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Institutional Economics and the Progressive Movement for the Social Control of American Business

This article investigates the history of the Progressive Era effort to develop new techniques and technologies of control over American business and corporations in the late nineteenth and early twentieth centuries. A revolution in Progressive economic regulation was rooted in the intellectual work of the so-called institutional economists—particularly in the context of what economists and lawyers like Richard Ely, John Commons, and Walton Hamilton ultimately talked about as the movement for the “social control” of business, with distinct emphasis on the legal and regulatory “foundations” of modern capitalism. With increased attention to dynamics rather than statics, the real social economy rather than ideal rational actors, and historical and institutional rather than theoretical and abstract renderings of business, industry, and the market, the institutionalists were directly concerned with problems of control, particularly those mechanisms of control available through law, politics, the state, and new technologies of legislative and administrative regulation.

Keywords: political economy, law, legal history, business history, regulation, administration, social control, institutional economics, history of capitalism

The history of political economy in the United States is experiencing something of a welcome renaissance. New histories of capitalism have joined with innovative work in business history and economic history per se to vastly extend the field and traditional parameters of inquiry.¹ In law, something known as the “law and political economy”

¹ For a quick index to an ever-expanding literature, see the essays and bibliography compiled in Sven Beckert and Christine Desan, eds., *American Capitalism: New Histories* (New York, 2018).

movement (LPE) has energized a new generation of legal scholars keenly interested in reinvestigating and reinterpreting the important connections between historical legal change and the existing contours of American capitalism.²

Two factors seem to be propelling this exciting realignment in scholarly priorities. First, there is a palpable and deep dissatisfaction with the current American political-economic status quo. A flood of multifaceted critiques of what is increasingly referred to as American “neoliberalism” and its underlying political-economic rationales and justifications has matured into a steady wave of inquiries into the historical origins and roots of our current economic condition.³ The rediscovery of the vital economic theme of “inequality” and its intersection with broader concerns with exclusion, discrimination, domination, poverty, unaffordability, necessity, redistribution, provision, criminality, and even incarceration has reanimated general interest in the history of law and political economy in the construction of modern American capitalism. Beyond the obvious significance of Thomas Piketty’s remarkably successful *Capital*, the most visible manifestation of such a reorientation is a series of important intellectual histories exploring the rise of a neoliberal orthodoxy in contemporary political-economic thinking, from the Walter Lippmann Colloquium and the Mont Pelerin Society to the Chicago School and the Washington Consensus.⁴

Second, and less predictably, a similarly motivated group of law and policy scholars has begun to systematically excavate earlier periods of American political-economic history in search of new foundations for the construction of alternative paradigms and policy proposals. The rediscovery of seemingly lost or forgotten political-economic worlds before the rise of a neoliberal synthesis has been astonishingly generative for the production of new histories of American political economy grounded in more than intellectual genealogy. This new scholarly focus and energy has fueled important new histories of American labor law,

² For a similar bibliographic introduction to LPE, see David Singh Grewal, Amy Kapczynski, and Jedediah Purdy, “Law and Political Economy: Toward a Manifesto,” *Law and Political Economy* (blog), 6 Nov. 2017, <https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto>; Grewal and Purdy, “Law and Neoliberalism,” *Law and Contemporary Problems* 77 (2015): 1–23.

³ See, for example, David Harvey, *A Brief History of Neoliberalism* (New York, 2005); Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York, 2015); Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (New York, 2014); and Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (New York, 2018).

⁴ Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA, 2017); Angus Burgin, *The Great Persuasion: Free Markets since the Depression* (Cambridge, MA, 2015); Quinn Slobodian, *The Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA, 2018).

public-utility law, unfair competition, antimonopoly policy, and even civil liberties and civil rights.⁵

Now, of course, not all of these discoveries will come as news to regular readers of *Business History Review*. Indeed, the confluence of these two contemporary developments has returned to center stage the key concerns of classic histories of early American managerial capitalism, as pioneered by Alfred Chandler and Louis Galambos, and the early American regulatory state, as pioneered by Morton Keller and Thomas McCraw.⁶ Indeed, as scholars push to understand the complex mesh of forces that yielded contemporary neoliberalism, they are increasingly drawn back to that period before the New Deal—the long Progressive Era—and a set of alternative ideas and legal-political-economic practices that John Dewey once brought together under the concept of a “new liberalism” and that Walter Weyl dubbed a “new democracy.” Dewey famously decried the fact that classical liberalism had lost sight of its emancipatory origins and had grown too static (failing to account for dramatic changes in socioeconomic context), too negative (emphasizing a formal, legalistic liberty from the state instead of a substantive, positive commitment to human freedom), too economic (defining freedom in almost exclusively monetary terms and ignoring the importance of cultural expression: science, art, intellect, aesthetics, romance), and too individualistic (failing to recognize human beings as fundamentally changing and growing, associative,

⁵ Kate Andrias, “The New Labor Law,” *Yale Law Journal* 126, no. 1 (2016): 2–100; William J. Novak, “The Public Utility Idea and the Origins of Modern Business Regulation,” in *Corporations and American Democracy*, ed. Naomi Lamoreaux and William J. Novak (Cambridge, MA, 2017), 139–76; Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the “New Competition,” 1890–1940* (New York, 2018); K. Sabeel Rahman, *Democracy against Democracy* (New York, 2017); Laura M. Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* (Cambridge, MA, 2016); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA, 2010).

⁶ For the most relevant texts on these themes in four prolific bibliographies, see Alfred D. Chandler Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA, 1977); Alfred D. Chandler Jr., “Government Versus Business: An American Phenomenon,” in Thomas K. McCraw, ed., *The Essential Alfred Chandler: Essays Toward a Historical Theory of Big Business* (Cambridge, MA, 1988); Chandler and Herman Daems, eds., *Managerial Hierarchies: Comparative Perspectives on the Rise of the Modern Industrial Enterprise* (Cambridge, MA, 1980); Louis Galambos, *The Public Image of Big Business in America, 1880–1940: A Quantitative Study in Social Change* (Baltimore, 1975); Galambos, “The Emerging Organizational Synthesis in American History,” *Business History Review* 44, no. 3 (1970): 279–90; Galambos, “Technology, Political Economy, and Professionalization: Central Themes of the Organizational Synthesis,” *Business History Review* 57, no. 4 (1983): 471–93; Morton Keller, *Affairs of State: Public Life in Late Nineteenth-Century America* (Cambridge, MA, 1977); Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933* (Cambridge, MA, 1996); Thomas K. McCraw, ed., *Regulation in Perspective: Historical Essays* (Cambridge, MA, 1981); McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, MA, 1986).

social, and relational creatures). In America's so-called first Gilded Age—also known as the Lochner era—American liberalism was fast transmogrifying into a reactionary form of laissez-faire apologetics, Dewey contended.⁷ “Our resplendent plutocracy,” Weyl called it—wherein a corrupt political-economic alliance of “political bosses,” “railroad kings,” and “Senate oligarchs” ran roughshod over established principles and practices of American democracy.⁸

In response, American Progressives launched a fundamental reworking of the American system of law and governance with momentous implications for modern American economic life. Nineteenth-century traditions of local self-government and associative citizenship were replaced by a distinctly modern approach to positive statecraft, social legislation, economic regulation, and public administration. Social legislation and social welfare emerged as new objects of state and national governments actively committed to guaranteeing socioeconomic rights while also insuring, provisioning, and policing populations. The state regulation of modern business and mass production and consumption ushered in a new understanding of the interdependence of statecraft and economic development in a mixed economy and a new political-economic vision of the democratic control of capitalism. Together these changes moved to the center of American history a modern legislative, administrative, and regulatory state of a vastness and complexity still being reckoned with in new law school courses on Legislation and Regulation.⁹ This juridical, governmental, and political-economic revolution left no aspect of modern American life untouched or the same.

⁷ John Dewey, “Liberalism and Social Action,” in *John Dewey: The Later Works, 1925–1953*, vol. 11, ed. Jo Ann Boydston (Carbondale, IL, 1987), 1–65; William J. Novak, “Private Wealth and Public Health: A Critique of Richard Epstein’s Defense of the ‘Old’ Public Health,” *Perspectives in Biology and Medicine* 46, no. 3 (2003): S180.

⁸ Walter Weyl, *The New Democracy* (New York, 1912), 2, 78. As Weyl described it, “There is only too much evidence to associate the getting of many of our great fortunes with a swaggering financial brigandage. The story of our railroad wreckers, of our distributors of worthless stocks, of our gentlemanly, manicured thieves of public lands. . . . The incredible rascalities of the old Erie Railroad; the historic shifts, lies, violences, and illegalities of the Standard Oil Company; the dubious financial manipulations of the United States Steel Corporation; the fraudulent operations of the Ship-building Trust; the dishonest promotion of notorious asphalt companies; the labors of the forty thieves of public service franchises—link the present with the past in one malodorous chain of financial infamy.”

⁹ John F. Manning and Matthew C. Stephenson, eds., *Legislation and Regulation: Cases and Materials* (New York, 2010); William N. Eskridge Jr., Philip P. Frickey, Elizabeth Garrett, and James J. Brudney, eds., *Legislation and Regulation: Statutes and the Creation of Public Policy: Cases and Materials*, 5th ed. (St. Paul, MN, 2014); Jerry L. Mashaw, Richard A. Merrill, Peter M. Shane, M. Elizabeth Magill, Mariano-Florentino Cuéllar, and Nicholas R. Parrillo, eds., *Administrative Law: The American Public Law System: Cases and Materials*, 7th ed. (St. Paul, MN, 2014); Lisa Schultz Bressman, Edward L. Rubin, and Kevin M. Stack, eds., *The Regulatory State* (New York, 2010).

Of course, some of the main features of this political-economic transformation have long been on the radar of business historians and legal scholars. Alfred Chandler highlighted the transformation in business/government relations inaugurated by three pioneering federal interventions alone: the Interstate Commerce Commission (ICC) (1887), the Sherman Antitrust Act (1890), and the Federal Trade Commission and Clayton Acts (1914).¹⁰ Legal scholar John A. Lapp compiled a much more comprehensive two-volume listing of the federal laws, rules, and regulations affecting business and the economy during this same period. Within ten basic categories, Lapp attempted to capture the explosion of regulations “in the interest of the common welfare which the federal government has thrown about business”:

1. Federal banking legislation (including the establishment of the Federal Reserve System)
2. The Income Tax Act, the Corporation Tax Act, and other federal revenue regulations
3. Federal food, drug, meat, and narcotics acts
4. Federal labor regulations, including the Employers' Liability Acts, child labor legislation, and assorted public works, safety, and inspection acts
5. New trademark, copyright, and bankruptcy legislation
6. Establishment of the Public Health Service
7. Federal regulations of horticulture and agriculture
8. Federal regulations of immoral commerce, including the White Slave Act and the Webb-Kenyon Act
9. The Shipping Board Act
10. The Federal Good Roads Act¹¹

Stuart Chase went further, highlighting the even more rapid proliferation of federal economic regulations in the aftermath of World War I and also during what he termed “Mr. Hoover’s New Deal.”¹² Incomplete as they were, such surveys suggest something of the inexorable trend in

¹⁰ Chandler, “Government Versus Business,” 425.

¹¹ John A. Lapp, *Important Federal Laws* (Indianapolis, 1917); Lapp, *Federal Rules and Regulations* (Indianapolis, 1918).

¹² Chase’s incomplete list of new federal institutions post-1912 included (other than the War Boards of 1917/18) Federal Income Tax (1913); Federal Reserve Board, Federal Trade Commission, Alaska Railroad (1914); Bureau of Efficiency (1915); U.S. Shipping Board and Merchant Fleet Corporation, Federal Farm Loan Bureau, U.S. Tariff Commission (1916); Inland Waterways Corporation, U.S. Employment Service, Federal Board for Vocational Education (1917); Federal Power Commission (1920); Bureau of the Budget (1921); Grain Futures Administration (1922); Personnel Classification Board (1923); Federal Oil Conservation Board (1924); Aeronautics Branch (1926); Federal Radio Commission (1927); and Federal Farm Board (1928). Stuart Chase, *Government in Business* (New York, 1935), 28–29.

the long Progressive period toward the increased legal and political control of business and the economy.

One of the key features of this political-economic revolution that has captured the attention of a new generation of scholars was its distinctive law- and state-centeredness. Here, new histories emphasize not only the transformation in structures of corporate power, concentration, and management in modern American capitalism but also the coincident radical transformation of American law and statecraft—what Felix Frankfurter once described as “a degree of experimentation in governmental direction of economic activity of vast import and beyond any historical parallel.”¹³ Social theorist Jürgen Habermas used the term “organized” or “state-regulated” capitalism to capture this structural shift to a new stage in accumulation and governance processes. For Habermas, advanced capitalism featured both increased economic concentration—the rise of large national and multinational corporations and the increased organization of “markets for goods, capital, and labor”—and increased state intervention in the market in the form of advanced legal and administrative regulation.¹⁴

Of course, Habermas’s account built on some well-established theories of capitalist modernization. Max Weber’s sociology of formal legal and economic rationalization notably identified organization and bureaucratization as key ingredients in modernizing economies and politics: “economic production is organized in a capitalist manner, with rationally calculating entrepreneurs; public administration is organized in a bureaucratic manner, with juristically trained, specialized officials.” For Weber, the bureaucratization of both politics and the economy was symptomatic of the period as a whole: “Increasing public ownership in the economic sphere today unavoidably means increasing bureaucratization. The ‘progress’ toward a bureaucratic state, adjudicating and administering according to rationally established law and regulation, is nowadays very closely related to the modern capitalist development.”¹⁵

Moving beyond this modernization theory of rationality, bureaucracy, and organization, the Frankfurt School also developed a more critical conception of “state capitalism.” Forgoing alternative labels such as “monopoly capitalism,” “corporate liberalism,” “managerialism,” “mixed economy,” and “neo-mercantilism,” theorists like Friedrich Pollock used

¹³ Felix Frankfurter and Henry M. Hart Jr., “Rate Regulation,” in *Encyclopedia of the Social Sciences*, vol. 13 (New York, 1934), 104.

¹⁴ Jürgen Habermas, *Legitimation Crisis* (Boston, 1975), 33.

¹⁵ Jürgen Habermas, *The Theory of Communicative Action*, vol. 2, *Lifeworld and System*, trans. Thomas McCarthy (Boston, 1987), 306; Max Weber, “The Bureaucratization of Politics and the Economy,” in *Max Weber: Essays in Economic Sociology*, ed. Richard Swedberg (Princeton, 1999), 110.

the term “state capitalism” to draw attention to the degree to which state regulation in the late nineteenth and early twentieth centuries fundamentally shifted political-economic control to the legal-administrative state apparatus. For theorists of state capitalism as well as for later scholars in the French regulationist school, the enormous rise in economic regulation in this period was viewed not as a simple political adjustment or crisis intervention but as reflective more generally of the institutionally situated and systematically regulated nature of capitalism per se in the modern era.¹⁶ Emphasizing the historical variability of capitalism over time, regulationist scholars countered the transhistorical theories of neoclassical economics. They emphasized instead what Bob Jessop characterized as “the socially embedded, socially regularized nature of capitalist economies rather than pure, self-regulating market phenomena.” Consequently, regulationists stressed a wide range of other factors—“institutions, collective identities, shared visions, common rules, norms, conventions, networks, procedures”—in “structuring, facilitating, and guiding (in short, ‘regulating’ or, better, ‘regularizing’) capital accumulation.”¹⁷

In the United States, the emergence of such regulation and regularization marked the emergence of a distinctive and new form of political-economic organization in which business and economic factors, far from determining legal and political arrangements, were themselves the subjects of a conscious legal and political manipulation as never before. For Andrew Shonfield, this “changing balance of public and private power” was key to “modern capitalism” in the American experience.¹⁸ For Pollock, “the replacement of economic means by political means as the last guarantee for the reproduction of economic life” changed the “character of the whole historic period.” It signified “the transition from a predominantly economic to an essentially political era.”¹⁹ This is what Walton Hamilton had in mind when he referred to the new “politics of

¹⁶ Michael Aglietta, *A Theory of Capitalist Regulation: The U.S. Experience* (London, 1979); Robert Boyer, *The Regulation School: A Critical Introduction* (New York, 1990); Boyer and J. Rogers Hollingsworth, eds., *Contemporary Capitalism: The Embeddedness of Capitalist Institutions* (Cambridge, U.K., 1997).

¹⁷ Bob Jessop, “Survey Article: The Regulation Approach,” *Journal of Political Philosophy* 5, no. 3 (1997): 289.

¹⁸ Friedrich Pollock, “State Capitalism: Its Possibilities and Limitations,” in *The Essential Frankfurt School Reader*, ed. Andrew Arato and Eike Gebhardt (New York, 1994), 78; Andrew Shonfield, *Modern Capitalism: The Changing Balance of Public and Private Power* (New York, 1965). Shonfield’s analysis is particularly on the mark with regard to the early role of government in American capitalism: “Historically, American capitalism in its formative period was much readier to accept intervention by public authority than British capitalism” (p. 301). He makes a mistake in giving too much credence to the rise of laissez-faire in what he terms, “the reversal of the late nineteenth century” (p. 304).

¹⁹ Pollock, “State Capitalism,” 78.

industry” wherein “a host of procedures and arrangements—*political in character*—have invaded the domain of business. As a result there has arisen, quite apart from the ordinary operations of state, *a government of industry* which in its own distinctive way has its constitution and its statutes, its administrative and judicial processes, and its own manner of dealing with those who do not abide by the law of the industry.”²⁰

The new surfeit of rules and economic regulations that accompanied the early twentieth century marked a new era in government-business relations in the United States and a reconfiguration of the relationship of law and American capitalism—a revolution, if you will, in political economy. State and regulation assumed prominent new roles in this increasingly mixed and regulated economy.²¹ And though many labels and terms have been frequently applied to this new form of regulated, state-guided capitalism that emerged in the United States at this time, perhaps the best description is still the one adopted by these advocates and reformers themselves: the movement for the social control of business and the market. As Edward Adler put it in one of the pioneering articles in this tradition, “The law of railroads, shipping, banking, corporations, partnership, brokerage, trade marks, ‘unfair competition,’ ‘restraint of trade,’ ‘monopoly,’ and related subjects has been much discussed, but little attention has been devoted in this country to a study of the things of which all these particular subjects are commonly but phases,—the doing of business.”²² The economic regulatory agenda of the Progressive Era was devoted to this more omnibus and encompassing cause: the social control of *business* writ large.

As Adler suggests, one reason for the comparative neglect of this larger reconfiguration of American political economy has been the tendency to separate out the economic from the political and to disaggregate discrete public policies. Consequently, for this era, we have innumerable studies of managerial capitalism, corporate concentration, and business

²⁰ Walton Hamilton, *The Politics of Industry* (New York, 1957), 6–7 (emphasis added). As Hamilton elaborated, “The thesis here is that the market which of old was sovereign to the whole economy has been deposed, and that the mandate of supply and demand which rigidly it enforced ceased to be an ‘iron law.’ It is not that the market is no longer of importance, or that it is a matter of indifference as to how much or how little of a commodity is offered for sale. It is rather that the throne has had to be shared, or that in areas of the economy the market has ceased to be overlord; and that the stream of judgments by which the vast network of productive activities is kept going no longer emerges from the automatic play of economic forces.”

²¹ Claudia Goldin and Gary D. Libecap, eds., *The Regulated Economy: A Historical Approach to Political Economy* (Chicago, 1994); Howard Brick, *Transcending Capitalism: Visions of a New Society in Modern American Thought* (Ithaca, 2006); Keller, *Regulating a New Economy*; William J. Novak, “Law and the Social Control of American Capitalism,” *Emory Law Journal* 60, no. 2 (2010): 377–405.

²² Edward A. Adler, “Business Jurisprudence,” *Harvard Law Review* 28, no. 2 (1914): 135–62; See also Adler, “Labor, Capital, and Business at Common Law,” *Harvard Law Review* 29, no. 3 (1916): 241–76.

history on the one hand and equally dispersed accounts of railroad regulation, general incorporation, the race to the bottom, banking reform, antitrust, blue sky laws, and unfair competition policy on the other. What is missing is a more synthetic and comprehensive account of the whole—the general Progressive movement for the control of the doing of business in the United States.

The history of antimonopoly and antitrust, for example, has been especially hampered by the tendency to separate business-economic analyses from legal-political history and to view antitrust as a discrete and independent arena of policymaking. Conventional business history accounts have emphasized market consolidation, vertical integration, managerial hierarchies, consumer welfare, adversarial business-government relations, backward-looking policymaking, and a relatively weak and limited state. For McCraw, adversarial legalism, “the tiny size of the United States government,” and the “illogical,” “aesthetic” nature of critiques of “bigness” combined to make American antimonopoly policy something of a misguided political-economic anachronism. As McCraw summed up his peculiarly pointed conclusions about Louis Brandeis, “Brandeis misunderstood the forces underlying the rise of big business and consistently advocated economic policies that were certain to reduce consumer welfare.”²³ If business histories tended to de-emphasize and depoliticize the power and effect of the American antimonopoly tradition, conventional political histories all too often cabined and isolated the juristic, common-law underpinnings of antitrust policymaking with equally underwhelming assessments. William Letwin’s classic history of the Sherman Act rests on the baseline assumption that “American economic policy has always rested on two principles: 1) government should play a fairly confined role in economic life, and 2) private economic activities should be controlled largely by competition.”²⁴ Ellis Hawley’s famously “ambivalent” account of antimonopoly policy similarly emphasized America’s “libertarian” and “liberal individualistic traditions,” wherein “long devotion to a philosophy of laissez-faire, local rights, and individual liberty” made Americans “reluctant to use the federal government as a positive instrument of reform.”²⁵ With assumptions like these about the status quo ante,

²³ Thomas K. McCraw, “Rethinking the Trust Question,” in McCraw, *Regulation in Perspective*, 5; McCraw, “Louis D. Brandeis Reappraised,” *American Scholar* 54, no. 4 (1985): 525, 527. For an excellent overview of McCraw’s position, see Richard R. John, “Prophet of Perspective: Thomas K. McCraw,” *Business History Review* 89, no. 1 (2015): 129–53.

²⁴ William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago, 1956), 7. Notably, Letwin’s study was a direct product of Edward Levi’s and Aaron Director’s Antitrust Research Project at the University of Chicago Law School.

²⁵ Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, 1966), vii, 4–5. Martin Sklar also caricatured America’s common

assessing the full scale of the political-economic development of the modern American regulatory and administrative state becomes virtually impossible.²⁶

A full reckoning with the nature and effects of a policy like antimonopoly thus requires a jettison of these faulty presuppositions about the historic limits of American statecraft as well as a more holistic account of the situatedness of antitrust within a panoply of highly interrelated and interdependent regulatory technologies and strategies, from remarkably robust common-law doctrines to state charter regulations to the development of state police powers to the rise of public utility and trade regulation to construction of de facto federal regulatory and administrative authority. Beyond the problem of monopoly or “bigness” per se, it is important to continually probe the role of the Sherman Act, the Clayton Act, and the creation of the Federal Trade Commission (FTC) within the larger framework of the expansion of federal police power control over corporations, businesses, and economic activities formerly dealt with by states through charters and local police regulations. For as was the case with the development of the public utility regime that culminated in the extraordinary establishment of the ICC, exactly at the point when an earlier regulatory regime built around common law, police power, and state charter controls began to falter, the Sherman Act inaugurated a broad new set of federal initiatives aimed at maintaining and expanding public control over a rapidly transforming American business and industry.²⁷ The political economist Myron Watkins thoroughly understood the interconnections between public utility, antitrust, and the emerging law of unfair competition in the omnibus movement for the social control of business. Watkins captured the ultimate regulatory force of the ICC for interstate carriers: “We are regulating you, not one of your functions or part of your actions. . . . Now the interests of national commerce are supreme. Hence, your first allegiance, your

law traditions: “The concepts themselves embodied principles enunciated in common-law precedents and strictures. These, in turn were rooted in the dogma of natural liberty”—that is, “liberty of private contract and the rights of private property.” Sklar, *The Corporate Reconstruction of American Capitalism: The Market, the Law, and Politics* (New York, 1988), 100–1. Rudolph Peritz similarly positions the Sherman Act and antitrust policymaking squarely in the shadow of “the era of *Lochner*” and “the Supreme Court’s ‘economic due process’ regime founded on the major premise that the Fifth and Fourteenth Amendments protect individuals’ natural rights by safeguarding private transactions from legislative impairment. Judges tended to write in a deductive style, beginning with the assumption that private property rights, exercised through ‘liberty of contract,’ reflect the ‘due process’ clauses’ protection of ‘life, liberty, and property.’” Peritz, *Competition Policy in America: History, Rhetoric, Law* (New York, 2001), 11–12.

²⁶ For a broader analysis of this interpretive problem, see William J. Novak, “The Myth of the ‘Weak’ American State,” *American Historical Review* 113, no. 3 (2008): 752–72.

²⁷ On the ICC, see Novak, “Public Utility Idea.”

primary duty is to the federal regulatory power.”²⁸ Watkins read the ultimate effect of antimonopoly and antitrust in an interrelated context: “It is for the protection of the [general] public interest against the nefarious designs and the unfair practices of this element of the business world that the anti-trust laws are properly maintained.” Refusing to see anti-trust confined to negative laissez-faire economic or common-law legal principles, Watkins emphasized the long, positive arm of an American policy that launched a “path for the development of sound public policy toward trade, the protection and fostering of honest enterprise, prudent investment and efficient management, [sober industry and fair dealing], and the prohibition and discouragement of every opposite course of business conduct.”²⁹

It was this broader, interconnected, and more positive aspect of anti-trust and antimonopoly policy that generated a more open-ended federal economic regulatory control over American business in the early twentieth century. And it was this longer and more continuous arc of legal-regulatory policymaking that was the central concern of a new generation of political economists at the turn of that century. Hamilton was one of the key innovators in this capacious new economic thinking that synthesized the perspectives of economics, law, history, and politics. Pushing quickly beyond older, siloed arguments about monopoly and trust busting per se, new institutionalists took stock of much larger, longer regulatory traditions in the United States and created a new intellectual foundation for future regulatory and administrative innovation across the modern economy. For Hamilton, the Sherman Act in isolation was merely “the elementary ordinance.” What was important was the longer and larger “pattern of the public control of business” that was woven around it: “Over the centuries this fabric of control has been woven. Public policy, the common law, the usages of trade, statutes of the realm, opinion popular and unpopular, decrees of judges have all left their impress on it. . . . The law of industry is the cumulative result of countless expediencies shaped to countless occasions, a corpus distilled from myriads of decisions about everyday matters.”³⁰ This new interdisciplinary and interdependent institutional perspective was central to a momentous redirection in economic thought that paved the way for some of the most ambitious experiments in the social control of American industry and the market writ large.

²⁸ Myron W. Watkins, “Federal Incorporation: III,” *Michigan Law Review* 17, no. 3 (1919): 242.

²⁹ Myron W. Watkins, “The Economic Philosophy of Anti-Trust Legislation,” *Annals of the American Academy of Political and Social Science* 147, no. 1 (1930): 15, 23

³⁰ Walton Hamilton, “Common Right, Due Process, and Antitrust,” *Law and Contemporary Problems* 7, no. 1 (1940): 24.

The Institutional Revolution

Of particular importance to the new set of political-economic practices bound up in the rise of the modern American regulatory and administrative state was the emergence of institutional economics. The intellectual roots of this new institutionalism were broad and extremely diverse.³¹ They ranged from the general emergence of pragmatism, sociology, and modern American social science to the broad influence of the German historical school to the more particular development in American economics of a social and evolutionary counterpoint to classical and neoclassical political economy.³²

The significance of the institutionalist revolution in American economic thinking has been eclipsed to some extent by the revanchism of late twentieth-century Chicago-style price theory, neoclassicism, and neoliberalism. Ronald Coase, for example, famously consigned to the dustbin of history (or more precisely a bonfire of vanities) two previous generations of the best and the brightest work in economics, noting that “the American institutionalists were not theoretical but anti-theoretical, particularly where classical economic theory was concerned. Without a theory they had nothing to pass on except a mass of descriptive material waiting for a theory, or a fire.”³³ Such contemporary assessments are unfortunate. Counter to the neoliberal Chicago School pretense that the American institutionalists “led to nothing,” this article contends that the extraordinary intellectual (as well as political and legal) output of this distinctive generation of economists—from Henry Carter Adams and Thorstein Veblen to Richard T. Ely and John Commons to Walton Hamilton and Robert Lee Hale—underwrote one of the more fundamental governmental revolutions in modern times.³⁴ This

³¹ The brief survey that follows emphasizes the broad commonalities within the institutionalist tradition from the late nineteenth century through to the late New Deal. For current purposes, this synthetic treatment obscures significant differences and nuances within this intellectual history. For a more thorough examination of the variety of influences, separate schools, and important debates within institutional economics proper, see Malcolm Rutherford, *The Institutional Movement in American Economics, 1918–1947: Science and Social Control* (New York, 2011).

³² For two able introductions, see Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA, 1998), 76–111; and Dorothy Ross, *The Origins of American Social Science* (New York, 1991).

³³ Ronald H. Coase, “The New Institutional Economics,” *Journal of Institutional and Theoretical Economics* 140, no. 1 (1984): 230; Donald R. McCloskey, *The Rhetoric of Economics* (Madison, WI, 1985). For a more generous assessment of the relationship of the “new” to the “old” institutionalism, see Malcolm Rutherford, “Chicago Economics and Institutionalism,” in *The Elgar Companion to the Chicago School of Economics*, ed. Ross B. Emmett (Northampton, MA, 2010), 25–39.

³⁴ Henry Carter Adams, “Relation of the State to Industrial Action” and “Economics and Jurisprudence,” in *Two Essays by Henry Carter Adams*, ed. Joseph Dorfman (New York, 1969); Thorstein Veblen, “The Preconceptions of Economic Science,” in *What Veblen*

historical community of economists, thinkers, and reformers self-consciously crafted an ambitious agenda of legal and political intervention: in effect, a legal-intellectual framework for economic regulation. And the language, conceptualizations, and active reform proposals of this group of economists and law writers played a key role in the development of new legal and political controls over the burgeoning national economy. Though the contributions of the American institutionalists had ramifications for thinking about almost every aspect of the economy, the feature that most concerns us here is their articulation of a new theory of the “social control” of business, the market, and modern capitalism. The real-world effects of this army of institutionalists transformed American economic policymaking.

Now, the first thing to note about this tradition in economic thought is its almost complete synchrony with some of the general trends in the modernization of social science and social theory. The intellectual movement for the social control of business built directly on influential sociological work on “the social,” social control, and the distinctive nature of modern societies by scholars like E. A. Ross and, especially, the sociologist-cum-economist Charles Horton Cooley.³⁵ From the perspective of this sociological tradition, the *fin-de-siècle* United States was undergoing an epochal transformation from traditional to modern forms of social and economic organization. In this massively dislocating process, older mechanisms of control and order were rapidly being rendered obsolete with potentially dire consequences. Ross, like so many other social scientists of the era, drew directly on Ferdinand Tönnies’s work *Gemeinschaft*

Taught: Selected Writings of Thorstein Veblen, ed. Wesley C. Mitchell (New York, 1936), 39–150; Veblen, *Theory of Business Enterprise* (New York, 1904); Richard T. Ely, *Property and Contract in Their Relations to the Distribution of Wealth*, 2 vols. (New York, 1914); John R. Commons, *Legal Foundations of Capitalism* (New York, 1924); John Maurice Clark, *Social Control of Business* (Chicago, 1926); Bruce Wyman, *Control of the Market: A Legal Solution of the Trust Problem* (New York, 1911); Hamilton, *Politics of Industry*; Wesley C. Mitchell, *Business Cycles* (Berkeley, 1913); Mitchell, *What Veblen Taught*; Samuel P. Orth, ed., *Readings on the Relation of Government to Property and Industry* (Boston, 1915); Robert Lee Hale, *Freedom through Law: Public Control of Private Governing Power* (New York, 1952); Rexford G. Tugwell, *The Economic Basis of Public Interest* (Menasha, WI, 1922).

³⁵ Edward Alsworth Ross, *Social Control: A Survey of the Foundations of Order* (New York, 1901); Charles Horton Cooley, *Social Organization: A Study of the Larger Mind* (New York, 1909); Helen Everett, “Social Control,” in *Encyclopaedia of the Social Sciences*, vol. 4 (New York, 1930), 344–49. For a broad survey of the potential impact of the idea of “social control” on social and cultural policing in the early twentieth century, see Mabel A. Elliott and Francis E. Merrill, *Social Disorganization* (New York, 1934). The language of socialization that permeated much of this literature owed more to these theories of modern social change than to the political agenda of socialism. Later economic critics of the early American institutionalists frequently failed to make this distinction. For a nuanced discussion of the permeating language of “socialization” in this period, see Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York, 2003).

und Gesellschaft: “Powerful forces are more and more transforming *community* into *society*, that is, replacing living tissues with structures held together by rivets and screws. . . . Natural bonds, that were many and firm when the rural neighborhood or the village community was the type of aggregation, no longer bind men as they must be bound in the huge and complex aggregates of to-day.”³⁶ Economic and technological change were crucial harbingers of this transformation. Economist John Maurice Clark echoed, “We are living in the midst of a revolution—a revolution which is transforming the character of business, the economic life and economic relations of every citizen, and the powers and responsibilities of the community toward business.”³⁷ A particularly acute sense of crisis, uncertainty, and fear surrounded thinking about the economic consequences of this revolution. Clark warned explicitly of the potential for “bloody social warfare” and “catastrophe” in concurrence with Ross’s ominous forecast that: “The grand crash may yet come through the strife of classes. . . . But if it comes, it will be due to the thrust of new, blind, economic forces we have not learned to regulate.”³⁸

The University of Michigan in particular provided a welcome environment for the further refinement of these notions and for their more direct application to the emerging social science of political economy. The inheritance and perspective of Dewey, George Herbert Mead, and James Hayden Tufts soon found its way into an economics department already boasting among its members such fellow travelers as Adams and Cooley. Hamilton, among the most prolific and inventive of the American institutionalists, came to Michigan in 1910 as a graduate student and instructor and readily acknowledged Cooley’s influence in inculcating an alternative, sociotheoretic approach to the role of economy in society. Whereas Fred M. “Freddy” Taylor drilled in “neo-classical economics,” insisting on “thinking it straight” and making “marginal utility in all its ramifications clear to the sophomores,” Hamilton suggested that it was Cooley who was “able to free young men from slavery to the little intellectual systems of time and place” through his quiet concern “with that abstract and remote thing ‘social theory.’”³⁹ Hamilton placed Cooley in a category with John Stuart Mill and Thomas Hill Green and dubbed him “one of the great intellectual radicals of his generation,” where “radicalism” was a badge of honor in its original

³⁶ Ross, *Social Control*, 432–433.

³⁷ Clark, *Social Control of Business*, 4.

³⁸ Ross, *Social Control*, 436.

³⁹ Walton H. Hamilton, “Charles Horton Cooley,” *Social Forces* 8 (1929): 183–85. Actually, Taylor himself later became quite a radical economist, moving well beyond the theories of Cooley or Adams. See, for example, Fred M. Taylor, “The Guidance of Production in a Socialist State,” *American Economic Review* 19, no. 1 (1929): 1–8.

meaning: “a person who persists in getting to the root of the matter.” Glossing Cooley’s great trilogy of *Human Nature and the Social Order* (1902), *Social Organization* (1909), and *Social Process* (1918), Hamilton gave particular importance to the way Cooley challenged “common sense notions” of “atomic individualism” that were “inadequate to explain contemporary society.”⁴⁰ For Cooley, “the complex life of the modern world was not to be crowded into mechanical forms”; “individualism, as philosophy, institution, and reform, was outworn.” Cooley introduced economists like Hamilton to the idea of seeing “life as an organic whole” and revealing “‘the individual’ and ‘society’ remaking each other in an endless process of change.” For Hamilton, this new vision of individual *in society* was alone adequate to the task of studying modern “social organization” or formulating a contemporary “social program.”⁴¹

It goes without saying that this new sociotheoretic perspective posed some problems for orthodox economic thinking. And the second major component of the institutional perspective was a thorough critique of both classical and neoclassical economics. Now, of course, critiques of economic classicism were hardly a new thing under the sun by the turn of the twentieth century. Karl Marx, Thomas Carlyle, and John Ruskin, to name just the most influential examples, had already built up a pretty impressive intellectual infrastructure of points of contention. For Carlyle, the “dismal science” was at the root of a parade of horrors: “to live miserable we know not why; to work sore and yet gain nothing; to be heartworn, weary, yet isolated, unrelated, girt-in with a cold universal

⁴⁰ Charles Horton Cooley, *Human Nature and the Social Order* (New York, 1902); Cooley, *Social Organization*; Cooley, *Social Process* (New York, 1918). John Maurice Clark concurred in Hamilton’s regard for the formative influence of Cooley: “Charles H. Cooley performed the great service of showing that the mechanism of the market, which dominates the values that purport to be economic, is not a mere mechanism for neutral recording of people’s preferences, but a social institution with biases of its own, different from the biases of the institutions that purport to record, for example, aesthetic or ethical valuations. Policy-wise, his theories looked largely in the direction of making the market responsive to a more representative selection of the values actually prevalent in the society.” Clark, *Economic Institutions and Human Welfare* (New York, 1957), 57.

⁴¹ Hamilton, “Cooley,” 185–87. In *Price and Price Policies*, Hamilton delivered a characteristically more adventuresome and entertaining account of the irretrievably social nature of industry and the economy: “A long time ago a Christian saint declared somewhat abstractly that ‘we are severally members one of another.’ A little while ago the records of business, with all the concretion of some millions of entries in red ink, set down in a multiple factual account the dependence of individual upon individual within an organized community. The two events are separated by some nineteen centuries; and, during the long interval, the restlessness which keeps mankind forever upon the march has many times made over the order of society. The church has surrendered its overlordship to the state, and the state has lost its dominance to the business system. But as society has passed from a Christian hierarchy to a political democracy to an industrial commonwealth, the tangle of personal activities into a none too orderly aggregate, upon which the welfare of every man rests, has endured.” Walton Hamilton and Associates, *Price and Price Policies* (New York, 1938), 1.

Laissez-faire; it is to die slowly all our life long, imprisoned in a deaf, dead, Infinite Injustice.” Ruskin put things more simply, equating government and cooperation with “Laws of Life” and the economists’ competition with “Laws of Death.”⁴² What made the American institutionalists’ critique particularly new and significant was the fact that it occurred after the so-called marginal revolution and its form and content stayed strictly within the terms of modern and professional social science.

Hamilton’s reflections on Cooley, who once characterized neoclassical doctrine as “an attempt to tell time by the second hand of the watch,” again captured the point of departure: “We had been taught an economics made up of principles as neatly articulated as the laws of physics, [and Cooley] helped us to see it as a system of thought, rooted in ideas, a product of a particular time and place.”⁴³ Just as the critical realism of the turn of the century upended conventional notions of literature, philosophy, law, politics, and society, in the hands of the institutionalists its “cynical acids” challenged reigning economic dogma.⁴⁴ The broad-gauged “revolt against formalism” that defined the intellectual life of the era—with its full-throated assault on unrealistic and abstract generalities, formulas, and deductions as the basis for modern scientific thinking—pierced the veil of economic theory as well.⁴⁵ The life of the modern economy was not to be apprehended through logic or syllogism or supply-and-demand curves alone, one might say following Oliver Wendell Holmes Jr. Rather, it was only accessible and understandable through a broader reckoning with human and institutional experience.

The American Economic Association (AEA) was, famously, founded (by the likes of Ely, Adams, Edwin R. A. Seligman, Woodrow Wilson,

⁴² Karl Marx, *Capital: A Critique of Political Economy* (New York, 1967); Thomas Carlyle, *Past and Present* (London, 1897), 210–11; John Ruskin, *Unto This Last and Other Writings*, ed. Clive Wilmer (New York, 1997), 202.

⁴³ Hamilton, “Cooley,” 185.

⁴⁴ Vernon Louis Parrington, *The Beginnings of Critical Realism in America: Main Currents in American Thought* (New York, 1927).

⁴⁵ Morton G. White, *Social Thought in America: The Revolt against Formalism* (New York, 1949); Richard Hofstadter, *Social Darwinism in American Thought* (Boston, 1944); H. Stuart Hughes, *Consciousness and Society* (New York, 1958); James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920* (New York, 1988). What these historians explicate in sophisticated detail was captured more generally by the *Oberlin Review* in 1886: “Humility and open mindedness is succeeding dogmatism. The old theories and systems of education are being revised. Life, in all its aspects, has grown beyond the old systems which seemed so logically complete. Thoughtful men are content to patiently begin anew their study, that with fresh knowledge they may obtain deeper insight into the truth. There is a new chemistry, a new geology, a new philology; there is a new political economy, a new philosophy, a new theology. The new science in each case is born of a fresh contact of the mind with life and truth.” “Notes and Comments: The Duty of the University,” *Oberlin Review* 14 (1886): 130.

Washington Gladden, and Carroll D. Wright) in 1885 precisely to challenge the scientific pretensions of classical political economy and to put modern economics on a more realistic, empirical, and inductive basis. The founders could not resist including in its very first publication Daniel Webster's frank dismissal of traditional political economy: "For my part, though I like the investigation of particular questions, I give up what is called the science of political economy. There is no such science. There are no rules on these subjects so fixed and invariable that their aggregate constitutes a science. I believe I have recently run over twenty volumes, from Adam Smith to Professor Dew; and from the whole if I were to pick out with one hand all the mere truisms, and with the other all doubtful propositions, little would be left." Or, as Coase might see it, at least not enough to start a theory or a fire. Contributors to the first report of the AEA promulgated the idea that classical political economy was unscientific: "It made no endeavor to ascertain how men actually do act; it only undertook to philosophize respecting the results, provided they acted in a certain assumed manner."⁴⁶ Ely detected in this tendency not only a faulty epistemology but a retrograde blueprint for various forms of laissez-faire apologetics: "It means that the laws of economic life are natural laws like those of physics and chemistry, and that this life must be left to the free play of natural forces. One adherent use[d] these words: 'This industrial world is governed by natural laws. . . . These laws are superior to man. Respect this providential order—let alone the work of God.'⁴⁷

In place of this unscientific science of pure thought rather than observation, the economists and social scientists who founded the AEA promoted a "New Political Economy" very much in sync with the German historical school: "pursuing the inductive method, ascertaining how men actually do act, gathering statistical and historical material, and educing the laws of human action from a wide observation of phenomena."⁴⁸ The new "realism" of this new political economy was bound up in three particular factors, or moves. First, much the way

⁴⁶ Richard T. Ely, "Report of the Organization of the American Economic Association," *Publications of the American Economic Association* 1, no. 1 (1886): 10.

⁴⁷ Ely, 16–17.

⁴⁸ Ely, 10–11. The *Oberlin Review* at exactly the same time noted the same article in the *Christian Union* announcing the new approach: "A new science of political economy is growing up. Half a century ago, men believed they had a perfect science of political economy. But there has been a steady evolution of social and political relations since then. The world is larger and more diversified. It is a different world from that to which the *laissez faire* doctrine seemed so neatly fitted. Men are beginning to see that the old dogmas are not eternal. There is an attempt to supply men with data for intelligent thinking. . . . In this way can social and economic questions be studied and taught. . . . Dogmatism is antiquated, and out of place in the class-room." "The Duty of the Universities," *Oberlin Review*, 14 (1886): 130.

Lester Frank Ward answered Herbert Spencer's *Social Statics* with a more developmental and evolutionary account of *Social Dynamics*, the American institutionalists demanded an approach to the economy that could explain change over time. Here the contributions of Veblen—still something of the patron saint of contemporary evolutionary economics—were particularly significant.⁴⁹ Drawing on the revolutionary inheritance of Darwinism and social Darwinism, Veblen contended, “The sciences which are in any peculiar sense modern take as an (unavowed) postulate the fact of consecutive change. Their inquiry always centres upon some manner of process. This notion of process about which the researches of modern science cluster, is a notion of sequence, or complex, of consecutive change, in which the nexus of the sequence . . . is the relation of cause and effect.” The problem posed for traditional economics, as Wesley C. Mitchell saw it, was that it was neither the “the theory of value and distribution as worked out by Ricardo nor the refined form of this theory presented by Veblen’s teacher, J. B. Clark, deals with consecutive change in any sustained fashion.” Rather, “the more classical political economy was purified, the more strictly was it limited to what happens in an imaginary ‘static state.’ Hence orthodox economics belongs to the ‘taxonomic’ stage of inquiry represented, say, by the pre-Darwinian botany of Asa Gray.”⁵⁰ Or, as Hamilton saw things, “Value theory deals with its phenomena as if they were physically complete, independent, unchangeable substances. The only variations which it admits are quantitative. . . . Such a method of procedure has, quite appropriately, been called ‘economic statics.’”⁵¹ If economics was to be a fully “modern” rather than “antiquated” discipline it had to become an evolutionary science attuned to questions of process,

⁴⁹ Geoffrey M. Hodgson, *The Evolution of Institutional Economics: Agency, Structure and Darwinism in American Institutionalism* (New York, 2004).

⁵⁰ Thorstein Veblen, “Why Is Economics Not an Evolutionary Science?,” in *The Place of Science in Modern Civilization and Other Essays* (New York, 1919), 56–81; Mitchell, “Thorstein Veblen,” in Mitchell, *What Veblen Taught*, xxiii–xiv. For the continued resonance of this critique, see the similar musings of Robert Lekachman: “In despairing moments, I sometimes think that no amount of empirical evidence of actual business and individual behavior will ever suffice to woo conventional economics from its land of delight—the never-never paradise of competitive allocation and distribution in which time stops. One wonders why, for as much as Ptolemaic astronomers before the Copernican revolution spent endless, ingenious effort tidying up a theory in visible discord with the misbehavior of the planets, so respectable economists cope desperately with enormous multinational corporations, international cartels, public enterprise and inference, and a host of institutions such as cooperatives, health insurers, foundations, and universities which fit conveniently into none of the maximizing models. Models of competitive price may have been relevant to other times and places. One can afford to be generous in such matters because these models are manifestly irrelevant to the United States in the twentieth century.” Lekachman, foreword to *The Economy as a System of Power*, ed. Warren J. Samuels, vol. 2 (New Brunswick, NJ, 1979), i.

⁵¹ Walton H. Hamilton, “The Institutional Approach to Economic Theory,” *American Economic Review* 9, no. 1 (1919): 314–15.

change and continuity, and the complex, interconnected development of actual economic institutions over time.⁵² Concern about process—dynamics over statics—would remain a hallmark of realist, cutting-edge American social science right through the pioneering postwar work of Talcott Parsons in sociology, Willard Hurst in law, and David Truman in political science.⁵³

If a more realistic conception of time, change, development, and process was a first-order requirement of a more realistic economics, a close second was a more believable rendering of human nature. Veblen, Hamilton, Mitchell—indeed all the American institutionalists—insisted that “economic theory must be based upon an acceptable theory of human behavior.” It was a given that traditional political economy was not. Much as Charles Darwin transformed established conceptions of biology, William James’s psychology and Mead’s sociology challenged prevailing notions of the nature of the individual personality and its myriad preferences, wants, desires, interests, inclinations, and so on.⁵⁴ Modern social psychology rendered problematic *homo economicus*. Hamilton bemoaned the fact that “the extreme individualism, rationality, and utilitarianism which animated eighteenth century thought still finds expression in neo-classical economics.” He suggested that “the one touch which the economist has added to the [eighteenth-century ethical] theory” was “in making a pecuniary expression of self-interest a part of human nature.” This thin, pecuniary account of human behavior struck institutionalists as “nothing more than a blanket formula” that elided all of the “concrete influences” and “conflicting values” that “animated the behavior of individuals.” Hamilton argued that such an account “falls short of explanation because self-

⁵² The links between this evolutionary approach and the significance of broader social, cultural, and political institutions should be obvious. Hamilton put it this way: “Competition, property, the price structure, the wage system, and like institutions refuse to retain a definite content. Not only are things happening to them, but changes are going on within them. A law, a court decision, a declaration of war, a change in popular habits of thought, and the content of property rights is affected. An increased demand for labor, a refusal of the nation to allow strikes, an enforced recognition of unionism, an establishment of wages upon living costs, and the wage system becomes different. Both by a change in its relation to other things and by subtle changes going on within, each of these institutions is in a process of development. And, if this is true of particular institutions, it is likewise true of the complex of institutions which together make up the economic order. We need constantly to remember that in studying the organization of economic activity in general as well as in the particular, we are dealing with a unified whole which is in the process of development.” Hamilton, “Institutional Approach,” 315.

⁵³ See, for example, Talcott Parsons, *The Social System* (Glencoe, IL, 1951); James Willard Hurst, *Law and Social Process in United States History* (Ann Arbor, 1960); and David B. Truman, *The Governmental Process: Political Interests and Public Opinion* (New York, 1951).

⁵⁴ William James, *Principles of Psychology*, 2 vols. (New York, 1890); George Herbert Mead, *Mind, Self and Society* (Chicago, 1934).

interest is not a simple thing that can be easily discerned, but a huge bundle of conflicting values wherein the present and the future are at variance. . . . It failed to note that my life and yours is a continuous thing, and that what I do today constrains my acts tomorrow. It overlooked the part that instinct and impulse play in impelling one along the path of this economic activity. And, most important of all, it neglected the influence exercised over conduct by the scheme of institutions under which one lives and must seek his good.”⁵⁵ Veblen put the critique this way:

The classical economics, having primarily to do with the pecuniary side of life, is a theory of a process of valuation. But since the human nature at whose hands and for whose behoof the valuation takes place is simple and constant in its reaction to stimulus, and since no other feature of human nature is legitimately present in economic phenomena than this reaction to pecuniary stimulus, the valuer concerned in the matter is to be overlooked or eliminated; and the theory of valuation process then becomes a theory of the pecuniary interaction of the facts valued. It is a theory of valuation with the element of valuation left out.⁵⁶

In their elaborate critiques of individual, rational, and economic self-interest from Veblen to Hamilton and beyond, the institutionalists anticipated Dewey’s mature argument in *Individualism, Old and New* that together the machine, money, and pecuniary culture characteristic of the age obscured and crowded out such things as “the spiritual factor, equal opportunity and free association and intercommunication.” In place of the actual, real development of individualities “is the perversion of a whole ideal of individualism to conform to the practices of a pecuniary culture. It has become the source and justification of inequalities and oppressions.”⁵⁷

In an effort to develop a more realistic account of human nature beyond the one-dimensional hedonistic pecuniarism of orthodox economics, the institutionalists turned not only to modern social psychology, emphasizing the importance of others à la James and Mead, but also to the larger social surround: to the impact of law, politics, public

⁵⁵ Hamilton, “Institutional Approach,” 316–17.

⁵⁶ Veblen, “Preconceptions,” 109–10. Veblen elaborated on a certain dehumanization at the core of such assumptions: “In all the received formulations of economic theory . . . the human material with which the inquiry is concerned is conceived in hedonistic terms; that is to say, in terms of a passive and substantially inert and immutably given human nature. . . . The hedonistic conception of man is that of a lightning calculator of pleasures and pains, who oscillates like a homogeneous globule of desire of happiness under the impulse of stimuli that shift him about the area, but leave him intact.” Mitchell, “Thorstein Veblen,” xxv–xxvi.

⁵⁷ John Dewey, “Individualism, Old and New,” in *John Dewey: The Later Works, 1925–1953*, vol. 5, ed. Jo Ann Boydston (1929; Carbondale, IL, 1988), 49.

opinion, culture, and environment. In particular, they drew increasing attention to the complex web of “institutions”—“social arrangements capable of change rather than obstinate natural phenomena”—from which the new political economy drew its most common name. Neither the individual nor the economy could be understood abstracted from the real social and institutional world that gave them meaning and possibility. The links between the evolutionary approach, the critique of a crude theory of individual self-interest, and the importance of “the scheme of institutions under which one lives and must seek his good” was obvious to these thinkers. Hamilton declared boldly that “the proper subject-matter of economic theory is institutions” and that “the institutional approach was the only way to the right sort of theory”:

“Institutional economics” alone meets the demand for a generalized description of the economic order. . . . Such an explanation cannot properly be answered in formulas explaining the processes through which prices emerge in a market. Its quest must go beyond sale and purchase to the peculiarities of the economic system which allow these things to take place upon particular terms and not upon others. It cannot stop short of a study of the conventions, customs, habits of thinking, and modes of doing which make up the scheme of arrangements we call “the economic order.” It must set forth in their relations one to another the institutions which together comprise the organization of modern industrial society.⁵⁸

Hamilton’s example of price was apt in illustrating the fundamental differences between institutionalism and both classicism and neoclassicism. Neoclassical economics, of course, replaced Adam Smith’s and David Ricardo’s labor theory of value with a value and price theory based on the more abstracted and universal concepts of supply, demand, and marginal utility (as well as rational choice). Geoffrey Hodgson contrasted this ideal and theoretic perspective directly to the more realistic and concrete approach of institutionalism where “prices are social conventions, reinforced by habits and embedded in specific institutions. . . . Such conventions are varied and reflect the different types of commodity, institution, mode of calculation, and pricing process.” Such a revolutionary approach to prices paved the way for the mass of empirical and sociohistorical investigations of pricing in particular industrial and institutional settings that dotted early twentieth-century economic writing. In place of a general theory of price, Hodgson noted, “attempts were made to develop specific theories of

⁵⁸ Hamilton, “Institutional Approach,” 309, 311, 313.

pricing, each related to real-world market structures and types of corporate organization” and each proceeding “by first examining the institutions in which the prices are being formed.”⁵⁹ The road was thus paved for an early series of “historically and institutionally specific studies . . . of market institutions and pricing processes” that culminated in new theories of imperfect and monopolistic competition as well as Gardiner Means’s more influential work on “administered prices.”⁶⁰ And thus Hamilton and associates began their detailed and classically institutionalist series of inquiries into price setting and the “politics of industry” in the automobile, gasoline, cottonseed, dress, whisky, and milk markets.⁶¹ As Hamilton stated the problem, when he and his staff began work, “Accounts of how . . . in the abstract prices are made were available in abundance. Yet, with notable exceptions, little was at hand upon the structures of particular industries, their distinctive habits, their unique patterns of control, and the multiplex of arrangements—stretching away from technology to market practice—which give magnitude to their prices.”⁶² Hamilton insisted that students of economics should spend more time on just such research and subjects: “subjects worth investigation.” For “if learning were a mere search for hypothetical truth,” he contended, “the principles governing the economic life of cave men, the inhabitants of Mars, or of a Crusoe-infested island might be worth formulating.”⁶³

Institutional Economics, Social Control, and the Modern Regulatory State

In the end, this new focus of the American institutionalists on dynamics rather than statics, on the real social economy rather than

⁵⁹ Geoffrey M. Hodgson, “The Approach of Institutional Economics,” *Journal of Economic Literature* 36, no. 1 (1998): 169–70.

⁶⁰ Joan Robinson, *The Economics of Imperfect Competition* (London, 1933); E. H. Chamberlin, *The Theory of Monopolistic Competition* (Cambridge, MA, 1933); Gardiner C. Means, *Industrial Prices and Their Relative Inflexibility: Letter from the Secretary of Agriculture Transmitting in Response to Senate Resolution No 17, a Report Relating to the Subject of Industrial Prices and Their Relative Inflexibility*, Senate Doc. No. 13, 74th Cong., 1st Sess. (Washington, DC, 1935); Caroline F. Ware and Gardiner C. Means, *The Modern Economy in Action* (New York, 1936).

⁶¹ Hamilton, *Price and Price Policies*. See also Hamilton’s pioneering investigations of the coal industry: Hamilton and Helen R. Wright, *The Case of Bituminous Coal* (New York, 1925); and Hamilton and Wright, *A Way of Order for Bituminous Coal* (New York, 1928). This deep background on the coal industry greatly informed Hamilton’s noted critique of the U.S. Supreme Court’s decision in *Carter v. Carter Coal Co.* Hamilton and Douglass Adair, *The Power to Govern: The Constitution—Then and Now* (New York, 1937). See also Hamilton and Stacy May, *The Control of Wages* (New York, 1923).

⁶² Hamilton, *Price and Price Policies*, vii.

⁶³ Hamilton, “Institutional Approach,” 312.

ideal rational actors, and on historical and institutional rather than theoretical and abstract renderings of business, industry, and the market yielded an economics directly concerned with the problem of control—*social control*—and particularly those mechanisms of control available through law, politics, the state, and new technologies of legislative and administrative regulation. For the institutionalists, the problem of control was not exogenous to the operations of a free market or a second-order question in theorizing the modern economy; rather, it was constitutive and foundational. J. B. Clark's son, John Maurice Clark, made that all too clear in *The Social Control of Business*, the most complete and far-reaching attempt to make economic theory relevant to the modern problem of control: "When we speak of the 'social control of business' we must first take some pains to avoid the implication that business exists first and then is controlled. Control is rather an integral part of business, without which it could not be business at all. The one implies the other, and the two have grown together." Clark distinguished at least three levels of control that are always present in any modern economy: the informal controls that all economic groups develop "out of their own needs and customs"; the common-law controls of courts "in settling disputed cases" and establishing controlling ground rules in areas like property, contract, patent, copyright, bankruptcy, tort, and crime; and the controls "resulting from legislation" and modern administration "which change the rules for the future, with a definite purpose of bringing about some new result."⁶⁴ According to institutionalists like Commons, Hamilton, and Mitchell, this underlying control aspect of economic order was frequently ignored or theorized away by classical and neoclassical political economy, especially as it concerned informal or common-law controls. And the initial antimercantilist, laissez-faire posture of classicism reinforced a tendency to see control as only coming from the state or the legislature in the form of outside "interventions" in an otherwise "free" market.⁶⁵ But, for institutionalists,

⁶⁴ Clark, *Social Control of Business*, 12–13.

⁶⁵ As Hamilton noted, "Early classical economics was formulated by men who sought to remove the artificial restrictions which had been imposed upon industry. *Laissez faire* was a formal and explicit part of its statement. It tended to show the beneficence of an industrial system automatically organized in response to the pecuniary self-interest of individuals. It made the scheme of arrangements wherein lay the real organization of society a part of the immutable world of nature. Since the neo-classical doctrine has passed into the inheritance, the formal defense of *laissez faire* is gone, though it still lingers implicitly in terms and the statement of propositions. Formally it is concerned with the mechanical way in which the value of goods and of shares in distribution emerge in the market. But it has no concern with the organization of that market, the nature of the transactions which occur there, or the less immediate facts of the distribution of opportunity, property, and leisure upon which the size of these shares rest. Its explanatory terms are not matters subject to control." Hamilton, "Institutional Approach," 313.

collective control was essential to almost every aspect of economic life very much bound up with the political and, especially with the rules of law that triggered Commons's and Ely's foundational inquiries in *Legal Foundations of Capitalism* and *Property and Contract in Their Relations to the Distribution of Wealth*, respectively.⁶⁶ Such control was found in every society, Mitchell noted, "though in a well-ordered state it works so unobtrusively most of the time that economic theorists have given it scant attention."⁶⁷

From the very beginning, then, the social control theories of the American institutionalists sped rapidly away from the laissez-faire inheritance of classical economics. Volume 1 of the *Publications of the American Economic Association*, published in 1886, again testified to this clear predilection. Plank 1 of the association's so-called platform was unambiguous: "We regard *the state* as an educational and ethical agency whose positive aid is an indispensable condition of human progress. While we recognize the necessity of individual initiative in industrial life, we hold that the doctrine of *laissez-faire* is unsafe in politics and unsound in morals; and that it suggests an inadequate explanation of the relations between the state and the citizens."⁶⁸ The same volume of AEA proceedings contained Adams's famous call to arms, "The State and Industrial Action," conceived as an economic rebuttal to Spencer's "The Man versus the State" on par with Ward's powerful sociological refutation.⁶⁹ Adams began by noting the way Spencer had begun with "a long list of acts passed by Parliament pertaining to industrial affairs. These enactments he regards as an invasion of the domain of personal liberty, because an encroachment upon the '*régime* of contract.' He conceives it as beyond question that 'Government is begotten of aggression

⁶⁶ Commons, *Legal Foundations*; Ely, *Property and Contract*.

⁶⁷ Wesley C. Mitchell, "Commons on Institutional Economics," *American Economic Review* 25, no. 4 (1935): 638. Mitchell was an extraordinary interpreter and popularizer of Commons's frequently inaccessible prose. See also Mitchell, "Commons on the Legal Foundations of Capitalism," *American Economic Review* 14, no. 2 (1924): 240–53.

⁶⁸ Ely, "Report," 6 (emphasis added). The platform seemed to be a product primarily of Ely, who added a statement arguing along the same lines: "We hold that the doctrine of laissez-faire is unsafe in politics and unsound in morals, and that it suggests an inadequate explanation of the relations between state and the citizens. In other words we believe in the existence of a system of social ethics; we do not believe that any man lives for himself alone, nor yet do we believe social classes are devoid of mutual obligations corresponding to their infinitely varied inter-relations" (p. 16). The AEA took care to note that (a) the platform "was never meant as a hard and fast creed which should be imposed on all members" and (b) that Ely's statement was an "individual statement" and that "while some endorsed it all without reservation, others objected strongly to some of his views" (pp. 6, 14n1).

⁶⁹ Adams, "Relation of the State," 119, 125. For an excellent discussion of the economics and jurisprudence of Adams, see Ajay K. Mehrotra, "Creating the Modern American Fiscal State: The Political Economy of U.S. Tax Policy, 1880–1930" (PhD diss., University of Chicago, 2003).

and by aggression,' and for that reason deprecates the willingness on the part of legislators to pass laws regulating the processes of production, or extending the administrative duties of the state." In contrast to Spencer's laissez-faire dream of a perfect society emerging "from the struggle for individual existence under 'voluntary coöperation,'" Adams proffered an alternative conception of the relation of "government and industry" in which "The State" exercised "a controlling and regulating authority over every sphere of social life, including the economic, in order to bring individual action into harmony with the good of the whole." Adams's critique of laissez-faire was but a prelude to his endorsement of a broad positive program for the governmental control of industrial action, from the so-called Granger laws, railroad regulation, and the origins of the concept of business "affected with a public interest" to educational reform, factory legislation, and general government enforcement and supervision of competition.⁷⁰

Thus, already in the first volume published by the newly minted AEA, Adams could offer up a thumbnail policy sketch for the social control of business. For in the end, the new economic ideas of the institutionalists were ideas in action. The pragmatic and realist revolution in modern economic thought was a plan of action to be tested in action. From intellectual roots reconfiguring economic theory around a more realistic and sociohistorical understanding of institutions and social control there quickly developed a more concrete and expansive legal and policymaking agenda. A democratic transformation in the relations of American polity, society, *and* economy was the ultimate goal. The vehicle for achieving that goal was the construction of a modern regulatory and administrative state.

John Maurice Clark left little doubt about the institutionalist turn to Progressive statecraft, administration, and regulation, arguing that "the most definite and powerful agent of society is government, and in this country the municipal, state, and federal governments between them exercise the formal, legal power of control in economic life." In the early 1920s, Clark had offered up his own list of legislative and regulatory achievements in the institutionalist control of business that vastly extended Adams's blueprint: "the effective control of railroads and of public utilities," land reclamation and flood prevention, radio and aerial navigation laws, the trust movement and antitrust laws, conservation, the Federal Reserve system, labor legislation, social insurance, minimum-wage laws, industrial labor arbitration, pure-food laws, public health regulation, and city planning and zoning. On the frontier,

⁷⁰ Henry C. Adams, *Relation of the State to Industrial Action*, (Baltimore, 1887), 62; Adams, *Description of Industry: An Introduction to Economics* (New York, 1918), 247.

Clark suggested, were health insurance, control of the business cycle and unemployment, the control of large fortunes and the distribution of wealth, and what Clark called the “social control of the structure of industry itself, through the ‘democratization of business.’”⁷¹

Clark’s list of policy achievements and policy agendas was but the tip of the spear of the Progressive achievement in the regulatory control of business, industry, and the market. In 1937, Milton Handler dedicated his pioneering casebook in trade regulation and competition policy to Brandeis with a reference to the “Sisyphean task” of simply trying to keep pace with “the accelerated tempo of change” in the field of economic regulation.⁷² In attempting to get his head around the increasingly unwieldy topic of “the progressive penetration of government in business,” Handler began by undertaking a quick and illuminating survey of New York statutes brought to bear on an individual undertaking any kind of economic enterprise in the state. By 1931, *McKinney’s Consolidated Laws of New York* comprised sixty-seven separate volumes, with titles ranging from *Arbitration, Banking, Benevolent Orders, and Business Corporations* to *Salt Springs, State Charities, Tenement Houses, and Workmen’s Compensation*.⁷³ Even before organizing an economic venture, Handler noted, one had to consult the statutory provisions regarding “Business Corporations, General Corporation, Stock Corporation, General Associations, Membership Corporations, and Partnership laws.” Beyond such general regulations for implementing a

⁷¹ Clark, *Social Control of Business*, 4–5.

⁷² Milton Handler, *Cases and Other Materials on Trade Regulation* (Chicago, 1937), vii.

⁷³ *McKinney’s Consolidated Laws of New York, Annotated*, 67 vols. (New York, 1931). 1. Report of Consolidators; 2. Constitution; 3a. Arbitration; 4. Banking; 5. Benevolent Orders; 6. Business Corporations; 7. Canal; 7a. City Home Rule; 8. Civil Rights; 9. Civil Service; 9a. Condemnation; 10. Conservation; 10a. Cooperative Corporations; 10b. Correction; 11. County; 12. Debtor and Creditor; 13. Decedent Estate; 14. Domestic Relations; 16. Education; 17. Election; 17a. Employers’ Liability; 18. Executive; 18a. Farms and Markets; 19. General Business; 20. General City; 21. General Construction; 22. General Corporation; 23. General Municipal; 24. Highway; 25. Indian; 27. Insurance; 28. Joint-Stock Association; 29. Judiciary; 30. Labor; 31. Legislative; 32. Lien; 34. Membership Corporations; 34a. Mental Hygiene; 35. Military; 35a. Multiple Dwelling; 36. Navigation; 37. Negotiable Instruments; 38. Partnership; 39. Penal; 40. Personal Property; 43. Public Buildings; 44. Public Health; 45. Public Lands; 46. Public Officers; 47. Public Service Commission; 47a. Public Works; 47b. Public Welfare; 48. Railroad; 49. Real Property; 50. Religious Corporations; 51. Salt Springs; 52. Second Class Cities; 53. State Boards and Commissions; 54. State Charities; 54a. State Departments; 55. State Finance; 56. State; 57. State Printing; 58. Stock Corporation; 59. Tax; 60. Tenement House; 61. Town; 62. Transportation Corporations; 62a. Vehicle and Traffic; 63. Village; 64. Workmen’s Compensation; 65. Unconsolidated Laws; 66. Table of Laws Repealed; 67. General Index. There are several things worth noting circa 1931: first, the large number of titles dealing with Corporations, Partnerships, and Associations; second, the new progression in Book 47 from Public Service Commission to Public Works to Public Welfare; and third, the changes made to Book 26 formerly Insanity now Mental Hygiene, Book 41 formerly Poor now Public Welfare, and Book 42 formerly Prison now Correction.

New York private enterprise in the first place, Handler pointed to a host of other, more particular statutes concerning business names, methods of raising capital (blue sky and usury regulations), zoning restrictions, construction rules and permitting and inspection processes, and equipment standards. As Handler put it, “The entrepreneur constructing his own plant will find himself in a maze of fire control, illumination, safety, and sanitary requirements.”⁷⁴ And, of course, an equally complex and special maze of licensing restrictions guarded certain New York professions and businesses, including physicians, surgeons, dentists, optometrists, pharmacists and druggists, nurses, midwives, chiropodists, veterinarians, certified public accountants, lawyers, architects, engineers and surveyors, shorthand reporters, master plumbers, undertakers and embalmers, real estate brokers, junk dealers, pawnbrokers, ticket agents, liquor dealers, private detectives, auctioneers, milk dealers, peddlers, master pilots and steamship engineers, weighmasters, forest guides, motion picture operators, itinerant retailers on boats, employment agencies, commission merchants of farm produce, and manufacturers of foreign desserts, concentrated feeds, and commercial fertilizers. Factories, canneries, places of public assembly, laundries, cold storage, shooting galleries, bowling alleys, billiard parlors, the storage of explosives, the sale of minnows, the operation of educational institutions (and motor vehicles), and filling stations all required special licenses.⁷⁵ Even these fairly elaborate provisions paled in comparison to the detailed state regulations impinging upon entry into the business of banking or insurance or the provision of gas, electricity, or communications—with foreign corporations encountering additional obstacles and restrictions. If one’s business required employees, a law library of labor relations controls impacted the operation, regarding industrial accidents, worker’s compensation, limits on child labor, maximum hours that varied according to sex, age, and occupation, and factory and wage regulations. If one’s business involved the production of food, commodities, or household goods, an equal litany of restrictions was triggered, including adulteration, advertising, and trademark restrictions, minimum standards, weights and measures, and inspection regimes.

With regard to certain industries (as was the case with early railroads and public utilities), states like New York developed separate codes with commission oversight and detailed price and production controls. In New York, this was the case with liquor control and with the Milk Control Act of 1933 made famous in *Nebbia v. New York* (1934).⁷⁶ The

⁷⁴ Handler, *Trade Regulation*, 2.

⁷⁵ Handler, 3–4.

⁷⁶ *Nebbia v. New York*, 291 U.S. 502 (1934); *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934); *Borden’s Farm Products v. Baldwin*, 293 U.S. 194 (1934); *Baldwin v. G. A. F. Seelig*,

result of an extraordinary set of economic dysfunctions—detailed in the *Report of the Joint Legislative Committee to Investigate the Milk Industry*, the copious annual reports of the Milk Control Board, and special investigations by the FTC—the Division of Milk Control of the New York Department of Agriculture and Markets was ultimately charged with regulating the entire statewide milk industry: “production, storage, distribution, manufacture, delivery, and sale of milk and milk products.” An elaborate license regime was the gateway to comprehensive administration and regulation. Licensees had to satisfy the commissioner that they were “qualified by character, experience, financial responsibility and equipment to properly conduct the business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest.”⁷⁷ Licenses were revocable for a whole range of offenses against public health, public welfare, or the public economy of milk, and commissioners were given select powers to fix prices and establish quotas as well as to undertake advertising campaigns on milk consumption, public health, and child nutrition.⁷⁸ As Handler noted about these comprehensive powers, “This mandate coupled with the broad rule-making powers of the department permit . . . an almost unlimited degree of control.”⁷⁹

As Handler himself concluded, “Impressive as these summaries may be, they present but a partial picture of modern business regulation. A much larger canvass would be needed for the legislation enacted *before* the New Deal, the regulations of state and federal administrative agencies, the statutes of the forty-eight states, the ordinances of our

Inc., 294 U.S. 511 (1935); *Borden’s Farm Products Co. v. Ten Eyck*, 297 U.S. 251 (1936); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936).

⁷⁷ Handler, *Trade Regulation*, 9–10.

⁷⁸ The statute directed coverage of the following topics: (a) milk and its importance in preserving the public health, its economy in the diet of people, and its importance in the nutrition of children; (b) the manner, method, and means used and employed in the production of milk and to the laws of the state regulating and safeguarding such production; (c) the added cost to the producer and milk dealer in producing and handling milk to meet the high standards imposed by the state that ensure a pure and wholesome product; (d) the effect upon the public health that would result from a breakdown of the dairy industry; (e) the reasons why producers and milk dealers should receive a reasonable rate of return on their labor and investment; (f) the problem of furnishing the consumer at all times with an abundant supply of pure and wholesome milk at reasonable prices; (g) the instability peculiar to the milk industry, such as unbalanced production and effect of the weather on the demand; (h) the possibilities with particular reference to increased consumption of milk; (i) the beneficial effect of sanitary laws and regulations enacted by the state; and (j) further and additional information as shall tend to promote the increased consumption of milk and as may foster a better understanding and more efficient cooperation between producers, milk dealers, and the consuming public. Handler, *Trade Regulation*, 10–11

⁷⁹ Handler, *Trade Regulation*, 10.

countless municipalities, and the substantive rules formulated by our courts.”⁸⁰ Dexter Merriam Keezer and Stacy May concurred in *The Public Control of Business* (1930), where they argued that “the free working of free private enterprise in a competitive system is an American ideal that has never existed except in theory. The country started with certain established governmental regulations as a heritage of common law, and there has been a definite tendency to add to rather than to subtract from the amount of such regulation ever since. Today our government touches our economic system at so many points that a mere cataloguing of the economic concerns of the various branches of American government would be a lengthy undertaking.” Within such an effort, Keezer and May included the following:

1. Government “promotion of privately owned business through such mechanisms as the tariff, land grants, loans and subsidies, the gathering and dissemination of statistics, . . . the promotion and protection of foreign trade, and through the . . . patent laws.”
2. General exercise of the state police power “to take action necessary for the protection of the public health, welfare, safety, and morals.”
3. Emergency measures including “the government operation of railways” and “such peace-time measures as the Adamson Act.”
4. “Permanent regulatory measures” in specific areas like those involving products harmful to public health, for example, the Pure Food and Drug Act, or those bound up in the labor question, for example, “compulsory social insurance and minimum wage, hours of labor, and child labor legislation.”
5. Direct federal and state provision of goods and services including the activities of federal arsenals, “highway building and maintenance, the issuing of currency, the postal service, police service, the Coast Guard, Geological Survey, weather bureau,” etc.⁸¹

These were just some of the policy consequences of the long Progressive crusade for the social control of business and the economy. As Handler concluded, “Our legislation thus runs the gamut of our economic problems and a list of all the varied objectives of these laws would encompass most of the aims of our economic order.”⁸² The modern American

⁸⁰ Handler, *Trade Regulation*, 13–14 (emphasis added).

⁸¹ Dexter Merriam Keezer and Stacy May, *The Public Control of Business: A Study of Antitrust Law Enforcement, Public Interest Regulation, and Government Participation in Business* (New York, 1930), 3–4.

⁸² Handler, *Trade Regulation*, 18.

regulatory and administrative state would leave few aspects of economic life untouched through the first half of the twentieth century.

Conclusion

In 1924, future New Dealer Rex Tugwell brought together some of the best American economic institutionalists in the production of what he dubbed “sort of a manifesto of the younger generation.” Tugwell, who had produced a manifesto of his own with his 1922 dissertation, “The Economic Basis of Public Interest,” entitled the consequent volume *The Trend of Economics* as a testament to the “gathering force of the renaissance of economic thought we are having in this country.”⁸³ In *The Trend of Economics*, Mitchell discussed “the significance of institutions in economic behavior”; John Maurice Clark described “the socializing of theoretical economics”; Paul Douglas cataloged “the reality of non-commercial incentives in economic life”; Sumner Shlichter summarized recent trends in the “organization and control of economic activity”; and Hale contributed a view of “economic theory” from the perspective of “the statesman.” The thirty-page bibliography was something of a scholarly monument to the substantive progress of institutional economics within the AEA from 1885 to 1922 as well as a blueprint for the Progressive economic policies that would preoccupy the New Deal.

But already in 1924 were the beginning signs of a rather momentous reaction against the institutional approach in economics. Indeed, another central contributor to *The Trend of Economics* was none other than Frank Hyneman Knight—teacher of Milton Friedman, James Buchanan, and George Stigler and future founder of the Chicago School. Knight’s entry was an exploration of “scientific method in economics” and an attempt to reclaim the high ground for “economics as a science.” As he concluded, *contra* most of the antiformalist premises of institutionalism, “There is a science of economics, a true, and even exact, science, which reaches laws as universal as those of mathematics and mechanics. . . . It comes about in the same general way as all science, except perhaps in a higher degree, i.e., through abstraction.” While Knight agreed that “there are no laws regarding the *content* of economic behavior,” he contended that “there are laws universally valid as to its *form*. There is an abstract rationale of all conduct which is rational at all, and a rationale of all social relations arising through the organization

⁸³ Rexford Guy Tugwell, introduction to *The Trend of Economics*, ed. Rexford Guy Tugwell (New York, 1924), viii, ix; Tugwell, *Economic Basis*.

of rational activity.”⁸⁴ Here began the great revolt against the institutionalist “revolt against formalism” in economics.

Knight’s own personal copy of *Trend* was further testament to the beginnings of a significant turn in economic thinking and policy. Just as Friedrich A. Hayek’s 1939 University of Chicago pamphlet “Freedom and the Economic System” presaged an alternative economic order at the height of wartime planning, regulation, and mobilization, Knight’s meticulous penciled marginalia in *Trend* announced the arrival of an important stranger within the gates of institutionalism.⁸⁵ In reading John Maurice Clark’s reflections on “a pragmatic view of economic truth” and “the socializing of economics,” Knight noted, “I don’t understand why so many economists with brains fall for Veblen, think him a ranter.” With respect to the musings of Douglas, his future senator and University of Chicago colleague, on “non-commercial incentives,” Knight offered an unmitigated hostile judgment: “Entertaining. No pretense of close analysis.” When Mitchell opined about the “mistake of differentiating economic theory from the study of economic institutions,” Knight asked provocatively, “Is it a mistake?”⁸⁶

In just such musings, one can see the hesitant beginnings of a subsequent paradigm shift in law and political economy. What eventually comes to be known as the Chicago School began as an explicit rebuke to the more critical, pragmatic, institutionalist, and realist approaches to law and political economy that for a time dominated the “trend” in early twentieth-century economics and public policymaking. Indeed, much of the construction of what recent scholars have been discussing as the current neoliberal paradigm began through fierce critiques of key elements of the early Progressive regime: critiques of planning, critiques of public utility, critiques of public provision, critiques of the Progressive antimonopoly tradition, and critiques of the entire notion of Tugwell’s “public interest.” The resultant return of classical and neoclassical models (and the demise of the larger notion of a distinctly *political* economy) has at times been so complete that it has rendered invisible the earlier accomplishments of the institutional economists and the historic policy achievements of the social control of business in the Progressive and New Deal eras. In a new season of discontent—as scholars begin to self-consciously search out historic precedents and lost traditions

⁸⁴ Frank Hyneman Knight, “The Limitations of Scientific Method in Economics,” in Tugwell, *Trend of Economics*, 256.

⁸⁵ Friedrich A. Von Hayek, “Freedom and the Economic System” Public Policy Pamphlet No. 29 (Chicago, 1939).

⁸⁶ John Maurice Clark, “The Socializing of Theoretical Economics,” 73–104; Paul Howard Douglas, “The Reality of Non-Commercial Incentives in Economic Life,” 153–190; and Wesley Clair Mitchell, “The Prospects of Economics,” 3–36; All in Frank H. Knight’s personal copy of Tugwell, *Trend of Economics*, Knight’s annotations at 18, 85, 151.

for alternative ways of thinking about the policies and politics of economics—I contend that a recovery and reckoning with the extraordinary record of early twentieth-century American institutional economics, as well as the policymaking initiatives that created the modern American regulatory state, is a good place to start anew.

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