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New Perspectives in Regulatory History

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We live in tumultuous times, to say the least. The recent financial crisis raised global concerns about financial deregulation and contributed to a populist backlash against expert-led governance. Then, Britain voted to leave the European Union—an ongoing saga—and the U.S. presidential election sparked investigations into foreign interference, leading many Americans to question not only the security of their online data but also the power of new tech giants, echoing concerns already advancing in Europe. Together, these crises have strengthened existing critiques of our regulatory past and generated novel ideas for our future. Financialization, “globalism,” and, more generally, modern capitalism and the regulatory state are at the forefront of political and economic debates, both within the academy and in the general public.¹

We find ourselves at a critical juncture where the conventional interpretations of the past and the possibilities for the future of regulation—even the basic nature of business-government relations—are being reconsidered. In an effort to galvanize reformers, numerous scholars and pundits have dubbed our current era the “New Gilded Age,” marked by rising income and wealth inequality, increasing corporate markups and profit share of the economy, and lower wages for

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¹ See David Moss and John Cisternino, *New Perspectives on Regulation* (Cambridge, MA, 2009); Greta Krippner, *Capitalizing on Crisis* (Cambridge, MA, 2011); Quinn Slobodian, *Globelists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA, 2018); and Sven Beckert and Christine Desan, *American Capitalism: New Histories* (New York, 2018).

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employees.² As that moniker suggests, this sense of economic crisis and political disequilibrium has generated new ideas, much as the previous Gilded Age produced a progressive reformation of social and economic regulations. As historian Daniel Rogers wrote of the early twentieth-century reformers, their call to action was not “an abstract realization, slumbering in the recesses of consciousness,” but was instead an opportunity to actualize the policy critiques and prescriptions that had been circulating among academics, researchers, and reformers for a generation.³ It was not simply that policymakers identified problems and then applied the proper solutions. Instead, problems arose and persisted; then, through sustained intellectual debate and political compromise, policymakers found some “politically imaginable solution” through the ferment of debate and disagreement.⁴ Reflecting on twentieth-century political economy, Milton Friedman, a libertarian economist who disagreed fundamentally with those progressive reformers, also had a similar insight—“progress comes from people who make hypotheses, most of which turn out to be wrong, but all of which ultimately point to the right answer”—which he later said motivated his voluminous and influential editorial writing.⁵

This special issue of the *Business History Review* seeks to encourage an intellectual exchange for our own Gilded Age, by creating an opportunity for leading scholars of history and regulation to engage with one another and with *BHR*'s readers. Together, the chronologically arranged essays reflect on the predominant historical narrative of economic regulation through the twentieth century. That narrative emphasizes how economic ideas have played an instrumental role in delimiting policy options, always shaping the contours of public policy debates. As William Novak describes in the first essay in this issue, economic regulations of the early twentieth century reflected the economic thinking of the time. Rejecting classical economists' idea of perfect competition,

² See Fiona Scott Morton, “Modern U.S. Antitrust Theory and Evidence amid Rising Concerns of Market Power and Its Effects” (research paper, Center for Equitable Growth, Washington, DC, 29 May 2019), <https://equitablegrowth.org/research-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/>; Jan De Loecker and Jan Eeckhout, “The Rise of Market Power and the Macroeconomic Implications” (NBER Working Paper No. 23687, Cambridge, MA, Aug. 2017); Simcha Barkai and Seth G. Benzell, “70 Years of US Corporate Profits” (Stigler Center for the Study of the Economy and the State, University of Chicago Booth School of Business, New Working Paper Series No. 22, Apr. 2018); José Azar, Ioana Marinescu, and Marshall I. Steinbaum, “Labor Market Concentration” (NBER Working Paper No. 24147, Cambridge, MA, issued Dec. 2017, revised Feb. 2019).

³ See Daniel Rogers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA, 1998), 5.

⁴ Rogers, 6.

⁵ Tunku Varadaraja, “The Romance of Economics,” *Wall Street Journal*, 22 July 2006.

a group of progressive economists pioneered new modes of thinking about markets, adopting models of imperfect and monopolistic competition.⁶ Those models encouraged an active regulatory state, which American courts eventually ratified, and ultimately structured the modern American regulatory tradition. A backlash, however, was already underway as the Supreme Court approved some of the most interventionist antitrust rulings in the 1960s. Since the 1970s, Chicago law and economics has reframed both the history and the trajectory of economic regulations. Dismissing the idea of imperfect or monopolistic competition, economists used price theory to explain that perfect competition could be attained through deregulatory or noninterventionist policy prescriptions. Their work emphasized government failure rather than market failure.⁷ The late 1970s signaled a turning point in the history of (de)regulation but certainly was not the last word.⁸ The essays collected here address these changing modes of analysis that have informed historical and contemporary regulatory traditions.

Combining an interdisciplinary approach with an eye toward current public-policy dilemmas, this special issue seeks to provide a window into the new perspectives on the history of regulation that are percolating through the academy. Drawing from historians, legal scholars, and political scientists' efforts to "bring the state back in," scholars of regulation have rediscovered the "unseen" to explain how overlooked yet powerful administrative rules, "mezzo-level" bureaucrats, or unlikely alliances have facilitated or redirected regulations in unexpected ways.⁹ Many of

⁶ For an example of institutionalist economists' logic of segmented market regulation, see Justice Louis Brandeis's opinion in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). On imperfect competition, see Joan Robinson, *The Economics of Imperfect Competition*, 2nd ed. (New York, 1969). On monopolistic competition, see William Chamberlin, *The Theory of Monopolistic Competition* (Cambridge, MA: 1933).

⁷ For example, see George Stigler, "Monopolistic Competition Based in Retrospect," in *The Organization of Industry* (Chicago, 1983), 309–21. See also Joseph Stiglitz, "Government Failure vs. Market Failure: Principles of Regulation," in *Government and Markets: Toward a New Theory of Regulation*, ed. Ed Balleisen and David Moss (Cambridge, U.K., 2010).

⁸ On the impact of new economic ideas, such as behavioralism and game theory, on antitrust law and policy, see Herbert Hovenkamp and Fiona Scott Morton, "Framing the Chicago School of Antitrust Analysis," *University of Pennsylvania Law Review* (forthcoming).

⁹ It was almost thirty years ago that Theda Skopold demonstrated the powerful presence of the state and the often overlooked and autonomous force of bureaucratic politics in the early twentieth century. Skopold, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA, 1992). Since then, the interdisciplinary movement in American political development has influenced numerous scholarly projects. On "unseen" or overlooked regulations, see William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, 1996); Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge, U.K., 2009); Balogh, *The Associational State: American Governance in the Twentieth Century* (Philadelphia, 2015). On "mezzo-level" bureaucrats, see Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, 2001).

these narratives have been written in response to deregulatory policies that have minimized the importance and function of economic regulations. Today, we are tasked with combining these narratives into a new synthesis responsive to the questions of our time by integrating political crises, economic theories, and legal reforms that have reordered government-business relations through economic regulations. Each of the authors in this special issue brings a unique perspective to their field of inquiry; many are both historians and legal scholars. Each is concerned with historicizing the concept of market failure and exploring the contemporary responses to the diagnosis of negative externalities, monopoly power, and asymmetric information—the classic problems of market failure.

This special issue builds on a tradition of academics partnering with historically minded policymakers, and it aims to contribute to that cooperative endeavor. The late Thomas McCraw's *Regulation in Perspective* serves as a guidepost, noting the "inescapable tradeoffs between efficiency and equity" while also extolling the historical insights gained from an institutional examination of organizational patterns and structures.¹⁰ McCraw's research and teaching imparted historical perspective onto contemporary policy dilemmas; although we may have new tools to evaluate public-policy choices, it is necessary to understand the historical origins and intent of policymakers. The American "adversarial tradition," for example, allows the judiciary to redirect legislative prerogatives while remaining hamstrung by legal precedent and constitutional constraints.¹¹ More recently, the Tobin Project's "*Government & Markets*" initiative presents leading social scientists intent on advancing scholarly research on public policy in order to move beyond the politically overdetermined categories of "market failure" or "government failure," which have led inexorably to prescriptions of regulation or deregulation, respectively.¹²

To advance this cooperative agenda, this special issue revives an older tradition at *BHR*: the embedded commentary. Several of the articles in this issue are followed by a very brief comment. Meant to provoke critical analysis and engagement, these comments evoke the spirit of

¹⁰ Thomas K. McCraw, introduction to *Regulation in Perspective: Historical Essays*, ed. Thomas K. McCraw (Cambridge, MA, 1981), vii, viii. The pathbreaking authors in that volume, McCraw wrote, "have typically chosen to study bureaucratic adaptations to cultural movement and have often focused their research on the thought and behavior of professionals operating within complex organizations or doing battle against them from without." The same holds true here.

¹¹ On the "adversarial tradition," see Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, MA, 1984).

¹² *Government and Markets: Toward a New Theory of Regulation*, ed. Edward J. Balleisen and David A. Moss (Cambridge, U.K., 2010).

academic debate and inquiry. We hope that these serve to stimulate further conversations, not only among our authors and the general readership but perhaps also in classrooms, as this renewed interest in regulation includes undergraduate and graduate students.

Thus, we are happy to begin this special issue with Novak's essay, "Institutional Economics and the Progressive Movement for the Social Control of American Business," which provides an excellent entry point into the current "renaissance" in the history of political economy. Novak forcefully argues that historians of regulation should embrace a new starting position or frame, one that embraces state regulatory action as those institutionalists saw it at the time—as constitutive—rather than the now conventional framing that has focused on the structural or ideological constraints to state action. Following this essay, Susie Pak contributes an equally compelling critique of this intellectual history and argues for expanding the frame to also address the illiberal ideas of many Progressive Era economists.

Two essays and two comments explore the high tide of regulatory interventions and the resulting deregulatory trends. Anne Fleming's "Anti-Competition Regulation" demonstrates the extent to which both state and federal laws explicitly created barriers to entry in certain industries through "certificates of public convenience." Akin to licensing laws that policed quality standards of various occupations, these certificates created explicit barriers to entry. In response to Fleming's article, legal scholar Rebecca Haw Allensworth probes why regulatory reforms happened in some jurisdictions but not others. In response to the type of regulations explored in Fleming's essay, a deregulatory backlash emphasized how some economic interventions had unintended consequences, such as raising consumer prices. Reuel Schiller's essay, "The Curious Origins of Airline Deregulation: Economic Deregulation and the American Left," expands our historical understanding of "agency capture"—the phenomenon of a regulatory agency advancing the interests of those businesses that it is charged with regulating—by exploring how and why left-leaning politicians embraced deregulation in the 1970s. Political historian Lily Geismer provides a thoughtful critique that encourages further exploration of these intellectual and political linkages among left-leaning critics of government failure and regulatory reform.

Bringing us back to the theme of the New Gilded Age, legal scholar Daniel Crane reflects on the history and future of U.S. antitrust law and policy, arguing that the Chicago School of antitrust will continue to hold sway despite pressures for greater antitrust interventions from both the left and right. This essay, "A Premature Postmortem on the Chicago School of Antitrust," sure to foster debate, chronicles the rise and fall of various interpretive regimes of antitrust and explains that

the Chicago School offers a compelling set of tools for the “bipartisan mainstream of market regulation.” Commenting on Crane’s essay, Lina Khan, a legal scholar closely associated with the New Brandeisians, reflects on the current political possibilities of antitrust reform. Finally, legal scholar David Gerber’s essay “Prisms of Distance and Power: Viewing the U.S. Regulatory Tradition” widens the frame to interrogate the administrative procedures that divide the American and European systems of rule-making and adjudication; yet, commonalities remain—for example, both sides of the Atlantic are experiencing a resurgence in competition policy, a field once considered moribund in the United States. While the two sides differ significantly on exclusionary practices, they are more or less united in cartel and merger policy. Critically, they also appear to be united in their concerns about large consumer platforms, including Google, Amazon, Facebook, and Apple. The narrative arc of these essays may provoke us to wonder how the history of regulation might help shape its future.

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