

## “The Myth of Laissez-Unfaire” (1997)<sup>1</sup>

*Mark Wahlgren Summers*

### **Do-Nothing Government?**

Americans talked of laissez-faire as if it were a national monopoly and a cure-all, but statute books spoke louder than words. Every year, Congress legislated more. In the 1870s, over 37,000 bills were introduced; in the 1880s, this figure surpassed 81,000. On the state level by 1900, there were 20 fish commissions, 25 railroad commissions, 25 bureaus of labor, over 30 boards of public health, and no end of boards of public education and inspectors of different sorts. Nearly all of them had appeared since 1860.

Bosses in the North and bayonets in the South had shaken faith in government power just after the Civil War. Later observers complained about legislatures “sandwiched through and through with railroad lawyers.” “The Politician is my shepherd,” went one parody,

I shall not want. He leadeth me into the saloon for my vote’s sake. He filleth my pockets with five-cent cigars and my beer-glass runneth over. He inquireth concerning the health of my family even to the fourth generation. Yea, though I walk through the mud and rain to vote for him, and shout myself hoarse, when he is elected, he straightway forgetteth me. Yea, though I meet him in his own office, he knoweth me not. Surely the wool has been pulled over my eyes all the days of my life.

The more remote the government, the greater the suspicion that public power would exert itself only for the sake of private privilege. By the 1890s, people spoke of the Senate as “the Millionaire’s Club.” Nevada sent its silver-mine nabobs, California a railroad baron, Montana a copper magnate. Elsewhere in the Capitol, the crowd of paid lobbyists and hungry congressmen left many with the same impression that San Francisco editor Ambrose Bierce gave in one of his fables:

A statesman who attended a meeting of a Chamber of Commerce rose to speak, but was objected to, on the ground that he had nothing to do with commerce.

“Mr. Chairman,” said an Aged Member, rising, “I conceive that the objection is not well taken. The gentleman’s connection with commerce is close and intimate. He is a commodity.”

At times, it seemed as though probity was a quality as precious as rubies, and nearly as scarce, even in the Redeemers’ South. Conservatives had vowed to turn the Republican rascals out, and so they did—to make room for fresh rascals. In Georgia, Kentucky, Tennessee, Virginia, and Alabama, the state treasurers emptied the vaults to invest in Mexican silver mines, cotton futures, and their own bank accounts.

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<sup>1</sup> Mark Wahlgren Summers, “The Myth of Laissez-Unfaire,” Ch. 14 from *The Gilded Age, or, The Hazard of New Functions* (Upper Saddle River, New Jersey: Prentice Hall, 1997), 194-204.

Yet there was no getting around it. Even in the South, government power fell only to rise again, at least on paper. The necessity lay as close as Sunday dinner. When food providers battled each other for their margin of profit, they skimmed on cleanliness or quality. Local dairies saved money by feeding their kine on “swill,” the cast-off dregs of nearby breweries. “Swill milk” was so low in butterfat that it looked blue, coming from the cow, and to fix the color, dairymen poured in plenty of chalk dust. (Farmers played the game the other way around. They sold milk that was one part cow to three parts pump water.) Without outside controls, buyers might sicken and babies dependent on fresh, clean milk might die. Government intervened with state inspectors and pure-milk ordinances, a few of which were almost worth the paper they were printed on. St. Louis even outlawed skimmed milk. And food was only one issue involving the life or death of innocents. Where citizens’ health or safety were at stake, common law gave governments a broad police power. (That included citizens’ moral health; lawmakers could close down opium dens, gambling joints, and liquor retailers; certain states did away with prizefighters and football; Iowa even stopped the sale of cigarettes.)

Moreover, the demand for public action came from all over. Symbol of Republican independence though he was, no one farmer could hold back a horde of locusts or bar his farm to Russian thistle seed that was blown across the prairies, choking out the wheat. “The sidewalks run between hedges of it,” a reporter complained. “The chinks of the sidewalks are fringed with it, the yards and vacant lots are matted with it.” Eventually, market forces might drive the makers of third-rate fertilizer out of business. But by then bad selections would have put the farmer out of business, too. State government had to help, with state chemists to evaluate fertilizers, subsidies to train professional entomologists, and taxes to relieve the thistle’s worst victims.

Laissez-faire suited employers only where labor was concerned. “I say the legislature has no right to encroach upon me as to whether I shall employ men eight hours or ten or fifteen,” said Henry V. Rothschild, a clothing manufacturer. But without courts to enforce contracts, deals were meaningless. Without patent protection, no Edison would bother to invent. No play, no book, could earn foreign writers a cent in royalties without legal sanction. Self-interest itself dictated a federal trademark law in 1881, and an international copyright law a decade later.

### **The Many Constituencies for Active Government**

Money talked pretty loudly in getting its way from government, though never in one voice. When regulators set freight rates, grain shippers and railroad tycoons had very different ideas of what charge was fair, for example. Still, any group able to rally votes behind it could at least get a hearing. The Department of Agriculture serves as a monument to farmers’ power. Established in 1862, raised to Cabinet rank in 1889, it quickly expanded to fit the varying needs of different farm interests: from animal husbandry to ornithology. It inspected livestock brought from overseas, wrote quarantine regulations for everything from hog cholera to sheep scab, graded meat at slaughterhouses, and tested vaccines. Distributed free and by the hundreds of thousands, the Department’s Yearbook sent out reams of useful information. So did agricultural experiment stations set up with federal money: they sent out 445 annual reports and bulletins to half a million subscribers.

Where labor unions were strongest, politicians listened to them, too. Witness David Bennett Hill, New York's notorious governor in the late 1880s. "If Hill had been brought up in Texas, I reckon he'd a' killed a dozen men by now," one admirer commented. A machine politician, proudly partisan, contemptuous of those who would reform the spoils, saloons, or suffrage, Hill knew how to spout the Democratic catchwords about self-reliance, but he was the last man to perish for a principle, not when there were plenty of workingmen ready to listen to spokesmen from the United Labor Party.

New York City's mayoral race in 1886 drove the risk home. Henry George had offered to run as labor's candidate, if thirty thousand workers would promise to back him. He got thirty-four thousand pledges, wrote his own platform, and ran on it. Little had conservatives dreamed that there were so many "Anarchists and Socialists and Strikers and Deadbeats of every description," among them forty Catholic priests, a bishop, author William Dean Howells, and former President Hayes. George gave the Democrats a run for their money, even in Tammany country. Coalitions like his—Irish nationalists, socialists, trades unions, and middle-class reformers—were born to fracture, and George's did, but major parties took no chances. They must beat him at his own game. From then on, every platform had something to suit labor leaders in it.

By no coincidence, a month before the 1886 mayoral election, Governor Hill commuted the sentence of some Knights jailed for leading a boycott. Nor did it just happen that he pushed for laws to end stock watering, incorporate trade unions, and provide arbitration for labor disputes. He actually got a long list of measures on the books, including ones regulating labor and tenement conditions, turning Saturday afternoon into a half-holiday, and creating Labor Day. In fact, nearly every statute book north of the Ohio showed the mainstream parties' bid for the labor vote. In ten years, over 1,600 laws affecting labor were enacted, and most of them, controlling health and safety, passed court challenge.

Action only started at the water's edge. As much as four-fifths of the cotton crop crossed the Atlantic for sale, and more than half of all tobacco. Even companies doing well at home looked overseas to do better. Cedar from the Pacific coast went into coffins in China and timber propping up Australia's gold mines came from half a world away. The roast beef of old England itself stood a good chance of coming from the Great Plains. Indeed, as one brochure pointed out late in the century "Armour's corned beef cans mark the desert and Nile routes to Khartoum; you will find them on the banks of the Amazon, the Ganges, and the Volga."

Businesses could open foreign markets on their own. When the makers of agricultural machinery wanted to open Russian markets, they hired as their salesmen the very people that antisemitism had driven out; Jewish immigrants not only knew the language, they understood how American machinery worked, and could explain it. By the early 1900s, thousands of tons of reapers and harvesters were unloaded every year at Odessa and carried all the way into Central Asia, sometimes on camel back. Enterprisers traded new lamps for old in Baghdad, made sacred scarab charms for Egyptian customers, sowed Russia with Dakota wheat seed, and outfitted India with cast-iron Krishna statues. Still, business welcomed government help. Starting with Secretary of State William Evarts in 1877, monthly consular reports were written to advise businessmen of where to sell their goods. At every international exhibition, America displayed its wares. Especially in Mexico, the Caribbean, and along the west coast of South America, American

diplomacy promoted American markets. Evarts's successor, James G. Blaine, made a specialty of Latin American relationships; his own successor, Frederick T. Frelinghuysen, concentrated on Samoa and Hawaii. But both went out of their way to protect firms' advantages abroad. So when the London *Times* quoted an ill-informed consul's report of a farmer fallen ill from trichinosis after eating American sausages—"worms in his flesh by the millions, being scraped and squeezed from the pores of his skin...creeping through his flesh and literally eating up his substance"—a sensation turned into an international quarrel. Using health concerns as an excuse for protecting their own swineherds, Italy, France, and even Turkey shut out American salt pork, and Germany did the same for pork, salt or fresh. American officials waged a desperate fight to open the markets again.

Even those denied full citizenship could change the laws. Women petitioned, lobbied, gathered signatures, and organized to bring pressure on government. As long as they could defend what they did as a blow for home and family, they got a friendly hearing. Disgusted by spitting on the streetcars, the Ladies' Health Protective Association of New York brought police action. Soon they were scrutinizing bakeshop conditions and closing down slaughtering pens downtown. At some schools, students choked on the smell of manure from stables next door and teachers were drowned out in the cackle of nearby poultry pens. Ending both was women's work. The Chicago Woman's Club had sufficient clout to get woman doctors for the county insane asylum and to set up free kindergartens.

### **The Selective Nature of Government Action**

And yet, a list of the laws would be as deceptive a guide to government action as laissez-faire slogans were. Government promised more than it performed. Some promises were part of a political con game from the first. What a group's gains meant depended on the economic clout of interests affected. In general, corporations could rely on more faithful protection than consumers, farmers got more than factory hands, property more than people. At least in outward show, Governor Hill's program brought New York miles closer to social justice. But how little change came from so much law! New York might demand that employers pay wages every week in one session, only to exempt railroad workers in another, or add new occupations to those to which its maximum-hours laws did not apply. Limits on how long women and children could work became meaningless, when the state failed to provide machinery for enforcement at all.

Why should this have surprised anyone? When political parties made the legislation, they kept an eye out for votes and money. Actual regulation made enemies. By contrast, laws that codified good intentions, however hollow, and programs that did people favors or bestowed offices and contracts, made friends. So the programs carried out most faithfully were those that put deserving partisans to work.

### **What Cities Did—And Didn't**

This may explain why city government showed so many concrete achievements—literally. Those achievements critics missed; there were so many ugly things to see elsewhere. Something certainly was wrong when the mayor of New York appointed as local school trustee a man one year dead, and then belittled his mistake by arguing that the selection scarcely mattered: that ward had no schools. Perhaps tongue in cheek, an 1884 guidebook to New Orleans urged visitors to go into the ninth ward for fishing and duck shooting: the neighborhood was “as unknown as the centre of Africa.” Many cities lagged on installing water filtration systems. Out of Philadelphia taps flowed a liquid with a taste that one connoisseur likened to “a solution of gum boots and coal tar,” and a British wayfarer, discovering what looked like a glass of weak buttermilk by his plate in a St. Louis restaurant, was astonished to find that this was the “fresh water” he had just ordered! (From then on, he made do with St. Louis champagne, which, he admitted, beat plenty of the French brands.) To do street cleaning properly would have taken an army of sweepers. A thousand horses, after all, dropped five hundred gallons of urine and ten tons of dung on pavements every eight hours, and even a small city had many thousand. Except for the “white wings,” New York City’s disciplined sanitation corps in the mid-1890s, no city even tried to afford efficient clean-up costs. Foreigners found American paving more atrocious than any in the world—when they found it at all. Granite made city life deafening with the clop of horses. Not until the century’s end did asphalt catch on, though cities did lay it first where reducing noise mattered most: around hospitals, churches, and schools. Even then, the streets belonged to lunchwagons, waffle sellers, pushcarts, streetcar lines, and commercial wagons, rather than to the pedestrians. Commerce mattered, whatever the congestion.

Indictments like that of police reporter Jacob Riis helped New York City put through a tough new housing code, compelling future tenements to have fire escapes, flush toilets, and rooms of a decent size, with windows, transoms, and ventilators. All it took was enforcement, which was hit or miss. There were too few police, firemen, or health inspectors, especially in poorer neighborhoods. When innovations like gas or electricity came to the city, business districts got the amenities long before the slums, and black areas got them last of all. With seventeen white playgrounds already built, Birmingham’s black children got their first in 1914, with \$300 a year in city money for its upkeep out of a playground budget of \$15,375.

The drawbacks of city services and the misery of millions obscures very real accomplishments. For all the feebleness, say, of Nashville’s Board of Health, for all it could have done, it still managed to cut the death rate in half over a fifteen-year period. City water may have been pure poison, but Americans could get a lot more of it than Europeans had. Thanks to metropolitan building programs, aqueducts piped one hundred gallons a day per resident to New Yorkers, and half as much again to Philadelphians. There was more water for tubs and toilets, enough for tenement dwellers to afford what in Berlin or Manchester would have been a luxury. So abundantly did cities provide it that outlying suburbs were ready to merge with them, in return for a share. Gas lamps gave Old World cities a quaint, golden glow, but for light and convenience, they could not compare with the electric lights that Cleveland raised around its public square in 1879, nor the brightness of Times Square when New York followed. American cities led the world in the construction of public libraries and schools. Nearly all came into being during the Gilded Age. No other country could boast such advances in free public education beyond grade school, nor such a wealth of teaching aids as blackboards, charts, maps, and even

pianos. Boston had 1,100 acres of park, and in New York's Central Park, gardeners planted up to five million trees, shrubs, and vines in its first ten years.

In almost every case, the city did best when rich, poor, and middle class alike stood to gain. An efficient fire department would save the insurance underwriters from bankruptcy, but they could call on the whole community to back up their demands. Whether Mrs. O'Leary's cow kicked over the lamp that started the Chicago fire in 1871 or not, everyone who went through it knew that the fire was an equal-opportunity destroyer, spreading beyond the Irish shantytowns to the business district itself (And, if a further lesson were needed, Chicago's business district burned down again three years later; this time the cow had an alibi.) But there were plenty of reasons why programs that required construction did best of all. Taxpayers were willing to pay more for tangible results. What could be more tangible than Chicago's advance in the quarter-century after 1870 from 61 miles of improved street to 1,007? Electrical lighting and good sewers added to property values. Party organizations liked any reform that would allow them to hand out contracts to construction companies and providers of brick and asphalt. Bankers welcomed any improvement that allowed them to market municipal bonds, which in the hard years after 1893 did better than just about any other.

Even when government action had more severe limits than in the cities, three main points remain in its defense. First, the states were doing more, and they were venturing into areas they had never gone into before. Second, intervention, however modest, provided a basis for more ambitious action later on. Third, the problems of coordinating state policies made national action only a matter of time.

## **Railroad Regulation**

Railroad regulation showed that unmistakably. Though two New England states had set up a commission before the war, the credit for a lasting, precedent setting agency goes to Massachusetts, and especially to its founder, Charles Francis Adams, Jr. Himself a peculiar mixture of aristocrat and businessman, Adams had all the sense of public duty that made his family so widely admired and so rarely elected. He fought at Gettysburg and Antietam (or, at any rate, fell asleep on the field while the battles were going on). As a postwar specialist in railroad administration, he reached a surprising conclusion. Since competition wrecked railroads and monopoly allowed them to mulct their customers, the public interest needed some outside influence to make the market work fairly: government must step in. Adams was not urging public ownership. Like all Adamses, he despised politicians (family members excepted). State-owned railroads—and a few still existed in 1869—were just plum trees for spoilsmen to shake. At the same time, regulatory laws made day-to-day would end up with administration as hodgepodge as a party platform. But if the state chose commissioners versed in railroad finance and operations, they would be able to judge whether the companies were asking fair rates or a pirate's ransom.

In 1869, Massachusetts took Adams's advice. It chose three commissioners: Adams, a corrupt businessman, and "the damndest fool I have met lately." With no staff, procedural machinery, or powers of enforcement, the board could only give advice. It suggested proper rates

to the companies; then questionnaires checked on whether rates had changed in fact. Even on matters of safety, the board shunned dictation. It drew up a set of standard rules on air brakes and electric signals, but did not order them adopted.

Mark, then, the advance by 1897! Twenty-eight states had commissions. While those in the Northeast resembled that of Massachusetts, other states took the Illinois model, which could set maximum rates. As Adams put it, westerners made commissions into constables. In the early 1870s, the upper Midwest put through the so-called Granger laws, setting rates by legislative fiat. (As it happened, the Grange had little to do with any such measures; in Iowa and Illinois, they stood with the railroads against the radicals.) Sometimes the constables were like many of New York's finest: on the take or asleep on the beat. The companies certainly had plenty of say in any policy that got made. They filled the press with self-puffery, employed lobbyists, helped elect their lawyers to the Senate, let officials in on special real-estate deals, scattered free passes to every prominent figure who asked (countless legions). But regulators still made trouble for railroad managers, and even a "weak" commission was likely to go through a body-building program eventually."

### **Whose Jurisdiction? The Blurred Boundaries of City and State Regulations**

Finally, state regulation only made national action more acceptable. From the first, the Supreme Court beamed on the constable commissions. It even let states set rates for companies with charters that specifically spared them from such regulation. After all, the common law required reasonable rates, and the legislature had the right to decide just what "reasonable" was. Setting rates on interstate shipments was different. That was a federal responsibility only, said the Court in 1886. Already, two years before, both parties had endorsed a national regulatory commission. Early in 1887, one of them became law. The Interstate Commerce Act set up an independent agency to investigate abuses and prosecute those who committed them. It forbade rate discrimination, banned pools, and gave the Interstate Commerce Commission power to decide whether rates were fair and uniform.

Federal regulation did appeal to some railroad executives, in principle. Better to have one master than nearly forty; each with its own vagaries. If railroads could not get together in a pool and cooperate on their own, a bill turning the government into compulsory matchmaker was worth a try. But *a* bill is not the same as *the* bill. Railroad men screamed highway robbery. They objected to the clause on pools, but far more to the ones requiring the same rates per mile for long-haul and short-haul traffic. They watched in alarm as states took the federal law as a model for fortifying their own commissions' powers. "I believe I would just about as soon own chips, wet stones and dogs as an investment in Railroad stocks," one business executive fumed.

The Interstate Commerce Commission that followed was not a stacked agency, by any means. As far as the clause forbidding pools permitted, it worked to create the stable rates without which railroad companies would cut each others' throats and their own. But it did a pretty poor job of it. Small shippers had nothing to complain about: regulators helped cut short-haul rates twice between 1887 and 1893. But all rates fell, and with them the railroads. An

appreciative Congress added to the commission's powers, allowed it to compel testimony before it, and gave it new safety laws to enforce.

"If the Interstate Commerce Commission were worth buying, the railroads would try to buy it," a commissioner grumbled in 1900. This was, in fact, an overstatement. The ICC made progress in setting up a uniform classification of rates. By drawing on state commissions for information, it compiled more reliable statistical weaponry than any lesser agency could, and provided a forum for coordinating individual states' efforts to bring the railroads to heel. Neither Janney's automatic coupling device nor Westinghouse's air brake would have become standard equipment without the ICC, for railroad owners were slow to accept new technology where profit was not attached (which was why passenger cars had the brakes installed by the late 1870s, and freight cars took several decades longer). "Do you pretend to tell me that you could stop trains with wind?" "Commodore" Vanderbilt snarled, when Westinghouse tried to promote his invention. "I'll give you to understand, young man, that I am too busy to have any time taken up in talking to a damned fool." When only one car stopped by hand brake could make air brakes useless from one end of the train to the other, and when trains shared each other's cars so promiscuously that a fifty-car train might have the rolling stock of twenty companies hitched on, the air brake was money thrown away, until some outside authority forced it on all railroads equally. So the real credit belongs to Lorenzo S. Coffin, once a Union chaplain and a member of Iowa's railroad commission in the 1880s. A master of publicity and pressure, he pushed through a bill to install automatic couplers and air brakes on every car rolling into the state, and in 1893, got Congress to require it nationwide. Backed by the railroad brakemen's unions, the ICC turned the law into action. Six years later, the number of employees killed or injured in coupling cars had been halved, to the monstrously unacceptable figure of seven thousand a year.

By then, however, the ICC's weaknesses in rate making had become so glaring that railroads themselves agreed on the need for its overhaul. The original act had not specifically said that once the ICC found what a fair rate was, it could make companies adopt it, whatever was intended. The James J. Hills never got a judiciary they could trust completely. One reason that they got Congress to open federal courts to their appeals just after the Civil War was the uncertain reception that the state bench provided. Even in the 1890s, railroad men were twice as likely to lose an appeal to the high court as win it. But in three vital particulars, federal courts made a real difference. The first involved cases where railroad workers were hurt or killed on the job. Federal judges led the way in freeing the companies from responsibility, under the "fellow-servant" rule. Second, federal decisions changed bankruptcy procedures to give railroad managers greater power at the expense of bondholders and stockholders. As a result, railroad empires went broke—they didn't break up, and creditors had to absorb the cost when outstanding debts were "adjusted." But of course national railroad systems were more likely to care about satisfying their long-haul customers than heeding local shippers' complaints. Third, jurists like Stephen J. Field took a leading role in breaking down regulatory power. Rate setting, conservatives argued, deprived the corporations of their property. That could be done constitutionally, but only with safeguards for due process, safeguards that no legislative action could assure.

Who, then, could decide what made a rate fair? First, the Court gave judges the right to do so, as well as the ICC. Railroad companies discovered that while regulators could clip rates in

theory, legal appeals could overturn any decision or delay action eternally. In 1897, the justices cut the ICC out entirely in the Maximum Freight Rate case. That same year, the Court threw out the grounds that state and national commissioners had used to regulate discrimination between long-haul and short-haul rates. To railroad companies' dismay, it also wiped out their exercise of discretion to oversee rate stabilizing agreements. Not just a "pool" —firms dividing up traffic or profits among themselves—but any agreement on classification, switching service, rates, terminal and storage charges, or interchange of cars—violated the Sherman Anti-Trust Act, a majority declared. That left hardly a wrack behind.

### **The Supreme Court and Regulation**

The way the Supreme Court marred railroad regulation may be the best, ironic testimonial to how far governments fell from *laissez-faire* in the Gilded Age. All through the last third of the century, judges were expanding their own powers to match the advance in those of governors, legislators, and congressmen. Initially, they left lawmakers alone. Tradition gave tremendous latitude to the police power, and jurists liked to give elected officials the benefit of the doubt. Every so often, there would be a rumble from the bench about how the police power had its limits, and woe to the authority who crossed them, but those limits usually stood somewhere else, rather farther off than anything the states happened to be doing.

By the last decade of the century, that was changing. Up to 1864, the Supreme Court had struck down a federal law only twice. In the next ten years, it did so ten times. State laws in record numbers failed to meet constitutional requirements, and state courts became still more aggressive: in New York against a statute forbidding a cigar making in the tenements, in Massachusetts against a ban on employers' levying fines for damage done on the job. Most ominous was the way jurists began to use the doctrine of liberty of contract to thwart labor legislation. Assuming workers really *were* free agents, able to choose a job and have a say in a contract's conditions, what right had the state to keep them from working a seven-day week? or to keep women out of the mines?

Already the Supreme Court was harkening to business's argument that government intervention in business deprived firms of their property without due process of law. Of course, the bench would have to broaden what due process meant and who it protected. Corporations would need to be covered, just as individuals were. By the 1890s, both changes had happened. Even progressive justices were stressing the limits on the states' police power. Before the century had ended, the bench had fashioned the concept of "substantive due process." In practical effect that meant that the court had the right to decide not just whether a measure was constitutional, but whether it was fair. The court could set standards and procedures that had to be met.

In 1905, the Supreme Court took up a New York statute limiting bakers to a ten-hour day. Joseph Lochner, owner of a bakery in Utica, broke the law twice. He appealed his fine. Maximum hours legislation, his lawyer argued, denied an employee the right to work extra time, even when he wanted to do so. By five to four, the Court agreed. It brought forth the sharp dissent of justice Oliver Wendell Holmes. Reminding his brethren that citizens' liberty to do as they liked had always been subject to limits (truant officers, say, or postal laws, or taxes), he

struck at the heart of the philosophy of judicial activism, that courts had the right to second-guess legislators on what economic theory to base their laws on. “The Fourteenth Amendment,” Holmes reminded, “does not enact Mr. Herbert Spencer’s Social Statics.”

There are two points essential to see in this revolution. With all the court decisions, regulation and legislation continued. If anything, it quickened—even in the months just after *Lochner*. In state after state, legislatures closed the “fellow servant” loophole that courts had helped to open. Soon Congress was following suit. Railroads faced more oversight, not less, on everything from crossing gates to the stoves that warmed the cars. “Every legislative season in every State in this country of free speech and equal rights is the winter of discontent and fear to the directors of all great corporate interests,” grumbled one corporate journal.

Lawmaking continued because the courts let it go on. Most statutes escaped review, and those challenged usually escaped unharmed. The police power still covered an imperial demesne. *Lochner* itself would have turned out differently, if the justices had been convinced that ten hours on the job was all that employees’ health could stand. Three years later, Louis Brandeis made the case better, in defense of an Oregon law keeping women from working more than a ten-hour day in any industry. This time the Supreme Court bought the argument. In 1917, by five to three, it even upheld a law extending the same limit to the hours that men worked, bakers included.

Legislation continued because of the responsiveness of both parties to pressure group politics, and this responsiveness may have been what saved them from going the way of the Whigs and Federalists. As long as Republicans and Democrats would make concessions, third parties served more as a protest and a goad to action than as a real alternative.

That flexibility explains much of the failure of the Knights of Labor to build a workingmen’s party that would last. In the mid-1880s, that goal seemed possible, not just in Henry George’s New York, but in Richmond, Virginia, and Rutland, Vermont. The Knights made a black miner mayor of an Ohio town and a bank janitor mayor of Waterloo, Ohio. Two Knights from the South won seats in the House in 1886, and everywhere aldermen, legislators, and congressmen won after pledging their loyalty to the workingmen.

The minor party never got beyond its promising beginning. The destruction of the Knights’ unions and Powderly’s lack of support weakened them. As factions quarreled, an unlikely coalition became an impossible one. Still, what may have delivered the *coup de grace* was the timidity of the elected Knights and the nerve of the major parties. City officials elected by workingmen backed the eight-hour day for municipal workers. They forced railroads to pay wages at least every two weeks and spent more on schools and water lines than before. Any Republican or Democrat could offer a program as meaningful. That is just what they did, though, in reforms that proved more symbol than substance. The most militant Knights might not be coaxed back into the major parties, but enough workingmen would be to keep the political system in the same old sets of hands.

The system’s flexibility let it survive outsiders’ challenge. It also sped on the trend towards government being used as a grab bag for special interests, farmers and workers included. The broker-state was just coming into being. It was most visible at the city level, least so at the national; that fit in well with the assumptions of Gilded Age America, that the government closest to the people should have the most responsibility. Still, the models for federal policy to follow, and the precedents for Congressional action, were being made. Already, in many respects,

American government by 1890 had become the cop on the beat, keeping the public peace and honest dealing, and the traffic cop, directing commercial traffic to make the economy run smoothly.