Law and the Social Control of Business in the Progressive Era

William J. Novak
University of Chicago
American Bar Foundation

> "To hold the balance between the material and the human values is the oldest and the newest economic problem."
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> – Walton Hale Hamilton

This paper is part of a larger ongoing book project investigating the role of law in the creation of the modern American liberal state from 1877 through 1937. That project charts the decline of an early nineteenth-century world of local, common-law, self-government (a "well-regulated society") and the rise of a distinctly modern regulatory state in the United States rooted in three interlinked political-economic developments: the centralization of power; the individualization of right; and the constitutionalization of the rule of law.[1] The project has two overarching 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

[1] The early nineteenth-century governmental regime is the subject of my first book *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996). Two other articles highlight different aspects of the creation of the liberal state: Novak, "The Legal Origins of the Modern American State," in Austin Sarat, Bryant Garth, and Robert A. Kagan, eds., *Looking Back at Law's Century* (Ithaca: Cornell University Press, 2002), 249-286; and Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History*, ed. Meg Jacobs, William J. Novak, and Julian E. Zelizer, 85-119 (Princeton: Princeton University Press, 2003).

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.[2] We need to write histories accounting for *the* glaring, central fact of modern American history – the development of a global geo-political 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 a hindrance or an obstruction to) the growth of the American state, this project highlights law as a formative and forceful technology of public action – a distinctive source of expansive governmental authority in a critical period of United States political and economic development.[3]

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[2] Some important recent entries in this revisionist project include Richard R. John, "Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787-1835," *Studies in American Political Development*, 11 (Fall 1997): 347-380; Michele Landis Dauber, "The Sympathetic State," *Law and History Review* (forthcoming, 2005); Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Networks, Reputations and Policy Innovation in Executive Departments, 1862-1928* (Princeton: Princeton University Press, 2001); Christopher Howard, *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton: Princeton University Press, 1997); and David A. Moss, *When All Else Fails: Government as the Ultimate Risk Manager* (Cambridge: Harvard University Press, 2002).

[3] I owe the phrase 'technology of public action" to Dirk Hartog whose work on property 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* (Chapel Hill: University of North Carolina Press, 1983). We need to start viewing particular components of the rule of law that hitherto have been seen as indicators of a "weak," "fractured," and "limited" American state as, in fact, sources of tremendous state power. My favorite example is American federalism (decentralization of governing authority), almost universally portrayed in the literature as a constitutional barrier to the construction of a powerful state in the U.S. It seems to me that one of the great lessons of the twentieth century is the relative tenacity and power of decentralized, federated legal-political regimes -- enjoying greater legitimacy and a more thorough penetration of civil society -- compared to highly centralized and authoritarian ones. There is a distinct source of nation-state power in American legal doctrines and practices typically understood as limiting: from litigation to civil rights to private property.

In the context of these larger themes, this particular paper takes a new look at an old topic – the relationship of law and the regulation of the economy in the late nineteenth and early twentieth centuries. Of course, the topic of law and economic regulation in the Gilded Age and Progressive Era is not exactly terra verde. Historiographically-speaking, it resembles something more akin to a burnt-over district. So it is perhaps necessary at the outset to quickly stake out a few historiographical boundaries, so as to make room for any new claims.

I. ECONOMIC INTERPRETATIONS OF LAW AND REFORM

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 be able 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 (Charles Beard, J. Allen Smith, Frank Goodnow, Louis Boudin, and Gustavus Myers) anxious to impugn an American judiciary that they envisioned as an obstacle to the legislative and administrative experiments of reform.[4] The progressive critique of turn-of-the-century jurisprudence was as unsubtle as it was

[4] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913); Beard, *Contemporary American History, 1877-1913* (New York: Macmillan, 1914); J. Allen Smith, *The Growth and Decadence of Constitutional Government* (New York: Henry Holt and Co., 1930); Louis B. Boudin, *Government by Judiciary*, 2 vols. (New York: William Godwin, Inc., 1932); Frank J. Goodnow, *Social Reform and the Constitution* (New York: Macmillan, 1911); Gustavus Myers, *The History of the Supreme Court of the United States* (Chicago: C.H. Kerr & Company, 1912).

materialist. As Max Lerner summed up the reigning dogma, 'The real Constitution became under capitalism merely the modus operandi of business enterprise. . . . Capitalist enterprise in American generated . . . forces in government and in the underlying classes hostile to capitalist 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."[5] What is surprising is that despite a rash of critical revisionism dating back to the late 1960s (including the work of Alan Jones, Charles McCurdy, Michael Les Benedict, Mel Urofsky, Barry Cushman, and Ted White),[6] laissez-faire constitutionalism remains alive and kicking – the dominant discourse in Howard Gillman's, *The Constitution Besieged*, Bill Wiecek's, *The Lost World of Classical Legal Thought*, and Owen Fiss's, *Troubled Beginnings of the Modern State* as well as the general histories of Robert McCloskey revised by Sandy Levinson and Kelly and Harbison revised by Herman Belz.[7]

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[5] Max Lerner, "The Supreme Court and American Capitalism," *Yale Law Journal* 52 (1933): 668-701, 671-672. See also, Max Lerner, "The Triumph of Laissez-Faire," in *Paths of American Thought*, ed. Arthur M. Schlesinger, Jr. and Morton White, 147-166 (Boston: Houghton Mifflin Company, 1970). For the best critical evaluation of progressive historiography, see Richard Hofstadter, *The Progressive Historians: Turner, Beard, Parrington* (Chicago: University of Chicago Press, 1968).

[6] Alan Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration," *Journal of American History* 53 (1967): 751-771; Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of 'Laissez-faire' Constitutionalism, 1863-1897," *Journal of American History* 61 (1975): 970-1005; McCurdy, "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," *Business History Review* 53 (1979): 304-342; Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (1985): 293-331; Melvin I. Urofsky, "State Courts and Protective Labor Legislation During the Progressive Era: A Reevaluation," *Journal of American History* 72 (1985): 63-91; Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998); G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000).

[7] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993); William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (New York: Oxford University Press, 1998); Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910 (*New York: Macmillan, 1993); Robert G. McCloskey, *The American Supreme Court*, 2d ed., rev. Sanford Levinson (Chicago: University of Chicago Press, 1994); Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, 6th ed. (New York: W.W. Norton & Company, 1983).

The second important interpretation of law and economic regulation in this period goes by the name of the "capture thesis" – an 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), the regulation served not the "public interest" professed by the reformers, but the narrower interests of the regulated businesses themselves. As Chicago-school economist George Stigler summed up the thesis for his unlikely intellectual compatriots in history (Gabriel Kolko, James Weinstein, and Martin Sklar): "As a rule, regulation is *acquired by the industry* and is designed and operated primarily for its benefit."[8] In the hands of the "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 Weinstein put it, "Businessmen 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."[9] Caught between such twin assaults of left and right, the "public interest" or "public service" theory of regulation and administration articulated by progressive reformers

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[8] George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2 (1971): 3-21, 3; Richard Posner, "Theories of Economic Regulation," *Bell Journal of Economics and Management Science* 4 (1974): 335-358; Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics* 19 (1976): 211-240.

[9] James Weinstein, *The Corporate Ideal in the Liberal State, 1900-1918* (Boston: Beacon Press, 1968), ix-x; Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago: Quadrangle Books, 1967); Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge: Cambridge University Press, 1988). As Gerald Berk summarized this school of thought in an excellent review essay: "Corporate 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." Berk, "Corporate Liberalism Reconsidered: A Review Essay," *Journal of Policy History* 3 (1991): 70-84, 70-71.

themselves is often treated as no more than a pipe-dream by contemporary social scientists.[10]

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 socio-economic challenges of modern industrialism.[11] 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 governing at all"), the "weakened spring" thesis has been only reinforced more recently by an 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" to Theda Skocpol's (and her many students') voluminous chartings of the comparative laggardness of the American social welfare state.[12] The list of odd and

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[10] Two classic statements of the public interest theory are Felix Frankfurter, *The Public and Its Government* (New Haven: Yale University Press, 1930) and James M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938). For some signs of a renewal of interest in "public interest," see Martha Minow, *Partners not Rivals: Privatization and the Public Good* (Boston: Beacon Press, 2002); David A. Moss and Michael R. Fein, "Radio Regulation Revisited: Coase, the FCC, and the Public Interest." *Journal of Policy History,* 15(2003); Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: The New Press, 2004); and Jody Freeman, "Extending Public Law Norms Through Privatization," *Harvard Law Review*, 16 (2003), 1285-1352.

[11] Wallace D. Farnham, "The Weakened Spring of Government: A Study in Nineteenth-Century American History," *American Historical Review* 68 (1963): 662-680; M. Ostrogorski, *Democracy and the Organization of Political Parties*, 2 vols.(New York: Macmillan, 1902).

[12] Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Harvard University Press, 1992). For an excellent overview and bibliography of American Political Development, see Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge:

strained adjectives used to describe the modern American state is illuminating. The American state is "uneasy" for Barry Karl, "reluctant" for Bruce Jansson, "divided" for Jacob Hacker, "hidden" for Christopher Howard, "flawed & inept" for Farnham, and "warped" for Ostrogorski. [13]

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, 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 exposes of the muckraking journalists Ida Tarbell, Lincoln Steffens, and Ray Stannard Baker who gathered around *McClure's Magazine*, 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

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Cambridge University Press, 2004).

[13] Barry D. Karl, *The Uneasy State: The United States from 1915 to 1945* (Chicago: University of Chicago Press, 1983); Bruce S. Jansson, *The Reluctant Welfare State: A History of American Social Welfare Policies* (Belmont, Calif.: Wadsworth, 1988); Jacob S. Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States* (Cambridge: Cambridge University Press, 2002); Howard, *Hidden Welfare State*.

public life – at the very origin of progressive reform.[14] 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 politicos (to use Matthew Josephson's evocative terms).[15] What was new at the turn of the century was an awareness of the 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* (1871) to Frank Norris's *McTeague*, *The Octopus*, and *The Pit* (1899-1903).[16] "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.[17] As Thorstein Veblen concluded in "Business Principles in Law and

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[14] Richard L. McCormick, "The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism," *American Historical Review* 86 (1981): 247–74.

[15] Matthew Josephson, *The Robber Barons: The Great American Capitalists, 1861-1901* (New York: Harcourt, Brace and Company, 1934); Josephson, *The Politicos, 1865-1896* (New York: Harcourt, Brace and Company, 1938).

[16] Charles Francis Adams, Jr. and Henry Adams, *Chapters of Erie* (Boston: J.R.Osgood and Company, 1871); Frank Norris, *McTeague: A Story of San Francisco* (New York: Doubleday & McClure Co., 1899); Norris, *The Octopus: A Story of California* (New York: Doubleday, Page, & Co., 1901); Norris, *The Pit: A Story of Chicago* (New York: Doubleday, Page, & Co., 1903).

[17] 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*." *Lochner v. New York*, 198 U.S. 45 (1905).

Politics," "Constitutional government has, in the main, become a department of the business organization and is guided by the advice of business men."[18]

There is no question that progressives emphasized the theme of corruption as a prelude to and a basis for their own reform proposals. There is also no doubt that the peak years of muckraking disclosure from 1904 to 1908 were accompanied by a wave of legislative activity specifically designed to curb the influence of private interest and private money in American politics, including federal and state corrupt practices laws regulating campaign contributions and the solicitation of funds from corporations, laws regulating legislative lobbying, laws prohibiting free transportation passes, and political reforms like direct primaries.[19] The question remains, however, whether or not to believe the progressive claims about corruption as a principal motivation. How central was the problem of antecedent corruption *per se* to the full progressive legislative, judicial, and administrative agenda? Admitting the central role of muckraking in producing campaign finance, election, and political process regulations in the early twentieth century, does the same logic explain direct regulations of economic activity like railroad rate regulation and antitrust – regulations with much earlier genealogies? Moreover, beyond the increased regulation of the political process itself, in what direction did the presence of corruption point reformers? For every progressive like Frank Goodnow advocating increased governmental regulation and professional administration as an antidote to the "corrupt and partial" administration of justice, there were a myriad of commentators

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[18] Thorstein Veblen, *The Theory of Business Enterprise* (New York: Charles Scribner's Sons, 1904), 287.

[19] McCormick, "Business Corrupts Politics," 266-267; Earl Ray Sikes, *State and Federal Corrupt Practices Legislation* (Durham: Duke University Press, 1928); Helen M. Rocca, *Corrupt Practices Legislation* (Washington: National League of Women Voters, 1928).

drawing the opposite conclusion.[20] As early as 1873, E. L. Godkin concluded from the Credit Mobilier scandal that the only remedy was simple: "Government must get out of the 'protective' business and the 'subsidy' business and the 'improvement' and the 'development' business. It must let trade, and commerce, and manufactures, and steamboats, and railroads and telegraphs alone. It cannot touch them without breeding corruption."[21] Laissez-faire as a natural solution to corruption? Godkin's sentiments echoed an older Jacksonian conclusion that corruption was not to be remedied by increased governmental regulation of private economic life – on the contrary, it was caused by the intensive government-business partnerships that defined a highly interventionist early American political economy.[22]

Fortunately, however, the laissez-faire, regulatory capture, weak state, and private 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

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[20] Frank J. Goodnow, *Politics and Administration: A Study in Government* (New York: Macmillan, 1900): 13-14.

[21] E.L. Godkin, "The Moral of the Credit Mobilier Scandal," *Nation* 16 (1873): 68.

[22] The best discussion of this earlier nineteenth-century reckoning with economic regulation and corruption is contained in the so-called "commonwealth studies." Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (Cambridge: Harvard University Press, 1947); Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge: Harvard University Press, 1948); Carter Goodrich, *Government Promotion of American Canals and Railroads, 1800-1890* (New York: Columbia University Press, 1960); Robert A. Lively, "The American System: A Review Article," *Business History Review,* 29 (1955), 81-96; Harry N. Scheiber, "Government and the Economy: Studies of the 'Commonwealth' Policy in Nineteenth-Century America," *Journal of Interdisciplinary History*, 3 (1972), 135-51.

American Phenomenon."[23] Chandler emphasized not laissez-faire, not capture, not a crabbed and laggard state, but rather a distinct adversarial relationship between an anything but insignificant State and Capital, an anything but deferential Law and Business. Alfred DuPont Chandler cited the opinion of a former chairman at DuPont: "Why is it that I and my American colleagues are constantly being 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?" Chandler accurately observed that the "regulation of business became the paramount domestic issue in American politics in the early 20th century." Citing the Interstate Commerce Act, the Sherman Anti-Trust 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.[24] 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 once noted, "The land of the trust was also the land of antitrust."[25]

This dissonance between (the irreconcilability of) Chandler and the other three interpretations of the origins of modern American political economy opens up an

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[23] Alfred D. Chandler, Jr., "Government Versus Business: An American Phenomenon," in *The Essential Alfred Chandler: Essays Toward a Historical Theory of Big Business*, ed. Thomas K. McCraw, 425-431 (Boston: Harvard Business School Press, 1988). See also Thomas K. McCraw, "Business and Government: The Origins of the Adversary Relationship." *California Management Review* 26 (1984): 33-52. David Vogel, "Why Businessmen Mistrust Their State: The Political Consciousness of American Corporate Executives," *British Journal of Political Science* 8 (1978): 45-78.

[24] Chandler, "Government Versus Business," 425, 427.

[25] Morton Keller, "The Pluralist State: American Economic Regulation in Comparative Perspective, 1900-1930," in *Regulation in Perspective: Historical Essays*, ed. Thomas K. McCraw, 56-94 (Cambridge: Harvard University Press, 1981), 65.

intriguing avenue for inquiry. What could the business historians and the laissez-faire constitutionalists be looking at to give them such diametrically opposite interpretations of the relationship of law, regulation, and economy in this formative era?

In the *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 which "annex[ed] the principles of laissez-faire capitalism to the Constitution and put them beyond the reach of state legislative power."[26] The five cases are wholly familiar to students of constitutional history: *Wynehamer v. New York* (NY 1856); *In Re Jacobs* (NY 1885); *Godcharles v. Wigeman* (Pa. 1886); *Ritchie v. People* (Ill. 1895); and *Lochner v. New York* (U.S. 1905).[27]

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 about the economic representativeness of these cases: liquor prohibition (*Wynehamer*), cigar rolling in tenements (*Jacobs*), a nail mill *(Godcharles*), hours of women in clothing manufactories (*Ritchie*); and the hours of bakers, again, in tenements (*Lochner*). What is not represented by such cases? Nothing less than the dominant sectors of the late nineteenth and early twentieth century American economy: 1) Transportation & Shipping (railroads, highways, grain elevators, ports, streetcars); 2) Communications (telegraph and telephone); 3) Energy (electricity, water, coal, and

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[26] Lawrence M. Friedman, *A History of American Law*, 2d ed. (New York: Simon and Schuster, 1985), 358-360; Edward S. Corwin, *The Twilight of the Supreme Court: A History of Our Constitutional Theory* (New Haven: Yale University Press, 1934), 78.

[27] *Wynehamer v. New York*, 13 N.Y. 378 (1856); *In Re Jacobs*, 98 N.Y. 98 (1885); Godcharles v. Wigeman , 113 Pa. 431 (Pa. 1886); *Ritchie v. People*, 155 Ill. 98 (1895); and *Lochner v. New York* (1905).

petroleum); and 4) Money & Banking. What do we know about these areas of economic activity? They were the focus of the kinds of intense and unprecedented regulations that led Alfred Chandler to conclude that the essential relationship of government and business in this period was adversarial. Indeed, to get ahead of myself a bit, and deliver the punch line near the middle of the paper, these were precisely the major sectors of the economy that progressive lawyers, economists, reformers, and legislators were busily redefining as fundamentally public in nature – public utilities and public service corporations – subject to interventions ranging from regulation to outright public or municipal 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. (Bruce Wyman generated a far more extensive categorization in his two volume, 1500 page, 5000 case treatise on *Public Service Corporations*).[28] 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.

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[28] Rexford G. Tugwell, *The Economic Basis of Public Interest* (1922; New York: August M. Kelley, 1968), 95; Bruce Wyman, *The Special Law Governing Public Service Corporations and All Others Engaged in Public Employment*, 2 vols. (New York: Baker, Voorhis & Co., 1911)

13. Banking.
14. Businesses of preparing for market and dealing in food, clothing, and fuel.

But though Tugwell's and Wyman's lists do seem to make understandable Chandler's charges of aggressive American regulation of business (while rendering illusory claims about laissez-faire and weakened government), my own conclusions about the relationship of law and the economy at the turn of the century do not wholly conform to any of the four dominant interpretations. Rather, taking cues from the work of Morton Keller, Harry Scheiber, Louis Galambos, and Douglass North (and that of their students), I'd like to insist first on the overwhelming force of what Claudia Goldin and Gary Libecap dubbed a distinctly "Regulated Economy" in this period.[29] Secondly, drawing on some of the theoretical work of the postwar Frankfurt School, I'd like to argue that this regulation marks 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 (as in the first three interpretations), are themselves the subjects of a conscious and consistent legal and political manipulation as never before. Friedrich Pollack called this realignment "State Capitalism," though Andrew Shonfield's moniker "Modern Capitalism," highlighting a "changing balance of public and private power" is perhaps even more applicable to the American experience.[30] Pollack captured the essence of the transformation when he argued, "The replacement of economic means

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[29] Claudia Goldin and Gary D. Libecap, eds., *The Regulated Economy: A Historical Approach to Political Economy* (Chicago: University of Chicago Press, 1994).

[30] Friedrich Pollock, "State Capitalism: Its Possibilities and Limitations," in *The Essential Frankfurt School Reader*, ed. Andrew Arato and Eike Gebhardt, 71-94 (New York: Continuum, 1994), 78; Andrew Shonfield, *Modern Capitalism: The Changing Balance of Public and Private Power* (New York: Oxford University Press, 1965). Shonfield's analysis is particularly right on the mark with regards to the 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." Shonfield, *Modern Capitalism*, 301.

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."[31] Legal and constitutional history's obsession with classical and orthodox legal doctrines like laissez-faire constitutionalism, class legislation, and the public-private distinction, and economic formulas of regulatory capture, business self-interest, and corporate liberalism has to some extent obscured this more fundamental shift from economic to fundamentally political priorities.

In the period from 1877 to 1937, a new liberal state was created in the United States. Reformers, jurists, and legislators consciously constructed in law and politics 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 statebuilding project relied fundamentally on law, and it was anything but reflective of weakness, backwardness, or a governmental willingness to "leave alone" – in Farnham's words, "to barely govern." Corruption was a compelling rhetoric for reform and an effective political wedge opening up possibilities for radical legal and political change. But the problems of political economy of this period and the extent of the new state solutions proposed and

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[31] Pollack; "State Capitalism," 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." Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975), 33.

enacted by progressive reformers went well beyond a concern with corruption, its inefficiencies, and its amelioration.

II. TOWARD THE SOCIAL CONTROL OF THE MARKET

Evidence for the deliberate creation of the American liberal state is not hard to find in the late nineteenth and early twentieth centuries, from the formal constitutional redefinition of national citizenship in the Fourteenth Amendment immediately after the Civil War to the more subtle effort to use national spending and taxing powers to counterfeit a federal police power through the 1930s. For the purposes of this paper focused on economic policy, the task of creation was consciously advanced by an extraordinary group of economic and law writers who explicitly and consistently advocated new legal and political controls over the development of the national economy. Key figures and formative texts in this political-economic revolution included: Henry Carter Adams ("Relation of the State to Industrial Action" and "Economics and Jurisprudence"); Thorstein Veblen (*Theory of Business Enterprise*); Richard T. Ely (*Property and Contract in their Relations to the Distribution of Wealth*); John R. Commons *(Legal Foundations of Capitalism*); John Maurice Clark (*Social Control of Business*); Bruce Wyman (*Control of the Market*); Samuel P. Orth (*Relation of Government to Property and Industry*); Robert Lee Hale (*Freedom Through Law*); Walton Hale Hamilton (*The Politics of Industry*); and Rexford G. Tugwell (*The Economic Basis of Public Interest*).[32] Many in this group of political economists are wholly familiar

[32]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: Augustus M. Kelley, 1969); Thorstein Veblen, *Theory of Business Enterprise* (New York: Charles Scribner's Sons, 1904); Richard T. Ely, *Property and Contract in their Relations to the Distribution of Wealth*, 2 vols. (New York: The Macmillan Company, 1914); John R. Commons, *Legal Foundations of Capitalism* (New York:

figures in economic and legal historiography. Barbara Fried dubbed some of them "the first law and economics movement."[33] 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 – 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.[34]

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

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The Macmillan Company, 1924); John Maurice Clark, *Social Control of Business* (Chicago: University of Chicago Press, 1926); Bruce Wyman, *Control of the Market: A Legal Solution of the Trust Problem* (New York: Moffat, Yard and Company, 1911); Samuel P. Orth, ed., *Readings on the Relation of Government to Property and Industry* (Boston: Atheneum Press, 1915); Robert Lee Hale, *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952); Walton Hale Hamilton, *The Politics of Industry* (New York: Alfred A. Knopf, 1957); and Rexford G. Tugwell, *The Economic Basis of Public Interest* (Menasha, Wisc.: The Collegiate Press, 1922).

[33] Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Cambridge: Harvard University Press, 1998).

[34] Ernst Freund's most important works were *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan & Company, 1904); and *Administrative Powers over Persons and Property* (Chicago: University of Chicago Press, 1928). Frank J. Goodnow's more general statements included *Politics and Administration*; *Social Reform and the Constitution* (New York: Macmillan, 1911); and *Principles of Constitutional Government* (New York: Harper & Brothers, 1916).

democracy."[35] But in the extended progressive struggle with the problem of monopoly through the late nineteenth and into the twentieth century, business increasingly came to be seen 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 itself with grave implications for what legal historian Willard Hurst called "the balance of power." Hurst understood the "balance of power" as a first-order principle of American constitutionalism. 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."[36]

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

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[35] Henry Carter Adams, "Relation of the State to Industrial Action" (1887), in *Two Essays by Henry Carter Adams*, ed. Joseph Dorfman, 57-133 (New York: Augustus M. Kelley, 1969), 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).

[36] James Willard Hurst, "Problems of Legitimacy in the Contemporary Legal Order," *Oklahoma Law Review* 24 (1971): 224-238, 225. 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," *Law and History Review* 18 (2000): 97-145.

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. 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." [37] 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, 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 progressives authorities, required new legal and legislative restraints – an expansion of the economic police power of the state setting up government as a countervailing regulatory force to the power of business and organization in American socio-economic 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 seeing within private economic

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[37] Robert L. Hale, *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952); Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly* 38 (1923): 470-494, 470.

organizations 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."[38] By the time one gets to the analyses of John Maurice Clark or Walton Hale Hamilton, "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. Going 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, administrative as well as academic (the National Bureau of Economic Research, for example), for investigating and controlling American economic life. 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 on-going administrative

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[38] 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 Bruce Wyman, *Control of the Market: A Legal Solution of the Trust Problem* (New York: Moffat, Yard and Company, 1911); to John Maurice Clark, *Social Control of Business* (Chicago: University of Chicago Press, 1926); to 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: Harper & Brothers, 1930); to The American Economic Association, *Readings in the Social Control of Industry* (Philadelphia: The Blakiston Company, 1942).

governance and economic planning. The state here was envisioned not as an economic policeman or even as a countervailing force to private economic power, but as full, interactive partner in a legal-economic vision of modern state capitalism.[39]

The progressive movement for the social control of business built directly on the influential sociological work on general social control of E.A. Ross and Charles Horton Cooley.[40] The language of socialization that permeated so much progressive reform owed more to these theories of modern social change than the political agenda of socialism.[41] The essence of these theories held that *fin-de-siecle* 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 work on "Gemeinschaft 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." Economic and

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[39] The chart in *Appendix 1* attempts to provide a schematic overview of the intellectual movement towards the social control of business.

[40] Edward Alsworth Ross, *Social Control: A Survey of the Foundations of Order* (New York: The Macmillan Company, 1901); Charles Horton Cooley, *Social Organization: A Study of the Larger Mind* (New York: Charles Scribner's Sons, 1909); Helen Everett, "Social Control," in *Encyclopaedia of the Social Sciences*, 15 vols., IV: 344-349 (New York: The Macmillan Company, 1930). 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 and Francis E. Merril, *Social Disorganization* (New York: Harper & Brothers Publishers, 1934).

[41] For an excellent discussion of the role of "socialization" in law, see Michael Willrich, *City of Courts : Socializing Justice in Progressive Era Chicago* (New York: Cambridge University Press, 2003).

technological change were crucial harbingers of this transformation. As Clark recognized, "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." And a particularly acute sense of crisis, uncertainty, and fear surrounded thinking about the economic consequences of this revolution. Clark talked explicitly of the potential for "bloody social warfare" and "catastrophe" 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."[42]

From this perspective, corruption and the problem of monopoly were primarily indicators of a much larger socio-economic 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 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." 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, John Maurice Clark provided an excellent overview of the vision as well as the accomplishments of the movement circa 1922:

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[42] Ross, *Social Control*, 432-433, 435; Clark, *Social Control of Business*, 4.

> "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, have all 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 more informed and enlightened, but it cannot be stopped, and no one group can dictate its course."[43]

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 one of the main "Materials for the Study of Business" in the School of Commerce and Administration at the University of Chicago.

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 (yet 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

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[43] Clark, 4. [Milton Handler list of "unfair competition" regulations].

limitations of a veritable handful of state and federal supreme court cases, the overwhelming story of the police power from 1877 to 1937 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 1700 new statutes per session; and states like New York and South Carolina over 1000. By even the most conservative estimates, 1/3 of these new statutes were regulatory in nature. Again, taking the most conservative measures, over 1000 police power cases reached the U.S. Supreme Court over this period and almost 500 in each state supreme court. And as every historian who has carefully examined this output since Charles Warren has concluded, the vast majority of this regulatory legislation was readily sustained.[44] Something of the efficacy of such controls on economic activity (which doesn't include private litigation or administrative actions) is suggested when AT&T vice president Charles DuBois urged 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'" – to escape some of the onerous corporate burden of local and state regulations.[45] 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 (a bastion of liberty

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[44] Charles Warren, "The Progressiveness of the United States Supreme Court," *Columbia Law Review* 13 (1913): 294-313, 294; Charles Warren, "A Bulwark to the State Police Power – The United States Supreme Court," *Columbia Law Review* 13 (1913), 667-695, 667. Warren's famously concluded that the vast bulk of state regulatory legislation passed between 1887 and 1911 was upheld by the courts: "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," 695.

[45] Richard R. John, "Making Connections: The Political Culture of Telephony in the United States during the Progressive Era" (unpublished manuscript), 14.

and free enterprise?) 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.[46]

Now, these illustrations are nothing more than that; and a convincing counter-argument 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 policymaking can suggest some of the interpretive possibilities in reexamining economic regulation in the progressive era with an eye towards the active statebuilding project outlined here.

III. BUSINESS AFFECTED WITH A PUBLIC INTEREST

One of the most important developments in the regulation of economic activity in the late nineteenth and early twentieth centuries 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") to be a crucial battleground in the development of the American regulatory and administrative state. 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, progressives viewed the law of public utilities as a vibrant and expansive arena for experimenting with unprecedented governmental control

[46] *Sterling v. Constantin*, 287 U.S. 378 (1932).

over business, industry, and the market. While today most would restrict the idea of public utility to a couple of closely circumscribed industries (water, electricity, and gas), in the early twentieth century, the utility idea affected urban transportation, railroads, motor bus and truck, telecommunications, radio, pipe lines, warehouses, stockyards, ice plants, banking, insurance, milk, fuel, and packing.[47] It was an idea so capable of further growth as to produce one of the most ambitious administrative and regional planning initiatives of the New Deal – the Tennessee Valley Authority.

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.[48] The idea received additional support from the wide variety of mixed public-private enterprises – turnpikes, canals, railroads – that fueled the antebellum transportation revolution.[49] But the legal history of public utilities only really exploded after the influential United States Supreme Court decision in *Munn v. Illinois* in 1876. 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

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[47] Ben W. Lewis, "Public Utilities," in *Government and Economic Life: Development and Current Issues of American Public Policy*, ed. Leverett S. Lyon and Victor Abramson, 2 vols., II: 616-745 (Washington, D.C.: The Brookings Institution, 1940), 616.

[48] Novak, *People's Welfare*, 92; Barbara Y. Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920* (New York: Cambridge University Press, 2001); Andrew K. Sandoval-Strausz, "Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America," *Law and History Review* (forthcoming, 2005).

[49] George Rogers Taylor, *The Transportation Revolution, 1815-1860* (New York: Rinehart, 1951); Carter Goodrich, *Government Promotion of American Canals and Railroads, 1800-1890* (New York: Columbia University Press, 1960); Harry N. Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy, 1820-1861* (Athens: Ohio University Press, 1968).

warehouses and elevators operating around the mouth of the Chicago river. 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. 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.[50] 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.

The *Munn* decision has been the subject of extensive historical commentary which need not be rehearsed here. What is significant for the argument of this paper, however, is the degree to which most historians agree that 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, or at least until the equally important depression-era milk regulation case *Nebbia v. New York* (1934).[51] Waite's public interest doctrine, the argument goes, only succeeded in further insulating business not deemed "affected with a public interest" from police power regulation, 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 v. Illinois* along with the *Slaughterhouse Cases* (1873) stood out

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[50] *Munn v. Illinois*, 94 U.S. 113 (1876).

[51] *Nebbia v. New York*, 291 U.S. 502 (1934).

'in melancholy solitude as part of the 'road not taken' when two paths diverged for the Supreme Court in the constitutional wood."[52] Even Harry Scheiber, who along with his students has done more than anyone to illuminate the public regulatory power of the legal doctrines underlying 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."[53]

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. Far from being 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 it was uttered by Justice John Marshall Harlan in an attempt to widen the constitutional arena for civil rights regulation in the *Civil Rights Cases* (1883):

> 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

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[52] Lerner, "Triumph of Laissez-Faire," 159.

[53] Harry N. Scheiber, "Law and Political Institutions," in *Encyclopedia of American Economic History: Studies of the Principal Movements and Ideas*, ed. Glenn Porter, 3 vols., II: 487-508 (New York: Charles Scribner's Sons, 1980), 501-502. For Scheiber's definitive and influential study of *Munn*, see "The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts," *Perspectives in American History* 5 (1971): 327-402. Also see Molly Selvin, "The Public Trust Doctrine in American Law and Economic Policy," *Wisconsin Law Review* 1980 (1980): 1403-1442.

> 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.[54]

Over the next 50 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 Association v. Greenberg* (1907), 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 other place of public amusement or entertainment."[55] State appellate courts used *Munn* to even greater regulatory effect.[56] Moreover, the Court made perfectly clear that the fact that a business or industry was not found to be legally "affected with a public interest" did not insulate that activity from ordinary police power regulations. In *Schmidinger v. Chicago* (1913) and *Holden v. Hardy* (1898) the Court upheld a detailed regulation of the sale of bread in Chicago and an 8-hour day for Utah workers in mines and smelters without ever taking up counsels' contention that those police power regulations required a special finding of business "affected with a public interest."[57]

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[54] *Civil Rights Cases*, 109 U.S. 3 (1883), 42.

[55] *Western Turf Association v. Greenberg*, 204 U.S. 359 (1907), 362.

[56] 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 (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 (549).

[57] *Schmidinger v. Chicago*, 226 U.S. 578 (1913); *Holden v. Hardy*, 169 U.S. 366 (1898).

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.[58] 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 statebuilding project of progressivism. In an extraordinary essay on "Rate Regulation" 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 has made possible, within a selected field,*

[58] 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* (New York: Thomas Y. Crowell Company, 1925).

> *a degree of experimentation in governmental direction of economic activity of vast import and beyond any historical parallel.*[59]

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 there in economic thought and some economic history. But the problem is particularly acute in legal scholarship and legal history. The continued emphasis in legal scholarship on judges, the common law. and the main categories of nineteenth-century private law (property, contract, and tort) 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

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[59] Felix Frankfurter and Henry M. Hart, Jr., "Rate Regulation" in *Encyclopedia of the Social Sciences*, 15 vols., XIII: 104-112 (New York: The Macmillan Company,k 1934), 104 (emphasis added).

governmental history in the dark.[60] 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 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 century. 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 social control of business.

[60] For signs of an important recent shift in legal scholarship, see Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, and Matthew L. Spitzer, eds., *Administrative Law and Regulatory Policy*, 5th ed. (New York: Aspen Law & Business, 2002); William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, eds., *Legislation: Statutes and the Creation of Public Policy*, 3rd ed. (St. Paul: West Group, 2001); Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, eds., *The Law of Democracy: Legal Structure of the Political Process*, 2d ed. (New York: Foundation Press, 2002); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994).

APPENDIX 1

"From the 'Discovery that Business Corrupts Politics' to the 'Social Control of the Market'"

NBER Conference
"Corruption and Reform"

	PHASE 1 BUSINESS CORRUPTS POLITICS	PHASE 2 PROBLEM OF MONOPOLY	PHASE 3 SOCIAL CONTROL OF THE MARKET
DATES	1880-1900	1900-1917	1917-1937
LEGAL-ECONOMIC WRITERS	Veblen H.C. Adams	Ely Commons	Hamilton Clark Tugwell
ILLUSTRATIVE TEXT	Veblen, "Business Principles in Law and Politics"	Bruce Wyman, "Control of the Market"	Clark, "The Socializing of Economics"
NATURE OF CORRUPTION	Stealing, Fraud; Private Industry Corrupting Public Law and Politics	Imbalance of Power; Problem of Private Governing Power	On-Going Structural Problems in Business, the Market, & Capitalism
CONCEPTION OF LAW	Common Law	Statutory Law; Police Power	Administrative Law
CONCEPTION OF STATE	Republican Nightwatchman State State as Umpire	Liberal Regulatory State State as Countervailing Power	Social-Welfare Administrative State State Capitalism
PROTOTYPICAL REFORM	Ultra Vires Corrupt Practices Acts	Antitrust Rate Regulation Wages & Hours	Public Ownership of Utilities NRA