outcome of the new technological conditions prevailing in industry, but with a new—significant—change in emphasis. Trusts and combinations, it was argued, offered a 'way of deliverance' from a competition that has become, or threatens to become 'ruinous' or 'cut-throat' (Clark & Clark, 1912, p. 3). The Clarks referred to the presence of relatively high overhead costs and increasing returns to scale as attributes leading to ruinous competition. In this case, when faced with declining gross revenues, firms attempt to recover profits by cutting prices and selling more at lower margins. While it would be rational for the industry as a whole to reduce output in order to increase profit margins, each single firm finds an incentive to displace its competitors by increasing production and cutting the price. This, in turn, would trigger a reaction by competitors:

The other companies are in the same situation and have the same incentives, while they are spurred to aggressive action by seeing their established market taken from them by the belligerent tactics of their neighbor. So, first, there comes retaliation and reprisal until a form of guerrilla warfare takes the place of reasonable competition, and finally, the ruinously low prices spread over the whole market and profits are turned into losses everywhere. (Clark & Clark, 1912, p. 174)

The problem of ruinous competition was associated with high overhead costs because in their presence prices can drop much further and still cover variable costs. This in turn implies, in the words of Michael H. Best (1990, p. 50), that 'companies can be hemorrhaging but still operating.'

According to the Clarks (1912, pp. 3–4), ‘so long as mere pools or contracts to control prices were depended on they were not as menacing as the later forms of union became; and they did at least allay a warfare that involved much evil.’ It was ‘the appearance of consolidations that were firmer and more complete that caused the menacing shadow of general monopoly to deepen.’ The whole situation was made even more severe by the fact that the protection of potential competition ‘cannot be trusted as it could in earlier days’ (Clark & Clark, 1912, p. 27)—an argument anticipated by the elder Clark in his Senate testimony. This new focus on ruinous competition, coupled with the growing skepticism towards the discipline imposed by potential competition, was reflected in the increasing attention devoted to the anticompetitive behavior of the trusts. It is true that John Bates Clark had already condemned unfair practices in the first edition of *The Control of Trusts*, but now the whole argument is further elaborated in a more emphatic fashion. It was now pointed out, for instance, that the banning of price discrimination would place an important check on the process leading to ruinous competition. As the Clarks explained, ‘at the start [of an episode of ruinous competition] the price-cutting covers only part of a firm’s consumers, and only when other producers begin to retaliate does it spread to the whole. That is, it starts with discrimination. . . . If this were not possible, if any cut prices had to cover all customers or none at all, would not a manager think twice before offering his whole output below cost?’ (Clark & Clark, 1912, p. 175).

The most important element of novelty, however, is to be found in the discussion of the holding company as an unfair institutional arrangement—interestingly enough, another aspect anticipated in Clark’s 1911 testimony and completely absent from the first edition of *The Control of Trusts*. The holding company, it was argued, allows corporations to control assets that significantly exceed their capitalization through the creation of a series of intermediary companies within a pyramided structure. The ‘unfairness’ of this legal arrangement lies in the possibility of acquiring control of another firm at a reduced cost, i.e., without having to bear the cost of acquiring full ownership. Further, the holding company permitted firms to expand across state lines without having to pay ‘foreign’ corporation taxes, i.e., the corporate taxes of states other than those of the initial state of incorporation. The Clarks placed their critique in harsh terms:

There is one institution, a bad product of recent development, for which no good words should be said, and very few are said. It is the ‘holding company’ so called, and is diabolically perfect as a means, first, of concentrating the control of many corporations in a single one and, secondly, of concentrating the control of that single company in a small minority of the real owners of the capital and the business over which they have sway. It sometimes puts property belonging to a vast number of owners at the disposal of a very insignificant minority and because of its bad perfection in creating monopolies, which injure consumers, and in building up little oligarchies within the monopolistic corporations, and so injuring honest capitalists, it finds few so mean as to do it with reverence. (Clark & Clark, 1912, p. 74)

The constitution of a holding company was also seen as the perfect complement of some manipulative financial devices such as the inflated appraisal of the

constituent companies' properties leading to stock watering: 'nothing is simpler than this means of uniting rival corporations under one control and the excluding the great body of owners from all power over them. First, inflate the capital of the original and constituent companies until the common stock is mostly water; then organize a new corporation to buy the majority of that water, and the thing is done' (Clark & Clark, 1912, pp. 75–76).

As a remedy, the Clarks proposed the sterilization of the voting control held by the holding company over its subsidiaries. To reach this end, they suggested, it would be sufficient 'if all the shares held by such a company were counted as a single share for voting purposes.' This should be coupled with specific prohibitions concerning interlocking directorates: 'If we impose upon stockholders' voting power the limitation already suggested, we can hardly fail also to prohibit the choosing of directors who have any considerable interest in other companies from which their own is required by law to be completely separate in policy and management' (Clark & Clark, 1912, p. 154). It is worth noting that it was the 'unfairness' of the holding corporation as a device to acquire control at the expenses of the majority of shareholders that had to be prohibited, not the direct acquisition of a competitor's assets *per se*. To leave no doubt on the matter, the Clarks explicitly specified that their plan to sterilize the voting power of holding corporations 'would not of itself prevent combination by the out-and-out method of buying out the property of rival plants or merging two corporations in a single one; but it would prevent combination from taking that other most subtle and pervasive form, in which those who have put in the majority of the capital are completely shut out from control' (Clark & Clark, 1912, p. 151).

The identification of specific types of prohibited conduct did not exhaust the Clarks' agenda. They understood that, while the enumeration of certain specific offenses might provide a degree of added certainty in matters of antitrust policy, such certainty could extend no further than the extent of the enumeration. Left unaddressed was still the underlying issue involved in the 1911 court decision—namely, how any statutory policy could reconcile the apparently irreconcilable objectives of certainty on the one hand and flexibility on the other; of identifying precise violations under existing laws and of preventing new forms of potential violations in their incipiency. The solution was found in the establishment of a federal administrative commission:

It is clear enough that in regulating trusts there are things to be done and needs to be met that cannot be accurately foreseen and provided for by detailed and self-acting statutes. Our methods must be so far as possible elastic, adaptable as to ways and means though inflexible in underlying purposes; and yet these laws must be applied definitely and forcibly. We cannot afford to have any large section of the business world in doubt whether they have broken the laws or not, and we cannot let the laws become a dead letter through vagueness. In this view it is clear that an administrative commission can render invaluable service. After commanding everything we can definitely command, and forbidding everything we can definitely forbid, we may cover the rest of the field in general terms and leave the commission to enforce them, as the Interstate Commerce Commission now enforces the general terms of the Interstate Commerce Act. The need of such a body is probably the one thing on which the various

plans now before the people are most generally agreed. (Clark & Clark, 1912, pp. 59–60)

With this proposal, the Clarks joined a growing number of economists who had expressed confidence in the ability of an administrative agency to deal with antitrust problems (Fiorito, 2011). While the participants in the policy debate were largely silent on the question of what procedural devices would be appropriate to achieve the agency objectives, two distinct visions of such a commission did emerge. While some economists saw the commission as having a purely investigative role, with little or no enforcement authority over precisely defined violations of law, others, like the Clarks, advocated a more powerful commission with stringent licensing powers and clear authority over unfair methods of competition. John Bates and John Maurice Clark envisioned a federal law under which no corporation could engage in interstate commerce without obtaining a license from the proposed administrative agency. Accordingly, the agency would have the authority, subject to judicial review, to refuse or withdraw the license if the corporation in question violated the terms of the license or other federal laws (Clark & Clark, 1912, pp. 16, 15–16, 194–195). In addition, a corporation would be required to publish properly audited balance sheets and income statements. John Bates Clark was especially forceful in emphasizing the need for public reporting. As he put it, the proposed federal agency would ‘impose on every corporation a burden of proof; first, that it does not have the whole field; secondly, that rivals maintain themselves by their own excellence and are not tolerated as a blind for the public; thirdly, that there are enough of them to affect the standards of price in the whole industry; and fourthly, that the way is so open for the entrance of more that prices cannot become extortionate’ (Clark, 1912a, pp. 65–66).

5. Clark, Antitrust Policy and the 1912 Presidential Campaign

In the meantime, public concern about monopolies was influencing the 1912 presidential campaign.⁴ The Sherman Antitrust Act had become a crucial issue and featured prominently in the platforms of the three major candidates: William Howard Taft, the Republican incumbent; Theodore Roosevelt, the former Republican president now running as a Progressive; and Democrat Woodrow Wilson. The Republican platform, after claiming credit for having ‘placed upon the statute book . . . the antitrust act of 1890,’ proclaimed its support of ‘the enactment of legislation supplementary to the existing antitrust act which will define as criminal offenses those specific acts that uniformly mark attempts to restrain and to monopolize trade. . . .’ (Porter & Johnson, 1956, p. 178). While Taft was hesitant to increase the certainty or severity of punishment under the law, he did wish to widen its coverage. The Progressive Party favored ‘strengthening the Sherman Act’ by prohibiting certain trade practices that were legal but unfair. Roosevelt

⁴On the role of the 1912 presidential campaign in the formation of antitrust policy in the US, see Kovacic (1982) and Winerman (2003).

specifically urged a commission with wide-ranging powers to regulate the issuance of securities, compel publicity of corporate accounts, investigate suspicious business behavior, and (in at least some cases) set maximum prices for goods produced by monopolies that had attained their position by superior efficiency. The Democratic platform backed extension and vigorous enforcement of antitrust law:

We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions. . . . We regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficiency and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation. (Porter & Johnson, 1956, p. 169)

Wilson was prepared to create some sort of trade commission, but he contemplated a far less powerful agency than did Roosevelt.

Clark decided to give his own intellectual contribution to the electoral campaign in his dual role of academician and opinion maker. On September 20, 1912, on the eve of the 1912 presidential elections, he wrote to his friend Woodrow Wilson and sent him a copy of *The Control of Trusts*. In a crucial passage of the letter, Clark reiterated his aversion to any policy contemplating price regulation as a viable solution to the trust problem: ‘I am sending a little book on Trusts. It shows . . . how grave is the error in the Van Hise-Roosevelt policy, which relinquishes on slight proof, the hope of preserving competition in great business, and accept with no appreciation of the most fatal objections to it, the plan of regulating prices by a commission.’⁵

About two weeks later, Clark reviewed the presidential candidates’ official agendas on trusts in an article for *The Independent*. Clark began by expressing skepticism towards Taft’s defense of the executive’s ability to use existing legislation aggressively to dissolve large conglomerates (as Taft himself had done) under a ‘rule of reason’ construction of the Sherman Act. For Clark, the problem lies with the reorganization of the dissolved trusts. Both Standard Oil and American Tobacco shareholders each had received shares in the firms’ successors; the shared ownership of the succeeding companies, Clark pointed out, had the consequence of maintaining the community of interest and delaying the emergence of effective competition: ‘if the units act in complete concert, if the prices of their products do not fall and their monopoly is as strong as ever, *a rule of reason calls for some addition to the law*’ (Clark, 1912b, p. 891; emphasis added).

⁵Clark is referring here to Charles Van Hise, who was president of the University of Wisconsin and a close advisor to Theodore Roosevelt. In his influential *Concentration and Control*, Van Hise (1912) argued strongly for a powerful administrative commission with far-reaching authority to regulate prices. The quoted letter from Clark, dated September 20, 1912, is preserved in the John Bates Clark Papers, Rare Books and Manuscript Library, Columbia University.

Defending the status quo, as the Republicans were proposing, he declared, was no longer sufficient.

Clark was more sympathetic to the Progressive platform. He agreed with Roosevelt's proposal for an administrative commission and applauded his commitment to make certain unfair practices illegal. Nonetheless, he was critical of the Progressive Party's focus on price regulation, which he thought was both wrongheaded and resolute: 'Repressing predatory competition is thoroly [sic] admirable, but doing that and nothing more may amount to a surrender to monopoly. A proposal of price regulation implies some expectation of thus surrendering' (Clark, 1912b, pp. 893–894).

Finally, Clark turned to the Democratic platform. He began by expressing approval of Wilson's call for laws on price discrimination, holding companies and interlocking directorates. Curiously, Clark did not comment on Wilson's views of the proposed federal commission. The distinguishing mark of Wilson's antitrust efforts, however, was his commitment to legislation aimed directly at limiting corporate size—a provision that Clark himself had vigorously sustained in his 1911 testimony:

This plan accords well with an intelligent policy in dealing with trusts, and the actual policy of the party is intelligent. It proposes to exclude from interstate trade companies having the clear characteristics of monopoly and recognizes as one of these traits, 'the control by any one corporation of so large a portion of an industry as to make it a menace to competitive conditions.' There are difficulties in the way of applying this test, but the worst that can be said about them is that it will take wisdom and earnest effort to overcome them (Clark, 1911, p. 894).

Further evidence of Clark's support for Wilson is provided by a letter that Benjamin M. Anderson Jr—then an instructor of economics at Columbia—wrote to Wilson on behalf of Clark and himself. Anderson had been alarmed by a report of Wilson's views on trusts published in the *New York Times* on October 12, 1912, which, as he put it in his letter to the future President, 'quotes you as holding . . . that all that need be done in connection with the problem of monopoly is to remove the special favors and unfair methods of competition which have built up the trusts; and then "natural law" will take care of the situation: that there is no danger in size as such: that, if they can be made to fight fairly, you are willing for them to remain as big as they can' (Anderson to Wilson, October 15, 1912, in Link, 1966–94, pp. 420–421). Anderson explained that Clark himself held a similar view in 1901, when the first edition of *The Control of Trusts* was published, but that since then he had changed opinion. The salient passages of Anderson's letter to Wilson are reproduced below:

It is not enough, [Clark] now maintains, so to regulate competition that 'potential competition' may exist. There must be actual competition, on a considerable scale, and in all important markets. And size, as such, is often a tremendous factor in preventing this. . . . I may add that, while he waives the question of details, he is disposed to believe that a Federal Commission, issuing licenses to corporations doing interstate business, and having power to revoke them,

will be an effective means of handling such parts of the problem as a call for direct Federal action.

The evidence presented in this section indicates that Clark, despite his Republican Party sympathies, endorsed the democratic candidate in the belief that Wilson would pursue effective antitrust remedies. Wilson's policy proposals appeared to Clark as the only ones that could keep the trusts under governmental control while preserving the working of 'actual competition' even in highly concentrated markets.⁶

6. The National Civic Federation Proposal

The second act of John Bates Clark's direct participation to the antitrust movement is tied to his involvement with the National Civic Federation. As a coalition of progressive businessmen and conservative labor leaders, the NCF had been in the forefront of progressive efforts to revise the antitrust laws since its establishment in 1900 (Cyphers, 2002). In March 1908 a bill drafted by a committee of NCF representatives in consultation with Roosevelt's Commissioner of Corporations was introduced in the House by William P. Hepburn and in the Senate by William Warner. The bill, known as the Hepburn bill, protected corporate expansion under extensive federal regulation, restored the Sherman Act's common law interpretation to allow 'reasonable' restraints of trade, instituted a federal registration of large corporations and unions, and expanded firms' reporting requirements. The Hepburn Bill aroused fierce opposition and, in spite of Roosevelt's endorsement, was defeated in that session of Congress (on the Hepburn Bill, see Sklar, 1988, pp. 203–285). In June 1911—on the heels of the Standard Oil and American Tobacco decisions—the NCF set up a new committee on the trust question that met for a year and which in turn appointed a drafting subcommittee consisting of Seth Low, the president of the NCF; Talcott Williams, an NCF leader and future director of Columbia University's School of Journalism; Jeremiah W. Jenks, the industrial organization specialist from Cornell; and Clark. The result of the subcommittee's efforts was a draft bill that obtained the Federation's approval and was finally printed in December, 1913.⁷ The bill was then sent to Senator Francis G. Newlands, to Representative Henry D. Clayton, to newly elected President Wilson's commissioners of corporations, Joseph E. Davies, and to the President himself (Weinstein, 1968, p. 88).

⁶In the closing passage of his *Independent* piece, Clark (1912b, p. 894) wrote: 'The present writer is a Republican, the descendant of Republicans, Whigs and Federalists. Tested by general views of the Federal constitutions, he thinks both his hereditary party and the new Progressive one have the advantage over their common rival. By the test of practical action in the most vital issue of the day he concedes that the Democrats win.'

⁷The document, marked 'Confidential', was entitled 'Proposal for a bill to create an Interstate Trade Commission, to define its powers and duties, to provide for the registration and license of persons, partnerships, corporations and joint-stock associations engaged in interstate commerce, and for other purposes; Dec 16, 1913.' A copy is preserved in the Seth Low Papers (Box 105) at the Rare Books and Manuscript Library, Columbia University.

The NCF bill proposed to separate the Bureau of Corporations from the Department of Commerce and Labor and transform it into a seven-member independent agency. Corporations with gross annual revenue in excess of \$10 million would be required to register with the commission and provide full information, as the commission might prescribe. The commission would grant public access to the information so obtained, as well as to other information collected in the course of its investigations, and it would make annual reports to Congress. Registered corporations would be required to obtain permission from the commission before issuing new shares, including shares issued 'for the purpose of acquiring additional property.' Any increase in shares made without the required consent 'shall, in the discretion of the Commission, subject the corporation to a forfeiture of license.'⁸ The commission would have the power, upon complaint or on its own initiative, to refuse or revoke license for noncompliance with registration prescriptions, and for violations of the Sherman Act. The bill also specified that the commission might refuse or revoke license whenever it finds that in the conduct of its business a corporation 'makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality in any respect whatsoever; or subjects any particular person, company, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'⁹ Upon revocation or cancellation of corporation's registration, the commission could order the corporation to cease engaging in interstate or foreign commerce. All decisions of the commission would be final, except that a corporation might appeal in federal courts the commission's order to cease trade. Such suit in the District Court 'shall proceed in all respects as other civil suits for damages, except that on the trial thereof the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated and that the complainant shall not be liable for costs in the District court.'¹⁰

Clark, Jenks, Low and Williams set forth the principles underpinning their proposal in a cover letter dated December 9, 1913, which accompanied the final version of the bill.¹¹ In its drafting of the bill, they stated, the committee had acted under the assumption 'that the Sherman Anti-Trust Law, as interpreted by the Supreme Court of the United States, forbids restraints of trade, but not necessarily all restraints of competition. That is to say, the Sherman Anti-Trust Law is specifically aimed at all restraint of competition which is brought about either by monopolizing or by unfair practices; but the law does not assume that restraint of competition and restraint of trade are synonymous terms.' Accordingly, the major aim of the NCF bill was to infuse into existing antitrust legislation a higher degree of certainty by somewhat limiting the Court's discretion in judging whether certain acts, because of their illegal intent or effect, constitute

⁸Proposal for a bill to create an Interstate Trade Commission; Dec 16, 1913; Sec. 15.

⁹Proposal for a bill to create an Interstate Trade Commission, Dec 16, 1913; Sec. 12.

¹⁰Proposal for a bill to create an Interstate Trade Commission, Dec 16, 1913; Sec. 23.

¹¹The letter is preserved in the Seth Low Papers (Box 105) in the Rare Books and Manuscript Library, Columbia University. Unless otherwise indicated, the quotations which follow in this section refer to this letter.

an unreasonable restraint of trade. The proposed interstate commission—as the committee’s members put it—‘so far from being an agency for the arbitrary control of business, is to be an agency to help business men to determine whether what they are doing, or proposing to do, is probably lawful or unlawful.’ The committee justified the placing of only those corporations with a gross annual revenue of \$10 million or more under the licensing authority of the commission on mere organizational grounds: ‘if such administrative regulation of commercial business is to be applied at the outset to all interstate business, . . . the mere volume of such business will make it difficult, if not impossible, for such a Commission to cope with the undertaking in any helpful way.’ Yet, in the following passage it was added that ‘the principal evils of which the public are conscious undoubtedly relate themselves to the largest corporations’—a remark that evokes Clark’s emphasis on mere corporate size as a potential source of monopolistic power.

As to the federal licensing provision for the conduct of interstate business, the authors of the NCF bill explained that under the current legislation any single state of the nation ‘may create a corporation that does interstate business,’ and ‘the State that creates the corporation is the only government in the world that can regulate the corporation as such.’ On the other hand, the individual states have no jurisdiction at all on the activities of the corporation. All this implies that

in the United States we have at present no government at all that regulates both the agent and the interstate business that the agent does. This is a condition of governmental feebleness, which has already resulted, and is likely to result again unless it be changed, in a situation that is little short of governmental chaos. It is certainly desirable, and in the opinion of many it is necessary that the same government which controls the business that is done should control the agent that does it, if interstate business in the United States is ever to be freed from uncertainty and conducted under the protection of uniform law. It is not often enough remembered that when the Federal Union was formed all of the States had the common law, so that interstate business was then free from conflicting legal requirements; but, with the development of statutory legislation, the States have long since ceased to have a common law. So long as the States were largely isolated, this was a matter of comparative unimportance; but now that the life of the people in all the States has been so far unified that the interstate business of every State is probably largely in excess of the intrastate business of that State, the subjecting of such business to the statutory variations of forty-eight different commonwealths becomes a matter of increasing embarrassment to the citizens not of one State here and there but of every State wherever it may be.

The NCF committee had in fact considered the possibility of requiring all large corporations engaged in interstate business to reorganize themselves under a federal incorporation law. A federal law governing the financial and managerial responsibilities of these corporations would have been significantly more stringent than that of the individual states, which, it was noted, ‘have competed with each other in the making of lax corporations laws.’ Its efficacy notwithstanding, the committee discarded the measure because ‘the effort to define the essential elements of a good corporation law is a matter itself so

difficult, and as to which there may be so many differences of opinion, that it has seemed best not to attempt to deal with that aspect of the subject in connection with this bill.’

By the end of 1913, then, the NCF had formulated a bill which provided for the federal registration of corporations, created an interstate trade commission, and introduced an elastic concept of unfairness borrowed verbatim from the Interstate Commerce Act of 1887. The NCF proposal was essentially Clarkian in its spirit. Clark’s view of a commission, as he had repeatedly affirmed in his Senate testimony, was ‘somewhat on the lines of the Interstate Commerce Commission,’ especially in connection with the latter’s power to prohibit or discourage unfair competition (Clark, 1911). Similarly, the drafting committee defined the NCF bill as an ‘effort to apply to general commercial business the methods of regulation which have worked well as applied to the Interstate commerce commission.’ Section 12 of the NCF bill, as its authors explained, applied to ‘the business affected by the bill the precise language of the Interstate commerce Law which has enabled the Interstate commerce commission to put an end to rebating and every other unfair practice in railroading which has been brought to its attention.’

It was the strict licensing and registration provision of the bill, however, which revealed most clearly Clark’s decisive influence on the NCF proposal. Clark in fact had openly contemplated a commission with broad licensing authority both in his Senate testimony and his post 1911 contributions. Writing on the need to restore actual competition, for instance, he had affirmed that ‘If we refuse federal charters or licenses to corporations which cannot show that active competition exists and that potential competition is free and effective, we accomplish the purpose in view, and it is then less important whether the field is in the possession of one colossal company and many smaller ones, or in that of one company which is very large and a number of others of moderate size’ (Clark, 1912a, p. 66). As noted by Sklar (1988, p. 289), any predisposition in the direction of a strong pro-license bill on the part of the other members of the subcommittee, especially Jenks and Williams, ‘may have well been reinforced by Clark.’¹²

7. The Enactment of the 1914 Antitrust Legislation

The timing of the NCF proposal, and this might not have been a sheer coincidence, corresponded almost exactly with actions of Newlands, Clayton, and the President on legislation leading to the Federal Trade Commission Act (Weinstein, 1968, p. 88). In January 20, 1914—roughly one month after the NCF had circulated its draft bill—Wilson decided to lay out his own antitrust agenda in a landmark

¹²As to Jenks, the other economist in the NCF committee, I was unable to find any explicit endorsement of a commission with licensing powers in his professional writings of the time, and even his condemnation of unfair competition was cautiously phrased and always conditional on circumstances (Fiorito, 2011).

address to Congress.¹³ Wilson proposed, among other things: legislation to provide ‘further and more explicit legislative definition of the policy and meaning of existing antitrust law,’ and the creation of an ‘intestate trade commission’ which would provide guidance on the formulation and interpretation of antitrust laws and help courts frame effective relief in cases involving antitrust violations (Winerman, 2003, pp. 51–92).

It was against this background that the bills which eventually became the FTC and Clayton Acts were introduced in Congress. The legislative path of the 1914 antitrust legislation was a particularly tortuous one and needs only to be recapitulated here in its essential steps; our historical reconstruction draws heavily on Winerman (2003). The House took up antitrust legislation first. Representative Henry Clayton prepared five tentative bills (the so-called five brothers). When the bills were introduced into the House, the provisions that would in the end develop into the Clayton Act were incorporated into a single bill that was referred to Clayton’s judiciary committee, while the Commission bill was referred to the House Committee on Interstate and Foreign Commerce.¹⁴ In the Senate, Newlands had introduced a commission bill identical to Clayton’s. The Clayton and Newlands bills contained no reference to unfair practices. The new agency would receive annual reports from large corporations; would investigate Sherman Act cases on behalf of the Justice Department; and would report to the President and Congress on the need for additional antitrust legislation. Thus, the new agency would have few substantive powers beyond advisement and providing information to the public. On June 5, 1914, the House passed its Commission bill.

However, the core of Wilson’s original program was the Clayton bill, which was facing political resistance in the House. As documented by Winerman (2003, pp. 37–38), even before the House passed its versions of antitrust bills, Louis Brandeis and George Rublee—two influential advisers to Wilson, both of whom were associated with the NCF—persuaded the President to support a stronger Commission bill in an effort to salvage an effective antitrust package. The proposed commission was still weaker than the one envisioned by Clark and the NCF drafting committee, but the Senate did grant the commission enforcement power by adding a provision (in Section 5) that gave it authority to prohibit unfair methods of competition. Dissenters raised their voices. Some opponents argued that this made the commission, which was also authorized to enforce the Clayton Act, too strong. Others objected that the proposed commission would be too weak because it would have no licensing power and no authority in the area of investment strategy. Despite these objections, the FTC Act was passed by Congress and signed into law by President Wilson in September 1914. The

¹³Wilson’s speech on antitrust legislation was delivered to a joint session of Congress on January 20, 1914; the text of the speech can be found in Link (1966–94, Vol. 29, pp. 153–158).

¹⁴In testimony given before the Judiciary Committee in February 1914, Clark (1914, p. 328) affirmed that the measures proposed by Clayton were ‘in absolute harmony with the requirements of economics, with present conditions and economic tendencies . . .’

Clayton antitrust bill, now reduced in significance because of Wilson's acceptance of a regulatory commission strategy, became law on October 15, 1914.

The FTC Act provided for a board of five members, no more than three of whom could come from the same political party. The core of the FTC's authority rested in three fundamental provisions contained in Section 5, namely that 'unfair methods of competition in commerce are hereby declared unlawful;' that the commission has the effective power to determine which methods are unfair; and that it can order offenders to 'cease and desist' from using such unfair methods.¹⁵ In addition, the agency could require annual and special reporting by corporations engaged in interstate commerce, while providing the public with information the agency gathered in order to promote fair trade practices. The new agency could also assist the judiciary in formulating remedial orders to deter future antitrust violations.

The Clayton Act represented a different approach from the FTC Act. In framing Section 5 of the FTC Act, in fact, legislators recognized the difficulty of specifying all the anti-competitive practices that then existed and, accordingly, granted the new commission generous discretion to define and limit attacking such practices. The Clayton Act, instead, was intended to supplement the Sherman Act by addressing additional specified practices that might pass through perceived loopholes in the earlier statute.¹⁶ It had four principal provisions.

- Price discrimination in connection with interstate commerce was declared to be unlawful 'where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly.' The Act allowed differences based on grade, quality, on the quantity sold, on the cost of selling and transportation, or when 'made in good faith to meet competition' (Section 2).
- Exclusive selling or leasing contracts, whether of patented or unpatented articles, whose effect may be to 'substantially lessen competition or tend to create a monopoly' were also declared unlawful (Section 3).
- The acquisition of stock in one corporation by another, or the combination of two or more corporations through stock ownership, where the effect 'may be substantially to lessen competition, . . . to restrain commerce . . . , or tend to create a monopoly,' is prohibited. The Act excluded existing corporate relations and made exemptions in the case of common carriers developing branch lines, and of subsidiaries companies (Section 7).
- Complicated limitations were imposed upon interlocking directorates. The provision relating to industrial combinations prohibited any person, after two years from the approval of the act, from being a director in two or more corporations, any one of which has a capital of a million dollars or more, provided that the business carried on by such corporations be of such a nature 'that the elimin-

¹⁵These 'cease and desist' orders could be issued only after hearings, could be enforced only through decrees of circuit courts of appeal, and were subject to appeal.

¹⁶The text of the Clayton Act can be found online at: <http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf>. The passages quoted below are cited by the relevant section number of the Act.

ation of competition by agreement between them would constitute a violation of the antitrust laws (Section 8).

In addition to these prohibitions of monopolistic practices, Section 6 of the Clayton Act partially exempted labor unions and farm cooperatives from the domain of antitrust legislation because of their non-profit status and their purpose of mutual benefit.

Made up as it is of material drawn from the four original Clayton bills that were at one time under consideration in different committees of Congress, the Clayton Act lacked the simplicity and unity of the FTC Act. Moreover, the specificity of its prohibitions was blurred by the necessity of showing that the prohibited behavior will probably ‘substantially lessen competition.’ Apart a few notable exceptions, such as Allyn Young, American economists viewed the 1914 antitrust package favorably. Sympathetic assessments came from very different directions. Edward Dana Durand (1914, p. 73), an ardent advocate of the dissolution of trusts, observed that ‘if the destruction of trusts and the maintenance of competition be accepted as a proper policy, these acts must be approved for the most part as valuable aid in carrying out that policy.’ Henry Seager (1915, p. 448), whose views were similar to those of John Bates Clark, hailed the new acts as ‘as a legislative endorsement of the position already taken by the courts substituting the policy of “regulated competition” for the policy of “enforced competition”’; while William S. Stevens (1914, p. 854), who had focused on unfair competitive conduct, affirmed that ‘the power over unfair methods of competition which has been given to the Trade commission is an important step in the direction of eliminating those practices and therefore toward the ultimate solution of the trust problem.’ Curiously enough, neither John Bates Clark, nor his son John Maurice commented on the passing of the 1914 antitrust legislation—and this in spite of the key role they played in the debates and reform movements that paved its way.

8. Conclusions

John Bates Clark was the most influential economist to support and promote the 1914 Clayton and FTC Acts. When the 1911 dissolutions turned public sentiment and political agendas in favor of such a legislative measure, his work presented a coherent idea of what kind of unfair activities had to be banned, what the proposed federal commission should do, and how it should be empowered to achieve those ends. In 1912, together with his son, he published the second edition of his seminal *The Control of Trusts*, where, among other things, they advocated expanding the scope of the Sherman Act so as to prohibit precisely those activities and institutional conditions that would eventually be prohibited by the final version of the Clayton Act.

Clark’s involvement with the NCF was equally important, albeit less successful. Clark was among the coauthors of a NCF-sponsored draft bill that contemplated a federal commission with strict and pervasive licensing and enforcement powers over anticompetitive practices similar to that of the Interstate Commerce Commission. Although the final version of the FTC Act envisioned a far more active and powerful agency than anything Wilson had advanced during his campaign, it

lacked the three key measures that represented the core of the Clark-NCF proposal, namely (1) registration of all large corporations with the commission; (2) commission control over capitalization and stock issue; and (3) federal licensing by the commission as a necessary condition for corporations to engage in interstate commerce.

All this leads to our final point, i.e. Clark's conception of competition. Our reconstruction has shown that in his discussion of the trust problem, Clark—a pioneering neoclassical theorist—avoided formalism and did not attempt to define competition according to a set of fixed abstract standards. In an ever-changing environment, Clark perceived increasing size and market power as an essential part of a new form of competition that had supplanted the old-style struggle among small non-integrated firms. Yet, he understood that even under these new economic conditions competition could still promote social justice and the efficient apportionment of capital and labor between different activities. Here Clark introduces an ethical element into his argument: 'The line across which, in the field of economics, a great moral battle is now waging is the one which separates the powers which make for the welfare of society from those which prey upon it' (Clark & Clark, 1912, p. ix). The new policy challenge was to distinguish between the predatory elements in the economy from the monopolistic tendencies that were intrinsic to the new competitive order of large-scale production. This is why Clark's analysis did not focus exclusively on the competitive structure of the market as defined by the mere size of the competitors and their actual or potential market power, but also—and in some case predominantly—on the actual behavior of large firms and its anticompetitive consequences. Were it not disrupted by unfair practices such as those that had led to the dissolution of the Standard Oil and American Tobacco Companies, the new competitive order would exhibit superior efficiency and would, at the same time, reduce social conflict in the market arena. In a nutshell, the frictions introduced by the unavoidable monopolistic elements of modern competitive enterprise, if properly controlled, would be more than offset by the elimination of the waste of the old-style competition. As he and John Maurice Clark state in a crucial passage of the 1912 edition of the *Control of Trusts*, 'we do not want competition to be as fierce as it has been in the past, for that kind never lasts long, and while it lasts it does more harm than good. The more moderate rivalry that would be set up in the way [we have] proposed offers at least some probability of permanence, so that we should be likely to have more competition left after twenty years than after twenty years of the present attempts to preserve "free" warfare' (Clark & Clark, 1912, pp. 114–115).

Acknowledgment

This essay is dedicated to the memory of Warren Samuels (1933–2011), who gave guidance and encouragement to the writer, and was a continuous source of inspiration to the entire community of historians of economic thought.

References

- Best, M.H. (1990) *The New Competition: Institutions of Industrial Restructuring* (Cambridge: Harvard University Press).

- Clark, J.B. (1887) The limits of competition, *Political Science Quarterly*, 2, pp. 45–61.
- Clark, J.B. (1899) *The Distribution of Wealth* (New York: Macmillan).
- Clark, J.B. (1901) *The Control of Trusts* (New York: Macmillan).
- Clark J.B. (1911) Statement of Professor John Bates Clark, Professor of Political Economy at Columbia University, New York. In United States Senate Committee in Interstate Commerce (1913) *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce*, Vol. 1, hearings before the United States Senate Committee on Interstate Commerce, Sixty-Second Congress, first session and Sixty-Second Congress, second session, on August 4, November 15–18, 20–25, 27–29, December 5–9, 11–16, 18, 19, 1911, Washington: US GPO, pp. 971–985.
- Clark, J.B. (1912a) The possibility of competition in commerce and industry, *Annals of the American Academy of Political and Social Sciences*, 42, pp. 63–66.
- Clark, J.B. (1912b) The parties and the supreme issue, *The Independent*, 63 (October 17), pp. 891–894.
- Clark, J.B. (1914) Statement of Prof John Bates Clark, Professor of Political Economy at Columbia University. Hearings before the Committee on the Judiciary, House of Representatives, Sixty-third Congress, Second Session on Trust Legislation, February, 4, pp. 320–324; 328–333.
- Clark, J.B. & Clark, J.M. (1912) *The Control of Trusts*, 2nd edn (New York: Macmillan).
- Clark, J.M. (1913) Frontiers of regulation and what lies beyond, *American Economic Review*, 3, pp. 114–125.
- Clark, J.M. (1914) Recent trust decisions and business—discussion, *American Economic Review*, 4, pp. 192–193.
- Coats, A.W. (1960) The first two decades of the American Economic Association, *American Economic Review*, 50, pp. 556–574.
- Cyphers, C.J. (2002) *The National Civic Federation and the Making of a New Liberalism*, pp. 1900–1915 (Westport: Praeger).
- Durand, E.D. (1914) The trust legislation of 1914, *Quarterly Journal of Economics*, 29, pp. 72–97.
- Fiorito, L. (2011) The influence of American economists on Clayton and Federal Trade Commission Acts, *Quaderni del Dipartimento di Economia Politica*, 623 (Università degli Studi di Siena).
- Fiorito, L. & Henry, J.F. (2007) John Bates Clark on trusts: new light from the Columbia archives, *Journal of the History of Economic Thought*, 29, pp. 229–250.
- Henry, J.F. (1995) *John Bates Clark: The Making of a Neoclassical Economist* (London: Macmillan).
- Jenks, J.W. (1912) Economic aspects of the recent decisions of the United States Supreme Court on trusts, *Journal of Political Economy*, 20, pp. 346–357.
- Klebaner, B.J. (1964) Potential competition and the American antitrust legislation of 1914, *Business History Review*, 38.2, pp. 163–185.
- Kovacic, W.E. (1982) The Federal Trade Commission and congressional oversight of antitrust enforcement, *Tulsa Law Journal*, 17, pp. 587–671.
- Lamoreaux, N.R. (1985) *The Great Merger Movement in American Business: 1895–1904* (Cambridge: Cambridge University Press).
- Letwin, W. (1965) *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (New York: Random House).
- Link, A.S. (1966–94) *The Papers of Woodrow Wilson*, Vols. 1–69 (Princeton: Princeton University Press).
- Mayhew, A. (1998) How American economists came to love the Sherman Antitrust Act, in: M.S. Morgan & M. Rutherford (Eds) *From Interwar Pluralism to Postwar Neoclassicism* (Durham: Duke University Press).
- Morgan, M.S. (1993) Competing notions of ‘competition’ in the late nineteenth-century American economics, *History of Political Economy*, 25, pp. 563–604.
- Nelson, R.L. (1959) *Merger Movements in American Industry, 1895–1956* (Princeton: Princeton University Press).
- Pigou, A.C. (1902) Review of *The Control of Trusts*, *Economic Journal*, 12, pp. 63–67.
- Porter, K.H. & Johnson, D.B. (Eds) (1956) *National Party Platforms: 1840–1956* (Urbana: University of Illinois Press).
- Prechel, H. (2000) *Big Business and the State: Historical Transformations and Corporate Transformations* (Albany: State University of New York Press).
- Seager, H.R. (1911) The recent trust decision, *Political Science Quarterly*, 26, pp. 581–614.

- Seager, H.R. (1915) The new anti-trust acts, *Political Science Quarterly*, 30, pp. 448–462.
- Sklar, M.J. (1988) *The Corporate Reconstruction of American Capitalism, 1890–1916* (New York: Cambridge University Press).
- Stevens, W.H.S. (1914) The Trade Commission Act, *American Economic Review*, 4, pp. 840–855.
- Van Hise, C.R. (1912) *Concentration and Control: A Solution of the Trust Problem in the United States* (New York: Macmillan).
- Ward, P.C. (1986) *Federal Trade Commission: Law, Practice and Procedure* (New York: Law Journal Seminars-Press).
- Weinstein, J. (1968) *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Press).
- Winerman, M. (2003) The origins of the FTC: concentration, cooperation, control, and competition, *Antitrust Law Journal*, 71, pp. 1–97.
- Young, A.A. (1915) The Sherman Act and the new anti-trust legislation I, *Journal of Political Economy*, 23, pp. 201–220.