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THE FAILURE OF FEDERAL INCORPORATION LAW: A PUBLIC CHOICE PERSPECTIVE

by

SUNG HUI KIM

PROFESSOR OF LAW

FACULTY DIRECTOR OF THE PROGRAM ON IN-HOUSE COUNSEL,

LOWELL MILKEN INSTITUTE FOR BUSINESS LAW AND POLICY

In CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW (edited by Iman Anabtawi, Stephen Bainbridge, Sung Hui Kim, James Park, Cambridge University Press, forthcoming 2017).

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Author: Sung Hui Kim*

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Introduction

Delaware's domination of corporate law in the U.S. has long fascinated academics. While there is wide consensus that Delaware's preeminence arose out of decades of state-to-state competitive pressures, there is sharp disagreement and debate about the nature of those competitive pressures, that is, whether the competition has been a salutary or nefarious one – a race to the top or to the bottom.[1] Both sides

[1] *See, e.g.*, Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001) (top); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795 (2002) (bottom); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14–24 (1993) (top); William L. Carey, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (bottom); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1509 (1992) (bottom). Some articles that deny the existence of state competition for corporate charters nonetheless acknowledge that the race occurred at an earlier point in

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of the debate believe that states compete to attract corporate franchise tax revenues, but they differ as to what the estimated $500 million annual prize incentivizes states to do. Race-to-the-top theorists argue that the prize motivates states to compete to make better, more efficient, corporate law in an effort to discourage shareholders from causing a reincorporation outside of Delaware. Race-to-the-bottom theorists argue that the prize motivates states to pander to managerial interests because managers are the constituents that control the initial incorporation decision.

The debate took an interesting turn in 2003 when Mark Roe argued that the ongoing debate was badly misconceived. He observed, "Whether or not the states are racing, and whether they are racing to the top or to the bottom, we live in a federal system where Washington can, and often does, take over economic issues of national importance." Given Washington's tendency to take corporate lawmaking power away from the states, Roe explained, "we have never had, and we never could

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time. *See, e.g.*, Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002).

have had, a full state-to-state race in corporate law."[2] After applying a "public choice, institutional analysis" to the Washington-Delaware relationship, Roe concluded that this federal-state "structure privileges state-level deals between managers and investors in Delaware" while excluding outside interest groups, such as unions, public interest groups, and financial institutions, thus keeping broad political concerns out of its corporate law. However, when a key issue attracts federal attention – by, for example, gaining media salience or being linked to anxiety about the economy, wide coalitions of outside interest groups emerge to affect the making of corporate law at the federal level.[3] In sum, Delaware holds the agenda-setting power but is constrained by the threat that Congress, federal courts, the Securities and Exchange Commission, or the New York Stock Exchange will intervene to preempt Delaware on a particular issue. As Roe put it, "Delaware gets to say the words, but only as long as the federal authorities tolerate its script."[4] These dynamics, in turn,

[2] Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 591–92 (2003) [hereinafter Roe, *Competition*].

[3] Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV., 2491, 2542 (2005) [hereinafter Roe, *Politics*].

[4] Roe, *Competition*, *supra* note 2, at 598–601.

motivate Delaware to forge a moderate, status-quo oriented path between managers and investors, entrenching a quasi-contractual paradigm, which Roe referred to as the "conservative, boardroom-centered nature of American corporate law."[5]

Roe's pivot to the Washington-Delaware relationship and his emphasis on the power of federal corporate lawmakers to trump Delaware are important moves in the debate over the determinants of American corporate law. Yet Roe's analysis raises the obvious question: Why does Congress allow Delaware to grab the agenda-setting power, allocating for itself (and its affiliates) only the ex post decision of whether to displace Delaware? Why permit Delaware to have the first crack at making corporate law? Roe answered this question with three alternative and non-mutually exclusive hypotheses. First, those interest groups clamoring for federal action may be able to achieve sufficiently what they want via external constraints such that they are happy to recede from the federal incorporation agenda. Second, as a historical matter, the "serendipitous alignment of interests, policymakers, and scandal just has never been right for full nationalization of corporate law." Third, failing to federalize corporate law may be precisely what

[5] Roe, *Politics*, *supra* note 3, at 2509, 2542.

policymakers or key interest groups, for example, the productivity-oriented policymakers, want. They do not want corporate law to be hijacked by a competing interest group to whom they are even more antagonistic than the investors and corporate managers who are privileged under Delaware's regime.[6]

This essay sheds light on the question of why Congress does not displace the states in the important task of making corporate law. It does so by looking back at an important element in the story of Delaware's domination of corporate law: the failure of Congress to implement federal incorporation. In 1908, during the last year of the Theodore Roosevelt's final term as President, Congress had what may have been its best opportunity to enact a federal incorporation law. Roosevelt, perhaps the greatest presidential champion of federal chartering, asked Congress to consider a proposal to amend the Sherman Act to rectify some of the Act's deficiencies as part of an extensive federal chartering scheme for interstate corporations. That proposal was known as the "Hepburn bill," not to be confused with the Hepburn Act of 1906, which granted the Interstate Commerce Commission the power to set maximum railroad rates. Despite widespread dissatisfaction with the

[6] *Id*. at 2536.

Sherman Act, populist anxiety over the power of large corporations, and big business publicly embracing the general notion of coming under federal control, the Hepburn bill died a quick death.

After examining the excellent histories compiled by Lawrence Mitchell, Martin Sklar, and others and reviewing select primary sources, this essay finds some support for Roe's three hypotheses, but especially his second explanation – that the alignment of interests and scandal has never been right for the full nationalization of corporate law. As this essay discusses, organized interest groups failed to come together in sufficient strength to support the Hepburn bill. But a fuller explanation for the failure of federal incorporation must also account for Roosevelt's intransigence, coupled with his unorthodox views about the proper role of corporations in society, which translated into idiosyncratic strategic choices that helped to doom the bill's survival. Finally, this study also finds that strong federalism norms, as expressed in deep-seated fears of centralized power and an ongoing commitment to states' rights, significantly constrained the ability of Congress to implement federal incorporation. These norms should continue to inhibit the complete displacement of state corporate law.

By invoking public choice theory as an alternative to the public interest model of regulation, this essay makes no claim that failing to accomplish federal incorporation – and thus relinquishing the agenda-setting power to the states – has been contrary to the public interest. Rather, this essay more narrowly employs the lens of public choice theory, its basic skepticism about the likelihood of enacting legislation that provides for a diffuse public benefit, and its emphasis on the strong influence of organized interest groups on legislation in order to illuminate the constraints of federal action on corporate law.

Part I describes the issue to which the idea of federal incorporation would be linked in the Progressive Era — the problem of how to regulate monopolies, cartels and large interstate corporations, commonly referred to as that time as "the trust question." It also describes Roosevelt's initial efforts to build his agenda for federal incorporation. Part II describes Roosevelt's best chance at accomplishing federal incorporation in the form of the Hepburn bill. Part III offers some reflections on the reasons for the failure of the Hepburn bill.

I. Building the Federal Incorporation Agenda

A. The Trust Question

By the early 1900s, federal incorporation was politically linked to the "trust question," the broad issue of how to regulate monopolies, cartels, and large interstate corporations. The U.S. economy, like those of most industrialized nations of the world, was in the midst of a dramatic economic shift characterized by urban expansion and industrial consolidation and facilitated by technological and industrial developments.[7] In several industries, competition among small producers gave way to industrial cartels, which attempted to control production and prices by agreement. Because cartels were notoriously unstable and states had barred corporations from owning stock in other states' companies, companies resorted to the device of a trust, in which a centralized trustee was appointed to hold the stock of constituent companies and coordinate production. Beginning in 1889, however, states, including New Jersey and Delaware, eliminated their holding company restrictions. This liberalization dispensed with the need to use the trust or similar device and enabled companies to integrate disparate

[7] Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160, 160–61 (1982); Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from Knight to Swift*, 39 U.C. DAVIS L. REV. 85, 86–87 (2005).

producers under a single corporate umbrella.[8] Accordingly, the term "trust" would evolve colloquially to encompass more broadly any "corporate aggregation engaged in business other than merely local, and not confined in its operations and scope to the state of its creation."[9]

During the early phase of the trust movement, attempts by large manufacturers to control competition sparked public anxiety about the power of trusts and fueled widespread perception that only the federal government had the resources to control them. Lawrence Mitchell observed that between 1881 and 1901 forty-five bills and three constitutional amendments were proposed to resolve the debate over the federal government's power to regulate trusts.[10] Congress's initial response was in 1890 to pass the Sherman Act, which declared, "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . to be illegal." But the Sherman Act was a political compromise; hence, it contained "ambiguous language

[8] Roe, *Politics*, *supra* note 3, at 2520.

[9] James B. Dill, *National Incorporation Laws for Trusts*, 11 YALE L.J. 273, 275 (1902).

[10] LAWRENCE MITCHELL, THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY 122 (2007).

that provided no guidance as to practical application."[11] So, instead of resolving the trust question, "Congress . . . drafted a statute that, in effect, delegated the real task of defining the nation's antitrust laws to the courts."[12]

As it turned out, the U.S. Supreme Court's handling of the trust question alienated big business and created confusion and uncertainty about the meaning of the Sherman Act. For example, in *United States v. Trans-Missouri Freight Association,* the Court invalidated an agreement among railroad corporations, the express purpose of which was to "maintain[] reasonable rates, rules and regulations on all freight traffic"[13] and to prevent the type of destructive competition that was endemic to the industry.[14] At common law, such an agreement would have been deemed reasonable and therefore lawful because its ostensible purpose was consistent with the common law's policy of protecting the rights of

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[11] Smythe, *supra* note 7, at 96 (quoting James W. Ely).

[12] *Id.* at 138.

[13] 166 U.S. 290 (1897).

[14] Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 44 (1999).

business owners to compete freely.[15] Nevertheless, the Court, in a five-to-four decision, disregarded the common law and construed the Sherman Act in accordance with its plain, literal meaning. Because the Act declared illegal "every contract" in restraint of interstate or foreign trade, the Court deemed both reasonable and unreasonable restraints to be illegal.[16] The holding in *Trans-Missouri* implied that all contracts and combinations, including mergers between horizontal competitors, were illegal, so long as the parties were involved in interstate commerce or foreign trade.[17] While the Justices of the Court remained sharply divided over the construction of the Sherman Act, from 1897 to 1911, a majority usually prevailed with its literal interpretation of the Sherman Act, recognizing no distinction between reasonable and unreasonable restraints of trade.[18]

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[15] Smythe, *supra* note 7, at 97.

[16] *Trans-Missouri*, 166 U.S. at 328.

[17] Smythe, *supra* note 7, at 104.

[18] MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS 128–29 (1988).

Although the *Trans-Missouri* holding was probably welcomed by the general public, it was deeply unsettling to much of American business and the politicians grappling with its implications. There was immediate concern about how far the Court would go in invalidating contracts or combinations. Prominent financier Henry Clews, for example, feared that the courts might make almost any kind of business transaction illegal. And *The New York Times* observed that the Supreme Court's antitrust decisions created a cloud of doubt that hung over many large scale business concerns.[19]

Meanwhile, in 1898, the Republican-controlled Congress, in an effort to placate an anxious public, created the U.S. Industrial Commission and tasked it to investigate then current business conditions, including the rapid growth of industrial consolidations, and to recommend legislation to Congress. Staffed with U.S. representatives, senators and presidential appointees, the Commission conducted numerous hearings and published a voluminous Final Report in 1902. The Report, reflecting the sober opinion of most elites, accepted the inevitability of consolidation but was bothered about practices that drove out competition, inhibited entrepreneurialism, fixed prices, or otherwise

[19] Smythe, *supra* note 7, at 141 (reporting reactions).

harmed consumers. It was also bothered by what it observed as a race to the bottom: "Two or three States have apparently, for the sake of securing a certain revenue easily collected, bid against each other by offering more liberal inducements to corporations." To remedy this "demoralizing tendency in corporation legislation," it recommended the tightening of state laws and the consideration of a federal licensing law requiring all corporations engaged in interstate commerce to be licensed and registered with a bureau of corporations. The law would be aimed at controlling monopolies and, relatedly, mandating corporate publicity as a tool to facilitate legislation and prosecution.[20]

The Report and its recommendation were well received by prominent members of the business community including leading businessmen from Standard Oil, Federal Steel, United States Tobacco Company, American Steel and Wire, and reputable corporate lawyers. They openly welcomed an alternative to the fragmentation of state laws and opined that the benefits of uniformity and predictability under a federal law would outweigh the benefits to be forgone under liberal state charters. Some believed that uniformity would

[20] MITCHELL, *supra* note 10, at 124–28; SKLAR, *supra* note 18, at 185; Urofsky, *supra* note 7, at 166–67.

encourage legitimate combinations while preventing frauds against the public.[21] With big business generally behind the idea of federal licensing, it seemed that Roosevelt, who eventually made the regulation of large corporations a central goal of his presidency, was poised to accomplish it.

B. The Bureau of Corporations

On December 3, 1901, in his first message to Congress, Roosevelt argued for the federal supervision of trusts to be coordinated with state-based regulation. On December 2, 1902, he called for the creation of an executive agency tasked to oversee industry. On February 14, 1903, Congress granted Roosevelt's request by establishing the Department of Commerce and Labor and the Bureau of Corporations as a subunit. The Bureau was vested with expanded information-gathering and investigatory authority, including subpoena power, but not rulemaking authority. At the time, Roosevelt wanted an agency, under tight presidential control, that would assist him in shaping public opinion and eventually recommend regulatory legislation to Congress, thereby

[21] Urofsky, *supra* note 7, at 167, 175–76.

strengthening his own leverage in monitoring and restraining corporate behavior.[22]

Under the successive leadership of two Roosevelt loyalists, James R. Garfield and Herbert Knox Smith, the Bureau campaigned for the affirmation and regulation of corporate combinations and the reestablishment of the common-law distinction between reasonable and unreasonable restraints of trade. It conducted a number of industry studies – from the meatpacking to the oil industries – to assist the administration's antitrust prosecution efforts. Throughout its activities, the Bureau distinguished "good trusts" from "bad trusts" and "fair" from "unfair" business methods. As Roosevelt later expressly acknowledged, with the Bureau's investigatory assistance, his administration selectively enforced the antitrust laws (as construed by the Supreme Court) to target only those contracts and combinations that it deemed were "unfair, unreasonable, and against the public interest."[23]

In its first annual report, delivered by Roosevelt to Congress in December 1904, the Bureau complained about antitrust laws aimed at

[22] *Id.* at 168–69; SKLAR, *supra* note 18, at 186.

[23] SKLAR, *supra* note 18, at 186–87, 191–92; MITCHELL, *supra* note 10, at 158.

preventing monopoly and the restraint of trade for the purpose of maintaining the conditions of free competition. This category of legislation, the Report noted, had been "singularly futile" because it "attempt[ed] to stop the operation of strictly economic law by statutory enactment." Further, in a swipe against the Supreme Court, the Report remarked, "The attempt to maintain a state of competition by prohibiting all combination, reasonable or unreasonable, is wrong in principle."[24]

By contrast, the Report endorsed antitrust laws aimed at banning improper rebates, discrimination, and unfair competition. This category of law intended to regulate the *methods* of competition and thus had "no necessary connection with combinations" or the "maintenance of competition." It rested on an "entirely different principle" and thus was "fundamentally correct."[25]

But unfair competition and pricing were not the only sharp practices that concerned the Bureau. The Report also complained about certain other "peculiar evils," including the abuse of minority interests,

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[24] U.S. BUREAU OF CORPS., REP. OF THE COMM'R OF CORPS., H.R. DOC. NO. 58-412, at 52-88, 81-82 (1904); MITCHELL, *supra* note 10, at 158.

[25] H.R. DOC. NO. 58-412, *supra* note 24, at 82.

the exploitation of one company for the benefit of another, the small and vulnerable investor, speculative manipulation, over-capitalization, and increased risk to creditors.[26] As far as the Bureau could determine, the system of state incorporation was failing to address all of these concerns. Indeed, it seemed that state competition for charters was leading to a type of maleficent race. The Report noted:

> The present situation of corporation law may be summed up roughly by saying that its diversity is such that in operation it amounts to anarchy. . . . This situation, taken in connection with the principle of the comity of States, has had a singular and far-reaching effect on commercial conditions. This principle of comity has the practical result of giving to the organizers of a proposed corporation the choice of all the corporation laws of the various States. Many such organizers represent one of the peculiar interests above referred to, namely, that of the financial or speculative type. Each State naturally desires, chiefly for the purpose of revenue, to attract incorporation to itself by lax corporation laws. The ground has been cut from under the feet of objectors to such laws by the unanswerable proposition that if

[26] *Id.* at 79.

incorporators or organizers were not accommodated in the given State they could incorporate in a more complacent State and easily come back to the first State to do business. The logical result has been an inevitable tendency of State legislation toward the lowest level of lax regulation and of extreme favor toward this special class of incorporators, regardless of the interests of the other classes properly concerned.[27]

Moreover, as the Report noted, states were hampered in their dealings with companies operating within their borders but not incorporated domestically because the principle of comity (the internal affairs doctrine) classified such entities as doing business as "foreign corporations." The Report concluded, "The net result of this State system is thoroughly vicious. In the bidding of State against State for corporation revenue, only one of the numerous interests involved in corporate business is regarded."[28]

As the solution to these problems, the Report recommended that the federal government bring some order to this anarchy in the form of federal licensing or franchising of corporations engaged in interstate

[27] *Id.* at 80–81.

[28] *Id.*

commerce. The idea was that corporations engaged or seeking to engage in interstate or foreign commerce would be required to obtain a federal license, which in turn would be granted on the condition that the corporation satisfy "all necessary requirements as to corporate organization and management" and make the necessary disclosures.[29]

Notably, the Bureau rejected the alternative of federal chartering of corporations, a proposal that had widely circulated during the proceedings of the Industrial Commission. Though it deemed the scheme "probably legally practicable," it acknowledged some uncertainty over the question of whether Congress could constitutionally grant to "interstate commerce corporations" the power to "produce or manufacture" within the states. This uncertainty had been compounded by the Supreme Court's decision in *United States v. E.C. Knight Co.*, in which it rejected the federal government's authority under the Sherman Act to prosecute pure manufacturing activities, as distinguished from commerce.[30] The Report also worried about the constitutionality of state

[29] *Id.* at 85–86.

[30] 156 U.S. 1 (1895).

power to tax federally chartered corporations,[31] as well as the likelihood that federal chartering would involve "radical industrial and political changes by the centralization of power in the Federal Government."[32]

In the end, the Bureau's originally recommended approach was a modest proposal, as seen through a modern lens. The proposal preserved state chartering and states' power to tax their corporations while enabling the federal government to impose conduct standards and publicity.[33] While there was some opposition, the plan was generally received "with so much favor" by industrial companies, as *The Wall Street Journal* reported. In light of the "developing concentration of capital and the growing power of the corporations," it was seen as "inevitable" that "the people should take some measures for their protection, and that these measures should take the form of governmental regulation." Also, the business interests seemed to think

[31] MITCHELL, *supra* note 10, at 164; H.R. DOC. NO. 58-412, *supra* note 24, at 85.

[32] H.R. DOC. NO. 58-412 *supra* note 24, at 85, 87; SKLAR, *supra* note 18, at 188; MITCHELL, *supra* note 10, at 164.

[33] *See* MITCHELL, *supra* note 10, at 164–65.

that federal regulation offered the valuable benefit of uniformity of laws.[34]

It is inherently difficult to judge the sincerity of the business community's receptivity to the notion of federal licensing. But historical accounts suggest that there was genuine support for some federal licensing measure. This support is best explained by the unusual business climate at the time. As Mitchell observed:

> Business had been clamoring for certainty. The Bureau of Corporations' files contain a raft of letters from businessmen around the country inquiring as to whether they could federally incorporate or, more frequently, whether the Bureau would give them advance guidance or approval of their plans, a matter which Garfield and his successor, Herbert Knox Smith, regularly had to reply was beyond their authority. Ralph Hill of Mount Vernon, Iowa, wrote to Smith asking flat out whether the Bureau had jurisdiction to advise a corporation "how it may change its policies or organization so as to conform to the Sherman Anti-

[34] *Attitude of Financial Interests*, WALL ST. J., Dec. 28, 1904, at 1; *see also* MITCHELL, *supra* note 10, at 159–61 (describing public reaction to the plan).

trust Act." More plaintively, the Bain Wagon Company of Kenosha, Wisconsin, sent Smith a letter claiming that only the merger of a number of wagon makers could save many of them from bankruptcy and asking for the Bureau's sanction of their combination.[35]

To be sure, the Bureau's licensing proposal had its share of criticisms. The focal point of the criticism was the increased centralization of power in the federal government at the expense of state governments. *The Wall Street Journal* reported that in some financial circles the plan was seen as "do[ing] away with the sovereignty of the states and the constitution of the United States." In the same report, it articulated the issue as one of "imperialism," noting that it was "the same issue . . . that was fought over by Hamilton and Jefferson in the early days of the Republic. It is the issue which very largely led to the Civil War. It is the issue which antagonized the establishment of the national bank system."[36] The Democratic-leaning *New York Times*, while acknowledging that some states have "prostituted" their charter-

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[35] MITCHELL, *supra* note 10, at 171.

[36] *The Issue of Imperialism in a New Shape*, WALL ST. J., Dec. 29, 2904, at 1.

giving power for revenue, warned that "before resorting to the Federal power, the resources of the State power should be more thoroughly examined."[37]

Despite these expressed fears of centralization, Roosevelt was intent on going even further in the direction of federal executive control than what the Bureau had initially recommended. Roosevelt also was not willing to forego some form of federal licensing despite lingering constitutional concerns. Historical analysis of the drafts and accompanying correspondence reveal that Roosevelt's preferred approach was for exclusive executive administration with no judicial review, which was at odds with the views of even his closest advisors.[38]

C. The Panic of 1907

Roe observed that national political forces, if powerful enough, can temporarily overcome Delaware's agenda-setting power and move the game to Washington. Typically, a "focusing event" such as a scandal uncovered by the media or poor national economic performance that is plausibly tied to corporate governance can move an issue onto the congressional agenda and drive legislation that displaces state corporate

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[37] *State or Federal Control?*, N.Y. TIMES, Dec. 27, 1904, at 6.

[38] *See* SKLAR, *supra* note 18, at 198–203.

law.[39] This appeared to have been the case with the Sarbanes-Oxley Act of 2002, enacted in the aftermath of the bankruptcies of Enron and WorldCom. Did the Panic of 1907 serve as a focusing event? Although the Panic had severe repercussions in the form of a thirteen-month industrial depression, a cursory examination of the history suggests that the Panic was not interpreted by legislators as being sufficiently tied to problems endemic to large corporations and trusts to serve as the pretext for a federal licensing law.

The Panic of 1907 was a bank panic triggered by a failed attempt to corner the stock of United Copper. Some of the important banks and trust companies involved in the financing of this speculative effort had failed to keep sufficient reserves to protect their obligations to depositors. When the Knickerbocker Trust Company of New York, New York's third largest trust company, failed because it could not meet the run on its deposits, the Panic spread to brokerage houses, international stock exchanges, and industrial corporations until J.P. Morgan

[39] Roe, *Politics*, *supra* note 3, at 2528–29.

orchestrated an intervention to rescue the banking system.[40] There is little doubt that the Panic was caused at least in part by reckless speculation, and Roosevelt wanted to address speculative abuses and regulate the securities markets as part of his grand federal licensing scheme. Therefore, it was theoretically possible to use the Panic to advance the federal incorporation agenda. However, Congress interpreted the root cause of the Panic to be the inelastic money supply and, hence, enacted a law – the Aldrich-Vreeland Act of 1908 – specifically aimed at eliminating currency shortages and thus plausibly addressed this narrower concern.[41]

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[40] *See* JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR (1900-1970) 29–41 (2002); MITCHELL, *supra* note 10, at 167–69.

[41] MARKHAM, *supra* note 40, at 28–39. If anything, the Panic may have diminished Roosevelt's chances of passing a federal incorporation law because many conservatives blamed Roosevelt for causing the Panic through attempted overregulation based on a widespread perception of his disdain for big business. MITCHELL, *supra* note 10, at 166.

With much of the business community openly acknowledging the need for some form of federal regulation, the time seemed ripe for Roosevelt to act on his goal of achieving strong executive control over the nation's major business enterprises. Ever the strategic politician, he would harness the growing dissatisfaction with the Supreme Court's interpretation of the Sherman Act, coupled with the popular hostility against large corporations, to push for a federal incorporation bill. What Roosevelt needed was a gathering of elites from the economic, political, intellectual, and religious sectors of society to help mobilize public opinion to pressure Congress to amend the Sherman Act and provide for federal incorporation. For Roosevelt, the National Civic Federation's upcoming conference on trusts appeared to provide the ideal opportunity.

II. Roosevelt's Last Shot at Federal Incorporation

A. The National Civic Federation

Founded in 1900 to succeed the Chicago Civic Federation, the National Civic Federation (NCF) was a politically-moderate social reform organization committed to the promotion of a state system that would address the economic and social problems wrought by the nation's maturing industrialized economy.[42] From October 22 to 25, 1907, it held its National Conference on Trusts and Combinations in Chicago, with the objective to press Congress for a revision of the Sherman Act to legalize reasonable restraints of trade under some form of government regulation and supervision. The conference was attended by 492 delegates consisting of state governors and official representatives from a wide array of trade associations as well as officers of universities, industrial corporations, state bar associations, NCF members, and local civic federations. In an effort to appear nonpartisan and keep politics out of the trust question, the conference did not invite nationally prominent political leaders – prospective presidential candidates and U.S. senators and representatives (although *state* representatives did attend).[43]

At the conclusion of the conference proceedings, the delegates of the conference unanimously passed resolutions calling for Congress "without delay" to establish "a non-partisan commission," representing the "interests of capital, labor and the general public," to "consider the

[42] CHRISTOPHER CYPHERS, THE NATIONAL CIVIC FEDERATION AND THE MAKING OF A NEW LIBERALISM, 1900-1915 3–5, 9 (2002).

[43] SKLAR, *supra* note 18, at 207–09.

entire subject of business and industrial combinations" and their regulation, including the advisability of federal licensing or incorporation schemes, and to recommend legislation to Congress. They called for an expansion of the Bureau of Corporation's publicity work, by requiring "complete publicity in the capitalization, accounts, operation, transportation charges paid, and selling prices" of such corporations, "whose operations are large enough to have monopolistic influence." They also recommended the modification of laws that restricted: (i) collective bargaining agreements; (ii) agreements among farm associations to "secure a stable and equitable market for the products of the soil, free from fluctuations due to speculation"; and (iii) business agreements or combinations "whose objects are in the public interest."[44] Significantly, the conference embraced the notion of an administered market in the four major sectors of the economy (railroad, industry, agriculture, and labor), while avoiding a major confrontation between labor and capital.[45]

[44] *Want New Law to Curb Trusts*, N.Y. TIMES, Oct. 26, 1907, at 7.

[45] SKLAR, *supra* note 18, at 211.

Yet Roosevelt seemed disappointed in the conference's outcome. He wanted more than another investigating commission; after all, the Bureau of Corporations had been investigating for over four years. At minimum, Roosevelt wanted a definite pronouncement in support of the federal licensing of all corporations engaged in interstate commerce. But, according to Seth Low, the president-elect of the NCF, former mayor of New York City and close ally of Roosevelt,[46] the widely shared sentiment at the conference was that a federal licensing scheme was such a radical departure from the status quo that further reflection was needed before any concrete action could be taken. Consequently, Low chose to push aggressively for an investigating commission rather than risk divisiveness, which might have jeopardized the consensus achieved on legalizing reasonable restraints of trade.[47]

Determined to push forward on constructive legislation, on December 3, 1907, in his annual message to Congress, Roosevelt urged members to enact an amendment to the Sherman Act that corresponded with, but went beyond, the NCF conference resolutions. He spoke of the need to clarify the Act as forbidding only the kind of combination that

[46] *Id.* at 206.

[47] *Id.* at 215.

harms the general public. But any amendment, Roosevelt maintained, must be incident to a grant of strong supervisory power to the government over interstate corporations. That supervisory power should include the authority to approve reasonable restraints of trade, to require publicity, and to approve federal charters or, alternatively, federal licenses, as well as the power to revoke a federal charter or license, should a registrant stand in violation of the law. In addition, he recommended laws that would assure the stock market's performance as a safe savings vehicle, laws that would protect small businesses by prohibiting "unhealthy competition" (such as loss leader pricing and tying contracts), and laws that would address the evils of overcapitalization[48] and securities fraud. The crucial point of his message to Congress was that Roosevelt would support no restoration of the common-law meaning of the Sherman Act unless part of a "general

[48] "Overcapitalization" is the situation in which a corporation is capitalized in an amount that is greater than the cash value of the assets that appear on its balance sheet. The concept was tied to the now obsolete concept of par value, which represented the minimum amount of capital per share that each shareholder committed to the corporation. MITCHELL, *supra* note 10, at 58, 64–66.

scheme" (as he later came to call it) of national supervision of big interstate business – Roosevelt's federal licensing proposal. Against the backdrop of widespread public opinion that big business needed to be tamed by regulation, Roosevelt believed that Congress would accept federal licensing as the proper price of legalizing reasonable restraints of trade.[49]

Roosevelt set out to work with the NCF and to push it beyond the position embraced in its conference resolutions. Conversely, the NCF wanted to draw on presidential power, prestige, and leadership to achieve a revision of the Sherman Act. At Roosevelt's suggestion, the NCF staffed a committee of 100 members with strong labor and agricultural representation to apply multiclass pressure on Congress to pass legislation. Over the course of its lobbying efforts, the NCF encountered pervasive unease among members of Congress about the president's regulatory ambitions. Roosevelt, however, would not be deterred. On January 31, 1908, Roosevelt addressed Congress again, stressing the need for an administered market under the active direction of the federal government. He restated his position that the common-law meaning of the Sherman Act must be restored but only if accompanied

[49] SKLAR, *supra* note 18, at 216, 217, 223.

by an effective licensing scheme. At this point, Roosevelt needed a political boost to gain momentum for his legislative agenda.[50]

On February 3, 1908, the Supreme Court handed down its decision in *Loewe v. Lawlor*.[51] The case was brought by Dietrich Loewe, the owner of a hat manufacturer in Danbury, Connecticut, against the United Hatters of North America, a union headed by Martin Lawlor. The union was being sued for leading a boycott of the manufacturer's fur hats as part of its campaign for union recognition. The Supreme Court found in favor of the manufacturer and fined the union and its individual members $250,000 in treble damages – a truly massive amount at that time. Chief Justice Fuller, writing for a unanimous Supreme Court, held that the Sherman Act applied with equal force to combinations of farmers and laborers as to those of capital and concluded that the union sought to unionize the manufacturers "with the intent thereby to control the employment of labor in the operation of said factories" in violation of the Sherman Act. Acknowledging a departure from common-law principles, Fuller noted that whether such union combinations might be reasonable or not, "the Anti-Trust Law has a broader application than the

[50] *Id.* at 216, 219, 221–23.

[51] Loewe v. Lawlor, 208 U.S. 274 (1908).

prohibition of restraints of trade unlawful at common law." Two months later, in *Shawneee Compress Co. v. Anderson*, the Supreme Court unanimously affirmed its general position that all direct restraints of trade were prohibited under the Sherman Act.[52]

To labor leaders, *Loewe v. Lawlor* had far-reaching implications. Under the Court's logic, if trade unions were not to be distinguished from for-profit corporations, then not only were boycotts illegal, but so were strikes and union contracts that set wages and working conditions. Thus, at a time when trade unions were experiencing massive growth in membership,[53] the Supreme Court seemed to pose an existential threat to trade unionism and collective bargaining. This perception was reinforced by the fact that *Loewe v. Lawlor* was only the latest loss in a string of Supreme Court rulings hostile to labor.[54] Samuel Gompers, the

[52] 209 U.S. 423 (1908).

[53] Trade union membership grew from around 800,000 in 1900 to more than 1.8 million by 1905, and to more than 2 million by 1910. SKLAR, *supra* note 18, at 225.

[54] For example, in *Lochner v. New York*, the Supreme Court barred state regulation of hours of work. Labor was also in the midst of

American Federation of Labor leadership, the railway brotherhoods, and some farm leaders mobilized quickly in Washington and publicly rallied for an amendment of the Sherman Act to expressly exempt unions.[55]

While labor leaders publicly advocated for a blanket exemption for unions and farm organizations, they largely understood that affording a special status for labor could not pass muster in this Congress and, in any case, could not survive Supreme Court scrutiny in light of its clear tendency of favoring management over labor. As a result, labor leaders were prepared to accept a substantial amendment of the Sherman Act to permit reasonable restraints of trade, accompanied by the rigorous government regulation of interstate business through a federal licensing scheme.[56]

B. The Hepburn Bill of 1908

In the altered political climate occasioned by *Loewe v. Lawlor*, the NCF leadership was convinced that a sufficiently large, bipartisan, and multiclass coalition had emerged to move Congress to revise the

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losing on the yellow-dog contract and the boycott in *Adair v. U.S.* and *Buck's Stove and Range Co. v. Gompers*. SKLAR, *supra* note 18, at 225.

[55] *Id.* at 224, 226.

[56] *Id.* at 225, 227.

Sherman Act. Therefore, the NCF shifted its strategy from drafting a bill that sought to establish an investigating commission (as per conference resolutions) to one seeking directly to amend or replace the Sherman Act. In late February, the NCF prepared the initial draft, a "mild registration-publicity measure with permissive legalization of reasonable restraints of trade." By late March, the draft had transformed over the course of numerous revisions at the hands of Roosevelt into a "strict license bill providing for stringent state direction of the market." The final draft of the bill, as was submitted to the House of Representatives, on March 23, 1908, and the Senate, on April 1, 1908, went well beyond what the NCF constituents originally intended to support, even though NCF was its official sponsor.[57]

To sidestep federalism and due process concerns, the final draft of the Hepburn bill provided for voluntary, as opposed to mandatory, registration with the Bureau of Corporations or, for railroad companies,

[57] *Id.* at 229, 232–33, 238–39, 283. Although Representative Hepburn lent his name to the bill, he had not participated in the drafting or legislative processing of it. H.R. 19745, 60th Cong. (1908); S. 6440, 60th Cong. (1908) [Senate version of the bill hereinafter HEPBURN BILL].

the Interstate Commerce Commission. Under the bill, business corporations "engaged in interstate or foreign commerce" would be able to register by filing with the commissioner of corporations, in accordance with the regulations determined by the president, a statement of its "organization, . . . , its financial condition, its contracts, and its corporate proceedings."[58] Having registered, the corporation would be required to file all of its significant contracts and combinations. If the commissioner failed within thirty days to declare such contract or combination "an unreasonable restraint" of trade, the corporation would be free to continue such contract or combination and would be exempt from federal prosecution and private suit under the Sherman Act "unless the same be in unreasonable restraint of trade."[59] Importantly, this last proviso afforded the commission the future discretion to reverse its prior judgment and attack a contract or combination as "unreasonable," regardless of prior approval. Hence, the proviso potentially diminished the certainty and predictability of the law on unreasonable restraints that the business community had sought.

[58] HEPBURN BILL, *supra* note 57, § 8, at 2.

[59] *Id.* § 10, at 4–5; SKLAR, *supra* note 18, at 241–42.

If the corporation failed to file all current and subsequent combinations or consolidations, its registration and all benefits therefrom, including amnesty from prosecution, would be canceled. A corporation would be able to challenge in federal court an order of the commissioner of corporations that canceled or otherwise adversely affected the corporation's registration.[60] However, under the bill, the commissioner's rulings as to the unreasonableness of a restraint would not be reviewable by a court.[61]

Although registration would be voluntary, the bill designed strong incentives to register by not amending the prohibitory sections of the Sherman Act. Accordingly, the ability to engage in a reasonable restraint of trade would be strictly conditioned on successful registration and approval. Therefore, under the bill, if a corporation failed to register or had its registration canceled, then the corporation could not benefit from the amnesty afforded to reasonable restraints of trade.[62] In other words, the Sherman Act's prohibitory sections, which made all restraints of trade illegal under then current Supreme Court interpretations, would

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[60] HEPBURN BILL, *supra* note 57, § 8, at 3.

[61] *Id.* § 10, at 5; SKLAR, *supra* note 18, at 242.

[62] HEPBURN BILL, *supra* note 57, § 4, at 9.

hold for unregistered corporations. This effect, coupled with fear that failure to register might arouse popular distrust and unwanted political attention, effectively made the registration provisions compulsory.[63]

By excluding the determination of a reasonable restraint of trade from judicial review, Roosevelt was intent on supplanting judicial procedure with administrative supervision. In a letter to Low of the NCF, he noted, "my desire is to strengthen the hand of the executive in dealing with these matters, and not to turn them over to what I regard as the chaos and inefficiency necessarily produced by an effort to use the courts as the prime instrument for administering such a law."[64] Roosevelt distrusted the judiciary and was adamant that the Sherman Act not simply be amended to allow "reasonable restraints of trade" whose meaning had to be hashed out by the courts. Moreover, Roosevelt believed, apparently correctly, that a simple amendment to the Sherman Act to legalize reasonable restraints of trade would not have passed in

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[63] SKLAR, *supra* note 18, at 242, 246.

[64] *Id.* at 245.

Congress, because such an amendment would have been received by the general populace as a sell-out to big business.[65]

Although the bill did not reflect everything that Roosevelt wanted, it went far beyond NCF's original draft and reflected Roosevelt's overall philosophy, as revealed in the Bureau's publications and Roosevelt's congressional messages. That philosophy accepted the inevitability of concentration in business, as witnessed in the great merger wave of the 1890s, and opined that the corporate reorganization of capitalism had largely been accomplished. The problem, of course, was that Supreme Court pronouncements made it such that "the business of the country can not be conducted without breaking [the law]."[66] The only feasible remedy was to revise the law such that combinations would be regulated, not outright prohibited, and to focus regulation on "the intent, methods, and results of combinations," with the objective of keeping "business opportunity and the highways of commerce . . . equally open to all," by preventing "fraud, special privilege, and unfair competition."

[65] *Id.* at 251 (noting the example of the Foraker bill dying in the Senate Judiciary Committee in January 1909).

[66] *Id.* at 193 (quoting Roosevelt's Annual Message to Congress).

This, Roosevelt believed, could only be done "positively, through an active federal agency."[67]

In the bill, Roosevelt attempted to give something to all sides. To appeal to labor, the bill provided for the perfunctory registration of trade unions and other non-profit associations, upon which they would be exempted from filing their contracts or combinations as a condition for maintaining their registration and receiving the benefits under the act.[68] The bill reduced from treble to single the damages under the Sherman Act,[69] which had been a sore point for labor since *Loewe v. Lawlor*. It also expressly protected the right of workers to strike and to enter into collective bargaining agreements,[70] settling a question left open by

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[67] *Id.* at 193–94.

[68] HEPBURN BILL, *supra* note 57, § 9, at 3–4.

[69] *Id.* § 3, at 7 ("That in any suit for damages . . . , the plaintiff shall be entitled to recover only the damages by him sustained and the costs of suit . . .").

[70] *Id.* § 3, at 7–8 ("Nothing in said [Sherman Anti-Trust] Act . . . . or in this Act, is intended, nor shall any provision thereof hereafter been enforced, so as to interfere with or to restrict any right of employees to strike for any purpose not unlawful at common law or to combine or to

Loewe v. Lawlor. But the bill did not expressly protect the boycott, leaving its status somewhat unclear.[71]

To appeal to small businesses, including farmers and farm organizations, the bill provided for lenient registration requirements.[72] For employers, both large and small, it protected the rights of employers to impose yellow-dog contracts,[73] to establish the open shop,[74] and to

contract with each other or with employers for the purpose of peaceably or by any means not unlawful at common law satisfactory terms for their labor or satisfactory conditions of employment . . . .").

[71] SKLAR, *supra* note 18, at 243; HEPBURN BILL, *supra* note 57, § 3, at 8.

[72] SKLAR, *supra* note 18, at 242–43; HEPBURN BILL, *supra* note 57, § 9, at 3–4.

[73] A yellow-dog contract is an employee's promise, extracted as a condition of employment, not to be a member of a labor union.

[74] A workplace without labor union representation or one in which there is no requirement to join a union.

engage in lockouts.[75] But it did not protect the employer blacklist,[76] although the language of the bill was somewhat ambiguous.[77]

C. The Defeat of the Hepburn Bill

The reaction to the Hepburn bill ranged from tepid support to vehement opposition. In congressional hearings, labor leaders affirmed the propriety of replacing an unrestricted competitive market with a government-administered one that stabilized prices, wages, and

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[75] A lockout is a temporary work stoppage or worker layoff orchestrated by management for the purpose of gaining leverage during a labor dispute. HEPBURN BILL, § 3 at 7–8 ("Nothing . . . is intended, nor shall any provision thereof hereafter be enforced, . . . so as to interfere with or to restrict any right of employers for any purpose not unlawful at common law to discharge all or any of their employees or to combine or to contract with each other or with employees for the purpose of obtaining labor on satisfactory terms peaceably or by any means not unlawful at common law.").

[76] A blacklist is a list of union sympathizers, compiled by employers and intended to facilitate the avoidance of hiring them.

[77] SKLAR, *supra* note 18, at 243; HEPBURN BILL, *supra* note 57, § 3, at 8.

employment and permitted reasonable restraints of trade. Hence, they generally endorsed the bill as applied to for-profit corporations. But, in the aftermath of *Loewe v. Lawlor* and the recently intensified anti-labor campaign waged by the manufacturers' associations, union leaders felt politically compelled to press for more than what the Hepburn bill offered, namely, the outright exemption of trade unions and farm organizations from the Sherman Act. Such an exemption would operate to legalize the boycott, along with strikes, which labor leaders believed were necessary tools to safeguard worker's basic human and economic rights. That said, labor leaders understood that Congress would never accede to a blanket exemption for labor because, among other reasons, it would likely be declared unconstitutional. And they knew that Roosevelt would never sign a bill that legalized either the boycott or the blacklist, as a broad swathe of business opinion, buttressed by academics and lawyers, regarded both practices as improper. For similar reasons, farm leaders refrained from supporting the bill.[78]

The vociferous opposition of various associations of smaller manufacturers, which were important constituencies to both the Republican and Democratic parties, appeared to doom the bill's chances

[78] SKLAR, *supra* note 18, at 254–58.

of surviving a committee vote. To be sure, smaller manufacturers did favor the rigorous regulation of the anticompetitive practices of large corporations, which threatened the standing of small manufacturers. Smaller manufacturers also wanted the freedom to engage in reasonable combinations themselves which put them at odds with the Supreme Court's literalist interpretation of the Sherman Act. However, they perceived their interests as being more endangered by labor unions than by monopolistic corporations like Standard Oil. They objected to the bill's differential treatment of labor organizations and business, and they feared that the bill's ambiguous language could effectively legalize the boycott,[79] depriving them of the ability of using the Sherman Act as a weapon against unions. As a result, smaller manufacturers tactically opposed any amendment to the Sherman Act out of fear that any revision could impair their ability to exploit the precedent of *Loewe v. Lawlor* against unions. In short, from the perspective of the small

[79] *See supra* note 70.

manufacturers, there could be no legislative resolution of the trust question without an acceptable arrangement on the labor issue.[80]

The features that garnered the most widespread objection, however, were the substantial amount of unilateral power allocated to the executive and the unprecedented degree of government intervention in the market. Sklar described the bill as moving toward statism, that is, "toward state command of investment, prices, and contractual relations."[81] The media immediately harped on these features as being too radical. The *Journal of Commerce* called the bill "drastic" and "extreme." It criticized the bill for effectively coercing corporations to register: registered corporations and associations would be able to take advantage of the distinction between unreasonable and reasonable restraints of commerce, but unregistered entities would be "crushed out by legal proceedings, . . . the executive power of Washington being the judge."[82] The *New York Sun* complained that the bill "would subject the

[80] *Id.* at 158, 260–64. The anticompetitive practices that small manufacturers opposed included differential pricing, discriminatory buying and selling, and tying contracts.

[81] *Id.* at 181 (defining statism).

[82] *Id.* at 241, 246.

validity of all contracts in restraint of trade to the fiat" of an executive department."[83] The *Journal of Commerce* further noted that the bill "would mean the absolute control of interstate industrial business by one man [the commissioner of corporations] subject to the veto or oversight of one other man [the president]."[84] *The New York Times* similarly pointed out that the bill would "confer upon the President the power of control over the country's business."[85]

Urban commercial associations, such as the New York Board of Trade and the Merchants' Association of New York, took the lead in opposing the statist features of the bill in congressional hearings and in public debate. They were important bodies because they represented a broad swathe of mercantile, manufacturing, transportation, financial, and small and large corporate interests. They denounced the bill's unprecedented degree of concentration of both legislative and judicial functions in the executive branch. But, departing from the public positions of the small manufacturers' associations, they did not embrace the status quo vis-a-vis the Sherman Act. They called for the Sherman

[83] *Id.* at 247.

[84] *Id.*

[85] *Id.*

Act to be amended to legalize reasonable restraints of trade and provide for publicity of corporate affairs under a system of regulation that combined executive administration and ample judicial process. But they wanted the administrative powers over contracts and combinations to be defined ex ante with greater precision in explicit legislation. Hence, reminiscent of the NCF conference resolutions, they proposed that Congress establish an investigatory commission to define standards of reasonableness and unreasonableness. In short, they were amenable to government regulation, but not state direction, of the market.[86]

Opposition to the bill was joined by western and midwestern cattle raisers, who worried that the intrusive nature of the regulation that characteristically governed public service corporations (namely, the regulation of prices and profit) would be extended to private business, effectively transforming private enterprises into public service agencies. This transformation, as the spokesperson for the cattle raisers argued in the House Judiciary Subcommittee hearings, would "shake the foundations of the Government as to the ownership of property" and threaten "the legal fabric upon which all our industries are built." After all, as the spokesperson noted, empowering a bureaucracy to determine

[86] *Id.* at 268–72.

the reasonableness of a contract or combination would invariably lead to making determinations about the reasonableness of prices and profits. This "slippery slope" argument was shared by the urban commercial associations.[87]

In the face of almost universal opposition, the bill's putative sponsor, Low of the NCF, was unable to marshal support even from his own organization. The NCF members had been willing to accept strong administrative oversight over corporate affairs within the traditional judicial process. But the bill's scheme of comprehensive government supervision and direction under strong executive control with minimal judicial process was more than what they imagined. Like a faithful soldier, Low advocated in favor of the bill through March and April and attempted to get Roosevelt to embrace the bill in a more public, visible way.[88] While Roosevelt formally supported the bill and authorized Commissioner Smith of the Bureau to file memoranda and make

[87] *Id.* at 272–73.

[88] *Id.* at 275.

appearances on the administration's behalf before the committees, these efforts were too little and too late.[89]

In January 1909, the full Senate Judiciary Committee issued an adverse report on the Hepburn bill, as well as another bill proposing to simply amend the Sherman Act. The report emphasized the bill's departure from traditional constitutional principles of due process and checks and balances. It expressed strong reservations about setting up a bureaucracy under the executive branch vested with both legislative and judicial functions and the broad and indefinite power to define what practice would constitute an "unreasonable restraint of trade," in light of the criminal authority of the Sherman Act. At the same time, the report feared that simply amending the Sherman Act would weaken it. The Sherman Act, the report said, was "clear, comprehensive, certain and highly remedial." Introducing a vague rule of reasonableness to be subject to various interpretations by different courts could potentially undermine the potency of the antitrust laws in an environment of

[89] *Id.* at 275–76. Behind the scenes, NCF members worked with members of Congress to return the bill to its original basis. However, these efforts were emphatically rebuffed by Roosevelt. *Id.* at 248.

increasing consolidation.[90] In sum, the report reflected both the fear of too much centralized power and the fear of too weak enforcement.

Therefore, the best chance for federal incorporation was buried in the judiciary committees of Congress. As Sklar concluded, "The division over the labor question combined with the strong aversion to the statist features of the bill to dissolve support for the measure from the moment it was introduced." With the closing of Roosevelt's term, the strongest champion of federal incorporation was out of office. While there again emerged in 1911 wide-ranging popular support for a federal incorporation law, no bill of any specificity was able to command the support of a sufficient number of members of Congress. In 1911, the Supreme Court in the *Standard Oil* and *American Tobacco* cases restored the common law construction of the Sherman Act by adopting the economically sensitive and flexible "rule of reason," which recognized and legalized reasonable restraints on trade. This welcomed judicial development allowed President Taft to abandon the program of direct administrative direction of corporations and the legislative prohibition of specified unfair practices in favor of increasing emphasis

[90] *Id.* at 280–81.

on the judicial enforcement of the law.[91] Quite simply, federal incorporation had become less of a priority for Taft as the issue became decoupled from the trust question.[92]

During the presidential campaign of 1912, Roosevelt, as the candidate of the new National Progressive Party, explicitly campaigned for strong executive control over large corporations under a license-registration system. But Roosevelt lost the election, and federal incorporation as a means of controlling the conduct of large corporations never assumed prominence in the Wilson administration, which preferred to focus on alternative, less-intrusive means of policing corporations –through the Federal Trade Commission and Clayton Acts in 1914. After the passage of these acts, the trust question largely

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[91] Urofsky, *supra* note 7, at 181–82; SKLAR, *supra* note 18, at 181–82, 280–81, 283, 373–76. Although such administrative supervision and legislation were not priorities for Taft, he was restrained in 1912 by the Republican Party's platform commitment to a federal trade commission and to legislation defining and prohibiting specific unfair practices. SKLAR, *supra* note 18, at 380.

[92] Urofsky, *supra* note 7, at 181.

receded from the center of national party politics.[93] No longer linked to the once-urgent trust question, federal incorporation also receded from politics – at least until the Great Depression brought the issue again to the fore.

III. Reflections on the Failure of Federal Incorporation

Federal incorporation under Roosevelt failed primarily because of the conflict between small manufacturers and labor. Although *Loewe v. Lawlor* initially seemed to activate broad-based alignment for revision of the Sherman Act to permit reasonable restraints of trade, the decision actually operated to foreclose the passage of the Hepburn bill by deepening the divisions between capital and labor on the issue of how the law of restraints of trade would be applied to labor relations. *Loewe v. Lawlor* made it politically difficult for labor leaders to enthusiastically embrace the bill, which failed to expressly protect the boycott, seen as critical to labor's leverage against management. In the end, labor leaders complained that the bill did not go far enough; they publicly pressed for the outright exemption of trade unions and farm organizations from the Sherman Act. At the same time, the bill's ambiguous language about

[93] SKLAR, *supra* note 18, at 90, 347–48, 420.

the status of the boycott worried the associations of small manufacturers, which feared losing the unambiguous anti-boycott weapon granted by the Supreme Court in *Loewe v. Lawlor*. Ultimately, they were able to achieve enough of what they wanted via the Supreme Court such that they were content with standing pat on the Sherman Act. Also, they did not want federalization to be hijacked by labor unions, to whom they were even more antagonistic than monopolistic corporations. Their opposition to the bill seems to support Roe's first and third hypotheses.[94] In sum, the failure to clearly resolve the labor question - to which the issue of federal licensing was invariably linked - doomed the Hepburn bill's chances of survival.

Roosevelt himself also deserves some blame for the failure of a federal incorporation. By all indications, the time was ripe for a federal chartering or licensing scheme. But Roosevelt arguably squandered this unique opportunity through aggressive attempts to impose his out-of-the-mainstream views about corporations' role in society. The Hepburn bill in its later drafts was imprinted with Roosevelt's philosophy that large corporations were akin to public utilities and other natural monopolies, such as railroads, and thus should – as part of the capitalist noblesse oblige – be operated in the service of public policy and the general

[94] *See* text accompanying note 6 *supra*.

welfare. Therefore, Roosevelt believed it was appropriate to regulate them in the same manner in which public utilities and natural monopolies were regulated. But, as Sklar observed, "Neither the major organizations of capitalists, big and small alike, nor those of a broader segment of the public, including farmers and trade unionists, favored direct government participation in shaping the market, outside the market relations of 'natural monopolies' such as railroads and public utilities, or the degree of executive power implied in provisions of the Hepburn bill."[95]

Moreover, the Hepburn bill concentrated too much power in the president's hands by eliminating meaningful judicial review. Although this feature is well explained by Roosevelt's justifiable mistrust of the Supreme Court, it aggravated deep-seated fears of centralized power, thereby alienating big business, an important Republican Party constituency, which had previously been receptive to federal licensing. In any event, this feature most likely would never have passed muster in

[95] *Id.* at 251–52, 283.

the Senate, whose leadership was entrenched by a group of conservative Republicans.[96]

The statist character of the bill may also have alienated southern Democrats, who remained committed to notions of states' rights after the painful scar of Reconstruction. Although the Democrats embraced trust reform and federal incorporation in their campaign platforms, "the idea of federal incorporation overriding the prerogatives of the states fueled strong emotions."[97]

Roosevelt's intransigence prevented an alternative federal licensing scheme from being brokered. After shaping the bill in his own image, Roosevelt declined to throw the Administration's weight behind the bill. He seemed to have recognized even before the bill's submission to Congress that his strong proposal could not succeed in the then current Congress. But he strenuously opposed any effort to pass a weaker bill that simply permitted reasonable restraints of trade combined with mere publicity. In his estimation, this would have been "ruinous politically" because it would have been perceived as yet again releasing corporations

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[96] *See* EDMUND MORRIS, THEODORE REX 432 (2001) (explaining the entrenchment of the Senate leadership under Nelson Aldrich).

[97] MITCHELL, *supra* note 10, at 116–17.

from rigorous regulation. According to Sklar, the issue of robust government regulation of corporations was important to Roosevelt, and he wanted to use the leverage of the current legal situation to "inaugurate serious public debate, on terms defined largely by him, about government-market relation in accommodating the law to the corporate reorganization of the economy." That debate took place, and it happened in a manner that seemed to limit any political humiliation for Roosevelt, who maintained an arms-length relationship to the bill.[98]

Conclusion

During the Progressive Era, the alignment of interests and scandal failed to happen in a manner that would accomplish the full nationalization of corporate law. Despite years of gestation under the watchful eye of the Roosevelt administration, the opposition of the small manufacturers, urban commercial associations and others coalesced to bury the Hepburn bill in the judiciary committees of both houses. Although the labor relations issue may have sealed the bill's fate, Roosevelt's unwillingness to compromise on the statist features of the bill guaranteed its early death. In sum, the division over how labor unions would be treated, combined with almost unanimous aversion to

[98] SKLAR, *supra* note 18, at 239–40, 249, 282.

the statist features of the bill and Roosevelt's unwillingness to compromise worked to doom support for the bill almost as soon as it was introduced. The Hepburn bill's quick death also evinced the strength of federalism norms, as expressed in deep-seated fears of centralized power and an ongoing commitment to states' rights. While there is little doubt today that Congress has the constitutional authority to enact federal incorporation, federalism norms should continue to inhibit the full nationalization of corporate law. Perhaps that is a good thing. We will never know for sure.