

## *Chapter Six*

### *From Trusts Emergent*

#### *From Regulating Trusts to Regulating Securities*

The long decade from 1900 to 1914 unleashed a flood of corporate reform activity in Congress. No fewer than 62 unsuccessful bills embraced federal incorporation or federal licensing. An additional eight attacked overcapitalization, and seven more tried to create some form of securities regulation. Six dealt with the more novel subject of minority stockholder protection, signaling that this new class of public investors was becoming an increasingly influential force in American economic life. A slowly dawning comprehension of the complexity of the corporations problem is reflected by the fact that only five purely antitrust measures were introduced.

But antitrust concerns didn't disappear. Indeed, the growing congressional awareness that the corporations problem was bigger than antitrust alone brought federal incorporation or licensing proposals to be the most frequently introduced type of antitrust legislation. No matter how the bills were drafted, antitrust concerns predominated.

Thirty two federal incorporation bills were introduced between the Industrial Commission's final report in 1902 and 1907, with an average of about 5 a year during the next three years and only three in each of 1912, 1913, and 1914. The relatively steady march of the bills reflects the strong desire of the elected branches to constrain the Supreme Court's freedom to interpret the Sherman Act, a desire that began to relax only when the Court adopted the flexible and economically appropriate rule of reason in the 1911 *Standard Oil* case. The

trajectory of the bills tracks Congress' expanding appreciation of the distinct issues of trust regulation and corporate regulation, and an awakening interest in securities regulation.<sup>1</sup>

Internal corporate governance matters, which traditionally were ruled by the states, also figured in the federal incorporation debate. A number of bills proposed during this period imposed stricter federal regulation of managerial and directorial conduct. A few were so bold as to demand prison for malfeasant managers. It's a safe bet to suggest that federal incorporation or licensing would, more likely than not, have included significant rules on what we consider internal corporate governance. And, as we will see, the beginnings of modern securities regulation began to work their way out of the federal incorporation debate.

The shift in issues addressed by the federal incorporation bills over time shows the developing market. In 1905 and 1906 bills were focused largely on monopoly, requiring federal incorporation or licensing, especially for interstate businesses supplying food or fuel products for which consumer demand was relatively inelastic. Bills of this sort were introduced as late as 1909, as were federal incorporation bills in 1910. Proof that a corporation was neither overcapitalized nor a monopoly was a universal requirement.<sup>2</sup>

All of the bills that dealt only with overcapitalization came between 1907 and 1910. This was a natural outgrowth of the Panic of 1907 which exposed the investment risks banks and trust companies were taking and the serious damage they inflicted upon the nation's economy. Overcapitalization now was treated as much as a banking and economic problem as it was as an antitrust problem. Securities bills, starting in 1907, focused on the same concerns.<sup>3</sup>

Perhaps the most extraordinary illustration of the various federal incorporation measures is S. 232, introduced in the Senate late in the game, in 1911. Its focus on overcapitalization

aimed at the heart of the antitrust attack. The bill would have stopped corporations from issuing stock except “for the purpose of enlarging or extending the business of such corporation or for improvements or betterments,” and only with the permission of the Secretary of Commerce and Labor. In other words, corporations could issue stock only to finance revenue-generating industrial activities. The bill would also have replaced traditional state corporate finance law by preventing companies from issuing “new stock” for more than the cash value of their assets. S. 232 was designed to address concerns about antitrust, internal corporate management, and securities all at once.

S. 232 meant to restore the industrial business model to American corporate capitalism and rid it of the finance combination that had become dominant during the merger wave and the years following. Equally important, following as it did the Panic of 1907 and the resulting depression, it was designed to help maintain the market as a forum for allocating capital rather than allowing it to serve as a speculative playground. **[more legislation – and I need whatever reports or debates you can find. Get me copy of S.232 again please].**

Just as S. 232 tied together antitrust, federal incorporation, and securities issues, traces of the new interest in securities regulation rise throughout the federal incorporation debate. Securities regulation as an independent force would slowly begin to emerge as a legislative chrysalis after 1907. Conceived in the panic and the investigations that followed, it pursued its own legislative path to maturity in the aftermath of the Great Crash. On its way, it passed through the three stages I’ve previously described. Securities regulation for trust control was a perennial aspiration, and with it came a more subtle but nonetheless palpable hope that new laws could control the economically destabilizing speculation distorting the market’s allocative

functions. Speculative binges brought on by increased margin trading and short selling increased after the Panic of 1907 and threatened the stability of a banking system suspended within a decentralized and loosely regulated currency system. Banks held barrels of stock as collateral for margin loans, collateral that could return to water after a bad week or two on Wall Street. Sheltered by the dark corners of the National Banking Act, banks also conjured up ways to become traders for their own accounts. Securities regulation scored for banking and economic stability became the theme following the Panic of 1907. The first two stages, securities regulation as the stepchild of trust regulation and as the sister of banking regulation united, with no success, in 1914.

In short, the federal incorporation period mostly involved a regrafting of antitrust reform onto a matrix woven of publicity, corporate finance, and, to a lesser but nonetheless distinct extent, corporate governance. Overcapitalization was the central antitrust issue which held the framework together, and while it started to lose its grip by the end of the decade it retained importance for several decades more, particularly with respect to economically essential products like agricultural commodities. **[need to do research on overcap in '10s and '20s here]** Railroads, as natural monopolies, received perennial attention, and attempts to control utility overcapitalization followed later in the decade. The disclosure remedy envisioned by the proposed legislation was a regulatory tool aimed principally at exposing overcapitalization to reveal monopoly and speculation, yet even then there were hints of investor protection beginning to emerge.<sup>4</sup>

This was the landscape of the federal incorporation era. It gradually was laid out over the economic and financial topography of the United States. At the start of the century, Congress

and the executive tried to shape these developments, to take hold of the new corporate economy and mold it in ways that would subjugate corporate behavior to some notion of responsible public service. But resistance by conservative Republicans and Roosevelt's own erratic behavior disrupted any action that might seriously interfere with business. Rather than control the developing corporate economy, they chased it, so that business regulation became a cooperative project between business and government rather than one of federal control. In the end, business was allowed to organize, capitalize, and manage as it saw fit. By the time of the major antitrust reforms, the Clayton Act and FTC Act, the moment for federal regulation of business had passed. All eyes were on the stock market.

The federal incorporation movement wasn't a complete failure, but the law that emerged was modest. The only meaningful corporate legislation, other than some railroad regulation that haltingly increased the ICC's rate regulation powers, was the Nelson amendment to the Department of Commerce bill. While the resulting Bureau of Corporations, an investigative body, discovered much about American business and aided antitrust prosecution, it essentially served as an extension of the Industrial Commission. The Nelson amendment's main political objectives were perhaps at least as important as its substantive achievements. Its introduction into the debate over federal incorporation threw sand in the gears of progress of far more extensive regulation. It succeeded admirably. It also placed such minimal regulatory power as was created directly into the hands of Theodore Roosevelt.

#### *The Littlefield Bill of 1903*

Perhaps the most important bill in the history of the first federal incorporation movement was the Littlefield Bill. While I previously summarized Roosevelt's initial support and

abandonment of the bill, I want to focus now on the bill itself, its history in Congress, and why it failed. First introduced in the House in 1901, the Littlefield bill was reintroduced as a substantially changed draft in 1903, debated by the House in February 1903, and passed unanimously before it was amended and killed in the Senate. The Littlefield Bill was important because it was the only federal incorporation measure during the 14 year period from the turn of the century to the start of World War I to be seriously debated in either house and passed by at least one. Only the tepid Nelson amendment succeeded as an indirect corporate control measure.<sup>5</sup>

#### *The Littlefield Bill as Federal Incorporation*

The Littlefield bill was called an antitrust measure. Its principal focus was overcapitalization. As the Committee Report both stated and illustrates, the premise of the bill was that “overcapitalization is the chief of these [trust evils] and the source from which the minor ones flow.” But the Littlefield bill was also among the very first federal incorporation measures. Overcapitalization was a corporate finance issue, and the goals sought by the bill’s proponents included investor protection and managerial accountability as well as trust reform. The Committee Report drew on quotes from Roosevelt, Knox, the Industrial Commission, and James B. Dill on all of these issues as support for the bill. In its disclosure requirements, the Littlefield bill would have operated precisely the same way that most federal incorporation bills would have. The only meaningful difference between the Littlefield bill and other federal incorporation measures was the absence of a federal incorporation or licensing requirement, but the bill’s reporting requirements and the ICC’s rulemaking and investigatory powers served the primary purposes of federal licensing. Coming as it did directly on the cusp of the transition from

direct antitrust regulation to federal incorporation, and in light of its broad substantive overlap, the Littlefield bill should be considered to be among the latter.<sup>6</sup>

The Littlefield bill is important because it gives the best picture of what at least one house of Congress was willing to accept as a federal incorporation measure. The story of its failure reveals a lot about why the federal incorporation movement failed. It is also a personal drama of political rise and fall.

### *Littlefield*

Charles Edgar Littlefield was Teddy Roosevelt's choice to lead the charge for trust reform in Congress. He was first elected to the House as a Republican from Maine in 1899 and almost instantly asserted leadership, making several impressive and bold speeches on important issues. He was "admired almost without exception throughout the party in the House." McKinley consulted him on most matters of policy, which both reflected and increased Littlefield's early influence. And Littlefield was known as a leader in the antitrust crusade, as one account put it, a "household name," even [before] Roosevelt became President.

Littlefield was well-known as a reform leader and crusader, and for that reason was an understandable choice to advocate trust reform. But he was, perhaps, a poor political choice to manage the antitrust fight for a controversial president only recently described by Mark Hanna as "that damned cowboy." He possessed many of the more fearsome qualities the plutocracy attributed to Roosevelt, without the underlying political wiliness. He was idealistic, persistent and, perhaps fatal for a politician, obstinate to a fault.

Littlefield's capacity to make enemies almost equaled his President's. In 1902 he led an unsuccessful insurgency to topple and himself replace Joe Cannon as Speaker of the House.

Canon emerged with little more than a scratch. So Littlefield found himself increasingly suspect within his party. The powerful conservative Republicans on the Senate side fretted over Littlefield's increasing radicalism. But he was TR's lieutenant and worked with Attorney General Knox throughout the fall of 1902. In the end, his President and his party would desert him.

### *The Bill*

The issues raised by the Littlefield bill and during the course of its debate encompass most of the problems that plagued all later efforts to pass federal incorporation legislation. Littlefield introduced H.R. 17 on December 2, 1901, which was immediately referred to the House Judiciary Committee. That relatively modest piece of legislation required every corporation engaged in interstate commerce to file financial and capitalization reports with the secretary of the treasury, that latter official to publish annually "for free public distribution," a list of all filing corporations together with information on their financial conditions. False filings were to be prosecuted as perjury. More aggressively, all corporations with watered stock had to pay an annual tax equal to 1% of their issued and outstanding capital stock.<sup>7</sup>

When the Committee brought the substitute H.R. 17 before the House on January 26, 1903, it was a bill transformed. In some measures it had been diluted, in others, strengthened. Filing was no longer to be with the executive branch secretary of the treasury but with the independent Interstate Commerce Commission. The filing requirement no longer applied to "every corporation engaged in interstate commerce" but instead to "every corporation *which may be hereafter organized*" and which engages in interstate commerce. This protected the trusts formed during the great merger wave from the bill's reach. Instead of annual reports,

corporations only had to file reports “at the time of engaging in interstate or foreign commerce,” which may or may not have made a practical difference depending upon how the ICC interpreted it. The Committee bill no longer required the report to include a balance sheet and income statement, but it did give the Commission rulemaking power to enforce the law.

The bill’s finance provisions had changed too. The overcapitalization tax was gone. On the stronger side, while corporations still had to report their capital, the bill now required them to disclose the method they used to determine the cash market value of property received for stock, “especially” whether they had done so by capitalizing earnings.

The substitute bill did cover corporate governance matters not addressed in the original. Each corporation had to file its charter and also “a full, true, and correct copy of any and all rules, regulations, and by-laws adopted for the management and control of its business and the direction of its officers, managing agents, and directors.” In contrast to the earlier bill which asked only the corporation’s treasurer to certify its information, the Committee bill required that the “president, treasurer, and a majority of the directors of such corporation shall make oath in writing on said return that said return is true.”

While the overcapitalization tax had been dropped, the committee bill approached the underlying issue of monopoly in a more traditional way. The three new substantive sections it added, said Alabama Representative Henry Clayton in reflecting the Democrats’ skepticism, would be its downfall in the Senate. New section 5 prohibited common carriers from granting rebates and other similar advantages to shippers in interstate commerce. Section 6 denied the use of the means of interstate commerce to any “corporation engaged in the production, manufacture, or sale of any article of commerce” that accepted rebates granted in violation of section 5, tried

to monopolize its industry, or otherwise attempted to destroy competition in “any particular locality.” And section 7 penalized interstate common carriers for knowingly transporting products that were produced, manufactured, or sold in violation either of the Littlefield bill or the Sherman Act. Finally, the committee bill added a provision providing for a private right of action and treble damages for any person or corporation injured by any behavior made illegal by the act.<sup>8</sup>

The minority report issued on January 29 foreshadowed the terms of the debate. The Democrats wanted the bill to include provisions that made overcapitalization a ground for declaring bankruptcy, ensuring that corporations operating in interstate commerce remained subject to state jurisdiction, imposing a capitalization tax on all corporations with capital of more than \$200,000, and removing the tariff from a list of domestically trust-produced items.<sup>9</sup>

#### *The Debate over the Littlefield Bill*

As I will explain, the Littlefield bill failed because of Roosevelt’s political manipulation, with help from the Senate leadership. But the debate itself is important, because a number of arguments aired during its course were repeatedly used to block federal incorporation throughout the decade. Both sides agreed that the American public demanded some kind of trust legislation and they had to provide it. Almost any congressman voting against the bill would have put himself in political jeopardy. Hence the bill passed the House without amendment on February 7, 1914. The vote was 246 to 0, with six members answering “present” and 99 members not voting. Nobody could vote against it. But not everybody would vote for it. **[check parties of abstainers]** Many Democrats didn’t think the bill had gone far enough in regulating trusts or corporations. Many Republicans were beholden to their big business constituents.

It is important perhaps to clear up an historical misunderstanding. The Democrats were not opposed to big business, and they didn't ground their opposition to trusts in mere corporate size. Democrats repeatedly acknowledged the efficiencies and other benefits created by large corporations. Their issue was not about wealth or the size of enterprise *per se*, but the way it was used. This was the point distilled by the brilliant Mississippi Representative, John Sharp Williams, on February 6: "The Democratic party is not afraid of the right sort of combinations of capital. Nobody is afraid of combinations of capital. . . . It is not a question of the amount, but it is a question of the method in which the combination of capital uses, and is permitted by law to use, its energies after the combination is formed."<sup>10</sup>

Going further, North Carolina Representative Claude Kitchin reflected his party's appreciation of the distinction between finance and industrial corporations. "We are not against men or riches, or corporations, or big corporations. We admit that large capital or large *manufacturing plants* can produce more cheaply than small ones. No man denies their right to this advantage. We deny the necessity of enormous *combinations* for economical production." Industrial corporations, even very large ones, were assets to the nation. Finance combinations were not.<sup>11</sup>

Federal incorporation was a plank in the Democrat's platform in 1900, and the Democrats had, for years, been clamoring for strong trust legislation. But Congress and the executive branch had been controlled by Republicans since 1895, and Harrison had presided over the critical 1889-1891 period during a brief interlude in which the Republicans again controlled both houses. It was on a Republican watch that the Sherman Act was passed. But the Sherman Act had proven largely to be ineffective and new legislation was needed. Palpable in the debates is

the Democrats' resentment that Republicans, having come late to the cause of trust regulation, would be credited with its passage.<sup>12</sup>

The Democrats were also convinced that the Republicans were hypocrites. The bill was weak regulation to begin with and had been further watered down by the Committee. Stronger measures were needed. It also rapidly became clear to all involved that the Senate, under the firm control of the pro-business Republican leaders, would never pass the bill. Thus the Democrats were especially bitter that their Republican rivals would reap the political rewards of trust reform without bearing the burden of alienating the plutocrats.

Clayton gave voice to this dismay. Addressing Littlefield, his speech was interrupted by frequent laughter and applause on the Democrat side of the aisle.

We guess here and now that you are not going to pass into law this bill which you are about to pass through this House under a special rule, and for which we shall vote. This bill has in it certain provisions which corporate greed and monopoly will not permit the majority party to vote into law . . . . Now, personally I have confidence in and respect for the gentlemen on the Republican side of the House; but no Republican is bigger than his party, and it is your party that controls you and is amenable to criticism. . . . There is no organization on earth where the rule of majority carried to brutality is so well exemplified as in the case of your party. Your party has created these trusts and now protects them. The trusts have fed you during the campaigns, [and] they have furnished the money that has paid your election expenses . . . .

Earlier, to equal amusement, he had described the history of the Republicans' attitude toward the trusts and their behavior in the legislature: "Hereafter, when you discuss the Darwinian theory, which is applicable in the case of mollusks and monkeys, make some application of it to the Republican party. . . . That party has at last reached the monkey stage, where it has vertebrae and a tail, and monkey-like imitates some of the good actions of the Democratic party."<sup>13</sup>

Support it as they did, the Democrats were unhappy about having to rally behind such

inadequate reform legislation. One particular complaint was that the Littlefield bill failed to address the high tariffs which many Democrats, and a number of economists and businessmen, credited with substantially stimulating the growth of trusts by creating the protectionist environment in which they could flourish. Besides, the bill was mostly a publicity measure, and the Democrats thought that publicity alone simply wasn't enough to control the trust problem.

The overwhelming concern with overcapitalization and overcharged consumers as the primary evil of trusts resounds throughout the reports and debates. The Committee report was quite explicit. It began by surveying the statements of a number of policymakers and authorities. It quoted Roosevelt on overcapitalization as well as the Attorney General. "Overcapitalization is the chief of these [trust evils] and the source from which the minor ones flow." It also quoted at length from James B. Dill's testimony before the Industrial Commission on the issue of overcapitalization and the Chicago Conference on Trusts transcript, as well as from other sources on the value of publicity in preventing trust evils. Overcapitalization hurt investors, too, but nobody yet treated this as an important concern.

Publicity was the principal remedy proposed by the bill. The main purpose of publicity was to expose overcapitalization to the public, especially consumers, in a way that would discourage the practice or lead to government action against the trusts. While the concerns with large corporations were broad and general, it nevertheless becomes clear upon careful reading of all of the literature of the period that the major concern was monopoly above all else, and certainly above investor welfare. Only some Americans were investors, but all Americans were consumers. At a time when trusts dominated important suppliers of necessities like beef, sugar, kerosene, and the like, the problem of overcapitalization leading to overpricing was very serious.

The Committee report made this clear. “It is through the medium of consumers, the purchasers of its products, that the overcapitalized combination finds its most extensive and oppressive contact with the public.” While there was some concern expressed for investors, it was far from central.

The real purposes of overcapitalization are believed to be of an entirely different character, and they all have an injurious effect upon the public. The purpose to create for the stock a fictitious value and thus arbitrarily increase the wealth of the persons interested is undoubtedly the main purpose in overcapitalization. In order to accomplish this, in nearly every instance the price to the consumer must either be increased or maintained above its natural normal level. . . . As capital is entitled to a fair return, the public is vitally interested in the amount of capital necessary to carry on a given enterprise.

Finance preceded monopoly. “The attempt to monopolize the market is not the principal purpose, but an incident thereto, and follows as a necessary corollary of the condition. . . Unwarranted dividends and not monopoly are the moving cause. Monopoly is invoked to produce that result.”<sup>14</sup>

This is rather a striking statement coming as it did from a Republican controlled Congress and Committee. The principal beneficiaries of the dividends and the stock created to pay them were the very financiers the Republicans were accused of helping. The benefit was not so much in holding the overcapitalized stock, but in the ability to unload it on the public that expected the large dividends promised by promoters. To sustain these dividends on the stock of an overcapitalized company, and thus to retain the credibility to create and unload more watered stock, meant that promoters had to ensure their corporations charged high consumer prices.

Overcapitalization wasn't the only issue. The Democrats repeatedly raised the high tariff as a source of benefit for trusts. In addition, railroad rebates had been an issue in trust formation since the 1860s and were a particular hot button for congressmen from the south and west whose

constituents had to pay the published rates. Issues of states' rights and federal jurisdiction were sometimes raised during the debate, and it appears clear that the Democrats as a whole were uncomfortable with the federal government's power to regulate trusts using the highly elastic commerce clause. Indeed, when the Democrats pushed for a stronger measure, they favored using the federal taxing power as, for example, to tax watered stock. The Democrats could accept federal power within clearly defined constitutional limits but didn't want to create the opportunity to allow it to expand.

Later in the decade, when public investment in common stock became more widespread, public attention returned to more general issues of corporate regulation. When it did, the focus no longer was governance and finance. It was the securities markets.

#### *The Failure of the Littlefield Bill*

#### *The Power of the President*

Roosevelt wanted trust legislation. He had started to pay attention to the issue while governor. It became part of his portfolio as vice president as much by McKinley's default as by his own interest. Once president he increasingly became frustrated with federal inaction and state self-indulgence felt compelled to demonstrate the Republican commitment to reform as his first important mid-term elections approached in November 1902.

Roosevelt and Knox signed on with Littlefield in July 1902. In his extensive speaking tour later that summer, Roosevelt began to swell with support for strong federal regulation lodged in the executive branch. The campaign for trust reform began in Pittsburgh on Independence Day. Roosevelt and Knox were in that leading industrial city to attend a dinner in honor of the attorney general, its native son. Roosevelt's speech kicked-off the administration's

drive to pass trust legislation during the 57<sup>th</sup> Congress, well in time for him to begin his presidential campaign.

Roosevelt got his legislation. But he paid a big price. He abandoned Littlefield in order to appease the strong Republican Senate leadership and business interests as he kept his eye on the 1904 election. In exchange he accepted the considerably more modest measures captured in the Nelson amendment, the Elkins Anti-Rebate Act, and an expediting amendment to the Sherman Act, mere shadows of the President's articulated ambitions. The battle for their passage and the political capital Roosevelt spent to get it largely exhausted his opportunity to institutionalize meaningful trust and corporation regulation. But the President also got something back. He got a measure, albeit a watered one, of the power he sought to make him the principal overseer of corporate America and with it an opportunity to remodel the presidency in his own image.

The Pittsburgh address was similar in tone to Roosevelt's other early speeches, calling for intelligent and moderate federal regulation. But now he also introduced another theme, the theme of wealth. Among the problems caused by modern industrialization, he said, were the rise of great individual and corporate fortunes that skewed the national distribution of wealth and power. But wealth was good. Its image stimulated, and its achievement sustained, the creation of great and beneficent enterprise. What mattered was how the wealth was used. "It is immensely in the interests of the country" that great wealth existed, as long as it was used for good. There should be no envy of great wealth, for that "would invite disaster." The polestar was to be justice. And the administration of justice required a powerful authority. What was needed was new legislation, but, whatever its form, "it is infinitely more important that [the new

laws] be administered in accordance with the principles that have marked honest administration from the beginning of recorded history.”<sup>15</sup>

The speech is subtly intriguing. It contains some hints about why, by February 17 of the following year, Roosevelt would describe the Littlefield bill as “perfectly idiotic.” It also begins to reveal his vision of the presidency. Roosevelt gave no details of the proposed bill in the Pittsburgh speech. But he did stress several times the overwhelming importance that any legislation be fairly and justly administered. Administration, more than the law itself, was the key to justice and efficiency. It isn’t surprising that administration of the law would be a natural theme in a speech that ended by honoring Pittsburgh’s native son, the nation’s chief legal administrator. And, as a political matter, Roosevelt had to continue to show his strong backing for Knox who, as a private lawyer, had helped to organize U.S. Steel, and whose appointment by McKinley in 1901 created “an uproar” over the idea that a trust lawyer would be in charge of prosecuting trusts.

But there is more underlying the Pittsburgh address than crude politics. Implicit in that speech, as in many of Roosevelt’s trust speeches of the period, was a strongly held philosophical conviction, the philosophy of executive supremacy. It was a philosophy born of his intellectual and class heritage, a heritage that passed through Henry Adams and the difficult and imperious John Hay to Roosevelt’s close friend Cabot Lodge, a peculiarly mandarin Harvard philosophy that understood a certain class of best men to be the appropriate repository of American leadership. Roosevelt was the embodiment of that philosophy even as he possessed the more plebeian set of skills that the Brahmins and Hay lacked to engage in the rough and tumble world of modern politics and achieve popular elective success. The Littlefield bill would have

dispersed what Roosevelt came to believe was appropriately presidential power into the new model independent regulatory agency. In the end, as Roosevelt recognized, the federal government got less power than it might have, but at least it was power in presidential hands.<sup>16</sup>

By the time the Littlefield bill was taken up in the House, Roosevelt was already more confident of his own political authority following the party's success in the midterm elections. Yet he remained cautious in light of his powerful ambition to be elected president in his own right in 1904. His confidence in his political ability and policy judgment had also been reinforced by positive public reaction to the way he helped settle the highly disruptive and widely observed Pennsylvania anthracite coal strike that took place during the summer and fall. Perhaps a bit immodestly, and with a touch of exaggeration, in letters to Lodge and his Harvard classmate, Morgan partner Robert Bacon, he compared both his travails and his instincts to Lincoln's, the last president to have accumulated and exercised the strong centralized power that Roosevelt sought. He clearly saw the modern struggle for justice between labor and capital as similar to Lincoln's own, and his own duty as achieving that goal. "[I]f I had failed to attempt [to settle the strike] I should have held myself worthy of comparison with Franklin Pierce and James Buchanan," Lincoln's two predecessors whose inactivity and appeasement helped to bring about the Civil War. Roosevelt was personally disgusted by the behavior of the coal mine operators during the strike and their expressed attitude toward the miners themselves. In contrast, he was deeply impressed by the quiet dignity and common sense of United Mine Workers' President, John Mitchell. The plutocrats needed to be controlled by someone with the strength to control them, and the working man – elevated in TR's estimation by Mitchell's quiet dignity – deserved some federal protection. To Roosevelt, the person to accomplish these tasks

was none other than Roosevelt himself.<sup>17</sup>

Roosevelt's desire for personal control over the regulation of trusts had been developing over the course of his young presidency. Take his speech at Providence in August calling, as was typical, for judicious, careful, and intelligent control of trusts rather than radical measures, and noting: "I believe that the nation must assume this power of control by legislation; and where or if it becomes evident that the constitution will not permit needed legislation, then by constitutional amendment. The immediate need in dealing with trusts is to place them under the real, not nominal, control of some sovereign to which, as its creature, the trust shall owe allegiance, and in whose courts the sovereign's orders may with certainty be enforced. . . . In my judgment, this sovereign must be the National Government."

He was even more direct in Cincinnati in September. "The necessary supervision and control in which I firmly believe as the only method of eliminating the real evils of the trusts must come through wisely and cautiously framed legislation which shall aim in the first place to give definite control to some sovereign over the great corporations." This would be followed by a system of disclosure. He was, in this speech, more explicit about the need for a constitutional amendment than he had been earlier.<sup>18</sup> **[check speeches, 7/4 to 3/4, looking for similar stuff—does he ever mention Congress?]** While these speeches don't explicitly identify executive power, in contrast to general federal power, as the place to rest trust regulation, the Nelson amendment creating the Bureau of Corporations, which Roosevelt would turn to instead of the Littlefield bill as his most important trust reform, put the power squarely in the hands of the President.

Roosevelt walked a fine line during that autumn of 1902. In spite of even J.P. Morgan's

dismay with the behavior of the coal mine operators during the anthracite coal strike, Roosevelt's sympathy for the miners, especially after the *Northern Securities* suit, brought the wrath of Wall Street crashing down on his head. Its already intransigent friends in the Senate were allied with them. The Littlefield bill was perceived to be highly regulatory and the Senate leaders made their opposition clear. Although the debate over the Department of Commerce bill had been strenuous enough, its Nelson amendment provided for emasculated regulatory power and, as a consequence, had a fighting chance of passing. The combination of political feasibility and Roosevelt's desire to expand his own powers, his power to administer the laws with justice, were important factors in the way the successful legislation was drafted and Littlefield defeated. His strong antitrust rhetoric and the fact that power under the bill was lodged in the hands of the "trust buster" assured reasonable public support.<sup>19</sup>

#### *Roosevelt Betrays Littlefield*

It began in early July. On July 5, *The New York Times* reported from Oyster Bay that Roosevelt and Knox had been in conference with Littlefield, leading to their request that Littlefield work with Knox to prepare the administration's trust bill. Although correspondence with powerful senators during this period is sparse, it must have been the case that swift reaction from the Senate leadership, and presumably others, quickly dampened TR's enthusiasm for the command of the scrappy congressman from Maine.

An embarrassment to Littlefield, widely reported by the press, foreshadowed what was to come. Roosevelt began a speaking tour through New England and the Middle West in August. Among the stops he was scheduled to make was, at Littlefield's personal request, the latter's home town of Rockland, Maine. Roosevelt simply cancelled the appearance without any

explanation. The press had a bit of a field day at the expense of the controversial congressman, with the *Times* noting that the “fact that Rockland had been dropped from the itinerary excited widespread speculation and many smiles.” Commenting on the event, the paper interjected, perhaps with some disingenuity, that “[o]f course there is not the slightest reason to believe that Mr. Littlefield has been ‘turned down’ by the President after the latter had encouraged him to go ahead with his anti-trust plans.” The *Times* generously attributed the cancellation to Roosevelt’s desire to avoid further talk of the trust “triumvirate of Roosevelt, Knox and Littlefield,” perhaps because of Roosevelt’s desire to avoid the appearance of a power grab. **[ more press accounts ]**.

It is a curious fact that the Roosevelt papers include no correspondence between Roosevelt and Littlefield during the entire period from July 4 through the adjournment of Congress the following March. **[what does Harvard have?]** One might have expected to see some written communication between the two of them on a matter of such great importance to the President. Correspondence might be all the more expected because Roosevelt spent the summer at Sagamore Hill and would not likely have had much personal contact with Littlefield. **[check TR diaries – LC]**. It is at least plausible to infer that, between July and late August, Roosevelt had been lobbied heavily by Republican Senators, although the correspondence of the Senate leadership quartet is similarly lacking in evidence to back this up. **We really need to plumb this stuff.** Indeed the manuscripts show very little correspondence to or from Roosevelt with anybody on the trust issue between July 1902 and March 1903. Nonetheless, in several letters written from Oyster Bay that August, he reports that the Republican National Congressional Committee was expressing deep concern about the mid-term elections, especially about the lack of campaign contributions, acknowledging that perhaps he had overstated his case

against the trusts. Otherwise, Roosevelt's fall correspondence was mainly focused on the coal strike and the mid-term congressional elections, while foreign affairs began to dominate somewhat later, in the winter of 1903. <sup>20</sup> **[look at Jan-Mar one more time– Check Senate 4 correspondence and Hanna]**

Knox, sent as a personal substitute by Roosevelt, gave an important speech in Pittsburgh in October, confirming the administration's determination to pass the kind of comprehensive legislation Littlefield was drafting. In this speech Knox outlined trust measures more aggressive even than Littlefield's approach and certainly more intrusive than the measures ultimately passed. The speech was considered so important that it became the public touchstone for discussions of the administration's antitrust policy. As we have seen, the House Committee Report quoted it as authoritative.

At the same time, and unbeknownst to Littlefield, Roosevelt had been meeting with Republican leaders in the Senate and came to realize that a bill as "radical" as the Littlefield measure couldn't pass. As Littlefield continued to live off of TR's earlier support and his continuing work for Knox, the ground was shifting beneath him.

Perhaps he should have sensed this shift. Perhaps he did, and didn't care. Littlefield, in the heat of his crusade and perhaps intoxicated by the public attention after his defeat for the speakership, worked either oblivious to or in disregard of the President's changing attitudes. As early as the fight with Cannon, the *Times* reported that there had in fact been no solid basis to conclude that Littlefield was leading the administration's charge on trust matters, and indeed that Roosevelt had largely cut him out of policy matters. Subsequent events suggest that this was true. But Roosevelt appeared to continue publicly to support Littlefield's efforts right up through

House passage of the bill in February. It was only when the bill was languishing in the Senate later that month that Littlefield visited Roosevelt to affirm his support. It was then, and evidently for the first time, that the President told him, with characteristic bluntness, that his bill was worthless. Without telling Littlefield, and even as the debate over his bill proceeded in the House, Roosevelt had shifted his support to three separate, and ultimately successful, measures; the Elkins Anti-Rebate Act outlawing price discrimination by railroads; a bill to allow the courts to expedite antitrust prosecutions, and the Department of Commerce Act which, with the Nelson amendment, became known as the administration's anti-trust measure.<sup>21</sup>

It's hard to feel terribly sorry for Littlefield. It appears that few of his contemporaries did, perhaps demonstrating a kind of political *schadenfreude*. He must have read the newspapers and felt the absence of contact from Roosevelt. Perhaps he was reassured of the President's support because of Knox's cooperation, but by early November it was clear to everyone else that the President himself had cut Littlefield out of the loop. Perhaps his own "tenacity of opinion when he once makes up his mind" contributed to a certain blindness, which extended to his party's fairly strong opposition to trust legislation in the Senate. The Department of Commerce bill had been introduced in the Senate on [ ], and the Nelson amendment on [ ]. He had to have seen that the politically vital Senate, where real control of the Republican Party rested, would be pushing its own measures.

Roosevelt's own account of the matter suggests a later date for his abandonment of Littlefield at the same time that he gave testimony that my earlier description is accurate. In a single letter where he specified the timing of his change, he described his own shift to the substance of the new approach to have been as early as Knox's Pittsburgh speech and implied

that perhaps Knox had been working on a track separate from Littlefield's. [check Knox papers]

Writing on February 3 to Lawrence Abbott, the son of Roosevelt's friend and frequent editor, Lyman Abbott of *The Outlook*, he explained: "In the trust matters I am having one astounding development here. A month ago I had the fight definitely as to whether we should have legislation or not. . . . I then asked for the three measures which Knox had been devoting himself to preparing along the lines of his Pittsburgh speech." Those measures were the three successful measures introduced in and pushed by the Senate, of which only the rebate measure was at all similar to anything in the Littlefield bill. Of these, he wrote, "[p]ersonally I regard the Nelson amendment on account of the supervision and publicity clauses as the most important." Roosevelt reported "very much secret opposition" to the Elkins and Littlefield bills, with "the extremists" plotting to have the House reject the Nelson amendment and the Senate reject Littlefield, leaving no trust legislation at all. But Roosevelt did get his "most important" bill, the Nelson amendment, in the end and, with it, the Bureau of Corporations and his own plenary power over all of the matters under its jurisdiction.<sup>22</sup>

It made good political sense for Roosevelt to shift to the Nelson amendment, which focused on investigation and publicity as the remedy, rather than the Littlefield bill, which provided more intrusive and substantive regulation. The Nelson bill, assured of passage, allowed him to claim success in passing trust legislation and thus to have fulfilled his promise to the public. At the same time, the location of the Bureau of Corporations in the cabinet-level Department of Commerce gave him the centralized control he desired.

Despite his own professed success, Roosevelt remained sensitive to possible public accusations of betrayal of trust reform. On December 27 he complained bitterly to a

correspondent who was pushing him to insist on stricter trust measures than the simple and attenuated publicity contained in the Nelson amendment, insisting with some justification that he had always stood for publicity as the appropriate regulatory approach. “But are you aware that to make publicity an issue is mere nonsense unless I frame legislation which will give us a chance to get it? Are you also aware of the extreme unwisdom of my irritating Congress by fixing the details of a bill, concerning which they are very sensitive, instead of laying down the general policy?” Knox and he had started to work more cooperatively with Congress, Roosevelt having come to understand that dictating legislation was sure to cause him trouble.<sup>23</sup>

In addition to his trouble with Congress, Roosevelt hadn't exactly ingratiated Wall Street. The *Northern Securities* suit that Knox filed that spring had already irked Morgan. Roosevelt's sympathy for the workers and undisguised distaste for the operators during the anthracite coal strike made things worse. The *New York Sun*, in which Morgan held an interest [**confirm**] had attacked TR so bitterly that, with characteristic sensitivity, he was provoked to accuse that paper's editor of speaking the voice of Morgan. In response, William Laffan denied that Morgan had applied any pressure on the paper to attack Roosevelt and took full responsibility for the article. [**See what's in the Morgan library**] Roosevelt's friend, the newspaperman J.B. Bishop, on the other hand, wrote that Morgan indeed was behind the *Sun*'s attack, describing “his bitter personal feeling toward you.” But Roosevelt's troubles ran deeper: “There is in his circle in Wall Street an undercurrent of hatred toward you of which this is a surface indication.” While it is likely that this is overstatement, it must have hurt Roosevelt who, as we have seen, cared deeply that the powerful like and respect him.

Roosevelt did keep a pipeline open to Morgan through his close friendship with Bacon

and Bacon's partner, George Perkins. TR had also developed a real friendship with Hanna who seems to have developed both fondness and respect for Roosevelt following his initial horror, grounded only partly in his genuine affection for McKinley, at Roosevelt's ascension to the White House. Hanna was a particularly important asset to Roosevelt because he was independent of Aldrich, Spooner, Platt, and Allison, and indeed often was at odds with them, at the same time that his business *bona fides* were unquestionable. His childhood friendship with John D. Rockefeller gave Hanna even greater business credibility. Through these relationships, Roosevelt had to have realized that he would have significant trouble achieving any sort of trust legislation and that it was critical that anything he supported would be at least acceptable to Wall Street.<sup>24</sup>

The shift from proposals to statutes happened fast. Politics was the driving force. And Roosevelt was at least as much a follower as a leader. Pressure came both from Republicans and Democrats. On January 17, J.C. Shaffer, president of the *Chicago Evening Post* warned him, "I discovered in the past three days that there was a great change in the sentiment of some of the leading senators, and the progressive men in the house, in regard to needed legislation on trusts [and] finances . . . ." The scheming wasn't over. On February 3, Jeremiah Jenks wrote a somewhat agitated letter to Roosevelt describing "an ingenious plan" by the Democrats that he learned of while in New York several days earlier. Jenks reported that they were plotting to introduce a bill permitting corporations to voluntarily incorporate under federal law, which federal law would mimic the New York Business Companies Act of 1900, which Roosevelt had approved while governor. "They think that it will rather seriously embarrass the Republicans to reject it, and that it is too rigid a bill for them to approve." Jenks characteristically waffled, noting to the President at this late date and with rumors of this Democratic plot, that federal

incorporation “is probably constitutional.” He had earlier objected to federal incorporation while he served the Industrial Commission because “it was altogether too centralizing.” Now Jenks changed his mind and informed the increasingly imperial Roosevelt that he would support such a bill if proposed. But the path of legislation had been plotted out and was in the process of following its course. House debate on the Littlefield bill would begin the next day.<sup>25</sup>

The Littlefield bill’s progress was closely followed by the national press, which reported every step along the way. But it progressed through a legislative obstacle course. The Department of Commerce bill had been introduced in [ ] in [ ] and had been proceeding through debate, passed by both houses, and was in conference committee at the time the Littlefield bill was taken up. On [ ], the Senate conferees amended the bill with the Nelson amendment. That amendment appended a new Bureau of Corporations to the Department of Commerce, and was considered, in its investigatory and publicity capacities, to be the Senate’s antitrust measure. The House strenuously objected to this last minute Senate interjection into its own antitrust debate, correctly fearing that it was designed to displace the Littlefield measure. At the same time, the Elkins Anti-Rebate bill, covering railroad rebates and thus overlapping Section 5 of the Littlefield bill, had been introduced in the Senate on [ ], and Senate leaders were pressuring Littlefield to drop the anti-rebate section of his bill on the same day that debate on that measure had begun in the House. A legislative race to set the terms of trust legislation had begun between the House and Senate.<sup>26</sup>

During the three day House debate on the Littlefield bill, the Senate passed with almost no comment the Elkins bill, the expediting bill, and the Nelson amendment. It referred these measures to the House before that latter body’s debate on the Littlefield bill had even ended. The

day after the Littlefield bill passed, the conference committee on the Department of Commerce bill agreed to include the Nelson amendment which, according to *The New York Times*, was “the anti-trust measure favored by the administration.” It was clear by that point that nobody thought that the Littlefield bill had a prayer.<sup>27</sup>

The Littlefield bill was killed off in the Senate on February 27 after that body voted to amend the bill to make it stronger. Meanwhile, the Elkins bill passed the House with lukewarm Democratic, as well as Republican, support on February 13. The Department of Commerce Act along with the Nelson amendment and expediting bill, passed on February 14 and [ ], respectively. Littlefield, almost completely isolated now and refusing to accept the consequence of Roosevelt’s betrayal, fought to the end, voting as the lone Republican against the Department of Commerce bill and refusing to vote at all on the Elkins bill. The resulting legislation was celebrated in some quarters as the best that could be achieved, while most accounts recognized the measures as relatively ineffectual. Business interests were generally pleased. What had happened?<sup>28</sup>

Teddy Roosevelt’s political survival instincts got the better of him. The Republican Senate, despite the presence of some reformers, was run by Aldrich and his cronies, and as discussions continued throughout January it became obvious to Roosevelt that he would never win the more aggressive measures he favored. As he wrote to Lawrence Abbott on the day the debate on Littlefield began, “there has been very much secret opposition to the bills,” although it seems unlikely that he was caught off-guard so late in the game. At the same time, his popular political survival meant that he could hardly appear to be running from the strong trust program he had announced and that he and Knox had been publicly pursuing. Even as his agenda

changed, he couldn't withdraw his support for the strong Littlefield bill without a credible alternative that would pass with the conservatives but at the same time could be displayed as a public victory against the trusts. Thus, until he was secure that trust legislation would pass, he had to remain publicly committed to the Littlefield bill.<sup>29</sup>

The Department of Commerce and Bureau of Corporations promised to give Roosevelt considerable power. The Department itself, as a cabinet-level agency, concentrated a great deal of responsibility for American business in the executive. The Bureau of Corporations was even better. As Nelson's biographer put it: "President Roosevelt was quite enthusiastic over the establishment of the department of commerce and labor and the reorganization and rearrangement of boards and bureaus which it affected."<sup>30</sup> **[More]**

Even when the new legislation was at hand, he was hardly home-free. Although House Democrats were skeptical of the Littlefield bill's chances from the beginning, Roosevelt was facing a united House in the face of the Senate's last-minute, and considerably weaker, measures. Moreover, the Senate itself was hardly united, with the pro-business Republican wing still balking at the idea of any trust legislation at all. He was also facing a public that had been anticipating strong anti-trust action.

As a House-Senate standoff became a real possibility, Roosevelt threatened to call a special session of Congress on March 5. It was at that point that he pulled off a political stunt that assured passage of the Nelson amendment, a stunt that might have been simple exaggeration but that, in the eyes of many, was an outright manipulative lie. Lie or not, it had its desired effect.<sup>31</sup>

On February 7, the day the Littlefield bill passed the unanimous House, Roosevelt

announced that it had come to his attention that six telegrams had been sent by Standard Oil, bearing the signature of the retired John D. Rockefeller, to key senators stating Standard's opposition to any antitrust legislation and notifying the senators that they would be called upon to discuss the matter by Standard's counsel. With this, it was also revealed that Standard had been pressuring the administration to kill the Littlefield bill and was especially dismayed by the Nelson amendment which, in light of the investigative and publicity powers it would have given the Bureau of Corporations, would have been characteristic of the notoriously secretive Rockefeller. As Roosevelt intended, the news set off a tempest in Congress and among the public, and it gave the President the kind of political leverage he needed to kick through the Nelson amendment over conservative opposition. In fact one story reported him as "very well satisfied with the effect produced" by reports of the telegrams. And it was apparent that the Littlefield bill would die in the Senate. It all worked as he had planned. But there was a catch.

Roosevelt's story wasn't true – or at least not entirely. One of the senators identified as receiving a telegram said the telegrams were fake. Four of the identified senators denied receiving telegrams at all. One senator close to the administration confirmed the story, but when asked to show his telegram it obviously had not been signed by John D. Rockefeller. Matt Quay published the telegram he had received but its text made it clear that it was sent as a response to Quay's letter. While some reports credited Roosevelt's account as true, at least in part, far more suspected that any telegrams that had been sent were instigated by Roosevelt in order to ensure passage of the Nelson amendment. One historical account, although not identifying source materials, claims that the telegrams never had existed, were a pure invention of Roosevelt, and that he later admitted this, claiming the important thing was that he had gotten his legislation.

Rockefeller's biographer, Allan Nevins, told a different story. He reported in 1940 that Rockefeller did not send the telegram "but it can now be revealed that his son had done so." Junior wrote to Senators Allison, Lodge, Hale, and Teller articulating Standard's objection to all legislation except the Elkins Act. Other Standard employees wrote telegrams opposing the Nelson Amendment. John Archbold, Standard's counsel, did in fact meet with senators, but in the end he only thought it necessary to meet with Aldrich who was, after all, part of the Standard Oil family by marriage. But Nevins, sympathetic biographer that he was, didn't let Roosevelt off the hook. He noted that Lodge had all the facts and could have told them to the President and, implying that Roosevelt either knew or ignored what Lodge knew, concluded that "it is evident that he had deliberately used the Rockefeller bogey to promote his special purposes."<sup>32</sup>

And what happened to Littlefield? By early February, Roosevelt was calling the Littlefield bill "idiotic," despite Knox's involvement in its drafting. Even as debate on the bill had begun, members of the House became aware of the fact that the President had withdrawn his support, which accounts for repeated Democratic comments during the debate accusing the Republicans of cynicism in their support for it. This evidently was the first that Littlefield showed that he was aware of the fact that his president had abandoned him. During the debates, he went to the White House and was told rather pointedly that the administration's support was for Elkins, Nelson, and the expediting bill. Littlefield continued anyway, railing like King Lear in the face of an increasingly dwindling audience. By the end of the debate he was being openly mocked.<sup>33</sup>

Things went downhill for Littlefield from that point on. He was so ostracized by his own party that he was not permitted to speak during the brief House debate on the Elkins bill. His

downfall pleased the House leaders whose authority he had so recently challenged. He had risen to extraordinary power quickly, demonstrated the hubris of that rise, and fell just as fast.

Although he lost the fight for the speakership, he had earlier led the insurgents against the House leadership and won significant internal reforms. The battle over the Littlefield bill left him politically weakened and publicly ridiculed. But Littlefield was resilient. Before he retired in 1908 to practice law in New York, he and Roosevelt had a last chance at federal corporation in the Hepburn bill hearings of 1908.<sup>34</sup>

As I explained in Chapter Five, federal incorporation failed for a number of reasons. But the Littlefield bill failed largely because of politics. Hans Thorelli, in his exhaustive account of the era, postulated three grounds for Roosevelt's *volte face*, although admittedly without extensive research. Roosevelt might not have actually approved of Knox's work with Littlefield, Roosevelt simply changed bills when passage of Littlefield seemed improbable, and the combination of the Nelson amendment and the Elkins bill was a better, more administrable, and more "elegant" solution than the Littlefield bill.

None of this is plausible. First, the evidence is indisputable that Roosevelt not only was aware of Knox's work but both encouraged it and described it as the administration position well after the Pittsburgh address. One study claims that TR and Knox both supported the Littlefield bill until the end of January, with Roosevelt reiterating his approval after a late rumor spread that he was abandoning it. This evidently had the desired effect of creating anxiety in the Senate leadership and perhaps softening it up for the Nelson amendment, but in any event it seems clear that Roosevelt still expressed some commitment to Littlefield in the rebate provisions. Moreover, Roosevelt didn't simply change horses. He shot the one he rode in on. His late animosity toward

the Littlefield bill and Littlefield himself suggests that his turn had deeper causes than a simple shift in policy decision. Political survival panic is the most likely explanation. Finally, it is hard to argue that the Elkins and Nelson amendments were more elegant than the Littlefield bill, except to the extent that their simplicity reflected a lack of substance. These bills also gave Roosevelt virtually all the control over corporate America that there was to be had. Thorelli was correct that Roosevelt's actions were political. But they were political to a much greater purpose than the passage of antitrust legislation. They were political for the purpose of increasing Roosevelt's power. After the fact Roosevelt would claim great pride in establishing the Bureau of Corporations, referring to it as an act of "constructive statesmanship," even as he acknowledged to his close friends that the measure was only "tentative" and a first step.<sup>35</sup>

*Roosevelt's Last Chance -- Federal Incorporation, the Hepburn Bill, and the Faint Beginnings of Investor Protection*

Despite the failure of the Littlefield bill, the federal incorporation debate would go on. As we saw in the last chapter, federal licensing was the first important recommendation of the Bureau of Corporations. Bills continued to be introduced and, after Roosevelt took a post-election break to focus on railroad regulation with the Hepburn Act of 1906, he renewed his attempts to secure federal incorporation under his control. The Hepburn bill, introduced in the House on March 23, 1908, was Roosevelt's last chance to achieve federal incorporation. It was also the last chance for Littlefield, who chaired the subcommittee that conducted hearings on the bill in his last year in Congress. Although Seth Low, president of the National Civic Federation that drafted the bill, denied it was a federal incorporation or licensing measure, his distinctions were technical and the bill obviously is precisely that.

The bill began rather modestly as an amendment to the Sherman Act. But Roosevelt diverted it from the initial goals of the National Civic Federation whose proposal it was, and reshaped it in his own regulatory image. Perhaps increasingly frustrated with the modesty of his achievements in trust regulation, Roosevelt came more and more to see trust regulation as a crusade, ending a letter on the subject to Charles Bonaparte with the last paragraph of Lincoln's Second Inaugural Address and closing his January 1908 *Special Message to Congress* with the same words. But Roosevelt wasn't Lincoln. Despite his use of the latter's immortal words of healing, Roosevelt continued to prosecute the war, in the process condemning the Hepburn Bill to failure. Most important for our purposes, coming as it did after the Panic of 1907, concern with stock speculation was evident in the bill and the debates.<sup>36</sup>

#### *The Need for Certainty*

In basic outline as in its origins, the Hepburn bill was the epitome of a federal incorporation measure aimed principally at antitrust. It would have allowed interstate corporations to register with the Commissioner of Corporations to give them the privilege of advance review of their contracts or combinations in restraint of trade. The Commissioner then would have had the power to determine whether they were reasonable or not and, if the former, to exempt the inquirer from federal prosecution unless the government decided that conditions had changed.

Business had been clamoring for certainty. The Bureau of Corporations' files contain a raft of letters from businessmen around the country inquiring as to whether they could federally incorporate or, more frequently, whether the Bureau would give them advance guidance or approval of their plans, a matter which Garfield and his successor, Herbert Knox Smith,

regularly had to assert was beyond their authority. Ralph Hill of Mount Vernon, Iowa, wrote to Smith asking flat out whether the Bureau had jurisdiction to advise a corporation “how it may change its policies or organization so as to conform to the Sherman Anti-trust Act.” More plaintively, the Bain Wagon Company of Kenosha, Wisconsin, sent Smith a pleading letter, noting that only the merger of a number of wagon makers could save many of them from bankruptcy and asking for the Bureau’s sanction of their combination. In 1907, an agent of the Traveler’s Insurance Company wrote to Smith enclosing a newspaper article attacking the Bureau for creating such great uncertainty that entrepreneurs found it difficult or impossible to obtain capital. “I fear you do not begin to realize the great amount of trouble and financial distress you are helping to bring about by the methods you are pursuing in the management of your Department. It is affecting many lines of business and causing anxiety in many homes. If you want Harriman or Rockefeller, why not go out and lasso them instead of disturbing all the smaller business interests, and thus disturbing the whole country.” A number of trade associations, like the Building Material Men’s Exchange of Jefferson County, Alabama, the National Petroleum Association, the Wisconsin Retail Lumber Dealers’ Association, and the Bituminous Coal Trade Association, wanted advice or assurance from the Commissioner that they were in compliance with the antitrust laws. In one particularly unusual letter, Charles W. Chase of Chicago wrote on behalf of his client, the Chicago-New York Electric Air Line Railroad Company, asking if it could provide all of its relevant corporate and financial information to the Bureau so that the Bureau could publicly release it and reassure potential investors as to the soundness of the enterprise. This, of course, Garfield refused to do, and Smith, then his deputy, expressed some skepticism that the company simply wanted to use the

Bureau both as a shill and a stamp of approval. These inquiries reflected a growing mood of uncertainty and anxiety about antitrust concerns among businessmen of all types and in all regions of the country. Many businessmen were generally in favor of the Hepburn bill. Others opposed it because they wanted clear rules as to what combinations and restraints were legal and what were not, rather than regulatory guidance on a case by case basis. Some were concerned that the regulatory process contemplated by the bill would legalize trusts to their competitive disadvantage. Most small businessmen opposed the way the bill could be read to legalize labor boycotts under the Sherman Act. There was much for some people to like in the Hepburn bill, but reading the hearings suggests that there was something for everyone to hate.<sup>37</sup>

The Hepburn bill itself was the product of the NCF's Chicago Conference on Trusts and Combinations held in Chicago from October 22<sup>nd</sup> to 25<sup>th</sup>, 1907, as the panic in New York was raging. Among its final recommendations were that Congress create a non-partisan commission to study ways of easing the effects of the Sherman Act on big business, specifically to create a system of federal incorporation or licensing that would permit regulation of business to distinguish between trusts serving the public and those which damaged the public, and also to ease the crunch of the Sherman Act on organized labor. It also recommended that Congress expand the role of the Departments of Commerce and Labor to require the disclosure of corporate information.

A final amendment to the recommendations asked outgoing NCF president, Nicholas Murray Butler, to appoint a delegation to present its ideas to Congress and the President. In late January 1908, the delegates met with congressional leaders. Aldrich evidently told NCF executive director Ralph Easley that trust legislation was unlikely to be considered during that

congressional session, but that the NCF ought to create a commission to investigate changes along the lines of the conference resolution.<sup>38</sup>

The story of the bill's origin, development, and hijacking by Roosevelt, comprehensively told by Martin Sklar, is long and complex. What started as an outgrowth of the trust conference was taken over by the NCF in the wake of the Danbury Hatters' case. There the Supreme Court unanimously ruled that the Sherman Act applied to combinations of labor, a ruling which galvanized union leaders from Gompers to Bryan to seek outright amendment of the Sherman Act to protect the unions rather than go through the indeterminate process of committee investigation resolved by the conference. NCF President Seth Low, former president of Columbia University and former mayor of New York, a "conservative of large, flexible, and articulate views, and a friend of organized labor" testified that, while he was in the process of contacting Jenkins and Hepburn to arrange the presentation of the conference's thoughts to Congress, the legislators asked him, on behalf of the conference, to draft a proposed bill. The conference hadn't authorized such action, so the NCF took over, although Low assured the committee that nothing in the bill was inconsistent with the Chicago resolutions.<sup>39</sup>

Low set up the committee. Despite the rich variety in its membership, by this time the NCF was largely dominated by the business and financial members who "carefully controlled" participation in the 1907 Conference. Reflecting the dominance of business interests in the NCF its principal participants included August Belmont, Elbert Gary, Henry Lee Higginson, and Isaac Selgiman, as well as labor leaders like Samuel Gompers and John Mitchell, among others. Also on the committee were two eminent corporation lawyers, Victor Morawetz, counsel to the Atchison, Topeka and Santa Fe Railroad, formerly a partner in the prominent Cravath firm and

the author of perhaps the first modern American treatise on corporate law, and Francis Lynde Stetson, counsel to the House of Morgan, who drafted the bill.<sup>40</sup>

### *The Imperial President Revisited*

While the individual eminence of its members gave the NCF influence on the executive branch, the organization historically had little legislative influence or public support. It had begun this new project with the desire to cooperate with the administration. Now it worked closely with Roosevelt, who seized the chance to transform the measure from Sherman Act amendments to an elaborate registration and regulatory scheme vested in the executive with, unsurprisingly, significant power in the President's hands.<sup>41</sup>

In fact the bill ultimately introduced in the House, from which it never emerged, was an extreme expression of Roosevelt's vision of the presidency. While it followed his policy of publicity, allowing corporations to register with the Commissioner of Corporations, the real power of publicity lay in the President's hands. The President, not the Commissioner, was given direct rulemaking power over the initial application requirements. And this power continued. "[T]he President shall have power to make, alter, and revoke, and from time to time, in his discretion, he shall make, alter, and revoke, regulations prescribing what facts shall be set forth in the statements to be filed with the Commissioner of Corporations . . . and what information thereafter shall be furnished by such corporations and associations so registered, and he may prescribe the manner of registration and of cancellation of registration."

### *From Securities Regulation as Trust Regulation to Securities Regulation as Consumer Protection – The Beginnings*

The Hepburn bill also serves as a bridge between the antitrust-based federal incorporation

debate and the rising concern with securities speculation and stock market regulation that I'll discuss in the next section. This is partly reflected in the bill's distinction between the requirements of for-profit and not-for profit corporations, and partly in direct testimony. Although the not-for-profits that the bill contemplated primarily were labor unions, the influence of the growing stock market was evident.

Business corporations had to file their organizational materials and all of their contracts, statements of financial condition, and corporate proceedings pursuant to regulations "made by the President." Not-for-profits only had to file their charters and by-laws, the address of their principal offices, and the names and addresses of officers, directors, and members of standing committees.

The periodic filing requirements were different too. The President was given authority to create regulations for periodic filings by business corporations, which presumably would include significant financial information, whereas not-for profits weren't required to file anything beyond the registration materials, except for updated registrations as may be required by the Commissioner of Corporations. As a trade-off, not-for-profits couldn't take advantage of the Commissioner's rulings on the reasonableness of their contracts. But the bill's attempt to exempt labor boycotts from the Sherman Act would hardly have made this a problem.<sup>42</sup>

Why the difference? Low, testifying in favor of the bill, explained. "Corporations for profit appeal to investors for their money; corporations not for profit do not." Corporations that sought money from investors were obliged to provide the kind of financial information that would allow them to make reasoned decisions.<sup>43</sup>

Low's view of "the large measure of publicity" of corporate information that would be

released if the bill passed was sophisticated and anticipated the New Deal acts in policy as well as philosophy. He identified the “advantages of publicity [as] two sided. Men whose corporate activities, within proper limits, are to be matter of public record are likely to be careful not to do anything they are not willing the public should know.” By the same token, appeasing business interests, he noted that much of the public criticism of corporations came from ignorance, and disclosure would bring understanding that would portray corporate dealings in a better light. While not so obviously shareholder-related, the first reason was aimed at controlling corporate misbehavior and the second at assuring investors that American corporations were a safe place to invest their money. Under the Hepburn bill they would presumably limit the formation of illegal trusts.

The strongest hint of investor protection came relatively early in the extensive hearings, during an interchange between Littlefield, Low, and Jenks. Littlefield had been questioning Jenks on the federal government’s power to require interstate corporations to disclose information of the type contemplated by the bill, including capitalization and financial information. Jenks, despite his regular protestations that he wasn’t a lawyer, didn’t hesitate much in giving his legal opinions. The use of publicity for investor protection emerged from the use of publicity to control trusts.

Low focused the discussion. Referring to interstate corporations that sought financing from the public, he asked: “Is it not a perfectly legitimate thing to ask that corporation, if it wants to do interstate commerce on the basis of all sorts of stocks and bonds, for the benefit of the investor whose money is to be engaged in interstate commerce, to state the conditions upon which that money is to be used in interstate commerce?” The question is grounded in trust

concerns, for Low clearly meant that publicity would alert potential investors to the possibly illegal use of their money and thus allow them to decide whether to invest. But Littlefield refocused the question. “That comes right down to the question as to whether, under our power to regulate commerce, we have any power to protect the investing public as a part of the regulation of commerce.” Jenks demurred, and Littlefield became even more specific. “Do we have any power, under the power to regulate commerce, to so regulate it as to protect the security or value of the investing public’s investments?” To this Jenks answered in the affirmative.<sup>44</sup>

While such a brief and seemingly off –the- point exchange in over seven hundred pages of hearings hardly proves a major development in federal thinking, it nonetheless does demonstrate the beginning of legislative attention to the securities market. The recent Panic of 1907 was the elephant in the room. Jenks testified again, later during the hearings, this time on the relationship between trusts, securities, and overcapitalization, and approvingly introduced into evidence the English Companies Act of 1900 with its detailed prospectus requirement for the protection of investors. Under Littlefield’s questioning, he also gave particular attention to the relationship between overcapitalization and speculation.<sup>45</sup>

The Hepburn bill wasn’t securities regulation. But the connections between the creation of the giant trusts, monopoly, speculation, and investor fraud were becoming more clear. In the last federal incorporation gasp of the Roosevelt administration, one can see the effects of a growing stock market and concern with speculation begin to manifest itself as legislated protection for investors.

Roosevelt himself had begun to speak out more widely on the subject of investor protection, although he was firm in his insistence that the shareholders of illegal trusts bear the

brunt of the penalties rather than officers. “Nothing is sillier than this outcry on behalf of the ‘innocent shareholders’ in the corporations,” he wrote Bonaparte. The shareholders after all controlled the corporations. Stockholders hurt by overcapitalization were different, and it was necessary to protect them in their purchases by disclosure, although his legislative efforts had at best an indirect influence on investor protection. But once the stockholder owned shares, the corporation’s misbehavior was their responsibility, even if the corporation had a controlling group. “That stockholder is not innocent who voluntarily purchases stock in a corporation whose methods and management he knows to be corrupt; and stockholders are bound to try to secure honest management, or else are estopped from complaining about” the government’s enforcement of the laws against the corporation. Roosevelt clearly saw the difference between defrauding investors by selling them impure stock and the responsibilities that came with stockholding. It was at almost precisely this time that securities regulation took off as a legislative project in its own right.<sup>46</sup>

### *The Beginning of Federal Securities Regulation*

Overcapitalization, federal incorporation, and the trust question largely remained consumer issues through the Panic of 1907. As I have shown, those who made law and policy didn’t entirely ignore investors. Calls for securities regulation were common. But securities regulation wasn’t the subject of legislative activity except to the extent lawmakers thought it was necessary to remedy trust abuses. Consumer protection was the order of the day. The investing class wasn’t yet a major constituency for anybody except perhaps politicians from New York, and their most influential constituents were getting rich from securities issuances just the way they were. Thus the first stage of securities regulation wasn’t much of a stage at all. Even as the

market was becoming increasingly important to the middle class, securities regulation *as* consumer protection, in contrast to securities regulation *for* consumer protection, had only limited conceptual development and wasn't yet perceived to be a federal responsibility.

The market grew during the decade between the start of the merger wave and 1907. Speculators tipped and sloshed the waterlogged securities that fed the growth and generally created waves in the market, waves that helped to cause continuing economic instability. As we have seen, this instability had some effect on corporate health, increasing the cost of capital under circumstances where sometimes unsteady product markets meant that interest and dividends were hard to meet. But the more frightening effect of massive speculation in water was on the nation's currency and banking system. By the Panic of 1907, savings banks and insurance companies had become big investors in corporate bonds and even some of the more conservative stocks. Higher returns meant higher profits and, when times were good, those higher returns flowed in. But higher returns also meant higher risks. When times were bad, returns evaporated and the securities that these institutions held as reserves tanked in value, making it hard for them to meet their obligations. Some of them, especially the trust companies, played heavily in more speculative stock as well, creating even further potential systemic banking risks. Those risks upended the New York banking community during the Panic of 1907. The regulatory result of that panic was to introduce the idea of securities regulation as a federal responsibility to the ongoing trust debate.

As we will see in the rest of this chapter and the next, securities regulation proposals through the beginning of the war were designed to control speculation and thus stabilize the economy. But while economic stability was the focus, the interests of investors were also

starting to matter more as the middle class increasingly turned not only to securities in general but to common stock more specifically. Thus the second and third stages of securities regulation began together. The second stage would end in failure, although some of its concerns would be dealt with by the creation of the Federal Reserve System in 1913, whose evolution largely paralleled this second stage.

Four important governmental efforts at the end of the decade show the progress of these developments. The investigation by the Hughes Committee in 1908, the debate over the Mann-Elkins Act in 1910, the Report of the Railroad Securities Commission in 1911, and the Pujo investigations of 1911-1913, the last of which I'll take up in the next chapter, marked a significant turn toward securities regulation.<sup>47</sup>

#### *The Panic of 1907*

The Panic of 1907, the worst in the nation following the panics of 1873 and 1893, was a watershed event for currency regulation, banking regulation, and securities regulation. As such, it has gotten at least its share of scholarly attention. I don't have much to add to the excellent stories told about the events. What follows is a brief outline of what happened, enough I think to set the context for explaining the lawmaking efforts that followed.

The Dow doubled between 1904 and 1906. Speculation was rampant. Mining stocks were the driving force, as they would be the catalyst of the panic. But the winter of 1907 brought a rude if brief awakening. The money market tightened and credit increasingly was hard to come by, not least for brokerage houses. Railroads had been put under severe monetary pressure the previous year. Some brokerages had to close up shop. Now a March stock market panic removed \$2 billion in market value from the NYSE. Investors gasped.<sup>48</sup>

U.S. Steel's resumption of dividends, as well as an increase in Union Pacific dividends, brought temporary relief. But the Egyptian and Tokyo exchanges collapsed in April. The summer brought more bad news. New York failed to float two bond issues, and San Francisco repeated New York's failure. The New York street railway combination went into receivership, as did Westinghouse Electric Company in October, just as the panic was getting underway. U.S. Steel announced lower earnings. J. P. Morgan's ambitious and poorly conceived shipping trust failed. Judge Kennesaw Mountain Landis ruled that Standard Oil had violated the Elkins Anti-Rebating Act and stuck it with a \$29 million fine in the fall. Standard's stock price dropped 10%.

Crises on the Hamburg and Amsterdam exchanges in early October created an outflow of U.S. gold to Europe. Problems on the Montreal Exchange soon followed. A speculation scheme in copper stocks, especially United Copper, in which several important banks and trust companies were implicated, fell apart, threatening the solvency of three New York banks. A banking panic was at hand.

The trust companies had caught the speculative fever without keeping sufficient reserves to protect their obligations to depositors. Among these were the banks involved in the United Copper play. One clearing house, the National Bank of Commerce, announced that it no longer would perform clearing operations for New York's third largest trust company, the Knickerbocker Bank and Trust Company. The Knickerbocker failed in mid-October, after it had to shut down because of its inability to meet the subsequent run on its deposits. The real Panic of 1907 – a banking panic – had begun.

The federal government did all it could. Treasury Secretary George Courtelyou went to New York to meet with Morgan and other bankers with the result that Treasury deposited \$25

million with leading New York banks to be loaned essentially as Morgan saw fit – mostly to bail out brokerage firms and their customers. Another \$10 million followed to shore up the trust companies. The Chicago Clearing House suspended payments.

The panic was a bank panic, but the banks' losses and runs on their deposits were caused at least in substantial part by bank speculation in securities. The Aldrich-Vreeland Act of 1908, the Federal Reserve Act of 1913, and finally the Glass-Steagall Act of 1933, all were designed to respond to this irresponsible banking environment. At the time though, no effective federal mechanism existed to control the banks.

The intervention was led by the nation's *de facto* central banker, J.P. Morgan, asked by the administration to save the American money supply as he had during the gold crisis of 189[5]. The story is well-known of Morgan's hasty return from an Episcopal retreat in Richmond, Virginia, and the all-night meetings at the Morgan mansion on Fifth Avenue, attended by George Baker of the First National Bank, James Stillman of the National City Bank, E.H. Harriman, and other financial luminaries, with Morgan demanding the infusion of funds by each of the attendees in order to shore up the failing trusts. (Morgan refused to support Knickerbocker because of its particularly bad behavior and heavy demands. Its president, Charles T. Barney, committed suicide, but every account of the story suggests that perhaps Mr. Barney had not been his own executioner.)

The panic continued and the circle widened. Morgan invited more than fifty New York bank and trust company presidents to his library. He locked the door. He opened it again only when each had agreed to kick in their respective shares of the \$25 million needed to prevent the bankruptcies of more than sixty brokerage houses and the ruin of their customers as well. John

D. Rockefeller put in a share, and deposited \$10 million with Stillman's bank. Morgan bailed out New York City from its impending bankruptcy by uniting with Baker and Stillman to issue bonds to keep it afloat. He bought up bills of exchange to force the flow of gold from Europe to the United States.

And, in a tarnished last-minute deal, he saved a large brokerage firm, Moore & Schley, on the verge of ruin. The bailout arranged was for Morgan-controlled U.S. Steel to buy Moore & Schley's principal collateral which just happened to be the stock of a major Steel competitor, the Tennessee Coal, Iron, & Railroad Company. The arrangement was made only after Morgan received perfunctory approval by Teddy Roosevelt. The deal was probably overkill in terms of what Moore & Schley needed to keep it afloat, and almost certainly violated the Sherman Act, which let Roosevelt in for a lot of public criticism. It was great for Morgan and Steel. In any event, the panic drew to a close in November and a thirteen month industrial depression followed.<sup>49</sup>

The Panic of 1907 was so severe that it led to seven more or less lean years in America although, as we will see, it was a time when individual investors rapidly expanded their presence in the market. Governor Charles Evans Hughes of New York, the scene of the debacle, appointed the Governor's Committee on Speculation in Securities and Commodities. It was charged with determining "what changes, if any, are advisable in the laws of the State bearing upon speculation in securities and commodities, or relating to the protection of investors, or with regard to the instrumentalities and organizations used in dealings in securities and commodities which are the subject of speculation." While the Committee's focus was on the effect of speculation on the economy, investor protection was present as a reform theme.<sup>50</sup>

After slightly more than six months of work, the Committee delivered its report on June 7, 1909. The Committee's work has received scholarly attention, with some historians noting the extent to which it lashed out at the New York Stock Exchange in particular. In fact it did nothing of the sort. Its Report is probably best characterized as gentlemen calling the attention of other gentlemen to the disagreeable fact that there were a few scoundrels in their midst who needed a good thrashing.

The Committee's composition made its conclusions predictable. Horace White, who chaired the Committee, seemed bound for reform, but he was a reformer of the type associated with the "best men" theory of government. His young associate and fellow mugwump, Oswald Garrison Villard, described him as ranking "as a great economic conservative," "blind to much that was going on about him in our economic life" and particularly the deprivations of Wall Street against which Roosevelt and Bryan both were fighting. Born in 1834, he worked as a reporter for the *Chicago Evening Journal* before moving to *The Chicago Tribune*. He covered the Lincoln-Douglas debates, befriending Lincoln, and eventually serving as his paper's Washington correspondent during the Civil War. An ardent abolitionist, he spent time in the 1850s funneling money, arms, and supplies as assistant secretary of the National Kansas Commission to the Free State pioneers, numbering among them John Brown. After brief service with his friend, Henry Villard, son-in-law of the great abolitionist William Lloyd Garrison, on the Kansas-Pacific Railroad and the Oregon Railway & Navigation Company, he moved to the *New York Evening Post* and the *Nation*, along with Carl Schurz and E.L. Godkin, and later Villard's son, Oswald, taking over financial and economic reporting for the two journals. Eventually White became editor-in-chief of the *Post* and retired in 1903. In addition to his

journalism he wrote books on economics and translated Greek works into English.<sup>51</sup>

Charles Sprague Smith, was an educator, romantic, and idealist, who founded the People's Institute at Cooper Union and revitalized Cooper Union itself. Also a member was David Leventritt, a New York lawyer whose nomination to the New York State Supreme Court was vigorously, if unsuccessfully, opposed by the elite and antisemitic Association of the Bar of the City of New York led by Elihu Root and catalyzed the creation of the more democratic New York County Lawyers' Association. Despite the progressive characteristics of its members, the Committee's conclusions toed the Republican Party line.<sup>52</sup>

The Committee found that speculation which, in contrast to gambling, was legal in New York, wasn't all bad. In fact, it helped to stabilize prices. But speculation had started to get out of control and threatened to destroy the economic service performed by the NYSE. The Report noted that "It is unquestionable that only a small part of the transactions upon the Exchange is of an investment character; a substantial part may be characterized as virtually gambling." Gambling should be stopped.<sup>53</sup>

The trouble for the Committee was that distinguishing good speculation from bad speculation, or gambling, was really impossible. The Committee's principal speculative concern was futures trading, and the forms and structures of legitimate and gambling futures trades were indistinguishable. The Committee also studied the speculative effects of short selling, which had been outlawed by New York in 1812 and restored in 1858. Again the Committee punted, largely because of the serious financial problems Germany had experienced after trying to regulate the practice. The Committee did urge brokers to require higher margins to dampen the speculative effect of margin trading. It also criticized other speculative practices including price

manipulation, wash sales, and matched orders. These, it was “convinced,” could be controlled by the Exchange.

Exchange self-regulation was the Committee’s dominant solution, although the Exchange had been notoriously unwilling to regulate its members. The Exchange pretty much ignored the Committee until, at the height of the Pujo Committee hearings in 1913, it adopted several vague and perfunctory rules against the most obvious kinds of manipulation.

So much for controlling speculation. The Committee also expressed some concern for investor protection. It considered and rejected the idea of a mandatory registration and disclosure system like that embodied in the British Companies Act of 1900. Two problems precluded this logical step. The Committee was afraid that New York might lose business to states that didn’t adopt such regulations. It also expressed its concern that state registration might lead investors to think the state had actually evaluated the quality of the security. The former concern is implausible in light of New York’s towering dominance in financial matters. The latter concern often came up in debates over securities regulation and became more credible in the next few years as state blue sky laws did precisely that.

The Committee did suggest some pallid legislation, in particular a sort of antifraud law for advertising. It also would have required that any person placing an ad for securities had to sign a statement accepting responsibility for it with the newspaper’s publisher. But this was the greatest extent of its willingness to impose legal requirements.

So much for a consumer-oriented disclosure law. Perhaps, the Committee suggested, the Exchange ought to verify corporations’ listing information. But this, too, it rejected, arguing that the public would rely too heavily upon the required audit as state verification of the investment-

worthiness of the security. Instead, the Committee recommended that the Exchange should require more detailed information to meet listing requirements, and that “means should be adopted for holding those making the statements responsible for the truth thereof.” [**check Report –connection between audit and state?**]

The Committee was especially critical of fraudulent and misleading securities advertising. But here, too, it was reluctant to suggest that anybody bear any obligation for anything. Again it displayed perhaps an unjustifiable (and ultimately unjustified) faith in human nature by choosing to forego law and recommend that investors trust in the fact that bankers and brokers of good reputation naturally would protect that reputation by refusing to advertise in papers that accepted such “swindling advertisements.” Directors, too, should have the character to pay attention to the accuracy of their companies’ publicity. In the end, the Committee, putting its faith in the NYSE, did little more than to ask the Exchange itself to pay a little more attention to the miscreants.<sup>54</sup>

That organization, still characterized by all of the trappings of a private club, more or less ignored the Committee. The market largely remained as it was.

#### *Brief Interlude -- Taft And Investor Protection*

William Howard Taft as Roosevelt’s hand-picked successor continued the advance of securities regulation as an antitrust issue, especially with respect to the railroads, but also began to articulate it as an issue of investor protection and the health of American industry. Taft unsuccessfully pursued securities regulation both in the Taft-Wickersham federal incorporation bill of 1910 and in his attempt to regulate the issuance of railroad securities with the Mann-Elkins Act. The continued success of the American economy demanded that individuals remain

willing to invest their money in industrial development, and industrial development required that capital raised be used for the growth of business, not the enrichment of promoters.

The Panic of 1907 had its influence on Taft as on everybody else, but his concern for investors was well formulated significantly before Americans became buyers of common stock. And early-formed opinions were important for Taft. As the editor of Taft's speeches put it, "it is hard to avoid the sense that Taft's political character, political opinions, political prejudices even, were formed early and thoughtfully and thereafter changed little." One of his most deeply held convictions was the sanctity of private property and its relationship to liberty. It was this belief in property rights that drove his concern with investors.<sup>55</sup>

As early as 1895 Taft, who was then a federal circuit judge, saw overcapitalization both as a fraud on bondholders (who were the true "investors") and destructive of the advance of industry. In a speech before the American Bar Association in Detroit on August 28, 1895, he criticized state corporate law for allowing promoters and managers to water corporate stock which they then issued to themselves, giving themselves control over the corporation which, by virtue of the watered stock, could only be mismanaged and was mismanaged for their benefit.

The real owners, the bondholders, are at the mercy of this irresponsible management until insolvency comes. The reckless business methods which such an irresponsibility and lack of supervision invite create an unhealthy and feverish competition in every market, wholly unrestrained by the natural caution which the real owner of a business must feel. The concern is kept going with no hope of legitimate profit, but simply to pay large salaries or to favor unduly some other enterprise in which the managers have a real interest.

Only after making this observation did he proceed to assert a "distrust of corporate methods" in their use of large amounts of capital "to monopolize and control particular industries."<sup>56</sup>

Taft's concern for private property drove his interest in investor protection, both for the sake of the investors themselves and for the safety of the industrial system that had grown in America. Campaigning during the mid-term elections of 1906, he argued that the use of capital to reproduce itself was "a virtue." It was the corporation that made this possible "and the incident of the transfer of shares of stock is what enables so many millions of people to have an interest in these immense corporations which they have helped to build up by contributing their modest savings." The prosperity of all of the people depended upon the institution of stock to permit the distribution of corporate wealth.<sup>57</sup>

But Taft was not primarily interested in securities regulation as an investor-protective issue. In Columbus, Ohio, in August 1907, he made his concerns plain, noting "recent revelations" of railroad overcapitalization which bilked "innocent investors." This was not a federal problem, according to Taft. What was a federal problem and had to be dealt with was the manner in which overcapitalization "has a tendency to divert the money paid by the public for the stock and bonds which ought to be expended in [railroad improvements and maintenance] into the pockets of the dishonest manipulators and thus to pile such an unprofitable debt upon a railway as to make bankruptcy" likely. Following the Panic of 1907, he extended this view to industrial corporations generally, demanding federal supervision of securities issuances as a means of improving corporate management and with it public confidence in corporate America, although he came to doubt the federal government's constitutional power to do this with any corporations but the railroads.<sup>58</sup>

At the beginning of his term he was happy to leave antitrust regulation of industrial corporations primarily to the courts, subject to a Sherman Act amendment clarifying illegal

combinations, but overcapitalization, and especially railroad overcapitalization, was a problem that required legislative and administrative action. His first concern was the way promoters could use watered stock to obtain control of railroads with other people's money, but it gradually shifted until he was fighting against watered stock, both as a fraud on investors, and as leading to the destruction of the railroads by encouraging the financial mismanagement of a vitally important facility, mismanagement which could and did lead to excessive numbers of railroad bankruptcies and disruption in service. By 1910, he had returned to the idea of federal incorporation, proposing the extensive Taft-Wickersham bill, which among other things would have imposed strict federal administrative control on corporations' issuances of stocks and bonds, including federal determination of the fair valuation of stock issued for property. His clear purpose continued to be to ensure that money raised by corporations was invested in those corporations, for business health and stability. He continued to push for federal incorporation until almost the end of his term.<sup>59</sup>

Investors were not irrelevant. His early concern for bondholders now included stockholders as well. The only purpose of watering stock, he said, was to deceive investors into paying too much for it. These investor concerns were manageable with disclosure. Indeed one of the principal benefits he saw in corporate taxation was the fact that reporting corporations would be disclosing far more information than ever they had before, aiding investors in evaluating corporations' stock as well as the government in collecting taxes. His concern both with the sanctity of private property and with maintaining a healthy investor base had become sufficient that in proposing amendments to the Interstate Commerce Act in order to prevent railroads from buying stock in competing lines, he cautioned that it be done in a manner that didn't hurt the

interests of shareholders of existing railroads and that would maintain a healthy market for their stock. To accomplish this, he asked for an exemption for railroads that already owned half or more of the stock of another line, permitting them to acquire all of the stock.<sup>60</sup>

Taft wasn't particularly focused on the investor as investor. In fact one biographer suggests that Teddy Roosevelt had to focus Taft to show concern for the small investor during the 1908 campaign. But he helped to highlight and publicize the need for securities regulation in the context of his broader concerns for the well-being of the American industrial economy and the need to protect private property.<sup>61</sup>

#### *Capital versus the Consumer: Securities Regulation through the Railroads*

Congress devoted a significant amount of attention to the securities of common carriers for antitrust purposes. Overcapitalization made it difficult for the issuers to earn enough money to meet the stated dividends on their watered stock. To ameliorate the problem, they overcharged consumers.

By the end of the first decade, many economists and public actors had come to accept as a matter of economic logic that competitive markets would eliminate the possibility of overcharging consumers. Manufacturers and retailers had to set their prices to meet the competition which increased when prices rose and made industries attractive to new entrants. Only in monopolistic industries did overcapitalization remain an intractable problem, both for the consumer and for the uninformed stock buyer. Railroads, and especially the new intra-urban rail and streetcar lines, often had the characteristics of natural monopolies, as did public utilities. These businesses were capable of pricing like monopolists, so overcapitalization meant overcharging consumers for a necessary service as to which no real alternatives were available.

Thus securities regulation in this area became a central focus, as the monopoly debate that had begun in the 1880s moved toward its conclusion during the second decade. Again the focus was watered stock and monopoly, but consumer legislation for securities investors became an increasingly important part of the debate as the general public continued to enter the market. From a congressional standpoint, this latter form of regulation again played second fiddle to securities regulation for banking and economic stability.

Investors weren't the object of concern when Congress passed the Hepburn Act of 1906, amending the Interstate Commerce Act of 1887. That Act, which enlarged and strengthened the Commission and gave it real power to prohibit excessive rates, was an antitrust measure, ensuring that rates charged by common carriers would be "just and reasonable" and giving the Commission the express authority to set maximum rates. The Act did require substantial and detailed financial reporting by all common carriers to the Commission but this requirement was designed to keep the Commission itself informed, not investors.

But shareholders weren't completely absent from the debate. Democratic Senator Benjamin Tillman of South Carolina, who supported the bill, submitted a lengthy statement. Overcapitalization, while only a small portion of his statement, was a problem he stressed, and he stressed it on behalf of shareholders.

. . . [I]t is impossible not to reach the conclusion that there has been an immense amount of overcapitalization deliberately planned and carried out for a specific purpose; and that purpose can be no other than the foisting on the people of railroad securities which have no actual value and the only motive for whose creation and sale was to add to the gains of a coterie of multimillionaires, whose energies are now directed toward compelling the business interests of the country to 'make good' by increasing the earnings of the roads with a view to paying dividends upon this fictitious valuation of the properties.<sup>62</sup>

He went on to note that the proceeds of the inflated securities, while allegedly needed for

improvements to the roads, were mostly pocketed by the controlling interests. His concerns were clearly three – actual maintenance of the roads, consumer overcharging in order to make dividend payments, and protection of shareholders. Shareholders were, however, the least of it. By far the greater problem was excessive rates. In particular, the Senator was concerned with the provision of the statute that authorized the Commission to determine the “just and reasonable and fairly remunerative rate.” “Fairly remunerative” on what? The watered capitalization or the value of the tangible property?

There can be no justice in compelling the people as a whole to pay dividends on watered stock primarily for the purpose of increasing the fortunes of men already too rich. The poor dupes who have been led to invest their savings in such stocks can better afford to lose them than to have the labor of the country saddled with the burden of paying perpetual tribute in the shape of dividends on dishonest valuations . . .

All issues of railroad securities in the future . . . should be under the control of the Interstate Commerce Commission and there should be a speedy readjustment of capitalized values . . . while protecting, as far as possible, the innocent holders of watered stock. It may be that these can not be protected under the law and that the holders of first-mortgage bonds and of preferred stock, who will be found in the end to be the multimillionaires who have perpetrated the scheme of injustice, will retain their advantage, while the poor dupes who have been led to buy the products of railway printing presses will lose what they have invested.

Tillman might have been concerned about shareholders but not nearly so much as he was with the general public. As with the legislative proposals on federal incorporation, the seeds of stockholder concern were present in the Hepburn Act debate, but it was decidedly a side issue.

The Hepburn Act was not effective enough, so Congress passed the Mann-Elkins Act in 1910 at Taft’s request. Originating in the Roosevelt administration, and indeed outlined in detail in Roosevelt’s March 1907 letter to the ICC, it was drafted, in Rooseveltian style and to congressional consternation, by Attorney General George Wickersham. The Act grew out of the

Republican platform of 1908 with its promise to pass additional legislation to restrain railroad rate abuses. [ **get platform** ] Although the Republicans still controlled both houses, the Act's passage was ensured only by a combination of progressive Republicans and progressive Democrats.<sup>63</sup>

Most of the act is unimportant for the purpose of understanding the evolution of securities regulation. The most important part of the act is the portion that wasn't passed at all. One of the planks in the Republican platform called for legislation to regulate and supervise securities issued by common carriers to prevent overcapitalization. As drafted by Wickersham and presented in the House, one of the three principal purposes of the proposed statute was to accomplish exactly this goal. All new securities to be issued by railroads had to be paid at par value, in cash and, if in services or property, at fair value to be determined by the Interstate Commerce Commission. Echoing the failed S. 232, the draft prohibited railroads from issuing securities without Commission approval after the Commission had determined that all of the proceeds were to go to the announced purposes of the issue and not into the pockets of the shareholders or promoters. Finally, only railroad combinations approved by the Commission were to be permitted. The Commission also had the authority to pass on the capital structures of railroad corporations in reorganization.

The purpose of this capital regulation was not, as it might appear at first blush, investor protection. Rather, it was to prevent the kind of overcapitalization that obliged corporations to overcharge customers in order to make high dividend payments. Like virtually all other business regulation during this period, it was pretty much all about antitrust. The debates leave no room for doubt.

The corporate finance provisions of the bill were fiercely debated before they were defeated. The debate reveals one reason why securities regulation hadn't previously received much attention. Congressmen from regions other than the Northeast weren't particularly inclined to protect the suppliers of capital, no matter how modest their means, when returns on that capital were reaped from the fields of their constituents. The House minority report clarified these concerns. "The apparent purpose of this proposed drastic and unprecedented legislation is to protect and guarantee the owners of capital stock of a railroad that has engaged in overcapitalization." This was a theme repeated throughout the debate. As William Adamson of Georgia put it, the only purposes of the corporate finance provisions were to protect already existing railroad monopolies as well as the value of the securities held by their owners. "Their evident purpose is to anticipate and set up by indirection, for the advantage of present security holders, the impossible federal incorporation act . . . to take control of the subject of investments and look after securities in speculation. If that is a good purpose, it should find manifestation in an honest effort to enforce the antitrust law instead of trying to invent means to nullify it."

Were these provisions to pass, he continued, southern and western railroads would be unable to raise capital and transportation throughout the country would be controlled by existing monopolies. If overcapitalization and corporate mismanagement were problems, he said, the states and not the federal government ought to assert responsibility over it.<sup>64</sup>

In response, James Mann of Illinois, House sponsor of the bill, gave the matter a different spin in a manner that I find, frankly, to be less clear than the arguments in opposition. After noting that the purpose of the provisions were to ensure only reasonable returns on railroad securities in order to keep rates down he said: "[The corporate finance provisions] will protect

the public; it will give to an unknown corporation which has no market value for its stock or its bonds, in a new part of the country . . . an opportunity to obtain money from the issuance of its stocks and bonds on such reasonable terms as may be allowed.” The securities regulation provisions would help to railroads to raise capital by ensuring the integrity of their securities. They would create opportunity and foster competition, not limit them.<sup>65</sup>

The Senate debate was largely long the same lines. After Albert Cummins of Iowa noted that he favored legislation regulating the corporate finance of all corporations, not just railroads, he too attacked the proposed bill on the grounds that it perpetuated the status quo and left wealthy promoters and monopolists in charge.<sup>66</sup>

The concern remained antitrust, the target high rates. The dominance of this point is brought home by Cummins’ objection to a portion of the corporate finance provisions sustaining the validity of securities of overcapitalized corporations as long as they were in the hands of “innocent purchasers.” All purchasers would fit this category, he said, and the wealth they held was illegitimate because born of fraud and monopoly. More important, the purpose of the statute was to prevent overcharging consumers, and this purpose that would be defeated if corporations were permitted to continuing paying dividends on watered securities, no matter how innocent the purchaser.

The corporate finance provisions were eliminated and the bill passed with substantial majorities in both houses. All that was left of the corporate finance provisions was authorization to the President to appoint a commission on railroad securities.

The debate over the corporate finance provisions of the Mann-Elkins Act continue to illustrate an important turning point in our story, despite its conventional concern with

monopoly. For what it, along with the Hepburn hearings and the Hughes Committee show, is the growth of a new branch of the trust debate, a branch with two prongs. The new branch grew out of regulatory concern with securities from a business standpoint, that is, a concern with competition, opportunity, and consumer pricing. It developed into public concern about regulating securities as securities, about regulating securities from an investor's standpoint. The faster growing prong of this new branch focused upon a particular category of investor, banks and financial institutions, whose stability and support of the economy was affected by their investments in corporate securities. The other prong focused upon securities regulation for the protection of investors. Significant evidence of this appears in the Railroad Securities Commission Report.<sup>67</sup>

*The Hadley Commission – Protecting Investors*

The Railroad Securities Commission was chaired by Arthur Hadley. Hadley's eminence as an economist put his appointment beyond question. But he was a perfect choice to chair the commission if the goal were to preserve the status quo, and I should note that his appointment came at a time when Taft was in the process of abandoning Roosevelt's interventionist approach to regulation in favor of a more judicially-oriented hands-off approach. At the time of his appointment, Hadley had been an economist for over thirty years, and most famous for his 1896 book *Economics*. He was also an expert in railroad economics. One reviewer approvingly noted of *Economics* that "The work is a long argument for the general rightness of what is . . . ." Another observer wrote of the book that it was "as intelligent an apologia and as judicious a defense of the economic institutions of the day as the American literature contains." His son and biographer, Morris Hadley, agreed with this, noting that "Hadley did believe that the economic

institutions of the day, with all their faults, were a better basis for future development than any of the rival schemes proposed by socialists or others.”<sup>68</sup>

Hadley was not a great believer in governmental regulation. In an 1890 speech in Denver, Hadley took a position similar to that of the Brahmins, strongly arguing that misbehaving corporate executives should be socially shunned rather than punished by statute, because this was clearly an “all-powerful remedy.” As early as 1885, while serving as Connecticut’s Commissioner of Labor Statistics, he had, on more practical grounds, suggested only mild legislative reform, “believing that it would be quite hard enough to enforce [those he suggested] and out of the question to enforce more sweeping ones.”<sup>69</sup>

Hadley had a clear history of opposition to securities regulation in particular. In his 1885 book, *Railroad Transportation*, while accepting the bad effects of speculation on business, he dismissed the idea of regulation: “Legislation against commercial crises is about as effective as legislation against chills and fever.” Legislation against speculation, even if it were a good idea, would be impossible, Hadley wrote, because there was no way to distinguish between “good speculation” and “bad speculation.” These words would echo throughout the Commission’s Report. If Taft wanted to prevent regulation, he chose the right man.<sup>70</sup> **[anything in Taft papers, bios, to show depth of his connection to and knowledge of Hadley’s ideas?]**

Hadley exercised tight control not only over the Commission but its purpose as well. He responded to Taft’s invitation to chair the Commission with a letter exploring the different forms a special commission could take. A commission that took testimony “and on the basis of this testimony to draft a statute which shall represent intelligent public opinion and have the force of intelligent opinion behind it” held no interest for him. He was, however, quite willing to chair a

commission of “experts, selected for their knowledge of the specific matters involved,” to advise the government on the basis of their expertise as to what reforms might be “practicable.” While a commission of experts was appointed, their deliberations were not always easy. Hadley wrote to his wife after one session that “Sessions of the Commission were squally, but interesting. How we are ever going to agree on a report is more than I can see.” But the final report was unanimous, a point in which Hadley took special pride. While he noted that he had to make concessions to achieve this result, the Report reads more or less exactly as one would have predicted based on his earlier work.<sup>71</sup>

Despite Hadley’s distaste for hearings, the Commission did hold public hearings in New York, Chicago, and Washington where it heard testimony from thirty-four witnesses. It received hundreds of letters commenting on railroad securities regulation, and studied the literature on the subject as well as the congressional debates over the Mann-Elkins Act. The Commission submitted its Report to the President on November 1, 1911.

Mann-Elkins had been designed to assert more aggressive federal control over the railroads. By contrast, the Report and its recommendations with respect to securities regulation were a model of conservatism. Most important for our story is the Commission’s reliance upon disclosure as the device best calculated to control overcapitalization and financial manipulation in the railroad industry. We have seen that disclosure up until this time was almost entirely regulatory disclosure, designed to give the government information to enable it to enforce the law. Disclosure for investor protection was mentioned from time to time, as it was by scholars and other prominent thinkers and activists, but it had never been a central part of the regulatory agenda.

Disclosure for the protection of investors took center stage in the Report. The Commission identified two ways that overcapitalization could damage the public. The first, now familiar, concern, was the way it induced common carriers (and other businesses) to pay dividends that were, in effect, “an unnecessary tax on interstate commerce.” But, and quite outside the scope of its charge, the Commission identified a second evil – the deception of bondholders by overcapitalization, leaving them to believe that their bonds had a meaningful equity cushion when the truth was that they were floating on water. The Commission showed little sympathy for the individual bond holder, suggesting that state law and his own intelligence could protect him. But it did see that systemic overcapitalization could shake the confidence of creditors generally and thus result in higher borrowing costs for railroads that legitimately needed the funds.

Perhaps the most interesting thing about the Report is the extraordinary skill with which the Commission transformed this last concern, which was a matter of macro- economic regulation, a matter of ensuring the financial viability of common carriers, into an investor concern and, at the same time, introduced modern financial thought into the regulatory debate.

The Commission recommended that common carriers be obligated to make full financial disclosures to the Interstate Commerce Commission as to the actual funds received upon stated capital. And this was not just for the purpose of discovering monopolistic practices. Managers should do what they wanted in terms of financing, “but they must make it plain to the investor today and to the public tomorrow” how much cash lay behind stated capital.

This conservative form of regulation would eventually serve as the typical federal model as it developed through the Wilson administration. Only publicity was to be required. The

Commission specifically noted that it was financially legitimate for a corporation to offer its existing shareholders stock at a par value below the market value as long as management disclosed that fact. Issuing stock this way is just one way of watering stock, and the Commission recognized financial reality in accepting its utility. Managerial discretion to finance the corporation as it saw fit should not be circumscribed by the federal government; state corporate law should not be superceded. Publicity alone should be the federal remedy. All of a corporation's financial information should be disclosed to the ICC, the ICC should have authority to investigate the corporation in order to determine the accuracy of the information, the ICC itself should have the power to set accounting rules, and corporate directors should disclose all of their personal interests in the corporation.

The second transformative aspect of the Report was its introduction of modern financial thinking into the debate over federal corporate regulation. I noted in the preceding paragraph the Commission's understanding and acceptance of the concept of market value dilution. The public's failure to understand the difference between stock and bonds was another issue the Commission identified as a serious impediment to appropriate finance. This misunderstanding was natural in light of the fact that stock, especially common stock, had only recently come into popular use as an investment vehicle. But it was compounded by the standard practice of identifying common stock at its par value, typically \$100. A bond with a stated par value of \$1,000 represented a promise to repay that money to the bondholder, but common stock with a stated par of \$100 represented no such thing. "It has at best only a historical importance, as showing property was or purported to be worth at time of incorporation." It was par value that created the problem with overcapitalization, not necessarily the overcapitalization itself. If

investors knew the actual value of the corporation's assets and income, they would be able to assess for themselves the worth of the stock. "[T]he investor must depend upon his own intelligence to protect him from loss. The function of the government is to see that correct information is available."

Throughout its report, the Commission sounded the theme of share value based on capitalizing earnings, recognizing that common stockholders couldn't rely upon the promised dividend for their return but rather on the profits actually realized by the roads. This wasn't the same thing as accepting capitalized earnings as a valuation method for the roads' initial capitalizations, but instead an understanding of the financial reality of the limited use of stated capital as an assurance of returns. In thirty brief pages, the Report focused governmental attention on the legitimate factors that determined the value of common stock. Future profit, not historical cost, was the true determinant. It was a lesson that the public would absorb only too well during the 1920s.

The Report was presented to President Taft. Nothing was done. It was under Woodrow Wilson that the first significant steps toward federal securities disclosure laws were taken, and indeed it was during the Wilson administration that securities investing fully became part of the common culture of Americans.



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1. SKLAR, *op. cit.* at \_\_; KOLKO, *op. cit.* at \_\_. Other serious concerns were the impediments the Sherman Act created for organized labor, a widely perceived counterbalance for the worker against the giant corporations. As to state control of minority shareholder issues, the Supreme Court made this abundantly clear in the 19[ ] case of *Santa Fe v. Green*.

2. HR 5170, 61<sup>st</sup> Congress, 1<sup>st</sup> Session.; HR 16360, 61<sup>st</sup> Congress, 2<sup>nd</sup> Session.

3. As with the legislative census in the previous chapter, the data presented here is taken from an examination of the Congressional Record for this entire period. [cite].Banks and insurance companies were already subject to significant state regulation.[Get Winkler article.]

4. H.J. Resolution 94, 58<sup>th</sup> Congress, 2<sup>nd</sup> Session (proposing Constitutional Amendment to prohibit states from incorporating interstate businesses other than banks and insurance companies and giving Congress power to incorporate all corporations doing business in interstate commerce); HR 15792, 58<sup>th</sup> Congress, 3<sup>rd</sup> Session (prohibiting corporate activity designed to destroy competition); HR 473, 59<sup>th</sup> Congress, 1<sup>st</sup> Session (requiring federal incorporation and preventing overcapitalization for businesses engaged in food and fuel supplies. Legislation on this subject was also introduced in 1906, HR 13095, 59<sup>th</sup> Congress, 1<sup>st</sup> Session); HR 9740, 59<sup>th</sup> Congress, First Session (to prevent and punish overcapitalization); Senate Resolution dated December 6, 1905, 59<sup>th</sup> Congress, 1<sup>st</sup> Session (to require ICC to propose to Congress a national incorporation act for railroads); SR 86, January 4, 1905 joint resolution to establish 14 member commission for comprehensive railroad regulation, including of capitalization. The archival

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copy of this resolution has attached to it an explanatory memo by J.W. Mitchell of the Bureau concluding: “It is therefore fair to suspect that the real purpose of the resolution is to prevent action upon the subject-matter by the present Congress.”); . All legislation described in this section can be found in NATIONAL ARCHIVES II, RECORDS GROUP 122, STACK AREA 570, ROW 7, COMPARTMENT 18, SHELF 2, BOX 297, unless otherwise indicated in the endnotes.

<sup>5</sup> The Elkins Act of 1903, Hepburn Act of 1906, and Mann-Elkins Act of 1910, while related to corporate issues, were specialized railroad legislation and oriented toward the particular problems of that industry.

<sup>6</sup> REPORT NO. 3375, HOUSE OF REPRESENTATIVES, 57<sup>TH</sup> CONG., 2D SESS., JAN. 26, 1903, p. 3 (quoting Philander Knox, Pittsburgh Speech), p. 2 (Roosevelt), p. 4 (Industrial Commission), p. 5,6 (Dill).

7. H.R. 17, 57<sup>th</sup> Congress, 1<sup>st</sup> Sess., Dec. 2, 1901.

8. H.R. 17, 57<sup>th</sup> Congress, 2<sup>nd</sup> Sess. Jan. 26, 1903.

9. *Anti-Trust Bill Favored*, New York Times, Jan. 10, 1903, p. 8; *Trust Bill Not Ready*, New York Times, Jan. 16, 1903, p. 4; *Bill Aimed at Trusts*, Washington Post, Jan. 23, 1903, p. 4; *Agreed on a Trust Bill*, Washington Post, Jan. 24, 1903; *Democrats’ Anti-Trust View*, Washington Post, Jan. 30, 1903; **[Misha -copy of minority report]**

10. Mark Roe, for example, relying almost exclusively on the contested work of Richard Hofstadter, identifies the American fear of large aggregations of capital as true in analyzing the legislation that supports his thesis. MARK ROE, STRONG MANAGERS, WEAK OWNERS (PRINCETON 1994). CONGRESSIONAL RECORD, 57<sup>TH</sup> CONGRESS, 2D SESSION, P. 1824 (2/6/03).

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11. *Id.* at 1829 (emphasis added).

12. One congressman did point out that the Republican platform of 1888 had been anti-trust and that the Republican congress passed the Sherman Act. This led to a argument over the fact that the Democrats had appended a free-silver measure to the Sherman Act in an effort to derail it because the Republican platform of 1888, while anti-trust, was also anti-silver.) *Id.* at 1765.

13. *Id.* at 1757,1756.

14. H.R. Report No. 3375, 57<sup>th</sup> Congress, 2d Session, 1/26/03, p. 19,20.

15. Address of President Roosevelt at Pittsburgh, July 4, 1902, Theodore Roosevelt Manuscripts, Library of Congress, Series 5A, Reel 424; *Mr. Roosevelt Eager for Trust Legislation*, New York Times, July 6, 1902, p. 1.

<sup>16</sup> Lawrence E. Mitchell, *From Frustration to Success: The Gentleman-Scholar in Politics*, unpublished manuscript on file with the author. JOHN SPROAT, *THE BEST MEN* [COMPLETE CITE]; TR to Lyman Abbott, Sept. 5, 1903, in III MORRISON, pp. 590-92.

17. A significant conflict in assessing Roosevelt's relationship with Wall Street exists. On the one hand, as I will discuss below, there is correspondence indicating Roosevelt's belief that J.P. Morgan was a particularly strong enemy during the coal strike. On the other hand, one of Roosevelt's earliest and most prominent biographers quotes correspondence from Roosevelt to Morgan expressing gratitude for the latter's help in the strike and placing Morgan as well as

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Root, Schwab, and the Rockefellers behind Morgan in the strike. HENRY F. PRINGLE, THEODORE ROOSEVELT: A BIOGRAPHY (NEW YORK, HARCOURT, BRACE; 1931), p. 264. My reading of the record leads me to conclude that Roosevelt was attempting to ingratiate himself with an angry Wall Street before the mid-term congressional elections of 1902. As I [will][have] discussed, Roosevelt's editing of his trust speeches during this period show a clear attempt to avoid inflammatory or overgeneralized condemnations of trusts, corporations, and businessmen.

Lincoln was Roosevelt's hero. TR to George Otto Trevelyan, March 9, 1905, in IV MORRISON, 1132, and his letters are replete not only with references to Lincoln but also with analogies to Lincoln's struggles during the Civil War with his own fight against the trusts. TR to Lyman Abbott, Sept. 5, 1903, in III MORRISON, pp 590-92.

18. TR, *Speech* delivered at Cincinnati, Ohio, 9/20/02, Roosevelt mss., Series 5A, Reel 418 (typed, hand-revised copy); *see* same speech in I ROOSEVELT, ROOSEVELT POLICY, *op. cit.* at 75.

19. Roosevelt's letters, especially in late 1903, are full of denunciation of the Wall Street interests for their attacks on him as a result of his role in the anthracite coal strike. *See e.g.* TR to Richard Watson Gilder, Nov. 4, 1903, TR to Lyman Abbott, Nov. 5, 1903 both in III MORRISON, pp. 645, 647-8; Margaret V. KNIGHT, PHILANDER CHASE KNOX: CABINET OFFICER, unpublished thesis presented for the degree of Master of Arts, Ohio State University, 1934; TR to J.B. Bishop, Feb. 17, 1903, Roosevelt Mss., Series 2, Reel 330. There is a large amount of correspondence to and from Roosevelt regarding the anthracite coal strike in Roosevelt mss., Series 1, Reel 28, and Series 2, Reel 329. Indeed most of Reel 329, going from early summer to

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late autumn of 1902, is taken up with Roosevelt's correspondence on the coal strike. Letters to some of his most intimate correspondents that illustrate Roosevelt's attitude toward each side and his sense of accomplishment in its resolution include TR to Oswald Villard, Oct. 2, 1902; TR to Marcus A. Hanna, Oct. 3, 1902; TR to Grover Cleveland, Oct. 5, 1902; TR to Robert Bacon, Oct. 5, 1902; TR to Jacob Riis, Oct. 8, 1902; TR to Robert Bacon, Oct. 7, 1902; TR to W.S. Cowles, Oct. 16, 1902 [**Misha – check this letter – addressed to “My Darling Bye” and sent to WS Cowles, TR's brother-in-law. TR referred to his sister Anna as “Bamie.” Could this letter be mixed up?**]; TR to Henry Cabot Lodge, Oct. 17, 1902; TR to William Allen White, Oct. 6, 1902, Roosevelt mss.; TR to Robert Bacon, Oct. 7, 1902, all located in Series 2, Reel 329. Pringle points out that Morgan, Root, Schwab, and Rockefeller, among other conservatives, backed Roosevelt in the strike, anticipating as he did the mid-term elections and the possibility that a mishandled strike could lead to Republican defeat. PRINGLE, *op. cit.* p. 264.

20. *Mr. Littlefield Left Off President's List*, New York Times, August 21, 1902, p. 1; *President Starts on Trip*, New York Times, July 4, 1902, p. 3 [**more papers**] Given Roosevelt's view of the power of the presidency, it certainly seems like that the executive branch was preparing trust legislation. HENRY F. PRINGLE, *THEODORE ROOSEVELT: A BIOGRAPHY* (NEW YORK, HARCOURT, BRACE; 1931), p. 259 (noting Roosevelt's belief that the legislature should carry out the wishes of the executive.); GEORGE E. MOWRY, *THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA, 1900 -1912* (NEW YORK; HARPER & ROW; 1958), p. 130(observing that Roosevelt initiated the *Northern Securities* case and dealt with the coal strike with little or any consultation with Congress and thus antagonizing the conservatives.); TR to Benjamin Barker

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Odell, Aug. 19, 1902, and TR to Winthrop Murray Crane, Aug. 19, 1902, both in III MORRISON, pp. 316-17.

21. *Bitter Fight Ahead for the Speakership*, New York Times, Nov. 7, 1902, p. 5; *Fall of Mr. Littlefield*, New York Times, Feb. 15, 1903, p. 8; **[Misha – news from 7/4 throughout fall. We need to check TR papers]**; *Affairs in America*, Current Literature, Apr. 1903, Vol. 34, no. 4, p.

392. Roosevelt actually pushed the Pittsburgh Chamber of Commerce to invite Knox and to move up their meeting one month earlier (giving them one week's notice) so that Knox could attend and deliver "a speech which I regard as the most important any member of the administration is to deliver." TR to W.H.Keach, Oct. 7, 1902, Roosevelt mss., Series 2, Reel 329.

22. TR to Lawrence Fraser Abbott, February 3, 1903, Roosevelt mss., Series 2, Reel 330.

23. TR to Dr. W.S. Rainsford, Dec. 27, 1902, Roosevelt mss., Series 2, Reel 330.

24. Wm. Laffan to TR, Oct. 7, 1902, Roosevelt mss., Series 1, Reel 30; J.B. Bishop to TR, Oct. 25, 1902, Roosevelt mss., Series 1, Reel 30. **[get source for Hanna quote]**

25. J.C. Shaffer to TR, Jan. 17, 1903, Roosevelt mss., Series 1, Reel 32; J.W. Jenks to TR, Feb. 2, 1903, Roosevelt mss., Series 1, Reel 32.

26. **[Misha– need legislative stuff]**; *Proceedings in Congress*, New York Times, Feb. 4, 1903, p. 4; *Outstrips the House*, Washington Post, Feb. 4, 1903, p. 4; *Still After Trusts*, Feb. 5, 1903, p. 4.

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27. *Trust Bills in House*, The Washington Post, Feb. 6, 1903, p. 4; *Friction over Trust Bills*, New York Times, Feb. 7, 1903, p. 3; *Agree on Bill for Department of Commerce*, The New York Times, Feb. 8, 1903, p. 13. **[Misha – legislative stuff]**

28. *Turned Down by Senate*, The Washington Post, Feb. 28, 1903, p. 4; *Wider in its Scope*, The Washington Post, Feb. 17, 1903, p. 4; *Anit-Rebate Bill Passed*, New York Times, Feb. 14, 1903, p. ; *The Status of Anti-Monopoly Legislation*, The Watchman, Vol. 85, No. 9. Feb. 26, 1903, p. 5; *Not So Bad, Perhaps*, New York Times, Feb. 28, 1903, p. 8; *Trust and the Lottery Decision*, The Independent, Vol. 55, No. 2831, Mar. 5, 1903, p. 574. **[more on attitude toward trust measures]**. Some, like the avid trust-booster, George Gunton, were disgusted by the Republicans and saw the Bureau of Corporations as giving the federal government unprecedented “inquisitorial power.” *The New Anti-Trust Law*, Gunton’s Magazine, Mar. 1903, p. 189.

29. **Misha – we need BIG TIME support for this.** In fact as late as February 3, TR was firmly behind at least the anti-rebate provisions of the Littlefield bill. TR to Lawrence Abbott, February 3, 1903, Roosevelt mss., Series 2, Reel 330; **[more letters]** Herbert Croly, Hanna’s sympathetic (and occasionally fawning) biographer, underscore the importance of Hanna’s role in the Department of Commerce debate and attributes it to his desire that “government might be equipped to serve the industry of the country. . . .” In light of Croly’s own sympathies, it is at least reasonable, if not most plausible, to understand him to be noting Hanna’s support for, rather than regulation of, industry. HERBERT CROLY, MARCUS ALONZO HANNA: HIS LIFE AND WORK

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(HAMDEN, CONN.; ARCHON BOOKS; 1965)(REPRINT OF ORIGINAL COPYRIGHT 1912), pp. 373-74.

This is further supported by the fact that Croly published THE PROMISE OF AMERICAN LIFE only three years before the Hanna biography.

30. Martin W. Oland, *The Life of Knute Nelson* (Minneapolis; The Lund Press; 1926), p.

272.[more]

31. **Cite debate, etc. on Democrats' skepticism; *President Threatens An Extra Session***, *The New York Times*, February 8, 1903, p. 1.

32. *President Threatens An Extra Session*, *The New York Times*, Feb. 8, 1903, p.1; *Warned of Trusts*, *The Washington Post*, Feb. 9, 1903, p. 1; *The President and the Standard Oil Story*, *The New York Times*, Feb. 10, 1903, p. 1; *Anti-Trust Effort Strongly Resisted*, *The Los Angeles Times*, Feb. 8, 1903, p.1;*Treaties and Trust Laws*, *The Independent*, Vol. 55, no. 2829, Feb. 19, 1903, p. 410; *The New Anti-Trust Law*, *Gunton's Magazine*, Mar. 1903, p. 189; B.O. Flower, *The Corruption of Government by the Corporations*, *The Arena*, Vol. 30, No. 1, July 1903, p. 55; *The New Publicity Law*, *Outlook*, Vol. 73, No. 8, Feb. 21 1903.. Roosevelt's story is completely discredited in L. WHITE BUSBEY, *UNCLE JOE CANNON: THE STORY OF A PIONEER AMERICAN* (NEW YORK; HENRY HOLT & CO.; 1927) at 221-223. Busbey identifies the senators receiving telegrams as more than the six noted by Roosevelt, and were Allison, Aldrich (at this point Aldrich was already John D. Rockefeller, Jr.'s father-in-law), Hale, Spooner, Kean, Platt, Depew, Lodge, Elkins and Nelson, none of whom would naturally have been inclined to favor trust legislation in the first place. One of Rockefeller's early biographers, John T. Flynn, notes

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that Roosevelt admitted he had released the information to ensure passage of the legislation.

Flynn does note that “Standard Oil was in arms” over the legislation but neither affirms or denies the existence of the telegrams. In light of the significant inaccuracies in Flynn’s account of the legislation, the question is hardly resolved. JOHN T. FLYNN, *GOD’S GOLD: THE STORY OF ROCKEFELLER AND HIS TIMES* (WESTPORT, CONN.; GREENWOOD PRESS; 1932), p. 381. 2 ALLAN NEVINS, *JOHN D. ROCKEFELLER: THE HEROIC AGE OF AMERICAN ENTERPRISE* (NEW YORK; SCRIBNER’S; 1940), pp. 516-17

33. *Fall of Mr. Littlefield*, *The New York Times*, Feb. 15, 1903, p. 8; *Accept Trust Amendment*, *The New York Times*, Feb. 11, 1903; *Elkins Bill to be Rushed*, *The New York Times*, Feb. 12, 1903; *The Interstate Penalty Not in the Trust Laws*, *The Independent*, Vol. 55, No. 2829, Feb. 19, 1903, p. 456; *Proceedings in Congress*, *New York Times*, Feb. 18, 1903, p. 8; *Trust Bill is Passed*, *Washington Post*, Feb. 8, 1903, p. 5

34. *Fall of Mr. Littlefield*, *ibid.*, *Anti-Rebate Bill Passed*, note \_\_.

35. THORELLI, *op. cit.* at 555; Johnson, *op. cit.*; TR to J.H. Woodard, 10/19/02, in MORISON, *op. cit.* at 356; TR to Lawrence Fraser Abbott, 2/3/02, in MORISON, *op. cit.* at 416. *President McKinley’s Policy*, delivered at the Union League, Philadelphia, Pa., 11/22/02, in THE ROOSEVELT POLICY, *op. cit.* at 107; MERRILL AND MERRILL, *op. cit.* at 142; TR to Nicholas Murray Butler, Aug. 29, 1903, TR to Lyman Abbott, Sept. 5, 1903, TR to Lyman Abbott, Oct. 29, 1903, TR to Carl Schurz, Dec. 24, 1903, all in III MORRISON, pp. 579-80, 590-2, 638-9, 679-80.

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<sup>36</sup> TR to Charles Joseph Bonaparte, Jan. 2, 1908 , Theodore Roosevelt, *Special Message of the President of the United States*, Jan. 31, 1908, both in VI MORRISON, 883, 890,1572, 1590.

<sup>37</sup> The letters can be found in the Bureau's archives at the National Archive Research Center, College Park, Maryland, RG 122, File No. 4085.

38. Proceeding of the National Conference on Trusts and Combinations Under the Auspices of The National Civic Federation, October 22-25, 1907 (New York; The McConnell Press; 1908; Gordon Maurice Jensen, The National Civic Federation, American Business in an Age of Social Change and Social Reform, 1900-1910 (unpublished doctoral dissertation; Princeton University; 1956) at 273-277; SKLAR, *op. cit.*, p. 220.

<sup>39</sup> Roosevelt himself told Low in October 1907 that he didn't see how a Sherman Act amendment would be useful in the absence of federal supervision notifying businesses whether their activities

were lawful. TR to Seth Low, in V MORRISON, pp. 824-825. As work on the bill progressed, Roosevelt increasingly strongly asserted his desire to impose executive control over the regulation of trusts. TR to Jonathan Bourne, Jr., July 8, 1908, TR to Seth Low, Nov. 21, 1908, TR to Seth Low, Nov. 24, 1908, all in VI MORRISON, pp. 1114-15, 1374, 1379; Hearings ON HOUSE BILL 19745 BEFORE SUBCOMMITTEE NO. 3 OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 60TH CONG., 1<sup>ST</sup> SESS. (WASHINGTON; GOV'T. PRINTING OFFICE; 1908), p. 10.

40. Low identified "the men who have been in conference more or less on the subject" in his

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testimony before the judiciary subcommittee holding the Hepburn hearings. HEARINGS ON HOUSE BILL 19745, p. 149 (testimony of Seth Low). To understand Jenks' view it is only necessary to read his questioning of witnesses for the U.S. Industrial Commission, his speech at the Chicago Civic Federations' National Conference on Trusts in 1899, his questioning of witnesses for the Bureau of Corporations, and his book, [ ]. HEARINGS ON HOUSE BILL 19745, p. 79 (testimony of Jeremiah W. Jenks); JENSEN AT 279. SKLAR, *op. cit.*, p. 285-97, gives an excellent account of this process.

41. Gordon Maurice Jensen, *The National Civic Federation: American Business in an Age of Social Change and Social Reform, 1900-1910*, 51-52 (unpublished doctoral dissertation, Princeton University). Sklar at 205-07, 228-253.

42. H. R. 19745 [complete cite]

43. The story of the Hepburn bill's drafting and Teddy Roosevelt's involvement in it is so well told in SKLAR at 228-253 and sufficiently off my topic that interested readers should consult that work. *See also* KOLKO, 133-138.

<sup>44</sup> HEARINGS ON HOUSE BILL 19745, pp. 91-92 (testimony of Jeremiah W. Jenks).

<sup>45</sup> HEARINGS ON HOUSE BILL 19745, pp. 584, 606-07 (testimony of Jeremiah W. Jenks).

46. House Committee on the Judiciary, *Hearings on House Bill 19745, An Act to Regulate Commerce, Etc.*, March 23, 1908 [get proper cite]; TR to Lyman Abbott, April 23, 1906, in V MORRISON, pp. 217-18; TR to Charles Bonaparte, Jan. 2, 1908, TR to George Cabot Lee, Jr., Jan. 13, 1908, Theodore Roosevelt, *Special Message of the President*, Jan. 31, 1908, all in VI

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MORISON, pp. 883, 886, 906, 1584.

<sup>47</sup> State blue sky laws began to develop around 1911. While they evolved over the course of the decade, their principal target was bucket shop brokers peddling corporate junk. Their method of regulation, most prominently a commission that determined the merits of the securities, was conceptually different from federal regulation and didn't play an important role in the federal debate. Many fine works exist on blue sky laws, and I don't address the subject in this book.

48. The basic story of the Panic of 1907 is too well-known to justify resort entirely to primary sources. The chronology of the story in the text is principally drawn from KOLKO, CONSERVATISM, AT 153-158; JAMES GRANT, MONEY OF THE MIND: BORROWING AND LENDING IN AMERICA FROM THE CIVIL WAR TO MICHAEL MILKEN (NEW YORK, FARRAR STRAUS GIROUX, 1992, 113-116; III MARKHAM, FINANCIAL HISTORY OF THE UNITED STATES, 29-36; [ ]; MARTIN S. FRIDSON, IT WAS A VERY GOOD YEAR: EXTRAORDINARY MOMENTS IN STOCK MARKET HISTORY (NEW YORK; JOHN WILEY & SONS; 1998), CHAPTER ONE.

<sup>49</sup> The Taft administration sued U.S. Steel under the Sherman Act, in part because of its acquisition of Tennessee Coal. Roosevelt, in an editorial in the Outlook, attacked the suit and Taft's approach to trust regulation, while at the same time defending his approval of the Tennessee Coal acquisition. Theodore Roosevelt, *The Trusts, The People, and the Square Deal*, *op. cit.*

50. New York State, Report: The Governor's Committee on Speculation in Securities and Commodities, June 7, 1909

<sup>51</sup> JOSEPH LOGSDON, HORACE WHITE: NINETEENTH CENTURY LIBERAL (WESTPORT, CONN.;

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GREENWOOD PUB. CORP.; 1971); OSWALD GARRISON VILLARD, *FIGHTING YEARS: MEMOIRS OF A LIBERAL EDITOR* (NEW YORK; HARCOURT BRACE; 1939), pp. 125-26; MICHAEL WRESZIN, *OSWALD GARRISON VILLARD: PACIFIST AT WAR* (BLOOMINGTON, IND.; INDIANA UNIVERSITY PRESS; 1965), p. 22, 25.

<sup>52</sup> IX AND X DICTIONARY OF AMERICAN BIOGRAPHY (NEW YORK; CHARLES SCRIBNER'S SONS; 1932 AND 1933).

53. Hughes Committee Report at 5.

54. Hughes Committee Report at 9.

55. I THE COLLECTED WORKS OF WILLIAM HOWARD TAFT (EDITED WITH COMMENTARY BY DAVID H. BURTON AND A.E. CAMPBELL)(ATHENS, OHIO, OHIO UNIVERSITY PRESS; 2001), pp. 66, 70-71. Taft took a more sanguine view of the panic, for which the Roosevelt administration received its share of blame, than most. While he acknowledged the role of speculation and the irresponsibility of the trust companies, his principal explanation of the panic was an exhaustion of world capital in the context of an inflexible currency system. William Howard Taft, *The Panic of 1907*, Boston, Mass., Dec. 30, 1907, in I TAFT, pp. 230 -232.

56. Recent Criticism of the Federal Judiciary delivered before the American Bar Association, Detroit, Michigan, August 28, 1895, I THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 294, 300-01.

<sup>57</sup> DONALD F. ANDERSON, *WILLIAM HOWARD TAFT: A CONSERVATIVE'S CONCEPTION OF THE PRESIDENCY* (ITHACA; CORNELL UNIV. PRESS; 1973), pp. 51-2; William Howard Taft, *A Republican Congress and Administration, and their Work from 1904*

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to 1906, Boise City, Idaho, Nov. 3, 1906, in I TAFT, pp. 167, 168-9; William Howard Taft, *Mr. Bryan's Claim to the Roosevelt Policies*, Sandusky Ohio, Sept. 8, 1908, in II THE COLLECTED WORKS OF WILLIAM HOWARD TAFT (DAVID H. BURTON, GENERAL EDITOR)(ATHENS, OH., OHIO UNIVERSITY PRESS; 2001), pp. 42, 43.

<sup>58</sup> William Howard Taft, *The Legislative Policies of the Present Administration*, Columbus, Ohio, Aug. 19, 1907, in I TAFT, pp. 190, 200-01. Taft, *Panic of 1907*, *op. cit.* p. 238; Taft, *Mr. Bryan's Claim*, *op. cit.* pp. 42, 50.

<sup>59</sup> Taft's administration brought 90 antitrust lawsuits during his four-year term in contrast to 54 brought by Roosevelt during his seven years in office. DAVID H. BURTON, WILLIAM HOWARD TAFT: IN THE PUBLIC SERVICE (MALABAR, FLA.; ROBERT E. KREIGER; 1986) p. 74; William Howard Taft, *Interstate Commerce and Anti-Trust Laws and Federal Incorporation*, Washington, D.C., Jan. 7, 1910, in III TAFT, pp. 408, 422-23; William Howard Taft, *Annual Message: Part I*, The White House, Dec. 5, 1911, in IV THE COLLECTED WORKS OF WILLIAM HOWARD TAFT (DAVID H. BURTON, GENERAL EDITOR)(ATHENS, OH.; OHIO UNIVERSITY PRESS; 2002), pp. 159, 170; *Taft's Bill For Federal Rule of the Trusts*, New York Times, Jan.13, 1910, p. 1; H.R. 20142, 61<sup>ST</sup> CONG., 2D SESS., FEB. 7, 1910.

<sup>60</sup> William Howard Taft, *The Tariff, Income, and Corporation Taxes*, Portland, Oregon, Oct. 2, 1909, in III THE COLLECTED WORKS OF WILLIAM HOWARD TAFT (DAVID H. BURTON, GENERAL EDITOR)(ATHENS, OH; OHIO UNIV. PRESS; 2002), p. 237, 245; William Howard Taft, *Corporation and Income Taxes*, Denver, Colorado, Sept. 21, 1909, in III TAFT, pp. 194, 201.

<sup>61</sup>. BURTON, *op. cit.*, p. 57.

62. III Schwartz at 827 – get actual congressional debates.

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<sup>63</sup> TR to the Interstate Commerce Commission, March 15, 1907, in V MORISON, 622-623.

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67. Report of the Railroad Securities commission to the President and Letter of the President Transmitting the Report to the Congress, House of Representatives, Doc. No. 256, 62<sup>nd</sup> Congress, 2<sup>nd</sup> Session, December 11, 1911.

68. W. G. Langworthy Taylor, *Hadley's "Economics"*, J. Pol. Sci., Vol. 4, No. 4 (Sept. 1896) 467-493, 468

<sup>69</sup> Taft's move away from Roosevelt's ideal of centralized federal regulation is chronicled in SKLAR, *op. cit.*, pp. 285-309, 364-382.

70. Morris Hadley, Arthur Twining Hadley (New Haven; Yale; 1948), at 79 (quoting Max Lerner in the *Encyclopedia of Social Sciences*), 60, 182-83; Arthur T. Hadley, *Railroad Transportation: It's History and its Laws* (New York; Putnam's Sons; 1885), p.49.

71. Hadley at 188-191.