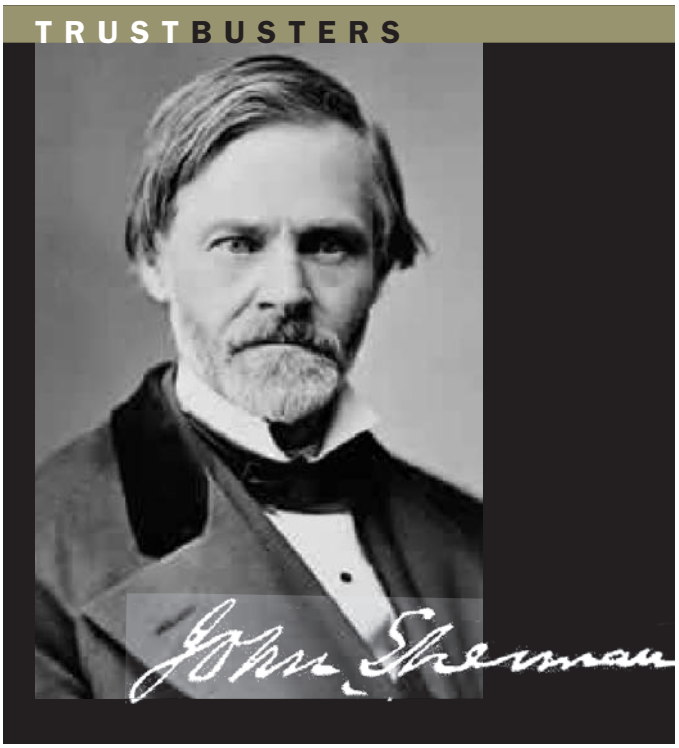
Antitrust, Vol. 24, No. 1, Fall 2009.



Senator John Sherman And the Origin of Antitrust

BY WILLIAM KOLASKY

THE SUPREME COURT HAS CALLED THE Sherman Act the Magna Carta of our free enterprise economy,[1] yet probably few of us know much about the man whose name is synonymous with our most important antitrust law, John Sherman. This article seeks to introduce us all to John Sherman and to tell the story of how he became our first trustbuster.[2]

John Sherman's Background

When John Sherman first took up the antitrust cause in the summer of 1888, at the age of sixty-five, he was nearing the end of a remarkable forty-year career in Washington, which he later recounted in his memoirs, *Recollections of Forty Years in the House, Senate and Cabinet*.[3] Over this period, Sherman served six years in the House from 1855 to 1861, and represented Ohio in the Senate for more than thirty years from 1861 to 1897, during one of which he sat as President pro tem, following the death of Vice President Thomas Hendricks in 1886. He also served for four years as Secretary of the Treasury in the administration of Rutherford B. Hayes and for one year as Secretary of State in the administration of William McKinley.[4] Sherman died in 1900, too soon to see the Sherman Act become an effective weapon against monopolies and cartels, which Presidents Theodore Roosevelt and William Howard Taft wielded to break up the very monopolies that had provided the stimulus for its enactment. Indeed, Sherman's obituary in *The New York Times* does not even mention the Sherman Antitrust Act.[5]

Despite his long and distinguished record of public service, John Sherman spent most of his career in Washington in the shadow of his older brother, William Tecumseh Sherman. Tecumseh, or "Cump," as he was known to his family and friends, was one of the Union's greatest heroes of the Civil War; his March to the Sea through Georgia in the last months of 1864 had been instrumental in driving the Confederacy to its knees and securing the Union's victory. Following the war, he served as Commanding General of the Army for nearly fifteen years, from 1869 to 1883. In that position, General Sherman applied the same modern theory of total war he had used in his March to the Sea to the Army's efforts to remove the Indians from the West. In a letter to John, he explained his strategy bluntly: "The more I can kill this year, the less will have to be killed next year."[6]

While John had a cold, austere personality that earned him the nickname the "Ohio Icicle," and he was an indifferent public speaker,[7] Tecumseh was a fixture on the banquet circuit where he was widely sought after as an engaging and entertaining raconteur. As a consequence, when Tecumseh retired from the Army in 1884, he reportedly was offered the Republican nomination for President, but spurned the offer, famously replying that, "I will not accept if nominated and will not serve if elected."[8]

John Sherman's Presidential Aspirations

In striking contrast to his brother, John Sherman spent most of the decade of the 1880s actively pursuing the presidency. An 1888 article in *The New York Times* accuses Sherman, while serving as Secretary of the Treasury, of misusing the power of his office to secure the Republican nomination in 1880 by freely promising patronage in return for support, especially in the former Confederate states.[9] Sherman went into the 1880 convention believing he had the full support of the Ohio delegation and a realistic prospect of winning the nomination.[10] At the convention, however, several members of the Ohio delegation defected, supporting James G. Blaine of Maine instead. The convention then deadlocked between Blaine and the former president, Ulysses S. Grant, with Sherman a distant third. After fifty-seven ballots, Blaine and Sherman both threw their support to a dark horse candidate, fellow Ohioan James Garfield, who had put Sherman's name in nomination. After the convention, Sherman blamed the then-Governor of Ohio, George Foster, who was supposed to be managing Sherman's campaign for the nomination, for his defeat. In an angry letter, Sherman accused Foster of hav-

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ing sabotaged Sherman's campaign by withholding votes that were ready to be cast for Sherman because he secretly favored Blaine.[11] Garfield went on to win the election, only to be assassinated less than one year into his term, leaving his vice president, Chester Arthur, to succeed him.

In 1884, Sherman was again mentioned as a likely candidate, but he declined to pursue the nomination in part because the Ohio delegation was again divided between him and Blaine. Sherman also sensed that the widespread dissatisfaction with Arthur's performance made it unlikely that any Republican could be elected.[12] Blaine won the nomination, but went on to lose the general election to Grover Cleveland, the first Democrat elected since the Civil War, just as Sherman had feared.

Sherman recognized that 1888 was almost certainly his last opportunity to reach the White House. This time Sherman was careful to ensure that he had the full support of the Ohio delegation, and many leading newspapers believed his nomination was all but certain.[13] But the convention did not go as they and he expected. Sherman enjoyed a substantial lead in the early ballots, once coming within just sixty-seven votes of the nomination, but was unable to capture a majority through the first three ballots. On the fourth ballot, New York shifted its votes to Benjamin Harrison, a Civil War hero from Indiana. That shift doomed Sherman's candidacy. After three more ballots Pennsylvania also switched to Harrison, effectively ending Sherman's bid. Harrison went on to defeat the Democratic incumbent, Grover Cleveland, in what is often said to have been the most corrupt presidential campaign in American history.[14]

Sherman was bitterly disappointed. He felt the nomination had been stolen from him, and he was not shy about saying so.[15] He accused the leader of the New York delegation, Tammany boss Thomas C. Platt, of having made a "corrupt bargain" to deliver New York's votes to Harrison.[16] Sherman accused another of his principal rivals, Governor Russell Alger of Michigan, of buying votes, an allegation that had appeared publicly in a number of contemporary newspaper accounts. Writing in his *Recollections*, Sherman claimed that he had "conclusive proof" that friends of Alger had purchased the votes of many delegates from the Southern States who had been instructed by their conventions to vote for him, thus "tempting with money poor negroes to violate the instructions of their constituents."[17]

Sherman's Reasons for Pushing Antitrust Legislation

Some have suggested that Sherman's sudden interest in antitrust legislation following the 1888 convention might have been payback directed at Alger for denying Sherman the nomination.[18] As support, they cite Sherman's extended reference in his principal Senate speech supporting his antitrust bill to a Michigan Supreme Court decision, *Richardson v. Buehl*,[19] which had found Alger's Diamond Match Company to be an unlawful combination in restraint of trade under Michigan state law. The next day, *The New York Times*, reporting his speech, noted sarcastically that "[o]f course it was with reluctance that Mr. Sherman directed the attention of the Senate and the country to Gen. Alger's connection with this 'unlawful' combination."[20] And even President Benjamin Harrison is reported to have remarked when he signed the Act into law that "John Sherman has fixed General Alger."[21]

A more likely explanation for Sherman's sudden interest in antitrust in the summer of 1888 was that he wanted to protect Republican flanks on what he believed would be the central issue in the upcoming election, tariff policy. Sherman was proud of having "participated in a greater or less degree in the framing of every tariff law for forty years" and was a strong proponent of protective tariffs to promote domestic industry.[22] In his annual message to Congress the previous December, President Cleveland had raised what Sherman called a "cry of alarm,"[23] directly linking protective tariffs to the spread of domestic trusts, which Cleveland charged "strangled competition."[24] Sherman responded in what he described as "a carefully prepared speech" defending strong tariffs.[25] Three months later, in March 1888, in another Senate speech, Sherman challenged a Democratic senator, James Beck of Kentucky, who likewise sought to link the two issues, to name any trust that had grown out of tariff laws, declaring that he doubted "whether trusts were caused by the tariff."[26]

Given Democratic efforts to link the two issues, Sherman likely wanted to assure that the Democrats would not be able to ride the swelling public antipathy towards trusts to victory in November.[27] Both the Republican and Democratic platforms in the 1888 election included antitrust planks.[28] It was natural, therefore, for Sherman to have wanted to gain control over the issue, both to reduce the pressure to lower tariff barriers and also to assure that whatever legislation was passed was not too radical. And, indeed, one historian writes that Republicans traded their support for Sherman's antitrust bill for Democratic support for the McKinley tariff law.[29] Consistent with this claim, Sherman in his *Recollections* names the McKinley tariff law, not the Sherman Antitrust Act, as "[t]he most important measure adopted" by the 51st Congress.[30]

Moving Antitrust Legislation Through the Senate

Immediately after the 1888 Republican Convention, Sherman began his push for antitrust legislation by introducing a resolution in July, proposing to direct the Committee on Finance, of which he was a ranking member, to develop antitrust legislation designed to promote "free and full competition," which he saw as naturally "increasing production [and] lowering . . . prices."[31] Before the Finance Committee could complete its work, Senator John Reagan, a Democrat from Texas, introduced his own antitrust bill in August, which he asked to have referred to the Judiciary Committee. Senator Sherman, faced with this challenge to his leadership on the issue, immediately objected, asserting that the Committee on Finance was "already in charge of that subject."[32] Senator Reagan quickly receded, saying he had no objection to the bill being referred to the Committee on Finance, but Sherman's old foe on tariff policy, Senator Beck, objected that the Committee on Finance "has got its hands very full just now";[33] he urged therefore that the bill should go to either the Commerce or Judiciary Committees. After a brief debate, the President pro tem sided with Sherman and ordered the bill referred to Finance. Sherman immediately introduced his own

bill as a substitute for Reagan's, entitling it "A bill to declare unlawful trusts and combinations in restraint of trade and production."[34]

Congress recessed shortly thereafter without taking any further action on the proposed legislation. On January 25, 1889, the first day of the next Congress, Sherman re-introduced his bill, with very minor amendments, and brought it to the floor of the Senate for consideration. The debate initially focused on what constitutional authority Congress had to regulate these trusts. Sherman's bill sought to draw that authority from the power of the Congress to raise revenue. Senator Reagan argued that this was "a great mistake," and that the authority should instead be grounded on Congress' authority to regulate commerce.[35] When debate resumed ten days later, another Southern Democrat, Senator James George of Mississippi, a former Confederate general and Mississippi State Supreme Court Justice, launched a carefully reasoned and devastating critique of the bill. Expressing his full support for legislation to prevent trusts and combinations, George said that he wanted "effective legislation—legislation that will crush out these combinations and trusts."[36] After first questioning Sherman's reliance on Congress' taxing authority, Senator George also charged that the bill would not reach many of the business combinations at which it was supposedly directed, but would instead risk outlawing combinations of farmers or laborers who were simply seeking to earn an honest living.

Senator George's attack effectively killed the bill for the remainder of the 50th Congress. But on the first day of the next Congress, Senator Sherman reintroduced his bill, now S.1.[37] On February 27, 1890, the full Senate again took up the bill, and Senator George repeated his critique. A month later, on March 21, Senator Sherman gave his only extended speech in support of his proposed legislation in which he tried to respond to Senator George's detailed critique.[38] In this speech, Sherman continued to invoke Congress' authority to levy taxes to defend the bill's constitutionality, but now also relied on its authority to regulate interstate commerce. In addition, in defending the bill's provisions, he made two key points that have since helped shape both the final legislation and how the courts have interpreted it.

First, Senator Sherman argued that his bill did not announce a new principle of law, but simply applied "old and well recognized principles of the common law," under which the types of agreement prohibited by his bill would have been treated as null and void. The purpose of his bill, therefore, was simply to give the federal courts the authority "to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several states to protect local interests."[39]

Second, Senator Sherman denied Senator George's charge that the bill would interfere with lawful trade. Sherman insisted that his bill would "not in the least affect combinations in aid of production where there is free and fair competition," but would only "prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer."[40]

The Judiciary Committee reported back less than one week later with a new bill. The new bill deleted all of Sherman's language except for the title and replaced it with the language now so familiar to all antitrust lawyers.

Sherman Loses Control of the Sherman Act

Beginning on March 25, 1890, the Senate held three consecutive days of floor debate on the bill. Those senators who spoke almost all voiced their strong support for legislation regulating trusts, but many continued to voice concerns as to the bill's constitutionality and its enforceability. Senator Sherman's responses have been described as "impatient and confused."[41] He allowed multiple amendments to be added, turning the bill into a "tangled" mess.[42]

On March 27, two senior Republican senators—George Edmunds of Vermont and George Hoar of Massachusetts—seeing that things were spinning out of control, essentially took over the debate.[43] While voicing support for the need to regulate trusts more effectively, each questioned both the bill's provisions and the basis for Congress' constitutional authority to act. Their remarks emboldened a relatively junior Republican Senator, Oliver Platt of Connecticut, to deliver a scathing attack on the bill. Platt closed his remarks with a stinging rebuke of the more senior Sherman: "I am sorry, Mr. President, that we have not had a bill which had been carefully prepared." Rather, he said, "[t]he conduct of this Senate for the past three days—and I make no personal allusions—has not been in the line of the honest preparation of a bill to prohibit and punish trusts. It has been in the line of getting some bill with that title that we might go to the country with. We should legislate better than that."[44]

Having successfully resisted having his bill referred to the Judiciary Committee on multiple occasions over nearly two years, Sherman now lost control of the Act that would bear his name. Over Sherman's opposition, the Senate voted 31–28 to refer the bill to the Judiciary Committee with instructions to report back within twenty days. The Judiciary Committee reported back less than one week later with a new bill. The new bill deleted all of Sherman's language except for the title and replaced it with the language now so familiar to all antitrust lawyers. In section 1, it declared unlawful "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." And in section 2, it provided that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor." This language resolved the questions about Congress' constitutional authority, solidly grounding the legislation in Congress' power to regulate interstate and foreign

commerce. The Senate, after a brief debate, quickly passed the Judiciary Committee's substitute bill with only minimal changes.[45] The House subsequently approved a nearly identical bill and, following conference, both houses passed the Sherman Act nearly unanimously.

After the Judiciary Committee reported its substitute bill, Senators Edmunds and Hoar assumed leadership of the debate on the Senate floor. Senator Sherman did not further participate in that debate, apart from this one brief statement: "I wish to state that, after having fairly and fully considered the amendment proposed by the Committee on the Judiciary, I shall vote for it, not as being precisely what I want, but as the best under all the circumstances that the Senate is prepared to give in this direction."[46] Sherman was considerably less circumspect in sharing his true feelings in an interview he gave to the St. Louis *Globe-Dispatch* on April 8. The paper reported:

> Senator Sherman does not mince words in speaking of the fate of his Anti-Trust bill. The bill . . . will, in the opinion of the Senator, be "totally ineffective in dealing with combinations and Trusts. All corporations can ride through it or over it without fear of punishment or detection." "It is manifest," he says, "that if any relief is to be had it must be done as a result of popular opinion or by the action of the House, where amendments may be provided which will restore in substance the original design of the bill."[47]

Senator Platt's biographer adds that Sherman never forgave Platt for the criticism he directed at the bill on the floor, which had helped lead to its referral to the Judiciary Committee.[48]

Perhaps in response to Senator Sherman's public criticisms of the law that now bears his name, Senator Hoar later wrote sarcastically in his *Autobiography* that, "In 1890 a bill was passed which was called the Sherman Act, for no other reason that I can think of except that Mr. Sherman had nothing to do with framing it whatever."[49] Hoar, a distant cousin of Sherman's, went on to claim that he, not Sherman, "was the author of the bill." On the floor of the Senate that same year, Hoar added that "the Sherman antitrust law . . . ought to be called the anti-Sherman trust law, because it was passed under his vigorous protest."[50]

Senator Edmunds later disputed Senator Hoar's claim of authorship, although he agreed that Sherman was not the author. Edmunds recounted that the bill was based on extended discussions among the members of the Judiciary Committee, but that he was the one who had taken "notes and written slips of the various proposals," and who "was then instructed to prepare the draft of the whole bill as then finally agreed upon."[51] Unlike Hoar, Senator Edmunds graciously credited the entire committee as sharing in the Act's authorship: "It would be correct to say that nearly every member of the committee was the author of the bill, for my work in drawing it up was merely putting into logical shape what every member of the committee had participated in."[52]

Although Edmunds, Hoar, and the other members of the Senate Judiciary Committee may have been the authors of the bill's final language, it still seems fair to give John Sherman the credit history has accorded him by attaching his name to the Sherman Antitrust Act. Sherman, after all, was the principal sponsor of the legislation and moved it through the legislative process for nearly two years, almost to the eve of its enactment. And the substitute bill the Judiciary Committee's members crafted at that point was fully consistent both with the title Sherman himself had given his bill and with the purpose of the legislation as he described it in his speeches in support of his bill. Sherman, therefore, fully deserves to be recognized as our first—and original—trustbuster. ■

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1 *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

2 For a far more detailed and scholarly account of the legislative history of the Sherman Act, see HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 165–232 (1955), and WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 53–99 (1965).

3 JOHN SHERMAN, RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET (1895) [hereinafter RECOLLECTIONS].

4 Following Sherman's death in 1900, the *New York Times* reported that McKinley was believed to have appointed Sherman to be his Secretary of State to open up a Senate seat for his closest political advisor, Mark Hanna, and that Sherman's tenure as Secretary was both unsuccessful and abbreviated due to his failing health. *See John Sherman Is Dead*, N.Y. TIMES, Oct. 23, 1900, at 5.

5 *See id.*

6 *See* LEE KENNETT, SHERMAN: A SOLDIER'S LIFE 298 (2001).

7 ROBERT D. MARCUS, GRAND OLD PARTY: POLITICAL STRUCTURE IN THE GILDED AGE, 1880–1896 at 37 (1971).

8 *Id.* at 333.

9 *See A Persistent Candidate: John Sherman's Work to Gain the Presidency*, N.Y. TIMES, Apr. 23, 1888, at 1.

10 *See* 2 RECOLLECTIONS, *supra* note 3, at 609–11.

11 *Id.* at 613–15.

12 *Id.* at 693.

13 *Id.* at 787.

14 *See* James L. Baumgarten, *The 1888 Presidential Election: How Corrupt?*, 14 PRESIDENTIAL STUD. Q., Summer 1984, at 416–27.

15 One author later wrote that Sherman's "conduct in defeat betrays less fortitude and self-restraint than that of any other candidate we have ever had." Joseph B. Bishop, *Humor and Pathos of Presidential Conventions*, 52 THE CENTURY 311 (1896).

16 2 RECOLLECTIONS, *supra* note 3, at 793. Years later, following Platt's death in 1910, Sherman's suspicions were confirmed in a statement that Platt had given to a newspaper publisher with the promise that it would not be published until after his death. *See How Platt Lost a Cabinet Place*, N.Y. TIMES, Mar. 9, 1910, at 3. According to the statement, one of Harrison's supporters, Stephen Elkins, met with Platt at the Grant Pacific Hotel in Chicago and told Platt that Harrison had authorized him to say that if the New York delegation would support him, Harrison would appoint Platt Secretary of the Treasury and allow him to control Federal patronage in the State of New York. Platt claimed, however, that after Harrison was elected he reneged on the deal, probably because of the rumors swirling about it.

17 2 RECOLLECTIONS, *supra* note 3, at 795.

18 *See, e.g.*, Robert L. Bradley, Jr., *On the Origins of the Sherman Antitrust Act*, 9 CATO J. 737 (1990); MATILDA GRESHAM, LIFE OF WALTER QUINTIN GRESHAM 574 (1919).

19 77 Mich. 632 (1889).

20 *Sherman to Alger*, N.Y. TIMES, Mar. 25, 1890, at 4.

21 GRESHAM, *supra* note 17, at 632.

22 2 RECOLLECTIONS, *supra* note 3, at 775.

[23] *Id.* at 771.

[24] LETWIN, *supra* note 2, at 86 (quoting 8 James D. Richardson, *Messages and Papers of the Presidents* (1900), at 588 (Message of Dec. 6, 1887)).

[25] 2 RECOLLECTIONS, *supra* note 3, at 772.

[26] *Id.* at 777.

[27] *The New York Times*, for example, published articles and editorials about the growing danger posed by these trusts every day during the month of February 1888, and other regional newspapers wrote about the issue almost as frequently. *See* THORELLI, *supra* note 2, at 136–43.

[28] The Democratic plank declared that "the interests of the people are betrayed when, by unnecessary taxation, trusts and combinations that, while unduly enriching the few that combine, rob the body of our citizens, by depriving them of the benefits of natural competition. LETWIN, *supra*, note 2, at 87 (quoting T.H. MCKEE, NATIONAL CONVENTIONS AND PLATFORMS 235 (1904)). The Republican Party likewise declared its opposition to all combinations of capital formed to control arbitrarily the condition of trade and called for legislation to "prevent the executions of all schemes to oppress the people by undue charges on their supplies, or by unjust rates for the transportation of their products to market." *Id.*

[29] *See* SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE 360 (3d ed. 1993).

[30] 2 RECOLLECTIONS, *supra* note 3, at 839.

[31] Senate Resolution Directing the Committee on Finance To Inquire into Control of Trusts in Connection with Revenue Bills, 50th Cong., 1st Sess. (July 10, 1888), 19 CONG. REC. 6041, *reprinted in* EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 54–55 (1978).

[32] 19 CONG. REC. 7512 (Aug. 14, 1888), *reprinted in* KINTNER, *supra* note 31, at 61.

[33] *Id.* at 62.

[34] S. 3445, 50th Cong., 1st Sess. (Aug. 14, 1888), *reprinted in* KINTNER, *supra* note 31, at 63–64. Using the same broad language as his earlier resolution, this bill declared unlawful "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, made with a view, or which tend to prevent full and fair competition in the production, manufacture, or sale of articles of domestic growth or production, or of the sale of articles imported into the United States, . . . and all arrangements, contracts, agreements, trusts, or combinations . . . designed, or which tend, to advance the cost to the consumer of such articles."

[35] 20 CONG. REC. 1167 (Jan. 25, 1889), *reprinted in* KINTNER, *supra* note 31, at 72.

[36] 20 CONG. REC. 1457 (Feb. 4, 1889), *reprinted in* KINTNER, *supra* note 31, at 77.

[37] S.1, 51 Cong., 1st Sess. (Dec. 4, 1889), *reprinted in* KINTNER, *supra* note 31, at 89.

[38] 20 CONG. REC. 2455 (Mar. 21, 1890), *reprinted in* KINTNER, *supra* note 31, at 113–50.

[39] *Id.* at 114.

[40] *Id.* at 116.

[41] *See* LETWIN, *supra* note 2, at 87.

[42] *See id.* at 94.

[43] *See* 21 CONG. REC. 2723 (Mar. 27, 1890), *reprinted in* KINTNER, *supra* note 31, at 262.

[44] *Id.* at 274.

[45] S.1 as Reported by the Senate Committee on the Judiciary, 51st Cong., 1st Sess. (Apr. 2, 1890), *reprinted in* KINTNER, *supra* note 31, at 275–76.

[46] 21 CONG. REC. 3145 (Apr. 8, 1890), *reprinted in* KINTNER, *supra* note 31, at 279–80.

[47] *Mr. Sherman Gives Up Hope*, N.Y. TIMES, Apr. 8, 1890, at 4.

[48] LOUIS ARTHUR COOLIDGE, AN OLD-FASHIONED SENATOR: ORVILLE H. PLATT, OF CONNECTICUT 443 (1910).

[49] GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 363 (1903).

[50] 36 CONG. REC. 2: 1783 (Feb. 6, 1903), *quoted in* THORELLI, *supra* note 2, at 210 n.112.

[51] *See* THORELLI, *supra* note 2, at 211–12.

[52] *See, e.g., id.*