

## CONGRESS AND THE SHERMAN ANTITRUST LAW: 1887-1890

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THE DECEPTIVE simplicity of the Sherman Act<sup>1</sup> has led many historians to believe that the intention of Congress was equally simple. Although they have not agreed on what the intention was, these historians have shared the view that the motives of Congress were elementary and unmixed and have differed chiefly over whether Congress was sincere. Some suppose that the congressmen of 1890 were committed to a policy of *laissez-faire*, interpret that policy as a dogmatic faith in competition, and regard the Sherman Act as an effort to enforce that orthodoxy.<sup>2</sup> Others less trustful maintain that the Act was a fraud, contrived to soothe the public without injuring the trusts, and they insist that no other result was possible because the Republican Party, in control of the 51st Congress, was "itself dominated at the time by many of the very industrial magnates most vulnerable to real antitrust legislation."<sup>3</sup> Both these schools can draw support from distinguished men who lived while the Act was being passed.<sup>4</sup>

But the process by which laws are made in the American democracy is not so direct and obvious. Congress does not merely enact its private dogmas, nor does it simply supply whatever the people order. Public opinion is not so precise. Far from demanding a particular law, the public desires at most a certain kind of law, and more often only wants to be rid of a general evil. Sometimes, indeed, public opinion is practically silent and yet effective, for Congress often refuses to pass laws because it expects that the public would object, or adopts them anticipating that the public will approve. Congress is

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<sup>1</sup> 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1951).

<sup>2</sup> This view is taken, for instance, by the authoritative text, Seager and Gulick, *Trust and Corporation Problems* 373 (1929). See also, Mund, *Government and Business* 145, 146, 150 (1950).

<sup>3</sup> Fainsod and Gordon, *Government and the American Economy* 450 (1941). Cochran and Miller, *The Age of Enterprise 171-2* (1942). See also, Papandreou and Wheeler, *Competition and Its Regulation* 213 (1954) in which the Sherman Act is described as a measure of "appeasement."

<sup>4</sup> Senator Platt said that his colleagues were interested in only one thing, "to get some bill headed: 'A Bill to Punish Trusts' with which to go to the country." Coolidge, *An Old-Fashioned Senator: Orville H. Platt* 444 (1910). Justice Holmes thought that the Act was "a humbug based on economic ignorance and incompetence." I Holmes-Pollock *Letters* 163 (Howe ed., 1941).

not a factory that mechanically converts opinion into statutes. The congressman is a representative, who must recognize at least some tendencies of public opinion if he is to be re-elected. He is also a professional lawmaker, more likely than not a lawyer by training, who is not indifferent to his craft. He talks with lawyers, follows the decisions of judges, and reads law journals. He is not unwilling to draw on the skill of other experts when the need arises, and will take advice from businessmen, reformers, or economists. He is a member of a political party, may feel loyal to its traditional policies and obliged to support at least part of its current platform. Finally, he is an individual with beliefs, interests, ambitions, and idiosyncrasies quite his own.

It should not be surprising then that although the Sherman Act was passed by a virtually unanimous vote, and although its language is disarmingly clear, the administrations and courts charged with enforcing it have experienced so much difficulty in settling its meaning. For the Sherman Act reflects not only the uncertainty present in every general law because its authors cannot foresee the particular cases that will arise, but also the ambiguity that colors many democratic laws because the authors cannot completely resolve the divergent opinions and cross purposes that call it forth.

## I

No one denies that Congress passed the Sherman Act in response to real public feeling against the trusts, but at this distance it is difficult to be sure how hostile the public was and why. The intensity of public opposition, difficult though it may be to assess, is of some importance in explaining what Congress did. If public hatred of trusts was violent, or if congressmen thought it was, then they might have felt so pressed to pass the law, whatever their own judgments, as to have done the work hastily and perhaps spitefully. If, on the other hand, the public opposition was firm but calm, then Congress may have felt free to pass the best law it could devise. In fact, though the public sentiment may not have been so intense as some believed, yet it was more deeply rooted than many have noticed, and sufficient in any event to persuade Congress that something had to be done; but since the public, despite its hostility, did not and could not suggest any specific solution for the problem, Congress was left very much to its own devices in deciding what was to be done.

In the years immediately before the Sherman Act, between 1888 and 1890, there were few who doubted that the public hated the trusts fervently. Those who fanned the prejudice and those who hoped to smother it agreed that the fire was already blazing. Radical agitators and polite reformers spoke admiringly of the "people's wrath." Apologists for the trust did not deny its unpopularity. Dodd, the Standard Oil Company lawyer who invented the trust device, was properly mild when he told the merchants of Boston that there was

“an earnest popular prejudice against trade combinations”;<sup>5</sup> but George Gunton, a scholarly defender of Standard Oil, wrote that “the public mind has begun to assume a state of apprehension, almost amounting to alarm.”<sup>6</sup> Those whose professional interests lay not so much in provoking or fearing the public reaction as in gauging it agreed that it was intense. Journalists gave every action of the trusts and of their critics ample publicity,<sup>7</sup> which suggests that they did not find their readers indifferent. The din forced Charles Francis Adams, a calm and judicious man, to complain that an innocent plan for coordinating railroads was no sooner announced than it was “characterized in the papers as a vast ‘trust’—in these days,” he added, “everything is a ‘trust’—and denounced as a conspiracy.”<sup>8</sup> Another railroad president said that he knew of no trust that had injured the public, and thought that “the attitude of the press and the consequent temper of the people are breeding a greater panic than the country has ever seen.”<sup>9</sup> The editor of a law journal said that the ordinary man was “in a feverish state” about trusts even though he knew nothing about them; “He has been taught his terror by the newspapers and politicians.”<sup>10</sup> It was certainly true that politicians, whether or not they taught terror, assumed that it existed. Representative Raynor of Maryland urged a congressional committee in 1888 to waste no time on investigation; it need only “listen to the voice of a suffering people resounding through the homes and business centers of this country, and through the medium of an enlightened press appealing to their representatives to rescue them,” to see the urgency of accepting his antitrust bill.<sup>11</sup> Many congressmen who participated in the debate on antitrust measures made declarations equally dramatic, if not always as dire as Senator Sherman’s warning that the “popular mind is agitated with problems that may disturb social order.”<sup>12</sup>

These impressions of the state of public opinion were supported by more nearly impartial contemporaries, including the judges who, with William Howard Taft, took it quite for granted that the Act “was a step taken by Congress to meet what the public had found to be a growing and intolerable evil.”<sup>13</sup> Here and there a few doubts were expressed about the public’s determination. Some extremists said that the people could solve the trust problem—by establishing government ownership of all industry—if it would only

<sup>5</sup> Dodd, Address Before the Merchants’ Association of Boston, 5 Ry. & Corp. L.J. 97 (1889).

<sup>6</sup> Gunton, *The Economic and Social Aspect of Trusts*, 3 Pol. Sci. Q. 385 (1888).

<sup>7</sup> Discussion *infra* at 224.

<sup>8</sup> Adams, Statement of Dec. 15, 1888, 4 Ry. & Corp. L.J. 579 (1888).

<sup>9</sup> Porter, writing in the *Chi. Trib.* (July 28, 1889), quoted in 6 Ry. & Corp. L.J. 103 (1889).

<sup>10</sup> 6 Ry. & Corp. L.J. 61 (1889).

<sup>11</sup> *N.Y. Times* p. 5, col. 1 (Feb. 11, 1888).

<sup>12</sup> 21 Cong. Rec. 2,460 (1890).

<sup>13</sup> Taft, *The Anti-Trust Act and the Supreme Court* 2 (1914).

awake and "prove itself worthy to be free."<sup>14</sup> Some free-traders said that trusts could be eradicated by abolishing protective tariffs, if the people would only "open their eyes."<sup>15</sup> A skeptic has since held that government would have destroyed the trusts, if the people had really cared.<sup>16</sup> But these irregular views have not received much notice, and most later commentators have been satisfied to believe that there was a "great public outcry" against the trusts.<sup>17</sup>

Those who have questioned this standard opinion have pointed out that few books or journal articles were published on the trust problem before 1890, fewer, at least, than were printed afterwards. This fact led a leading historian of the Sherman Act, John Davidson Clark, to conclude that the public was not "hysterical" but rather indifferent to the trusts.<sup>18</sup> Unfortunately Clark exaggerated the evidence. Far more was printed than he realized,<sup>19</sup> and especially in the newspapers. For instance, in February, 1888, *The New York Times* published articles and editorials about trusts on every day but one.<sup>20</sup> If the *Times* was never again so persistent, neither did it become silent on the subject, and it certainly did not—as Clark asserted—ignore the hearings of the congressional committee investigating the trusts.<sup>21</sup> The most widely distributed newspaper in the Midwest, the *Chicago Tribune*, was at least as assiduously interested.<sup>22</sup> Moreover, there is evidence that other newspapers throughout the country were not much less attentive to the problem.<sup>23</sup>

<sup>14</sup> Lewis, *A Talk About "Trusts"* [13] (1889).

<sup>15</sup> *N.Y. Times* p. 4, col. 3 (Dec. 28, 1887) (editorial).

<sup>16</sup> Wollman, *The Mortality of Trusts*, 67 *Alb. L.J.* 227 (1905).

<sup>17</sup> E.g., authorities cited notes 2 and 3 *supra*.

<sup>18</sup> Clark, *The Federal Trust Policy* 27-37 (1931). Clark tried to bolster his case with other evidence, some of which, however, is erroneous and the rest capable of different interpretation. It is not true, for instance, that the political parties "wholly overlooked" the trust problem during the election campaign of 1888 (see discussion *infra* at 247-48); neither is it necessary to believe that the twelve states which passed antitrust laws before July, 1890, were merely following a fashion—particularly since the statutes were quite different from each other.

<sup>19</sup> Sizable gaps in Clark's list of publications are indicated by Thorelli, *The Federal Anti-trust Policy* 137 (1954).

<sup>20</sup> The missing day was Feb. 8th.

<sup>21</sup> The *N.Y. Times* reported on the hearings in its issues of Feb. 2, 11, 25, 29; March 9, 10, 11, 24, 26; April 7, 8, 14, 27, 28, 29; May 1, 2, 4, 5, 22; July 21, 28 of 1888. Compare Clark, *op. cit. supra* note 18, at 33.

<sup>22</sup> During the first week of February, 1888, the *Chicago Tribune* published the following articles on trusts. Feb. 1: p. 3, col. 1, p. 4, col. 6, p. 9, col. 2; Feb. 2: p. 2, col. 3, p. 4, col. 1, p. 6, col. 5; Feb. 3: p. 1, col. 4, p. 1, col. 6, p. 3, col. 6, p. 6, col. 5, p. 8, col. 2, p. 8, col. 5; Feb. 4: p. 1, col. 4, p. 1, col. 5, p. 2, col. 6, p. 3, col. 6, p. 6, col. 1, p. 6, col. 6; Feb. 5: p. 10, col. 2, p. 14, col. 5, p. 17, col. 7; Feb. 6: p. 3, col. 4, p. 4, col. 1. The articles concerned the Standard Oil, Sugar, Whisky, Stove, Salt, Chicago Gas, Castor-Oil, Coal, and Starch trusts, and a New York antitrust bill.

<sup>23</sup> At least thirty-one newspapers outside New York published articles on trusts which were quoted by the journal *Public Opinion*. Thorelli, *op. cit. supra* note 19, at 141 n. 138.

Antitrust sentiment, in any case, cannot be measured merely by counting the number of articles concerned exclusively with trusts that appeared exactly within the three years prior to the passage of the Sherman Act. The great political problems of a period are not so easily isolated. The true importance of the monopoly problem in public opinion is more nearly revealed by how much it pervaded the discussion of the leading political questions of those years.

Between 1887 and 1890 the tariff question had priority in the newspapers, party platforms, and, as Senator Sherman himself said, in the work of the 51st Congress.<sup>24</sup> But the pre-eminence of the tariff question did not detract from the trust problem, and if the tariff constantly intruded in congressional debate on trusts, so did the trust problem regularly infiltrate discussion of tariffs. When Chicago meat-packers petitioned Congress to repeal the tariff on salt, their congressman said that the strongest argument for their case was the Michigan salt monopoly.<sup>25</sup> When Representative Randall announced that the revenue bill he was introducing would, among other things, set a high duty on steel rails, those who saw in his proposal the hand of the Iron and Steel Association promptly labeled it "a bill for the perpetuation of trusts."<sup>26</sup> And in the Senate, debate on the Dependent Pension Bill—a scheme for disposing of surplus revenues—centered for a while on the accusation that Blair of New Hampshire, as an advocate of tariffs, was a defender of trusts, which he denied as one rejecting a heresy: "They are abhorrent to me."<sup>27</sup>

The trust problem was regarded as an integral part also of other leading political questions. Current discussions of how to improve federal regulation of railroads were largely concerned with whether "pools" should be allowed, and it was repeatedly said that these would produce the same monopolistic combinations so much objected to when they took the form of trusts. Labor unions, whose rights and limitations were a subject of angry debate, were on the one hand defended as necessary to enable workmen to deal with the trusts, on the other hand condemned for being monopolies as obnoxious as the trusts themselves. The low income of farmers, for which remedies were constantly being considered, was often said to be aggravated by various trusts, such as those that sold farmers bags and bought their linseed and cotton-seed. The general problem of poverty, a great concern of the time, was regularly said to be accentuated by the trusts, which were accused of dividing the country into two classes, the very rich and the very poor.

<sup>24</sup> Sen. Sherman to Gen. W. T. Sherman, Nov. 9, 1889, *The Sherman Letters* 379 (Thorn-dike ed., 1894).

<sup>25</sup> *Chi. Trib.* p. 1, col. 1 (Feb. 1, 1888).

<sup>26</sup> *N.Y. Times* p. 5, col. 1 (March 6, 1888).

<sup>27</sup> *N.Y. Times* p. 2, col. 6 (March 2, 1888).

The pervasive antitrust sentiment did not spring up overnight. Hatred of monopoly is one of the oldest American political habits and like most profound traditions, it consisted of an essentially permanent idea expressed at different times. "Monopoly," as the word was used in America, meant at first a special legal privilege granted by the state; later it came more often to mean exclusive control that a few persons achieved by their own efforts; but it always meant some sort of unjustified power, especially one that raised obstacles to equality of opportunity. The trust was popularly regarded as nothing but a new form of monopoly, and the whole force of the tradition was focused against it immediately.

The principle that government should create no monopolies was one of those deep political convictions that the colonists had brought with them from England. There the matter had been settled in 1624 by the Statute of Monopolies, which closely limited the King's power to grant exclusive privileges.<sup>28</sup> In America the same attitude was expressed when the colonial legislature of Massachusetts decreed that "there shall be no monopolies granted or allowed among us but of such new inventions as are profitable to the country, and that for a short time."<sup>29</sup> Soon after the Revolution several states included in their bills of rights rather more philosophic statements, similar to that adopted by Virginia: "No man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community. . . ."<sup>30</sup> Jefferson thought that a prohibition to the same effect should appear in the federal Bill of Rights,<sup>31</sup> and there are signs that his opinion was widely supported. Several of the states, having agreed to ratify the Constitution although they were not satisfied that it sufficiently guaranteed the people's rights, proposed amendments which they submitted with their acts of ratification. Among these were proposals offered by New York, "that the Congress do not grant monopolies,"<sup>32</sup> and by Massachusetts, New Hampshire, and Rhode Island, "that the Congress erect no company of merchants with exclusive advantages of commerce."<sup>33</sup> In the end, however, no specific prohibition of monopoly was included in the federal Bill of Rights. Some afterwards maintained that since the power of creating monopolies had not been explicitly denied to Congress, it had been implicitly conceded;<sup>34</sup> others said that a legislature could not grant monopolies unless the

<sup>28</sup> 21 James I, c. 3 (1623-24).

<sup>29</sup> c. 71 (1641); *Charters and General Laws of the Colony and Province of Massachusetts Bay* 170 (1814).

<sup>30</sup> Va. Bill of Rights § 4 (1776); Mass. Const. Part I, Art. 6 (1780); Conn. Const. Art. 1, § 1 (1818).

<sup>31</sup> Jefferson, 5 Works 371 (Ford ed., 1904) (Jefferson to Madison, Dec. 20, 1787).

<sup>32</sup> I Elliot, *Debates in the Several State Conventions* 330 (2d ed., 1854).

<sup>33</sup> *Ibid.*, at 323, 326, 337.

<sup>34</sup> Rep. Lawrence, in congressional debate on the first Bank of the United States, Feb. 4, 1791. 2 *Debates and Proceedings in Congress of United States* 1915 (Gales, comp., 1834).

Constitution expressly authorized it;<sup>35</sup> but no one argued that the prohibition was omitted because the public favored or was even indifferent to monopolies.

In spite of this hostility, the federal government after the Revolution did from time to time create private monopolies, but these did more to renew and deepen the public sentiment than to dilute it. The most numerous were patent monopolies granted to inventors, but the patent system was generally tolerated as a traditional exception to the traditional principle. Other monopolies, such as the two Banks of the United States,<sup>36</sup> were not tolerated so quietly. The debates on the first Bank, both when it was created in 1791 and when it was discontinued twenty years later, were concerned mainly with the constitutional question whether Congress had authority to create corporations and especially banks. However, many objections besides the constitutional one were raised: that the plan for the Bank was ill-devised, that state banks would render better service, and not least, that the national bank would be a monopoly—since the plan committed the United States to establish no competing banks.<sup>37</sup> In the Senate, an unsuccessful attempt was made to delete the monopoly clause;<sup>38</sup> in the House, the Bank's opponents did not fail to seize on this objection. James Jackson of Georgia called the Bank "a monopoly, such an one as contravenes the spirit of the constitution—a monopoly of a very extraordinary nature—a monopoly of the public moneys for the benefit of the corporation to be created,"<sup>39</sup> while James Madison, its most active enemy, criticized it somewhat more judiciously as "a monopoly which affects the equal rights of every citizen."<sup>40</sup> The Bank's supporters did not deny the principle of this attack. Hamilton, in replying to the adverse opinion that Jefferson had submitted to Washington, did not maintain that monopoly was good but

<sup>35</sup> As Attorney General of the United States, Taney gave this opinion in 1833 concerning the monopoly granted the Camden and Amboy Railroad by the New Jersey legislature. Dodd, *American Business Corporations* 125 (1954).

<sup>36</sup> Their predecessor, The Bank of North America, incorporated in 1781 by the Continental Congress, was accepted because it would help finance the Revolution, and no great commotion was aroused by the recommendation of Congress that so long as the war lasted the states should neither incorporate nor endure any other banks. 20 *Journals of the Continental Congress* 547, 21 *ibid.* 1190 (Hunt ed., 1912). When the Bank, uncertain whether the congressional charter was valid, petitioned the states for reassurance, seven of them quickly passed acts confirming its legality and granting the requested monopoly for the duration of the war. 2 Davis, *Essays in the Earlier History of American Corporations* 38 (1917). But after 1784 the states withdrew the privilege: Massachusetts, New York and Maryland incorporated new banks, while Pennsylvania, the Bank's home state, was persuaded by attacks on the Bank's policies and privilege to repeal its charter and finally to grant a new and more restricted one. *Ibid.*, at 41-43.

<sup>37</sup> Clarke and Hall, *Legislative and Documentary History of the Bank of the United States* 33 (1832).

<sup>38</sup> *Ibid.*, at 36.

<sup>39</sup> *Ibid.*, at 37.

<sup>40</sup> *Ibid.*, at 43.

rather than the Bank's privilege did not constitute a monopoly. "Monopoly implies," he said, "a *legal impediment* to carrying on the trade by others than those to whom it was granted,"<sup>41</sup> and since the Act to create a Bank of the United States did not prohibit the states from incorporating banks or citizens from operating unincorporated banks, it created no monopoly.

Opposition to monopoly, important but not critical in determining the affairs of the first Bank of the United States, became a chief weapon against the second Bank. President Jackson and his lieutenants, who led the movement, attacked the Bank on two scores: since its charter expressly guaranteed that the federal government would create no other banks, it was a monopoly in the strict legal sense; since it was too big and rich, it was also a monopoly in the broader political sense. Thomas Hart Benton of Missouri, the Bank's chief opponent in the Senate, argued accordingly that it was objectionable not only "on account of the exclusive privileges, and anti-republican monopoly, which it gives to the stockholders," but also "because it tends to aggravate the inequality of fortunes" and is "an institution too great and powerful to be tolerated in a Government of free and equal laws."<sup>42</sup> Jackson, when he vetoed the bill renewing the Bank's charter, emphasized the "great evils to our country and institutions [that] might flow from such a concentration of power in the hands of a few men irresponsible to the people."<sup>43</sup> Amos Kendall, who as a member of Jackson's Kitchen Cabinet wrote the first draft of the veto message,<sup>44</sup> in his own public addresses also called the Bank a threat to democracy. All nations in the past, he said, had been controlled by "Nobility Systems," and now one was growing up in America: "Its head is the Bank of the United States; its right arm, a protecting Tariff and Manufacturing Monopolies; its left, growing State debts and State incorporations."<sup>45</sup> In the end this maneuver of repeatedly condemning the Bank as a "monster monopoly," a "moneyed power" that would establish an oligarchy and eventually a monarchy,<sup>46</sup> defeated the Bank's supporters and led to its destruction.

There were other institutions, more numerous and permanent than the central banks, against which public opposition to monopoly was more regularly expressed. Chief among these was the corporation. The view that all corporations are monopolies was as old as the principle that all monopolies are evil, and like it, was founded on English experience. One of the most common forms of the early corporation in England was the guild—indeed there had

<sup>41</sup> *Ibid.*, at 101.

<sup>42</sup> 7 Cong. Deb. 50-54 (1831).

<sup>43</sup> 2 Messages and Papers of the Presidents 581 (Richardson ed., 1900).

<sup>44</sup> Schlesinger, *Age of Jackson* 89 (1945).

<sup>45</sup> *Wash. Globe*, Dec. 13, 1832, quoted *ibid.*, at 97.

<sup>46</sup> Consult Knox, *History of Banking in the United States* 69-70 (1903).



been a time when "incorporated" was a synonym for "guildated"<sup>47</sup>—and the guild was a monopoly, since it could prevent everyone but its members from following its trade.<sup>48</sup> Another important group of corporations was composed of the great companies for foreign trade, most of which were monopolies, since their charters granted exclusive rights to commerce with certain parts of the world.<sup>49</sup> Since these prominent monopolies made up most of the private corporations, it was not hard to slip into thinking that all corporations were monopolies, and this belief became quite popular in the United States. This was not so much because American states continued the practice of English governments. They seldom gave corporations exclusive rights, and when they did it was to toll-bridge, turnpike, canal, and railroad companies. Though these grants did arouse some vigorous opposition, the fact that the recipients were "public service" corporations seems to have been regarded as a mitigating circumstance.<sup>50</sup>

In America every corporation, whether or not it had an express monopoly, was considered monopolistic simply because it was a corporation. This was partly because all corporations before the end of the eighteenth century, and most of them before the Civil War, were chartered by special legislation. Each was authorized by a separate act that prescribed its distinctive organization and defined the rights and duties peculiar to it. No group of men could form a corporation unless the state legislature passed a special act in their favor, and those who succeeded were regarded as privileged above their fellows. The mere existence of a corporation was therefore proof that it was a monopoly. So Theodore Sedgwick reasoned: "Corporations can only obtain existence . . . by a special grant from the Legislature. Charters of incorporation are therefore grants of privilege, to be exclusively enjoyeyd by the corporators. . . . Every grant of exclusive privilege, strictly speaking, creates a monopoly. . . ."<sup>51</sup>

Also, every corporation had additional privileges, the real advantages that made men want to incorporate, such as long life, limited liability, and in

<sup>47</sup> Williston, *History of the Law of Business Corporations before 1860*, 3 *Select Essays on Anglo-American Legal History* 195, 198 (1909).

<sup>48</sup> *Davenant v. Hurdis*, Moore 576 (K.B., 1599) (The Merchant Tailors' Case).

<sup>49</sup> *East India Co. v. Sandys*, 10 *Howell's St. Tr.* 372, 90 *Eng. Rep.* 62 (1685) (The Great Case of Monopolies).

<sup>50</sup> The three earliest railroads in Massachusetts, incorporated in 1830, were given thirty year monopolies of their routes, Kirkland, *The "Railroad Scheme" of Massachusetts*, 5 *J. Econ. Hist.* 145, 164 (1945). Other instances of monopoly grants to such corporations are cited by Dodd, *op. cit. supra* note 35, at 161, 127 n. 20, 162 (1954) and by Cadman, *The Corporation in New Jersey* 224-27 (1949). Instances of opposition to them are given by 1 Davis, *op. cit. supra* note 36, at 193, 306, *et seq.*, and by Cadman, *supra*, at 74. The exception in favor of public service corporations was endorsed even by such antagonists of corporations as Taney, consult Swisher, *Roger B. Taney* 366-67 (1935); and Gov. Morton of Massachusetts, consult Dodd, *supra*, at 311-12.

<sup>51</sup> [Sedgwick] *What Is a Monopoly* 12 (1835).

some early cases, public subsidies. All of these aggravated the complaint that corporations were privileged, monopolistic bodies. The amplitude of privilege sometimes easily justified the charge. For instance, New Jersey's first business corporation, the Society for Establishing Useful Manufactures, was exempted from paying taxes on much of its property, was given authority to conduct lotteries and exercise the power of eminent domain, and enjoyed the additional subsidy that its workmen were exempt from all taxes and military service.<sup>52</sup> It was no wonder then that critics said it was a part of "a new system of monopolies,"<sup>53</sup> or that a writer who signed himself "Anti-Monopolist," in attacking it, bewailed, "the present prevailing propensity for corporations and exclusive privileges, a system of politics well calculated to aggrandize and increase the influence of the few at the expense of the many."<sup>54</sup>

Even corporations that had no express monopolies and no extensive privileges were attacked in the same terms. It became an axiom that corporations were privileged bodies, monopolies incompatible with liberty, and this accusation was repeated through the years. It was one of the objections urged in 1785 against a bill to incorporate a society of tradesmen and mechanics in New York: "all incorporations imply a privilege given to one order of citizens which others do not enjoy, and are so far destructive of that principle of equal liberty which should subsist in every community."<sup>55</sup> It was one of the grounds on which Connecticut in 1787 refused to incorporate a medical society, which was denounced as "a combination of doctors . . . directly against liberty . . . a monopoly."<sup>56</sup> It was one of the arguments that Henry Clay in 1811 offered against the Bank of the United States, when he said that the Bank's express monopoly was not as offensive as its corporate status, and that to incorporate competing banks would only compound the mischief, for "all corporations enjoy exclusive privileges. . . . And if you create fifty corporations instead of one, you have only fifty privileged bodies instead of one."<sup>57</sup> Finally, in the 1830's, it became the watchword of the great campaign that the Jacksonian Democrats led against all private corporations. One of their journalists wrote that "All Bank charters, all laws conferring special privileges, with all acts of incorporations [sic], for purposes of private gain, are monopolies, inasmuch as they are calculated to enhance the power of wealth, produce inequalities among the people, and to subvert liberty."<sup>58</sup> Another writer carried the argument one step further: "To have the land scattered over with incorporated

<sup>52</sup> 1 Davis, *op. cit. supra* note 36, at 384-5.

<sup>53</sup> 1 *ibid.*, at 430.

<sup>55</sup> 2 *ibid.*, at 303.

<sup>54</sup> 1 *ibid.*, at 431.

<sup>56</sup> 2 *ibid.*, at 304.

<sup>57</sup> Clarke and Hall, *op. cit. supra* note 37, at 355.

<sup>58</sup> Cadman, *op. cit. supra* note 50, at 75, quoting *Emporium and True American*, March 28, 1835.

companies, is to have a class of privileged, if not titled, nobility."<sup>59</sup> This doctrine, embellished with various expressions of fear and horror, was proclaimed on all sides.<sup>60</sup>

The natural solution, if all corporations were evil, would have been to destroy them all. There is a tone of martyred forbearance in the statements of those Jacksonians and Locofocos, who much as they would have liked to revoke the rights of all existing corporations, said that to do so would "stain the sacred faith of a whole people."<sup>61</sup> A more reasonable alternative was to extend the evil no further, and some therefore said that the legislature "ought cautiously to refrain from increasing the irresponsible power of any existing corporations, or of chartering new ones."<sup>62</sup> Others maintained that no new corporations likely to compete with individual enterprises should be created, and that in any case they ought not to enjoy the special advantage of limited liability.<sup>63</sup> The policy finally accepted was to reduce the privilege of incorporation, not by taking it from the few, but by opening it to the many: general incorporation laws authorized state officials to issue charters to all qualified applicants. A few such laws had been passed before 1837 by legislatures that hoped to stimulate various branches of industry;<sup>64</sup> they were recommended also as devices to save legislatures the time otherwise spent in considering special acts;<sup>65</sup> but they became normal only after the great agitation against the monopolistic character of corporations created by special acts. Connecticut, New Jersey, Pennsylvania, and Massachusetts passed general incorporation laws between 1837 and 1851, and several of the younger states—California, Indiana, and Minnesota—adopted constitutions during this period prohibiting legislatures from creating private corporations in any other way.<sup>66</sup> For a time special incorporation persisted: in New Jersey, for instance, the number of incorporations under general law did not overtake those under special acts until 1875.<sup>67</sup> By the time of the Civil War incorporation under general

<sup>59</sup> *Ibid.*, at 77.

<sup>60</sup> *Ibid.*, at 72 et seq.; Dodd, *op. cit. supra* note 35, at 394–95, 414–15; Handlin, *Commonwealth Massachusetts* 229–35 (1947); and for a compendium of examples, consult Schlesinger, *op. cit. supra* note 44 (*passim*).

<sup>61</sup> Cadman, *op. cit. supra* note 50, at 76.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, at 78–80; Dodd, *op. cit. supra* note 35, at c. 5 and 6, esp. p. 385.

<sup>64</sup> Dodd, *op. cit. supra* note 35, at 417 n. 28; Cadman, *op. cit. supra* note 50, at 21–27.

<sup>65</sup> Dodd, *op. cit. supra* note 35, at 316.

<sup>66</sup> *Ibid.*, at 317, 449. The first state constitution to prohibit special incorporation was that of Louisiana adopted in 1845. By 1860, twelve states had similar provisions. 2 Evans, *Business Incorporations in the United States* 11 (1948).

<sup>67</sup> Cadman, *op. cit. supra* note 50, at 207–8. The same was true in Maine. Evans, *op. cit. supra* note 66, at 12.

laws had become so easy and frequent that the old complaint against "monopolistic corporations" could no longer be sustained.

The distrust of corporations did not evaporate with the old complaint; after the middle of the nineteenth century new grounds were found for believing that corporations were monopolistic, and criticisms that had been subordinate now became prominent. They achieved their new importance partly because the fundamental American attitude toward government was changing at this time. The fear of oligarchy, which had been carried over from the colonial period and so carefully expressed in the Constitution, was subsiding. The fear of plutocracy, always present in some degree, grew sharper as Americans recognized the rapid growth of national wealth during and after the Civil War. Reasoning about monopolies accommodated itself to the new disposition: it was less often argued that monopolists would abolish representative government and more often they would use their wealth to make it serve their own interests. A great deal began to be said about the opulence of corporations. A Justice of the Supreme Court spoke in 1853 of "the vast amount of property, power, and exclusive benefits, prejudicial to other classes of society, that are vested in and held by these numerous bodies of associated wealth."<sup>68</sup> After the Civil War this idea became increasingly common, and frequent warnings were heard of "the rapid concentration of the whole political, commercial, and financial interests of the country in corporations and other monopolies."<sup>69</sup>

The chief attacks on monopolies after the Civil War became more specific. They were no longer directed at incorporation itself or corporations in the mass, but more particularly against certain practices, above all economic abuses, that were attributed to some corporations. No one could by this time reasonably want or hope to solve the problem by abolishing corporations or by making it easier to establish more of them. The idea began, therefore, to spread that the power and injurious behavior of monopolistic corporations should be controlled by government regulation.

Agitation for anti-monopoly laws was first led by the Grangers or Patrons of Husbandry. Founded two years after the Civil War and at first intended to serve the social and educational needs of farmers, it soon became involved in economic and political activities. By 1871, its founder reported that "'Cooperation' and 'Down with monopolies' were proving popular watchwords"<sup>70</sup>—indeed by 1875, when the Grange reached its peak, it had brought within its ranks at least one of every ten American farmers.<sup>71</sup> "Cooperation" meant

<sup>68</sup> Catron, J., in *Ohio Life Insurance Co. v. Debolt*, 16 How. (U.S.) 416, 422 (1853).

<sup>69</sup> Cloud, *Monopolies and the People* 259 (1873).

<sup>70</sup> Buck, *The Granger Movement* 52-53 (1913).

<sup>71</sup> *Ibid.*, at 58. As of October 1875, the Grangers claimed 758,767 members; the agricultural population at that time, according to the United States census and Buck's estimate, was about 6,800,000.

organization of farmers' cooperatives, while "Down with monopolies" meant principally regulation of railroads. Granger opposition to railroads and monopolies was expressed in a host of manifestoes, declarations, petitions and statements, of which the resolutions adopted by an Illinois Farmers' Convention in 1873 were fairly typical. The first two stated "that all chartered monopolies, not regulated and controlled by law, have proved detrimental to the public prosperity, corrupting in their management, and dangerous to republican institutions," and "that the railways of the world, except in those countries where they have been held under the strict regulation and supervision of the government, have proved themselves arbitrary, extortionate and as opposed to free institutions and free commerce between states as were the feudal barons of the middle ages."<sup>72</sup> The traditional theme, that monopolies are dangerous to liberty, was there as always, but with it a contemporary variation: the only cure is regulation by law. The resolutions went on to propose particular laws that would fix "reasonable maximum rates" and impose various other restrictions and duties on railroads. In a number of midwestern and western states, especially Illinois, Iowa, Minnesota, and Wisconsin, Grangers founded or supported independent parties—usually armed with the name "Anti-Monopoly"—that advocated railroad legislation of this sort. For a few years before 1875 they were surprisingly successful in having such laws enacted by the states,<sup>73</sup> but various difficulties prevented the laws from having any great effect, and indeed the railroad problem remained a leading aspect of the monopoly question until long after the Sherman Act was passed. Although the Grange had lost much of its power by 1880, it had served to stimulate a revival of anti-monopoly sentiments which had been obscured by the more dramatic events of the Civil War.

Reformers with rather broader interests succeeded the Grange as leading anti-monopolists during the early 1880's, and in their hands "monopoly" was a brush that could tar many rich or exclusive institutions. One crusader condemned as monopolistic not only railroads, banks, and public utility companies, but also speculative dealing in grains, restrictive licensing of businesses and professions, laws limiting the ballot to males, and "those nurseries of caste"—West Point and Annapolis.<sup>74</sup> John Jameson, a Chicago judge, speaking before the Illinois Bar Association in 1882, described as one of America's gravest problems the accumulation of capital into the "great moneyed institutions"—private corporations—that are "commonly stigmatized as monopolies." He gave three principal examples: the railroad corporation, typical form of the evil; the giant wheat farms of the northwest, which he described as novel, though his complaint echoed the cry of "land monopoly"

<sup>72</sup> Periam, *The Groundswell* 286 (1874).

<sup>73</sup> Buck, *op. cit.* *supra* note 70, at c. 3.

<sup>74</sup> Bland, *The Reign of Monopoly* (1881).

that had been raised often before against speculators and absentee owners; and the "monster business establishments, owned by private individuals, of which the Standard Oil Company is the best known type."<sup>75</sup> General Ben Butler, presidential candidate of the Greenback and Anti-Monopoly parties in 1884, declared his hostility to monopolists in commerce, industries, and lands, and singled out the railroads that charged excessive rates, the sewing-machine monopoly, which derived its power from a patent, and the Standard Oil Company.<sup>76</sup>

Many other companies and institutions were attacked as monopolies during the years after 1880, but more and more attention was devoted to combinations of industrial firms, all of which, however organized, came by the end of the decade to be called trusts. Public prominence was achieved first by the Standard Oil Company, which by 1880 controlled much of the country's petroleum refining. Thereafter it became a favorite butt of the anti-monopolists, none of whom castigated it more loudly than Henry Demarest Lloyd. His article, "The Story of a Great Monopoly," was so well received that the Atlantic Monthly had to reprint its issue for March, 1881, six times.<sup>77</sup> In 1882, Standard Oil adopted the trust device, and the effectiveness of this method for making combinations permanently cohesive and easily manageable recommended it to others. The next two groups to use it were also oil businesses, whether by an association of ideas or because, as some thought, they were actively encouraged by Standard Oil.<sup>78</sup> The Cotton Oil Trust was organized in 1884 and the Linseed Oil Trust in the following year. The former is said to have angered Southern farmers and to have strengthened the demand for a federal antitrust law; at the very least it provoked the Attorney-General of Louisiana to proceed against it in the state courts.<sup>79</sup>

Trust-building did not begin in earnest until 1887, but then it took hold quickly. That year saw the formation of the Sugar and Whisky Trusts, which until the end of the century contended for unpopularity only with Standard Oil. Others, affecting lesser industries or smaller markets, added to the list, which by the end of the year included the Envelope, Salt, Cordage, Oil-Cloth, Paving-Pitch, School-Slate, Chicago Gas, St. Louis Gas and New York Meat trusts. When, in November, the president of the Paper-Bag Trust explained that trust-making was "the tendency of the times," his statement

<sup>75</sup> Jameson, *The Grounds and Limits of Rightful Interference by Law with the Accumulation and Use of Capital* 1-7 (1882).

<sup>76</sup> Butler, Speech of Aug. 30, 1884, appended to his pamphlet, *Address to His Constituents*, Aug. 12, 1884.

<sup>77</sup> Clark, *The Federal Trust Policy* 17 (1931).

<sup>78</sup> Cook, *Trusts* 3 (1888).

<sup>79</sup> Clark, *op. cit. supra* note 77, at 4 n. 5. The proceedings were begun in April 1887 and judgment given later in the year. *Louisiana v. American Cotton-Oil Trust, 1 Ry. & Corp. L.J.* 509 (1887).

was not treated as startling news.<sup>80</sup> Nor, if we are to credit the judgment of most contemporary observers, was the public uncertain about how well it liked the trusts: it seems to have had no difficulty in identifying them as the latest version of monopoly and in transferring to them the antipathy which by long usage it had cultivated against all monopolies.

The great fervor against trusts in 1888, which bursts so unexpectedly on an historian like Clark, was for the people living at the time nothing so sudden or strange. It was simply a familiar feeling raised to a high pitch, intense because the speed with which new trusts were being hatched made it seem that they would overrun everything unless some remedy were found soon. The general disposition of the public was not in doubt. There were numerous objections to the trusts—complaints of a traditional sort as well as newer ones suited to the character of these particular monopolies. Trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by watering stocks, put laborers out of work by closing down plants, and somehow or other abused everyone. The kind of remedy that the public desired was also clear enough: it wanted a law to destroy the power of the trusts. The alternative suggestion that government should take over the trusts and operate them as public property seems to have had scant support. But the desire was not, and, in the nature of public opinion, could not be expressed in much greater detail. Any law might be acceptable if it really suppressed the worst abuses of the trusts, especially of those like the Standard Oil, Sugar, and Whisky Trusts, that were most noticeable and most important in the everyday life of many people. The public's mandate was clear, but so broad that Congress had to look elsewhere for advice on how to implement it.

## II

Expert judgment on how to solve the trust problem would naturally be expected from the two professions most closely concerned with it, the economists and the lawyers.

The general opinion of American economists during the years after 1885 was easier for legislators and the public to detect because the American Economic Association, which had just been formed, could be regarded as its official spokesman. A first attempt to organize a professional society had been made shortly after 1880 by Edmund James and Simon Nelson Patten, who had come to teach in the Wharton School of Finance after completing their studies in Germany. Following German models they had observed as students, they proposed a Society for the Study of National Economy. Since they believed

<sup>80</sup>N.Y. Times p. 4, col. 5 (Nov. 7, 1887).

that competition had very serious shortcomings as the basis of economic life,<sup>81</sup> they suggested that the aim of the Society should be

To combat the widespread view that our economic problems will solve themselves, and that our laws and institutions which at present favor individual instead of collective action can promote the best utilization of our material resources and secure to each individual the highest development of all his faculties.<sup>82</sup>

In keeping with this aim, they suggested the Society should favor positive government intervention in economic life, particularly by means of federal aid to education, forest conservation, mineral surveys and agricultural experiment stations.<sup>83</sup> For one reason or another the proposal did not mature, and in 1885 Richard Ely made a fresh start. He circulated a statement setting forth the principles on which an American Economic Association should be based and outlining a platform that curiously blended the optimism, zeal, piety, and objectivity typical of younger economists of the time. It stated that economics was an immature science which could be improved greatly by statistical and historical research, intimated that the conflict between labor and capital could be resolved by the "united efforts of Church, state and science," and recommended that the Association avoid taking partisan positions on any matter of public policy and especially on the tariff question. But the essence of the program, virtually the same as that suggested by James and Patten,<sup>84</sup> was stated in its first principle:

We regard the state as an educational and ethical agency whose positive aid is an indispensable condition of human progress. While we recognize the necessity of individual initiative in industrial life, we hold that the doctrine of *laissez-faire* is unsafe in politics and unsound in morals; and that it suggests an inadequate explanation of the relations between the state and the citizens.<sup>85</sup>

This thesis was the main subject of discussion at the founding convention. Ely defended it. Others urged that it be modified; John Bates Clark, for instance, thought that "the point upon which individuals will be unable to unite is, especially, the strong condemnation of the *laissez-faire* doctrine."<sup>86</sup> Following a long debate the platform was finally revised, and the new version omitted the explicit denunciation though it retained the fairly safe assertion that the state is indispensable to human progress.<sup>87</sup> This refusal to denounce *laissez-faire* did not mean that the charter members of the Economic Association en-

<sup>81</sup> E.g., Patten, *The Premises of Political Economy* (1885).

<sup>82</sup> Ely, *Ground Under Our Feet* 132, 296 (1938).

<sup>83</sup> *Ibid.*, 296-99.

<sup>84</sup> *Ibid.*, at 135.

<sup>85</sup> Ely, *Report on the Organization of the American Economic Association*, 1 *Pub. Am. Econ. Ass'n*, No. 1, 6-7 (1886).

<sup>86</sup> *Ibid.*, at 29.

<sup>87</sup> *Ibid.*, at 20, 35 (*passim*).



dorsed it. Most of them were evidently as skeptical as Ely, but they did not want to make a formal declaration that might suggest they favored socialism. In fact they preferred a middle, "balanced" position between liberalism and interventionism, between what they called the "English" and "German" views,<sup>88</sup> in short, a distinctively "American" economic policy.<sup>89</sup> They concluded that as the "English" school believed competition was necessarily beneficial while the "German" school considered it inherently harmful, they themselves ought to regard it as a mixed blessing. Edwin Seligman said as much at the founding convention: "Competition is not in itself bad. It is a neutral force which has already produced immense benefits, but which may, under certain conditions, bring in its train sharply defined evils."<sup>90</sup> His colleagues agreed; their eagerness to construct a native economic policy increased their interest in what was anyway an important economic phenomenon, and many turned their energies to discovering when competition was useful and when it was inferior to combination or monopoly.

In order to judge the desirability of combination, they needed first to explain it. But this did not strike them as a particularly difficult task, for although they regarded the great wave of industrial combination as a new phenomenon, they were not surprised by it. Like many informed men of their time, they were convinced that Darwin's laws governed the evolution of human society, the social organism, no less rigorously than that of biological organisms.<sup>91</sup> Any social change in which they could detect "growth" or "centralization" struck them as "natural"; and as the combination—trust, pool, or syndicate—was an organization that many producers, who formerly went their own separate ways, formed in order to act jointly, they regarded it as an evolutionary advance. Combination was inevitable, an instance of the general law which ordained, as one writer put it, that "corporate action is ready to overshadow personal action."<sup>92</sup> The economists moreover could explain the inevitability of combination as the particular effect of technical progress. According to Davis Ames Wells, one of the most prominent economists of the older generation, the successful adoption of steam-driven machinery had made manufacturing so efficient that "industrial overproduction" re-

<sup>88</sup> *Ibid.*, at 21.

<sup>89</sup> As Ely said, *ibid.*, at 23. Consult also, Adams, *Relation of the State to Industrial Action*, 1 *Pub. Am. Econ. Ass'n* No. 6, 29 (1887); Walker, *Recent Progress of Political Economy in the United States*, 4 *Pub. Am. Econ. Ass'n* 245 (1889).

<sup>90</sup> Ely, *op. cit.* *supra* note 82, at 27.

<sup>91</sup> Wiener, *Evolution and the Founders of Pragmatism* (1949); Hofstadter, *Social Darwinism in American Thought* (1944). Ely later wrote: "The most fundamental things in our mind were the ideas of evolution and of relativity. I think that those two ideas were unanimously held by those who founded the American Economic Association." *The Founding and Early History of the American Economic Association*, 26 *Am. Econ. Rev. Supp.* 141, 144 (1936).

<sup>92</sup> Bascom, *Social Harmony*, 40 *Independent* 419, 420 (1888).

sulted; a strenuous effort to sell unwanted goods had led to "excessive competition"; manufacturing firms were losing money, and could only correct the difficulty if they combined to reduce their output.<sup>93</sup> John Bates Clark, the best of the younger economists and not the most Darwinian of them, held much the same view:

Combinations have their roots in the nature of social industry and are normal in their origin, their development, and their practical working. They are neither to be deprecated by scientists nor suppressed by legislators. They are the result of an evolution, and are the happy outcome of a competition so abnormal that the continuance of it would have meant widespread ruin. A successful attempt to suppress them by law would involve the reversion of industrial systems to a cast-off type, the renewal of abuses from which society has escaped by a step in development.<sup>94</sup>

Economists as different in spirit as Patten and Sumner agreed that improved transportation had been important in bringing about combinations.<sup>95</sup> Ely thought that "owing to discoveries and inventions, especially the application of steam to industry and transportation, it became necessary to prosecute enterprises of great magnitude."<sup>96</sup> And since the economists assumed that combination was the only way to correct excessive competition and the chaotic economic conditions that they thought it produced, as well as the most practicable way to get the positive advantages of large-scale production, they concluded that it was not only inevitable but in many instances beneficial.<sup>97</sup>

Nor did economists attribute such advantages only to combinations: they were adopting a theory which led them to conclude that even outright monopolies, or at least some of them, were also inevitable and potentially beneficial. This theory was by no means new, having been outlined by several great English economists earlier in the century,<sup>98</sup> but American economists of this generation were especially struck by it on reading the monograph, *Relation of the State to Industrial Action*, which their colleague, Henry Carter Adams, published in 1887.<sup>99</sup> Adams distinguished three classes of industries according to the size that firms within them would naturally attain. In "industries of

<sup>93</sup> Wells, *Recent Economic Changes* c. 1-3, p. 74 (1889).

<sup>94</sup> Clark, *The Limits of Competition*, reprinted in Clark and Giddings, *The Modern Distributive Process* 11 (1888).

<sup>95</sup> Patten, *The Principles of Rational Taxation* 5-7 (1890); Sumner, *Trusts and Trade Unions*, 40 *Independent* 482, 483 (1888).

<sup>96</sup> Ely, *The Nature and Significance of Corporations*, 75 *Harper's Magazine* 71, 75 (1887).

<sup>97</sup> This view had become more or less standard in the business community as well. See for an example, the testimony of Francis Thurber, an important commodity broker, before the New York State Senate Committee on Trusts, reported in 5 *Ry. & Corp. L.J.* 20 (1889).

<sup>98</sup> E.g., Senior, *Outline of the Science of Political Economy* 81 et seq. (reprint, 1938) (1834); Mill, *Principles of Political Economy* Bk. III, c. 2, § 2, 444 (Ashley's ed., 1909) (1848).

<sup>99</sup> Adams, *Relation of the State to Industrial Action*, 1 *Pub. Am. Econ Ass'n No.* 6, 55-60 (1887).

constant returns," every unit of capital and labor used in production yields equal quantities of output; a new firm in such an industry, say a new retail grocery, can sell its goods as cheaply as any older and larger store; and therefore competition can never fail to keep prices in such an industry from being exorbitant. In the second class, "industries of diminishing returns," small firms are more efficient than large ones because each additional unit of capital and labor produces a smaller quantity of goods; Adams cited agriculture as the typical industry of this sort, and concluded that individual interest will always maintain a large number of small producers in such industries. But in the third class, "industries of increasing returns," the opposite is true: since each successive unit of input produces more than the last, the largest firm is the most efficient and can eventually drive out all competitors. Industries of increasing returns, Adams concluded, must inevitably be controlled by monopolies.

Having decided that some combinations and all natural monopolies were inevitable, the economists did not hesitate to conclude that any attempt to prohibit them by law reflected the outworn belief "in the universal existence and beneficence of free competition."<sup>100</sup> Adams maintained that the only question of policy was whether an industry of increasing returns should become an "irresponsible, extra-legal monopoly, or a monopoly established by law and managed in the interest of the public."<sup>101</sup> The public interest could be protected only by government intervention, but he was not sure which particular method would be most effective, whether the work should be done "through carefully guarded franchises, through official commissions, through competition of the state with private industries, or through direct government management."<sup>102</sup> Ely, who with many of his prominent colleagues immediately adopted Adams' theory of natural monopolies,<sup>103</sup> was of two minds, because though in the abstract he preferred public ownership, especially municipal ownership of public utilities, he conceded that a system of control by limited charters and taxation might be more readily established.<sup>104</sup> Others, like Hadley, thought it would be best to subject all monopolies to some scheme of regulation like that imposed by state railroad laws, "under which the necessity for combination was at least tacitly admitted, but where the combinations were held to a larger degree of publicity and responsibility than before";<sup>105</sup> they did not, however, specify the rules of such a scheme.

<sup>100</sup> Seligman, *Railway Tariffs and the Interstate Commerce Law*, 2 *Pol. Sci. Q.* 374 (1887).

<sup>101</sup> Adams, *op. cit. supra* note 99, at 64.

<sup>102</sup> *Ibid.*, at 53.

<sup>103</sup> Ely, *Nature and Significance of Corporations*, 75 *Harper's Magazine* 259, 261 (1887); Hadley, *Private Monopolies and Public Rights*, 1 *Q. J. Econ.* 40 (1887); James, *Relation of the Modern Municipality to the Gas Supply*, 1 *Pub. Am. Econ. Ass'n* 29 et seq. (1886).

<sup>104</sup> Ely, *Problems of Today* 129-30, 189-94 (1890).

<sup>105</sup> Hadley, *op. cit. supra* note 103, at 44. Consult also his speech reported in *N.Y. Times* p. 1, col. 2 (Feb. 6, 1888); Seligman, *op. cit. supra* note 100, at 374.

Although they differed as to the exact action government should take, nearly all the economists were convinced that any attempt to prohibit combinations would be either unnecessary or futile. Since many of the trusts were "natural," the law could not destroy them: "If," as Adams summarized this view, "it is for the interest of men to combine no law can make them compete."<sup>106</sup> Those trusts, on the other hand, that were "artificial" could be destroyed by withdrawing the tariffs and other legal privileges that protected them, or by regulating the natural monopolies that created them—Ely, when discussing the latter method, had in mind for instance the rebates and extraordinarily low rates which railroads were supposed to have granted the Standard Oil Company.<sup>107</sup> Moreover, some economists argued, any combination that was not justified by the underlying conditions of its industry would decay of its own accord or be controlled by what came to be called "the active influence of the potential competitor."<sup>108</sup> Even when they were most vehement in denying English "laissez-faire" or the "orthodox" theories of the older American school, the economists granted that competition was inevitable and beneficial in some industries. But they insisted that in other industries combination was equally inevitable and beneficial. Younger and older economists alike agreed with Wells' judgment that "Society has practically abandoned—and from the very necessity of the case has got to abandon, unless it proposes to war against progress and civilization—the prohibition of industrial concentrations and combinations."<sup>109</sup> Wells went on to say that:

The problem, therefore, which society under this condition of affairs has presented to it for solution is a difficult one, and twofold in its nature. To the producer the question of importance is, How can competition be restricted to an extent sufficient to prevent its injurious excesses? To the consumer, How can combination be restricted so as to secure its advantages and at the same time curb its abuses?<sup>110</sup>

He offered no solution to the problem, nor indeed did the economists as a group. They insisted that the government must somehow allow both competition and combination to play their proper parts in economic life, that it must regulate both, that it could not reasonably prohibit either, but beyond this they offered no unified or precise suggestion about the law Congress should pass.

The legal profession was more apt to suggest means that Congress might use in solving the trust problem, since most lawyers believed that laws could

<sup>106</sup> Adams, *op. cit. supra* note 99, at 64.

<sup>107</sup> Ely, *op. cit. supra* note 104, at c. 3, esp. 201.

<sup>108</sup> Gunton, *The Economic and Social Aspects of Trusts*, 3 *Pol. Sci. Q.* 385, 403 (1888); Clark, *The "Trust,"* 52 *New Englander* 223 (1890).

<sup>109</sup> Wells, *op. cit. supra* note 93, at 74-75.

<sup>110</sup> *Ibid.*

prohibit monopolies. Indeed they thought that the common law already did so, although their conviction rested on a somewhat tenuous basis. There was no question that the common law had at various times condemned monopolies, or more often, behavior which was supposed to be monopolistic. There were many precedents to this effect in the bodies of law concerning chartered monopolies, forestalling and engrossing, contracts in restraint of trade and combinations in restraint of trade. Nevertheless, it was doubtful whether the common law was powerful enough in 1888 to destroy the monopolies of that time. Yet many lawyers felt sure that it embodied a spirit unalterably opposed to monopoly and that this spirit—the “public policy” of the law—would somehow prevail against any trust it encountered. The only problem they admitted was how to enforce and strengthen the common law.

Of the four branches of common law particularly concerned with monopoly, two had hardly any direct bearing on the trust problem. The common law concerning chartered monopolies, which had been used in England during the seventeenth century to destroy or weaken monopolies created by the Crown,<sup>111</sup> had little force as precedent in nineteenth-century American courts. Moreover it had no relevance to the trusts. The editor of one contemporary law journal wrote that “the word, ‘monopoly,’ in its only legal sense means an exclusive right to deal in and sell certain articles, . . . guaranteed . . . by positive law.”<sup>112</sup> Though it was an exaggeration to insist that “monopoly” still had an unequivocal legal sense,<sup>113</sup> it was undoubtedly true that trusts could not be condemned under this branch of the common law since their monopolistic power had not been granted by government.

The body of common law that prohibited engrossing had no more direct bearing on the modern monopoly problem. It had grown out of English cases and statutes against practices whereby merchants evaded the regulations of medieval markets: “forestalling,”—buying or selling outside the market place or before it officially opened; “regrating,” or buying and selling goods in the same market; “engrossing,” or buying up large quantities of a good in order to sell it at raised prices; and a series of similar methods by which middlemen, as it was supposed, made a parasitic living. Although in England, under the influence of free-trade ideas, this body of law was repealed,<sup>114</sup> in the United States it persisted. The ancient definitions of the crimes were forgotten, but “engrossing” came to mean cornering the supply of a commodity, “monopolizing” came to serve as a synonym for it, and in a few scattered cases American courts judged it illegal.<sup>115</sup> There was accordingly some point in declaring,

<sup>111</sup> Consult Letwin, *The English Common Law Concerning Monopolies*, 21 *U. of Chi. L. Rev.* 355, 356–67 (1954).

<sup>112</sup> 27 *Cen. L.J.* 205 (1888).

<sup>113</sup> Discussion *infra* at 244.

<sup>114</sup> Letwin, *op. cit.* *supra* note 111, at 367–73.

<sup>115</sup> Consult, Adler, *Monopolizing at Common Law*, 31 *Harv. L. Rev.* 246 (1917).

as one lawyer did in 1889, that the trusts "literally engross, to borrow a word from the common law, the market in respect of the particular commodity,"<sup>116</sup> though using the common law word did not prove that trusts were prohibited by American common law as it stood in 1888. There was much sounder historical evidence for maintaining, as did Theodore Dwight, Dean of the Columbia Law School, that the common law against engrossing was practically extinct; but he weakened his case by adding the disingenuous argument that the trusts could not be accused of engrossing, because a necessary part of that crime was the intent to raise prices, and the trusts had no purpose except the laudable one "to regulate prices and keep them steady."<sup>117</sup> Moreover, as Dwight emphasized, even supposing that the law against engrossing retained any vigor, it could hardly be used against trusts in general. Engrossing was traditionally a crime only if it affected food, or later, "necessaries of life," and although the definition of "necessity" had been broadened by American courts, it did not include many commodities in which trusts might deal.<sup>118</sup>

Although the common law against contracts in restraint of trade was distinctly more alive and more pertinent to the activities of trusts, it too was incapable of destroying them. Although such contracts were at first altogether condemned by common law, in time more and more of them were permitted, until, after the early eighteenth century, lawyers assumed they were valid if the restraint were "partial"—if the person undertaking the obligation not to engage in a certain business were excluded only from a small area and only for a short time.<sup>119</sup> Some American lawyers during the 1880's thought this rule—that all "general" restraints were void—still governed the decisions of American courts.<sup>120</sup> Others were beginning to believe that the true test was whether the restraint was "reasonable," and that the courts would consider unreasonable any restraint broader than the party imposing it needed or than the interest of the public could tolerate.<sup>121</sup> There are good grounds for believing, as Dwight evidently did,<sup>122</sup> that the test of reasonableness was rather more lenient than the older one and that by 1888 even the older one might permit almost any restraint. Dwight cited as chief evidence the case of

<sup>116</sup> The Theory of a Trust, 23 Am. L. Rev. 103 (1889).

<sup>117</sup> Dwight, The Legality of "Trusts," 3 Pol. Sci. Q. 592, 594, 609-10 (1888).

<sup>118</sup> A catalogue of commodities that American courts classified as necessities was given by Boisot, The Legality of Trust Combinations, 39 (N.S. 30) Am. L. Reg. 751, 762 (1891). Consult also, Allen, Criminal Conspiracies in Restraint of Trade at Common Law, 23 Harv. L. Rev. 531, 543, 547 (1910).

<sup>119</sup> Letwin, op. cit. supra note 111, at 373-77.

<sup>120</sup> Kerr, Contracts in Restraint of Trade, 22 Am. L. Rev. 873 (1888).

<sup>121</sup> McQuillan, Validity of Contracts in Restraint of Trade, 33 (N.S. 24) Am. L. Reg. 217, 281 (1885); Eaton, On Contracts in Restraint of Trade, 4 Harv. L. Rev. 128 (1890); Letwin, op. cit. supra note 111, at 373-79.

<sup>122</sup> Dwight, op. cit. supra note 117, at 610-11; cf. Letwin, op. cit. supra note 111, at 378-79.

*Diamond Match Co. v. Roeber*,<sup>123</sup> which decided that a contract to restrain Roeber from engaging in the match business anywhere in the United States, except Nevada and Montana, was still "partial" and therefore valid.<sup>124</sup> The courts' willingness to uphold rather broad restraints was only one reason for doubting that this body of common law could damage the trusts. A more important reason was that such contracts could be brought before the courts only by parties to them. If trusts were to be attacked by this means either they themselves or those who did business with them would have to initiate the action, and there were few instances of this kind. No outsider could attack such a contract, no public official could bring a suit to have it declared void, and a court could at most invalidate the contested agreement. There was little hope of destroying trusts in this way.

Nor were the trusts likely to be destroyed by the common law on combinations in restraint of trade. This body of law prohibited some, but only some, of the agreements by which a number of producers combined to reduce competition, either by setting uniform prices, fixing production quotas, dividing the market into exclusive dealing areas, or pooling their profits. The principle by which American courts distinguished between legal and illegal combinations was rather obscure, though they seemed to consider void any agreement that was "part of a conspiracy to create a monopoly."<sup>125</sup> There was enough doubt so that a lawyer well-disposed toward the trusts could argue that the courts were beginning to be more lenient toward industrial combinations,<sup>126</sup> while one of the leading opponents of the trusts could maintain that even the decisions which appeared lenient really sustained the severity of the principle.<sup>127</sup> However, the main defect of this branch of the law, considered as an antitrust device, was that the courts could decide cases involving combinations only when brought by persons who belonged to, or did business with, a combination. No public official could start proceedings to dissolve a combination or to punish its members.<sup>128</sup>

<sup>123</sup> 106 N.Y. 473 (1887).

<sup>124</sup> Dwight, op. cit. supra note 117, at 607.

<sup>125</sup> *Marsh v. Russell*, 66 N.Y. 288, 291 (1876). This doctrine seems to have been followed equally in cases where the combination was held valid and in those where it was not: *Central Shade Roller Co. v. Cushman*, 143 Mass. 353 (1887); *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880); *Craft v. McConoughy*, 79 Ill. 346 (1875). Consult, Allen, op. cit. supra note 118.

<sup>126</sup> Dwight, op. cit. supra note 117, at 608-9. As evidence that the courts were becoming lenient he cited two English cases, *Wickens v. Evans*, 3 Y. & J. 318 (1829) and *Collins v. Locke*, 4 L.R.A.C. 674 (1879). The American cases would not have supported this argument so clearly.

<sup>127</sup> Cook, *Trusts* 27 (1888). Cook was the author of a frequently quoted treatise on the Law of Stock and Stockholders, and was on a committee of well-known lawyers who drafted an antitrust bill for the N.Y. state legislature. 3 Ry. & Corp. L.J. 121 (1888).

<sup>128</sup> Allen, op. cit. supra note 118.

Although none of these branches of the common law was sufficiently powerful to be used in an active campaign to destroy the trusts, all of them together convinced lawyers that the law opposed monopolies. It had once prohibited chartered monopolies, it still prohibited "engrossing" or "monopolizing," "general" or "total" restraints of trade and combinations "tending toward monopoly." On the basis of such precedents judges had constructed the theory that the "public policy" embodied in the common law opposed monopoly.<sup>129</sup> This doctrine had become firmly established among lawyers,<sup>130</sup> and it was not denied even by those who disapproved of it. The very lawyers who insisted that the trust was not an illegal form of organization usually argued that nothing about the nature of the trust made it necessarily monopolistic, and in doing so they conceded that any trust which was a monopoly would probably be illegal.<sup>131</sup>

To say that monopolies were illegal at common law was one thing, to destroy them by using the common law was another. It was true that in at least three prominent instances between 1887 and 1890 courts judging private suits refused to uphold agreements in restraint of trade.<sup>132</sup> Such results were comforting indications of "the tendency of the judicial mind," as one contemporary law journal put it,<sup>133</sup> but they were clearly not enough to put an end to the trust problem. Active prosecution of trusts was needed, and indeed a few public officials managed to do it. If they could not sue monopolies in any other way, they could and did use the legal weapons provided by their power over corporations. Between 1887 and 1890 the attorneys-general of five

<sup>129</sup> A few of the opinions in which judges held that public policy favored competition are: *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880); *India Bagging Ass'n v. Kock & Co.* 14 La. An. 164 (1859); *Stanton v. Allen*, 5 Denio (N.Y.) 434 (1848). Consult also, Greenwood, *The Doctrine of Public Policy*, 674-75, 685-89 (1886). An example of the tendency to identify a "general restraint of trade" with "monopoly" appears in *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880).

<sup>130</sup> Cook, *op. cit. supra* note 127, at 28; Kerr, *op. cit. supra* note 120, at 879; McQuillan, *op. cit. supra* note 121, at 227; Mickey, *Trusts*, 22 Am. L. Rev. 538, 544, 547 (1888).

<sup>131</sup> Dwight, *op. cit. supra* note 117; Beach, editorial, 3 Ry. & Corp. L.J. 217, 219 (1888); Abbott, 34 Daily Register 484, 572 (1888), cited and criticized in 22 Am. L. Rev. 926 (1888); Dodd, 5 Ry. & Corp. L.J. 98 (1889); Heinsheimer, *The Legal Status of Trusts*, 2 Columbia L. Times 51 (1828).

<sup>132</sup> In *Chicago Gas Co. v. People's Gas Co.*, 121 Ill. 530 (1887), the court refused to enforce an agreement by which two gas companies partitioned Chicago into two exclusive markets; it considered the contract a partial restraint, but invalid because the parties were engaged in public service. In *Mallory v. Hanaur Oil Works*, 86 Tenn. 598 (1888), the court would not enforce a combination of five cottonseed oil manufacturers, because whether or not it was a monopoly, its members were corporations and had no proper authority for participating in a partnership. In *Richardson v. Buhl*, 77 Mich. 632 (1889), the court would not enforce a contract between organizers of the Diamond Match Co. on the ground that any contract for the formation of a monopoly was illegal.

<sup>133</sup> 25 Cen. L.J. 482 (1887), referring to *Chicago Gas Co. v. People's Gas Co.*, 121 Ill. 530 (1887).



states,<sup>134</sup> more or less enthusiastically<sup>135</sup> initiated suits to dissolve corporations that exceeded their chartered powers, or to destroy associations that exercised corporate powers without having charters. Most of the lawyers who insisted on the legality of trusts argued that they were either unincorporated joint-stock companies or partnerships of shareholders, both perfectly lawful forms of organization.<sup>136</sup> The public prosecutors set out to prove the opposite, and in every case they won.<sup>137</sup> The reactions to these cases were mixed. Some lawyers felt that this sort of attack might solve the problem: they hailed one decision as a "crushing" blow, another as a "setback" for the trusts, a third as a "victory" for the people, and concluded that at least in New York the trust had received its "judicial quietus."<sup>138</sup> Others were less certain that the solution was general: they pointed out that the Louisiana decision would not be followed elsewhere since other states did not prohibit joint-stock companies,<sup>139</sup> and that the Illinois decision was not a blow against trusts because the defendant, the Chicago Gas Trust Company, was not properly speaking a trust but a corporation.<sup>140</sup> But in any case, few monopolies had been destroyed in this way by 1890.

Still, these few recent attacks on monopolies, together with the current view that the common law expressed a public policy hostile to monopolies, made lawyers confident that the common law went in the right direction. Some

<sup>134</sup> In *Louisiana v. American Cotton-Oil Trust*, 1 Ry. & Corp. L.J. 509 (1887), the court declared the trust unlawful, because it was not a corporation and the state's statutes forbade joint-stock companies. In *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889), the court held that the Company must sell the stocks it owned of four other gas companies, because its corporate charter did not give authority to operate other corporations or to form a monopoly. In *California v. American Sugar Refining Co.*, 7 Ry. & Corp. L.J. 83 (1890), the court dissolved the corporation on the ground that it had forfeited its franchise by surrendering its business to the Sugar Trust. In *People v. North River Sugar Refining Co.*, 121 N.Y. 582 (1890) aff'g 22 Abb. N.C. (N.Y.) 164 (1889), the court dissolved the corporation because it exceeded its chartered powers by entering a combination, the Sugar Trust, which moreover was a monopoly. In *State v. Nebraska Distilling Co.*, 29 Neb. 700 (1890), the court annulled the franchise of the corporation because in selling out to the Whisky Trust it had made an unlawful contract.

<sup>135</sup> The New York sugar case (*People v. North River Sugar Refining Co.*, 121 N.Y. 582 (1890)) was called a "Tammany Hall suit," 4 Ry. & Corp. L.J. 241 (1888), and was part of a Democratic campaign to make capital of the trust question, 5 Ry. & Corp. L.J. 53 (1889). The Chicago Gas case (*People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889)), was prosecuted by Attorney General Hunt, at the instance of the Chicago Citizen's Association. His first reaction to their suggestion was that he could not bring the case without "backing" and that he had no money to pay for collecting evidence. *Chi. Trib.* p. 6, col. 5 (Feb. 3, 1888).

<sup>136</sup> Consult authors cited note 131 supra.

<sup>137</sup> See note 134 supra.

<sup>138</sup> Comments on the La. decision, 29 Cen. L.J. 41 (1889); Cal., 30 Cen. L.J. 69 (1890); Ill., 24 Am. L. Rev. 143 (1890); N.Y., Albany L.J., quoted in 5 Ry. & Corp. L.J. 144 (1889).

<sup>139</sup> Mickey, *op. cit.* supra note 130, at 542.

<sup>140</sup> 30 Cen. L.J. 2 (1890); 6 Ry. & Corp. L.J. 441 (1889).

of them thought it went far enough. The members of the New York Senate committee on trusts were so impressed by the *North River Sugar* decision that they proposed to defer legislation for the time being—or rather the Republican majority of the committee thought that no new law might be needed, while the Democrats believed that none likely to be passed would be as favorable as the common law declared in that decision.<sup>141</sup> The editor of the *American Law Review*, in commenting on Sherman's antitrust bill, said that as the trusts were making war on society, society was bound to make war upon them, but concluded that society could carry on its war without enacting criminal statutes: "The common law is good enough, if it were only administered."<sup>142</sup> Other lawyers, however, said that more force was necessary. One, after arguing that the trusts, as monopolies, were prohibited by the common law, suddenly ended with a warning that they could be checked only by "wisely and fearlessly executed legislation."<sup>143</sup> The editor of the *Central Law Journal*, commenting on the Tennessee case in which the operation of the common law dissolved a combination of cotton-oil manufacturers, nevertheless differed with the suggestions that the common law was a sufficient weapon. The trusts, he said, were "vast masses of aggregated capital, completely organized, and fully supported by numerous corporations, many of them improvidently endowed by their charters with extraordinary powers"<sup>144</sup>—they were too powerful to be destroyed without legislation.

Few of the lawyers who believed that statutes were needed—at least few who wrote in legal periodicals—suggested how the statutes should be framed. One of the rare proposals was that laws be passed to subject the trust to corporation law, and to prohibit any corporation from holding stock in any other.<sup>145</sup> This second hint was rather far-sighted, for the author understood, as few others yet did,<sup>146</sup> that the corporate holding company or merged corporation might be a much safer method of organizing monopolies than the trust. But there was a serious flaw in this scheme, as in all antitrust laws proposed or passed by the states (the Missouri antitrust law, for instance, had already encountered it by March of 1890):<sup>147</sup> the states lacked authority to regulate corporations engaged in interstate commerce. It seemed therefore that

<sup>141</sup> 5 Ry. & Corp. L.J. 478 (1889).

<sup>142</sup> 22 Am. L. Rev. 926 (1888).

<sup>143</sup> Mickey, *op. cit.* supra note 130, at 549.

<sup>144</sup> 27 Cen. L.J. 277 (1888), commenting on *Mallory v. Hanaur Oil Works*, 86 Tenn. 598 (1888).

<sup>145</sup> Stimson, *Trusts*, 1 Harv. L. Rev. 132 (1887).

<sup>146</sup> 30 Cen. L.J. 257 (1890); see also the remarks of Senators Teller and Sherman in 21 Cong. Rec. 2,560; 2,462 (1890). All of these, however, recognized the fact three years later than Stimson.

<sup>147</sup> Consult, 30 Cen. L.J. 1 (1890); 7 Ry. & Corp. L.J. 241 (1890).

if antitrust legislation were needed, and if it were to be effective against the largest and most powerful trusts, it must be passed by Congress.<sup>148</sup>

The lawyers and the economists offered Congress little specific help and much conflicting advice. Yet, although the economists advocated some sort of public regulation while the lawyers suggested nothing but prohibitory laws, their underlying views were well adapted to each other. The economists thought that both competition and combination should play their parts in the economy. The lawyers saw that the common law permitted combination in some instances and prohibited it in others. Congressmen seized on this hidden agreement, and set out to construct a statute which by the use of common law principles would eliminate excesses but allow "healthy" competition and combination to flourish side by side.

### III

The political parties officially recognized the trust problem soon after it arose. The third parties needed no urging; they were eager to extend the campaign that the Greenback and Anti-Monopoly parties had carried on since 1880 against "land, railroad, money and other gigantic monopolies."<sup>149</sup> It was a matter of course that the Union Labor Party, formed by a coalition of Greenbackers, Knights of Labor, and farmer organizations, should make much of this new opportunity, and indeed they made it one of their great causes. The platform they adopted in the spring of 1888 concluded with the declaration: "The paramount issues to be solved in the interests of humanity are the abolition of usury, monopoly, and trusts, and we denounce the Democratic and Republican parties for creating and perpetuating these monstrous evils."<sup>150</sup>

The major parties were anything but anxious to appear as champions of the trusts. The Democrats had made the appropriate general statements against monopoly in 1880<sup>151</sup> and 1884,<sup>152</sup> but they had especially good reasons for carrying these further in 1888. For one thing, they could cite the new offense as additional evidence against their old enemy, protection. President Cleveland, in his annual message to Congress at the end of 1887, said it was "notorious" that the "combinations quite prevalent at this time, and frequently called trusts," strangled competition; he urged that action be taken against them, and suggested that Congress reduce the customs duties protecting them

<sup>148</sup> Consult, 30 Cen. L.J. 1,365 (1890); 22 Am. L. Rev. 269 (1888).

<sup>149</sup> Greenback platform of 1884; a virtually identical expression appeared in their platform of 1880, and a more expanded version in the Anti-Monopoly platform of 1884. McKee, *National Conventions and Platforms* 215, 192, 224 et seq. (1901).

<sup>150</sup> *Ibid.*, at 251. Anti-monopoly planks appeared also in the 1888 platforms of the Prohibition Party and of the United Labor Party. *Ibid.*, at 247, 252 et seq.

<sup>151</sup> *Ibid.*, at 184.

<sup>152</sup> *Ibid.*, at 206.

against foreign competitors.<sup>153</sup> Moreover, the trust issue was especially useful for appealing to farmers and laborers who might shift their vote to the third party. Cleveland, during his term of office, opposed the easy-money and silver-coinage schemes that were supposed to be popular in the South and West, that were advocated by the Union Labor Party<sup>154</sup> and supported by a wing of his own party. As a candidate for re-election he was no more pliable, and the Democratic national convention of 1888 was the only one between 1880 and 1896 that did not advocate silver coinage; it did not even mention the word "silver" in its platform. The party apparently felt obliged to make up for this somehow, and amidst sympathetic references to "the industrious freemen of our land," "every tiller of the soil" and "the cry of American labor for a better share in the rewards of industry," it asserted that, "Judged by Democratic principles, the interests of the people are betrayed when, by unnecessary taxation, trusts and combinations are permitted to exist, which, while unduly enriching the few that combine, rob the body of our citizens. . . ."<sup>155</sup>

The Republican Party had even more compelling need to condemn the trusts. They had since 1880 achieved the reputation of being the party of the rich, and in 1884 Ben Butler began calling them the "Party of Monopolists."<sup>156</sup> This label became especially current after their presidential candidate was given a banquet by a group of businessmen, among them Gould, Vanderbilt, and Astor, which the *New York World* titled "The Royal Feast of Belshazzar Blaine and the Money Kings," and during which, it said, the "Millionaires and Monopolists" sealed their allegiance to the party.<sup>157</sup> A party whose policies were subject to so crudely cynical an interpretation and which was undoubtedly supported—as were the others—by some millionaires, must have condemned the trusts in self-defense even if it had not objected to them in principle. In their convention of 1888, the Republicans accordingly condemned "all combinations of capital, organized in trusts or otherwise, to control arbitrarily the conditions of trade among our citizens," and recommended "such legislation as will prevent the execution of all schemes to oppress the people by undue charges on their supplies, or by unjust rates for the transportation of their products to market."<sup>158</sup> Because they elected President Harrison and won decisive control of Congress in the following election, responsibility for carrying out the recommendation became theirs.

Congress began to concern itself with the trust problem in January of 1888.

<sup>153</sup> 8 Richardson, *Messages and Papers of the Presidents* 588 (1900) (Message of Dec. 6, 1887).

<sup>154</sup> McKee, *op. cit. supra* note 149, at 250.

<sup>155</sup> *Ibid.*, at 235.

<sup>156</sup> Butler, *Address to His Constituents* 8 (Pamphlet of Aug. 12, 1884).

<sup>157</sup> *N.Y. World* p. 1 (Oct. 30, 1884).

<sup>158</sup> McKee, *op. cit. supra* note 149, at 241.

The antitrust bill was brought to the floor of Congress by Senator John Sherman because he wanted to leave one more monument to himself. By 1888 he was aging, at times impatient and confused, but still the most prominent and esteemed Republican in Congress. He had served as representative for eight years, senator for over twenty-five, and had been Secretary of the Treasury under Hayes. He had been a candidate for the presidential nomination since 1880, and seemed finally to be winning it at the convention of 1888 until Harrison took the lead during the seventh ballot. Soon after this defeat he began to take serious interest in the trust question. His seniority and experience gave him great authority on financial questions and his recent disappointment gave him the urge to do something memorable. He began by establishing personal jurisdiction over the antitrust problem. The antitrust bills introduced earlier in the year<sup>159</sup> had been referred to committees, but none had yet been debated, when, on July 10, Sherman successfully introduced a resolution directing the Senate Committee on Finance, of which he was a ranking member, to investigate all antitrust bills.<sup>160</sup> He maintained that the Committee would investigate antitrust bills "in connection with" tariff bills, which were undoubtedly its proper province; but this argument had its danger as well, for by stressing the connection between trusts and tariffs he was playing into the hands of the Democrats. He had already made this blunder when, in replying to Cleveland's annual message, he agreed that the trusts might be fought by reducing duties that protected them—though he then added that he knew of no trusts which had such protection.<sup>161</sup> Now he was a little more on guard, and argued that the trusts not only prevented "freedom of trade and production" but also subverted the tariff system; they undermined "the policy of the Government to protect and encourage American industries by levying duties on imported goods."<sup>162</sup>

The effect of Sherman's maneuver became evident a month later, when Senator John Reagan, a Democrat from Texas, introduced an antitrust bill which was read and about to be referred to committee.<sup>163</sup> At this point Sherman rose to insist that according to the resolution the bill should be sent to the Finance Committee. He maintained that this was appropriate because the only constitutional provision enabling Congress to legislate against trusts was the power to levy taxes: though the federal government might not be able to attack trusts like Standard Oil, it could certainly use the taxing power to con-

<sup>159</sup> Sen. 2,906; H.R. 6,113, 6,117, 8,036, 8,054, 9,449, 10,049, 50th Cong. 1st Sess. (1888). The bills, as well as debates directly concerned with them, are conveniently gathered in Sen. Doc. No. 147, Bills and Debates in Congress Relating to Trusts, 57th Cong. 2d Sess. (1903), from which, however, some relevant matter is omitted, e.g., H. R. 4,406, 50th Cong. 1st Sess. (1888).

<sup>160</sup> 19 Cong. Rec. 6,041 (1888).

<sup>161</sup> *Ibid.*, at 190.

<sup>162</sup> *Ibid.*, at 6,041.

<sup>163</sup> *Ibid.*, at 7,512.

trol monopolies like the Sugar Trust, which were aided by tariffs. But this doctrine was far from congenial to him, and when Senator Ransom replied that Congress derived its jurisdiction over trusts from its constitutional power to regulate commerce, Sherman was ready to shift ground. He answered: "I always take the revenue laws as commercial laws. They always go together, interchangeably."<sup>164</sup> Though this may have been an accurate interpretation of the Constitution,<sup>165</sup> it was less than an adequate reason for referring trust bills to the Finance Committee rather than the Commerce Committee, but the Senate was impressed by Sherman's determination and agreed to send Reagan's bill to his committee. Sherman immediately capped the day's work by introducing an antitrust bill of his own.<sup>166</sup>

His bill, unlike Reagan's, was returned in short order to the Senate floor, where it was briefly debated and considerably amended in January, 1889.<sup>167</sup> By now it had begun to look like a serious effort, and was honored with a long attack by Senator James George of Mississippi, formerly a Confederate general and Chief Justice of the state supreme court, a Democrat and fervent upholder of states' rights.<sup>168</sup> George questioned both its effectiveness and constitutionality. He declared that although he firmly opposed the trusts and was eager to destroy them, he saw no hope that the bill could do so. It declared illegal "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition" in certain goods, or "to advance the cost to the consumer";<sup>169</sup> yet these words, George said, would condemn not only the trusts and combinations but also arrangements made "for moral and defensive purposes."<sup>170</sup> It would penalize not only the Southern farmers who had organized a boycott against the Jute-Bag Trust, but also combinations of farmers to raise the prices of their products and of laborers to raise their wages, and even temperance societies whose members compacted not to use spirits. However serious this defect—and Sherman immediately assured the Senate that it was unintentional—the great objection to the bill was its utter futility. The bill, as it now stood, supposed that Congress derived its power over trusts from the commerce clause of the Constitution; it therefore outlawed combinations dealing in goods that had been imported from abroad or that might "in the due course of trade" be transported from one state to another. But according to the established interpretation of the Constitution, he

<sup>164</sup> *Ibid.*

<sup>165</sup> Consult, Crosskey, *Politics and the Constitution* parts 1-2 (1953).

<sup>166</sup> 19 Cong. Rec. 7,512 (1888).

<sup>167</sup> 20 Cong. Rec. 1,167-69 (1889).

<sup>168</sup> *Ibid.*, at 1,459-61.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

insisted, Congress could control commerce only while goods were in the actual process of being transported into the country or from one state to another. It was apparent that a law punishing combinations because they dealt in goods that might once have been imported or that might some day be sent from one state to another was either unconstitutional, or if constitutional, then so limited in application as to be worthless. Having ended his critique, he took a little time to point out, with some relish, that Sherman had admitted that an anti-trust law could not be based on the commerce power and had recognized, as he himself would, that trusts could be controlled in a constitutional manner only by reducing protective tariffs.<sup>171</sup> Sherman did not answer, and before there was another opportunity for debate, the 50th Congress disbanded.

These preliminary skirmishes were continued during the early months of the 51st Congress. The moment the session began Sherman introduced a bill that, except for changes in detail, contained the words and principles of his previous drafts. It declared unlawful and void all combinations preventing competition in foreign and interstate commerce; it authorized any person injured by such combinations to recover damages; and it subjected all members and agents of such combinations to fine and imprisonment.<sup>172</sup> The bill, introduced on December 4, 1889, and very slightly amended by the Finance Committee, was brought to the floor of the Senate in February 1890, whereupon Senator George once again made a full-scale attack on it. He repeated his previous objections, and as before concluded that the bill was "utterly unconstitutional, and even if constitutional, utterly worthless."<sup>173</sup> The matter was left there, and it began to look as though antitrust legislation was a dim prospect. More than two years had passed since the first bills had been put before Congress, and as yet only one had been briefly considered. The machinery seemed to have come to a standstill. Two other bills in the Senate, introduced by George and Reagan, were still being held up by committees, as were seventeen bills that had been introduced by representatives.<sup>174</sup> It was rumored that the reason for the delay since December was that McKinley, chairman of the House Ways and Means Committee, was thinking of attaching an antitrust section to his tariff bill,<sup>175</sup> which had already been passed by the House and

<sup>171</sup> *Ibid.*

<sup>172</sup> Sen. 1, 51st Cong. 1st Sess. (1889).

<sup>173</sup> 21 Cong. Rec. 1,765-72 (1890).

<sup>174</sup> Sherman's Resolution (see text at note 160 *supra*) having expired with the end of the 50th Congress, Reagan's bill (Sen. 62, 51st Cong. 1st Sess. [1889]) was referred to the Judiciary Committee, but George's bill (Sen. 6, 51st Cong. 1st Sess. [1889]) was sent to the Finance Committee. Of the bills in the House (H.R. 91, 179, 202, 270, 286, 313, 402, 509, 811, 826, 839, 846, 3,294, 3,353, 3,819, 3,844, 3,925, 51st Cong. 1st Sess. [1889]) nine were referred to the Ways and Means Committee, six to the Judiciary, and two to Manufactures. H.R. 30, 51st Cong. 1st Sess. (1889), a proposal for a constitutional amendment prohibiting trusts, was also before the Judiciary Committee.

<sup>175</sup> 7 Ry. & Corp. L.J. 201 (1890).

was quite certain to become law. For the moment, however, nothing seemed to be happening.

Suddenly the situation changed, and in the last weeks of March 1890, the serious work of preparing an antitrust law was begun. The burst of energy may have come because the Republican congressmen gave up the idea, supposing they ever had it, of treating the trust problem in the McKinley Tariff Bill. To have done so would have given the impression that they agreed with the Democrats about the causes of trusts and the constitutional powers available to destroy them. They may have felt that the public was becoming impatient, for congressmen were receiving an increasing number of petitions advocating antitrust legislation.<sup>176</sup> Or the new activity may have come at Sherman's insistence. He announced a few days before it began that he had revised his bill to meet George's objections,<sup>177</sup> having deleted the provisions George had criticized because they would make the law a criminal one and thus oblige the courts to interpret it narrowly. In any case, by the time Sherman submitted his new bill on March 21, the Senate was prepared to concentrate on it and spent the next five days doing little else.

The great debate opened with a long, formal address in which Sherman praised his bill. He began by explaining its political and legal theory. It was intended, he said, to destroy combinations, not all combinations, but all those which the common law had always condemned as unlawful. It was not intended to outlaw all partnerships and corporations, though they were by nature combinations. The corporations had demonstrated their usefulness by the vast development of railroads and industry, and Sherman added—bearing in mind the lingering prejudice against them—that as long as every man had the right under general laws to form corporations, they were “not in any sense a monopoly.”<sup>178</sup> But any combination which sought to restrain trade, any combination of the leading corporations in an industry, organized in a trust to stifle competition, dictate terms to railroads, command the price of labor, and raise prices to consumers, was a “substantial monopoly.” It smacked of tyranny, “of kingly prerogative,” and a nation that “would not submit to an emperor . . . should not submit to an autocrat of trade.”<sup>179</sup> Sherman went on to say that all such combinations in restraint of trade were prohibited by the common law, wherever it was in force; it had always applied in the states, and the “courts in different States have declared this thing, when it exists in a

<sup>176</sup> A few public petitions and resolutions from state legislatures were read into the record during the second session of the 50th Congress (Dec. 3, 1888 to March 3, 1889), 20 Cong. Rec. 514, 1,234, 1,253, 1,273, 1,500, 1,589, 2,135 (1888-89). But between Dec. 2, 1889 and March 21, 1890, forty-nine were entered. 21 Cong. Rec. (listed in Index, sub. “Trusts, Petitions”).

<sup>177</sup> N.Y. Times p. 6, col. 1 (March 19, 1890).

<sup>178</sup> 21 Cong. Rec. 2,456 (1890).

<sup>179</sup> *Ibid.*



State, to be unlawful and void." Senator Cullom interrupted to ask, "Everywhere?" "In every case, everywhere,"<sup>180</sup> Sherman replied, and went on to list the recent decisions supporting his view. He first read the full opinion of the Michigan Supreme Court in the case of *Richardson v. Buhl*,<sup>181</sup> which had a double attraction for him. It struck at the Diamond Match Company's monopoly, and it labeled as a monopolist General Russel Alger, one of his chief rivals in 1888 for the Republican presidential nomination, the one whom Sherman blamed for his unexpected defeat and publicly accused of having bribed delegates.<sup>182</sup> Sherman then cited other cases, which if they did not hold the same personal interest for him, all supported the view that monopolies and combinations in restraint of trade were unlawful and void in courts of common law.<sup>183</sup> But, he continued, the trusts were threatened by no similar law in the federal courts and a statute was needed to enforce the common law that already applied in state courts. Once again, he insisted that Congress was authorized alike by the commerce and revenue clauses of the Constitution to regulate combinations affecting interstate and foreign commerce; and he concluded that his bill, based on this constitutional power and declaring the common law rule, would effectively destroy the power of the trusts.<sup>184</sup>

The debate which occupied much of the following week was untidy but not without pattern. Many senators delivered great orations, but few were heard to say that the trusts were desirable or an antitrust law unnecessary. George repeatedly questioned the bill's constitutionality; certain of his Democratic colleagues took occasion to avow their opposition to tariffs. A number of senators tried to substitute their own bills for Sherman's and failing this they attached them to his as amendments. By the end of the third day, the bill before the Senate consisted of sixteen sections.<sup>185</sup> Sherman's bill now had

<sup>180</sup> *Ibid.*

<sup>181</sup> 77 Mich. 632 (1889), discussed *supra* note 132.

<sup>182</sup> The rumor that Alger, or his managers, bought votes of Southern delegates, reputedly at \$50.00 each, was reported at the time and has been repeated since by disinterested witnesses: N.Y. Trib. (June 10, 1888); Stephenson, Nelson W. Aldrich 71, 434 n. 7 (1930); 2 Gresham, *Life of Walter Quintin Gresham* 574, 632 (1919). Sherman was convinced of its truth and was openly antagonistic to Alger. When President Harrison signed the Antitrust Bill, he is said to have remarked, "John Sherman has fixed General Alger," though this story may well be apocryphal. 2 Gresham, *supra*, at 632. Though revenge cannot have been Sherman's chief motive in pressing for the Act, there is no doubt that he was bitter about the incident; he still referred to it angrily in his autobiography. 2 Sherman, *Recollections of Forty Years* 1,029 (1895). And he did not forego the opportunity to indulge the passion; contemporary observers remarked the relish with which he read the opinion in *Richardson v. Buhl*. N.Y. Times p. 4, col. 3 (March 25, 1890).

<sup>183</sup> *Craft v. McConoughy*, 79 Ill. 346 (1875); *Chicago Gas Co. v. People's Gas Co.*, 121 Ill. 530 (1887); *People v. Chicago Gas Trust Co.*, 130 Ill. 268 (1889); *People v. North River Sugar Refining Co.*, 22 Abb. N.C. (N.Y.) 164 (1889), *aff'd*, 121 N.Y. 582 (1890).

<sup>184</sup> 21 Cong. Rec. 2,458 et seq. (1890).

<sup>185</sup> Bills and Debates 217-22 (1890).

tailoring after it: Reagan's bill, which, instead of relying on common-law formulas, gave a long explicit definition of the term "trust";<sup>186</sup> Ingall's bill, which was a more or less independent effort to prohibit speculation in farm products; and George's clause, which exempted labor unions and farmers' organizations from the general prohibitions. Moreover, the constitutional issue was still confused, and George suggested that the bill be referred to the Judiciary Committee, who, chosen for their legal wisdom, might be able to restore order to the law. Sherman, piqued and impatient, objected that it was most unusual to transfer a bill from one committee to another; Reagan, whose original bill had never yet been reported to the floor by the Judiciary Committee, was equally adamant; and Vance called the Judiciary Committee a "grand mausoleum of Senatorial literature" in which this bill would be buried.<sup>187</sup> But after two more days in which further amendments were added and further profound doubts expressed, the matter had become so tangled that little alternative remained, and the bill was referred to the Judiciary Committee with instructions to report within twenty days.<sup>188</sup>

The Judiciary Committee took the matter out of Sherman's hands, much to his regret and anger. But within a week, surprising everyone, the Committee produced a bill of its own. The work was done largely by its chairman, George Edmunds of Vermont. He disposed of the constitutional question very quickly: when the Committee first met to consider the bill, he proposed to his colleagues "that it is competent for Congress to pass laws preventing and punishing contracts etc. in restraint of commerce between the states." And they, including George, who had raised objections to this theory all along, unanimously agreed.<sup>189</sup> Edmunds then presented drafts of the critical sections of the Act, that made it a misdemeanor to engage in any combination in restraint of trade or to "monopolize" trade, and these were agreed to by all the committeemen present. Two of the remaining sections were written by others: George prepared the section authorizing the Attorney General to sue for injunctions against violators, and Hoar wrote the section authorizing private persons to sue violators for triple damages.<sup>190</sup> The Com-

<sup>186</sup> Reagan defined a trust as a "combination of capital, skill, or acts" by two or more persons or associations for any of the following purposes: to restrict trade, to limit production, to increase or reduce price, to prevent competition, to fix prices, to "create a monopoly," to make any agreement to set minimum prices, to agree to "pool, combine, or unite" so as to affect prices. Sen. 62, 51st Cong. 1st Sess. (1889).

<sup>187</sup> 21 Cong. Rec. 2,600 et seq., 2,604, 2,610 (1890).

<sup>188</sup> *Ibid.*, at 2,731.

<sup>189</sup> Senate, Committee on the Judiciary, Minute Book 226 (March 31, 1890) (Ms. in U.S. Archives).

<sup>190</sup> The Committee Minute Book, *ibid.*, at 227-33, shows that sections 1, 2, 5, and 6 were drafted by Edmunds, section 4 by George, section 7 by Hoar, and the phrase "in the form of a trust or otherwise" by Evarts. It does not indicate who drafted sections 3 and 8. There is a strong presumption, but no proof, to support Walker's assertion that Edmunds did; consult Walker, *Who Wrote the Sherman Law*, 73 *Cen. L.J.* 257, 258 (1911).

mittee's draft was in broad outline the same as Sherman's original bill, yet Sherman was not pleased. He immediately denounced it as "totally ineffective in dealing with combinations and trusts. All corporations can ride through it or over it without fear of punishment or detection."<sup>191</sup> His reaction was particularly ungenerous, since aside from the fact that the new bill was simpler than his, it differed mainly in providing a greater number of more severe penalties. But when the time came, he voted for it, and as a matter of courtesy it bears his name. The Senate as a whole seemed well satisfied, and after hearing Edmunds' plea that they "pass a bill that is clear in its terms, is definite in its definitions, and is broad in its comprehension, without winding it up into infinite details,"<sup>192</sup> they passed it by fifty-two votes to one.

The action of the House was less systematic. Representative Culberson, who was in charge of the debate, tried to limit it to one hour. His colleagues, who had not until now considered any antitrust bill, complained that they could not get printed copies of the one before them. A strong group insisted that a section should be added to the bill specifically aimed at outlawing railroad and meat-packing pools. After a rather desultory debate, the House passed the bill with one amendment, on May 1. During the next two months, conferences were held between the two chambers, and the House was eventually prevailed on to withdraw its amendment.<sup>193</sup> President Harrison signed the bill, and it became law on July 2, 1890.

#### IV

The Sherman Act was as good an antitrust law as the Congress of 1890 could have devised. Congressmen had been called on to give the federal government novel powers to control, directly and generally, the organization of economic life. They had little experience to teach them how such a law should be written or to inform them how the courts might interpret it. They realized from the beginning that whatever law they composed would be imperfect. Its strongest advocates frankly admitted that it would be "experimental,"<sup>194</sup> and in the end the whole of Congress was reconciled to the limitation Sherman recognized when he said, "All that we, as lawmakers, can do is to declare general principles."<sup>195</sup> Yet if the Sherman Act was an experiment, it was the safest one Congress could make, and if it only declared general principles, they were at least the familiar ones of the common law. Sherman had repeated-

<sup>191</sup> N.Y. Times p. 4, col. 4 (April 8, 1890).

<sup>192</sup> 21 Cong. Rec. 3,148 (April 8, 1890).

<sup>193</sup> Bills and Debates 327-402 (1890).

<sup>194</sup> E.g., Senators Sherman, Edmunds, Turpie, and Representatives Culberson and Heard; 21 Cong. Rec. 2,460, 2,557-58, 3,148, 4,089, 4,101 (1890).

<sup>195</sup> 21 Cong. Rec. 2,460 (1890).

ly said that his bill was based on a tried formula: "It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."<sup>196</sup> Edmunds, principal author of the Judiciary Committee bill, and Hoar, who guided it through debate on the floor, said the same.<sup>197</sup> Of the eighty-two senators, sixty-eight were lawyers, and as one of them said, "I suppose no lawyer needs to have argument made to him that these combinations and trusts are illegal without statute."<sup>198</sup> They could not tell how the courts would construe a statute that gave the government power to indict and sue the offenders, but they believed that the courts would experience little difficulty in recognizing the offense.

Congress had reason to think, further, that the Act aimed at the proper goals. On the one hand, it satisfied the public demand for an antitrust law. It prohibited trusts in so many words: it declared illegal "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations."<sup>199</sup> This specific mention of "trusts" had almost been omitted, for Edmunds so strongly desired to define the offense in "terms that were well known to the law already,"<sup>200</sup> that his draft of the section used only the common-law words, "contract," "combination," and "conspiracy." But a majority of his colleagues on the Judiciary Committee had seen the political value of adding a term that was well known to the public and had agreed to insert Evert's phrase, "in the form of a trust or otherwise."<sup>201</sup>

On the other hand, the Act did not go farther than Congress thought it should. Congressmen were no more in favor of unlimited competition than the economists were. Sherman, in his great address, had emphasized that many combinations were desirable. He was sure that they had been an important cause of America's wealth, and he had no intention of prohibiting them. It was only "the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination."<sup>202</sup> Edmunds and Hoar later said they had the same intention.<sup>203</sup> A majority of the representatives who conferred with senators about

<sup>196</sup> *Ibid.*, at 2,456.

<sup>197</sup> *Ibid.*, at 3,148, 3,146, 3,152.

<sup>198</sup> Sen. Teller, 21 Cong. Rec. 2,458 (1890).

<sup>199</sup> 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1951).

<sup>200</sup> 21 Cong. Rec. 3,148 (1890).

<sup>201</sup> See note 190 *supra*.

<sup>202</sup> 21 Cong. Rec. 2,457 (1890). Cf. *ibid.*, at 2,460.

<sup>203</sup> Washburn, *The History of a Statute* 9 (1927); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 544 et seq. (1898); 2 Hearings before Senate Committee on Interstate Commerce, pursuant to Sen. Res. 98, 62d Cong. 1st Sess., 1,550, 2,430 (1912).

the House amendment opposed it for similar reasons. They said that the bill's "only object was the control of trusts, so called," but that the scope of the amendment was broader, and indeed too broad: "It declares illegal any agreement for relief from the effects of competition in the two industries of transportation and merchandising, however excessive or destructive such competition may be."<sup>204</sup> Senator Teller meant the same, although he used impolitic language, when he said that "a trust may not always be an evil. A trust for certain purposes, which may mean simply a combination of capital, may be a favorable thing to the community and the country."<sup>205</sup> Perhaps the clearest statement of this view, held by many congressmen as well as by many economists of the period, was that of Representative Stewart of Vermont:

[T]here are two great forces working in human society in this country to-day, and they have been contending for the mastery on one side or the other for the last two generations. Those two great forces are competition and combination. They are correctives of each other, and both ought to exist. Both ought to be under restraint. Either of them, if allowed to be unrestrained, is destructive of the material interests of this country.<sup>206</sup>

The common law was a perfect instrument for realizing the policy supported by Congress. It prohibited monopolies but not all combinations, and congressmen felt that a statute based on it would have equally qualified effects.

Though the pattern of the law was sound, there were nevertheless defects in detail. Various ambiguities had crept in because so many men had part in drafting it, because they wanted it to be simple and general, and because they wanted to use common-law terms to define the offenses. In order to keep the law broad, Congress did not specifically exclude labor unions from its scope or include railroad pools. So far as their sentiments were expressed in debates and bills, they had favored unions or wanted to leave them immune from this law. Sherman said they should be specifically exempted and many agreed with him.<sup>207</sup> Edmunds almost alone spoke against a specific exemption, because he thought that labor unions should be treated like any other combination.<sup>208</sup> But when he came to write the bill he was mainly concerned with keeping it unqualified. His colleagues seem to have been convinced by his arguments in favor of simplicity. Although during the debates four of the eight members of

<sup>204</sup> 21 Cong. Rec. 5,950 (1890).

<sup>205</sup> *Ibid.*, at 2,471.

<sup>206</sup> *Ibid.*, at 5,956.

<sup>207</sup> Sherman, *ibid.*, at 2,562, 2,611-12; Hiscock, *ibid.*, at 2,468; Teller, *ibid.*, at 2,561-62; Reagan, *ibid.*, at 2,562; Gray, *ibid.*, at 2,657. Consult also, note 209 *infra*. The exemptions were included in Sen. 1, 6, and H.R. 91, 402, 509, 826, 3,819, 3,844, 51st Cong. 1st Sess. (1890).

<sup>208</sup> 21 Cong. Rec. 2,726-29 (1890).

the Judiciary Committee spoke for exempting labor unions,<sup>209</sup> they all voted for Edmunds' draft, probably because they agreed that the law should not be cluttered with details and felt that, in any case, it would not be construed against unions. Reasoning of the same sort explains why railroad pools were not specifically named as offenders, for Senator Vest, a member of the Judiciary Committee, in commenting on the House amendment, said that he too had wanted to add an explicit prohibition, until the other committeemen convinced him it would be redundant.<sup>210</sup> In order to make the Act more inclusive, Congress introduced another note that added to its ambiguity. "Restraints of trade," as the common law understood them, could only come about through agreement between persons; but the Judiciary Committee felt that the Act should also condemn any individual who restrained trade by himself, and they therefore drafted a section making it illegal for any individual to "monopolize." Hoar and Edmunds assured the Senate that the word had a well-known meaning at common law,<sup>211</sup> and their advice was followed although the word meant little more at common law than the engrossing of a local food supply. These were only a few of the blemishes that marred the Act; the courts in time found many more. But to have drawn up a more satisfactory solution for a new and difficult problem, congressmen would have had to be much more adept, much more remote from public opinion, and much more unanimous in their own views, than the lawmakers of a democracy ever can be.

<sup>209</sup> Hoar, *ibid.*, at 2,728; Wilson, *ibid.*, at 2,658; Coke, *ibid.*, at 2,613-15. George was the author of the proviso in the first place. It appeared in his Sen. 6, 51st Cong. 1st Sess. (1890), from which Sherman borrowed it, 21 Cong. Rec. 2,611 (1890).

<sup>210</sup> 21 Cong. Rec. 6,116 (1890). See also the remark by Hoar, *ibid.*, at 4,560.

<sup>211</sup> *Ibid.*, at 3,151-52.