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Victor Morawetz, Draftsman of Political-Economy: A Study in Constitutional Constraints and Solutions in the Era of Reform

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This paper offers the first comprehensive study of Victor Morawetz's important contributions to U.S. political economy during the Progressive Era. It relies overwhelmingly on primary documents to establish Morawetz's role in shaping the regulation of railroads under the 1905 Hepburn Act, his role in creating the structure for the Federal Reserve Board in the 1913 Federal Reserve Act, and his contributions to the development of antitrust policy leading to the creation of the Federal Trade Commission in 1914. Owing to his acknowledged expertise in corporation law, both as a scholar and practitioner, as well as his extensive experience as a notable executive of a national corporation, Victor Morawetz was especially well suited to provide constitutionally sound legislative solutions that achieved the goal of bringing the federal government into the market place to ameliorate the problems of laissez-faire capitalism while yet preserving the dynamic and innovative nature of the capitalist economy and principles of limited government.

The Progressive Era is often noted for having provided a "middle way" between unrestrained laissez-faire capitalism and the creation of a socialist state with public ownership of corporations. This middle path reform movement reached its fruition between 1905 and 1914 with the expansion of federal regulatory commissions empowered to promote the economic welfare of American consumers against threatening monopolistic corporations and to provide some protection for smaller producers against predatory business methods. Finding that middle path in a dramatically changed national economy was especially difficult in the United States because its constitutional system enshrined broad protections for the property of individuals, which were deemed to extend to the new colossal corporations of the Gilded Age. Once allowed to exist and then extended personhood through court decisions, these corporations became ever more difficult to restrain owing to the growing political influence they wielded. Public outcry

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URL: http://www.thebhc.org/sites/default/files/McClure_BEHO_Final%20Draft.pdf

for government control of these conglomerates led to state and federal legislation at the close of the 19th century – most notably the Interstate Commerce Act and the Sherman Anti-Trust Act – but those supposed legislative reforms were either not vigorously enforced or found unconstitutional in the courts, thereby blocking the path to effective reform. By the turn of the century, a renewed public clamor for reform created an overwhelming sense that new reforms must be enacted. The purpose of this paper is to demonstrate the significant role that Victor Morawetz played as a private citizen in helping chart the elusive middle path in U.S. political-economy as it emerged between 1905 and 1914. Owing to his acknowledged expertise in corporation law, both as a scholar and practitioner, as well as his extensive experience as a notable executive of a national corporation, Victor Morawetz was especially well suited to provide constitutionally sound legislative solutions that achieved the goal of bringing the government into the marketplace to ameliorate the problems of laissez-faire capitalism, while still preserving the dynamic and innovative nature of the capitalist economy and principles of limited government.

Victor Morawetz, born in Baltimore, Maryland, in 1859, had a rather unique formative education. After having studied at private schools in Baltimore, his father, a physician, sent him to Europe at 14 year of age, where on his own he studied first at German and Swiss schools and then primarily in Paris at the Sorbonne over a three year period. In additional to his formal studies, Morawetz had unique life experiences which rapidly matured him. Through a cousin living in Naples, Morawetz became associated with a titled Italian aristocrat, who had decided to travel to Spain to fight on behalf of the Carlist camp in what had become a century-long contest between competing lines of the Spanish Bourbon Dynasty. Morawetz, only 16, was invited to join him and agreed to act as aide-de-camp for Count de Bardi in the Carlist conflict. While doing so, he also served as a special correspondent for the Baltimore *Gazette* reporting on the war. When Morawetz returned to the U.S. in 1877 at age seventeen, he was fluent in French, German, and Spanish and had a store of grand experiences upon which to draw. Harvard University evidently gave him credit for his independent study and various experiences abroad and admitted Morawetz directly into the college of law, from which he graduated in 1879 at age twenty.[1]

In 1880 Morawetz moved to Chicago and, after securing his admittance to the bar, began practicing law independently. Owing to his young age – compounded by a petite stature – and a lack of practical experience, Morawetz had little success attracting clients. With an excessive amount of time on his hands and a fresh interest in the theory of law, Morawetz turned to writing a book on corporation law, since the subject had not received a systematic treatment. Morawetz worked on his treatise for over a year and in 1882 Little, Brown and Company published his composition as *The Private Law of Corporations*. In his introduction, Morawetz wrote:

> The following is the result of an attempt to write a concise treatise upon the law relating to private corporations of a business character.... There is perhaps no branch of the law which is in a less satisfactory state than the

[1] George Rublee, "Memorial of Victor Morawetz," *Year Book of the Association of the Bar of the City of New York* (1938), 398-399; Robert T. Swaine, *The Cravath Firm and Its Predecessors, 1819-1906, Vol. I, The Predecessor Firms, 1819-1906* (New York: Ad Press, Ltd., 1946), 381-382.

> law of private corporations. Many of its acknowledged rules are so vaguely defined as to be of no practical value in determining the law of a particular case, and upon important question the authorities are often wholly irreconcilable.... The author has endeavored to make a full collection of the authorities bearing upon this branch of the law, and to state clearly and concisely the principles which the authorities establish."[2]

Morawetz's "concise treatise" relied upon approximately 1,800 cases, included a 53-page index, and proved a substantial text of 670 pages. Owing to the comprehensive nature of the work, and the usefulness of the content, Morawetz's text "was immediately and generally recognized as the first important book" in the field. Harvard Law School dean James Barr Ames noted in 1886 that Morawetz's text was "generally conceded to be the best treatise on the subject of corporations" and had become the standard text for law schools.[3] This text began Morawetz's fifty-year contribution to the interpretation and evolution of corporation law. Not only did he clarify the law, he also injected his own conclusions of how the law should be definitively viewed. As a legal scholar later observed, because "the field was new and authorities scarce," Morawetz "was able to express dogmatically his own theories on controversial points, and he deliberately omitted such authorities as were against him."[4] Not only had Morawetz established himself as a national authority on corporation law, his mastery of law coupled with his keen intellect made him an invaluable asset in the formation and governance of corporations.

Based on the success of his text, Morawetz relocated to New York City in 1882 where his expertise might generate an income for him. Not long after arriving in the city, Morawetz was introduced to Andrew Carnegie, who had a copy of Morawetz's book, and the steel magnate engaged the 23-year-old lawyer and legal scholar on a railroad case, which Morawetz subsequently won. Thereafter, Morawetz continued as Carnegie's personal attorney and soon drew a steady stream of noted clients. Although he became a partner at the prestigious Seward, Da Costa & Guthrie (later Cravath) law firm for several years, Morawetz preferred to work independently and resigned his partnership to work alone with a small staff in the financial district. Without a doubt, Morawetz's most important client was the banking house of J.P. Morgan and Company, which in 1892 gave him a leading role in the technical formation of General Electric, and, after 1893, retained Morawetz to carry out the reorganization and conglomeration of three great railroad systems: the Union Pacific, the Atchison, Topeka and Santa Fe (AT&SF), and the Norfolk and Western. Morgan next made Morawetz general counsel for a number of railroads and, owing to Morawetz's keen financial, as well as legal, expertise, made him chairman of the board of directors and operating executive for the Atchison, Topeka and Santa Fe Railway Company at age 36. In 1901, Morawetz and a close friend, attorney Francis Lynde Stetson, carried out the formation of the U.S. Steel Corporation for J.P. Morgan. The U.S. Steel Corporation was the largest business consolidation to that time with a capitalization of $1.4 billion dollars. In the midst of all his activity, Morawetz managed to earn a graduate

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[2] Victor Morawetz, *A Treatise on the Law of Private Corporations other than Charitable* (Boston: Little, Brown, and Company, 1882), *iii.*
[3] Rublee, "Memorial of Victor Morawetz," 400.
[4] Swaine, *The Cravath Firm,* 383.

degree in economic theory at Columbia University and also served as director of a New York City bank. By 1900, Morawetz was recognized as one of the most distinguished attorneys in the nation in the burgeoning field of corporation law and finance, both as a legal theorist and a practitioner.[5]

It is worth noting that Morawetz's 1886 second edition of *The Law of Private Corporations* included a treatment of the issue of the legality of competing railroad companies entering into contracts to prevent "ruinous competition." This section, which appears in his chapter entitled Public Duties, sheds light on Morawetz's view of the growing debate on government regulation of railroad business practices which would culminate in the 1887 Interstate Commerce Act. In what amounts to a short opinion piece inserted in the text, Morawetz asserted:

> It is clearly to the interest of railroad companies operating competing lines to make such arrangements as will prevent ruinous competition, and secure to each company a fair share of the competitive traffic at reasonable rates. Arrangements of this character are directly conducive to the prosperity of the companies, by increasing the profits of their legitimate business, and, in many instances, are a necessary means of preventing ruinous loss and insolvency. It is but reasonable, therefore to hold that railroad companies are impliedly authorized by their charters to enter into such arrangements, unless some positive prohibition of the statutory or common law renders them illegal.[6]

Although the public viewed such arrangements as collusion that increased rates after a welcomed period of strident competition, Morawetz argued that so long as the resulting rates were not "unreasonably high," they do not "violate any duty which the companies owe to the public" and therefore "should be sustained and enforced by the courts."[7]

One might imagine Morawetz to have held inflexible laissez-faire capitalist sentiments owing to his role in the formation of the country's most significant corporations and because of the wealth he amassed in corporation securities during the period, but that was not the case. Although the source of his political-economic views is not yet known, the course of his public efforts in the first decade of the twentieth century reveals that Morawetz became increasingly interested in reforms designed to regulate the very corporations that he had created and profited from during the Gilded Age. While the inspiration for Morawetz's decision to become active in reform legislation is not currently clear, it is suspected that he was likely motivated by an enlightened self-interest for himself and his corporate class through a realization that unrestrained capitalism created excessive uncertainty for business and would not much longer be tolerated in Europe and in the United States from a social point of view. Whatever the source of his motivation, Morawetz became energetically involved in – and sought to direct – the public quest to restrain corporations through expanded regulatory powers of government. He brought to his efforts a profound understanding of corporation law, constitutional law, and the

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[5] Rublee, "Memorial of Victor Morawetz," 400-401; Swaine, *The Cravath Firm,* 383-384.
[6] Victor Morawetz, *A Treatise on the Law of Private Corporations other than Charitable* (Boston: Little, Brown, and Company, 1886), 1130-1131.
[7] *Ibid*, 1132.

policies, practices and business requirements of the new large national corporations of the period.

Public fear of exploitation by monopolistic corporations became ever more vocal after the rapid increase of reorganizations and mergers of previously competitive businesses in the wake of the 1893-1898 recession, the most notable of these being the product of Morawetz's own skilled hand. By 1900, the public was acutely aware that earlier efforts to control railroads through the 1887 Interstate Commerce Act and to prevent large corporations from forming through the 1890 Sherman Anti-Trust Act had been rendered generally useless through federal Supreme Court decisions. As the national tide of progressivism swelled at the turn of the century, political reformers, including the young president Theodore Roosevelt, championed new national legislation to strengthen the Inter-State Commerce Commission and to make amendments to the Sherman Act that would make it an effective weapon of reform. In an address to congress in December 1904 just after his election, Roosevelt set the stage for his legislative agenda when he insisted that, although "Great corporations are necessary, [they] should be managed with due regard to the interests of the public as a whole."[8] Roosevelt applauded the Elkins Act of 1904, which had established federal penalties for the discriminatory practice of paying secret rebates to select shippers, but called upon Congress to enact new legislation that would empower the ICC to set rates after a hearing of the commission had found them to be unreasonably high. Roosevelt's call for the further empowering of the ICC was evidently a result of public outcry against a recent substantial increase in railway rates across the industry. The House of Representative acted quickly and in February 1905 passed a bill sent to it by Senator Jonathan Dolliver, who Roosevelt had picked to draft the legislation. The bill authorized the ICC to set what it believed to be a reasonable rate in a particular case after having determined the railroad rate to be illegally high. The act also compelled railroads to adopt a uniform accounting system and open their books for ICC scrutiny in determining what a reasonable rate would be.[9] Although the House acted swiftly, the Senate delayed because many senators were more responsive to the interests of railroad companies than to the growing public cry for reform – including the People's Party's call for government ownership of railroads. The Senate Committee on Interstate Commerce took up the matter in April 1905 but decided to invite five industry experts – railroad presidents and eminent legal scholars – to weigh in on the debate over the proposed legislation.

Among those invited to testify was Victor Morawetz, who was recognized by the political and corporate elite as both an important railroad executive and a noted authority on corporation law and constitutional questions related to it. Morawetz was the first to address the committee when he appeared on April 18, 1905, at the request of Republican chairman Stephen Elkins of West Virginia. Elkins had written to five eminent men inviting them to advise the committee on two constitutional questions: 1) "Can the Congress delegate to a subordinate tribunal, like the Interstate Commerce Commission, the legislative power to fix railroad rates?" 2) "Would the ICC be allowed to manage the problem of rate differentials" that the public (especially farmers) complained of for having

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[8] Theodore Roosevelt: "Fourth Annual Message," December 6, 1904. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=29545.

[9] Edmund Morris, *Theodore Rex* (New York: Random House Publishing Group, 2001), 446-448.

to pay higher rates for the short-haul of their commodities compared to the lower rates that manufactures paid for long-hauls in their distribution.[10]

Morawetz evidently made an extensive study on the subject prior to his appearance and came armed with a lengthy brief to present to the committee. Before taking up the constitutional questions, however, Morawetz summarized the economic situation of the AT&SF Railway Company, evidently in hopes of answering the populist attack on railroads for the industry's recent rate increase. Morawetz pointed out that owing to increased demand for rail service during the recent period of national economic expansion, the railroad industry had nearly doubled its carrying capacity (from 95,000,000,000 to 170,000,000,000 tons per year) through the construction of new tracks, "greatly enlarged terminal facilities, and [the] purchase of a vast amounts of additional equipment of all kinds." The total investment necessary to accomplish the AT&SF's part of that increase included the raising of $100,000,000 in capital, much of which was in the form of new debt. Morawetz, who evidently wanted to remind society that the railroad industry's expansions were a critical part of the economic recovery and expansion after the devastating collapse of 1893-1898, warned that:

> No company will borrow money for the purpose of making extensions and improvements and run the risk of bad times unless reasonably assured of a substantial profit over and above the interest on the money borrowed. Therefore, if any legislation should be passed which would so reduce the earnings of the company as to render it uncertain whether it would earn a profit over and above the interest on ... all new capital raised, this would put an end to further extensions, improvements and additions. This applies equally to all the railway companies in the United States.[11]

Morawetz added

> The question deserves earnest consideration on the part of those who propose legislation that would cut down the net earnings and impair the credit of railway companies. Who will furnish these transportation facilities that are essential to the future development and commercial prosperity of the country if the railway companies themselves should be financially crippled by this proposed legislation or should be prevented from incurring the enormous expense which the furnishing of those transportation facilities would involve?[12]

Morawetz also asserted that the recent increase in industry rates were in significant part a result of inflationary pressures on the cost of labor and materials owing to various economic conditions, including a devaluation of currency brought on by a significant recent increase in the world supply of gold. He argued that, faced with increased costs going into the future, "the net earnings of railway companies... will be reduced

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[10] United States, Senate, *Senate Documents, Fifty-Ninth Congress, First Session* (Washington, D.C.: Government Printing Office, 1906), 792.
[11] *Ibid*, 793.
[12] *Ibid*, 793-794.

automatically, without any legislation to that effect." Morawetz concluded his general introduction by pointing out that about 50,000 households owned AT&SF railroad securities and another 43,000 households derived an income through employment with the railroad firm, and – pushing back against populist claims – he asserted that "Before the hearings of this committee are closed it will be [demonstrated] that the railway rates of the country are not excessive[; which] the Interstate Commerce Committee has repeatedly admitted in its published reports."[13]

Morawetz next turned to the constitutional questions upon which the committee sought input. Owing to his scholarly background, Morawetz made a very precise presentation with references to numerous relevant court decisions. With regard to the question of the constitutional right of the government to regulate railroad business practices, Morawetz affirmed that under the Interstate Commerce Act, a "public carrier is prohibited from making an unreasonably high charge for the services rendered" and is "prohibited from any unjust discrimination" in the rates it charges shippers. Morawetz believed that "There is no doubt that these acts, or any acts which would accomplish similar results, are constitutional." The difficulty, Morawetz argued, lay in how Congress might empower the ICC to prevent rates that are "unreasonably high, and therefore illegal" or so low as to be an illegal government confiscation of private property. Perhaps surprising those who expected him to ardently defend railroads against regulation, Morawetz disagreed with those who claimed that the recently passed House bill would unconstitutionally empower an executive branch agency with legislative authority by conferring power to the ICC to set rates. Morawetz stood instead with those that believed that this power existed, providing that constitutional safeguards were included for judicial review. On this point, Morawetz asserted: "The... point I wish to make is, Congress probably can delegate to a commission power to fix, subject to review by the courts, the maximum rates that would be unreasonably high and illegal as against shippers." His concern, however, was that the ICC should preserve the ability of businesses to make strategic marketing decisions and he asserted that "there is a wide range within which any rate would be just and reasonable, and it is wholly a question of business policy at what point the rate shall be fixed within that range."[14] The additional concern that he had with the existing House bill was that it lacked adequate provision for judicial review. Morawetz warned that creating an executive agency that depended on the decision of five members who would be political appointments was highly dangerous. Morawetz cautioned that:

> Any act of Congress... vesting in a commission purely discretionary power to fix rates... would vest in the Commission practically autocratic power over the policy of the railways of the United States, and autocratic power to make or unmake the prosperity of different sections of the country.... It would place in the practical control of the Commission property of a value of about $15,000,000,000 – the most important single property interest in the United States. It would create a form of bureaucratic government more absolute than any existing in any other country in the world. [And it] would

[13] *Ibid*, 794-795.
[14] *Ibid*, 795-796.

> certainly be contrary to the American system of government and to American ideas of what a free government should be.[15]

And yet Morawetz was not advocating laissez-faire capitalism, as became clear when he asserted that "Congress itself can fix a rate at any point it sees fit." But he warned that the delegation of that authority, without judicial review, to a small body of political appointments would be both dangerous and constitutionally a "very doubtful question, in my judgment."

Having established the paramount necessity of judicial review, the next problem that Morawetz identified in the legislation was the framing of the question to be put to the court in an appeal. He asserted that the court would be hearing an appeal from one of two parties against an ICC decision: either a shipper who claimed that the rate the ICC set was "unreasonably high" or a railroad that claimed the ICC rate was so low as to be an undue confiscation of property. Given that the court, in Morawetz's words, "must be a court pure and simple," it could not uphold the legality of an ICC rate because it could only affirm or disavow a claim that the ICC rate was unreasonably high or unconstitutionally low. Because of the constitutional requirement for judicial review of any legislative act (which a decision of the ICC would be), any rate that it fixes between "a rate that is unreasonably high and the rate that is confiscatory" would be non-binding on a railroad because a court could only answer the law's requirement that rates not be unreasonably high or so low as to amount to illegal confiscation of property. Nor could Congress require the court to "hear the case de nuvo and to substitute the ideas of the court as to what is wise or desirable for the ideas of the commission" because that would make the court "in effect an appellate railway commission," which is a quasi-legislative act that the court could not under the U.S. Constitution perform. Furthermore, Morawetz argued, such an arrangement would force the courts to "become the traffic managers of all the railways in the United States, [making them] the rate makers of the universe."[16]

In pointing out these constitutional restraints, Morawetz explained that he was not generally opposed to regulatory legislation but that his "principal point was to consider the legal and constitutional questions in framing any legislation of this kind." Morawetz added that:

> no man can say with entire confidence what the Supreme Court will decide when the question arises. But I am bound to say that the views expressed by the court in these cases would seem to preclude the possibility of [the court accepting as constitutional an act giving the Interstate Commerce Commission] absolutely discretionary power of fixing rates [nor one that requires the court to substitute a new rate in its place].[17]

Perhaps frustrated at the constitutional constraints that Morawetz raised against effective regulation, progressive Senator Francis Newlands asked: "Could you suggest any method by which this right could be enforced in some speedy and determinable way, both for the shippers on the one hand and the railroads on the other?"

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[15] *Ibid*, 807-808.
[16] *Ibid*, 803, 804, 806.
[17] *Ibid*, 799-802, 804, 809.

Morawetz, in fact, had just such an idea in mind, and his having found it demonstrates that he had some alignment with the popular goals of reform. Regarding the ability of a court to weigh in on the validity of a rate, Morawetz observed:

> The court could not be required under the Constitution to determine what shall be the rate to be charged for the future... but it can find what the maximum rate would be which lawfully could be imposed by the carrier and to what extent the [ICC] regulation must be changed in order that it shall cease to be discriminatory. [18]

Morawetz strongly preferred that the ICC only establish what a maximum rate might be and leave a field of play for railroads to operate below that threshold, but if the ICC insisted on establishing a fixed, specific rate and the railroad objected, claiming that the rate amounted to confiscation, a court could upon appeal establish what the maximum rate might be that a railroad could charge in a particular case. This was the best solution Morawetz could find that would allow government protection of the public against unreasonably high rates and prevent the establishment of incontestable bureaucratic authority, which the Supreme Court would likely find unconstitutional, and Morawetz himself found repugnant.

As to the means for speedy action on the part of the courts, Morawetz advised that the Senate amend a 1903 act which had given preference to suits brought by the United States Government in the judicial system. Morawetz suggested Congress establish new circuit judges to handle the increased case load. When asked if a special court should be created to hear regulatory cases, Morawetz observed that "there is a great deal to be said for... a court sitting in Washington to hear causes brought either in the name of the United States by the Attorney-General or by the Interstate Commerce Commission." He cautioned, however, that "the thing to avoid is the creation of a court the judges of which will have nothing to do except to hear the cases under these acts, and who would thus soon become specialists." Morawetz warned that "special courts... always are disposed to degenerate" and lose their sense of impartiality. And he cautioned that "The important thing is to have the judges sitting in this court to hear complaints from time to time and go back to their circuits and... remain in harmony with the rest of the judicial department."[19]

Having established what he identified as a constitutional way forward for effective regulation of railroads, Morawetz took the opportunity to admonish the ICC for its performance over the previous decade. He complained that the ICC had been acting mostly as a sunshine commission, holding "elaborate hearings and writing elaborate decisions, which, as the Commission itself has said, and as the Supreme Court has decided, bind nobody and go for nothing." Should the Senate conclude from his complaint that he was an opponent of reform, Morawetz was quick to explain: "I do not agree with those who think that the Interstate Commerce Commission is of no use whatever. I believe the Interstate Commerce Commission has been a very useful body." What he proposed was that instead of sunshine commission, "The Interstate Commerce Commission should be made the effective police of interstate commerce in the United States." He believed

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[18] *Ibid*, 804-805.
[19] *Ibid*, 816-817.

"They should be required effectively to prosecute the violations of the law whenever they occur," and asserted that "They have never tried to do it in the past." To this charge one Senator cajoled: "I think they are now contemplating a [rate discrimination] suit against the Atchison." To which Morawetz replied, amidst laughter from the gallery: "I wish they would bring it. If the Atchison has been guilty of any discrimination, any rebates, the Atchison ought to be punished."[20]

After a further lengthy discussion with the committee concerning how to craft constitutionally valid provisions for effective legislation, Morawetz turned to the current practices of the railroad industry and disclosed the methods by which some companies disguised illegal rebates. He recommended new codes that would assist the government in preventing the practice. Toward the end of his five-hour interview, the topic turned back to the question of the profitability of the AT&SF railroad. Some reform-minded senators sought to suggest that the firm's rates were unjustifiably high, but Morawetz countered claiming that was not the case, asserting that the AT&SF during the present board's stewardship had actually incurred more expenses in upgrades then their net earnings covered. Morawetz explained that rather than paying large dividends from net profits, the board had reinvested the company's capital into additional tracks, "better cars, [and] more facilities of all kinds [because] you have got to improve your property to keep going." These improvements exceeded net earnings and required the corporation to "borrow vast sums of money."[21] Morawetz seems to have been suggesting that the stewardship, if you will, of the nation's railroads was best left to its executives and board of directors, whose decisions tended to be beneficial to both consumers and stockholders through meeting the public need for transportation and the financial interest of the investing community, not to mention vast employment and general economic growth.

The Senate committee recalled Morawetz the following day, and he engaged with the senators in a lengthy discussion of wide ranging issues of public concern in the operations of the railroad systems. Far from being hostile to the idea of regulation, Morawetz was candid and suggested various improvements that could be made against practices that were injurious to the public. He did, however, take every opportunity to show that railroads were under tremendous regulatory pressure, especially under state law, which he argued were injurious to railroad operations without justification. Although Morawetz was no apologist for capitalism, and though his position did not align with those holding egalitarian sentiments, it is likely that it was his performance before for the Senate Committee on Interstate Commerce that began to earn him a public reputation as a sensible leader of industry and high finance who was open to moderate reforms in political-economy.

In April and May 1905 the principal debate in the Senate regarding the proposed legislation surrounded the degree to which the courts would be able to review the rates set by the ICC. Several Democratic senators, echoing the position of Representatives in the House, favored a limited review by the courts. But in early May, Roosevelt weighed in siding with Republican Senators who advocated the broad judicial review that Morawetz had advocated. The Senate passed the Hepburn bill on May 18 and a conference committee reconciled the bill in a contentious session over the next several weeks. On June 29 Roosevelt signed the bill, which included several features that Morawetz

[20] *Ibid*, 811-813.
[21] *Ibid*, 838.

advocated. Section 15 authorized the ICC to set maximum legal rates and section 16 required the ICC to apply to a district court for enforcement of its orders and included Morawetz's idea that such cases be expedited under the provision of a 1903 act that had given preference to suits brought by the United States Government in the judicial system.[22] The degree to which Morawetz may have invested himself behind the scenes in the contest between the House and Senate bills is not currently known. He did summarize his argument before the Senate subcommittee in a printed pamphlet and also in his article, "The Power of Congress to Regulate Railway Rates," in the June 1905 *Harvard Law Review*. If he found other ways to influence the debate in Congress it is presently unknown. He must, however, have been satisfied with the final version of the Hepburn Act. He may, likewise, have been pleased when the Supreme Court subsequently upheld the act upon challenge. Although Morawetz was apparently satisfied, those holding political views to the right and left of his middle-of-the-road solutions to constitutional constraints were not. Railroad chairman and bank president Melville Ingalls called the Hepburn Act and other efforts to regulate corporations "the greatest menace to American business."[23] William J. Bryan, who had on regulatory matters moved decidedly into the socialist camp after 1896, denounced the Hepburn Act for not giving the public enough control over railroads, asserting: "I have reached the conclusion that there will be no permanent relief... from extortionate rates, until the railroads are the property of the Government and operated by the Government in the interests of the people."[24]

Morawetz's involvement in the Hepburn Act marked his entry into the public debate over expanded powers of government regulation of the capitalist economy. He staked out a moderate position that preserved both capitalism and empowered the government to correct many of its negative influences on society. His position was odious to entrenched capitalists who denounced regulation entirely and was too conservative for those advocating a socialist state. Morawetz was certainly not alone in staking out this position, but was instead part of a group of progressive business elites (predominantly Republican) who were determined to preserve capitalism by making it more palatable to society by imposing rules on the free-for-all marketplace. The challenge for Morawetz and other likeminded men of the capitalist class was in negotiating a course between stalwart conservatives in their own party, states' rights Democrats who abhorred strengthening the federal government, and those advocating for a socialist political-economy.

There is currently a gap in evidence regarding Morawetz's possible involvement in reform initiatives between 1905 and 1908. He reemerged on the scene in 1908 when Congress was considering either strengthening or replacing the Sherman Anti-Trust Act. Early in 1908, Morawetz was approached by New York progressive Republican Seth Low to assist the efforts of the National Civic Federation (NCF) to initiate federal legislation to strengthen the Sherman Anti-Trust Act. The NCF not only aimed to reign in the power of corporations but also championed state and federal laws designed to support the right of laborers to organize and engage in collective bargaining, providing they do so peacefully. The organization aimed to create a more equitable marketplace and workplace and to "promote industrial harmony." The NCF held a national conference in Chicago in October 1907 to form a national lobby to shape and support legislation that Congress was expected

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[22] *Ibid*, 589-592.
[23] "Trade Laws Denounced," *New York Times*, 17 August 1906.
[24] "Bryan's Stand: End the Trusts," *New York Times*, 31August 1906.

to take up to reform the Sherman Act in 1908. By January 1908, Low had approached Morawetz's associate, Francis Lynde Stetson, who was also an important corporation lawyer for J.P. Morgan. Stetson, in turn, involved Morawetz in the effort to draft legislation that Low would present before Congress as president of the National Civic Federation.[25]

The problem for the NCF was that it was a big-tent organization whose only cohesion lay in a common belief that the Sherman Anti-Trust Act was a failure. The NCF included small producers who feared large corporations and who saw the Sherman Act as ineffective in stopping their formation. The federation also included advocates for large corporations who disliked the broad language of the Sherman Act because it might eventually be used to stop mergers that were not injurious to consumers (whether or not they were injurious to less efficient small producers did not concern them, nor could it be avoided if the country was to continue to pursue economic efficiency). The federation also included labor leaders, including Eugene Debs, who objected to the use of the Sherman Act to prevent union organization and collective bargaining. In the 1894 Pullman Strike, for example, railroads sought and received the support of U.S. district attorneys against the American Railway Union for its role in the strike. Using the "conspiracy in the restraint of trade" prohibition of the act, corporations secured an injunction against the union and its leadership, including Eugene Debs. Debs defied the orders not to send his inter-state communications to strikers and was jailed on contempt of court. Subsequent cases were brought and upheld against unions for even threatening obstruction in efforts to secure labor contracts.[26] From the labor point of view, not only had the Sherman Act proved incapable of preventing monopolistic combinations, the act had been used cynically against labor to the benefit of the corporations that the act was designed to control. Finally, the federation included close associates of Theodore Roosevelt, who sought legislation that would give the federal government effective oversight of corporations through a requirement that all businesses engaged in interstate commerce be required to procure a license through the Commissioner of Corporations, part of Roosevelt's 1903 Department of Commerce and Labor. The anticipated compliance mechanism was that a company's federal license would be imperiled through sanctions issued by the Commissioner of Corporations for antitrust violations, thereby producing a swift government response instead of a lengthy court proceeding during which numerous illegal injuries could occur.

A great debate took place among the conflicting elements of the National Civic Federation throughout the spring of 1908. It was at this point that Morawetz was able to advance his own position in the debate. As a corporation moderate, Morawetz wanted to alter the broad language of the Sherman Anti-Trust Act to give corporations security against eventual regulatory action that might injure legitimate business activities in a general sweep designed to stop those practices that were injurious to the public. Morawetz opposed Roosevelt's effort to force a federal license on all interstate corporations and

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[25] Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890*-1916 (New York: Cambridge University Press, 1988), 204-209; Seth Low testimony, United States, House of Representative, *Hearings on House Bill 19745: An Act to Regulate Commerce, Etc., Sixtieth Congress, First Session* (Washington, D.C.: Government Printing Office, 1908), 10-11; Augustus Cerillo, "Low, Seth," *American National Biography Online*, Feb. 2000.

[26] Victor Morawetz, "Should the Anti-Trust Act Be Amended," *Harvard Law Review*, vol. 22, May 1909, 492-493.

managed to diminish that aspect in the legislation when he and Stetson drafted the bill that ultimately came before congress.[27]

The bill championed by the NCF, which included several of Morawetz and Stetson's views, aimed to give the executive branch of the federal government some power to prevent the merger of corporations that would pose a monopolistic threat to American consumers. It also contained modest conciliations on behalf of labor. The legislation, which was introduced in Congress in March 1908, vested authority to regulate mergers in the recently created Department of Commerce and Labor. The bill would require all for-profit corporations that had voluntarily registered with the Commissioner of Corporations to notify the Commissioner of any new contracts or combinations with other corporations and to reveal the terms and conditions of the arrangement. The Commissioner would then have thirty days to assess the combination and if the commissioner determined that the contract would be an "unreasonable restraint of trade'" he would announce the decision and order the combination disbanded. If the combination was not dissolved, the commissioner could terminate the registration of the corporations involved, thereby making their interstate commerce activities illegal until the firms complied. The bill would additionally require all federally-licensed corporations to publish periodic reports on their business activities, structure, and financial situation.[28]

The bill also sought to come to the aid of labor unions by forbidding injunctions against union strikes and collective bargaining under the Sherman Anti-trust Act. The bill that Morawetz and Stetson drafted for the NCF stated that "nothing" in the Sherman Act would henceforth serve as a foundation to "interfere with or to restrict any right of employees to strike for any cause... or to contract with each other or with employers for the purpose of peaceably obtaining from employers... satisfactory conditions of employment."[29] It can be concluded from the use of the word "peaceably" that the NCF did not support the right of unions to engage in physical obstruction and certainly not in violence. Furthermore, to preserve an equitable arrangement, the bill also stated that nothing in the proposed act is intended to "restrict any right of employers for any cause to discharge all or any of their employees...." The inclusion of the section regarding the use of the Sherman Act in labor disputes might be viewed as a moderate effort to support the right of collective bargaining but also maintain the right of corporations to choose not to enter contracts with unions.

With the bill drafted, Seth Low appeared before a subcommittee of the House Committee on the Judiciary to present the NCF's modest reforms in the field of commerce, industry, and labor. Linking the bill to the growing public outcry for reform, Low observed: "Combinations in this country have been formed upon so vast a scale, and have so efficiently dominated one line of business after another, as to awaken a genuine fear in the minds of the multitudes that the end of individual opportunity is in sight."[30] It was just such a fear, Low asserted, that led to the passage of the 1890 Sherman Anti-Trust Act. And yet, Low pointed out, the U.S. had nevertheless benefitted from innovative

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[27] Sklar, *Corporate Reconstruction of American Capitalism*, 210-230; Gabriel Kolko, *Triumph of Conservatism; A re-interpretation of American History, 1900-1916* (New York: Free Press of Glencoe, 1963), 133-136.
[28] *Hearings on House Bill 19745*, 3-5.
[29] *Ibid*, 6.
[30] Low testimony, *Hearings on House Bill 19745*, 12.

corporations and stipulated that not all mergers or combinations should be deemed undesirable or unlawful. The Sherman Act, he argued, needed amending both to make it more effective but also because its language was so broad that, subject to interpretation, the operation of many businesses – as well as the activities of labor unions could – be viewed as a violation under the act. The goal of the NCF bill, he explained, was to create administrative oversight of combinations so that those that were not harmful could proceed while those that were adverse to public welfare could be stopped. The limitation of the bill, he admitted, was that the Commerce department would only have jurisdiction over corporations which had voluntarily sought federal licenses through the Commissioner of Corporations. Although the federal license was not a requirement for inter-state business in the bill, Low suggested that this initial voluntary approach might offer an experiment in dealing with the regulation of corporations. Congress might, with public support, eventually require federal licensing for all corporations involved in interstate trade.[31]

The NCF approach, however, was so balanced due to Morawetz and Stetson's influence that it pleased no one. Roosevelt gave it modest public support despite his close oversight of the bill, which included a lengthy White House conference that he held with members of the NCF along with Morawetz and Stetson. Roosevelt had wanted the NCF to seek mandatory federal licensing for interstate commerce, but, owing to Morawetz and Stetson's influence, that language was not subsequently included. Privately Roosevelt wrote: "The more I think over it the more I believe that to pass the bill on the Stetson-Morawetz line would be worse than passing nothing."[32] Socialists and labor activists, for different reasons, also believed the bill was not worth supporting because it was too timid a step forward. On the other hand, business associations saw in the legislation the beginning of an oppressive federal intervention in the marketplace and so also opposed it. Various business leaders sent dire messages to congressional Republicans warning of the political consequences if they endorsed the act. One stated: "If the Hepburn bill amending the Sherman Act is passed, we believe the people will repudiate the Republican party at the next election." Another asserted: "We can conceive of no legislation more disastrous to business interests and to the welfare of this country than would be the Hepburn [bill] if enacted."[33] Not surprisingly the bill languished in House and Senate committees, and the national debate over how to handle the threat of monopolistic power took a recess.

As the nation debated the role of government in the economy in 1908, a new crisis opened up a fresh field within the topic. That crisis was the financial panic of 1907-1908 which nearly toppled New York's financial houses and brought credit and business activity to a standstill across the country. The crisis was averted by the intervention of J.P. Morgan when he rescued a number of banks and trust houses and in the process took every advantage for himself and the corporations he controlled that he could.

None were more concerned by the panic than the industrial-financial class and their representatives in Washington, including Theodore Roosevelt. The panic concentrated their mind on the need to reexamine banking practices and bank regulation in America. Among others, the bank panic stirred Morawetz deeply and he soon devoted himself to

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[31] *Ibid,* 13; see also Sklar, *Corporate Reconstruction of American Capitalism*, 214.
[32] Sklar, *Corporate Reconstruction of American Capitalism*, 249.
[33] Quoted in *Hearings on House Bill 19745*, 9.

offering his extensive experience and intellectual powers to solving the banking problem in the U.S. In April, Morawetz appeared before the House Committee on Banking and Currency, which was considering a bill initiated by Nelson Aldrich in the Senate. The bill would create a government bond-based reserve bank note system that Morawetz condemned because it did not address what he saw as the central problem of the panic – the lack of currency elasticity that prevented credit from expanding in times of great demand. In his statement to the House, Morawetz recommended that the Aldrich bill not be authorized for more than two years and called for the creation of a special congressional commission to study the issue and await more well thought through recommendations upon which Congress could later act. Morawetz pointed out that "In all other countries there is a central control by a central bank, which has a monopoly of note issue, regulating reserves and the extension of credits." Morawetz did not believe that "you can ever have a central bank in the United States" along European standards because the public, himself included, would oppose it. But he did believe that "all banks and trust companies should be brought under a single control to prevent currency troubles." He noted that the "recent trouble" was primarily owed to a failure in the trust companies because "they did not keep proper reserves, and they engaged in business much more risky than that of the national banks," which were under some federal regulation, even if aspects of it were faulty.[34]

Morawetz's appearance before the House committee was the beginning of a five-year effort on his part to see a new banking system created that would accomplish what he thought best suited the American economy and the American system of government. Morawetz was pleased with Congress' decision not to adopt the Aldrich bill and to instead establish the National Monetary Commission to study the banking problem. As that two-year study commenced, Morawetz poured himself into the banking question, evidently trusting himself more than the rest of the banking industry to come up with the best solution. Morawetz was free to dedicate himself extensively to the problem owing to his retirement from the AT&SF Railroad in October 1908.[35] By early 1909 Morawetz completed and published *The Banking and Currency Problem in the United States*, arguably his most important contribution to political-economy during the era of reform.

In the preface to his 129-page study Morawetz explained: "This essay is the result of an attempt to discuss briefly the principal questions that are likely to engage the attention of the National Monetary Commission appointed under the Aldrich-Vreeland Act of 1908."[36] Morawetz began the book with an explanation of the causes of the 1907-1908 panic, which had "forced the suspension of nearly all the banks, and... arrested business activity throughout the country and caused vast losses to the people." Evidently writing for a broad audience who might have limited understanding of the field, Morawetz sketched the principles of money and banking and explained the chief problems that lead to bank panics: insufficient reserves, credit stringency, and deficiencies in the dependability of bank notes. He pointed out that the country would not benefit by simply requiring banks to keep larger minimum reserves because that would stifle the credit

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[34] "Oppose Aldrich Bill: Victor Morawetz, Horace White and Others Argue Against It," *New York Daily Tribune*, 11 April 1908.

[35] "Victor Morawetz Quits", *New York Daily Tribune*, 8 October 1908.

[36] Victor Morawetz, *The Banking and Currency Problem in the United States* (New York: North American Review Publishing Company, 1909), n.p.

necessary for the ever growing U.S. economy. He compared the policy of significantly raising reserve requirements to "killing the patient in order to destroy the disease." Morawetz argued that what was most needed was an elastic system of reliable bank notes that would allow the money supply to expand and contract without using the aggregate reserves of U.S. banks for that purpose.[37] Because the United States system had lacked elasticity, he explained, "there is either an over-abundance of money (meaning credit which that the banks are ready to lend) or a money famine."[38]

Morawetz next explained that the European approach was to "invest boards of experienced men with some measure of power to control the expansion of bank credits in the aggregate and in particular with the power to regulate the issue of bank-note currency." This was accomplished through the creation of a "large central bank" that also has the function of discounting commercial paper. "By raising or lowering its discount rate, the central bank can regulate interest rates and [control] the expansion of credits throughout the country." These central banks have the sole power to issues notes which individual banks then use as a "circulating currency." These national notes are deemed legal tender that banks count among their reserves and the supply of these notes are adjusted by the central bank as demand fluctuates.[39]

Morawetz knew that "many able bankers are of the opinion" that the United States "should provide for the stability of financial conditions by adopting the European plan [and] establishing a central bank." He argued, however, that the United States is as large as "all of countries of Europe combined" and the "different sections of [the country] are growing rapidly in wealth and independence." He therefore believed that the "business interests and financial resources" of America "cannot be centralized" in the way that the smaller European countries can. To do so, Morawetz, explained "it would be necessary to create a bank of colossal magnitude and to confer upon it a monopoly of the power to issue bank-note currency." He believed "the people of the United States would not consent to the creation of a central bank" that would "give to any man or set of men the power to control the vast resources of such a bank, and to dominate all the banks and business interests of the country." Even if it were politically acceptable to do so, Morawetz did not think it safe because "there would always be the danger that the control might pass into undesirable hands." Placing such an institution in the "hands of a board of directors chosen by... the existing National banks, free from government control, certainly would not be desirable or safe." On the other hand, vesting the power "in the Government to appoint mangers of the bank" would be no better, he argued, because "the policy of the bank [would] depend upon the result of popular elections and would [make] the control of the bank a political prize to be disposed of by the party in power." He urged that such an arrangement would "render financial conditions in the United States less stable and less safe than they are today."[40]

Morawetz's political wisdom is rather apparent in his explicit warning against the perils of a politicized central bank in the United States:

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[37] *Ibid*, 1, 5, 7-27.
[38] *Ibid*, 41.
[39] *Ibid*, 44-45.
[40] *Ibid*, 45-47.

> Even though provision could be made so that the control of such a bank always would remain in the hands of the wisest, and the most disinterested men, it would not be possible to satisfy the people throughout the country that the vast resources and powers of the bank were used only for the best interests of all the people without partiality or favor to any section of the country, or to any class or set of people.... Soon it would become a political issue, and in the contests for political supremacy appeals would be made to the prejudices of those unable to understand the difficult financial problems with which the managers of the bank would have to deal. The South would want the bank [to facilitate higher prices] of cotton and tobacco[;] the West...to raise the price of corn and wheat[;] The large money centers would want the bank to help bankers and brokers to carry stocks and bonds when speculation runs high at the stock exchanges.

Furthermore, in every period of financial distress or of high interest rates,

> an outcry would come from every part of the country that the central bank should relieve the situation; and if the mangers of the bank should deem it unsafe to yield to this outcry by expanding credits still further, their refusal to act would be charged to selfish motives, or to collusion with the so-called money interests of Wall Street."[41]

Simply put, Morawetz believed that "A great central bank would be out of harmony with our business habits and political methods."

In coming to the part of his book in which he presented his own recommendations, Morawetz expressed his conviction that "The serious financial troubles in the United States have not been due to dishonesty or bad judgment in management," but rather to the "absence of intelligent central regulation of the credit situation." The solution would be the creation of a "central agency... empowered to regulate the issue and redemption of currency by the National banks." The difficulty, Morawetz realized, was that "the Constitution does not confer upon Congress power to regulate [state] banking business...." He therefore believed that "any attempt... to subject the State banks... to National regulation would involve serious constitutional and practical difficulties, and in most of the States probably would meet with popular disproval." Given our "system of Constitutional government such legislation is impossible."[42]

Fortunately, Morawetz had come upon a solution: create through a central agency a bank of last resort. The central agency, which would be a private banking association, would act like a central bank if it had the sole power to issue legal tender notes. In times of need, the central agency could supply its notes as legal reserves to imperiled banks, which would then not have to sell securities held in other banks to raise cash, thus preventing a domino-like failure in the banking system as each bank sought to monetize its assets. This central agency would also be authorized to act as a clearing house that discounts its notes and could marginally influence interest rates around the country by raising or lowering its discount rate. Furthermore, Morawetz believed that this structure

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[41] *Ibid,* 48-49.
[42] *Ibid,* 76, 79.

he envisioned was possible under the U.S. Constitution. He proposed that Congress authorize the national banks (those with federal charters) to form the central agency and "issue notes upon their joint credit," each being required to keep a "prescribed percentage of its outstanding notes." The legislation should "empower the Secretary of the Treasury and a managing board, or committee, elected by the banks, to increase or diminish from time to time the prescribed percentage" that the national banks must hold in reserve. This would allow the Secretary of Treasury in concurrence with the elected representatives of the banks to expand or contract credit so as "to prevent or relieve credit stringencies" and "provide for reasonable stability of interest rates." Morawetz proposed that the legislation include a means that "enabled the National banks to concentrate their reserves" so as to "create a common fund upon which any bank might draw in case of need." The reserve assets must be, he insisted, in the form of "high-class commercial paper maturing from day to day" to provide safety and liquidity for the central agency.[43]

Finally, Morawetz proposed that the association of national banks should be located in "various sections of the country," forming a system of "sectional reserve banks[s], to be controlled [jointly] by them through stock ownership." The central office of this bank association should be in Washington and the association should be required to "establish a branch... in each city in which there is a United States sub-treasury" and "within two years establish a branch in every city having a population of one hundred thousand persons." Morawetz stipulated that the mangers of the association hold their meetings at the central office in Washington. The association's legal tender notes would be prepared "under the direction of the Comptroller of the Currency... and every act of the association should be subject to the supervision of the Comptroller." Adjustments to the percentage of notes to be held in reserve by the system of sectional reserve banks would be established by the elected board "with the approval of the Secretary of Treasury."[44]

In viewing this last feature of Morawetz's plan, it becomes apparent that his expertise in mergers was likely an important aspect of him devising such a plan. Looking at it thusly, Morawetz's plan may be viewed as the iconic fruition of the era's trend toward corporate combinations (with interlocking shared stock ownership) and government oversight of them as the natural outcome of the growth and development of the national economy during the period. Thus no reserve bank could act independent of the will of the entire elected bank preventatives, nor could a government agency act arbitrarily in bank policy. Morawetz plan would require a consensus policy position between those deemed wisest among national bank leaders and the two experts deemed wisest to be selected by the executive branch. That, he believed, was the best way to ensure that the wisest policy would emerge.

It took Morawetz four years to have his plan adopted by the banking industry and by a congress and by a president. There would be some alterations to his provision for the notes issued by the reserve association but his idea of a national private banking association with a regional structure that was subjected to close government oversight would become the central design of the Federal Reserve System enacted under Woodrow

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[43] *Ibid,* 86-88. See also "Discussion following the address of Mr. Victor Morawetz, *The banking and currency problem*, at first regular session of Finance Forum, November 24, 1909" (New York: H.D. Hooper & Staff, Official Stenographers, [1909]).
[44] *Ibid,* 88-90.

Wilson in 1913.[45] His struggle with the banking industry during the four year interlude centered on an alliance that had formed between New York banker Paul Warburg and Senator Nelsen Aldrich, who preferred a more centralized private banking association that did not feature Morawetz's regional structure and only allowed for limited government oversight.[46] As one historian of the Federal Reserve observed, Aldrich "stood foursquare for private control" and his "conservatism would not allow for the possibility of government control."[47] Aldrich's effort to establish a new national banking plan in 1911 under a bill with his own name made it all the more impossible for Democrats to accept the Aldrich-Warburg plan and the bill failed to pass in 1912. The plan did, however, at least move the banking industry behind the idea of an association of national banks that would coordinate activities so as to function as central bank similar to those in Europe.[48]

With the Democratic Party's sweep of the presidency and both houses of Congress in the 1912 election – a result of the fracturing of the national Republican Party between stalwarts and progressives – there seemed no chance of Aldrich's bill being revived. And yet the dire need for banking reform was strongly held among Democrats as well. A fundamental and somewhat ironic difficulty for Wilson and the Democrats was the success of their attack on the "Money Trust" and all the siblings of capitalism and high finance in the 1912 campaign. Owing to their strong denunciation of the "Money Trust," Democrat congressmen tasked with forming an alternate banking plan took great pains to distance themselves from the proposals of men from Wall Street. But without those men's support, bank reform could not go forward.

After five years of debate on how a new national banking system would be composed, Morawetz's moment began to emerge in January 1913 when he was asked to present his ideas before the House Subcommittee on Banking and Currency. Perhaps in an effort to keep Democrats from connecting him to the "Money Trust," Morawetz notated in his opening statement that should another financial panic unfold, the "Rich and the speculative part of the community would probably suffer less, for they generally can take care of themselves," but the "poor – the working classes – would suffer most of all in the end."[49] With that nod to populist sentiment, Morawetz then laid out his proposal for a constitutionally and politically acceptable modified central bank. It took him a while to

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[45] See Robert West, *Banking Reform and the Federal Reserve, 1863-1923* (Ithaca: Cornell University Press, 1974), 59-65. Although West is critical of several aspects of Morawetz's analysis, especially regarding his concept for reserve system notes, he asserted that Morawetz's "divisional reserve concept was innovative." He further observes: "Morawetz suggested that the note issue and reserve functions both be placed in the sectional reserve banks. In addition, he proposed a central authority to coordinate the functioning of the system. With this idea, he anticipated the Federal Reserve Board."

[46] For Warburg's central role in the debate leading to the Federal Reserve Act see Paul Warburg, *The Federal Reserve System: Its Origin and Growth* (New York: The MacMillan Company, 1930).

[47] *Ibid,* 87.

[48] *Ibid,* 68-69, 74, 78-79. West had much praise for Warburg and other banking experts' ideas for the new national banking system. He argued that the difficulty was that "the groups whose support was needed to pass legislation" (progressive Republican and progressive Democrats) "did not trust the people who were qualified to operate the system." The eventual "solution was government control of appointments with bankers as appointees."

[49] United States, *House of Representative Documents, Sixty-Second Congress, Third Session, Banking and Currency Reform* (Washington, D.C.: Government Printing Office, 1913), 46.

explain his plan and when he concluded he admonished Congress of the need to exercise great caution in moving forward and asserted: "We should try only things which have been found successful in other nations and which have the approval of those who have made a specialty of the study of banking institutions and banking methods." A problem, of course, with his assertion was that the banking specialists did not agree with one another as to the form the central bank should take. In fact, in addition to himself, Paul Warburg had been invited to present his proposals to the committee and was awaiting his opportunity to speak after Morawetz.[50] The committee heard the ideas of both men and for the next several months Washington argued over the final form that the bill should take. In the end, Wilson weighed in and made it known that he favored using many elements of Warburg's plan, but they would have to be adapted to Morawetz's more democratic proposal of a sectional reserve system strictly governed by a national board overseen by the federal government.[51] Wilson appears to have been won over to Morawetz's plan by his closest advisors, including Colonel Edward House and Louis Brandeis, both of whom were connected to Morawetz and favored his approach over Warburg's. Having reached a conclusion, Wilson soon voiced his opinion to congressmen who then advanced Morawetz's ideas in congressional committees.[52]

As the banking act took its final shape in October 1913, Morawetz was called again to Congress, this time to the Senate where they were seeking to amend the bill that had come out of the House of Representatives. When asked about his expertise in banking and his involvement in the national debate over banking legislation, Morawetz said that he had "given special attention to banking and currency questions for the last five or six years, and have published a small book and numerous pamphlets treating on this important subject." He went on to explain:

> I have advocated the adoption of the regional or divisional reserve bank plan, which is, in substance, the plan embodied in the bill now before this committee. All my prejudices, therefore, are in favor of this plan. I am anxious to have the bill, now before the committee, perfected, so that it will carry into effect the plan which I have been advocating, and which I believe to be the best and most practicable plan for this country.[53]

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[50] Morawetz and Warburg's contest over the form that new national banking act would take stretched back to 1909 when the two began publishing their plans for a central bank. An interesting episode of their contest is recorded in a transcript of their debate on 24 November 1909 at Finance Forum held in New York City at the Westside YMCA, a copy of which is in the Rare Book/Special Collections Reading Room of the Library of Congress Jefferson Building.

[51] John Milton Cooper, Jr., *The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt* (Cambridge: Belknap Press, 1983), 233, and John Milton Cooper, Jr., *Pivotal Decades: The United States, 1900 - 1920* (New York: W.W. Norton, 1990), 196-197.

[52] Marc McClure, *Earnest Endeavors: The Life and Public Work of George Rublee* (Newport: Greenwood/Praeger, 2003), 86-87.

[53] United States, Senate, *Senate Documents*, Banking and Currency: Hearings before the Committee on Banking and Currency, United States Senate, Sixty-third Congress, First Session, on H.R. 7837 (S. 2639), a Bill to Provide for the Establishment of Federal Reserve Banks, for Furnishing an Elastic Currency, Affording Means of Rediscounting Commercial Paper, and to Establish a More Effective Supervision of Banking in the United States, and for Other Purposes (Washington, D.C.: Government Printing Office, 1913), 2635.

At this point Morawetz was close to accomplishing his aim but had to eradicate some "very serious defects" that the House subcommittee under Carter Glass had introduced. Morawetz worked over the bill in detail pointing out where the problems were and recommending how they ought to be amended. On December 23, 1913, President Woodrow Wilson signed the Federal Reserve Act into law. Morawetz later wrote Colonel House saying that when he saw Wilson after the bill was signed Wilson said "[I] ought to be satisfied with the bill as it was my plan."[54]

Although the creation of the Federal Reserve was likely his most significant public contribution to U.S. political-economy, credit should also be given to Morawetz for his work that helped lead to the creation of the Federal Trade Commission, which Wilson signed into law in 1914. That legislation was the final piece of the new regulatory state established in the Progressive Era. Morawetz's role in the creation of the Federal Trade Commission began with his efforts with Stetson and the National Federation Council to amend the Sherman Act in 1908. Although that effort stalled, Morawetz continued to try to influence political thinking on antitrust legislation and the extension of the regulatory power of the federal government through successive articles between 1908 and 1913 in the *Harvard Law Review,* the *Columbia Law Review,* and the *American Economic Association Quarterly*. Morawetz also made an address in 1911 on the subject of antitrust law in which he asserted that "New social and economic conditions undoubtedly may require new laws." His articles and address in 1911 reflect a new approach to antitrust among those who favored preserving what was best about the new corporation while taking a stronger stand for regulation on behalf of public welfare. Morawetz asserted that he believed that the Sherman Act was beyond repair because of its imprecise language but he believed it "should remain on the statute books as it stands." What was needed, he argued, was new "legislation for the regulation of corporations and trusts" and he called for a "national commission similar to the Interstate Commerce Commission... created with jurisdiction over all interstate" commerce. [55]

Although also pouring himself into a national solution to the banking problem, Morawetz remained intent on the need to shape a new anti-trust regulatory approach that would provide safeguards against the corrosive effects of monopoly, retain the dynamic and innovative nature of American styled capitalism, and yet not increase federal power so much that the principles and benefits of limited government would be undermined. In 1912 Morawetz was called for two days of testimony before the Senate Committee on Interstate Commerce for what proved to be a lengthy dialogue with senators who relied

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[54] Victor Morawetz to Colonel House, 5 January 1927, Edward House Papers and Diaries, Sterling Library Special Collections, Yale University, box 82, folder 2769. Morawetz related the words that Wilson had offered him thirteen years earlier owing to a contest that had emerged over Carter Glass' claims to have been the mind most responsible for the Federal Reserve system in his work, *An Adventure in Constructive Finance*. Warburg disavowed Glasses authorship in his own 1930 work *The Federal Reserve System: Its Origin and Growth*, and asserted the greater role to himself, while giving credit to Morawetz for important aspects of the act. Although much has been written on the origins of the Federal Reserve as part of larger studies on it, the complete history of the evolution of the legislation creating the act has not yet been definitively written.

[55] Morawetz's address is inserted in *Senate Documents, Committee on Interstate Commerce, Sixty-Second Congress, Control of Corporations, Person, and Firms Engaged in Interstate Commerce* (Washington: Government Printing Office, 1913), 1466-1468.

upon Morawetz – and other noted experts – to help them think through how the Sherman Anti-Trust Act might be amended or superseded with new legislation. Morawetz argued for leaving the Anti-Trust Act "on the statute books unaltered and unchanged" and proposed a new approach to antitrust that would create effective enforcement through a new federal commission that would be "a kind of policeman to see that the law is obeyed." He proposed requiring "any corporation regularly engaged in interstate commerce" to report the terms of "all contracts and combinations between competitors in interstate commerce" to the new commission. Then, in the event of a third party complaint against such contracts, the commission would hold a hearing and "determine whether or not the proposed contract or combination would be in violation of the anti-trust act, and the finding of the commission in such a case would be effective" unless set aside by a court; thus providing for judicial review. This approach would, in Morawetz's mind, provide a much more timely method of dealing with questions of unlawful business practices than the court system could provide.[56] The transcript of the committee's dialogue with Morawetz runs 65 pages during which senators asked nuanced questions on an extensive range of court decisions and sought understanding of how Morawetz's approach might prove most beneficial to the creation of a new regulatory body. Although Congress did not attempt to create new anti-trust legislation in 1912, the discussions reflect the important question that anti-trust policy would play in the 1912 campaign. It is also important to note that Morawetz's lengthy interaction helped inform the debate on anti-trust reform in 1913 and 1914 when these same senators would debate proposals put forward with support from the Wilson administration.

Although Morawetz's name is not currently associated with scholarship pertaining to the Federal Trade Commission, his influence played a central part in shaping the debate and influenced other reform-minded corporate elites to carry forward these ideas, the most important of whom being his protégé George Rublee. Morawetz had hired Rublee, a Harvard Law School graduate, in 1897 to assist him in the formation of the U.S. Steel Corporation. Rublee viewed Morawetz as a mentor and, after having made a fortune of his own through his investment in AT&SF stock based on Morawetz's advice, Rublee largely abandoned the practice of law and supported Morawetz in his regulatory efforts through writing articles advocating railroad and currency reforms. In 1910 Rublee became an important advisor to progressive Republican Governor Robert Bass in New Hampshire and helped Bass craft state reforms based on Robert LaFollette's "Wisconsin Plan." In 1912 Rublee became an advisor to Theodore Roosevelt's Progressive Party and, along with Herbert Croly and Learned Hand, wrote the plank calling for a federal trade commission along the lines that Morawetz had advocated.[57]

The election of Woodrow Wilson seemed to spell disaster for the progressive Republican regulatory approach because Wilson had accepted and encapsulated Louis Brandeis' view that all trusts were evil and must be destroyed in his 1912 New Freedom platform. When strong opposition emerged in Congress in 1913 in response to Wilson's efforts to break up large corporations through the Clayton Act (which Brandeis had

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[56] United States, Senate, Report of the Committee on Interstate Commerce, Sixty-Second Congress, Pursuant to S. Res. 98, A resolution directing the Committee of Interstate Commerce to investigate and report desirable changes in the laws regulating and controlling corporations, persons, and firms engaged in interstate commerce (Washington, D.C.: Government Printing Office, 1913), 1580-1583.

[57] McClure, *Earnest Endeavors*, chapters 3-5.

crafted), Wilson backed away from the legislation and the progressive Republican idea was resurrected in an alternate bill that Rublee, although a personal friend of Brandeis, had written and already tried to introduce in Congress through a progressive Democrat, Raymond Stevens of New Hampshire. In the summer of 1914, Rublee managed to convince both Brandeis and Wilson that the Progressive Party's Federal Trade Commission approach – designed to stop abuses injurious to the public and stop business practices unfair to small producers – was preferable to the breaking up of all large corporations. Perhaps influenced by his appreciation of Morawetz's Federal Reserve Act, and worried by growing opposition to the proposed Clayton Act, Wilson shifted his position and supported Rublee's little known Federal Trade Commission bill, which Senator Francis Newlands soon championed in the Senate. Newlands was already familiar with many of Rublee's conceptions owing to Morawetz's January 1912 interview before the Committee on Interstate Commerce. In this curious fashion Morawetz and Rublee managed to save from demolition the corporations they helped create by establishing a regulatory body that could stop the bad actors among them. Wilson signed the Federal Trade Commission Act in September 1914.[58]

The passage of the Hepburn Act, the Federal Reserve Act and the Federal Trade Commission Act established the high water mark of reforms leading to the creation of the regulatory state prior to Franklin Roosevelt's New Deal. Despite the fact that Morawetz was centrally involved in all of these pieces of reform legislation, historians of the period have almost entirely overlooked him. He does appear in some works relating to the history of the Interstate Commerce Commission and the Federal Reserve but not in histories of the Federal Trade Commission; and none of the sweeping histories of the Progressive Era take note of his contributions. [59] Perhaps most reflective of Morawetz's obscurity, Eric Chappinelli makes no mention of any of Morawetz's public efforts in his article on Morawetz for Oxford University Press' *American National Biography*.[60] Nevertheless, the evidence in the historical record reveals Morawetz's intricate and significant involvement in the most prominent legislation of the Progressive Era, and historians of the period make an oversight in not recognizing his role in shaping the American

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[58] *Ibid*, chapter 6.

[59] Histories that take no notice of Morawetz's contributions include Richard Hofstadter, *The Age of Reform*; Thomas McCraw, *Prophets of Regulation;* Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933;* Lewis Gould, *America in the Progressive Era, 1890-1914;* David Kennedy, *Progressivism; the Critical Issues*; John Milton Cooper, Jr, *The Warrior and the Priest (*1985), *Pivotal Decades: The United States, 1900-1920* (1990), and *Woodrow Wilson: A Biography*; Richard McCormick, *From Realignment to* Reform; and Arthur S. Link, *Woodrow Wilson and the progressive era, 1910-1917,* Link and Richard McCormick, *Progressivism (*in *Wilson: Confusion and Crises* Link mentions Morawetz in a footnote regarding the Federal Reserve Act but he is dismissive of Morawetz having not seen – or possibly avoiding – Morawetz's testimony, nor Warburg works it seems). On the other hand, Gabriel Kolko recognizes Morawetz as a corporate elite who helped preserve capitalism in his work *The Triumph of Conservativism: A Reinterpretation of American History, 1900-1916.* Morawetz lacks progressive credentials in Kolko's work. Jean Schroedel makes passing reference to his plan for decentralization of the Federal Reserve in *Congress, the President and Policymaking*.

[60] Chiappinelli, "Morawetz," *American National Biography Online*, Feb. 2000. Chiappinelli only takes note of Morawetz's contribution to the development of corporation law and the legal profession. His bibliography includes none of Morawetz's publication relating to public policy.

regulatory state. A deeper study of Morawetz's reform goals and successes will surely lend to new insights into the development of America's "middle way" approach in political-economy at the beginning of the twentieth century. A middle path is certainly what Morawetz aimed for; one that preserved the dynamic and often beneficial elements of capitalism but one that also afforded society authority to provide rules and restrictions on corporation activities. While his approach offered little in the way of egalitarian principals, what Morawetz contributed especially well was the fashioning of legislation that created the Hepburn Act and inspired the Federal Trade Commission Act in a way that met the limitations imposed by the U.S. Constitution, as interpreted at that time. And in the Federal Reserve Act, Morawetz combined his expertise in money, banking, and corporation structures to create a novel system of banking that included his strongly held principals of democratic controls through federal oversight.

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