With Iron Interlaced: The Tangled Knot of Early Railroad Regulation

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ABSTRACT

As railroad consolidation in the late 19th century led to unprecedented levels of corporate power, outcry from various sources inspired the first systematic attempt to implement federal regulation of private enterprise. However, the forces behind the early acts of railroad regulation were tremendously complex, and historians widely diverge in their interpretations of this legislation. This project explores the meaning of regulatory legislation from the years preceding the pivotal creation of the Interstate Commerce Commission in 1887 to the Wilson Administration's nationalization of the railroads during World War I.

INTRODUCTION

Theses abound on the origins of railroad regulation, and interpretations wildly vary. Few doubt the inevitability of regulation; among the rare undisputed facts on the topic are that the modern economy which emerged after the Civil War lurched and swooped along a frighteningly unstable trajectory, and that fragile economies make for fragile politics, a situation career politicians leap to rectify.

But credit (or blame) for railroad regulation cannot be attributed to politicians alone. It was a bored, uninterested Grover Cleveland who signed the Act to Regulate Commerce on February 4, 1887, thus creating the Interstate Commerce Commission, and even those politicians who invested their sweat in the tortured path to regulation functioned only as pawns in the great chess game waged by their constituents against the mysterious economic forces unleashed by the industrial revolution raging at the time. But whose invisible hand controlled them? Albro Martin blames the political pawns for dictating moves to the ignorant hand of the masses, but other historians identify different parties. Robert Harbeson snaps a sunny picture of a public interest served by the ICC; Lee Benson looks in the shadows and sees New York merchants dictating federal railroad policy; and Gabriel Kolko, darkest of all, points out the equivalent of the grassy knoll by singling out railroad magnates themselves as the concealed motivators of regulation.[1] Clearly, some historical exposition is in order. This essay attempts to clarify the origins of railroad regulation, then look at its early years to see if the operations of the ICC bore out the intentions that went into it.

Federal Regulation, the First Incarnation: to 1897

In a sense, regulation is almost intrinsic to the railroad industry. The Baltimore & Ohio, America's first incorporated line, began laying track in 1828, and as early as 1832 Connecticut established a commission to oversee compliance with a railroad charter.[2] While that commission was terminated at the end of its sole task, a New Hampshire commission founded in 1844 sought more longevity.[3] But perhaps the first significant railroad regulation occurred in Iowa, where freight rates emanating out of Chicago gave lower fares to long-distance hauls than shorter ones, thus “depriving the Iowa commercial centers of their former economic importance,” as grain once slated for in-state markets like Dubuque found a new destination in Chicago.[4] While ambivalence based on a recognition of the need to attract eastern railroad investors for the sake of Iowa’s economic viability forestalled legislative action for over a decade, in 1874 Iowa finally passed a series of Granger Laws, which limited the rate discrepancies between long and short hauls railroads could charge. Illinois followed a similar course of action, and when disgruntled railroads took the state to court for interfering with free trade, the case ascended to the Supreme Court, which in 1877 decreed that, when business interferes with the “public interest,” government regulation is legal.[5]

An important step in the transition from a discrete set of state laws to a systematic federal policy, the Hepburn committee investigation of 1879 revealed abundant abuses in railroad operations. Instigated mostly at the behest of New York merchants also angry about the long/short-haul discrimination, which they felt put them at a competitive disadvantage with the rest of the nation, the investigation revealed three major misdeeds: rate discrimination, stock watering, and favoritism given to huge monopolies. The stubborn, pompous testimony of William Vanderbilt, son of the infamous Cornelius and head of the New York Central, certainly gave the railroads a public relations nightmare, as Vanderbilt became a favorite target of political newspaper cartoons demographically aimed at the lower class.[6]

But a shift in public opinion worried the railroads less than organized political lobbying on the part of independent businessmen. Pennsylvania oil producers, in particular, were furious about railroad rebates given to John Rockefeller’s massive Standard Oil, which allowed the corporation, already able to undercut the smaller producers’ prices due to economies of scale, even greater leverage in reducing prices and driving competition out of business. According to Edward Purcell, Jr., the campaign of the independent oil men “led directly to the introduction of John H. Reagan’s bill” in 1878.[7] Railroad regulation had entered the federal arena, but hardly with the proud stomps of the gladiator. Instead, the Reagan bill crawled in meekly, entering a decade-long cycle of passing the House and dying in the Senate.[8]

The basic tenets of the Reagan bill consisted of outlawing long/short-haul discrimination, pooling (used by large railroads to form de facto cartels), and rebates (given to large-scale customers as a covert form of rate discrimination), while placing enforcement directly in the hands of the courts.[9] Sensing radical sentiments in the Reagan bill, the Senate provided its own conservative substitute; the Cullom bill also prohibited rebates and rate discrimination, though it was more flexible on the latter. It said nothing of pooling, and provided for the establishment of a commission for enforcement. While the Reagan bill continued to languish in limbo, the Cullom bill passed the Senate in 1885, and federal regulation was only a tense series of negotiations away from becoming a reality.[10]

Circumstances contributed much to the coalescing of House and Senate. When Jay Cooke & Co. had gone bankrupt in 1873, it had induced a depression which clouded over much of the rest of the decade. The early 1880s then gave the budding Marxist movement a perfect illustration of the falling rate of capital, as the end of the depression led to a frenzy of railroad expansion culminating in the oversaturation of roads and a plummeting rate schedule. As the tenuous threads of the pools began to break, the New York Central took the initiative in lowering rates even further, initiating a rate war that drove rates down 20% by 1886. By that time, even the railroads admitted that “voluntary efforts at pooling would never solve the problems of rate cutting,” and many conceded “regulation was inevitable and that they had better define it to their own interest."[11] For the first time, and despite their opposing reasons, railroads and merchants agreed that some measure was necessary to preserve stability, and government involvement of some sort offered the only solution.

To add to the clamor, the Supreme Court clarified its position in the 1886 Wabash case, which "effectively forbade the states from regulating interstate railroad rates."[12] Now the states, too, called for federal regulation, since the vast majority of their individual laws suddenly applied only to the non-threatening granger lines, while the imposing trunk lines escaped unregulated.

Under this pressure, House and Senate labored to reach a compromise. By late 1886 they had it, "pure compromise in the worst American tradition," as Albro Martin calls it.[13] The Act to Regulate Commerce, signed into law in 1887, sacrificed Reagan's court enforcement by creating the Interstate Commerce Commission, but granted clauses prohibiting long/short-haul discrimination, pooling, and rebates to appease the mercantile interests.

The concessions very neatly canceled each other out, along with most of the goals each side hoped to achieve. By using a commission rather than a court to implement regulatory policy, Congress insured that the decisions reached would not be binding; in the very first case appealed to a court, a pattern of "judicial disrespect" for the ICC began, as Federal Circuit Judge Howell Jackson disregarded entirely the data collected by the ICC and ordered the whole investigation reviewed.[14] At the same time, with ICC rulings easy to challenge if the railroads so desired, other aspects of its decisions played directly into railroad interests. The Louisville & Nashville Railroad decision, one of the ICC's earliest on June 15, 1887, allowed railroads a great measure of self-determination in deciding whether or not to follow section four of the Act to Regulate Commerce, which forbade rate discrimination under similar circumstances.[15]

Despite a widely-respected chairman, Thomas Cooley, a former judge and law professor widely noted for his moderate stance on issues of federal interference in the market,[16] the ICC failed to command the attention of the railroads. Cooley's belief that due process was not equivalent to judicial process aided him in adopting a pragmatic, case-by-case approach to regulation, rather than a dogmatic stance, but it also contributed to the willingness of courts to overturn ICC decisions when they thought Cooley overstepped his defined role.[17] When Cooley resigned in 1891 due to poor health, the loss of his crucial charisma left the ICC even weaker, and it essentially resigned itself to gathering statistics for the next several years.

Depression reappeared in 1893, which weakened the ICC even further. As busy politicians and courts found other issues more pressing, and railroad companies violated ICC rules out of sheer economic necessity, the Commission found itself invisible in the sense of Ralph Ellison's invisible man rather than that of H.G. Wells, perfectly visible and yet totally unacknowledged. It did attempt to recover the power to apply section four of its charter document, but even in this it failed; the case floated slowly to the Supreme Court, which in the Alabama Midland case of 1897 gave the similarity qualification of section four such a rigid interpretation that "no two points were similar," and the clause was thus unenforceable. That same year, in the Maximum Freight Rate decision, the Supreme Court also insured the ICC lacked any rate-setting power.[18] At the end of its first decade, the ICC was shorn of its already flimsy power. Had circumstances not been so dire, it would be a clear-cut conclusion that railroads and merchants benefited from the ICC's weakness, but in fact, it was a lose-lose situation as the McKinley administration moved toward its most shocking loss.

Revitalization of the ICC: 1901-1916

The economic woes of the nation almost seemed to die with McKinley, and with a new president, a new century, and a new sense of American power after the Spanish- American War, prosperity resumed its course. Theodore Roosevelt entered office with a reputation for reformist tendencies, and he did in fact promote reform in the area of railroad regulation, though the extent to which this reform ventured beyond superficial appeasement of public complaints and into significant changes in the structure or conduct of industry is highly questionable. Studying Roosevelt, Leroy Dorsey identifies "the essentially rhetorical purposes of his involvement with corporate America," in which the railroad regulation Roosevelt enacted was mostly intended as a lightweight motivational booster for owners to impose self-regulation "before public backlash promoted the need for extreme corrective measures against all corporate entities."[19] This can be witnessed in both of the major acts of railroad regulation undertaken during Roosevelt's first term, the Northern Securities Case and the Elkins Act.

When the Northern Securities Company incorporated in 1901, it consolidated the Great Northern, the Northern Pacific, and the Chicago, Burlington and Quincy railroads under one massive holding company. The magnates behind this unification included James J. Hill, Edward H. Harriman, and J.P. Morgan, and the very grouping of these men, the two powerful railroad barons and the master of finance, could only lead to one association in the public eye, that of the dreaded monopoly.[20] Roosevelt quickly initiated court action against the holding company, citing the Sherman Antitrust Act, and in 1904 the Supreme Court delivered a verdict dissolving the Northern Securities Company.

The victory for reform, however, was only moral, not tangible. In breaking up the holding company, the Court distributed Northern Pacific and Great Northern shares to the security shareholders, thus preserving without alteration the community of interest which sought the consolidation in the first place, "while preventing the economies that would have resulted from consolidated operation."[21]

Appearances and actuality again diverged in the Elkins Act of 1903, which perhaps more than any other piece of railroad regulation supports Kolko's so-called "capture theory" of government. The Elkins Act essentially decreed one thing, that freight rebates were impermissible. Small merchants seemed to be the main beneficiaries of the act, since they could now ship their product at the same rate as large corporations and gain some competitive ground in price. Indeed, Edward Bacon of Wisconsin organized several shippers into a coalition which gained enough political ground to inspire the Corliss- Nelson Bill in 1902, which included among its provisions anti-rebating measures and enhanced ICC powers, such as the ability to set rates for two-year periods.[22]

At the same time, a group of Eastern railroad interests desired their own bill, which intersected with Bacon's plans by including an anti-rebating measure (to prevent railroads from losing profits by catering to the whims of large shippers), but ran perpendicular to the Corliss-Nelson Bill from there, numbering legalized pooling and the abolishment of prison terms as punishment for regulatory violations among its pro-railroad clauses. This bill, named after Stanley Elkins, chairman of the Congressional Interstate Commerce Committee, but written by James Logan of the Pennsylvania Railroad, competed with the Corliss-Nelson Bill for Congressional approval, but the actual competition was minimal. Not only was Bacon's rate-setting proposal too extreme for the politicians of the day, but Bacon himself alienated like-minded shippers with his hubris, deluding himself and others that Roosevelt saw him as an informal advisor, when in fact Bacon's influence extended at its highest to the secretary of the National Board of Trade. When the Elkins Bill passed into the Elkins Act in early 1903 through a unanimous Senate and a House almost as undivided, it was described as a compromise between the two bills. But a glance at its provisions undermines this: imprisonment was abandoned as a penalty, rebating was prohibited, and though pooling was not permitted, "joint rates," which worked toward a similar end, were embraced by the law. The ICC received no rate-setting power.

The Northern Securities Case and the Elkins Act may have helped silence the clamor of the public, but they clearly had a minimal impact on the railroads as regulatory measures, aside from boosting revenue by terminating the rebating system which irritated railroad owners. Moving into his second term, however, Roosevelt realized he needed slightly more meaningful regulation to preserve his credibility. The Hepburn Act, often cited as the "major domestic legislation of Theodore Roosevelt's presidency,"[23] emerged as the result.

Once again, the legislation that passed into law went through a process of dilution before receiving the president's signature. By 1905, railroad income had risen for a steady five years, dividends had doubled, and shipper unease, especially in the Midwest and South, had not subsided in the slightest since the Elkins Act, or, for that matter, since the original Act to Regulate Commerce.[24] Generated by this tension, the Esch-Townsend Bill rushed through a House perhaps too busy in the post-election session to fully evaluate it, passing in February 1905 and granting the ICC rate-fixing power. Conservatives in the Senate rebuffed the bill, though, delaying discussion until the bill could be conveniently swept under the rug and forgotten with the conclusion of the session.[25]

But the memories of merchants and shippers outlasted that of Congress, and when the politicians resumed their seats in the fall, the businessmen demanded action. Hearings were held in October, and business interests overwhelmingly endorsed plans for rate legislation. Of 675 business groups that attended the hearings, 484 favored the enhancement of ICC power. Much of this support came from agricultural interests, but manufacturing and lumber groups also joined hands to call for rate control. Only coal groups displayed any resistance to the general consensus, and their vested interest was obvious to all involved; those few coal groups not directly owned or indirectly controlled by railroads relied on railroads as their primary customers.[26]

Distaste for ICC empowerment clearly ran through the mouths of Congress, but the collective voices of the shippers could not be drowned out. Congress began to hammer out a bill, but the conflicting goals of conservative and progressive politicians proved less than malleable. Insurgents like Robert LaFollette called for a rate-setting plan based on physical valuation of railroad capital, meant to eliminate watered stock and unjustifiably high rates, but Republicans led by Nelson Aldrich rejected that notion without possibility of compromise. Roosevelt let it be known that he opposed any attempt to grant the ICC rate-fixing powers, but he supported the idea of allowing it to set maximum rates. His influence was apparent as the Hepburn bill took shape, since it dictated precisely that. Still, the bill initially failed to garner the required majority, since opposition existed at both ends of the political spectrum, from conservatives who thought it went too far in imposing on private transactions to Insurgents who viewed it as too weak to have any effect. The bill seemed in danger of following the Esch-Townsend bill into limbo, but Republican senators under the guidance of Roosevelt drew up the Allison amendment, which added judicial review to the bill, thus placing a check on the ICC's power and swinging the conservatives into the bill's favor.

The Hepburn bill passed into law in June 1906, and perhaps a measure of its strength can be gauged by the fate of its namesake, Senator William Peters Hepburn of Iowa, a state notorious for its progressive stance toward railroad regulation, best exemplified by its governor and senator Albert Cummins. The bill Hepburn introduced became, in the winter election of 1906, a major factor in his defeat for re-election.[28] Clearly, the Hepburn Act failed to satisfy the voters. The main reason was not any impotency of the act, but the difficulty in implementing it. Rather than allowing the ICC to instigate its own investigation of rates, the Hepburn Act specified that the ICC could only act at the formal behest of shippers. Not only did this place a burden on the shippers that served as an effective disincentive for the effort required, but also the judicial review added by the Allison amendment made any ICC ruling tentative at best, likely to be contested in court. By the time a conflict reached resolution, shippers suffering unfair rates could very well be already driven out of business.[29]

This practical uselessness of the Hepburn Act inspired much dissent. Railroads complained about the distortion of the free market,[30] and shippers complained about the difficulties of actually utilizing the legislation. Perhaps only Roosevelt himself really derived any utility from the act, since it certainly fueled his reform rhetoric without fundamentally challenging the social order he valued so highly.

Any potential for a quick follow-up to the Hepburn Act was squelched by the depression of 1907, and since regulation hardly thrives under conditions of economic sluggishness, the Taft administration was well-settled into place before any more significant railroad regulation took place. In the interim period, Roosevelt closed out his term with the "circumvention and effective destruction" of an important clause in the Hepburn Act forbidding railroads to carry goods from companies they owned; by excepting anthracite carriers from the clause, Roosevelt pandered to the House of Morgan, while he "talked softly and left his big stick at home."[31]

Taft saw regulation through conservative lenses, and it is a subtle irony of history that, after a decade which saw various progressive-minded reforms turn into soft, buttery legislation in the churning-pot of Congress, his own profoundly conservative intentions somehow resulted in perhaps the most liberal regulatory act up to its time, the Mann-Elkins Act of 1910.

Two items dominated Taft's railroad agenda: the legalization of pooling agreements and the creation of a Commerce Court specifically tailored to restrain the ICC's power. In Congressional discussion, widespread support for granting the ICC power to suspend proposed rate changes in advance led to the grafting of this more progressive clause onto the proposed Mann-Elkins bill.[32] With the bill packaged nicely for all political affiliations, it seemed slated for easy passage into law. But then the railroads made a colossal "political blunder" during the final days of debate on the bill; the Southern systems acted as a unified group in proposing a rate increase to the ICC.[33] By assuming the formation of a pool, they jumped the gun on the political process, and the resulting outcry from the public, Congress, and Taft himself, who threatened prosecution for collusion and violation of the Sherman Act, turned debate sour at the last moment.[34]

Congress dropped the pooling provision, and when the Mann-Elkins Act passed only days after the Southern railroad proposal, in June 1910, the ICC gained the power to suspend rate changes in advance, as well as the capacity, so conspicuously absent from the Hepburn Act, to take its own initiative and open inquiries into rates on the behalf of the public.[35] All increases in rates became "presumptively unreasonable," placing the burden of proof for justifying rate hikes in the hands of the railroads, a clause added by Hepburn's fellow Iowan Cummins, then serving in the Senate.[36] Finally, the original section four of the 1887 Act to Regulate Commerce was at last amended; removal of the "under substantially similar circumstances and conditions" qualification allowed regulation of long-short-haul discrimination to escape the moratorium placed on it by the Supreme Court's Alabama Midland verdict of 1897.[37]

Only the Commerce Court remained to appease Taft, and its record certainly gave cause for conservative cheers. In its first 30 cases, 27 verdicts overturned ICC rulings, in favor of railroads. But the blatant bias of the Commerce Court tilted public opinion away from it, and when Judge Robert Archibald was impeached for accepting railroad favors, Congress eliminated the Court in 1913.[38]

Analysts of the time described the Mann-Elkins Act as progressive, and the record proves them right. Frank Haigh Dixon, a conservative economist writing about the Act soon after its passage, notes its "radical character" and attributes its provisions to the brief period of power gained by the Insurgents during the pandemonium following the monopolistic front of the Southern railroads.[39] Another conservative economist, J.M. Clark, writing in 1914, criticized the resurrected prohibition of long-short-haul discrimination as comparable to Rip Van Winkle, "revived after a sleep of twenty years" and out of date with the contemporary situation.[40] The ICC, with its new power, would go on to deny rate increases in 1910, 1911, and 1914.[41] After almost a quarter-century of redundancy, kept alive only through institutional inertia and the need for images of reform, the Interstate Commerce Commission had finally acquired the power to regulate.

Epilogue: The Long Fade-Out

Just as the overhauled image of the ICC arrived with McKinley's death, the newly active ICC quickly departed with the Archduke Ferdinand. As Europe tumbled into war, the securities market wreaked havoc on the financial situation of the railroads, and they appealed to the government for help. The need for increased freight movement coupled with the financial disarray compelled the Wilson administration to acquiesce; though Wilson had taken a hard stance with the railroads by forcing them to make concessions to labor unions a few years earlier, as 1918 dawned he took the advice of his Secretary of the Treasury, William McAdoo, and put the railroads under federal control, much to the welcome of the railroad owners themselves.[42] When they were returned to private control in 1920, they brought home a gift: the Transportation Act of 1920, which used a plethora of subsidies to guarantee a specific minimum six-month profit margin, and to structurally reorganize the industry into regional monopolies, with smaller railroads kept on life- support through an income redistribution scheme for very profitable lines— "and Charles Darwin be damned," Albro Martin sneers.[43]

The trajectory of railroad history took a sharp turn for the worse with the popularization of the automobile. Henry Ford's dream became the railroads' nightmare, as federally-funded highways kept trucking costs low, and while trucks stole the freight, cars and then airplanes stole the passengers. As railroads lost their economic power, so too did the need for regulation seem to dissipate into the expanded traffic routes inscribed upon America. By 1955, the ICC's own Weeks Committee declared the railroad industry was hampered by too much regulation, and the Transportation Act of 1958 led directly to the vanishing of the passenger train into the financial black hole known as Amtrak.[44] The Staggers Act in 1980 deregulated railroads to a great extent, but the ICC managed to cling to life for another fifteen years, until Bill Clinton signed it out of existence at the end of 1995.[45] After over a century of railroad regulation marked by ten decades of rhetorical and legislative smokescreens and one half-decade of actual regulatory power invested in a body outside the corporate-dominated political process, the facade finally reached the end of the track.

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