

American Antimonopoly and the Rise of Regulated Industries Law

William J. Novak

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Introduction

Between the end of Reconstruction and the start of the New Deal, the American system of public regulation was transformed with major implications for the modern American economy.¹ The triggering mechanism for this modern transformation of law and economics was an age-old American preoccupation – antimonopoly. Amid a wave of unprecedented industrial consolidation and corporate concentration, a resurgent American antimonopoly tradition galvanized a broader movement for the “social control” of corporations, trusts, and American business writ large. The subsequent emergence of regulated industries law aimed to create a more public, accountable, and democratic American political economy.

The entering wedge of this regulatory revolution was the invention of public utility law – a history recounted in an earlier Tobin Project volume on *Corporations and American Democracy*.² The achievements of the progressive public utility movement were real and significant. A burgeoning law of public service corporations generalized concepts of public interest, public necessity, duty-to-serve, and non-discrimination, filling the gap in corporate

¹ For a full history of this transformation, see William J. Novak, *New Democracy: The Creation of the Modern American State* (Cambridge, MA: Harvard University Press, 2022).

² William J. Novak, “The Public Utility Idea and the Origins of Modern Business Regulation,” in *The Corporation and American Democracy*, ed. Naomi Lamoreaux and William J. Novak (Cambridge, MA: Harvard University Press, 2017), 139-176.

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regulation created after the decline of 19th century common law and state charter controls.³ The public utility idea inaugurated a series of bold experiments in corporate and industrial regulation that culminated in comprehensive, commission-based oversight and control. Public utilities law *was* antimonopoly law. As Alfred Chandler argued, railroads were “the nation’s first big business,” ushering in a large-scale transformation in corporate organization, finance, and management.⁴ In turn, railroad and utility regulation cast the die for the subsequent control of monopolies both natural as well as unnatural.

But as popular concern about corporate power, economic coercion, and industrial injustice moved beyond the particular cases of common carriers and public utilities like railroads and grain elevators, the antimonopoly tradition expanded again to engage an even wider swath of American business, commerce, and industry. When the original innovations of public utility merged with this broadened antimonopoly impulse, a modern law of regulated industries was born. From the state railroad commissions to the Interstate Commerce Commission; from the U.S. Industrial Commission to the Bureau of Corporations; from the Sherman Antitrust Act to the Federal Trade Commission; from state public utility commissions to the Federal Radio

³ For a quick indicator of the vast purview of the early 20th century public utility concept, see Bruce Wyman’s 2 volume, 1,500 page, 5,000 case treatise. Wyman, *The Special Law Governing Public Service Corporations and All Others Engaged in Public Employment*, 2 vols. (New York: Baker, Voorhis & Co., 1911). On special charters and the long road to more general laws, see Eric Hilt, “Early American Corporations and the State,” and Jessica Hennessey and John Wallis, “Corporations and Organizations in the United States After 1840” in Lamoreaux and Novak, *Corporations and American Democracy*, 37-73, 74-108. Also see, Naomi R. Lamoreaux and John Joseph Wallis, “Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy,” *Journal of the Early Republic* 41, no. 3 (2021): 403-433.

⁴ Alfred D. Chandler, ed., *The Railroads: The Nation’s First Big Business* (New York: Harcourt, Brace & World, 1965).

Commission and the Federal Power Commission, the period between Reconstruction and the New Deal witnessed the rise of a new political-economic agenda centered around the administrative and regulatory control of an ascendant monopoly capitalism.

Arthur T. Hadley was among the first to build out from the special case of *Railroad Transportation* (1885) to the more general problem of corporate concentration in what he termed “industrial monopolies.” Hadley’s baseline was the original public, state-created regime of “legal” or “natural” monopolies, including transportation service, postal service, and municipal utilities – all of which generated “most fruitful experiments in legislative control.”⁵ But by 1886, he noted with alarm the new problem of “*private monopolies*” where “business interests . . . made competition practically impossible,” endangering “*public rights*.” “There is nothing which the average citizen distrusts and fears so much as the power of great corporations,” Hadley claimed, especially those corporations with “a virtual monopoly in their own line of business” at odds with “our theories of industrial freedom.”⁶ Hadley acknowledged the proliferation of late-19th century exposes of monopolistic practices beyond traditional categories of legal, natural, or

⁵The original practice of publicly-created monopoly grants dates back to earliest colonial experience. Shaw Livermore’s indispensable history of the early American land companies noted the 21-year monopoly (as well as assorted other special privileges) granted by the Massachusetts General Court to the Lynn Iron Works, organized by John Winthrop Jr., as early as 1645. As Shaw concluded, “The project illustrates the Colonial attitude in the first half of the seventeenth century toward development schemes, much more suggestive of the *monopoly-grant* concept than of the voluntary association.” Shaw Livermore, *Early American Land Companies: Their Influence on Corporate Development* (New York: The Commonwealth Fund, 1939), 43.

⁶Arthur T. Hadley, *Railroad Transportation: Its History and Laws* (New York: G.P. Putnam’s Sons, 1886), 65; Hadley, “Private Monopolies and Public Rights,” *The Quarterly Journal of Economics* 1 (1886): 28-44, 28; Hadley, “The Good and Evil of Industrial Combinations,” *Atlantic Monthly* (1897): 377-385 (emphasis added).

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utility monopolies, citing John C. Welch’s “Standard Oil Company (1883),” Henry Demarest Lloyd’s “The Story of a Great Monopoly (1881)” and “Lords of Industry (1884),” and Henry George’s writings on land monopoly.⁷ To reckon with such worrisome new monopolies and monstrosities Welch resorted to the image of the devil himself – Monster and Fiend – from Milton’s *Paradise Lost*: “Whence and what art thou execrable shape?”⁸ Henry Demarest Lloyd and Henry George concentrated on the more secular and ancient problem of wealth against commonwealth and the threat that private monopolies posed to historic public rights.⁹

As corporate concentration and combination became a pattern beyond railroads, in the economy at large, Hadley advocated extending the “public use” and “right to regulate” rationales of public utilities law to new industrial and factory monopolies.¹⁰ One of the more original economic thinkers of the era, Henry Carter Adams, joined Hadley in that quest. Adams was brought to the Interstate Commerce Commission by its first chairman Thomas Cooley to produce important statistical and accounting reports on railways and public utilities. From that formative transportation and utilities experience, Adams extracted a comprehensive critique of the “evils” of laissez-faire as well as a commitment to what he termed “industrial responsibility” in a “truly

⁷John C. Welch, “The Standard Oil Company,” *North American Review* 136 (1883): 191-200. Lloyd’s essays were ultimately compiled in Henry Demarest Lloyd, *Lords of Industry* (New York: G.P. Putnam’s Sons, 1910), also including “Servitudes Not Contracts (1889),” and “The Sugar Trust (1897).”

⁸ Welch, “Standard Oil Company,” 191.

⁹ Henry Demarest Lloyd, *Wealth Against Commonwealth* (New York: Harper & Brothers, 1894). Henry George, *Progress and Poverty: An Inquiry into the Cause of Industrial Depression* (New York: D. Appleton and Company, 1879). For an excellent historical contextualization of George’s concern with land monopoly, see Tamara Venit Shelton, *A Squatter’s Republic: Land and the Politics of Monopoly in California, 1850-1900* (Berkeley: University of California Press, 2013).

¹⁰Hadley, “Private Monopolies and Public Rights,” 42.

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democratic industry.” In his classic essay, “The Relation of the State to Industrial Action,” Adams zeroed in on the pressing problem of “private” and “industrial monopoly,” which he defined as “a business superior to the regulating control of competition.” Like Hadley, Adams noted the deep roots of antimonopoly sentiment: “The existence of monopolies . . . has always been regarded as an infringement of personal rights, [and] free people have always revolted against the assumption of peculiar privileges” as “odious, grasping, and tyrannous.” But while traditional monopolies flowed mainly from royal prerogative and charter privileges, new private and industrial monopolies seemed to be emerging from the very “conditions of modern business activity” itself, especially “the law of increasing return which gives the large producer the advantage.” But such modern industrial monopolies now fueled the same pervasive, popular “distrust.” “The public is deprived of its ordinary guarantee of fair treatment,” Adams argued, and monopoly privileges are “perverted from their high purpose to serve private ends.”¹¹ Adams’ solution – hewn from his hands-on ICC experience – was to restore social harmony by “extending the duties of *the state*.” The question of the era was “whether society shall support an irresponsible, extralegal monopoly, or a monopoly established by law and managed in the interests of the public.”¹²

Of course, Hadley and Adams were only two voices, albeit important ones, in the massive antimonopoly regulatory sentiment that engulfed the late-19th century. By 1901, Fanny

¹¹Henry Carter Adams, “The Relation of the State to Industrial Action,” *Publications of the American Economic Association* 1 (1887): 7-85, 47-48; Adams, *Description of Industry: An Introduction to Economics* (New York: Henry Holt and Company, 1918), 264; Hadley, “Private Monopolies,” 40.

¹²Adams, “Relation of the State,” 64. Morton Horwitz, *The Transformation of American Law: The Crisis of Legal Orthodoxy, 1870-1960* (New York: Oxford University Press, 1992), 80-83.

Borden had compiled a remarkable bibliography on “Monopolies and Trusts in America,” which contained over 500 entries covering everything from Conferences, Legislation, Public Ownership, and Interstate Commerce to Coal, Coffee, Flour, Milk, Mining, Nails, Newspapers, Oil, Railways, Sugar, Telegraph, and Tobacco.¹³ By 1908, Chicago’s John Lewson had compiled a digest of over 450 cases on “monopolies and restraints of trade” with a further listing of over 100 state constitutional and statutory provisions with regard to monopoly and antitrust. As Lewson described this prodigious output, “The investigator of the trust problem finds himself in a maze of Legislation, Case-Law and Trust literature. About thirty states have legislated directly on the subject of monopolies, [and] almost seven hundred authors have made important contributions on various phases of the trust problem.”¹⁴ This veritable legal and political obsession with the so-called “monopoly problem” hastened the case for regulation beyond transportation and utilities to the whole of American political economy.

Two things are especially noteworthy about this resurgence of regulatory antimonopoly. First, in keeping with the deepest roots of American antimonopoly in the revolutionary traditions described by Richard John and Richard White in earlier chapters in this volume, late-19th century antimonopoly resonated with distinctly political and democratic themes. American antimonopoly was first and foremost a question of the democratic distribution of power and authority in a supposedly self-governing republic. Monopolies and new concentrations of private and

¹³Fanny Borden, “Monopolies and Trusts in America, 1895-1899,” *Bulletin of the New York State Library* 67 (1901), 1-33.

¹⁴John Lewson, *Monopoly and Trade Restraint Cases: Including Conspiracy, Injunction, Quo Warranto, Pleading and Practice and Evidence*, 2 vols. (Chicago: T.H. Flood & Co., 1908), I: vii.

industrial economic power were seen as potential threats to democracy itself – threats to self-rule and the democratic control over life, liberty, and happiness as exercised by citizens, households, producers, and proprietors.¹⁵ Agglomerations of private economic authority in a rapidly industrializing economy were viewed as new sources of private coercion and economic domination – a “new feudalism”– that upended the existing balance of socioeconomic power, exacerbated inequality, and distorted and corrupted democratic political processes.¹⁶

Senator John Sherman introduced the Sherman Antitrust Act in 1890 in just these terms as nothing less than a new political “bill of rights” and a democratic “charter of liberty.” Alluding to “the monopolies and mortmains of old,” Sherman drew attention to the new “inequality of condition, of wealth and opportunity, that has grown within a single generation out of the concentration of capital,” wherein “these combinations . . . reach out their Briarean arms to every part of the country.” Sherman conjured threats of general social disorder and “kingly prerogative”: “If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.”¹⁷

¹⁵Richard John, “Rethinking the Monopoly Question: Commerce, Land, Industry,” in *Antimonopoly and American Democracy*, ed. Daniel A. Crane and William J. Novak (chapter 2 of this volume); Richard White, “From Antimonopoly to Antitrust,” in *Antimonopoly and American Democracy* (chapter 3 of this volume).

¹⁶Roscoe Pound, “The New Feudalism,” *American Bar Association Journal*, 16 (1930): 553-558. Of course, this theme is also pronounced in the work of the so-called New Brandeisians in American antitrust law. Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018); Lina Khan, “Amazon’s Antitrust Paradox,” *Yale Law Journal* 126 (2017): 710–805.

¹⁷21 *Congressional Record* (1890), 2456-2457.

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This broad political and social-democratic perspective on antitrust continued to drive antimonopoly policymaking through the long progressive period. The Sherman Act was a superstatute. “A charter of freedom,” Charles Evans Hughes called it, “The act has a generality and adaptability comparable to that found . . . in constitutional provisions.”¹⁸ Louis Brandeis continued to endorse such a broad interpretation even after the Standard Oil and Tobacco Cases in 1912, “What does democracy involve? What does liberty involve? Not merely political and civil and religious liberty, but *industrial liberty* also.” Brandeis contended that “The will of the American people as expressed in the Sherman Law” was aimed precisely at the anti-democratic character of “private monopoly” – a “power in this country of a few men so great as to be supreme over the law.”¹⁹ As Lina Khan has observed, “Brandeis and many of his contemporaries feared that concentration of economic power aids the concentration of political power, and that such private power can itself undermine and overwhelm public government.”²⁰

Second, as should be obvious given the direct links with public utility and railroad regulation, this antimonopoly moment was about much more than antitrust enforcement or “break-em-up” trust-busting.²¹ Rather, beyond the economics of monopoly or “the curse of

¹⁸*Appalachian Coals v. United States*, 288 U.S. 344 (1933), 359. On the Sherman Act as a superstatute, see William N. Eskridge Jr. and John Ferejohn, “Super-Statutes,” *Duke Law Journal*, 50 (2001): 1215–1276.

¹⁹Louis D. Brandeis, “The Regulation of Competition Versus the Regulation of Monopoly,” *Yearbook of the Economic Club of New York*, 3 (New York: G.P. Putnam’s Sons, 1913): 7-20, 17, 19.

²⁰Lina Khan, “The New Brandeis Movement: America’s Antimonopoly Debate,” *Journal of European Competition Law & Practice* 9 (2018): 131-132, 131.

²¹ Zephyr Teachout, *Break ‘Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* (New York: All Points Books, 2020); Matt Stoller, *Goliath: The 100-Year War between Monopoly Power and Democracy* (New York: Simon & Schuster, 2020); Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (Hoboken, NJ: John Wiley & Sons, 2010).

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bigness” *per se*, it is important to view this modern antimonopoly movement in broader historical context as part of a more omnibus economic reform effort to extend democratic regulatory control over a larger swath of American business and industry. Original American antitrust was thus of a piece with other expanding techniques, tools, and technologies of police power, administrative regulation, public utility law, and an emerging law of unfair competition and fair trade. Indeed, it was the way police power, public utility, unfair competition, and antitrust converged that generated the template for a modern law of regulated industries. American antitrust and competition policy, properly construed, was confined neither to negative economic dialectics nor to narrow common-law limitations. Rather, it was a crucial component in a larger and more positive public policy agenda – the movement for the social control of business. As Edward Adler put it in one of the pioneering articles in this tradition, “The law of railroads, shipping, banking, corporations, partnership, brokerage, trade marks, ‘unfair competition,’ ‘restraint of trade,’ ‘monopoly,’ and related subjects has been much discussed, but little attention has been devoted in this country to a study of the things of which all these particular subjects are commonly but phases, – the doing of business.”²² Fueled by a re-energized American antimonopoly tradition, the economic regulatory agenda of the long progressive era was devoted to this more omnibus and encompassing cause – the social control of business writ large.

²²Edward A. Adler, “Business Jurisprudence,” *Harvard Law Review* 28 (1914): 135-162; See also Adler, “Labor, Capital, and Business at Common Law,” *Harvard Law Review* 29 (1916): 241-276.

Public Utility and Antimonopoly

Richard T. Ely, an early and impassioned advocate of institutional economics, first started writing seriously about monopoly and the trust problem in the 1880s.²³ Indeed, monopoly was the predominant topic in a series of *Baltimore Sun* articles that he compiled for his 1888 *Problems of To-Day: A Discussion of Protective Tariffs, Taxation, and Monopolies*. Ely's presentation described three original features of the late-19th century version of the American antimonopoly. First, the topic of monopoly was understood as of "tremendous practical importance," or, as Ely put it, "No problem of to-day is so pressing." Second, the problem of monopoly was presented not as an isolated, technical problem of law and economics, but as a social problem entangled in the entirety of American political economy. Ely viewed "the general growth of monopoly," for example, as both "a cause and a consequence" of renewed attention to protectionism as well as the labor question.²⁴ Finally, for Ely, antimonopoly was part-and-parcel of the historic development of the modern public utility idea. Indeed, Ely introduced his examination of monopoly with a discussion of Western Union and the possibility of a "government telegraph," and elaborated it further with chapters on the gas supply, street railroads, water supply, electric lights, railroad consolidation, and public roads and canals.²⁵

²³ For further discussion of the crucial role of "institutional economics" in the developing social control of American business and industry, see William J. Novak, "Institutional Economics and the Progressive Movement for the Social Control of Business," *Business History Review* 93 (2019), 665-696.

²⁴ Richard T. Ely, *Problems of To-Day: A Discussion of Protective Tariffs, Taxation, and Monopolies* (New York: Thomas Y. Crowell & Company, 1888), 112.

²⁵ The so-called "natural monopolies," Ely argued, consisted of "gas supply, street-car service, highways and streets, electric lighting, all railways, canals, bridges, lighthouses, ferries, docks, harbors, natural navigations, postal service, telegraphs and telephones." Ely, *Problems*, 117.

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Ely grounded his approach in America’s long antimonopoly tradition. Ely first broached the trust question per se – “monopoly in its most concentrated form” – through a rumination on Henry George and land monopoly, highlighting “the way in which our public domains and empires of valuable lands have been conferred on private corporations.” He endorsed “more vigorous efforts . . . to guard the interests of the public against land plunderers.”²⁶ Here he drew on the age-old theme of the private corruption of the public interest. Ely decried “government by special interests” and the private “lobbies that exist everywhere,” concluding, “government is created to promote the general welfare, and when it is used to advance special interests . . . it is perverted from its original purpose.”²⁷

Ely amplified this traditional antimonopoly and anti-corruption framework, however, by incorporating developments in the emerging law of public utilities. Before distinguishing between so-called “natural” from “artificial” monopolies, Ely introduced the prior significance and normative implications of the all-important public-private distinction: “The post-office is a public monopoly and is a national blessing. The telegraph is a private monopoly, and the fact that it is so is nothing less than a national calamity. *Private monopolies are odious.*” While Ely viewed public monopolies as key to civilization and “productive of vast benefits,” private monopolies were “contrary to the spirit of the common law and of American institutions” – “a

²⁶*Ibid.*, 111-113.

²⁷*Ibid.*, 210. For more on this ubiquitous progressive concern with the *private* capture of the public sphere, see Richard L. McCormick, “The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism,” *American Historical Review*, 86 (1981), 247-274; William J. Novak, “A Revisionist History of Regulatory Capture,” in Daniel Carpenter and David Moss, eds., *Preventing Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2013), 25-48.

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perpetual source of annoyance and irritation.”²⁸ Concerns about public utility preoccupied Ely: “A correct course of action” was predicated upon that “public spirit that leads people to reflect on the public welfare”: considering “measures from the standpoint of the greatest good to the greatest number,” wherein “public goods and public property are watched with jealous care” and where “public enemies are exposed.”²⁹ Ely’s solutions and remedies to the problem of monopolies both natural and artificial followed the state interventions and public regulations endorsed by public utility reformers. For natural monopolies, Ely recommended government ownership and in some cases government operation. For other monopolies, Ely urged (in addition to the reform of tariff law and patent law) the reform of the law of private corporations and the establishment of state and federal bureaus of corporations. And for the effects of monopoly on the larger distribution of wealth in America, Ely proposed the regulation of bequests and inheritances, through taxation and other measures, so that the “vast fortunes may gradually be broken up and wealth more widely diffused.”³⁰

The close connection between public utility regulation and antimonopoly and antitrust was even more pronounced in some of the distinctly legal texts that addressed the antimonopoly problem at the turn of the century. Two of the great innovators in the American law of public utility were Joseph Henry Beale (whose work on the law of hotels, innkeepers, and railroad rate

²⁸Ely, *Problems*, 108.

²⁹*Ibid.*, 181.

³⁰Richard T. Ely, *Monopolies and Trusts* (New York: The Macmillan Company, 1900), 264-268. Notably, Ely considered this work (among many others) as merely a part of his imagined opus on *The Distribution of Wealth*, consisting of 5 books. Book 1 alone was imagined as having 9 parts: Public and Private Property, Contract and Its Conditions; Vested Interests; Personal Conditions; Custom; Competition; Monopoly; Public Authority; Benevolence.

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regulation was formative) and Bruce Wyman (Beale’s frequent co-author and one of the founders of modern American administrative law). In a pioneering article entry on “Monopolies” in the *Cyclopedia of Law and Procedure*, Beale and Wyman together established the conceptual and practical continuity between early corporate charter regulation, the public utility idea, and modern antimonopoly and antitrust.³¹ After a general introduction on medieval franchises and patents of monopoly, Beale and Wyman divided the modern monopoly problem into two categories: monopolies created by franchises and monopolies created by combinations. Like Ely’s original classification of public and private monopolies, Beale and Wyman’s first category – monopoly by state or legislative franchise – acknowledged the deep historical roots of antimonopoly in an established law of public service corporations and public utilities. Beale and Wyman canvassed about 1,000 cases across various jurisdictions dealing with such franchise monopolies classified according to four public concerns: 1) Public Health (e.g., noxious waste removal, slaughterhouses); 2) Public Safety (e.g., skilled employments, fiduciary businesses, the sale of liquor); 3) Public Institutions (e.g., schools and public works); and 4) Public Services (e.g., transportation and public utilities *per se*). Here they underscored the earlier state regulatory and administrative traditions that still animated public policy concern about the “trust” problem and the concentration of industry in the late-19th century. In contrast to conventional wisdom about a common-law or free-market baseline, turn-of-the-century lawyers, judges, and economists situated new trusts, monopolies, and holding companies directly within the well-

³¹Joseph Henry Beale and Bruce Wyman, “Monopolies,” *Cyclopedia of Law and Procedure*, ed. William Mack and Howard P. Nash, 40 vols. (New York: American Law Book Co., 1901-1912), 27: 888-915.

established frameworks of earlier American regulatory and antimonopoly traditions. As Beale and Wyman concluded about monopolies created by private combination rather than public franchise: “Any scheme to corner the market by getting control of the available supply is illegal; and so all contracts made in promotion of such a scheme are unenforceable. Whatever device may be used to get control of supplies, whether by option or by lease may be held to have the taint of monopolization if the intent is to regain control of the market thereby.”³²

While the distinction between natural and artificial (or public and private) monopolies remained crucial to antimonopoly thought and policymaking in this time period, there was also a simultaneous movement to apply public utility models and remedies to the entire range of monopoly and trust problems. Bruce Wyman was once again in this avant-garde. In his important treatise *Control of the Market: A Legal Solution of the Trust Problem* (1911), Wyman made the case for explicitly extending the public utility solution to monopolies and trusts. Favoring the robust regulation of the trusts by law rather than their destruction through the disaggregation of capital, Wyman turned to historic examples from the law of public service corporations, public employment, and public utility. “I have come to believe in the control by the State of all businesses which have outgrown the regulation of competition,” Wyman argued, and “all businesses which have a virtual monopoly . . . are so *affected with a public interest* as to be within the class of callings which are considered public employments.”³³ Wyman accused trusts and monopolies of pursuing predatory competition under cover of a law of private business. In

³²Beale and Wyman, “Monopolies,” 898.

³³Bruce Wyman, *Control of the Market: A Legal Solution of the Trust Problem* (New York: Moffat, Yard and Company, 1911), v (emphasis added).

response, he advocated extending to such companies and corporations the substantive regulatory standards of public utility law: “One must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations.” Wyman saw in these hard fought public utility standards of equal access, adequate services, reasonable charges, and non-discrimination powerful legal and regulatory tools to bring to bear anew on the problem of the trusts. He argued for the “immediate extension” of the “law of public employment” to cover the industrial trusts.” If public utility law were enforced against monopolies and trusts, Wyman predicted, “a solution to the problem would be found.”³⁴

While Wyman’s approach to trusts as wholesale public utilities was never fully adopted, the public utility model remained a powerful weapon in the fight against monopoly. The most important manifestation of this influence was the rapid and widespread appearance of state public utility commissions, which moved well beyond the confines of the original railroad commissions to more vigorously police utility monopolies. By the beginning of the 20th century, public utilities – providing cities and individuals with water, gas, electricity, streetcars, and other public services – proliferated across the United States. Given the lessons learned about discriminatory rates and inadequate services in railroading, these new utilities also came under increasingly public scrutiny for monopolistic and unfair trade practices. In response, by 1928, every state (excluding Delaware and the District of Columbia) created a public utility

³⁴Wyman, *Control of the Market*, v-vi.

commission. These commissions were vested with considerable administrative and regulatory power. They could hire staff, conduct valuations of utility property, fix rates of service, establish standards for the quality of service, impose uniform accounting standards, require reports from the utilities at regular intervals, issue certificates of convenience and necessity that controlled the construction or expansion of utilities, and investigate unjust and discriminatory rates either on the complaint of the public or on its own initiative. The proliferation of state public utility commissions was a powerful example of the pervasive progressive assumption that government needed to be deeply involved in the management of a large segment of the economy – especially in the case of natural monopolies.

By the beginning of the twentieth century, the need to hold utilities accountable and to ensure that their actions reflected public preferences and furthered the public interest was unquestioned. Privately-owned public utilities, which typically operated under the terms of municipally- or state-granted franchises, were considered quintessential natural monopolies. With tremendous fixed costs and little competition, reformers worried that, left unregulated, such utilities would undermine the public interest by charging exorbitant and discriminatory prices (like the railroads on which they were modeled). In consequence, nearly every single state established public utility commissions to regulate virtually every aspect of such natural monopolies. As one commentator noted in 1906, “No one now, conservative or radical, stands for unregulated monopoly, while all thinkers and writers on the subject recognize public services

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as necessary and natural monopolies.”³⁵

The variety and comprehensiveness of public utility regulation is aptly illustrated by something called the Bonbright Utility Regulation Chart.³⁶ Too large and unwieldy to be reproduced in this volume, the chart compiled by Bonbright & Company in 1928 provided more than forty data points on each state utility commission then existing in the United States. The chart described the structure of each commission – the number of members, whether elected or appointed, the length of tenure, salaries, procedures for removal from office, and the specific courts to which aggrieved parties might appeal decisions of the commission. It identified the specific kinds of utilities under each commission's jurisdiction, listing no less than nine categories (electric light, heat and power, gas, street railway, inter-urban railway, motor vehicles, water, telephone and telegraph, pipeline, railroad). It evaluated each commission's powers over electric and gas companies on nineteen different criteria, including utility property valuation, ratemaking, discriminatory rates, terminable or indeterminate permits, investigations initiated either by complaint or by the commission itself, certificates of convenience and necessity, accounting, capitalization and securities, and consolidations and mergers. The chart also detailed the specific reporting requirements for electric and gas companies and the commissions' authority over municipal electric plants.

But whatever might be said for the Bonbright Utility Regulation Chart's individual data

³⁵George Stewart Brown, “Municipal Ownership of Public Utilities,” *North American Review*, 182 (1906): 701-708, 707.

³⁶*A Survey of State Laws on Public Utility Commission Regulation in the United States : Analyzing the Principal Powers and Jurisdiction of State Public Utility Regulatory Commissions, Including the Bonbright Utility Regulation Chart* (New York: Bonbright & Co., 1928).

points, the most striking fact about it was its mere existence. It was indicative of a political economy fundamentally committed to the extension of public control over monopolistic enterprises. Laws imposing statewide control over at least part of the public utility industry were the product, not of a small group of radicals operating at a particular moment in a single legislature, but of the considered decisions of nearly every American state legislature over a period of decades. The debate over the need to subject monopolistic utilities to government regulation and the best means of doing so was had over and over again in this period, and each time the debate ended with the creation of a statewide administrative commission with expansive regulatory powers.

Unfair Competition and Antimonopoly

The link between the public utility movement and the antimonopoly movement's focus on new "artificial" combinations and concentrations was clear. The public utility idea stood opposed to such unregulated private agglomerations of power and authority. But turn-of-the-century American antimonopoly had another important dimension beyond the utility tradition that was just as central to the development of modern regulated industries law. That was the law of unfair competition. As early as the original formation of the Interstate Commerce Commission – something of a national culmination of the first wave of public utility regulation – there existed a curious mixture of traditional antimonopoly sentiment together with a growing concern with general corporate corruption and trade practices long recognized as "unfair." As Laura Phillips Sawyer has most recently reminded us, a concern with "fair trade" was at the

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center of early 20th century debates over antimonopoly and antitrust.³⁷

Even at the first stages of public utility regulation – with the invention of state railroad commissions – the idea of railroads as common carriers and publicly-regulated utilities was entangled with both antimonopoly and unfair trade rhetoric and policymaking. New York formed the Hepburn Committee in 1879 as a response to popular agitation ranging from the Chamber of Commerce to the Anti-Monopoly League to Tammany Hall, who joined forces to attack “Alleged Abuses in the Management of Railroads Chartered by the State of New York.” The “alleged abuses” highlighted not just problems of scale or concentration, but many other worrisome corporate practices, including discriminatory rates, special privileges, stock manipulation, secrecy, public injury, and even workers’ injuries on New York’s public highways.³⁸ Nationally, the movement for the establishment of the ICC in 1887 began with a similar litany of eighteen railroad corporate abuses that fostered monopoly, enriched favorites, and obstructed free competition: high rates, discriminatory rates, secret special rates, rebates, drawbacks, concessions, favoritism, secrecy, speculation, dishonest agents, privileged passes, watered stock, extravagant and wasteful management,” among other evils.³⁹ Corrupt trade practices and unfair competition played key roles in the pioneering development of regulatory and administrative control over America’s emergent monopolies.

³⁷Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the New Competition, 1890-1940* (New York: Cambridge University Press, 2018).

³⁸*Proceedings of the Special Committee on Railroads Appointed Under a Resolution of the Assembly to Investigate Alleged Abuses in the Management of the Railroads Chartered by the State of New York* (New York: Evening Post Steam Presses, 1879).

³⁹*Report of the Senate Select Committee on Interstate Commerce as to the Regulation of Interstate Commerce*, 49th Congress, Session 1 (Washington, D.C.: Government Printing Office, 1886).

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The Sherman Antitrust Act, of course, was passed a mere three years after the Interstate Commerce Act by a nearly unanimous Congress, famously declaring illegal “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” It also sweepingly imposed penalties on “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.” And the same mixture of concern over trusts, corruption, inequality, economic concentration, corporate control, public utility, and unfair competition dominated the original legislative history. Senator John Sherman introduced the bill by explicitly citing the broad powers of an early American state regulatory regime in which antimonopoly was about much more than the common-law restraints of trade (to say nothing of business efficiency). Sherman introduced a range of state case law that illustrated the scope of the current problem as well as the feverish efforts of state officials to respond. He cited at length Michigan Supreme Court Chief Justice Champlin Sherwood in a recent case involving the Diamond Match Company. Sherwood deemed the enterprise of Diamond Match in Michigan to be “an unlawful one” and the contract at issue in this case as void “against public policy.” But it was Sherwood’s broad perspective on antimonopoly that animated Sherman’s efforts to now bring to the national level some version of the common-law and police powers used by states to regulate and control excessive corporate powers of “the cotton trust, the whisky trust, the sugar-refiners’ trust, the cotton-bagging trust, the copper trust, the salt trust, and many others”:

Monopoly in trade, or in any kind of business in this country, is odious to our form of government. It is sometimes permitted to aid the Government in carrying

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on a great public enterprise or public work under governmental control in the interest of the public. The tendency is, however, destructive of free institutions and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist, under express provision in several of our State constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interests of the public and that of the people for the personal gain and aggrandizement of a few individuals. . . . It revives and perpetuates one of the great evils which it was the object of the framers of our form of government and prevent.⁴⁰

Neither wealth maximization nor an exclusive concern with size or bigness animated the original American debate about trusts and monopolies. Rather the legal, legislative, and administrative record was replete with concern about politico-economic corruption and corporate misdeeds that threatened the public. “Corners, rings, patents of monopoly, pools, cartels, trusts, holding companies, ‘Gary dinners,’ interlocking directorates, ‘communities of interest,’ ‘gentlemen’s agreements,’ closed shops” – with this motley array of terms, Walton Hamilton introduced the “hydra-headed” monopoly problem as one intimately tied up with issues of corrupt and unfair business practices.⁴¹

While the Sherman Act did not expressly condemn “unfair competition,” it was clearly aimed at what Milton Handler called “the brutal and oppressive practices” of large enterprises.

⁴⁰21 *Congressional Record* (1890), 2458; *Richardson v. Buhl*, 77 Mich. 632 (1889). Sherman’s other cited cases included *Handy v. Cleveland & M.R. Co.*, 31 Fed. 689 (C.C. Ohio, 1887); *Craft v. McConoughy*, 79 Ill. 346 (1875); *Chicago Gas Light Co. v. People’s Gas and Coke Co.*, 121 Ill. 530 (1887); *People v. North River Sugar Refining Co.*, 22 Abb. N.C. 164 (1889); *Commonwealth v. Carlisle*, Brightly N.P. 32 (Pa., 1821).

⁴¹Walton Hamilton, “The Problem of Capitalistic Monopoly,” in Hamilton, *Current Economic Problems*, 429.

“The dominant economic position of these combines,” Handler noted, “made their methods particularly venomous.”⁴² Indeed, the Sherman Act, together with continued concern about unscrupulous business practices in rapidly consolidating industries, soon generated two additional federal administrative interventions – the U.S. Industrial Commission and the Bureau of Corporations. The Industrial Commission was created by Congress in 1898 to undertake a comprehensive investigation of “the industrial life of the nation” and “the important changes in business methods” so as to diagnose the “economic problems” that riled the nation.⁴³ Of the Commission’s nineteen volumes, the first two were dedicated to Trusts, Corporations, and Industrial Combinations – the consolidating establishments that created so much public “apprehension of monopoly.” The Commission took note of the recent “progress of legislation aimed to prevent trusts or avert their evils and dangers” as well as the government’s desire “to protect the public from all the dangers of conspiracy and extortion.”⁴⁴ The Commission’s highly detailed reports on business conduct and industry practice renewed attention to the problem of corporate excess, especially with respect to price discrimination, stock watering, promotion profits, and unfair trade practices.⁴⁵ In 1903, Congress created the Bureau of Corporations in the

⁴²Milton Handler, “Unfair Competition,” in American Economic Association, ed., *Readings in the Social Control of Industry* (Philadelphia: Blakiston Company, 1942): 76-180, 134.

⁴³“An Act Authorizing the Appointment of a Nonpartisan Commission to collate Information and to Consider and Recommend Legislation to Meet the Problems Presented by Labor, Agriculture, and Capital,” *U.S. Statutes at Large* 30 (1898): 476-477; U.S. Industrial Commission, *Final Report of the Industrial Commission* (Washington, D.C.: Government Printing Office, 1902), ix.

⁴⁴*Final Report of the Industrial Commission*, 595.

⁴⁵The Industrial Commission’s reports also had an important impact on institutional economics as both Thorstein Veblen and John Commons drew on the wealth of new information now available on Business Enterprise. David Hamilton, “Veblen, Commons, and the Industrial Commission,” in Warren J. Samuels, ed., *The Founding of Institutional Economics: The Leisure Class and Sovereignty* (London: Routledge,

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Department of Commerce and Labor – a direct forerunner of the Federal Trade Commission – to make further “diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States.”⁴⁶ The Bureau conducted exhaustive investigations into some of the country’s most conspicuous monopolies and trusts. Indeed, the Bureau’s reports on the petroleum and tobacco industries formed a basis for the Department of Justice’s subsequent antitrust prosecutions that famously dissolved Standard Oil and American Tobacco in 1911.⁴⁷ The Bureau’s uncovering of Standard Oil’s railroad rebates also played a key role in the passage of the Hepburn Act (1906), extending the ICC’s regulatory powers over the interstate transportation industry.⁴⁸

From the Interstate Commerce Commission and Sherman Antitrust Act to the Industrial Commission and Bureau of Corporations, concern about economic concentration and corporate consolidation mixed constantly with overarching worries about corruption and unfair modes and

1998): 3-13. Laura Weinrib has argued that the Industrial Commission’s report on labor “helped shape the agenda for labor reform in the Progressive Era.” Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* (Cambridge: Harvard University Press, 2016), 23.

⁴⁶“An Act to Establish the Department of Commerce and Labor,” *U.S. Statutes at Large*, 32 (1903): 825-830, 828.

⁴⁷United States Commissioner of Corporations, *Report on the Petroleum Industry* (Washington, D.C.: Government Printing Office, 1907); Industrial Commission, *Preliminary Report on Trusts and Industrial Combinations* (Washington, D.C.: Government Printing Office, 1900): 719-726. United States Commissioner of Corporations, *Report on the Tobacco Industry* (Washington, D.C.: Government Printing Office, 1909). See also, Civic Federation of Chicago, *Chicago Conference on Trusts* (Chicago: Civic Federation, 1900).

⁴⁸“An Act to Amend an Act Entitled ‘An Act to Regulate Commerce,’” *U.S. Statutes at Large*, 34 (1906): 584-596.

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methods of competition. For many, what made the rise of trusts and monopolies so especially dangerous was the introduction and proliferation of business practices that came to be seen as unfair or illegal in thousands of pages of subsequent antitrust actions. These practices included intimidation by threats of spurious lawsuits or a ruinous price war, the operation of bogus independents, the use of fighting brands, exclusive dealer arrangements, and tying contracts and rate discrimination.⁴⁹ The Standard Oil Company was accused of local price cutting, espionage, bogus independents, and preferential rebates. American Tobacco utilized bogus independents, fighting brands, and exclusive dealer arrangements. National Cash Register was cited for a slew of offenses, including espionage, enticement of competitors' employees, shadowing competitors' salesmen, inducing breach of contract, and circulating false reports. International Harvester was accused of exclusive dealing contracts, while American Can cut off competitors' sources of supply.⁵⁰ The list of corporate abuses detailed in antitrust litigation went on and on. As the National Industrial Conference Board put it, "The Whiskey Trust, the American Sugar Refining Company, the Eastman Kodak Company, the du Pont de Nemours Powder Company, the Corn Products Refining Company, and numerous others . . . were charged with using one or another of the kinds of competitive practices of the monopolistic type, which are now regarded as unfair."⁵¹

⁴⁹Myron Watkins, *Public Regulation of Competitive Practices in Business Enterprise* (New York: National Industrial Conference Board, 1940), 15.

⁵⁰*Standard Oil v. United States*, 221 U.S. 1 (1910); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Patterson*, 201 Fed. 697 (1912); 205 Fed. 292 (1913); 222 Fed. 599 (1915); *United States v. International Harvester Co.*, 214 Fed. 987 (1917); *United States v. American Can Co.*, 230 Fed. 859 (1916).

⁵¹Watkins, *Public Regulation of Competitive Practices*, 17-18. Numerous other unfair practices were restrained via consent decrees: threats to competitors' customers, inducing breach of contract, fighting brands, flying squadrons, disparagement, local price cutting, bogus independents, commercial bribery,

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The original federal antitrust prosecutions, in other words, marked the beginning of the development of a more robust law of unfair competition that ultimately formed the basis for the Federal Trade Commission and Clayton Acts.

Beneath this new wave of federal action against unfair monopolistic competition, the common law and state antimonopoly legislation also remained active in policing unfair trade. Common law case law was chock full of competitive torts: fraud, misrepresentation, misappropriation of trade secrets, inducement of breach of contract, substitution of goods, malicious interference, infringement of trade designation, defamation, and attacks upon competitors and competitors' goods. Milton Handler noted, however, that the common law "reached only the crudest competitive excesses," and the private, case-by-case regulation of unfair competition via common law judges was really no match for the expansive new trade practices of Standard Oil, American Tobacco, and National Cash Register.⁵² State regulatory legislation quickly tried to make up for the common law's limitations. By the time of the Industrial Commission's reports on trusts, corporations, and industrial combinations, twenty-seven states and territories had passed statutes to "prevent the formation of monopolies by fit regulations and penalties" and fifteen added explicit constitutional provisions.⁵³ And a host of other state police power regulations took aim at unfair and anti-competitive practices in general.

espionage, harassing litigation, exclusive dealing arrangements, etc. For an exhaustive list of further offenses, cases, and decrees, see Handler, "Unfair Competition," 125-130.

⁵²Bruce Wyman, "Competition and the Law," *Harvard Law Review*, 15 (1902): 427-445; Handler, "Unfair Competition," 121-122; Watkins, "Failure of Common Law Doctrine to Reach New Types of Unfair Competition," in *Regulation of Competitive Practices*, 28-32.

⁵³U.S. Industrial Commission, *Trusts and Industrial Combinations* (Washington: Government Printing Office, 1900), 3.

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These included restraint of trade and price discrimination statutes, false advertising laws, bribery laws, trademark statutes, food and drug legislation, labeling laws, prohibitory laws, chain store laws, statutes prohibiting sales below cost, trading stamps laws, state fair trade acts, acts prohibiting the appropriation of customer lists, advertising regulations, and proration laws.⁵⁴

This mass of legal and legislative regulatory activity concerning monopoly and unfair competition came to a head in the creation of the Federal Trade Commission. Joseph E. Davies was Woodrow Wilson’s Commissioner of Corporations. Hailing from Robert LaFollette’s progressive Wisconsin, Davies was steeped in both institutional political economy and the “Wisconsin Idea’s” multiple experiments with commission regulation in the democratic public interest.⁵⁵ Under his leadership, the Bureau of Corporations produced one of the first comprehensive analyses of the relationship of the antimonopoly movement to the underlying problem of competitive methods – *Trust Laws and Unfair Competition* (1916).⁵⁶ More importantly, as Commissioner, Davies began to push the Wilson administration to strengthen the Sherman Act, develop additional legislation on unfair competition, and establish a powerful independent “Interstate Trade Commission” to now do for American trade, in general, what the Interstate Commerce Commission did for the railroad problem. Davies’ “Memorandum of Recommendations as to Trust Legislation” proposed aggressive “administrative control to

⁵⁴Handler, “Unfair Competition,” 142-149.

⁵⁵Elizabeth Kimball MacLean, “Joseph E. Davies: The Wisconsin Idea and the Origins of the Federal Trade Commission,” *The Journal of the Gilded Age and Progressive Era*, 6 (2007): 248-284; Charles McCarthy, *The Wisconsin Idea* (New York: The Macmillan Company, 1912).

⁵⁶Joseph E. Davies, *Trust Laws and Unfair Competition* (Washington, D.C.: Government Printing Office, 1916).

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prevent monopoly from using its most potent weapon, unfair competition.”⁵⁷ Davies endorsed Justice John Marshall Harlan's broad defense of administrative regulation in *Interstate Commerce Commission v. Brimson*: “Nor can the rules established for the regulation of [interstate] commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty, not only of obtaining the required information, but of compelling, by all lawful methods, obedience to the rules.”⁵⁸ Davies recommended new federal legislation to regulate noxious trade practices ranging from interlocking directorates, holding companies, and stock watering to price fixing, full-line forcing, special privileges or rebates, espionage, and bogus independents. Davies even cited the New Jersey “Seven Sisters” laws, urging that “holding companies and mergers should be prohibited” and subject to review “by a commission analogous to the Public Utilities Commission.” The Bureau of Corporations’ “Survey of the Trust Question” thus did much to anticipate the content of the Federal Trade Commission and Clayton Acts, and an emerging synthesis of the law of trade regulation.

With the formation of the FTC and the passage of the Clayton Act, the movement for the regulation of trade and competition entered a new phase. In September 1914, the Federal Trade Commission Act declared unlawful “unfair methods of competition in commerce” and empowered the new independent regulatory agency not only to investigate business and corporate practices but also to prevent persons and corporations from using such “unfair

⁵⁷Joseph E. Davies, “Memorandum of Recommendations as to Trust Legislation,” in Arthur S. Link, ed. *Papers of Woodrow Wilson* (Princeton: Princeton University Press, 1979), vol. 29: 78-85; vol. 30: 420.

⁵⁸*Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1897).

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methods” as “the most important means of preventing the development of monopolies.”⁵⁹ In October, the Clayton Antitrust Act added a more detailed list of proscribed anti-competitive practices, including price discrimination, tying contracts, holding companies, and interlocking directorates. It also famously exempted certain labor and agricultural organizations and activities from antitrust laws.⁶⁰ In 1935, the FTC took stock of a seemingly ever-growing list of twenty-five unfair methods of competition condemned in its cease and desist orders: 1. false or misleading advertising; 2. misbranding of quality, purity, origin, source; 3. bribing buyers and customers; 4. procuring trade secrets of competitors by espionage or bribery; 5. inducing employees or competitors to violate contracts; 6. making false and disparaging statements about competitors; 7. intimidating suits for patent infringement; 8. trade boycotts or combinations to prevent the procurement of goods; 9. falsifying products as competitors’ products; 10. selling old as new; 11. paying excessive prices for supplies so as to buy up all; 12. concealed subsidiaries; 13. merchandising schemes on lot or chance; 14. agreeing to maintain resale price; 15. combining to control price, divide territory, or eliminate competition; 16. misleading techniques, deception; 17. imitating standard containers but with less content; 18. concealing business identity; 19. making false claims as to location, size, authorization, and government endorsement; 20. forming trade associations for uniform prices; 21. coercing or entrapping customers; 22. naming products misleadingly; 23. selling below cost; 24. dealing unfairly or

⁵⁹“An Act to Create a Federal Trade Commission,” *U.S. Statutes at Large*, 38 (1914): 717-724; Davies, *Trust Laws*, 22.

⁶⁰“An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies,” *U.S. Statutes at Large*, 38 (1914): 730-740.

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dishonestly with foreign purchasers; and 25. engaging in monopolistic reciprocal dealing.⁶¹

By 1938, the FTC had taken under advisement some 27,060 requests for action against “unfair competition,” including 12,726 complaints. It had also completed well over 100 studies and investigations into corporate practices ranging from an eleven-page report on Southern Livestock Prices (1920) to a 101-volume survey of Gas and Electric Utility Corporations (1928-35). FTC investigations led to significant subsequent legislation and administrative regulation, including passage of the Packers and Stockyards Act of 1921, the establishment of the Federal Oil Conservation Board in 1924, and the Robinson-Patman Act in 1936. The Commission’s Trade Practice Conferences covered almost 200 separate industries from the Anti-Hog-Cholera Serum and Virus Industry in 1925 to the Warm Air Furnace Industry in 1932.⁶² By the early 1930s, the massive regulatory and antimonopoly interventions of the progressive movement for the social control of business had begun to mature into a modern law of regulated industries.

Regulated Industries Law

“We are living in the midst of a revolution, John Maurice Clark noted in 1926, “a revolution that is transforming the character of business, the economic life and economic relations of every citizen, the powers and responsibilities of the community toward business and

⁶¹The list excludes specifically sanctioned Clayton Act violations. “Types of Unfair Competition: Practices Condemned in Orders to Cease and Desist,” in *Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1935* (Washington, D.C.: Government Printing Office, 1935): 67-71; Milton Handler, “Unfair Competition,” 159-164.

⁶²Myron W. Watkins, *Public Regulation of Competitive Practices in Business Enterprise* (New York: National Industrial Conference Board, 1940), 275, 300-317.

of business toward the community.”⁶³ By the time Clark completed his “Materials for the Study of Business” in the School of Commerce and Administration of the University of Chicago, the *Social Control of Business* had indeed brought tremendous changes to the regulation of corporations, business, and industry. The various strands of economic regulatory innovation – public utility, fair competition, and antimonopoly – had produced a whole more than the sum of its parts. That whole was a rather staggering pattern of comprehensive regulation that included common-law, statutory, and administrative supervision of American economic life. Corporation regulation through state charter controls no longer dominated economic policymaking. Rather, an extraordinary range of legislative and administrative regulations was now directed at substantive economic, corporate, and industrial conduct that ran the gamut. Clark compiled a suggestive list of legislative and regulatory achievements of the new movement for social and democratic control: “the effective control of railroads and of public utilities,” land reclamation and flood prevention, radio and aerial navigation laws, the trust movement and anti-trust laws, conservation, the Federal Reserve system, labor legislation, social insurance, minimum-wage laws, industrial labor arbitration, pure food laws, public health regulation, and city planning and zoning. On the frontier, Clark suggested, were health insurance, control of the business cycle and unemployment, the control of large fortunes and the distribution of wealth, and the “social control of the structure of industry itself, through the ‘democratization of business’ itself.”⁶⁴

Clark’s policy agendas merely hinted at the full scale and scope of the progressive

⁶³Clark, *Social Control of Business*, 4.

⁶⁴Clark, *Social Control of Business*, 4-5.

achievement in the regulatory control of business, industry, and the market that culminated in a modern law of regulated industries. In 1937 Milton Handler dedicated his pioneering casebook in trade regulation and competition policy to Louis Brandeis, with a nod to the “Sisyphean task” of simply trying to keep pace with “the accelerated tempo of change” in the field of economic regulation.⁶⁵ In attempting to get his head around the increasingly unwieldy topic of “the progressive penetration of government in business,” Handler began with a quick and illuminating survey of New York statutes brought to bear on an individual who wanted to pursue any kind of economic enterprise in the state. *McKinney’s Consolidated Laws of New York* (1931) comprised sixty-seven separate volumes with titles ranging from Arbitration, Banking, Benevolent Orders, and Business Corporations to Salt Springs, State Charities, Tenement Houses, and Workmen’s Compensation.⁶⁶ Even before organizing an economic venture, Handler noted, one had to

⁶⁵Milton Handler, *Cases and Other Materials on Trade Regulation* (Chicago: Foundation Press, 1937), vii.

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

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consult the statutory provisions regarding “Business Corporations, General Corporation, Stock Corporation, General Associations, Membership Corporations, and Partnership laws.” Beyond such general regulations for initiating a New York private enterprise, Handler noted a host of more specific statutes concerning business names, methods of raising capital (blue sky and usury regulations), zoning restrictions, construction rules and permitting and inspection processes, and equipment standards. Wrote Handler, “The entrepreneur constructing his own plant will find himself in a maze of fire control, illumination, safety, and sanitary requirements.”⁶⁷ An equally complex maze of special licensing restrictions governed whole classes of New York professions and businesses: physicians, surgeons, dentists, optometrists, pharmacists and druggists, nurses, midwives, chiropodists, veterinarians, certified public accountants, lawyers, architects, engineers and surveyors, shorthand reporters, master plumbers, undertakers and embalmers, real estate brokers, junk dealers, pawnbrokers, ticket agents, liquor dealers, private detectives, auctioneers, milk dealers, peddlers, master pilots and steamship engineers, weighmasters, forest guides, motion picture operators, itinerant retailers on boats, employment agencies, commission merchants of farm produce, and manufacturers of foreign desserts, concentrated feeds, and commercial fertilizers. Factories, canneries, places of public assembly, laundries, cold storage, shooting galleries, bowling alleys, billiard parlors, and storage sites for explosives all required special licenses. So did the sale of minnows, and the operation of educational institutions, motor

the large number of titles dealing with Corporations, Partnerships, and Associations; second, the new progression in Book 47 from Public Service Commission to Public Works to Public Welfare; and third, the changes made to Book 26 formerly Insanity now Mental Hygiene, Book 41 formerly Poor now Public Welfare, and Book 42 formerly Prison now Correction.

⁶⁷Handler, *Trade Regulation*, 2.

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vehicles, and filling stations.⁶⁸ Even these fairly elaborate provisions paled in comparison to the detailed state regulations that sentried the business of banking or insurance, or the provision of gas, electricity, and communications – with additional obstacles and restrictions for foreign corporations. If a business required employees, then a law library of labor relations controls affected the operation – controls dealing with industrial accidents, workers’ compensation, limits on child labor; maximum work hours parsed according to sex, age, and occupation; and factory and wage regulations. If a business involved the production of food, commodities, or household goods then it faced equally extensive restrictions, ranging from adulteration, advertising, and trademark restrictions to minimum standards to weights and measures and inspection regimes.

With regard to certain industries (as was the case earlier with railroads and public utilities) states like New York developed separate codes with commission oversight and detailed price and production controls. In New York, that was the case with liquor control as well as with the Milk Control Act of 1933 made famous in *Nebbia v. New York* (1934).⁶⁹ The Division of Milk Control of the New York Department of Agriculture and Markets was charged with regulating the entire statewide milk industry: “production, storage, distribution, manufacture, delivery, and sale of milk and milk products.”⁷⁰ An elaborate license regime was the gateway to comprehensive administration and regulation. Licensees had to satisfy the commissioner that

⁶⁸Ibid., 3-4.

⁶⁹*Nebbia v. New York*, 291 U.S. 502 (1934); *Hegeman Farms Corp v. Baldwin*, 293 U.S. 502 (1934); *Borden’s Farm Products v. Baldwin*, 293 U.S. 194 (1934); *G. Seelig, Inc. v. Baldwin*, 294 U.S. 511 (1935); *Borden’s Farm Products v. Ten Eyck*, 297 U.S. 251 (1936); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936).

⁷⁰ Ibid., 9-10.

they were “qualified by character, experience, financial responsibility and equipment to properly conduct the business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest.”⁷¹ Licenses were revocable for a whole range of offenses against public health, public welfare, or the public economy of milk. And commissioners were given select powers to fix prices and establish quotas as well as to undertake an advertising campaign on milk consumption, public health, and child nutrition.⁷² As Handler noted about these comprehensive powers, “This mandate coupled with the broad rule-making powers of the department permit of . . . an almost unlimited degree of control.”⁷³

As Handler himself concluded, “Impressive as these summaries may be, they present but a partial picture of modern business regulation. A much larger canvass would be needed for the

⁷¹*Ibid.*, 9-10.

⁷²The statute directed coverage of the following topics: a) milk and its importance in preserving the public health, its economy in the diet of people and its importance in the nutrition of children; b) the manner, method and means used and employed in the production of milk ant to the laws of the state regulating and safeguarding such production; c) the added cost to the producer and milk dealer in producing and handling milk to meet the high standards imposed by the state that insure a pure and wholesome product; d) the effect upon the public health which would result from a breakdown of the dairy industry; e) the reasons why producers and milk dealers should receive a reasonable rate of return on their labor and investment; f) the problem of furnishing the consumer at all times with an abundant supply of pure and wholesome milk at reasonable prices; g) the instability peculiar to the milk industry, such as unbalanced production, effect of the weather on the demand, etc.; h) the possibilities with particular reference to increased consumption of milk; i) the beneficial effect of sanitary laws and regulations enacted by the state; j) further and additional information as shall tend to promote the increased consumption of milk and as may foster a better understanding and more efficient cooperation between producers, milk dealers, and the consuming public. *McKinney’s Consolidated Laws of New York, Agriculture & Markets, Article 21, Sec. 328.*

⁷³*Ibid.*, 10.

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legislation enacted *before* the New Deal, the regulations of state and federal administrative agencies, the statutes of the forty-eight states, the ordinances of our countless municipalities, and the substantive rules formulated by our courts.”⁷⁴ Business historian Alfred Chandler highlighted the transformation in business-government relations inaugurated by three pioneering federal interventions alone: the Interstate Commerce Commission (1887), the Sherman Antitrust Act (1890), and the Federal Trade Commission and Clayton Acts (1914). But already by 1917 and 1918, John A. Lapp could compile an ambitious and comprehensive two-volume listing of federal economic regulations (a primitive forerunner to the Federal Register). 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. Establishment of the Public Health Service
7. Federal regulations of horticulture and agriculture
8. Federal regulations of immoral commerce
9. The Shipping Board Act
10. The Federal Good Roads Act.⁷⁵

⁷⁴Handler, *Trade Regulation*, 13-14 (emphasis added).

⁷⁵John A. Lapp, *Important Federal Laws* (Indianapolis: B.F. Bowen & Company, 1917); John A. Lapp, *Federal Rules and Regulations* (Indianapolis: B.F. Bowen & Company, 1918). Stuart Chase went further, highlighting the even more rapid proliferation of federal economic regulations in the aftermath of World War I and also during what he termed “Mr. Hoover’s New Deal.” Chase’s incomplete list of new

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

1. Government “promotion of privately owned business through such mechanisms as the tariff, land grants, loans and subsidies, the gathering and dissemination of statistics, . . . the promotion and protection of foreign trade, and through the . . . patent laws.”
2. General exercise of the state police power “to take action necessary for the protection of the public health, welfare, safety, and morals.”
3. Emergency measures including “the government operation of railways” and “such peace-time measures as the Adamson Act.”
4. “Permanent regulatory measures” in specific areas like those involving products harmful to public health, e.g., the Pure Food and Drug Act or those bound up in the labor question, e.g., “compulsory social insurance and minimum wage, hours of labor, and child labor legislation.”
5. Direct federal and state provision of goods and services including the activities of federal arsenals, “highway building and maintenance, the issuing of currency, the postal service, police service, the Coast Guard, Geological Survey, weather bureau,” etc.⁷⁶

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

⁷⁶Dexter 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), 3-4.

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These were just some of the policy consequences of the long progressive crusade for the social control of business and the economy launched by the American antimonopoly tradition. “Our legislation thus runs the gamut of our economic problems,” Handler concluded, “and a list of all the varied objectives of these laws would encompass most of the aims of our economic order.”⁷⁷ This modern American regulatory and administrative state would leave few aspects of economic life untouched through the first half of the 20th century.

Conclusion: Beyond the Myth of Regulatory Failure

At the turn of the 20th century, American movements for antimonopoly, public utility, and fair competition came together to produce a new legal-political architecture for modern American economic regulation at both the state and federal levels. The legal, legislative, and administrative tools forged in epic battles over railroads, monopolies, and corrupt business practices together moved the primary site of regulatory control beyond the limited case-by-case adjudications of the common law as well as special state corporate charters. The formal policing of the charter of incorporation itself would no longer be a singular focus of policymaking vis-à-vis corporations and monopolies. Rather, movements for the social control of business, created a thousand new sites of countervailing state power and new, cross-cutting regulatory criteria and technologies. State legislative power continued to police economic activities deemed harmful or prejudicial to public health, safety, and welfare. Public utility law brought heightened scrutiny to businesses especially affected with public interest and held them to higher standards in terms of

⁷⁷Handler, *Trade Regulation*, 18.

pricing, service, discrimination, and public convenience and necessity. Antimonopoly contributed an additional overarching concern with corporate structure, concentration, scale, and the democratic balance of politico-economic power. And unfair competition law greatly expanded administrative jurisdiction concerning unlawful business practices and corruption, from issues of fraud and secrecy to a vast array of new methods for restraining competition. Taken together – and these areas of policymaking and concern were almost always closely intertwined at the turn of the century – these legal, regulatory, and ultimately administrative policy innovations illuminated an expansive horizon for the future democratic control of American capitalism.

Shining a bright light on the informal and legal mechanisms of economic control that pervaded the industrial economy, progressive anti-monopolists drew renewed attention to the problem of organized private coercion: the sudden ascendance of new forms of private power wielded by massive corporations and trusts. The economic power of business was no longer justified as a natural outcome of the choices of rational individuals, voluntary cooperation, or the laws of supply and demand. Instead, reformers 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: “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

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ways in which they use it.”⁷⁸ For Hurst, American antitrust policy provided “an example unique in our legal history for a long-continued, broadly accepted, peacetime attempt to use law direction to affect the balance of power within the community.”⁷⁹

In the first half of the 20th century, an increasing number of commentators came to see monopoly and big business as a constitutional problem in this sense, creating a distinctive imbalance of power and control in American democracy. In *Freedom Through Law: Public Control of Private Governing Power* (1952), Robert Lee Hale synthesized a generation of institutionalist and realist scholarship in arguing that new concentrations of private economic power were slowly acquiring 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 coercion and destroying liberty as “public government itself.”⁸⁰ But whereas public power had been the subject of developing constitutional protections since the seventeenth century at least, these new forms of private economic domination were increasingly escaping traditional mechanisms of control (competition, common-law, charter, and state statute). The problem of industrial monopoly and increasing private governing power galvanized a broad search for new legal, legislative, and administrative restraints. The new

⁷⁸James 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.

⁷⁹James Willard Hurst, “Law and the Balance of Power: The Federal Anti-Trust Laws,” unpublished manuscript, 2.

⁸⁰Robert L. Hale, *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952); Hale, “Coercion and Distribution,” 470.

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surfeit of rules and regulations enacted in response marked a new era in government-business relations in the United States and a reconfiguration of the relationship of law and American capitalism – a revolution, if you will, in political economy. State and regulation assumed prominent new roles in an increasingly mixed and regulated American economy.⁸¹

Despite the vast scale and scope of this general regulatory revolution, however, classic accounts of American antimonopoly and antitrust have still too frequently ignored it. Indeed, leading authorities have continued to emphasize primarily the internal economics of antitrust shorn of socio-political context, while isolating antitrust as a discrete and independent arena of policymaking.⁸² Classic business and economic history accounts of antitrust, for example, have emphasized vertical integration, managerial hierarchy, allocative efficiency, consumer welfare, and a relatively weak, limited, and backward-looking state. For Thomas McCraw, adversarial legalism, “the tiny size of the United States government,” and the “illogical,” “aesthetic” nature of critiques of “bigness,” combined to make modern American antimonopoly something of a misguided political-economic anachronism. As McCraw strangely concluded about Louis Brandeis, “Brandeis misunderstood the forces underlying the rise of big business and

⁸¹ Claudia Goldin and Gary D. Libecap, eds., *The Regulated Economy: A Historical Approach to Political Economy* (Chicago: University of Chicago Press, 1994); Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933* (Cambridge: Harvard University Press, 1996); Howard Brick, *Transcending Capitalism: Visions of a New Society in Modern American Thought* (Ithaca: Cornell University Press, 2006); William J. Novak, “Law and the Social Control of American Capitalism,” *Emory Law Journal*, 60 (2010): 377-405.

⁸²Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), 61-63; Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976); Aaron Director and Edward H. Levi, “Law and the Future: Trade Regulation,” *Northwestern Law Review*, 51 (1956-1957), 281-296.

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consistently advocated economic policies that were certain to reduce consumer welfare.”⁸³

McCraw thus closely followed the new antitrust orthodoxy of Robert Bork, who claimed to “conclusively” and “exclusively” establish the original legislative intent of the Sherman Act as “consumer welfare,” and the neoclassical economic criteria implied thereby; namely, maximization of wealth and allocative efficiency.⁸⁴

As business histories de-emphasized and de-politicized the power and effect of the American antimonopoly tradition, conventional political histories tended to cabin and isolate the juristic, common-law underpinnings of antitrust policymaking with equally underwhelming assessments. William Letwin’s classic history of the Sherman Act assumed fundamentally that “American economic policy has always rested on two principles: 1) government should play a

⁸³Thomas K. McCraw, “Rethinking the Trust Question,” in *Regulation in Perspective*, 1-55, 5; McCraw, “Louis D. Brandeis Reappraised,” *The American Scholar*, 54 (1985): 525-536, 525, 527. For an excellent overview of McCraw’s position, see Richard R. John, “Prophet of Perspective: Thomas K. McCraw,” *Business History Review*, 89 (2015): 129-153.

⁸⁴Robert H. Bork, “Legislative Intent and the Policy of the Sherman Act,” *The Journal of Law & Economics*, 9 (1966): 7-48, 11-12. Lest the point be missed, Bork used the term “efficiency” 51 times in his 41 page article, concluding “Congress was very concerned that the law should not interfere with business efficiency.” Bork’s historical research on the Sherman Act has been vigorously challenged by Robert Lande and Herbert Hovenkamp, among others, with Hovenkamp arguing that “not a single statement in the legislative history comes close to stating the conclusions that Bork drew.” Robert Lande, “Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,” *Hastings Law Journal*, 34 (1982): 65-151; Herbert Hovenkamp, “Antitrust’s Protected Classes,” *Michigan Law Review*, 88 (1989): 1-48, 22. Daniel Crane has a judicious account, noting Bork’s most significant contribution to antitrust law as “his identification of economic efficiency, disguised as consumer welfare, as the sole normative objective of U.S. antitrust law. . . . this singular normative vision proved foundational to the reorientation of antitrust law away from an interventionist, populist, Brandeisian, and vaguely Jeffersonian conception of antitrust law as a constraint on large-scale business power and toward a conception of antitrust law as a mild constraint on a relatively small set of practices that pose a threat to allocative efficiency.” Daniel A. Crane, “The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy,” *Antitrust Law Journal*, 79 (2014): 835-53, 835.

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fairly confined role in economic life, and 2) private economic activities should be controlled largely by competition.”⁸⁵ Ellis Hawley’s famously “ambivalent” account of antimonopoly policy similarly emphasized America’s “libertarian” and “liberal individualistic traditions,” wherein “long devotion to a philosophy of laissez-faire, local rights, and individual liberty” made Americans “reluctant to use the federal government as a positive instrument of reform.”⁸⁶

Such priors about the supposed limits of American antimonopoly and antitrust were only reinforced by equally enervated accounts of the inherently weak and corruptible nature of the

⁸⁵William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago: University of Chicago Press, 1956), 7. Notably, Letwin’s study was a direct product of Edward Levi’s and Aaron Director’s Antitrust Research Project at the University of Chicago Law School. Dan Ernst nicely captured Letwin’s ideological priors: “In Letwin’s telling, the Rule of Reason cases of 1911 and the Clayton and Federal Trade Commission Acts of 1914 saddled federal antitrust policy with mutually inconsistent goals and a fragmented scheme of enforcement. By stressing the irremediably conflicted and incoherent nature of the antitrust tradition, Letwin’s book . . . joined a far-ranging attack on the pluralist model of the regulatory state mounted by economists, political scientists, and professors of administrative law.” Daniel R. Ernst, “The New Antitrust History,” *New York Law School Law Review*, 35 (1990): 879-892.

⁸⁶Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton: Princeton University Press, 1966), vii, 4-5. Martin Sklar also caricatured America’s common law traditions: “The concepts themselves embodied principles enunciated in common-law precedents and strictures. These, in turn were rooted in the dogma of natural liberty” – “liberty of private contract and the rights of private property.” Martin J. Sklar, *The Corporate Reconstruction of American Capitalism: The Market, the Law, and Politics* (New York: Cambridge University Press, 1988), 100-101. Rudolph Peritz’s *Competition Policy in America* similarly positions the Sherman Act and antitrust policymaking squarely in the shadow of “the era of Lochner” and “the Supreme Court’s ‘economic due process’ regime founded on the major premise that the Fifth and Fourteenth Amendments protect individuals’ natural rights by safeguarding private transactions from legislative impairment. Judges tended to write in a deductive style, beginning with the assumption that private property rights, exercised through ‘liberty of contract,’ reflect the ‘due process’ clauses’ protection of ‘life, liberty, and property.’” Rudolph Peritz’s *Competition Policy in America: History, Rhetoric, Law* (New York: Oxford University Press, 2001), 11-12. For a broader analysis of this interpretive problem, see William J. Novak, “The Myth of the ‘Weak’ American State,” *American Historical Review*, 113 (2008), 752-772.

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nascent American regulatory state. Samuel Huntington reached for the diseased metaphor of “marasmus” in one of the first accounts of regulatory failure and capture at the ICC.⁸⁷ Hewing closely to George Stigler’s influential economic theory of regulation (where “as a rule, regulation is acquired by the industry”) Frank Easterbrook conjured up a law and economics vision of antitrust aimed precisely against or “versus” regulation – wherein regulatory laws were viewed as owing “more to interest group politics than to legislators’ concern for the welfare of society.”⁸⁸ Stephen Skowronek imported this dismissive perspective into the heart of American political development in an especially ferocious critique of American efforts at railroad regulation. For Skowronek, state legislative experiments like the so-called “Granger Laws” inaugurated “a regulatory posture that had not worked in the past and could not possibly work in the future.” At the national level, Skowronek branded the Interstate Commerce Commission simply “ridiculous”: “In 1887, the ICC seemed an unpredictable institutional anomaly in the state of courts and parties; by 1900 it had become a mere irrelevance. . . . For all practical purposes,

⁸⁷ Samuel P. Huntington, “The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest,” *Yale Law Journal* 61 (1952): 467. In *Regulating Business by Independent Commission*, Marver H. Bernstein applied Huntington’s analysis and capture perspective to six additional agencies: the Federal Trade Commission, Federal Power Commission, Civil Aeronautics Board, Federal Communications Commission, National Labor Relations Board, and the Securities and Exchange Commission. Marver H. Bernstein, *Regulating Business by Independent Commission* (Westport, CT: Greenwood Press, 1955); Bernstein, “Independent Regulatory Agencies: A Perspective on Their Reform,” *The Annals of the American Academy of Political and Social Science* 400 (1972): 14.

⁸⁸ Frank H. Easterbrook, “Antitrust and the Economics of Federalism,” *The Journal of Law and Economics*, 25 (1983): 23-50, 23; George J. Stigler, “The Theory of Economic Regulation,” *2 Bell Journal of Economics and Management Science*, 3 (1971): 3-21. As Easterbrook transparently admitted, one could find articulations of this economic theory of regulation in “almost any issue of this Journal or the Bell Journal of Economics.”

the commission had effected no change in the established mode of governmental operations or in the business conditions of the country.”⁸⁹

On the basis of just such assessments of the inherent limits of American law, statecraft, and economics, historians of corporation law, economic concentration, and antimonopoly have painted a composite account of regulatory failure fit for a Gilded Age. Its common features range from the rise of general incorporation laws to the decline of the regulatory “artificial entity” theory to the triumph of a modicum of corporate personhood in *Santa Clara v. Southern Pacific Railroad* (1886).⁹⁰ Gaining momentum through decline of common-law corporate controls like the *ultra vires* doctrine and a state’s ability to regulate “foreign” (i.e., out-of-state) corporations,⁹¹ the conventional narrative reaches something of a climax in the race-to-the-bottom charter-mongering that culminated in New Jersey’s corporation act of 1889 and the re-incorporation of the Standard Oil Company in that “traitor state.” Ultimately, Delaware’s General Corporation Law of 1899 completed the revolution that “turned corporate law inside out.” For 100 years, Joel Seligman argued, the business corporation could “exercise powers or seek capital” only in ways dictated by state and charter. With the New Jersey and Delaware

⁸⁹ Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982), 138-160, 287-289. For Skowronek, one of the main reasons for “the limits of America’s achievement in regenerating the state through political reform” at the turn of the 20th century was still the “outmoded judicial discipline” created by “the constancy of the Constitution of 1789.”

⁹⁰ *Santa Clara v. Southern Pacific Railroad*, 118 U.S. 394 (1886).

⁹¹ Morton Horwitz, “*Santa Clara* Revisited: The Development of Corporate Theory,” in *The Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1992): 65-107; Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* (Cambridge: Harvard University Press, 1918).

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“self-determination provisions,” the “corporation could be a lawmaker itself.”⁹² The resultant triumph of the corporation as a natural and normal business unit, in the words of Morton Horwitz, worked to “legitimate large-scale enterprise and to destroy any special basis for state regulation of the corporation that derived from its creation by the state.”⁹³

No doubt, the late 19th century did witness an internal transformation of corporate law with regard to the general regulatory effects of the original rules that formed a corporation qua corporation in the first place. What is missing from the conventional story, however, is a comparable account of the almost simultaneous creation of brand new sites and creative new rationales for the continued regulation of corporate power in America. For wholly coincident with the corporate rush to New Jersey and Delaware was a concerted effort by reformers to exercise new legal and political controls over corporate capitalism. While not discouraging the formation of many new corporations through radical changes in general incorporation law, reformers built a new regulatory regime aimed precisely at those industries, monopolies, and corporate practices that posed the greatest threats to democracy. Here, a whole host of factors from the nature of certain industries (dealing with necessities or public provisions) to the characteristics of certain monopolies (in terms of scale, scope, and structure) to a new set of corporate practices and behaviors (like corruption, coercion, and unfair competition) triggered

⁹²Joel Seligman, “A Brief History of Delaware’s Corporation Law of 1899,” *Delaware Journal of Corporate Law*, 1 (1976): 249-286, 273. Also see Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: W.W. Norton & Company, 2018). For an alternative portrait of the complexities of corporation law in this period, see Naomi Lamoreaux and William J. Novak, eds. *Corporations and American Democracy* (Cambridge: Harvard University Press, 2017).

⁹³Horwitz, “Corporate Theory,” 104.

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new rounds of regulatory innovation, expansion, and enforcement. In just this way, a revolution in corporate governance law led to an equally efficacious revolution in regulated industries law.

A full account of the nature and effects of American antimonopoly and antitrust thus requires a healthy skepticism with regard to some faulty historical presuppositions about laissez-faire, a “race-to-the-bottom,” regulatory capture and failure, and the historic limits of American statecraft. It also requires a more holistic contextualization of antimonopoly and antitrust within many highly interdependent regulatory technologies and strategies involving laws as disparate as police power, public utility, and unfair competition. And one should not underestimate the continued effectiveness in some states of common-law controls, charter restrictions, *ultra vires*, the law of foreign corporations, and state antimonopoly enforcement.⁹⁴ From remarkably robust common-law doctrines to continued state legislation to general state police powers to the rise of public utility and trade regulation to the construction of de facto federal regulatory and administrative authority, turn-of-the-century American law provided a broad regulatory environment for the further development of antimonopoly and antitrust policymaking. Beyond the problem of monopoly or “bigness” per se, it is important to understand the Sherman Act, the Clayton Act, and the creation of the FTC within this larger framework of the expansion of state and federal police power control over corporations, businesses, and economic activities, formerly dealt with through common-law and charter restrictions. At exactly the point in history when that earlier regulatory regime began to falter beneath the weight of new monopoly powers, the

⁹⁴Naomi Lamoreaux, “Antimonopoly and State Regulation of Corporations during the Gilded Age and the Progressive Era,” in *Antimonopoly and American Democracy* (chapter 4 of this volume).

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American regulatory tradition launched a bold new slate of state and federal initiatives aimed at maintaining and expanding democratic control over American corporate capitalism.

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