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# LAW AND THE SOCIAL CONTROL OF AMERICAN CAPITALISM

William J. Novak\*

*To hold the balance true between the material and the human values of life is the oldest and the newest economic problem.*

—Walton Hale Hamilton<sup>1</sup>

## INTRODUCTION

This Essay is part of a larger, ongoing investigation of the role of law in the creation of a modern American state from 1877 to 1932. That project charts the decline of an early nineteenth-century world of local, common law self-government (what I called in a previous work a “well-regulated society”<sup>2</sup>) and the rise of a distinctly modern administrative regulatory state in the United States. This new legal-political regime was rooted in three interlinked developments: the centralization of public power; the individualization of private right; and the constitutionalization of the rule of law.<sup>3</sup> Beginning soon after the Civil War, nineteenth-century common law understandings of the public obligations of associative communities in a confederated republic were increasingly replaced by a new emphasis on the constitutional rights of individual citizens in a nation-state—a nation-state insistently expanding its general police and regulatory authority.<sup>4</sup>

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\* Professor at University of Michigan Law School. I wish to thank helpful and critical colleagues and audiences at the *Emory Law Journal*'s Randolph W. Thorer Symposium, the University of Michigan Law School Fawley Workshop, the National Bureau of Economic Research Economic History Group, and the Business History Seminar at Harvard Business School.

<sup>1</sup> CURRENT ECONOMIC PROBLEMS: A SERIES OF READINGS IN THE CONTROL OF INDUSTRIAL DEVELOPMENT, at ix (Walton Hale Hamilton ed., rev. ed. 1919).

<sup>2</sup> WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA I (1996) (“At the heart of the well-regulated society was a plethora of bylaws, ordinances, statutes, and common law restrictions” that “dominated United States social and economic policymaking from 1787 to 1877.”).

<sup>3</sup> The early nineteenth-century governmental regime is the subject of my first book. See *id.* Two other articles highlighting different aspects of the creation of the liberal state are William J. Novak, *The Legal Origins of the Modern American State*, in LOOKING BACK AT LAW'S CENTURY 249 (Austin Sarat et al. eds., 2002), and William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY 85 (Meg Jacobs et al. eds., 2003).

<sup>4</sup> NOVAK, *supra* note 2, at 235–48.

The project has three overarching interpretive objectives. First, it emphasizes the distinctive power and reach (as opposed to the exceptional weakness and limits) of the twentieth-century American state created in this period. In line with a recent wave of revisionist scholarship on American governance, it holds that the American state is and has been consistently stronger, larger, more durable, more interventionist, and more redistributive than accounted for in any earlier U.S. historiography.<sup>5</sup> Consequently, it attempts to come to grips with one of the fundamental yet underexplained facts of modern American history—the emergence of a global geopolitical and legal-economic leviathan. Second, the project asserts that law played a fundamentally positive and creative (as opposed to negative and restrictive) role in the development of that modern American state. In contrast to an extensive legal-political literature emphasizing the role of law as primarily a constitutional limitation on, or hindrance or obstruction to, the growth of the American state, this project highlights law as a formative and forceful “technology of public action”<sup>6</sup>—a distinctive source of expansive governmental authority in a critical period of United States political and economic development. Third, and very much related to the special role of law in American state-building, the project investigates the close interdependence of expanding central powers and new constitutional liberties. Though frequently presented as opposed developments, this study argues that the essence of the governmental regime established in turn-of-the-century America was the *simultaneous* centralization of new state powers and the constitutionalization of new individual rights. The new American state created in this period was both a jural *and* a regulatory state—a product of the rule of law as well as modern political administration.

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<sup>5</sup> See William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 752 (2008) (“[While t]he American present witnesses the steady aggrandizement of executive, administrative, emergency, penal, military, and war powers . . . the history that America most frequently tells itself highlights a story of relative powerlessness . . .”). Some important recent entries in this revisionist project include DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001); CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* (1997); DAVID A. MOSS, *WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER* (2002); Michele Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387 (2005); Richard R. John, *Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787–1835*, 11 STUD. AM. POL. DEV. 347 (1997).

<sup>6</sup> I owe the phrase “technology of public action” to Hendrik Hartog, whose work on property law as a tool of early New York City governance is a classic example of this approach to law. HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870*, at 66 (1983).

In the context of this larger story of legal and governmental transformation, the subject of this particular Essay is economic policy—the origins of modern American economic regulation. The period from 1877 to 1932 basically marks the development of modern capitalism in the United States—a realignment of economic actors and institutions in a market system more industrial, more organized, and more corporate. Perhaps most importantly, this modern capitalism was also decidedly more state and policy centered, shaped and directed by a new legal and political regime of economic rules and regulations that define this period of American history. Part II of this Essay attempts to present a new interpretation highlighting this interrelationship of legal statecraft and modern American capitalism. Subsequent Parts try to bolster that interpretation with evidence drawn from intellectual history, particularly a new legal-economic discourse concerning “the social control of business” in Part III, as well as a case study of the emerging legal concept of *public utility* in Part IV. But, of course, the general topic of law and economic regulation in the Gilded Age and Progressive Era is not exactly *terra verde*. Historiographically, it resembles something more akin to a burnt-over district. So it is perhaps useful at the outset, in Part I, to stake quickly a few interpretive boundaries so as to make room for new claims.

## I. INTERPRETATIONS OF LAW, ECONOMICS, AND REGULATION

There are basically four different, dominant interpretations of law and political economy in this period. The oldest, most powerful, and most tenacious interpretation goes by the name *laissez-faire constitutionalism*. So pervasive is this understanding of the relationship of law and economy that I need merely name it for most to conjure up a favorite example of a conservative, pro-business, *Lochner*-era jurisprudence frustrating progressive economic and social-welfare regulation. The thesis of *laissez-faire constitutionalism* is as old as the Progressive Era itself—invented by a host of early twentieth-century activist scholars, among them Charles Beard,<sup>7</sup> J. Allen Smith,<sup>8</sup> Frank Goodnow,<sup>9</sup> and Louis Boudin.<sup>10</sup> These scholars were anxious to

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<sup>7</sup> CHARLES AUSTIN BEARD, *CONTEMPORARY AMERICAN HISTORY, 1877–1913*, at 54 (1914) (describing the process of “Writing Laissez Faire into the Constitution”).

<sup>8</sup> J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT*, at vii, xi (1907) (aggressively attacking the immanent “reactionary” spirit of U.S. constitutional law and “its inherent opposition to democracy, the obstacles which it has placed in the way of majority rule”).

<sup>9</sup> FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION*, at v (1911) (opening his investigation with the straightforward statement of progressive purpose that “to ascertain, from an examination of the decisions of our courts, . . . to what extent the Constitution of the United States in its present form is a bar to

impugn an American judiciary that they envisioned as an obstacle to the legislative and administrative experiments of reform. The progressive critique of turn-of-the-century jurisprudence was as unsubtle as it was materialist. As Max Lerner summed up the reigning dogma,

[T]he real Constitution became under capitalism merely the *modus operandi* of business enterprise . . . . Capitalist enterprise in America generated . . . forces in government and in the underlying classes hostile to capitalistic expansion and bent upon curbing it: it became the function of the Court to check those forces and to lay down the lines of economic orthodoxy.<sup>11</sup>

What is surprising is that despite a rash of critical revisionism dating back to the late 1960s, including the work of Alan Jones,<sup>12</sup> Charles McCurdy,<sup>13</sup> Michael Les Benedict,<sup>14</sup> Mel Urofsky,<sup>15</sup> Barry Cushman,<sup>16</sup> and Ted White,<sup>17</sup> laissez-faire constitutionalism remains alive and kicking—the dominant discourse in Howard Gillman’s *The Constitution Besieged*,<sup>18</sup> William Wiecek’s *The Lost World of Classical Legal Thought*,<sup>19</sup> and Owen Fiss’s *Troubled*

the adoption of the most important social reform measures which have been made parts of the reform program of the most progressive peoples of the present day”).

<sup>10</sup> LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY*, at viii (1932) (beginning with a typical, acerbic conclusion that “we are ruled frequently by *dead Men* . . . generations of dead judges”).

<sup>11</sup> Max Lerner, *The Supreme Court and American Capitalism*, 42 *YALE L.J.* 668, 671–72 (1933); see also Max Lerner, *The Triumph of Laissez-Faire*, in *PATHS OF AMERICAN THOUGHT* 147 (Arthur M. Schlesinger, Jr. & Morton White eds., 1963) [hereinafter Lerner, *The Triumph of Laissez-Faire*]. For one of the finest critical evaluations of progressive historiography, see RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON* (1968).

<sup>12</sup> Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”*: A Reconsideration, 53 *J. AM. HIST.* 751 (1967).

<sup>13</sup> Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 *J. AM. HIST.* 970 (1975); Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 *BUS. HIST. REV.* 304 (1979).

<sup>14</sup> Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293 (1985).

<sup>15</sup> Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 *J. AM. HIST.* 63 (1985).

<sup>16</sup> BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

<sup>17</sup> G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

<sup>18</sup> HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

<sup>19</sup> WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998).

*Beginnings of the Modern State*,<sup>20</sup> as well as the general histories of Robert McCloskey<sup>21</sup> and Kelly, Harbison, and Belz.<sup>22</sup>

The second important interpretation of law and economic regulation in this period goes by the name of the *capture thesis*—a curious example of what can result when New Left historians and New Right economists agree. The essence of the capture thesis holds that, when initial economic regulation did escape the close scrutiny of laissez-faire courts, as in the case of the ICC or the FCC, for example, the regulation served not the “public interest” professed by the reformers, but the narrower interests of the regulated businesses themselves.<sup>23</sup> As Chicago School economist George Stigler summed up the thesis for some unlikely intellectual compatriots in history: “[A]s a rule, regulation is *acquired by the industry* and is designed and operated primarily for its benefit.”<sup>24</sup> In the hands of “corporate liberal” historians, the capture theme acquired a somewhat more sinister, class-based edge than the special-interest or rent-seeking theories of the economists. As James Weinstein put it, “[B]usinessmen were able to harness to their own ends the desire[s] of intellectuals and middle class reformers. . . . These ends were the stabilization, rationalization, and continued expansion of the existing political economy, and . . . the circumscription of the Socialist movement . . . .”<sup>25</sup> Caught between such twin assaults by left and right, the “public interest” or “public service” theory of regulation and administration articulated by progressive reformers

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<sup>20</sup> 8 OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910* (2006).

<sup>21</sup> ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (5th ed. 2010).

<sup>22</sup> I ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* (7th ed. 1991).

<sup>23</sup> For early statements, see MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 266 (1955) (“For regulated groups the regulatory process may be one method of converting public power into private gain.”), and Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467, 472 (1952) (describing the “increased dependence” of the ICC on the railroad industry for support).

<sup>24</sup> George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 3 (1971) (emphasis added). For further discussion of the capture thesis, see Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211 (1976), and Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON. & MGMT. SCI.* 335 (1974).

<sup>25</sup> JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900–1918*, at ix–x (1968); see also GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916* (1963); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916* (1988). Gerald Berk summarized this school of thought in an excellent review essay: “[C]orporate liberal scholarship, especially in its left-wing variant reintroduced class analysis into the study of twentieth-century politics, concluding that a powerful cadre of class-conscious corporate elites successfully used the state to stabilize modern capitalism and co-opt radical policy demands from below.” Gerald Berk, *Corporate Liberalism Reconsidered: A Review Essay*, 3 *J. POL’Y HIST.* 70, 70–71 (1991).

themselves is often treated as no more than a pipe dream by contemporary social scientists.<sup>26</sup>

The third significant interpretation, following Wallace Farnham and Moisei Ostrogorski, might be termed “The Weakened Spring of [American] Government”—the idea that the dominant story in the political economy of this period was a certain structural weakness, or a comparative deficiency, or an exceptionally limited trajectory in the nature of the American state and its response to the socioeconomic challenges of modern industrialism.<sup>27</sup> Originating in Farnham’s investigation of the role of government in the growth of the Union Pacific Railroad (which he characterized as a government “hardly govern[ing] at all”<sup>28</sup>), the weakened spring thesis has been only reinforced more recently by American Political Development literature fixated on demarcating the limited capacity of modern American statecraft in the late nineteenth and early twentieth centuries, from Stephen Skowronek’s characterization of state policy in this period as “patchwork”<sup>29</sup> to Theda Skocpol’s voluminous chartings of the comparative laggardness of the American social welfare state.<sup>30</sup> The list of odd and strained adjectives used to describe the modern American state is illuminating. The American state is “uneasy” for Barry Karl,<sup>31</sup> “reluctant” for Bruce Jansson,<sup>32</sup> “divided” for Jacob

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<sup>26</sup> Two classic statements of the public interest theory are FELIX FRANKFURTER, *THE PUBLIC & ITS GOVERNMENT* (1930), and JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). For some signs of a renewal of interest in public interest, see MARTHA MINOW, *PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *HARV. L. REV.* 1285 (2003); David A. Moss & Michael R. Fein, *Radio Regulation Revisited: Coase, the FCC, and the Public Interest*, 15 *J. POL’Y HIST.* 389 (2003).

<sup>27</sup> 2 M. OSTROGORSKI, *DEMOCRACY AND THE ORGANIZATION OF POLITICAL PARTIES* 550 (Frederick Clarke trans., 1902); Wallace D. Farnham, “*The Weakened Spring of Government*”: *A Study in Nineteenth-Century American History*, 68 *AM. HIST. REV.* 662, 678 (1963).

<sup>28</sup> Farnham, *supra* note 27, at 663.

<sup>29</sup> STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920*, at 46 (1982) (explaining how a pattern of patchwork reforms resulted from “the appearance of a series of notable institutional adaptations, each of which was caught in the unresolved tension between the governing demands of a new age and the triumph of th[e] old governmental order”).

<sup>30</sup> THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 5 (1992) (“[I]t seems highly unlikely that the United States will ever converge with the Western welfare states fashioned between the 1880s and 1960s.”). For an excellent overview and bibliography of American Political Development, see KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004).

<sup>31</sup> BARRY D. KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945* (1983).

<sup>32</sup> BRUCE S. JANSSON, *THE RELUCTANT WELFARE STATE: A HISTORY OF AMERICAN SOCIAL WELFARE POLICIES* (1988).

Hacker,<sup>33</sup> “hidden” for Christopher Howard,<sup>34</sup> “inept” for Farnham,<sup>35</sup> and “warped” for Ostrogorski.<sup>36</sup>

Now, one should immediately notice that there is a certain consonance in these first three interpretations of the formative era of modern American political economy. Despite the disagreements of individual authors, it is not impossible to imagine a synthesis involving a weak and uncertain general polity, easily captured and dominated regulatory agencies, and market-policing, laissez-faire courts. The overarching thrust of such a synthesis is economy trumping polity, a state deferential to, and incapable of, autonomously restraining the overweening interests of industrial, corporate capital.

In just such a synthesis—highlighting a weak and dependent public sphere and powerful and expansive private interests—does the theme of corruption become paramount. Corruption was a leitmotif for the progressive reformers. Beyond the well-known exposés of the muckraking journalists Ida Tarbell, Lincoln Steffens, and Ray Stannard Baker who gathered around *McClure's Magazine*,<sup>37</sup> progressive intellectuals and social scientists mounted a sustained attack on the perceived corruptions of the Gilded Age. Indeed, historian Richard L. McCormick has placed the “Discovery That Business Corrupts Politics”—the awakening of the people to illicit business influence in American public life—at the very origin of progressive reform.<sup>38</sup> Progressives used *corruption* in its classic sense indicating the despoiling of a distinctly collective public sphere (a republic supposedly devoted to *res publica*—the public things) by private and individual economic interests. Corruption here is easy to understand and of an age-old character, with resonances readily comprehensible in the early republic: fraud, theft, extortion, and bribery by unvirtuous robber barons and politicians (to use Matthew Josephson’s evocative terms).<sup>39</sup> What was new at the turn of the century was an awareness of the

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<sup>33</sup> JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* (2002).

<sup>34</sup> HOWARD, *supra* note 5.

<sup>35</sup> FARNHAM, *supra* note 27, at 678.

<sup>36</sup> OSTROGORSKI, *supra* note 27, at 550.

<sup>37</sup> LOUIS FILLER, *THE MUCKRAKERS* (1993) (originally printed as LOUIS FILLER, *CRUSADERS FOR AMERICAN LIBERALISM* (1939)); HAROLD S. WILSON, *MCCLURE'S MAGAZINE AND THE MUCKRAKERS* (1970).

<sup>38</sup> RICHARD L. MCCORMICK, *The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247 (1981).

<sup>39</sup> MATTHEW JOSEPHSON, *THE ROBBER BARONS* (1934); MATTHEW JOSEPHSON, *THE POLITICOS 1865–1896* (Commons new ed. 2008) (1938).



unprecedented threat to the polity posed by the arrival of large-scale business interests in rail, oil, meatpacking, and insurance, whose corruptions were cataloged in a seemingly endless series of reports and fictions from Charles and Henry Adams's *Chapters of Erie*<sup>40</sup> to Frank Norris's *McTeague*, *The Octopus*, and *The Pit*.<sup>41</sup> Laissez-faire constitutionalism was understood as a corruption of the American rule of law in precisely this sense—as a usurpation of the public law by private economic interests and philosophies.<sup>42</sup> As Thorstein Veblen concluded in *The Theory of Business Enterprise*, “[C]onstitutional government has, in the main, become a department of the business organization and is guided by the advice of the business men.”<sup>43</sup>

Fortunately, however, the laissez-faire, regulatory capture, and weak state and corruption themes are not the end of commentaries on turn-of-the-century political economy. There is a fourth coherent “school” of thought on the state and economic regulation that introduces an interesting note of dissonance. This school consists primarily of business historians. Alfred Chandler, the undisputed leading historian of American business, did not write often on public policy, but when he did, his conclusions were as crystal clear as the title of his leading article *Government Versus Business: An American Phenomenon*.<sup>44</sup> Here Chandler emphasized not laissez-faire, not capture, not a crabbed and lagged state, but rather a distinct adversarial relationship between an anything but insignificant state and capital, and an anything but deferential law and business.<sup>45</sup> To illustrate the business perspective, Chandler quoted the

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<sup>40</sup> CHARLES F. ADAMS, JR. & HENRY ADAMS, *CHAPTERS OF ERIE, AND OTHER ESSAYS* (Cornell Univ. Press 1956) (1871).

<sup>41</sup> FRANK NORRIS, *MCTEAGUE: A STORY OF SAN FRANCISCO* (Donald Pizer ed., 2d ed. 1997); FRANK NORRIS, *THE OCTOPUS: A STORY OF CALIFORNIA* (Penguin Books 1986) (1901); FRANK NORRIS, *THE PIT: A STORY OF CHICAGO* (Penguin Books 1994) (1903).

<sup>42</sup> Thus the popular power of Oliver Wendell Holmes's dissenting indictment in *Lochner v. New York*:

This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.

198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>43</sup> THORSTEIN VEBLÉN, *THE THEORY OF BUSINESS ENTERPRISE* 287 (Cosimo Classics 2005) (1904).

<sup>44</sup> ALFRED D. CHANDLER, JR., *Government Versus Business: An American Phenomenon*, in *THE ESSENTIAL ALFRED CHANDLER: ESSAYS TOWARD A HISTORICAL THEORY OF BIG BUSINESS* 425 (Thomas K. McCraw ed., 1988); see also Thomas K. McCraw, *Business and Government: The Origins of the Adversary Relationship*, 26 CAL. MGMT. REV. 33 (1984); David Vogel, *Why Businessmen Distrust Their State: The Political Consciousness of American Corporate Executives*, 8 BRIT. J. POL. SCI. 45 (1978).

<sup>45</sup> CHANDLER, *supra* note 44.

often-echoed opinion of a former chairman at DuPont: “Why is it that I and my American colleagues are being constantly taken to court—made to stand trial—for activities that our counterparts in Britain and other parts of Europe are knighted, given peerages or comparable honors?”<sup>46</sup> In explaining the rationale for such a common business opinion, Chandler accurately observed that the “regulation of business became the paramount domestic issue in American politics in the early twentieth century.”<sup>47</sup> Citing the Interstate Commerce Act, the Sherman Antitrust Act, and the Clayton and Federal Trade Commission Acts that established a legislative framework for regulation, antitrust, and administrative commissions, Chandler revealingly concluded, “In neither Europe nor Japan did any such comparable response [against business] occur.”<sup>48</sup> The exceptional nature of the American response to industrialism, in other words, lay not in a weak state or special-interest politics but in distinctly aggressive, “adversarial” economic regulations. As Morton Keller wisely noted, “The land of the trust was also the land of antitrust.”<sup>49</sup>

## II. LAW AND AMERICAN CAPITALISM

The dissonance between, and the irreconcilability of, business history and the other three interpretations of the origins of modern American political economy open up an intriguing question with which to begin a more positive reconstruction of the relationship between law and economic regulation. What could the business historians and the laissez-faire constitutionalists be looking at to give them such diametrically opposed interpretations of the relationship of law, regulation, and economy in this formative era?

In *A History of American Law*, Lawrence Friedman summarized the position of the laissez-faire constitutionalists by quoting from Edward Corwin’s classic progressive text *The Twilight of the Supreme Court*, and noting the five key cases that “annex[ed] the principles of *laissez faire* capitalism to the Constitution and put them beyond reach of state legislative power.”<sup>50</sup> The five cases are wholly familiar to students of constitutional

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<sup>46</sup> *Id.* at 425 (internal quotation marks omitted).

<sup>47</sup> *Id.* at 428.

<sup>48</sup> *Id.* at 425, 427.

<sup>49</sup> Morton Keller, *The Pluralist State: American Economic Regulation in Comparative Perspective, 1900–1930*, in *REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS* 56, 65 (Thomas K. McCraw ed., 1981).

<sup>50</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 269–71 (2d ed. 1985) (quoting EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* 78 (1934)) (internal quotation marks omitted).

history: *Wynehamer v. People*;<sup>51</sup> *In re Jacobs*;<sup>52</sup> *Godcharles v. Wigeman*;<sup>53</sup> *Ritchie v. People*;<sup>54</sup> and *Lochner v. New York*.<sup>55</sup>

Now, in addition to questioning the number of cases on which to base such a sweeping generalization about law and political economy in this volatile period, it is also fair to ask whether these cases reflect the most important fields of economic development and activity: liquor prohibition in *Wynehamer*, cigar rolling in tenements in *Jacobs*, a nail mill in *Godcharles*, hours of women in clothing manufactories in *Ritchie*, and the hours of bakers, again in tenements, in *Lochner*. What is not represented by such cases? Nothing less than some of the dominant sectors of the late nineteenth- and early twentieth-century American economy: (1) transportation and shipping (railroads, highways, grain elevators, ports, and streetcars); (2) communications (telegraph and telephone); (3) energy (electricity, water, coal, and petroleum); (4) agriculture and horticulture; and (5) money and banking.

What do we know about these areas of economic activity? They were the preeminent areas of industrial and corporate consolidation and expansion in this period. And they were the areas that attracted the most intense governmental interest and intervention—the unprecedented regulations that Alfred Chandler argues generated an antagonistic relationship between government and business. Indeed, to get ahead of the story just a bit, these were precisely some of the major sectors of the economy that lawyers, economists, reformers, and legislators were busily redefining as increasingly public in nature—public utilities and public services—subject to interventions ranging from increased police powers to direct rate regulation to outright public ownership.

In *The Economic Basis of Public Interest*, Rexford Tugwell provided a short list of the economic activities that he could envision as essentially public services by 1922.<sup>56</sup> (Bruce Wyman generated a far more extensive categorization in his earlier two-volume, fifteen hundred page, five thousand

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<sup>51</sup> 13 N.Y. 378 (1856).

<sup>52</sup> 98 N.Y. 98 (1885).

<sup>53</sup> 6 A. 354 (Pa. 1886).

<sup>54</sup> 40 N.E. 454 (Ill. 1895).

<sup>55</sup> 198 U.S. 45 (1905).

<sup>56</sup> REXFORD G. TUGWELL, *THE ECONOMIC BASIS OF PUBLIC INTEREST* 95 (Augustus M. Kelley Publishers 1968) (1922).

case treatise on public service corporations.)<sup>57</sup> Tugwell listed fourteen public classifications that covered a vast portion of American economic life:

1. Railways and other common carriers including express services, oil and gas pipe lines and cab and jitney lines.
2. Municipal Utilities, so called, such as water, gas, electric light and power companies and street railways.
3. Turnpikes, irrigation ditches, canals, waterways and booms.
4. Hotels.
5. Telephone, telegraph and wireless lines.
6. Bridges, wharves, docks and ferries.
7. Stockyards, abattoirs and grain elevators.
8. Market places and stock exchanges.
9. Creameries.
10. Services for the distribution of news.
11. Fire insurance businesses.
12. The business of renting houses.
13. Banking.
14. Businesses of preparing for market and dealing in food, clothing and fuel.<sup>58</sup>

Tugwell's list illuminates a fundamental reality about this period obscured by some common interpretations of law and economic regulation. The historical period between the end of the Civil War and the start of the New Deal, far from being marked by a laggard, captured, or constitutionally frustrated state, was in fact a period of formative governmental interventions into American economic life that transformed both economy and polity. Well before the emergency legislative and regulatory experiments of the New Deal, the American state developed surprising new capacities and techniques to regulate and control business and commerce. Chandler noted only the most well-known federal interventions: the Interstate Commerce Act (1887), the Sherman Antitrust Act (1890), and the Federal Trade Commission and Clayton Acts (1914).<sup>59</sup> The actual regulatory output of both federal and state governments went substantially further, encompassing economic activities far beyond the expansive progressive idea of public utility.

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<sup>57</sup> 1 BRUCE WYMAN, *THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT* (1911).

<sup>58</sup> TUGWELL, *supra* note 56.

<sup>59</sup> CHANDLER, *supra* note 44, at 427.

In 1917 and 1918, John A. Lapp compiled an ambitious and comprehensive two-volume listing of federal laws, rules, and regulations (a primitive forerunner to the *Federal Register*).<sup>60</sup> Lapp's compendium serves as a useful index for the dramatic expansion of federal economic regulatory law at the turn of the century. Contending that "scarcely any business can be done involving shipments across state lines without consulting . . . [the vast number of rules, regulations, and] restrictions in the interest of the common welfare which the federal government has thrown about business," Lapp summarized and reproduced a range of pioneering federal initiatives, including: (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) the establishment of the Public Health Service; (7) an array of federal regulations of horticulture and agriculture, from farm loans to the quarantine of livestock to the interstate movement of potatoes; (8) certain federal regulations of immoral commerce, including the White Slave Act and the Webb-Kenyon Act; (9) the Shipping Board Act; and (10) the Federal Good Roads Act.<sup>61</sup> This explosion of federal economic legislation was only supplemented by state regulations of commerce that frequently mirrored, but more often surpassed, federal interventionism.<sup>62</sup>

While certain aspects of this active state involvement in the American economy had precedents dating to the early republic (e.g., Hamilton's reports on manufactures and money and banking, the public promotion of internal improvements, state police power regulation of markets and goods, and Henry

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<sup>60</sup> JOHN A. LAPP, *IMPORTANT FEDERAL LAWS* (1917) [hereinafter LAPP, *FEDERAL LAWS*]; JOHN A. LAPP, *FEDERAL RULES AND REGULATIONS* (1918).

<sup>61</sup> LAPP, *FEDERAL LAWS*, *supra* note 60, at iii.

<sup>62</sup> Milton Handler provides a useful listing of state regulations of unfair competition (mostly established before 1932) that complements Lapp's federal story: (a) antitrust laws; (b) trademark statutes; (c) food and drugs legislation; (d) labeling laws; (e) prohibitory legislation (e.g., cigarettes and oleomargarine); (f) chain store tax laws; (g) peddling and itinerant seller laws; (h) statutes prohibiting sales below cost or secret rebates; (i) legislation prohibiting the use of trading stamps and lotteries; (j) regulations of weights and measures; (k) fair trade acts; (l) acts prohibiting use of another's list of customers; (m) restrictions on advertising, including billboard regulation; and (n) proration laws controlling production. Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 232-35 (1936). Unfair competition is but one area of state economic and commercial regulation. A full listing would also have to include labor regulations, commercially significant health and safety rules, licensing, and professional regulations, among others.

Clay's so-called American System),<sup>63</sup> it would be a mistake to overemphasize the continuities. The crises of late nineteenth- and early twentieth-century industrial, corporate capitalism were far removed from the developmental issues involved in the emerging commercial, maritime, trade, and urban market economies of the antebellum years. The regulatory controls were consequently of a different order. Federal and centralized techniques augmented and often displaced state and local regulations in an effort to address the problems of a consolidated and cartelized national economy.<sup>64</sup> Moreover, those techniques were increasingly administrative—the product of federal independent regulatory commissions newly invented to investigate, police, and direct the interstate market as never before. Finally, and relatedly, the common law framework of early American economic regulation ultimately gave way to a federal constitutional jurisprudence focused on the proliferation of the new statutory and administrative rules and regulations progressively governing more and more areas of the nation's economy.

These regulations mark a new era in government-business relations in the United States and a reconfiguration of the relationship of law and American capitalism—a revolution in political economy missed by traditional interpretations highlighting anachronisms like a self-regulating market, a backward polity, and laissez-faire legalism. This Essay proposes an alternative understanding of this revolution and the interactions among law, statecraft, and industrial commerce at its core. Taking cues from the works of Morton Keller,<sup>65</sup> Harry Scheiber,<sup>66</sup> Louis Galambos,<sup>67</sup> and Douglass North,<sup>68</sup> it first emphasizes the overwhelming reality of what Claudia Goldin and Gary Libecap dubbed a “Regulated Economy” in this period—a perspective centered on the proliferation of new state actions and institutions controlling American

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<sup>63</sup> RON CHERNOW, *ALEXANDER HAMILTON* (2004); JONATHAN R. T. HUGHES, *THE GOVERNMENTAL HABIT: ECONOMIC CONTROLS FROM COLONIAL TIMES TO THE PRESENT* (1977); JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES* (2001); GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION 1815–1860* (1989); Robert A. Lively, *The American System: A Review Article*, 29 *BUS. HIST. REV.* 81 (1955).

<sup>64</sup> LAPP, *FEDERAL LAWS*, *supra* note 60; WALTER THOMPSON, *FEDERAL CENTRALIZATION: A STUDY AND CRITICISM OF THE EXPANDING SCOPE OF CONGRESSIONAL LEGISLATION* (1923); JAMES T. YOUNG, *THE NEW AMERICAN GOVERNMENT AND ITS WORK* (1916).

<sup>65</sup> MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933* (1990).

<sup>66</sup> *UNITED STATES ECONOMIC HISTORY* (Harry N. Scheiber ed., 1964).

<sup>67</sup> Louis Galambos, *The Emerging Organizational Synthesis in Modern American History*, 44 *BUS. HIST. REV.* 279 (1970).

<sup>68</sup> DOUGLASS C. NORTH ET AL., *GROWTH AND WELFARE IN THE AMERICAN PAST* (3d ed. 1983).

economic life.<sup>69</sup> Also, drawing lightly on some of the theoretical work of postwar German critical theory as well as the more recent contributions of the French Regulationist School, I view this enormous rise in regulation not as a simple political adjustment or crisis intervention but as more generally reflective of the socially embedded and systematically regulated nature of modern capitalism.<sup>70</sup> This regulation marks the emergence of a distinctive and new form of political-economic organization in the United States in which business and economic factors, far from determining legal and political arrangements (as in most of the interpretations explored in Part I), are themselves the subjects of a conscious and consistent legal and political manipulation as never before. Friedrich Pollock called this realignment “State Capitalism,”<sup>71</sup> though Andrew Shonfield’s moniker “Modern Capitalism,” highlighting a “Changing Balance of Public and Private Power” is perhaps more applicable to the American experience.<sup>72</sup> Pollock captured the essence of the transformation when he argued, “The replacement of the economic means by political means as the last guarantee for the reproduction of economic life, changes the character of the whole historic period. It signifies the transition from a predominantly economic to an essentially political era.”<sup>73</sup>

Emphasizing the active political construction of modern American capitalism by definition requires a more thorough reckoning with the rule of

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<sup>69</sup> THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY (Claudia Goldin & Gary D. Libecap eds., 1994).

<sup>70</sup> See, e.g., MICHEL AGLIETTA, A THEORY OF CAPITALIST REGULATION: THE US EXPERIENCE (David Fernbach trans., 1979); THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER (William E. Scheuerman ed., 1996).

<sup>71</sup> Friedrich Pollock, *State Capitalism: Its Possibilities and Limitations*, in THE ESSENTIAL FRANKFURT SCHOOL READER 71 (Andrew Arato & Eike Gebhardt eds., 1982).

<sup>72</sup> ANDREW SHONFIELD, MODERN CAPITALISM: THE CHANGING BALANCE OF PUBLIC AND PRIVATE POWER (1965). Shonfield’s analysis is particularly right 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.” *Id.* at 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.” *Id.* at 304.

<sup>73</sup> Pollock, *supra* note 71, at 78. Jürgen Habermas also offers a useful description of this transformation:

The expression “organized or state-regulated capitalism” refers to two classes of phenomena, both of which can be attributed to the advanced stage of the accumulation process. It refers, on the one hand, to the process of economic concentration—the rise of national and, subsequently, of multinational corporations—and to the organization of markets for goods, capital, and labor. On the other hand, it refers to the fact that the state intervenes in the market as functional gaps develop.

JÜRGEN HABERMAS, LEGITIMATION CRISIS 33 (Thomas McCarthy trans., 1975) (footnote omitted).

law and a revision of some common assumptions about the relationship of law to state-building. For, in contrast to the dominant techniques and strategies of continental European statecraft, the technologies of American state development and regulation in this period were overwhelmingly legal in nature and in practice. And far from impeding new state economic controls, American public and private law were in fact sources of innovative tools and instrumental ideas through which a new relationship between the American state and modern capitalism was forged. What were some of these positive legal technologies of state action? The final Part of this Essay explores one such legal device in a bit of detail—the emerging concept of public utility. But the period was replete with many other examples of law creatively supplying foundational ideas, frameworks, precedents, and tools for modern American state-building and economic regulation. Two of the most important were an expanding conception of state police power (which moved increasingly in the direction of a de facto federal police power in this period) and the invention of modern administrative law (which produced the new independent administrative agencies expanding the jurisdiction and capacities of federal economic regulation). But the roles of law and legal institutions also should not be overlooked in the development of such things as professional and occupational licensing, workers' compensation, municipal justice reform, antitrust and a law of "unfair competition," as well as potent new federal powers to tax and to spend.

In the period from 1877 to 1932, a distinctive new state was created in the United States. Reformers, jurists, and legislators consciously constructed through law a new sphere of sovereignty and creatively destroyed and expropriated the powers of competing political-economic jurisdictions. This process included the forging of new national loyalties via the establishment of new citizenship rights and liberties, the invention of new mechanisms of social and cultural policing, and the establishment of a nationally regulated market for production, labor, and consumption. This state-building project relied fundamentally on law, and it reflected anything but weakness, backwardness, or a governmental willingness to "leave alone." Legal and constitutional history's obsession with classical and orthodox legal doctrines like *laissez-faire* constitutionalism, legal formalism, class legislation, and the public-private distinction, as well as economic formulas of regulatory capture, business self-interest, and corporate liberalism has to some extent occluded an appreciation of this more fundamental shift from economic to legal-political priorities.



## III. THE SOCIAL CONTROL OF BUSINESS

But the legal-political construction of the modern American regulatory state was not solely a product of the imaginations of social theorists or the reinterpretations of revisionist historians. To the contrary, it was explicitly advanced by a historical community of thinkers and reformers that consciously crafted an ambitious agenda of legal and political intervention—in effect, a legal-intellectual framework for economic regulation. The language and 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. The central tenet of this activist and professional discourse was something these thinkers dubbed “the social control of business.”<sup>74</sup>

Key figures and formative texts in this political-economic discourse included Henry Carter Adams’s *Relation of the State to Industrial Action and Economics and Jurisprudence*;<sup>75</sup> Thorstein Veblen’s *The Theory of Business Enterprise*;<sup>76</sup> Richard T. Ely’s *Property and Contract in Their Relations to the Distribution of Wealth*;<sup>77</sup> John R. Commons’s *Legal Foundations of Capitalism*;<sup>78</sup> John Maurice Clark’s *Social Control of Business*;<sup>79</sup> Bruce Wyman’s *Control of the Market*;<sup>80</sup> Samuel P. Orth’s compilation *Readings on the Relation of Government to Property and Industry*;<sup>81</sup> Robert Lee Hale’s *Freedom Through Law*;<sup>82</sup> Walton Hamilton’s *The Politics of Industry*;<sup>83</sup> and Rexford G. Tugwell’s *The Economic Basis of Public Interest*.<sup>84</sup> Many in this group of political economists are wholly familiar figures in economic and legal

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<sup>74</sup> JOHN MAURICE CLARK, *SOCIAL CONTROL OF BUSINESS* (1926); JOHN DEWEY & JAMES H. TUFTS, *ETHICS* 459–71 (rev. ed. 1932); BRUCE WYMAN, *CONTROL OF THE MARKET: A LEGAL SOLUTION OF THE TRUST PROBLEM* (1911).

<sup>75</sup> HENRY CARTER ADAMS, *Economics and Jurisprudence*, in *TWO ESSAYS BY HENRY CARTER ADAMS* 135 (Joseph Dorfman ed., reprt. ed. 1969); HENRY CARTER ADAMS, *Relation of the State to Industrial Action*, in *TWO ESSAYS BY HENRY CARTER ADAMS*, *supra*, at 57 [hereinafter ADAMS, *Relation of the State to Industrial Action*].

<sup>76</sup> VEBLEN, *supra* note 43.

<sup>77</sup> RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* (1914).

<sup>78</sup> JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924).

<sup>79</sup> CLARK, *supra* note 74.

<sup>80</sup> WYMAN, *supra* note 74.

<sup>81</sup> *READINGS ON THE RELATION OF GOVERNMENT TO PROPERTY AND INDUSTRY* (Samuel P. Orth ed., 1915).

<sup>82</sup> ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952).

<sup>83</sup> WALTON HAMILTON, *THE POLITICS OF INDUSTRY* (1957).

<sup>84</sup> TUGWELL, *supra* note 57.

historiography. Barbara Fried dubbed some of them “the First Law and Economics Movement.”<sup>85</sup> But the positive role of these active thinkers in constructing the legal-institutional apparatus of the American regulatory state still remains undervalued by history. Moreover, the extensive work of some—like Bruce Wyman on public service corporations or Walton Hamilton on almost every aspect of price controls—has been almost completely neglected. Like Ernst Freund and Frank Goodnow—arguably the foremost legal architects of the modern American administrative and regulatory state<sup>86</sup>—their technical achievements have been obscured by a focus on the more visible and easily digestible achievements of muckraking and trustbusting progressives like Theodore Roosevelt.

In the earliest texts in this tradition, the discovery that business corrupts politics remained a central theme. In 1887, for example, Henry Carter Adams drew “a close connection between the rise of the menacing power of corporations and the rise of municipal corruption” and called for greater industrial responsibility to “conserve true democracy” and overcome the corrupt tyrannies of corporations and “commercial democracy.”<sup>87</sup> But in the extended progressive struggle with the problem of monopoly through the late nineteenth and into the twentieth centuries, business was increasingly viewed as a threat not simply because of its political influence or its potential corruption of local, state, or national governance (much less because of ancient economic evils like fraud, extortion, or bribery). Rather, progressives increasingly considered monopoly and the concentration of economic interests as a problem in and of themselves with grave implications for what legal historian Willard Hurst called the “balance of power.”<sup>88</sup> Hurst understood the

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<sup>85</sup> BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

<sup>86</sup> Ernst Freund’s most important works were ERNST FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY: A COMPARATIVE SURVEY* (1928), and ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904). Frank J. Goodnow’s more general statements include FRANK J. GOODNOW, *PRINCIPLES OF CONSTITUTIONAL GOVERNMENT* (1916); FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* (1900); FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* (1911).

<sup>87</sup> HENRY C. ADAMS, *RELATION OF THE STATE TO INDUSTRIAL ACTION* 69, 76 (Baltimore, Guggenheimer, Weil & Co. 1887). For an excellent discussion of the economics and jurisprudence of Adams, see Ajay K. Mehrota, *Creating the Modern American Fiscal State: The Political Economy of U.S. Tax Policy, 1880–1930* (Dec. 2003) (unpublished Ph.D. dissertation, University of Chicago) (on file with Joseph Regenstein Library, University of Chicago).

<sup>88</sup> James Willard Hurst, *Problems of Legitimacy in the Contemporary Legal Order*, 24 OKLA. L. REV. 224, 232 (1971).

balance of power as a first-order principle of American constitutionalism.<sup>89</sup> He defined it as the idea that

any kind of organized power ought to be measured against criteria of ends and means which are not defined or enforced by the immediate power holders themselves. It is as simple as that: We don't want to trust any group of power holders to be their own judges upon the ends for which they use the power or the ways in which they use it.<sup>90</sup>

In the early twentieth century, an increasing number of legal and economic commentators came to see the growing economic force of big business as a constitutional problem in this sense: as an imbalance of power in the United States. Robert Lee Hale was but the most persuasive progressive writer on this theme. In a series of essays later collected in *Freedom Through Law: Public Control of Private Governing Power*, Hale argued that the new concentrations of private economic power were slowly taking on many of the attributes formerly thought of as the exclusive prerogative of public sovereignty.<sup>91</sup> Hale held that these new forms of "private government" were just as capable of exercising social force and coercion and destroying liberty as "public government itself."<sup>92</sup> But whereas public sovereignty had been the subject of developing constitutional protections since the seventeenth century at least, these new forms of private sovereignty were as yet unrestrained and uncontrolled by law. The problem of private governmental power in trusts, unions, corporations, and other large associations became the focus of legal-economic inquiry and reform in the first decades of the twentieth century precisely because they appeared to exist beyond the traditional jurisdictions of state sovereignty and common law. An adequate legal-governmental remedy to this problem was not to be found in a series of laws insulating the political process from economic influence (yet alone a traditional reliance on common law litigation and *ex post* criminal prosecution). Rather, the problem of monopoly and private-governing power, in the eyes of many of progressive authorities, required new legal and legislative restraints—an expansion of the economic police power of the state setting up government as a countervailing

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<sup>89</sup> *Id.* at 225.

<sup>90</sup> *Id.* For a more complete discussion of Hurst's perspective, see William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 *LAW & HIST. REV.* 97 (2000).

<sup>91</sup> HALE, *supra* note 82, at vii.

<sup>92</sup> *Id.*; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470 (1923).

regulatory force to the power of business and organization in American socioeconomic life. Though antimonopoly had deep roots in the Anglo-American legal tradition, this legal-economic analysis broke with earlier republican and Jacksonian and post-Civil War understandings of corruption by viewing private economic organizations as having a threatening center of power and sovereignty irrespective of any direct illegality or undue influence on the polity.

By the early twentieth century, this more structural critique of private economic power, together with reform proposals for new public economic regulations, were synthesized and extended in the progressive call for the social control of industry, business, and the market.<sup>93</sup> By the time one gets to the analyses of John Maurice Clark or Walton Hale Hamilton<sup>94</sup> “corruption” or “illegality” were no longer central problematics. Unscrupulous businessmen or politicians were not even on the radar screen, and the concentration of economic power was even seen as a potentially beneficent inevitability. From corruption and monopoly, these theorists moved to a more systemic investigation of some of the structural weaknesses of business, markets, and capitalism itself. Looking beyond litigation and even police power regulation, these lawyers and economists proposed much more involved and complicated remedies for economic problems seen as systemic rather than aberrational, remedies including public ownership, overt price controls, and the founding of new permanent institutions for investigating and controlling American economic life.<sup>95</sup> Well before the economic catastrophe known as the Great Depression, these legal and economic thinkers had formulated an ambitious plan for the public social control of the American economy through ongoing administrative governance and economic planning. They envisioned the state not as an economic policeman or even as a countervailing force to private economic power, but as a full, interactive partner in a legal-economic vision of modern state capitalism.<sup>96</sup>

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<sup>93</sup> One can get some sense of the evolution of this perspective in the early twentieth century by examining changes in the key texts over time from WYMAN, *supra* note 74, to CLARK, *supra* note 74, to DEXTER MERRIAM KEEZER & STACY MAY, *THE PUBLIC CONTROL OF BUSINESS: A STUDY OF ANTITRUST LAW ENFORCEMENT, PUBLIC INTEREST REGULATION, AND GOVERNMENT PARTICIPATION IN BUSINESS* (1930), to READINGS IN THE SOCIAL CONTROL OF INDUSTRY (Am. Econ. Ass'n ed., 1942).

<sup>94</sup> See, e.g., CLARK, *supra* note 74; HAMILTON, *supra* note 83.

<sup>95</sup> See, e.g., WALTON HAMILTON, *PRICE AND PRICE POLICIES* (1938); CARL D. THOMPSON, *MUNICIPAL OWNERSHIP* (1917); Malcolm Rutherford, *On the Economic Frontier: Walton Hamilton, Institutional Economics, and Education*, 35 HIST. POL. ECON. 611 (2003).

<sup>96</sup> See HAMILTON, *supra* note 83.

The progressive movement for the social control of business built directly on the influential sociological work on general social control of Charles Horton Cooley and E.A. Ross.<sup>97</sup> The language of socialization that permeated so much progressive reform owed more to these theories of modern social change than to the political agenda of socialism.<sup>98</sup> The essence of these theories held that 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 und Gesellschaft*<sup>99</sup>:

[P]owerful forces are more and more transforming *community* into *society*, that is, replacing living tissue with structures held together by rivets and screws. . . . [N]atural 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.<sup>100</sup>

Economic and technological changes were crucial harbingers of this transformation. As Clark noted, “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. . . .”<sup>101</sup> 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”<sup>102</sup> in concurrence with Ross’s ominous forecast: “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. . . .”<sup>103</sup>

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<sup>97</sup> CHARLES HORTON COOLEY, *SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND* (1909); EDWARD ALSWORTH ROSS, *SOCIAL CONTROL: A SURVEY OF THE FOUNDATIONS OF ORDER* (1901); see also Helen Everett, *Social Control*, in 4 *THE ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 344, 345 (1931). 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. ELLIOT & FRANCIS E. MERRILL, *SOCIAL DISORGANIZATION* (3d ed. 1934).

<sup>98</sup> For an excellent discussion of the role of socialization in law, see MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

<sup>99</sup> FERDINAND TÖNNIES, *COMMUNITY AND SOCIETY* (Charles P. Loomis ed. and trans., 1957).

<sup>100</sup> ROSS, *supra* note 97, at 432–33 (footnote omitted).

<sup>101</sup> CLARK, *supra* note 74, at 3.

<sup>102</sup> *Id.* at 4.

<sup>103</sup> ROSS, *supra* note 97, at 436.

From this perspective, corruption and the problem of monopoly were primarily indicators of a much larger socioeconomic crisis. And the central question was what new forms of control would arise to contain and regulate the new concentrations and organizations of economic power. The legal-economic movement for the social control of business had many particular solutions to particular problems, but what they all had in common was an increased willingness to use the state—to turn to law and government—as the most effective tool of economic control. As Clark argued, “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.”<sup>104</sup> Though space here does not allow a thorough exploration of the important programmatic details with which reformers successfully made the case for the state control of the market, Clark provided an excellent overview of the vision as well as the accomplishments of the movement circa 1922:

This period of fifty years has seen the growth of effective control of railroads and of public utilities; while electricity and the telephone have developed, first, into recognized public utilities, and, second, into businesses which transcend state boundaries and thus become essentially national problems. Irrigation, land reclamation and flood prevention also belong properly in the class of interstate public interests, while radio and aerial navigation have but recently been added to the list. The trust movement and anti-trust laws, conservation, the Federal Reserve system, vast developments in labor legislation, social insurance, minimum-wage laws . . . and the growing control of public health, prohibition, control over markets and marketing, enlarged control over immigration and international trade, city-planning and zoning, and municipal control of municipal growth in general, all have come about within this period. On the frontier are health insurance, the control of the business cycle and of unemployment, and the insertion of social control within the structure of industry itself, through the “democratization of business.” Back of these stand the stabilization of the dollar, and all the questions raised by birth control and the movement toward eugenics, while the control of large fortunes and of the unequal distribution of wealth is an ancient and ever new question which is becoming more and more acute as the masses gain a growing sense of their political power.

This many-sided movement toward control cannot be disregarded. . . . It may be guided and directed, its movements made

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<sup>104</sup> CLARK, *supra* note 74, at 8.

more informed and enlightened, but it cannot be stopped, and no one group can dictate its course.<sup>105</sup>

Lest one think that such views were marginal, outside the mainstream in the economic and business community of the 1920s, Clark's text on social control was written as a set of "Materials for the Study of Business" in the School of Commerce and Administration at the University of Chicago.<sup>106</sup>

As Clark's list of legal and legislative accomplishments suggests, the movement for the social control of business and the market was not simply a discourse (let alone a doctrine). Rather, it involved a broad legal and political strategy for expanding state and federal police power, the overruling power of the state to regulate persons, organizations, liberty, property, and contract in the general interest of the public health, safety, and welfare. And despite a secondary literature that continues to emphasize the constitutional limitations of a handful of state supreme court and U.S. Supreme Court cases, the overwhelming story of the police power from 1877 to 1932 is one of insistent expansion. Measuring the incidence of something as categorically amorphous as police power regulation is notoriously difficult. Still, by the end of this period (but before the New Deal), Congress was passing roughly 1,700 new statutes per session, and states like New York and South Carolina over 1,000.<sup>107</sup> By even the most conservative estimates, one-third of these new statutes were regulatory in nature.<sup>108</sup> And as Charles Warren concluded as early as 1913, the vast majority of this regulatory legislation was readily sustained.<sup>109</sup> Something of the efficacy of such controls on economic activity (which does not include private litigation or administrative actions) was

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<sup>105</sup> *Id.* at 4–5.

<sup>106</sup> CLARK, *supra* note 74.

<sup>107</sup> C.E. Merriam, *Government and Society*, in RECENT SOCIAL TRENDS IN THE UNITED STATES 1489, 1515 (1933); Ralph F. Fuchs, *The Quantity of Regulatory Legislation*, 16 ST. LOUIS L. REV. 51, 52 (1930).

<sup>108</sup> Fuchs, *supra* note 107, at 53

<sup>109</sup> See Charles Warren, *A Bulwark to the State Police Power—The United States Supreme Court*, 13 COLUM. L. REV. 667 (1913) [hereinafter Warren, *Bulwark*]; Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913). Warren famously concluded that the vast bulk of state regulatory legislation passed between 1887 and 1911 was upheld by the courts, including

anti-lottery laws; anti-trust and corporate monopoly laws; liquor laws; food, game, oleomargarine and other inspection laws; regulation of banks, telegraph and insurance companies; cattle, health and quarantine laws; regulation of business and property of water, gas, electric light, railroad (other than interstate trains) and other public service corporations . . . ; negro-segregation laws; labor laws; laws as to navigation, marine liens, ferries, bridges, etc., pilots, harbors and immigration.

Warren, *Bulwark*, *supra*, at 695.

suggested when AT&T vice president Charles DuBois urged AT&T president Theodore Vail to consider government control in 1913—“a telephone and telegraph service ‘under the direct and permanent control and administrative responsibility of the federal government’”—as one way to escape the onerous corporate burden of local and state regulations.<sup>110</sup> The extent that states were willing to go to control economic activity when necessary was suggested by the extreme action of Governor Ross Sterling of Texas who, in 1931, declared martial law in the East Texas oil fields in an effort to enforce the Texas Railroad Commission’s petroleum production controls.<sup>111</sup>

Now these are nothing more than illustrations, and a convincing counterargument to the four interpretations of law and political economy outlined at the start of this Essay requires a much more sustained and systematic presentation of ideas, statutes, and cases than is possible here. But perhaps one final concrete example of legal-economic policy making can suggest some of the interpretive possibilities in reexamining economic regulation in the Progressive Era with an eye toward the active state-building project outlined here.

#### IV. PUBLIC UTILITY

One of the most important developments in the regulation of economic activity in the late nineteenth and early twentieth centuries, and a perfect example of the creative force of law in the construction of the American regulatory state, was the legal invention of the idea of the public utility. Though the problem of antimonopoly and the development of state and federal antitrust law typically receive more historical attention, progressive lawyers and economists understood the law of public utilities (what Bruce Wyman termed the law of “public service corporations”<sup>112</sup>) to be a crucial battleground in the development of American regulation. Today the concept of public utility has lost quite a bit of luster and most of its political aspirations—a product of contemporary privatization as well as a tendency to take utilities for granted. But as Rexford Tugwell’s list of public interest services suggests,<sup>113</sup> progressives viewed the law of public utilities as a vibrant and expansive arena for experimenting with unprecedented governmental control over business,

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<sup>110</sup> RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 376 (2010).

<sup>111</sup> *Sterling v. Constantin*, 287 U.S. 378 (1932).

<sup>112</sup> See WYMAN, *supra* note 57.

<sup>113</sup> See *supra* note 58 and accompanying text.



industry, and the market. While today most would restrict the idea of public utility to a couple of closely circumscribed industries (water, electricity, gas), in the early twentieth century, the utility idea encompassed urban transportation, railroads, motor bus and truck, telecommunications, radio, pipelines, warehouses, stockyards, ice plants, banking, insurance, milk, fuel, and packing.<sup>114</sup> For progressive legal and economic reformers, the legal concept of public utility was capable of justifying state economic controls ranging from statutory police regulation to administrative rate setting to outright public ownership of the means of production. Indeed, the public utility idea was so capable of further growth as to ultimately produce one of the most ambitious administrative and regional planning initiatives of the New Deal—the Tennessee Valley Authority.<sup>115</sup>

The roots of a law of public utilities, of course, extended well back into the early republic. Early American common law recognized a clear category of economic activities including innkeepers and ferry, cart, and coach companies as distinctly public in nature—common callings or common carriers subject to special restrictions and regulations in the public interest.<sup>116</sup> The idea received additional support from the wide variety of mixed public-private enterprises—turnpikes, canals, railroads—that fueled the antebellum transportation revolution.<sup>117</sup> But the legal history of public utilities only really exploded after the influential United States Supreme Court decision in *Munn v. Illinois* in 1877.<sup>118</sup> In that well-known case dealing with the constitutional legitimacy of so-called Granger laws, the Court upheld an Illinois statute regulating the rates for the storage of grain in the warehouses and elevators operating around the

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<sup>114</sup> Ben W. Lewis, *Public Utilities*, in 2 GOVERNMENT AND ECONOMIC LIFE: DEVELOPMENT AND CURRENT ISSUES OF AMERICAN PUBLIC POLICY 616 & n.1 (1940).

<sup>115</sup> DAVID E. LILIENTHAL, *TVA: DEMOCRACY ON THE MARCH* (5th ed. 1953); PHILIP SELZNIK, *TVA AND THE GRASS ROOTS: A STUDY OF POLITICS AND ORGANIZATION* (1980). For an excellent examination of the importance of public utilities and public works in the New Deal, see JASON SCOTT SMITH, *BUILDING NEW DEAL LIBERALISM: THE POLITICAL ECONOMY OF PUBLIC WORKS, 1933–1956* (2006).

<sup>116</sup> NOVAK, *supra* note 2, at 92 (1996); see also BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920* (2001) (analyzing the effects of railroads and street cars on the development of law and individual liberties); A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53 (2005) (discussing equality in public spaces and its relationship to the civil rights movement).

<sup>117</sup> See CARTER GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS 1800–1890* (1960); HARRY N. SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820–1861* (1969); George Rogers Taylor, *The Transportation Revolution, 1815–1860*, in 4 THE ECONOMIC HISTORY OF THE UNITED STATES (1951).

<sup>118</sup> 94 U.S. 113 (1877).

mouth of the Chicago River.<sup>119</sup> Chief Justice Morrison R. Waite sustained the rate regulation as a legitimate exercise of the state police power—the power of Illinois to legislate in the interest of public health, safety, morals, and welfare.<sup>120</sup> He did so by arguing that grain elevators (like ferries, railroads, bridges, and navigable waterways historically) were businesses “affected with a public interest” and consequently subject to extraordinary regulatory controls (including the legislative setting of rates and prices) for the common good.<sup>121</sup> Business “affected with a public interest” thus entered the legal-economic lexicon as a constitutional test for determining what economic activities could be considered public utilities subject to special state regulatory controls.<sup>122</sup>

The *Munn* decision has been the subject of extensive historical commentary, which need not be rehearsed here.<sup>123</sup> What is significant for the argument of this Essay, however, is the degree to which most historians agree that Chief Justice Waite’s opinion and particularly the line drawn around businesses affected with a public interest marked a typical constitutional limitation on the power of the American state and regulation that would last until the New Deal,<sup>124</sup> or at least until the equally important Depression Era milk-regulation case *Nebbia v. New York*.<sup>125</sup> Chief Justice Waite’s public interest doctrine, the argument goes, only succeeded in further insulating from police power regulation business not deemed affected with a public interest, especially as laissez-faire constitutionalism gained a firmer hold over late nineteenth-century jurisprudence. In depicting the triumph of laissez-faire in law, Max Lerner held that *Munn*, along with the *Slaughter-House Cases*,<sup>126</sup> stood out “in melancholy solitude as part of the ‘road not taken’ when two

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 130 (quoting Matthew Hale, *De Portibus Maris*, in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 78 (Dublin, Francis Hargrave ed., 1787)) (internal quotations marks omitted).

<sup>122</sup> Walton H. Hamilton, *Affection with Public Interest*, 39 YALE L.J. 1089 (1930); Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930).

<sup>123</sup> See, e.g., GEORGE H. MILLER, RAILROADS AND THE GRANGER LAWS (1971); Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in 5 PERSPECTIVES IN AMERICAN HISTORY 329 (Donald Fleming & Bernard Bailyn eds., 1971); Hamilton, *supra* note 122; McAllister, *supra* note 122; Molly Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789–1920*, 1980 WIS. L. REV. 1403.

<sup>124</sup> See, e.g., Lerner, *The Triumph of Laissez Faire*, *supra* note 11; Harry N. Scheiber, *Law and Political Institutions*, in 2 ENCYCLOPEDIA OF AMERICAN ECONOMIC HISTORY 487, 501 (Glenn Porter ed., 1980).

<sup>125</sup> 291 U.S. 502 (1934) (upholding a New York statute setting the price of milk and holding that private contracts can be regulated by the government when public need would mandate regulation).

<sup>126</sup> 83 U.S. (16 Wall.) 36 (1873).

paths diverged for the Supreme Court in the constitutional wood.”<sup>127</sup> Even Harry Scheiber, who along with his students has done more than anyone to illuminate the public regulatory power of the legal doctrines underlying Chief Justice Waite’s opinion in *Munn*, in the end concluded that the public interest doctrine proved to be as much a restraint on the power of the state as an enabling doctrine: “The *Munn* doctrine was fated to become, in the hands of an increasingly conservative Supreme Court, an equally effective shield against public regulation for business the court deemed strictly private.”<sup>128</sup>

This narrow reading of *Munn* together with a relative neglect of the role of public utility law in progressive reform very much conforms to a historiography that privileges laissez-faire, capture, and an uneasy state. But far from a “road not taken,” *Munn* was the very superhighway down which reformers drove a truckload of far-reaching experiments in the state regulation of new economic activity. And the ramifications went beyond economic matters alone. The very next time the phrase “affected with a public interest” was used in the Supreme Court was by Justice John Marshall Harlan in an attempt (for the time being unsuccessful) to widen the constitutional arena for civil rights regulation in the *Civil Rights Cases*:

The doctrines of *Munn v. Illinois* have never been modified by this court, and I am justified, upon the authority of that case, in saying that places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large. The law may therefore regulate, to some extent, the mode in which they shall be conducted, and, consequently, the public have rights in respect of such places, which may be vindicated by the law. It is consequently not a matter purely of private concern.<sup>129</sup>

Over the next fifty years, the Supreme Court with few exceptions used the phrase “affected with a public interest” to uphold a wide variety of extensive economic regulations. In *Western Turf Ass’n v. Greenberg*, the Court used the language to sustain a California statute regulating admission policies at “any opera house, theatre, melodeon, museum, circus, caravan, race-course, fair, or

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<sup>127</sup> Lerner, *The Triumph of Laissez-Faire*, *supra* note 11, at 159.

<sup>128</sup> Scheiber, *supra* note 124, at 501. For Scheiber’s definitive and influential study of *Munn*, see Scheiber, *supra* note 123. See also Selvin, *supra* note 122.

<sup>129</sup> 109 U.S. 3, 42 (1884) (Harlan, J., dissenting).

other place of public amusement or entertainment.”<sup>130</sup> State appellate courts used *Munn* to even greater regulatory effect.<sup>131</sup> Moreover, the Court made perfectly clear that the fact that a business or industry was not deemed to be legally affected with a public interest did not insulate that activity from ordinary police power regulations. In *Schmidinger v. City of Chicago* and *Holden v. Hardy* the Court upheld a detailed regulation of the sale of bread in Chicago and an eight-hour day for Utah workers in mines and smelters without ever even acknowledging counsel’s contention that those police power regulations required a special finding of business affected with a public interest.<sup>132</sup>

Contrary to some well-established interpretations regarding the relationship of law and economic regulation in the late nineteenth and early twentieth centuries, *Munn v. Illinois* did not mark the beginnings of an era of constitutional limitations or classical legal thought or a state capitulating to business. On the contrary, *Munn* inaugurated an extraordinary era of innovation in the social control of business, industry, and the market. It set in motion a panoply of new ideas like public utilities, rate regulation, price discrimination, fair rate of return, valuation, just price, and economic planning that dominated the legal and economic treatises of the era. It propelled an agenda of economic regulation and controls that culminated in some of the more far-reaching experiments in public and government ownership of economic enterprises in United States history.<sup>133</sup> Felix Frankfurter, from his perspective as one of the central legal advocates for the increased social control of business in the early twentieth century, understood exactly the implications of *Munn* and early public utilities law for the economic state-building project of progressivism. In an extraordinary essay on rate regulation

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<sup>130</sup> 204 U.S. 359, 362 (1907).

<sup>131</sup> For a broad survey of state appellate usage of *Munn* to uphold regulation (as well as an excellent presentation of the legal and historical rationale), see Justice Samuel Blatchford’s opinion in *Budd v. New York*, 143 U.S. 517, 528 (1892). Blatchford’s extensive opinion forced Justice David J. Brewer to protest in dissent that by this interpretation of *Munn*, all businesses could be subject to extensive regulation:

There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man’s property is beyond the touch of another’s welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest.

*Id.* at 549 (Brewer, J., dissenting).

<sup>132</sup> *Schmidinger v. City of Chicago*, 226 U.S. 578, 589–90 (1913); *Holden v. Hardy*, 169 U.S. 366, 366–67 (1898).

<sup>133</sup> For an excellent survey, see CARL D. THOMPSON, PUBLIC OWNERSHIP: A SURVEY OF PUBLIC ENTERPRISES, MUNICIPAL, STATE, AND FEDERAL, IN THE UNITED STATES AND ELSEWHERE (1925).

that he wrote with Henry Hart for the original *Encyclopaedia of the Social Sciences*, Frankfurter summed up the accomplishment:

The resultant contemporary separation of industry into businesses that are “public,” and hence susceptible to manifold forms of control, of which price supervision is one aspect, and all other businesses, which are private, is thus a break with history. But it has built itself into the structure of American thought and law; and while the line of division is a shifting one and incapable of withstanding the stress of economic dislocation, *its existence in the last half century made possible, within a selected field, a degree of experimentation in governmental direction of economic activity of vast import and beyond any historical parallel.*<sup>134</sup>

The public interest doctrine of *Munn* did not insulate private business from regulation. Rather, it created a new legal field of important economic activity that could be subjected to unprecedented state control from direct price regulation to outright public ownership.

#### CONCLUSION

Felix Frankfurter’s perspective on the historic nature of the level of state direction of the economy pioneered in the Progressive Era has to some extent been obscured by a powerful strain of exceptionalism in United States historiography. The main feature of that exceptionalism is a continued reliance on some relatively anachronistic ideas through which to tell the story of the emergence of modern America—ideas like individualism, self-interest, localism, classical liberalism, laissez-faire, the free market, the common law, statelessness, and voluntarism. This interpretive tendency has kept scholars from fully reckoning with the power of the American state and the role of government in all aspects of modern social and economic life. This tendency is certainly present in economic thought and some economic history. But the problem is particularly acute in history and legal history. The continued emphasis in legal history on judges, the common law, and the main categories of nineteenth-century private law, and the relative neglect of statutes, legislation, administrative law, executive rule making, and public regulation has left a substantial and important portion of modern American governmental

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<sup>134</sup> Felix Frankfurter & Henry M. Hart, Jr., *Rate Regulation*, in 13 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 104, 104 (1934) (emphasis added).

history in the dark.<sup>135</sup> Not a single aspect of American economic or social life has remained untouched by the legal output of the modern administrative and regulatory state, yet the historical emergence of that state remains relatively unaccounted for. The origins of the modern American regulatory and administrative state were firmly planted in legal and constitutional developments of the late nineteenth and early twentieth centuries. With respect to economic policy, those developments had little to do with ideas like *laissez-faire* constitutionalism. They owed far more to broad-based movement in law and political economy for the state control of American capitalism.

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<sup>135</sup> For signs of an important recent shift in legal scholarship, see CHLOE BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (5th ed. 2002); WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (rev. 2d ed. 2002).