PRESIDENTS, PARTIES, AND THE STATE

A Party System Perspective on Democratic Regulatory Choice, 1884–1936

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The Democratic National Committee (DNC) relied extensively on Mugwump organization in the swing states during the campaign. Ultimately, a separate committee was formed by the NECRI to coordinate activities with Senator Arthur Pue Gorman of Maryland, Cleveland's campaign manager and chairman of the DNC's executive committee. Mugwumps also helped mobilize traditionally Republican businessmen in New York behind Grover Cleveland. With the NECRI's assistance, for example, Oscar S. Straus organized the Cleveland and Hendricks Merchants' and Business Men's Association in New York City, which also coordinated its activities with Gorman and the Democrats. As Straus later recalled, "We organized a parade and marched forty thousand strong from lower Broadway to Thirty-Fourth Street. It was the first time business men [sic] had ever been organized along political lines." In the end, Straus would decline an offer of political office as reward for services rendered, an act that both typified Mugwump propriety and served to differentiate these issue-oriented reformers from mere party hacks.

When the campaign was over I was told by a member of the National Committee that if there was any political office to which I aspired, the swing state, efforts were made, partially with the aid of NECRI money, to visit "county fairs where the farmers congregated in good numbers." Public meetings in many of the larger towns were also organized. More important still, the state committee had its own election ballots printed, with the names of state and local Republican candidates and Democratic presidential electors already affixed, and had them "distributed by mail or otherwise, to every Republican voter in the state." Without the availability of pre-split tickets, Mugwump organizers feared that "many independent voters might otherwise be prevented, by political or other pressure, from voting in accordance with their convictions." In New York, local organizations were established in Brooklyn, Buffalo, and Rochester, as well as "in most of the smaller cities, and in very many of the towns." While in New Jersey, where the NECRI was troubled by the apathy of the state Democratic organization, the Mugwump state committee was credited with providing the margin of victory. Here, as in Connecticut, it printed and circulated split party election ballots, "and in Hudson County, particularly, special arrangements were made to keep the polls supplied." In addition, with the support of the NECRI, the local committee hired Pinkerton detectives to help minimize the impact of party corruption at the polling places. Finally, in Indiana the state committee took out an advertising column in the Indianapolis Evening News and started up its own weekly publication, The Freeman, which proved sufficiently successful that it was continued beyond the election. Report of the National Executive Committee of Republicans and Independents, 7–12. Ohio posed its own problem, because the state presidential election was held in October, and political wisdom held that a large majority in that state provided substantial momentum to the victorious party in the November races. For this reason, the NECRI was "compelled ... against its will" to invest scarce resources in that state (11).

37. Straus, Under Four Administrations, 40.

Mugwumps, Agrarians, and the Railroad Problem: The Structure of Regulatory Preferences

Mugwumps and Railroad Regulation?

Mugwump reform commitments in the areas of civil service, the tariff, and currency matters have long been documented. However, the empirical relationship between Mugwumps and the resolution of the railroad problem remains considerably more tenuous. The standard literature leaves us poorly positioned to link these genteel reformers to the gritty
business world from which the demand for railroad regulation emanated. Mugwumps in the traditional frame are principally a sociological category. In Richard Hofstader's words, Mugwumps were an "old family, college-educated class" with "deep ancestral roots" — upper- and middle-class Yankee Protestants for whom cultural elitism, status deprivation, and a penchant for professionalism put them at odds with the boss-ridden, corruption-filled, democratic world of nineteenth-century American politics.\(^{39}\) The gap between Mugwumps and railroad regulation grows wider still when we consider that standard historical accounts depict these patrician reformers as adherents of laissez-faire economics and thus as ideological opponents of state economic intervention. To historians such as Sidney Fine and John G. Sproat, the ideological conservatism of these Gilded Age liberal reformers rejected out of hand "all suggestions that the state restrict competition or impose 'unnatural' fetters on the free play of commodity prices and transportation rates."\(^{40}\) In their renditions, Mugwumps emerge as staunch opponents of a national railroad commission with strong regulatory powers. To be sure, this characterization of Mugwumps is not without a factual basis. Indeed a leading exponent of this view was The Nation, a premier Mugwump periodical. The Nation's editor E. L. Godkin had occasion to write that Western Granger legislation was "spoliation as flagrant as any ever proposed by Karl Marx or Ben Butler." Nor did time alter Godkin's views, labeling the Interstate Commerce Act of 1887 "a piece of State socialism."\(^{41}\)

One need not reject out of hand these traditional accounts of the Mugwumps to take issue with some of their specific conclusions. For example, in Building a New American State, Stephen Skowronek offers a more complicated twist on these nineteenth-century reformers, and in doing so, has produced a more nuanced account of Mugwump regulatory thought. Skowronek distinguishes between "political Mugwumps" and "economic Mugwumps." Like the Mugwumps depicted in Sproat and Fine, political Mugwumps "tended to cling dogmatically to laissez-faire doctrines." But economic Mugwumps, Skowronek observes, "would use the state in a positive way to compensate for the market's most manifest deficiencies."\(^{42}\) Skowronek identifies several prominent economic Mugwumps, among them economists Henry Carter Adams and Arthur Twinning Hadley, jurist Thomas M. Cooley, Union Pacific President Charles Francis Adams, Jr., and the lawyer Simon Sterne. From their divergent occupational positions, these men converged on a similar solution to the railroad problem, one that "looked to experts working as administrative authorities in government."

National administrative regulation under the guidance of enlightened professionals promised to mediate economic conflicts, to stabilize a vital industry, and, in the process, to circumvent the unfettered plutocracy and the chaotic market competition emerging out of our past economic policy.\(^{43}\) In the end, however, Skowronek locates economic Mugwumps at the periphery in the legislative struggle over railroad regulation. In his analysis, state-building Mugwumps are confined to a narrow and nascent circle of social scientists and railroad experts — too little, too late, and too uninfluential — leaving it still to seem unlikely that Mugwump regulatory preferences directly fed into the framing of the Interstate Commerce Act.

My interest is strictly in those individuals who left the Republican party in 1884 and organized politically on behalf of the Democratic presidential candidate Grover Cleveland. And both the identity of these Mugwumps and their attitudes toward railroad regulation can be further refined. Most prominently, there existed a sizeable group of prosperous and pragmatic business Mugwumps who helped feed the demand for a national railroad commission. Drawn from the ranks of commercial wholesalers and larger manufacturers, these individuals were in on the ground floor of the Republican revolt against James G. Blaine in 1884. With similar energy, they joined the debate over economic regulation on the side of state intervention. How large was this business contingent within the Mugwump movement? No one can say for certain. But, as Table 2.2 makes clear, businessmen made up 40 percent of all those attending the National Convention of Republicans and Independents, which met in New York City on July 22, 1884. And among members of the New York delegation, business Mugwumps numbered almost one-half.\(^{44}\)

Business Mugwumps differed from economic Mugwumps in their occupational profile and, as a consequence, in their relationship to the market and the railroad problem. With few exceptions, economic Mugwumps did not derive their livelihood from the day-to-day operation of ongoing,

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42. Skowronek, Building a New American State, 133.
43. Ibid., 138.
44. McFarland, Mugwumps, Morals, and Politics, 24, 25.
Table 2.2. Mugwump Occupational Profiles (1884 Samples)

<table>
<thead>
<tr>
<th>Occupations</th>
<th>New York City Mugwumps</th>
<th>National Sample Mugwumps</th>
</tr>
</thead>
<tbody>
<tr>
<td>Businessmen</td>
<td>48%</td>
<td>40%</td>
</tr>
<tr>
<td>Lawyers</td>
<td>26</td>
<td>28</td>
</tr>
<tr>
<td>Educators</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Publishing</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Doctors</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td>Clergymen</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>(N)</td>
<td>(422)</td>
<td>(660)</td>
</tr>
</tbody>
</table>


daily business lives that drew business Mugwumps into the public debate on the railroad problem.

Jackson S. Schultz of New York embodied most of the characteristics of the business Mugwump.45 Schultz was an officer of the American Public Health Association, as well as sanitary commissioner for New York State, and he participated actively in the organized opposition to Blaine in 1884. He was also a prosperous leather-goods manufacturer (with a book on the subject to his credit), an owner of several Pennsylvania lumber mills, and a prominent member of the New York Chamber of Commerce. It was as a representative of the New York Chamber of Commerce that Schultz testified before the Senate Select Committee on Interstate Commerce on May 22, 1885. Before the committee, Schultz spoke at length on the problems facing businessmen and of the need for uniform, orderly, and responsible railroad practices. He described in detail the ways in which the various personal and locational discriminations meted out by the railroads worked hardships on entrepreneurs like himself. Discriminatory short-haul pricing by the Pennsylvania Central Railroad, Schultz calculated, had cost him roughly three-hundred thousand dollars over the course of several years. Schultz told the committee of being forced to pay $600 to $700 to ship pine lumber 400 miles to Philadelphia, while 1,000 miles outside Philadelphia, Michigan producers were paying between $1.00 and $1.50 for an equivalent load.46

A property owner himself, Schultz was cautious regarding legislated remedies that might inflict undue hardship on railroad stockholders. In his mind the goal was simply to secure principled railroad behavior and, therefore, uniformity of treatment. Toward this end, Schultz offered numerous recommendations. Among them, Schultz believed the creation of a federal railroad commission to be the most salutary step Congress could take. Such a commission, he suggested, should be armed with ample powers of publicity. More important, it should be required to prosecute all violations of the law, and generally enforce good order on the interstate railway system.47

45. I have identified Schultz from a master list of New York City Mugwumps listed as part of Appendix A in McFarland, Mugwumps, Morals, and Politics, 191.


47. Schultz further suggested that Congress require the railroads to publish their rates on all freight classifications and, once published, to adhere to them. He was also adamant about the need for a prohibition on the practice of charging more for a short haul than a long haul “under similar circumstances.” Again Schultz conceded the need to balance interests, and he reasoned that the goal of uniformity might leave room for
Mugwumps and Agrarians before the Select Committee on Interstate Commerce

Jackson Schultz was only one of several Mugwumps to testify before the Senate Select Committee on Interstate Commerce. The committee was organized in the final days of the Forty-eighth Congress (1883–5) to collect nationwide testimony on the interstate railroad problem and report back remedial legislation to the Senate. Because economic and business Mugwumps addressed the committee, the records offer a rare glimpse into Mugwump regulatory attitudes in the period immediately after Grover Cleveland’s presidential inauguration (March 4, 1885) and before the deliberations of the Forty-ninth Congress, which would pass the ICA.

This testimony is important for several reasons. First, it helps to clarify areas of both convergence and dispute between economic and business Mugwumps on the question of railroad regulation. At the same time, it serves to highlight the differences between Mugwump and agrarian approaches to the railroad problem, as well as politically crucial points of convergence. To Democratic party leaders looking to reconcile the policy preferences of their agrarian base with a recently cultivated electoral college ally, reliable information on the regulatory preferences of each group was valuable. Finally, this testimony is important because it reveals strong parallels between business Mugwump preferences and the final policy recommendations of the Senate Select Committee.

The Ontology of the Railroad Problem. Both economic and business Mugwumps took a structural view of the railroad problem: for each, the trouble lay with the perverse incentives arising from the economics of railroading. The root of the problem lay in the high ratio of fixed-to-variable costs in the railroad industry and the intense competition for available traffic. Cost structure and ruinous competition at the terminal

the railroads to charge as much for a short haul as for a long haul. The New York business Mugwump opposed giving a federal commission the authority to set maximum and minimum rates, nor did he speak to the issue of pooling. On Jackson S. Schultz, see McFarland, Mugwumps, Morals, and Politics, 25, 43.

48. I have used two sources to identify Mugwumps who testified before the Senate Select Committee on Interstate Commerce. The first is McFarland, Mugwumps, Morals, and Politics, Appendix A. Secondly, I relied upon The New York Times coverage of the Mugwump agitation in 1884, reporting that provided a number of names and their states of origin. Nevertheless, I am under no illusion that I have been able to identify every Mugwump who came before the Select Committee to comment on the railroad problem.

49. See, for example, the testimony of Francis B. Reeves (a wholesale grocer in Philadelphia) and A. C. Bartlett (a wholesale hardware dealer from Chicago), U.S. Congress, Senate, Select Committee on Interstate Commerce. Report. 49th Cong., 1st sess., 1886, S. Rept. 46, pt. 2: 448, 752. See also the testimony of Jackson S. Shultz, cited in footnote 53.
good or great harm, depending merely on royal whimsy.\textsuperscript{10} Similarly, a Nebraska farmer warned of “a power growing up in this country that to-day [sic] dominates the sovereignty of the people, and that any such power is inconsistent with the sovereignty of the people.”\textsuperscript{11} The animosity was such that one Minnesota farmer was prompted to observe:

There is nothing more dangerous than this sentiment that is springing up about the country against these large corporations. The people are absolutely feeling that their rights are being jeopardized; and there is an idea taking possession of them that unless there are some steps taken to mitigate or regulate the conditions of things in some way a feeling will spring up that will be dangerous at times. If there were a failure of the crops the people might become violent.\textsuperscript{12}

In sum, where Mugwumps held impersonal market incentives accountable for the patterns of injustice incurred, agrarians saw a failure of corporate ethics and personal responsibility on the part of railroad decision makers. The concentration of market power in the hands of these corporate actors had allowed them to subvert the moderating effects of competition on railroad pricing policy. Thus shorn of the externally imposed discipline and accountability of the market, the roads were left free to prey on small producers and merchants dependent on cheap transportation for their survival, subject only to the dictates of a flagging moral conscience.

\textbf{Competition and Cooperation.} Such understandings framed the broad parameters of the regulatory debate and distinguished Mugwumps from agrarian interpretations of the railroad problem. But, economic Mugwumps and business Mugwumps did not agree on all aspects of the railroad problem. Nowhere was this more apparent than in the disagreement that emerged over the beneficial effects of competition in the railroad industry. While most Mugwumps could agree that ruinous competition was disastrous to business interests, a split emerged nevertheless over the issue of railroad pooling, a practice designed to supplant railroad competition with institutionalized forms of cooperation.\textsuperscript{13} Economic Mugwumps, like railroad expert and Union Pacific Railroad

President Charles Francis Adams, Jr., associated railroad competition with “the wildest discrimination and utmost individual hardship.” Under questioning, Adams elaborated:

How the business community, under the full working of railroad competition, can carry on its affairs I cannot understand. I had not been able to understand how it could do it before I became president of a railroad, and I do not understand now. The business man never knows what railroad rates are going to be at other places, or at different times. He cannot sit down and say “I can count upon such a transportation rate for such a period of time, and make my arrangements accordingly.” He has to say, “I cannot tell to-day [sic] what the transportation rate is going to be tomorrow, either for me or my competitor.” This must be just so long as uncontrolled competition exists. It cannot be avoided.\textsuperscript{14}

In a similar vein, Yale economist and railroad expert Arthur Twining Hadley insisted that no nation had ever succeeded in eliminating discrimination without at the same time suppressing competition. This was simply “a historic fact,” Hadley told the Select Committee in New York City. The question was therefore a simple one: “Shall we have poolings or discriminations?”\textsuperscript{15} For both Adams and Hadley the question was easily resolved in favor of legally enforceable pooling contracts.

Business Mugwumps, on the other hand, espoused a more complicated (indeed, almost contradictory) position on railroad competition. At times, these differences pushed business Mugwumps surprisingly close to the agrarian position, which held price competition to be the master regulatory principle. This position was well expressed by the president of the New York Produce Exchange, who was clear in his opposition to extreme forms of market competition. He observed: “We cannot think that anybody, either the carrier or the public, is benefitted by any system which compels a ruinous loss, and the public and the railways equally suffer by the present ruinous war.” Yet this business Mugwump was also opposed to the artificial cessation of competition through legalized pooling arrangements. In his words, “[w]e are great believers in the ‘survival of the fittest.’”\textsuperscript{16} Similarly, a wholesale grocer and Philadelphia Mugwump expressed his commitment to competition and his opposition to railroad combinations. Asked by the Select Committee to clarify his use of the word “combination,” this Mugwump replied: “I mean a combination, for example, between the railroad companies to maintain pooling arrangements. I believe in free, open competition.” Yet, like

\textsuperscript{11} Ibid., 1173.
\textsuperscript{12} Ibid., 1140.
\textsuperscript{13} In the early 1880s the New York merchant community strongly supported the Reagan bill with its ban on pooling. Time had softened this opposition, but their testimony before the Senate Select Committee reveals a lingering distrust of the practice. On these early demands, see Benson, Merchants, Farmers, and Railroads.
\textsuperscript{15} Ibid., 194.  
\textsuperscript{16} Ibid., 216.
many business Mugwumps, the wholesaler’s position on competition and combination proved ultimately more ambiguous. This was apparent when he later asserted his interest in preventing only “unjust combination” through national legislation.57

Perhaps most illuminating is the testimony of John D. Kernan, the chairman of the New York Railroad Commission. As we will see in more detail, though Kernan was not himself a businessman, his testimony is important because of his strong ties with both the New York business community and President-elect Grover Cleveland. Indeed, some of the credit for swinging New York businessmen behind the regulatory commission idea can be traced to the success of the New York Commission. Before the Senate Select Committee, Kernan voiced his strong opposition to the legalisation of railroad pools, even as he conceded their effectiveness in restraining excess competition. The rationale for the commissioner’s opposition was clear and politically resonant, and it is worth reproducing at length:

The “pool” of railroads would determine what are reasonable rates, and what is and what is not unjust discrimination. An impartial observer can concede all that is claimed by the advocates of “pools” and still he cannot shut his eyes to the fact that, as at present constituted, they absolutely, and without appeal to any tribunal, determine what are their duties and what are the transportation rights of the citizen. Every decision made by the “pool” may be right, in fact, compelled, as asserted, by competitive and other considerations, and yet be a wrong upon the citizen, because it is made by an interested party who is engaged in disputing the claim presented. The submission pretended by railroads in debate to the corrective influences of public opinion, the good-will of shippers, &c., is somewhat exaggerated. This is beside the question under present discussion, for whatever the influences are about an arbiter it is a strange anomaly for a contestant to occupy that position.58

In sum, there was vocal opposition to railroad pooling practices within the business Mugwump community. As we will see, opposition to pooling was an important point of commonality between New York Mugwumps and agrarian Democrats, one that could be used to advantage by party leaders looking to reconcile the demands of the agrarian wing with the push for a national regulatory commission.

Long Haul–Short Haul Discriminations. The practice of charging shippers more to move their freight a short distance than a long distance engendered as acrimonious a conflict as any to flare up around the rail-

road problem. As the railroads explained it, the trouble was excessive competition at the terminal points. Fierce competition for customers at these urban centers resulted in the frantic slashing of freight rates, often below the actual cost of doing business. In order to make up for the revenue lost to cutthroat competition, railroads compensated by raising prices over those portions of their lines where they faced no competition. To the railroads, long haul–short haul discriminations injected a needed flexibility into the system, and its maintenance was critical to continued financial solvency. To agrarians, on the other hand, it epitomized the ruthless character of railroad monopolies. It was oppression pure and simple. Long haul–short haul discrimination raised the cost of doing business for the “little guy,” who could least afford it, and spread financial ruin throughout rural and small-town America. Farmers and small businessmen demanded an immediate and unconditional end to the practice.

Business Mugwumps were also more likely than economic Mugwumps to support a long haul–short haul law, though one with provisions limited in scope and flexible in application, not absolute or ironclad like the stringent agrarian proposals. As one business Mugwump put it, a long haul–short haul rule should not be “made inflexible and applicable to all points . . . ; that is, not making it compulsory by legislation.”59 In his judgment, it was unwise “to make that an unyielding and invariable rule,” because cheap through rates allowed businessmen access to distant product and consumer markets that would cease to be profitable if railroads were prohibited from subsidizing low terminal rates with higher charges on the noncompetitive points.

Asserting a desire to balance railroad interests against their own, business Mugwumps suggested that a ban against charging more for a short haul than a long haul need not preclude equivalent charges for the two. Here lay an important difference between business Mugwumps and agrarian reformers. Business Mugwumps were more likely to be larger and more efficient producers or merchants. They had confidence in their ability to successfully compete in the market if transportation costs could only be equalized (and therefore neutralized as a competitive factor). Sometimes these businessmen moved their operations (or sought to move them) just outside a terminal city in order to exploit locational advantages like cheap power sources or a fresh food supply. But under existing railroad pricing policies, such a decision subjected them to steep short-haul rates and priced them out of their market.

By contrast, agrarians generally advocated pro rata transportation

charges—rates calculated on the basis of distance traveled. As such, they insisted that a prohibition on long haul–short haul discrimination include a ban on the charging of equal rates for unequal distances. As agrarians were more often than not small producers and merchants, such restrictions would allow them to compete more effectively with large competitors shipping from distant markets. To Mugwumps, on the other hand, the agrarian long haul–short haul proposal was little more than an effort to subsidize small, uncompetitive producers at the expense of the large and efficient enterprise, while to railroads it spelled bankruptcy, pure and simple.  

A National Railroad Commission. Both economic and business Mugwumps agreed on the need for a national railroad commission. However, they frequently differed over the scope of its authority and power. All could agree that a commission with information-gathering and publicity functions was in the public interest. But before the Select Committee, economic Mugwumps were inclined to limit the powers of a national commission to these basic “sunshine” functions, modeling their proposals on the New York, Massachusetts, and Iowa commissions. Economic Mugwumps like Arthur T. Hadley and Charles Francis Adams, Jr., were the most prominent supporters of a national commission with vigorous information-gathering powers, but without the power to enforce its judgments. Adams, in particular, was pessimistic about the good that could be accomplished by a commission with regulatory powers. Rather, he preferred “a commission of men... whose business it would be to observe this question much as a physician would observe

the progress of disease.” Similarly, Hadley judged the granting of judicial and executive powers to a national commission “a somewhat hazardous experiment.” Such power, the railroad expert suggested, would only impede frank communication between the roads and the commission, with railroad officials fearing that sensitive information offered in good faith might be used against them in court. Still, unlike Adams, Hadley ultimately conceded the possibility that a stronger, regulatory commission might be required. “I should not say that I disbelieved in it[,]” Hadley cautiously admitted. “It might be worth trying.”

Business Mugwumps were quicker than economic Mugwumps to confer regulatory power upon the commission. While no Mugwump testifying before the committee advocated a commission with rate-fixing powers, a number of business Mugwumps argued that an effective commission required the authority to resolve rate disputes, to enforce its rulings in court, and to have its findings constitute prima facie evidence in judicial proceedings. Along these lines, one Chicago business Mugwump was convinced that “a commission could... be of any great service unless it had considerable power,” lending his support to a commission with adjudicatory powers. A New York business Mugwump, on the other hand, insisted that a national commission be granted the authority to initiate prosecutions. In sum, the proposals of business Mugwumps would draw the commission more deeply in the determination of just rates, transfer the onus of prosecutorial initiative and its related costs from shippers and producers to the commission, and place the burden of proof on railroads to justify their rates in court—

60. Benson finds that the division over pro-rata rates effectively ended the antimonopoly alliance for railroad regulation between New York merchants and upstate farmers. See Benson, Merchants, Farmers and Railroad Regulation, 198. Business Mugwumps were also more likely to be involved in moving large quantities of goods in a single shipment, which typically brought preferential rates. For this reason, they were also opposed to any law that banned volume discounts as an unjust discrimination.

61. The New York railroad expert and economic Mugwump Simon Sterne was a notable exception. Sterne strongly argued before the Select Committee for a national railroad commission with the power to adjudicate rate disputes and enforce its decisions in court. Sterne’s position might be explained by his long-standing relationship with the New York business community. For many years Sterne had acted as attorney for the New York Board of Trade and Transportation. Thus, Sterne’s views represent a hybrid of those held by both business and economic Mugwumps. Evidence of this is the fact that Sterne broke with business Mugwumps on the question of pooling, a practice he strongly endorsed. U.S. Congress. Senate. Select Committee on Interstate Commerce. Report. 49th Cong., 1st sess., 1886. S. Rept. 46, pt. 2: 52–89. On the rationale and operation of the sunshine commission, see McCraw, Prophets of Regulation, ch. 1.


63. Ibid., 1205.

64. The University of Pennsylvania political economist Edmund J. James seems to have been alone among Mugwumps in suggesting that commission rulings be final, without the possibility of appeal. The Select Committee appears to have quickly rejected such a possibility, worried about the constitutionality of the proposal. Indeed, on a number of issues James was the most radical Mugwump to testify before the committee. U.S. Congress. Senate. Select Committee on Interstate Commerce. Report. 49th Cong., 1st sess., 1886. S. Rept. 46, pt. 2: 493–506, 500.

65. Ibid., 735.

66. Ibid., 566–7. A tension in the minds of some business Mugwumps was apparent, between the desire to limit the powers of a national commission and the desire to solve the railroad problem. Thus the Mugwump businessman Francis B. Reeves of Philadelphia preferred an information-gathering commission to a regulatory commission, while also supporting a flexible long haul–short haul law. The inconsistency in Reeves’s thinking is clear, as the allowance for exceptions to the long haul–short haul rule presumed some ongoing authority with the power to identify those exceptions.
elements that became the mainstay of the legislation drawn up by the Select Committee as well as the final Interstate Commerce Act.

While differences can be found among agrarians, these reformers typically opposed the creation of a national railroad commission. State commissions, they believed, had worked to the benefit of the railroads, whose power and influence allowed them to dominate commission actions. What was needed, agrarians believed, was simple and unambiguous legislation stating the rights of shippers and producers and prohibiting in no uncertain terms the worst abuses of the railroads. Asked by the Select Committee whether he endorsed regulation by commission or by legislation, a Nebraska farmer recently turned banker replied:

I will say by legislation, plain and direct. As the commission system was rejected by the people of this state at the polls last fall, for the reason that it does not work to the advantage of the producers, and as it has proved itself a jug-handle system, all on one side, and that side the corporations, I am firm in the opinion that other legislation should be tried.67

M. A. Fulton, a representative of the National Grange and country merchant from Hudson, Wisconsin, reiterated this point in the following exchange:

MR. FULTON: We want an absolute law, if you can consistently give it to us, and we do not want our justice strained through a commission, because our experience with a commission . . . is that they are not only worthless, but worse than worthless.

THE CHAIRMAN: You consider them an absolute obstruction?

MR. FULTON: Yes, sir; we consider them an absolute obstruction. We want it enforced by the ordinary courts and juries of the country. Give us a plain law, and fix it so that the local courts and juries can understand it.68

As these passages make clear, agrarians demanded an “absolute law,” and typically opposed statutory language qualifying railroad obligations – for example, the prohibition of discriminations against persons and locales “under substantially similar circumstances and conditions.” Even if warranted on policy grounds, such qualifications injected interpretative and technical ambiguities in the heart of the law that allowed talented and well-financed corporation lawyers to subvert the statute’s intent and control the construction of its legal meaning in court. The resulting time, money, and expertise required to rebut railroad counsels in court would virtually nullify the legal remedies ostensibly gained by agrarians. For this reason they demanded unqualified or ironclad statutory language in the crafting of legislative rules governing railroad behavior, such as that contained in the agrarian-styled Reagan bill.

New York Mugwump Model Legislation and the Recommendations of the Select Committee on Interstate Commerce

The Senate Select Committee on Interstate Commerce held its last hearing in Atlanta, Georgia, on November 18, 1885. With the start of the Forty-ninth Congress less than a month away, the Select Committee set about preparing its final report and drafting statutory recommendations. For the purposes of this book, what is perhaps most notable about these recommendations is their conformity to model legislation earlier submitted to the committee by New York Railroad Commission chairman John D. Kernan. Both Kernan’s presence before the committee and his model bill are significant for several reasons. First, Kernan’s commission oversaw railroad activity in the most important state in electoral college politics, and in its short existence its actions had done much to swing business support behind commission-style regulation. Indeed, prior to his appointment as commission chairman, Kernan had served as legal counsel for the Merchants, Manufacturers and Farmers’ Union, an organization opposed to the creation of the New York commission. Now, however, Kernan urged the Senate committee to adopt a national commission more powerful than his own. The New York commission possessed only sunshine powers, and Kernan’s judgment that such powers were inadequate to solve the interstate railroad problem paralleled the judgment of the business Mugwumps who testified before the committee. Secondly, Kernan had been appointed to head the New York commission by then-governor Grover Cleveland. Kernan had been Cleveland’s choice for the Democratic slot of the bipartisan institution, an appointment that met with Mugwump approval both because Kernan was not a career politician (though he was active in local party politics) and because his appointment had been opposed by antimonopolists.69 Finally, in at least some quarters, President Cleveland was rumored to have qualms regarding the constitutionality of a national regulatory

68. Ibid., 1284.
69. Benson, Merchants, Farmers and Railroads, 188–9; Nevins, Grover Cleveland: A Study in Courage, 114; and New York Times, January 11, 1883, 4, 10. Nevins notes that Kernan and Republican Cleveland appointee W. E. Rogers were known only for their technical qualifications.” Kernan was also a New York delegate to the 1884 Democratic convention in Chicago, where he actively worked on behalf of Cleveland’s candidacy. Lynch, Grover Cleveland: A Man Four-Squared, 173.
commission. Thus, legislation bearing the mark of his own commission appointee might stand a better chance of obtaining final executive approval.

Because the Interstate Commerce Act would draw so heavily from the Senate Select Committee bill, the close correspondence between the latter and the provisions of the Kernan bill presents our first tangible linkage between New York Mugwumps and the creation of the ICC. A side-by-side comparison of the Kernan bill and the Select Committee bill is provided in Table 2.3. It details the direct parallels between these two regulatory proposals. Here I will simply summarize the provisions of the Kernan bill, which de facto will also serve as an introduction to the Select Committee legislation introduced at the start of the Forty-ninth Congress. It will also help begin to lay the groundwork for the analysis of legislative politics provided in the next section.

Kernan’s recommendations tracked the Select Committee bill on most of its essential points. It would subject all railroad charges to the common law requirement that they be just and reasonable, with no undue preference or advantage afforded an individual, firm or corporation, or locality. Rebates, drawbacks, and other direct or indirect forms of personal discrimination were to be made illegal, subject to a maximum fine of $1,000. In addition, all railroad schedules detailing freight classifications, destinations, rates, and shipment regulations were required to be posted at least five days before going into effect. They would remain in effect until such time as they were superseded by a new schedule, posted according to the same rules. Kernan’s model legislation also provided for a five-member Board of Interstate Commerce Commissioners with the power to conduct investigations; issue subpoenas and examine subpoenaed witnesses; examine books, records, and agreements of the railroads; and punish for contempt in proceedings before it. The failure to comply with commission requests was punishable by a maximum $5,000 fine and/or one year in prison.

But Kernan’s commission was no mere sunshine agency. Upon complaint, the commission was required to conduct investigations.

70. Illustrative of this is the letter from Chicago Tribune editor Joseph Medill to Senator Shelby M. Cullom, chairman of the Select Committee on Interstate Commerce, immediately upon President Cleveland’s signing of the Interstate Commerce Act. Medill’s comments imply that neither the President’s personal nor constitutional predilections alone could account for his embrace of a federal regulatory commission. Rather, he believed a more decidedly political calculus underlay Cleveland’s acquiescence to expanded federal power. To the Chicago editor the interpretation was quite clear: “His signing it shows that he is a candidate for a second term. That was the text.” Joseph E. Medill to Shelby Cullom (February 6, 1887). In Cullom, Fifty Years of Public Service, 440.
Table 2.3. (cont.)

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<th>The Select Committee Bill</th>
<th>The Kernan Bill</th>
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<td>or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and ... if said common carrier shall neglect or refuse, within the time specified, to desist from such violation of the law or to make reparation for the injury done, in compliance with the report and notice of the Commission as aforesaid, it shall be the duty of the Commission to forthwith certify the fact of such neglect or refusal, and forward a copy of its report and such certificate to the district attorney of the United States for the judicial district in which such violation of law occurred, for redress and punishment as in this act provided.</td>
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... to the circuit court of the United States for such district, for, and it shall be the duty of such court to grant, an order for such common carrier to show cause why it should not be enjoined and restrained against the continuance of such violation, and for such other order and relief in the premises as may be just and proper. Upon the service and return of such order to show cause, and notice to such parties as may be deemed necessary said court shall proceed as speedily and summarily as possible to hear and determine the matters in controversy; and whenever said court shall be of opinion that such common carrier has done as aforesaid, or is doing any act in violation of the provisions of this act as in said report set forth, it shall then be the duty of said court forthwith to issue a writ of injunction requiring such common carrier to desist and cease from such violation of the provisions of this act. Such court may enforce obedience to any such injunction, order, or decree by any such common carrier, or any officer, agent, or employee thereof, by fine, proceedings for contempt, and all other means within its lawful jurisdiction, sitting as a court of equity. ... Such court may, in its discretion, award or deny costs to any party to such proceedings. In any case where the court shall adjudge that the violation of the provisions of this act by any such common carrier has been willfully continued after the expiration of said twenty days, or after the expiration of the time fixed as aforesaid by said board, the court may award to any party injured such a gross sum, by way of costs, as will reimburse all his costs, charges, expenses, counsel fees, and disbursements to be paid by such carrier, and shall also impose a penalty not exceeding $5,000, and not exceeding $100 per day for each day that such violation shall continue after the expiration of the time aforesaid.

SEC. 13. That it shall be the duty of any district attorney to whom said Commission may forward its report and certificate ... to forthwith bring suit, in the circuit court of the United States in the judicial district wherein such violation occurred, on behalf and in the name of the person or persons injured, against such common carrier, for the recovery of damages for such injury as may have been sustained by the injured party; and if on the trial of said cause judgment shall be rendered against said common carrier, the court may allow a reasonable attorney's fee to the district attorney for prosecuting said cause, to be taxed as part of the costs; and in case of failure to recover, the United States shall pay the necessary costs of suit.

SEC. 18. The district attorneys of the United States in their respective districts shall at the request of said commission act for and represent it in all suits and proceedings before the courts of the United States.

call witnesses, take evidence, and enter judgments concerning alleged violations of the law. The commission was further empowered to issue cease-and-desist orders where a railroad failed to conform to the commission's ruling and to institute court proceedings through the U.S. district attorneys to bring railroad behavior into line with the law. The
objections to these regulatory powers, Kernan insisted, were “futile.” Courts and juries were incompetent to sift through and weigh the numerous and intricate facts of a railroad rate dispute. Moreover, shippers and producers would be spared the burden of information gathering (most of which was in the possession of the railroads) as well as prohibitive legal fees. Finally, in all court proceedings, the commission’s findings were to constitute prima facie evidence “as to each and every fact found in all courts and places.” “It seems idle,” Kernan told the Select Committee, “for a commission to spend weeks in accumulating evidence in order to ascertain facts and then to have its findings of no avail to any one [sic] in court.”

The only significant difference between the Kernan bill and the bill of the Select Committee was the latter’s inclusion of a long haul–short haul provision (neither included a prohibition on pooling). Even this provision, however, conformed to recommendations made by the New York commission chairman before the Select Committee. In his testimony, Kernan had advocated a long haul–short haul law modeled on the conservative Massachusetts law, one which would prohibit charging more “from one station to another a higher rate than it charges at the same time from that same original point of departure to a station at a greater distance in the same direction.” Like Kernan’s recommendation and Massachusetts law, Section 4 of the Select Committee bill read:

That it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or property subject to the provisions of this act for a shorter than for a longer distance over the same line, in the same direction, and from the same original point of departure.

Under both the Select Committee bill and Kernan’s recommendations, the railroad commission was empowered to make exceptions to this rule. Kernan opposed an absolute ban on the practice of subsidizing long-haul shipments through higher charges on local freight – an ironclad prohibition found in the House Reagan bill. In his judgment, “To pass a statute saying that they shall not charge more for a short than a long distance on any railroad would be an utter failure and would work vast injustice.”

With the introduction of the Select Committee’s bill into the Senate, business Mugwump regulatory preferences became a constituent part of legislative deliberation on the railroad problem, vying for political supremacy with popular agrarian legislation sponsored in the House of Representatives by Texas Democrat John H. Reagan. It was a clash of regulatory prescriptions that would pit Democratic party leaders in both chambers against their rank and file. Democratic leaders took an active role in moving the commission legislation through Congress. As will be argued in the next section, in so doing they hoped to demonstrate to their new and pivotal Mugwump allies the capacity of the Democratic party for responsible reform. In a legislative environment that afforded leaders only limited leverage over committee chairs and an assertive rank and file, the success of party leaders was far from certain.

Democratic Party Leadership and the Politics of Responsible Reform: Toward an Independent Regulatory Commission

Railroad Regulation and the Structure of Legislative Preferences

With this section my analysis moves sharply from the demand side of the politics of railroad regulation to its supply side: from the world of railroads, farmers, and Mugwumps to that of rank-and-file legislators and congressional party elites. The regulatory preferences of agrarians and business Mugwumps, as expressed before hearings of the Select Committee on Interstate Commerce, found their legislative expression in rival congressional bills. In the House, the agrarian railroad solution was pressed forward by John H. Reagan, chairman of the House Committee on Commerce, and backed broadly by rank-and-file members of the congressional Democratic party. The Reagan bill articulated clear antimonopoly principles: a moral code of railroad conduct to help level the economic playing field for farmers and small-town dwellers whose business survival was threatened by railroads’ monopoly power at points in between the terminal centers. In unqualified language, the Reagan bill forbade a host of personal discriminations, including rebates and drawbacks. Similarly, it prohibited discrimination between places – the charging of a higher freight rate for a short haul than a long haul. Most threatening from the railroad’s point of view, it also banned the practice of pooling freight and revenue, the most effective way yet found by railroad managers to stabilize prices and lessen competitive pressures. Finally, reflecting the traditional antistatism of the Democratic party, the Reagan bill avoided the creation of new federal institutions and the
expansion of administrative power. Rather, upon complaint, it would fall to the existing system of courts – and ideally the more responsive state courts – to enforce the statutory will of the people’s representatives.

By comparison, the Mugwump commission solution found its champion in the Senate Select Committee on Interstate Commerce and, more generally, among Republican legislators in both houses of Congress. The Select Committee bill dismissed the agrarian interpretation of the railroad problem. In their eyes, the issue was neither monopolistic greed nor agrarian malfeasance. Rather, as business Mugwumps had themselves maintained, the problem was the competitive structure of a poorly regulated market for transportation services. Like the Reagan bill, the Select Committee legislation banned both person and place discrimination. But the Select Committee bill differed from the Reagan bill in several particulars. First, it lacked an antipooling provision, arguably the central antimonopoly provision in the Reagan bill. Second, it contained a much more narrowly drawn long haul–short haul provision, a subject we will consider in detail later in the analysis. Finally, and most critically, it created an independent body of experts, the Interstate Commerce Commission, with the authority to exempt the railroads from congressionally proscribed behavior and craft a body of administrative law based solely on the judgments of the commissioners.

It was The New York Times, a preeminent Mugwump newspaper, that most closely drew the connection between responsible governing, the resolution of the railroad problem, and continued Democratic electoral success. As we saw at the opening of this chapter, in the weeks immediately following the 1884 election, action in the House of Representatives quickened on the railroad question and the prospects for the passage of the agrarian Reagan bill appeared to brighten. Floor activity on this legislation provided the occasion for the Times to clarify Mugwump expectations regarding Democratic leadership and the railroad problem. The paper identified what it termed two “conflicting tendencies at work within the bosom of the Democratic party.” The first tendency was characteristic of the party’s rank and file – supporters of the Reagan bill – the “unthinking mass of the party” as it derisively labeled the Democratic base. This element represented the antimonopolist and antistatist element of the party. They believed that “railroads were grinding monoplies” and “could be regulated in the minutest particulars by Congress.” They also believed in “the unconstitutionality of commissions.”

The second tendency was embodied in Democrats like Representative Abram Hewitt of Brooklyn. Like Cleveland, Hewitt was a native New Yorker and popular among Mugwumps for his uncompromising stances on civil service reform, free trade, and the gold standard. He was also a businessman and a manufacturer who “recognize[d] the responsibility of his party for the use it makes of its power.” And like the Times, Hewitt was a vocal opponent of the Reagan bill, decrying “the madness of trying to run the vast, complex, and delicate business of the railways by specific provisions of law.” The Mugwump paper acknowledged the injustices that shippers and producers experienced at the hands of the railroads, but it was adamant that the Reagan bill was bad law and would only create additional difficulties if enacted. The paper concluded by observing that it was “precisely the reckless tendency” of the antimonopolist wing of the party that “for years kept [the Democratic party] out of power.” That party now found itself with a mandate to govern. If it was “to reap any lasting fruits of that victory,” it counseled, “it [would] have to be very careful how it follows the lead of its demagogues.”

As my discussion of the Public Utility Holding Company Act in Chapter 4 will show, where electoral incentives favored the pursuit of agrarian antimonopoly values, Democratic party leaders have acted aggressively on their behalf, even at the risk of incurring the wrath of large economic actors and a sizeable portion of their own party base. For Gilded Age Democrats, however, national electoral incentives pulled party leaders in an altogether different direction, effectively foreclosing on the possibility that party leaders might see in the agrarian Reagan plan a politically feasible solution to the country’s developmental problems. Those same electoral incentives simultaneously enhanced the political acceptability of the regulatory commission scheme among Democratic leaders, given its strong base of support among an important swing constituency in the competitive states of the industrial Northeast. As noted earlier, the Democratic party was consigned to out-party status in presidential politics except as it could incorporate the voters of the industrial Northeast – and especially New York state – into its national coalition. These national electoral incentives operated effectively to limit the political appeal of the Reagan alternative to party leaders with one eye on the next presidential campaign. And on crucial questions – commissions versus courts, competition versus cooperation,

75. Indeed Reagan was so popular with antimonopolists that he was queried about his availability to be the Antimonopoly party’s vice-presidential candidate in 1884. He declined, citing his commitment to working for reform from within the Democratic party. Gerald Nash, ed. “Selections from the Reagan Papers: The Butler-Reagan Ticket of 1884.”
76. The New York Times, December 20, 1884, 4. 77. Ibid.
delegation or retention of legislative power — swing-state business Mugwumps brought to the Democratic party preferences very much at odds with those of the party’s agrarian base.

**The Sources of Party Leadership on the Railroad Question**

Perhaps the most striking aspect of this first case study of party leadership and regulatory choice is the absence of any discernible role played by Grover Cleveland, the incumbent Democratic president. In the politics of railroad regulation, presidential coalescional interests would be attended to almost exclusively by congressional party leaders. In large part, this political context reflected the centrality of both party and legislature to the basic functioning of national governance in the Gilded Age. Indeed, the publication of Woodrow Wilson’s *Congressional Government* in 1885 and Lord James Bryce’s *The American Commonwealth* in 1888 virtually bookended the first administration of Grover Cleveland. Together, these classic studies of nineteenth-century American government depict a legislative process dominated by congressional committees and a presidential office sapped of talent and energy by the electoral needs of vibrant national party organizations. But while capturing essential aspects of Gilded Age governing institutions, these two books are wide of the mark in certain crucial respects. Most important to the analysis that follows, Wilson’s description of Congress understated the growing influence of party leaders — especially the Speaker — as a counterpoise to congressional committees and as bearers of national party interests. Similarly, though of less importance to my argument, Bryce missed the latent capacity for policy leadership in the Gilded Age presidency. In addition to general tendencies of the period, the president’s marginal role in the politics of the ICA also reflected the fledgling status of the Cleveland administration at the time railroad regulation was under consideration, not to mention Cleveland’s surprising lack of prior experience as a political leader. But while Cleveland may have been peripheral to the politics of the ICA, we will nonetheless observe important linkages connecting the presidency and national party interests to congressional party elites. The point to be made in these opening remarks is simply that the expenditure of political energy to retain the presidency came first and foremost from congressional party leaders, not from reelection-minded presidents.

Democratic leaders faced their biggest hurdle to the passage of commission legislation in the House of Representatives. For even though Democrats controlled the chamber in the Forty-ninth Congress (1885–7), antimonopoly agrarianism was ascendant within the party, at least on the issue of railroad reform. Democrat John H. Reagan remained the chairman of the House Commerce Committee and his agrarian-styled regulatory bill continued to command rank-and-file majority support on the chamber floor. Senate Democratic leaders faced a challenge substantially less daunting than that which confronted House party leaders. Republicans in the Forty-ninth Congress once again controlled the upper chamber and, as we saw at the outset of this chapter, the GOP was now on record supporting the commission approach to railroad regulation. Still, Mugwumps’ emphasis on character and integrity and their circumscribed notions of responsible reform meant that the conduct of the Democratic party as a party would be scrutinized along with the chamber’s regulatory output. And because the Senate is a more individualistic institution than the House, it provided agrarian Democrats with substantial opportunities to embarrass or otherwise stymie commission legislation from the floor. For this reason it was imperative that Democratic leaders signal their interest in commission legislation early on and use their influence to contain agrarian floor activity as the Senate took up the Select Committee’s regulatory proposals.

The remainder of this section analyzes Democratic party leadership — first in the House and then in the Senate — against agrarian railroad measures and on behalf of an independent railroad commission. The following analysis seeks to organize a large quantity of information, with material spanning two Congresses, both House and Senate chambers, and a number of roll-call votes. Because the analysis is organized analytically rather than chronologically, Table 2.4 assembles information for quick reference, so that readers may refer back to it as needed.

**Party Leadership in the House of Representatives**

The Democratic party in the Forty-ninth Congress was predominately a party of the South and the West, regions of the country where antimonopoly agrarianism thrived. A little over 60 percent of House Democrats elected in 1884 came from districts located in the southern, Great Plains, and far-western states (for Republicans the corresponding figure was 30 percent). By contrast, only 19 percent of House Democrats hailed from districts located in the industrial Northeast (the Republican figure

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79. Indicative of this is the fact that the Democratic executive would assume a more prominent place in the politics of tariff reform toward the end of his first administration, while Cleveland’s role during his second administration in orchestrating the repeal of the Sherman Silver Purchase Act in 1893 would help open the eyes of the academic Woodrow Wilson to the potentialities of vigorous presidential leadership.
“Free and Unrestricted Competition”

Interpreting the Sherman Anti-Trust Act:
From Trans-Missouri to the “Rule of Reason”

With this section, we move from a consideration of electoral and party developments after 1896, to an examination of the regulatory attitudes manifested by agrarian Democrats on the so-called trust problem. The place to begin this discussion is with the Sherman Anti-Trust Act of 1890, the nation’s first attempt to deal with the problems of business monopoly and anticompetitive trading practices in interstate commerce. In particular, agrarian preferences and political activity evoked in reaction to the federal antitrust law’s interpretive history in the Supreme Court. By 1911, after more than twenty years of construction in the federal courts, the Sherman Act’s prohibition against “every contract, combination . . . or conspiracy in restraint of trade or commerce” had acquired a settled meaning at law. The Supreme Court had repeatedly held that its provisions were to be read literally. In the Court’s judgment, Congress, exercising its plenary power in the field of interstate commerce, had declared a national policy of “free and unrestricted competition.” As such, every direct restraint on competition in interstate commerce was illegal, whether or not such restraint had previously been considered reasonable at common law.

Agrarian Democrats were staunchly committed to the Court’s construction of the Sherman Act and its underlying vision of the American political economy. For by this interpretation, Congress was held to have placed the weight of its authority in support of a policy of decentralized economic activity and property ownership. The seminal case was United States v Trans-Missouri Freight Association, in which Justice Rufus W. Peckham first delineated the policy intent behind the Sherman Act and its rule of enforced competition. Speaking for the majority of the Court, Peckham set the Sherman Act against combinations of capital whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold; the effect being to drive out of business all the small dealers in the commodity, and to render the public subject to the decision of the combination as to what price shall be paid for the article.

Warming to his point, Peckham continued:


In this light, it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country, by depriving it of the services of a large number of small but independent dealers, who were familiar with the business, and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in; having no voice in shaping the business policy of the company, and bound to obey orders issued by others.

The settled meaning of federal antitrust law after Trans-Missouri and just prior to the Supreme Court’s “rule of reason” decisions was well stated by E. Henry Lacombe, Circuit Court judge for the Southern District of New York and author of its majority opinion in United States v American Tobacco Company. The case involved the merger of American Tobacco with former competitors Continental Tobacco and Consolidated Tobacco. In the Court’s opinion, it was irrelevant to inquire whether or not the merger had had a detrimental effect on prices or production. Equally irrelevant was a discussion of any economic efficiencies resulting from the merger. The only issue was whether or not the merger directly restrained competition between rivals. With evident dissatisfaction, Judge Lacombe reaffirmed the binding authority of the Trans-Missouri rule and held against the American Tobacco Company. The Sherman Act, in the judge’s determination, was “no longer open to construction in the inferior federal courts.” So bound, Lacombe simply invoked the per se rule and the national economic policy of “free and unrestricted competition” that informed the Sherman Act’s prohibition against every direct restraint of trade.

40. Ibid., 290, 324. Had this indeed been the policy intent behind the Sherman Act, Justice Oliver Wendell Holmes concluded, “I should regard calling such a law a regulation of commerce a mere pretense. It would be an attempt to reconstruct society.” United States v Northern Securities Company (1904) 193 U.S. 197 (Justice Holmes, dissenting).

41. United States v American Tobacco Company et al. (1908) 164 F. 700.

42. The phrase “free and unrestricted competition” recurs repeatedly throughout Justice Peckham’s opinion in Trans-Missouri. It was a phrase seized on by agrarian Democrats, and, as will be discussed in detail at a later point in the book, it was language that would reappear in the initial antitrust legislation introduced by the Democrats in 1914.
Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers however small.\textsuperscript{43}

Lacombe acknowledged the “revolutionary” impact of the statute as construed, adding parenthetically that such an impact did not necessarily prejudice the construction. Indeed, he continued:

When we remember the circumstances under which the act was passed, the popular prejudice against large aggregations of capital, and the loud outcry against combinations which might in one way or another interfere to suppress or check the full, free, and wholly unrestrained competition which was assumed, rightly or wrongly, to be the very “life of trade,” it would not be surprising to find that Congress had responded to what seemed to be the wishes of a large part, if not the majority, of the community, and that it intended to secure such competition against the operation of natural laws [emphasis added].\textsuperscript{44}

The act was revolutionary, Lacombe continued, because it swept aside the ancient common law category of reasonable restraint.

The act may be termed revolutionary, because, before its passage, the courts had recognized a “restraint of trade” which was held not to be unfair, but permissible, although it operated in some measure to restrict competition. By insensible degrees, under the operation of many causes, business, manufacturing and trading alike, has more and more developed a tendency toward larger and larger aggregations of capital and more extensive combinations of individual enterprise. It is contended that, under existing conditions, in that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured, and industrial progress assured. But every aggregation of individuals or corporations, former independent, immediately upon its formation terminates an existing competition, whether or not some other competition may subsequently arise. The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test: Two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not.\textsuperscript{45}

\textsuperscript{43} United States v American Tobacco Company et al. (1908) 164 F. 700, 701.

\textsuperscript{44} Ibid.

\textsuperscript{45} Ibid., 700, 701-2.

When, therefore, the Supreme Court announced its momentous “rule of reason” decisions in 1911, it fractured the legal status quo that had grown up around the antitrust law since 1896.\textsuperscript{46} At once, the meaning of the Sherman Act was transformed. Its literal language was now to be read in the “light of reason,” its legal sanctions applicable to “unreasonable” or “undue” restraints of trade only. For those opposed to the “rule of reason” decisions, as most agrarian Democrats were, the dissenting opinions of Justice John Marshall Harlan provided a potent rallying cry. For this reason, it is worth considering Harlan’s remarks in some detail.

To Harlan, the meaning of the Sherman Act was crystal clear. He was indignant at the insinuation of Chief Justice White that earlier Court majorities had “groped about in the darkness” without the aid of the “light of reason.”\textsuperscript{47} As Harlan reminded his fellow justices, in Trans-Missouri and again in United States v Joint Traffic Association the Court had explicitly confronted the question whether the Sherman Act, properly construed, made special allowance for reasonable restraints of trade. Indeed, arguments in support of this interpretation had been presented by the most able corporation counsel in the country. And in each instance, the Court rejected such arguments as contrary to the “plain meaning” of the statute, declining to amend an act of Congress by judicial construction. “One thing is certain,” Harlan wrote, “the ‘rule of reason,’ to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.”

I beg to say that, in my judgment, the majority, in the former cases, were guided by the “rule of reason”; for it may be assumed that they knew quite as well as others what the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the “light of reason,” and felt and said, time and again, that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word “unreasonable” or “undue” in the act of Congress would be judicial legislation.\textsuperscript{48}

\textsuperscript{46} The “rule of reason” decisions are United States v Standard Oil Company (1911) 221 U.S. 1; United States v American Tobacco Company et al. (1911) 221 U.S. 106.

\textsuperscript{47} United States v American Tobacco Company et al. (1911) 221 U.S. 106, 192 (Justice Harlan, dissenting).

\textsuperscript{48} Ibid.
Quoting Justice Peckham's majority opinion in Trans-Missouri, Harlan asserted what he considered to be a cardinal rule of statutory construction: when Congress speaks directly, the "public policy of the government is to be found in its statutes." And in Harlan's judgment—a judgment consistent with fifteen years of Sherman Act rulings—Congress had spoken directly through the Sherman Act.

The men who were in the congress [sic] of the United States at that time knew what the common law was about the restraint of trade. They knew what restraints of trade at common law were lawful and what were unlawful. But congress said: "The surest way to protect interstate commerce is not to start upon any distinctions at all as to the kinds of trade; 'every' contract in restraint of trade among the states is hereby declared to be illegal."49

Thus, by inserting the word "unreasonable" into the text of the Sherman Act's prohibition against every restraint of trade, Harlan wrote, the Court, by judicial legislation, "has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the government." In Standard Oil, Harlan wrote:

[At] every session of Congress since the decision of 1896, the lawmaking branch of the government, with full knowledge of that decision, has refused to change the policy it had declared, or to so amend the act of 1890 as to except from its operation contracts, combinations, and trusts that reasonably restrain interstate commerce.50

In American Tobacco, Harlan reiterated this point:

By every conceivable form of expression, the majority, in the Trans-Missouri and Joint Traffic Cases, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which has been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say; what as I think, it plainly did not intend to say; and what, since the passage of the act, it has explicitly refused to say. It has steadfastly refused to amend the act so as to tolerate a restraint of interstate commerce

49. This passage is excerpted from the written transcript of Justice Harlan's oral dissent, delivered in the Standard Oil case, 15 May 1911. That transcript can be found in The Commoner, May 26, 1911, 3.
50. United States v Standard Oil Company (1911) 221 U.S. 1, 92 (Justice Harlan, dissenting).

The Federal Trade Commission Act of 1914

even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the government has exclusive cognizance.51

Harlan concluded his opinion in the Standard Oil case on a ominous note:

After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the people of the United States—the source of all national power—shall, in their own time, upon reflection and through the legislative department of the government, require a change of that policy. . . . The supreme law of the land, which is binding alike upon all—Presidents, Congresses, the courts and the people—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids any restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all.52

The Democratic Response to the "Rule of Reason"

The proposition that the "rule of reason" decisions expressed a cross-class, cross-party consensus on the legitimacy of reasonable restraint blinds us to the shockwaves these rulings sent through the Democratic party. Indeed, it is difficult to exaggerate the alarm voiced by agrarian Democrats in the wake of these decisions. Representative William C. Adamson of Georgia, for one, attacked the constitutionality of the Court's ruling. As chairman of the House Interstate Commerce Committee—the committee charged with drafting trade commission legislation in that chamber in 1914—Adamson surmised that the late Mark Hanna's long-sought goal to distinguish legally between "good" and "bad" trusts was at long last a reality.

52. United States v Standard Oil Company (1911) 221 U.S. 1, 106 (Justice Harlan, dissenting).
The supreme court [sic] of the United States has no constitutional power to amend the Sherman law by writing into that statute the word "unreasonable." The trusts tried time and time again to amend the law in that way, by the insertion of that one word, but failed.

That was Mark Hanna’s plan; he wanted the law to distinguish between good trusts and bad trusts, but congress [sic] declined to make the distinction. Now the supreme court takes on itself the power of legislation, which was expressly reserved to congress under the constitution, and proceeds to write into the law what congress refused to consider.35

Democrats reacted quickly to the Standard Oil ruling, announced on May 15, 1911, by introducing legislation in Congress to reinstate the Trans-Missouri prohibition against all restraints on competition. Indeed, in the two days following the Court’s decision, a total of seven bills were introduced to expunge the rule of reason from the Sherman Act, six written by Democrats, mostly from the southern and western portions of the country and all outside the industrial Northeast. All sought specifically to clarify the first section’s prohibition against “every contract, combination... or conspiracy in restraint” of interstate commerce or trade. For example, one such bill, introduced by Senator James A. Reed of Missouri, a member of the Senate Interstate Commerce Committee, read: “Every such contract, combination, or conspiracy is hereby declared to be unreasonable and illegal, and shall be so considered, taken, and held in all proceedings at law and in equity.”44 Another, sponsored by Senator Thomas P. Gore of Oklahoma, also a member of the Senate Interstate Commerce Committee, sought to ensure that “no contract, combination, or conspiracy of whatever kind or character in restraint of [interstate] trade or commerce... shall be construed or adjudged to be reasonable.”55 Still another was introduced by Senator Charles Culberson of Texas, chairman of the Senate Judiciary Committee in 1914 and in charge of shepherding the Clayton Act to passage on the floor of the upper chamber. In the wake of the rule-of-reason decisions, Culberson predicted a dramatic drop in the number of successful criminal prosecutions involving trusts, as future antitrust cases would turn on the “supposed intent of the conspirators rather than [being] con-

53. The Commoner, May 26, 1911, 6. Like Adamson, William P. Hamilton, editor of the Wall Street Journal, believed that the Supreme Court had acted unconstitutionally, violating the separation of powers and “[reading] into the Sherman act an amendment that never could have passed the Congress of the United States.” Nevertheless, Hamilton counseled businessmen not to admonish the Court for its constitutional transgressions: “Why? Because you could never have got to pass through the Congress of the United States such a word as ‘unreasonable’ in the Sherman law, and you have got to get it into the law in order to save the business of the United States.” The New York Times, May 18, 1911, 3.
54. 62d Cong., 1st sess., S.2374. 55. Ibid., S.2433.

fixed to the issue of the actual existence of combination of monopoly.”56 His bill sought to remedy this situation, its first section stating: “Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce... OF WHATEVER CHARACTER, is hereby declared illegal.”57

But it was the Democratic party’s titular leader, William Jennings Bryan, who was called upon most often to express his party’s outrage at the Supreme Court decisions. In no uncertain terms, the headline in Bryan’s political organ, The Commoner, announced to its agrarian readership: “The Trusts Have Won.”58 Bryan accused the Court of straining to rewrite the antitrust law. “The real-meat of the decision is to be found in the amendment of the anti-trust law to meet the demands of the trusts,” the three-time Democratic presidential nominee wrote.

For several years the trusts have been demanding the very amendment that the court [sic] has read into the law. There will be rejoicing in Wall street [sic], but there will be sadness in the homes of the masses who are now compelled to begin a campaign for the enactment of an anti-trust law so clear and explicit that the court can not repeal it by construction. ... Now let those, republicans and democrats [sic], who are opposed to trusts, set to work to overcome the decision by legislation.59

Similarly, in an article written for the North American Review, Bryan characterized the rule-of-reason decisions as “revolutionary,” telling the periodical’s largely northeastern readership: “We may as well recognize that we now have no criminal law against the trusts.”60

In crime the intent is everything, and the accused is entitled to the benefit of every reasonable doubt. What trust magnate could be convicted of criminal intent (with every reasonable doubt resolved in his favor) to unreasonably restrain trade when there is no legal definition of unreasonable restraint.61

As well, Bryan predicted that the “rule-of-reason” decisions would hobble civil proceedings brought under the antitrust law. For now that the Court had decided that each case must be decided upon the facts of the individual case, court rulings largely would be inapplicable in subsequent cases.62

56. The Commoner, June 21, 1911, 2.
57. 62d Cong., 1st sess., S.2375 (emphasis in original).
58. The Commoner, May 26, 1911, 1.
59. Ibid.
62. Bryan’s analysis parallels the adverse report made in 1909 by Senator Nelson on behalf of the Senate Judiciary Committee, in reference to a bill to amend the antitrust act to allow reasonable restraints of trade. In that report Nelson stated: “The anti-trust act makes it a criminal offense to violate the law, and provides a punishment both by fine
Interviewed for *The Outlook*, and republished in *The Commoner* in early 1912, Bryan again reiterated his opposition to the rule of reason. Again he maintained the near impossibility of enforcing the antitrust law as construed by the White majority, expressing his belief that Congress "should at once declare by specific legislation that any attempt at restraint of trade should be considered unreasonable." Byran held that, "Such a law would repair the damage that the supreme court [sic] decision has done to the antitrust law."63

Bryan urged his agrarian readership in *The Commoner* to carefully study the opinions of Justice John Marshall Harlan in the *Standard Oil* and *American Tobacco* cases. Like Harlan, Bryan believed the Court had gone out of its way to reinterpret the antitrust law. The majority opinion in each case was pure obiter dicta – involving language and distinctions unnecessary to the decision of either case. Echoing Harlan's remarks, Bryan maintained that "in order to find the defendant companies guilty it was not necessary for the Court to discuss the question of reasonableness or unreasonableness. [...]" That is to say, in both the *Standard Oil* and *American Tobacco* cases the defendants would have been found guilty under either interpretation of the Sherman Act.64 Picking up on and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable is unreasonable would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variability and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts, and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In the case of the *People v. Sheldon* [(1893) 139 N.Y. 264], Chief Justice Andrews remarked: "[I]f agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing. [...] To amend the antitrust act, as suggested by this bill, would be to entirely emasculate it, and for all practical purposes render it nugatory as a remedial statute. Criminal prosecutions would not lie, and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain, and highly remedial. It practically covers the field of Federal jurisdiction, and is in every respect a model law. To destroy or undermine it at the present juncture, when combinations are on the increase, and appear to be as obvious as ever of the rights of the public, would be a calamity."65

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65. Ibid., 18.
66. Ibid., 17. Bryan's call for a legislative repeal of the rule of reason can also be found in *The Commoner*, issues May 26, 1911, December 1, 1911, and in an interview with C. M. Harger for the *Outlook*, reprinted in *The Commoner*, January 12, 1912, 2.

Within the Democratic party, agreement was widespread that the restoration of the Sherman Act was, in itself, an insufficient remedy to the trust problem. Indeed, agrarian Democrats had advocated their own federal license system – the crucial antitrust plank of the Democrats' 1908 platform – for corporations engaged in interstate trade. Under the Democratic licensing scheme, any corporation in control of at least 25 percent of the product it dealt in would be required to obtain a federal license to engage in interstate trade. The purpose of the license system, Bryan explained, was to protect the public from watered stock and to ensure that such corporations sold "to all customers in all parts of the country on the same terms, after making due allowance for cost of transportation." More striking – because more threatening to big business – corporations controlling "more than 50 per cent of the total amount of any product consumed in the United States" would be denied a license, this as a way of checking the process of corporate concentration and maintaining a minimum of competition.

*The Commoner*, May 26, 1911, 1; ibid., December 1, 1911, 1.
to the rule of reason, responding with legislative efforts to repeal its legal standing. That said, however, as our party system perspective would lead us to expect, the 1912 presidential election clearly complicated the Democratic party’s stance towards reasonable restraint. Indeed, the nomination of Woodrow Wilson by the Democrats in 1912, like that of Grover Cleveland in 1884, 1888, and 1892, suggests a clear recognition of competitive party pressures and the need for a candidate with appeal beyond traditional voting blocs – one who could pull in disaffected members of the Republican party. To be sure, any candidate fielded by the Democrats in the three-way presidential campaign was likely to emerge victorious in 1912. But third parties are notoriously ephemeral in American electoral politics, and the failure to build bridges to disgruntled Republicans would render the Democrats long-term hold on national power short-lived. However, in selecting the progressive New Jersey governor and former political scientist Woodrow Wilson, the Democrats acquired a candidate out of step with many of the party’s most deeply held convictions.

Wilson crafted his brand of Democratic progressivism to balance traditional party aspirations against the need to reach out to constituencies outside of normal party channels. Nowhere was this more apparent than in his stance on the trust question. In his speech accepting the Democratic nomination for president, Wilson readily endorsed the antitrust plank of the Baltimore platform, even as he was distancing himself from its more radical implications. That the antitrust plank proved amenable to different interpretations was in itself a short-term concession to national party victory, as it avoided an explicit call for repeal of the rule of reason. Nonetheless, the plank, largely written by Bryan himself, was pointed and retained a decidedly antimonopoly thrust. Specifically, it expressed the Democrats’ “regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficiency,” and it committed the party to “the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation.”

Intentionally or not, Bryan and Wilson were able to exploit this ambiguity in a way that would allow them to tailor their appeals to different audiences. For example, while for the duration of the 1912 campaign it became the unstated policy of The Commoner to mute its hitherto persistent call for the statutory repeal of the rule of reason, Bryan nonetheless took the occasion of the publication of the party’s Baltimore platform to instruct his largely agrarian readership on the meaning of its antitrust plank. Said Bryan: “Equally strong and felicitous is the plank on the supreme court [sic] decision which inserted the word ‘unreasonable’ in the anti-trust laws. The law must be restored to its former strength.” Moreover, on the stump for Wilson in the western states, Bryan was similarly pointed in his attacks on the rule of reason. There, he tore into President Taft for “laud[ing] the decision of the supreme court [sic] inserting the word ‘unreasonable’ into the criminal clause of the Sherman law.” Bryan warned: “That is what the trusts have been after for fourteen years.” Equally indicative of agrarian Democratic regulatory attitudes, Bryan blasted Theodore Roosevelt’s proposal to create an independent regulatory commission. Keeping in mind that the Democratic party would legislate this very same proposal only two years later, Bryan now characterized it as “the most dangerous plan ever presented to the American people”:

It is a step toward socialism...and by placing power in the hands of a few men it would give the predatory interests still more powerful incentives to enter politics and elect a president.

In accepting his party’s nomination for president, Woodrow Wilson, like Bryan, sought to calm the trepidations of his agrarian base, invoking the shibboleth of competition and alluding to the collusive and arbitrary practices prevalent in the modern business world. Addressing himself to the tariff and the high cost of living, Wilson spoke of an emerging understanding of “at least some of the methods...by which prices are fixed.”

68. The Commoner, July 12, 1912, 1. 69. Ibid., September 27, 1912, 6.
70. Ibid. Roosevelt, for his part, played on the public’s perception of the Democratic party as a party of antiquarian ideas and ideals, the party of the economic and cultural hinterland. Roosevelt charged that the antitrust program of the Democratic party was unfit for the conditions of modern industrial America, branding Bryan’s form of radical progressivism “a form of sincere rural torpidity.” Well-meaning but misguided, Bryanite agrarianism sought by the Sherman Law method “to bolster up an individualism already proved to be both futile and mischievous; to remedy by more individualism the concentration that was the inevitable result of the already existing individualism. They [see] the evil done by the big combinations, and [seek] to remedy it by destroying them and restoring the country to the economic conditions of the middle of the nineteenth century.” Roosevelt, Autobiography. Excerpted in Resek, ed. The Progressives, 183.
We know that they are not fixed by the competitions of the market, or by the ancient law of supply and demand which is found stated in all the primers of economics, but by private arrangements with regard to what the supply should be and agreements among the producers themselves. Those who buy are not even represented by counsel. The high cost of living is arranged by private understanding.\footnote{\footnote{The following discussion draws on Wilson’s speech accepting the Democratic nomination of 1912, which is reprinted in full in The Commoner, August 16, 1912.}}

At the same time, however, Wilson took steps to distinguish between trusts and large-scale enterprise and to focus his attack on the former. He was not opposed to bigness per se, he explained; rather, he sought merely to break apart those corporate enterprises that had grown too large to be efficient. “Big business is not dangerous because it is big,” Wilson asserted, “but because its bigness is an unwholesome inflation created by privilege and exemptions which it ought not to enjoy.”

Up to a certain point (and only a certain point) great combinations effect great economies in administration, and increase efficiency by simplifying and perfecting organization, but whether they effect economies or not, they can very easily determine prices by intimate agreement, so soon as they come to control a sufficient percentage of the product in any great line of business; and we now know that they do.

In his acceptance speech, Wilson sought to negotiate a middle ground between agrarians and progressives, between tradition and modernity, between time-honored values of rugged individualism and the inescapable realities of corporate concentration. Speaking to Democratic agrarians, Wilson promised a “restoration,” a “turning back from what is abnormal to what is normal.”

[We] will see a restoration of the laws of trade, which are the laws of competition and of unhampered opportunity, under which men of every sort are set free and encouraged to enrich the nation.

However, as he continued his acceptance speech, Wilson began to speak beyond his party’s traditional constituencies as if to broaden his base of support. He denied that his vision of the future was a simple yearning for the past.

I am not one of those who think that competition can be established by law against the drift of a world-wide economic tendency; neither am I one of those who believe that business done upon a great scale by a single organization – call it corporation if you will – is necessarily dangerous of the liberties, even the economic liberties, of a people like our own, full of intel-

As if to underscore the point, Wilson made his differences with the agrarian antimonopoly position explicit: “I dare say we shall never return to the old order of individual competition, and that the organization of business upon a great scale of co-operation is, up to a certain point, itself normal and inevitable.” One more time, however, coalitional balancing seemed to pull Wilson back in the opposite direction. While continuing to hold out an olive branch to legitimate large business with one hand, Wilson nevertheless asserted that “the trusts . . . have gained all but complete control of the larger enterprises of the country.” Even more ambiguously, he predicted that while “competition can not be created by statutory enactment, it can in large measure be revived by changing the laws and forbidding the practices that killed it, and by enacting laws that will give it heart and occasion again.” Finally, Wilson criticized as largely ineffectual the “general terms of the present federal antitrust law, forbidding ‘combinations in restraint of trade’.” The creativity of trust officials, the Democratic candidate continued, necessitated periodic revision of standing laws. And toward this end, he proposed to supplement the law with additional civil and criminal statutes as well as legislation rendering judicial processes more effective in bringing court cases to a rapid and successful conclusion.

As is well known, in 1912 Louis D. Brandeis was Wilson’s principal advisor on antitrust matters. Brandeis articulated a sophisticated “theory of regulated competition,” a policy prescription that sought to transcend the old dichotomy between enforced competition and administered markets. With Brandeis’s help, Wilson instructed his audiences on the possibility and the efficacy of restoring economic competition without doing violence to legitimate large enterprise. It was a central postulate of the Brandeisian creed that “there are no natural monopolies to-day [sic] in the industrial world,” that “in no American industry is monopoly an essential condition of the greatest efficiency.”\footnote{Brandeis, “Trusts, Efficiency, and the New Party,” 14. See also, Brandeis, “Shall We Abandon the Policy of Competition,” 435.} In this view, what distinguished big business from trusts was that the former grew large from within, on the basis of economic efficiency and competitive strength. It was the product of natural evolution, an enterprise “that has survived competition by conquering in the field of intelligence and economy.” Trusts, on the other hand, were made large
from without, "by combining competing businesses in restraint of trade." They were artificial creations - "an arrangement to get rid of competition" and preserve inefficiency. As such, Wilson maintained, through the statutory enumeration and proper enforcement of unfair trading practices, economic competition could naturally regulate the market without (again, contra Sklar) the creation of a powerful new regulatory institution.

With Brandeis's aid, Wilson searched for a position on the trust question that was electorally distinctive, substantively plausible, and attentive to coalitional needs. For our immediate purposes, however, the content of Brandeis's regulatory prescriptions is less important. By most accounts, Wilson only imperfectly understood the subtleties of Brandeis's ideas. Besides, as we will see, Brandeis would play a role only a peripheral role in the development of Democratic antitrust legislation in 1914. More important than Brandeis's ideas was the selection of the Boston attorney himself to advise Wilson on the trust question. The selection is illuminating, for Wilson sought a program that would at once distinguish him from Roosevelt and unite both Bryan Democrats and La Follette-led progressive Republicans. Brandeis was a bridge to La Follette progressives, a midwestern agrarian constituency Bryanites affectionately referred to as "Lincoln republicans," natural allies of "Jeffersonian democrats." 73 Brandeis was the perfect choice to counsel the Democratic candidate; for several years an intimate friend of Robert M. La Follette, Brandeis was also the Republican senator's principal advisor on antitrust matters.

Wilson's selection of Brandeis provides a window through which to view the coalition-building efforts that structured much of the Democratic strategy in 1912. At a minimum, Democrats hoped to obtain La Follette's tacit endorsement of Wilson's candidacy; at their most optimistic, they even hoped they might induce La Follette to break openly with the Republican party and align himself with a progressive Democratic party. The decision to pursue La Follette made eminent political sense. La Follette appeared to be ripe for the picking. Programmatically alienated from Taft conservatives, La Follette was also openly hostile to Theodore Roosevelt. To the Wisconsin senator, Roosevelt's progressivism was of dubious sincerity. Moreover, the apparent political opportunism Roosevelt had shown in derailing La Follette's own campaign for the 1912 Republican nomination left the latter with nothing short of animus for the fledgling Progressive party. 73

La Follette eventually informed the Democratic campaign that he could not personally vote for Wilson, nor had he given up on the Republican party as a vehicle for reform. But, this said, La Follette worked vigorously behind the scenes to secure progressive Republican support for Wilson at the expense of Roosevelt's Progressive party. La Follette's campaign activity on behalf of Wilson was such that Roosevelt's running mate on the Progressive party ticket, Hiram Johnson, would comment: "Our chief danger in the next year will be this Congressional group, and particularly La Follette . . . who showed himself lacking in real courage when with all his mendacity and hatred he did not dare openly to come out for Wilson, but pretended he was still a Republican who preserved his party regularity, while all the time he was beseeching his friends and satellites to get into the open for Wilson." 74 The day following Wilson's election, Brandeis wrote La Follette to praise him for his effort on behalf of Wilson, telling the senator that "all true Progressives owe you a deep gratitude for yesterday's victory." 75

73. Mowry, Theodore Roosevelt and the Progressive Movement, 183-206, 257, 263, 280. Wilson made overt appeals to La Follette supporters throughout the campaign, both to reopen the wounds between Roosevelt and La Follette and to minimize the distance between himself and the Wisconsin senator. An example is the following:

"Then there arose a sturdy little giant in Wisconsin who is now such an indomitable, unconquerable champion of progressive ideas all along the line. I mean Senator La Follette. Men who seek expediency rather than pursue principle took him up for a little while and pretended to follow him, and then rejected him, not because he was not the genuine champion of their principles, but because they apparently saw their interest lie in another direction. I do not believe there are many chapters of personal history in the records of parties in this country more difficult to reconcile with principles of honor than that. I feel myself close kin to these men who have been fighting the battle of progressive democracy, for no matter what label they bear we are of one principle."

"I remember hearing a story not long ago. I have told it a number of times but perhaps you will bear with me if I tell it again because it interprets my feeling. A very deaf old lady was approached by her son, who wanted to introduce a stranger to her, and he said, 'Mama, this is Mr. Stickpin.' 'I beg your pardon,' she said; 'what did you say the name was?' 'Mr. Stickpin.' 'I don't catch it,' she said. 'Mr. Stickpin.' 'Oh, she said, it's no use; it sounds exactly like Stickpin.' Now, when I talk of men like La Follette's way of thinking in politics I feel like saying: 'I beg you pardon, what did you say you were?' 'A Republican.' 'A what?' 'A Republican.' 'No use; it sounds to me just like Democrat.' "I can't tell the difference." Woodrow Wilson, "The Vision of the Democratic Party." In Davidson, ed. A Crossroads of Freedom, 260-1.

76. Doan, The La Follettes and the Wisconsin Idea, 72-3.

77. Louis D. Brandeis to Robert Marion La Follette, November 6, 1912. In Urofsky and Levy, eds. The Letters of Louis D. Brandeis Vol. 2, 710. Neither La Follette nor Brandeis were agrarian leaders on matters of regulatory policy; they accepted the
While Wilson worked to temper the image of his party as hostile to industrial concentration per se, he was nonetheless one with Bryanite Democrats in his firm opposition to a federal commission empowered to define and prohibit unfair trading practices. Far from embracing the regulatory commission idea, Wilson continually derided the Bull Moose solution to the trust problem. The Democratic candidate did support the creation of an information-gathering commission, as did Brandeis; one that would supplement the resources of the average individual in their legal battles with the trusts, and aid the courts in the effective administration of the antitrust laws. But Wilson objected vehemently to Roosevelt’s proposal to grant discretionary power to an appointed board of experts – to supplant the rule of law with rule by individuals; to trade democracy for technocracy:

What I fear... is a government of experts. God forbid that in a democratic country we should resign the task and give the government over to experts. What are we for if we are to be scientifically taken care of by a small number of gentlemen who are the only men who understand the job? Because if we don’t understand the job, then we are not a free people.  

This position led Wilson to reject the independent regulatory commission as the solution to the trust problem:

Sherman Act as reinterpreted by the rule of reason and channeled their energies both to clarify its substance and improve its procedure. Brandeis was the principal author of the La Foltete-Lenroot bill of December 1911, which sought several changes in the federal antitrust law. First, it struck at court discretion in the definition of unfair competitive practices and unreasonable restraints of trade by defining and outlawing specific methods of unfair competition – curthoat competition, tying contracts, the exclusion of competitors to essential raw materials, conducting business under assumed names or “fake independents,” unfair advantages through railroad rebates, and “acquiring, otherwise than through efficiency, such a control over the market as to dominate the trade.” Second, the La Foltete-Lenroot program would strengthen the enforcement of the Sherman Act in the courts by 1) changes in the methods of dissolution decrees to ensure that stock ownership in each of the segments of the dissolved trusts were kept “separate and distinct,” 2) allowing evidence obtained in successful government cases to be used in private suits for damages brought against the same defendants, and 3) stipulating that the statute of limitations shall not run out while a government suit is pending. Lastly, the program would create an administrative board or commission with strong powers of investigation and publicity. As Brandeis explained to Wilson during the campaign, “We need the inspector and the policeman, even more than we need the prosecuting attorney.” Louis D. Brandeis to Woodrow Wilson, September 30, 1912. In Urofsky and Levy, eds. The Letters of Louis D. Brandeis Vol. 2, 686–94.

Therefore, we favor as much power as you choose, but power guided by knowledge, power extended in detail, not power given out in the lump to a commission set up as is proposed by the third party and unencumbered by the restrictions of law, to set up a “constructive regulation,” as their platform calls it, of the trusts and the monopoly.  

By contrast, Theodore Roosevelt and the Progressive party platform heartily endorsed the regulatory commission solution to the trust problem. Roosevelt Progressives were keenly aware of the power of large corporations to menace the public welfare. But whereas Wilson’s yardstick to distinguish between trusts and legitimate big business was organizational efficiency, Roosevelt’s criteria turned on a determination of whether or not the public interest had been violated. The Progressive party’s antitrust policy, Roosevelt explained, “would draw a line on conduct and not on size.” It would strike at the abuse of corporate power – natural resource monopolies, stock watering, unfair competition, and unfair privileges – not corporate power per se.

For his part, Roosevelt stressed the social efficacy of large economic units. He explained that “bigness brought relative freedom from competitive pressures, making it likely that large rather than small business could blend moral considerations into its operations and give serious attention to... corporate social responsibilities.” However, Roosevelt maintained, such a grant of power to large corporations was justified only in conjunction with strong regulatory controls to protect the public interest. Along these lines, the Progressive party platform proposed a system of “permanent active supervision” of corporate activity, with its centerpiece the creation of a “strong Federal administrative commission” with regulatory powers similar to those possessed by the Interstate Commerce Commission, minus the latter’s power to set rates.

We have actually made the Inter-State Commerce Law work. We have found by the test of actual work that the way to control the railways lies through increasing the power, and especially through increasing the application of the power of the Inter-State Commerce Commission, by regulating and controlling those railways, and not by any development of the Anti-Trust Law. Real control of the trusts can come only by the adoption of similar expedi

Agrarian Democrats at High Tide: Toward the Reinstatement of the Trans-Missouri Rule

The presidential campaign of 1912 is important for what we learn about Democratic regulatory preferences as the party prepared to assume control of the national government. First, whatever else might be said, Democrats had not yet come to embrace the regulatory trade commission idea. As Wilson and Bryan’s campaign comments reveal, Democrats agreed that the Progressive commission was unacceptable, attacking it as excessively statist and technocratic. In this, they espoused a long-standing Democratic conviction, one we earlier encountered with agrarian Democrats opposed to an independent railroad commission. But, of more immediate importance is the gap that appeared to separate Wilson from his party’s agrarian wing over repeal of the rule of reason and the return to a policy of enforced competition. Throughout the presidential campaign, Wilson’s remarks on trust policy were considerably more conciliatory toward business cooperation and large enterprise than the Bryanite position. How important were these differences? The new president’s precise relationship to the party’s Baltimore platform and its congressional leadership was as yet not defined. It remained unclear whether Wilson’s campaign utterances represented statements of personal conviction or indicated a hard and fast presidential policy commitment, one that might set Wilson on a collision course with congressional Democrats over the direction of antitrust reform.

The Primacy of Party

The answer to such questions was soon apparent. Few things are as indicative of the nature of Democratic party government in the Progressive Era as the relationship that emerged between president and party on the subject of antitrust reform. Woodrow Wilson was not Franklin Roosevelt, and his legislative leadership was not the aggressive intervention of FDR on behalf of a unilaterally defined policy agenda, as we will observe in Chapter 4. While Wilson would be an active participant in

the framing of the Democrats’ initial antitrust program, agrarian Democrats in Congress remained in firm control of its final substance. And substantively, agrarian Democrats remained committed to rolling back the rule of reason.

Wilson was an outspoken proponent of responsible party government, and he accepted the principles of the Baltimore platform as binding upon the policy actions of the Democratic party in power. Regardless of his personal convictions, it was in conjunction with the congressional Democratic party that the new president intended to govern. Wilson’s deference to the Baltimore platform is revealed in an episode that occurred in the period between his November presidential victory and his inauguration in March. In one of the last important actions of his gubernatorial tenure, the president-elect pushed a series of corporation laws through the New Jersey state legislature — the so-called seven sisters. For our purpose here, this legislation is significant because of its orthodoxy regarding the Trans-Missouri rule. The most important of the seven statutes was the New Jersey Trust Definitions law. The content of the Definitions statute should have greatly allayed the concerns of agrarian Democrats by the way it closed the gap between Wilson’s campaign utterances and his party’s antimonopoly principles. Indeed, the Definitions law seemed to draw self-consciously on the phraseology of agrarian Democratic legislation introduced in the aftermath of the Standard Oil decision. Specifically, the statute made illegal:

any agreement by which they [the trusts] directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any article or commodity, either by pooling, withholding from the market, or selling at a fixed price, or in any other manner by which the price might be affected. 84

Agrarian Democrats had a right to be pleased with the language of the New Jersey Trust Definition law. By its adherence to the principle of “free and unrestricted competition,” the statute seemed to directly challenge the spirit of the rule of reason and its tolerance for the practice of reasonable restraint. Reaching back to the pre-Standard Oil status quo, it reaffirmed the party’s deepest-held antitrust aspirations. Indeed, it even seemed to want to outdo the Trans-Missouri doctrine, outlawing actions that both directly and indirectly restrained competition. The consistency of Wilson’s gubernatorial actions with the agrarian orthodoxy can be further gauged by comparing the language of the Definitions law with
