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From Regulation to Deregulation and (Perhaps) Back: A Peculiar Continuity in the Analytical Framework

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Abstract

The rise of the regulatory state during the Gilded Age was closely associated with the development of Institutionalist ideas in American academia. In their analysis of the emergent regulatory environment, Institutionalists like John Commons operated with a fundamentally marginalist theory of value and distribution. This engagement is a central explanation for the ultimate ascendancy of neoclassical economics, and the limitations of the regulatory environment that emerged in the Progressive Era. The eventual rise of the Chicago School and its deregulatory ambitions did constitute a rupture, but one achieved without rejecting preceding conceptions of competition and value. The substantial compatibility of the view of markets underlying both the regulatory and deregulatory periods is stressed, casting doubt about the transformative potential of the resurgent regulatory impulse in the New Gilded Age.

Keywords: John Commons; George Stigler; Regulatory Capture; Deregulation.

JEL Codes: B13; B15; B25; K20; L51.

1. Introduction

In the United States, the genesis of the modern regulatory state is generally traced to the Progressive Era. Though the term is often loosely defined, we associate it here with the creation of notionally independent Federal bureaucracies charged with the oversight of delimited aspects of economic activity (DeCanio, 2015; Levi-Faur, 2013). The hallmark regulatory institutions of the Progressive Era were the Interstate Commerce Commission (ICC) of 1887, the Sherman Antitrust Act of 1890, and the Federal Trade Commission (FTC) of 1914, and in the realm of monetary regulation, the Federal Reserve of 1913. Broadly, this regulatory apparatus was concerned with railroads, the excessive size of trusts, and the ravages of financial panics, themselves not completely disconnected from railroad speculation, at least early in the period.

The New Deal Era, running from the 1930s up to the 1960s opened up and extended the functions of the regulatory state, with the Securities Exchange Commission (SEC) of 1934 as the iconic institution of the period. Alongside the SEC, the sweeping transformations of the Federal Reserve system, and the creation of the National Labor Relations Board (NLRB), both in 1935, are further representative institutions of the period. Of note, in both the Progressive Era and in the early stages of the New Deal, sometimes referred to as New Deal Mark I, Institutionalists were a dominant influence, in contrast with the post-Roosevelt recession period after 1938, when, arguably, Keynesians were ascendant (Sandilands, 2001).

In our present era, calls for a renewed regulatory environment capable of remedying the novel monopolistic forces of the 21st century have become increasingly prominent (Philippon 2019).[1] We are told that the alleged virtues of free markets – namely, higher growth, more rapid innovation, and reduced inequality – can be reclaimed if only we are willing to protect competition. With these arguments comes fresh attention to the forces that motivated the earlier deregulatory tendency. The practical impact of the Neoliberal Era of deregulation began to be felt in the 1970s, though its intellectual roots developed considerably earlier. Here the literature on the rise of the Chicago School and Neoliberal conceptions of regulatory capture often suggests that there was a marked break with the body of economic theory pervasive in the Progressive and New Deal Eras. One of the suggestions made below is that the economic theory central to the Neoliberal Era of deregulation did not involve a major rethinking of the effects of competition and market power. Instead the champions of deregulation emphasized the likelihood of regulatory capture, and the potentially perverse effects of industry-specific regulation resulting from it.

Admittedly, some authors (e.g. Novak, 2013) acknowledge that the framers of the regulatory state were well aware of the possibility of regulatory capture. Such ideas were indeed part of the textbook presentation of state regulation in the late 19th century US. Richard Ely (1893: 292-3) could write that while the regulation of monopolies was certainly just:

> [t]he private interest which will use its resources to secure a vote of land or money or other advantage will do the same thing to ward off a threatened tax or vexatious regulation…When public

[1] The intellectuals behind the new regulatory impulse often suggest a connection with the older Progressive Era tradition, and refer to its policy agenda as New or Neo-Brandeisian, followers of Justice Louis Brandeis, one of the key champions of anti-trust legislation (Wu, 2018: 127-139). See also Glick (2018) for a critique of the Chicago school and the concept of consumer welfare.

> clamor at last secures the passage of a law the same corrupting agencies are turned against the officers charged with its execution…When private interests become monopolistic and powerful they do not only do not serve society reasonably, but all efforts to compel them to do so result in corruption of government and in ignominious failure.

Yet the notion that there is subsequently a significant theoretical break with Progressive Era economic theory, and that this new view becomes dominant during the Neoliberal period starting in the 1970s, persists and is rarely challenged.

While proffering an array of explanations for the rupture, Roger Backhouse (2005: 355, Emphasis added) insists that:

> [b]etween 1970 and 2000 there took place a remarkable and dramatic change in attitudes toward the role of the state in economic activity… This was much more than a simple change in attitudes toward economic policy: it was a radical shift of worldview, involving a transformation of attitudes across a wide range of the political spectrum *as well as being associated with profound changes in economic theory*.

Such accounts seem to overlook significant evidence for continuity regarding the underlying framework both for the rise and fall of the regulatory and deregulatory impulses in American society. In part, this follows from a lack of attention to what the framers of the original regulatory environment, against which the Neoliberal view rose, really proposed. Regulation was, at times, necessary to curb the excesses of the market arising from monopolistic power, or the disadvantaged position of immobile and ill-informed labor. An implicit notion of market imperfections, disturbing an otherwise efficient and desirable competitive market system, was at the heart of the original regulatory environment.

There is a connection between this interpretation of the potential excesses of the market, the effects of which were evident during the Gilded Age, and the ascendance of marginalism in late 19th century American political economy. It is true that marginalist methods were not absolutely predominant in the United States until much later, perhaps not until the Keynesian Revolution, and the development of what was later called the Neoclassical Synthesis of Keynesianism. But early regulators operated with a limited understanding of theory of value and distribution, grounded first on prominent Institutionalist ideas, and later on the Neoclassical Synthesis. In both cases, an imperfectionist model was dominant, and one can trace the priority given to marginalist ideas to a host of influential early Institutionalist authors, in particular those associated with Wisconsin Institutionalism, the ideas of John R. Commons and his followers.

It is with respect to these underlying ideas that the Chicago School, particularly as espoused by George Stigler, developed the push for deregulation. At its core, the deregulatory agenda involved a relatively conventional Marshallian presentation of mainstream marginalism. The fundamental notion given greater emphasis by the Chicago scholars was that while market imperfections were certainly possible, government failures would be pervasive, and considerably worse. In our view, perhaps contrary to conventional interpretations, there is a strange continuity in the subjacent views about how markets operate in the four eras[2], including the views of some Institutionalist

[2] The four eras would be the Progressive, New Deal, Neoliberal (or Deregulation) and, in an admittedly speculative way, a new Re-Regulation era that might be in its initial phase.

authors during the rise of the regulatory state and the Chicago authors that provided intellectual support to the deregulation process. The rest of the paper is divided into two sections and a conclusion tracing the evolution of the regulatory environment and the evidence for the strange continuity in economic thinking.

2. Institutionalism and the rise of the Regulatory Era

The direct influence exercised by Institutionalist authors over the nature and scope of the emergent regulatory environment expanded over time. While an array of existing regulators, industrialists, and farmers participated in Senator Shelby Collum's select committee during its investigation of railroad regulation, only a few passing references to political economy appear amidst their testimony (1886). As initially passed in 1887, the Interstate Commerce Act, the first major extension of the federal regulatory apparatus, reflected a desire to appease an array of conflicting interests, and was replete with loosely defined language prohibiting 'unjust' or 'unreasonable' practices (Eisner, 2000: 49-52). The Act's practical substance was therefore shaped by the interplay between the newly-created Commission and the courts. It was in these ensuing legal proceedings, and the gradual expansion of the regulatory state, that economic theory came to assume a larger role.

Much of our discussion below emphasizes the role of 'Wisconsin Institutionalism' and its exploration of the interplay between law and economics as typified by the work of John Commons and Richard Ely. Through its graduates, many of whom found careers in government, Wisconsin-style Institutionalism came to shape the regulatory environment and social protections of the New Deal Era (Rutherford 2011: 222). Seeing Commons' role in America as analogous to that of the Webbs in England, Kenneth Boulding (1957: 7) claimed that "through his students Commons was the intellectual origin of the New Deal, of labor legislation, of social security, of the whole movement in this country towards a welfare state."[3]

The particular novelty of early Institutionalism, and the point at which the school became clearly identifiable and self-conscious, has been the subject of continued debate. Walton Hamilton's (1919) plea for the primacy of institutional economics highlighted its relevance to the 'modern problem of control,' while also suggesting that it should serve as a unifying current, drawing together the insights an extraordinarily diverse array of authors including marginalists, including Austrians. Subsequent characterizations have been less unitarian in spirit. Anne Mayhew (1987: 980) is definitive, contending that the joint founders of Institutionalism were Thorstein Veblen and John Commons, and that their work was 'drastically different' from that of earlier traditions, including the German Historical School. In presenting what he deems a more balanced account of the development of Institutionalism, Yuval Yonay (1998: 52) identifies Veblen, Commons, and Wesley Mitchell as the "canonized fathers of institutionalism." For Yonay:

[3] For example, Elizabeth Brandeis, daughter of Justice Brandeis, together with her husband, Paul Rausenbush, and Harold Groves, all students of Commons were central in unemployment compensation laws (Rutherford, 2006: 172). On the Wisconsin school, see also Henderson (1988).

> "institutionalism continued a radical trend in American economics, one which was already quite powerful in the 1880s...Its enduring mark in economics is evident in the welfare legislation in the United States and the measurement techniques and economic forecast procedures common in our days (75-76).

Yonay further emphasizes that many of the Institutionalists working in the first third of the 20th century did not necessarily see themselves as a school apart from the mainstream.

Malcolm Rutherford (2009: 310) suggests that "the history of Institutionalism can be traced back to the work of German influenced economists of the 1880s and 90s," with the movement assuming mainstream influence only in the inter-war years. While acknowledging the methodological diversity within the triumvirate of Veblen, Commons, and Mitchell, Rutherford (2011) is insistent that Institutionalism *not* be defined as a species of dissent from neoclassical economics.[4] In this view, the characteristic features of early Institutionalism were a commitment to empirical realism, and an emphasis on the need to reform existing social institutions. Thomas Leonard (2015) labels the work of Commons and Ely as 'left Progressivism,' the natural successor of which was inter-war Institutionalism. With some acknowledgement that the line of demarcation is often blurred, Leonard maintains that this work should be distinguished from the 'right Progressivism' exemplified by John Bates Clark, and the embrace of marginalist methods. Bruce Kaufman's (2017) self-labeled revisionist account argues that Veblen's work is not easily integrated within the Institutionalist canon. Drawing from the later reflections of Mitchell, John Maurice Clark, and particularly Commons, Kaufman instead contends that Richard Ely's new economics of the 1880s, along with the earlier contributions of the German historical school, were key manifestations of an ongoing institutionally-attentive current in economic thought.

All would, however, acknowledge the relevance of the transformation of American political economy that coincided with the Progressive Era. A host of new academic institutions – the products of the Morrill Act's land grants, and of the endowments of private fortunes – sprung into being during the closing four decades of the 19th century. While the nascent graduate programs of these institutions were soon to begin turning out their own cadres of newly minted PhDs, considerable control over the character of graduate education in political economy was seized by scholars who had turned to Germany for their own graduate education. Germany had for some time regularly drawn American students interested in furthering their education in chemistry or medicine, but it was only after 1870 that American students in the social sciences began to swell these ranks (Herbst 1965: 8-9). Those newly minted PhDs that subsequently found positions 'back home,' such as J.B. Clark and Ely, were eager to elevate and burnish their scientific credentials as objective researchers. For some, this search for status and security necessitated trumpeting the novelty and the superiority of a loosely defined new approach to political economy.

The brand of political economy that American students encountered in Germany exercised a lasting impact. As Ely's student, Sidney Sherwood (1897: 8) put it, during the first century of the

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[4] Michael Bernstein (2001) argues that Veblen and Mitchell did in fact attack neoclassical theory, but essentially for "its excessive use of abstraction" (45). In particular, Veblen critique rested on the marginalists "presumption of rationality that ignored the social and cultural factors that modulated behavior".

republic, “the mind of the American economist, touched only by the practical reason of England and the speculative logic of France, was virgin yet from the intellectual ferment of German thought.” Having arrived in Germany in June of 1877, supported by a three-year fellowship from Columbia University, Ely was initially intent upon studying philosophy. During his first year of study at Halle he found himself more attracted to the lectures in political economy of Johannes Conrad, and on the advice of friends moved to the University of Heidelberg for his second academic year, where he came to study under Karl Knies. Ely completed his doctoral degree in two academic years, and occupied a third as both tourist and student. Though in his autobiography Ely would famously refer to Knies as his 'master,' he also attended the lectures of Ernst Engel, and Adolf Wagner during his German sojourn (Ely 1938: 39-51).

Together with Wilhelm Roscher, and Bruno Hildebrand, Knies is usually thought of as one of the founding figures of the ‘older’ German Historical School (GHS). Disagreements over the novel theoretical features of this older GHS, and the sustained impact that Ely’s German education may have exercised on his later thought appear as the first stumbling block for modern interpreters. Geoffrey Hodgson (2001: 138) argues that Ely and his fellow German-educated allies Henry Carter Adams and J.B. Clark shaped a “strong doctrinal theme in the early years of the AEA” that was both receptive to social democracy and the welfare state, “combined with a hostility to deductive and general theorizing.”[5] In his view, these scholars were attentive to the grave dangers of trans-historical theory, and wary of any and all inviolable laws in economics. While this cohort was not wholly successful in cultivating a distinct school of thought, Hodgson treats their awareness of the problem of ‘historical specificity’ of theory as laudable.

Dimitris Milonakis and Ben Fine (2009) go a step further in suggesting a far more direct linkage between the GHS and American institutionalism. Assuming an inclusive definition of institutionalism as a movement that flourished between the 1880s and the outbreak of the Second World War, they contend that:

> there is no doubt that if [the Historical School] spawned a successor, it is to be found not in Europe but in America. For at the same time that historical economics was losing ground in Europe, inductivism and empiricism were winning a new lease of life across the Atlantic in the form of American institutionalism (158).

In this view, if historicism was alive and well in the hands of such diverse authors as Veblen, Mitchell, and Commons, then Ely and his German-educated cohort were the essential transmission mechanism. Though they recognize that the German historical school was not wholly antagonistic towards theory, Milonakis and Fine see the rise of marginalism as, at least, a partial defeat for the school. Nevertheless, they find that “the residue of the GHS survived, however fitfully, as social economics and American institutionalism” (118).

[5] Almost as an afterthought Hodgson mentions that J.B. Clark attributed his own work on marginalist theory to the guidance of Karl Knies, his former teacher.

The notion that the older GHS, or their prominent American students, categorically rejected formal theorizing cannot be sustained. Instead, in both cases, there was a clear willingness to embrace new marginalist methods. Such a recognition is not new, though it warrants emphasis. Erich Streissler and Karl Milford (1993: 57) note that while German authors were often careful to present any array of different views in contrast to one another, "Roscher used both marginal utility and above all marginal productivity pricing and a host of other subjective value notions as a matter of course" Streissler (2001: 322) further contends that the defining innovations of neoclassical theory, namely the concepts of demand based upon marginal utility and a marginal productivity theory of distribution, were commonplace elements of German economics by the middle of the 19th century. John Chipman (2005) holds that Knies, Roscher, and Hildebrand all adopted and attempted to extend a marginalist theory of value drawn from the work of Karl Heinrich Rau.[6] Kosmos Papadopoulos and Bradley Bateman (2011) are more skeptical of attributing a full-fledged marginalist theory of value to Knies, but accept that his work embraced theory and served as a precursor for Carl Menger's value theory. It is not so curious then for Joseph Dorfman (1955: 28) to note that in Progressive Era American economics:

> "[f]or a while there occurred an overwhelming emphasis on the doctrine of marginal utility as the key to all economic analysis. Interestingly, the German-trained contingent was the first to welcome Jevons' theory as a part of the new economics."

Ely's early essay on "The Past and the Present of Political Economy" (1884) was an outcome of lectures of the history of political economy that Ely had delivered during his second academic year at Johns Hopkins.[7] It therefore offers something of an early snapshot of his understanding of the discipline's history upon his return from Germany. Ely suggests that because the older deductive school had the merit of having focused attention on the production and distribution of wealth as a special object of study, its universal advocacy for *laissez faire* meant that it "failed first as a guide in industrial life" (23).

In his view, the GHS objected to the "method and the sufficiency of its assumptions or major premises – that is to say, its very foundations" of the English deductive school (43).[8] In place of the axiomatic premises of the older school "[a]ll a priori doctrines or assumptions are cast aside

[6] In his 1855 essay, "*Die nationalökonomische Lehre vom Werth*," Knies (2015: 293-7) characterizes the theory of value he presents as:

> what we in Germany have rather universally accepted as the theory of value… [B]y value in general one imagines the degree of usefulness of goods which indicates both their useful effect insofar as they pass into consumption or use, as well as their useful effect insofar as they are exchanged against other goods...We refer to as goods all things that are recognized as useful for the satisfaction of human needs. Value is the degree of that usefulness which an object has as a satisfaction of human needs...Accordingly, the magnitude of the use value of goods depends: a) upon the intensity of the human needs that they satisfy; b) upon the intensity with which they satisfy a human need.

[7] During his year spent as a student at Johns Hopkins, Veblen attended Ely's lectures. Dorfman (1934: 40) notes that "the lectures made Veblen doubt that Ely had read the works he was discussing, and in exploring the library he found a German encyclopedia that contained almost the exact same material that Ely had been offering."

[8] Ely had studied political economy directly for little more than five years at this stage, and the essay seemingly reflects some of this immaturity, drawing broad generalizations of the "English deductive school" before zealously touting the virtues of the new historical economics.

by this school; or rather the final acceptance is postponed until external observation has proved them correct" (47). Importantly, even at this early stage, Ely does not depict the new school as dismissive of formal theory in general. Instead, Ely suggests that an attentive study of history might confirm existing principles or furnish new ones. The other major advance of the new school consisted in its embrace of an active role for political economy in informing policy. The new school understood the discipline of political economy as both theoretical *and practical*, and thus welcomed the search for laws and policies that would best promote human welfare. Though economists had an obligation to advocate for the common man, fulfilling this obligation would require the continued development of specialized knowledge.

Despite failing to complete a Ph.D. at Johns Hopkins, John Commons' graduate education there shaped the subsequent course of his career. Upon arrival in Baltimore, Commons (1963: 42-44) recalled that "I resolved to abandon all the theories of political economy which I had ever picked up, and to start, as John Locke would say, with a blank sheet of paper" and was soon "flaming with enthusiasm over this 'new' economics." As a student Commons aided Ely in preparing his *Introduction to Political Economy* (1889), and owed his eventual appointment at the University of Wisconsin in 1904 to Ely's support. In his *Distribution of Wealth* (1893), the first systematic work of Commons' early career, the unique character of the new economics was on display. The book foregrounds a marginalist approach to the theory of value with Commons insisting that "Value is the doorway to a theory of Distribution" (2). In competitive conditions the prices of commodities are driven to their costs of production, and capital receives its legitimate reward justified by the "sacrifice or abstinence of savers of capital, measured by the intensity of pleasures which they forego, the risk they assume, and the length of time they have to wait" (18). The existence of monopoly power, whether artificial or natural, altered distribution as the monopolist enjoyed the power to restrict their output relative to demand and thereby "keep up the marginal utility and the price of the article at some point above its cost of production" (102).[9] Such monopoly power could be counter-balanced by labor unions that served to restrict the supply of labor (177), or by taxes on land values or inheritance (237). His fundamental suggestion was that "[t]he so-called conflict between capital and labor is at bottom a conflict between capital and labor on the one hand, and the owners of opportunities on the other" (249). The continued dynamism of capitalism therefore required more freely competitive conditions that would expand access to such 'opportunities' (Gonce 1996). Dorfman (1965) sees the book as an illustration of the foundations of Common's

[9] Commons (1893: 59) holds that:

> [t]he place of law in Political Economy is a subject which has received from English economists no attention at all commensurate with its far-reaching importance… [They] have taken the laws of private property for granted, assuming that they are fixed and immutable… But such laws are changeable—they differ for different people and places, and they have profound influence upon the production and distribution of wealth.

Thus, in one form or another, the perpetuation of monopoly power relied upon the power of state.

economics.[10] Undoubtedly, there was much change in emphasis as Commons' work evolved, but a marginalist analysis of value and distribution remained as the foundational conception of a competitive market economy.

In *Legal Foundations of Capitalism* Commons gives over much of his effort to tracing the transformation of the jurisprudential understanding of property. The older material conception, a holdover from the use-value orientation of feudalism, treats property solely as the physical and tangible possessions of individuals. Over time the courts come to define property as a spectrum of tangible and intangible assets including firms' accumulated goodwill, the value of which is governed by the streams of income they are expected to yield in the future. The specific exchange value of factors and assets in contemporary capitalism corresponds to the relative bargaining power[11] of an array of going concerns, alongside the laws and norms that govern them. In the absence of such forces:

> economic theory has worked out a mechanistic proportioning of factors according to supply and demand… Producers, led on by an 'invisible hand,' are shifting towards the limiting factors whose value is high, and away from the complementary factors whose values are low, thus proportioning the factors by equalizing the incomes of individuals towards a 'normal' or 'natural' or harmonious standard of wages, interest or profits for each class (1924: 323).

Commons holds that these natural laws have not, however, been allowed to operate without the interference of a multitude of labor and business interests exercising differing degrees of bargaining power.

Commons' analysis of what he terms 'reasonable value' is elusive in that it does not propose a singular objective standard of value. Value is never anything but a reflection of the conditions of relative scarcity prevailing at the moment. The judgements of the courts regarding reasonable value are attempts to reapportion bargaining power and move towards a new distribution deemed to be in the public's interest. In that context, "[a] reasonable system of prices can be judged to be such only as it conforms in some way to the psychological or ultimate goal of welfare and the physical or intermediate goal of production of wealth" (1924: 382). The appropriate balance between the interests of capital and labor, or likewise between producers and consumers, is not taken by Commons to be self-evident. Still Commons would later argue in his *Institutional Economics* that pursuit of efficiency ought to serve as a guide in judgments of reasonable value. He concludes that "the gains from increasing efficiency in all industries shall go as much as possible, in the first instance, to producers and not to buyers; that the producers shall make their gains as efficient producers and not as mere sellers by higher prices received from buyers" (1934: 804). The proper role of political economy

[10] In a letter to Ely written at the time, Commons outlined some of his plans for subsequent work, noting that "I am planning my work to center around the legal aspects of sociology, expanding the doctrines in my *Distribution of Wealth"* (Dorfman 1965: xiv). Commons' preface to *Legal Foundations of Capitalism* echoes much the same point, somewhat generously contending that the work "commenced thirty-five years ago at Johns Hopkins University under my stimulating teacher, Richard T. Ely" (1924: v).

[11] In Commons' account (1924: 20-21), "[b]argaining power is the willful restriction of supply in proportion to demand in order to maintain or enlarge the value of business assets."

> is to uncover that limiting factor and to point out, if possible, the extent, degree and point in time at which it should be modified or counteracted, in order to control all of the other factors for the further purpose deemed important (1924: 378).

The main idea behind the early regulation of cartels was to preclude further concentration and to protect peripheral firms within an industry from being taken over by central firms. The jurisprudence, as per the decisions of the Supreme Court of the United States (SCOTUS), implied that corporations were entitled to "reasonable return on the fair value of the property being used for the convenience of the public" (see McCraw, 1984: 59).[12] The preoccupation with bigness, and concentration did not necessarily mean being against higher prices. The question of prices was seen essentially as something that was determined by efficiency, with the theories of value and scientific management of the time being relevant in this context. For example, Thomas McCraw (92) notes how Brandeis opposed higher prices for railroads on a specific brief to the ICC on the basis of their inefficient use of resources. Despite such examples, McCraw (1984: 115) notes that "government antitrust actions usually opposed not huge integrated firms, but loose associations of small companies."

In practice, most regulation involved 'advanced advice' to firms. During the Progressive era, many regulators had seen advance advice as a way of preserving the trusts without breaking them apart. The FTC tried to provide negotiated advance advice to corporations while trying to avoid the conventional adversarial procedure typical of the American jurisprudence (McCraw, 1984: 130). During the New Deal period there was a reduced emphasis on the need to break apart the center firms, the large corporations that came to dominate almost every branch of the economy of the United States, and that dominated the Gilded Age economy.[13]

A similar argument appears more recently in Leonard (2015: 56), even though he suggests that the vision of the regulatory state restoring the efficiency of markets should be mostly attributed to what he refers to as right progressives like J.B. Clark.[14] Left progressives were, in his view, more skeptical about the bigness of trusts, but he admits that the views of right and left progressives tended to converge (71). Leonard (58) argues that, for Mitchell, scientific management guaranteed the efficient functioning of the new giant corporations, and that inefficiency resulted from the functioning of markets. In that sense, anti-trust regulation guaranteed the restoration of efficiency, precluding collusion among corporations.

During the New Deal, deflationary pressures led to legislation concerned with allowing corporations to sustain higher prices. The fear of bigness and cartelization was trumped by the fear of

[12] Commons argues, for example, that: "The public utility law was designed to ascertain and maintain *reasonable values* and reasonable practices by the local public utility corporations" (1934: 2, Emphasis added). He is explicit about how the theory of Reasonable Value was created by the SCOTUS in its 1890 decision (649).

[13] James Landis, central regulator of the New Deal era, believed that to minimize the possibility of capture the regulations had to implicitly provide the correct incentives for those involved to have a self-interest in obeying the law. McCraw (1984: 195) highlights "the fundamental SEC strategy of manipulating private incentives to serve public ends."

[14] On Clark's views on regulation see Fiorito (2013). He suggests that Clark's "academic and popular writings on the so-called 'trust problem' significantly invigorated the discussion of unfair competition that followed the 1911 dissolutions of the Standard Oil and American Tobacco (140).

deflation. For many regulators, the Depression itself was the result of the oligopolistic competitive structure, and of persistent overproduction.[15] In the New Deal period, the most important legislation concerned monetary and financial markets which were seen at the center of the economic crisis. The regulatory solution implied the need for rigorous disclosure rules of information for corporations, and the elimination of all sorts of conflicts of interest, to preclude the information problems and perverse incentives that had led to market failure.[16]

It is important to note that while during the New Deal policies that were pro-union were passed, enforcement was lax. As noted by Richard Hurd (1976: 40):

> Working class gains during the Great Depression cannot be credited to New Deal policies. Unions prospered to be sure… Although the New Deal contributed only marginally to the unionization of the working class, it did help shape the movement which evolved. It furthered the expansion of unions which worked within the economic system, thus helping to avert the possibility that a new, more radical, movement would form which proposed an alternative to capitalism. Once the crisis was over the state adopted a more obviously pro-capital approach, a clear indication that the New Deal labor policy offered short-term concessions only in the interest of the long-term health of capitalism.

Organized labor was thus accommodated within the broader regulatory structure in much the way that Commons had expected and hoped for.[17] The New Deal labor regulations depended, it is worth remembering, on a political coalition that upheld Jim Crow and the power structure in the South, limiting its transformation of labor relations to a great degree. [18]

Seen in total, the regulation that emerged with the fourth branch of government was principally concerned with advance advice and providing the right incentives for economic agents, and with protecting workers by making their claims work within the system. In other words, the regulatory

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[15] These views about the causes of the Great Depression only were superseded by Keynesian views after the Roosevelt recession of 1938. See Sandilands (2001).

[16] It seems reasonable to assume that this view of market failure arose in the period from the mid-19th century, from transition authors like John Stuart Mill, and marginalist authors like Henry Sidgwick, Alfred Marshall and the latter's pupil Arthur Cecil Pigou. For a discussion see Medema (2007).

[17] Commons (1918: 15-16) distinguished between "class conscious" and "wage conscious" unionism, with the latter accepting the basic parameters of the existing capitalist order. A class conscious, revolutionary unionism was symptomatic of "the unripe philosophy of upstart unionism, or the pessimistic philosophy of defeated unionism." Commons (1963: 97) would later suggest that relative to his more radical friends it was always his trade-union philosophy that had marked him as conservative. In a tidy summation he noted that "[i]t is not revolutions and strikes that we want, but collective bargaining on something like an organized equilibrium of equality. This I take it, was the social philosophy of Samuel Gompers."

[18] Commons' support for unions and minimum wage legislation, it is worth remembering, was associated to the idea that the ethnicities and races that were in his view 'ambitious,' meaning willing to work for less, ended up reducing the real wage, by increasing labor supply. Restrictions on immigration, unions and minimum wages would counter those tendencies, and make higher wages the norm. In his words:

> [t]here is but one immediate and practical remedy—the organization of labor to regulate competition. The method of organization is to do in concert through self-sacrifice what the non-industrial races do individually for self-indulgence; namely, refuse to work. Where the one loafs the other strikes. While the necessities of the workers set the minimum below which wages cannot fall, and their physical endurance sets the maximum hours beyond which they cannot work, the labor-union, by means of the strike or the threat to strike, sets a higher minimum of wages and a lower maximum of hours, which leaves room for ambition (Commons, 1907: 149).

environment of the Progressive and New Deal eras seemed to suggest that market failures were pervasive and that regulation was needed to reduce their impact on consumer welfare or on perceived economic efficiency, and that collaboration between labor and capital was possible and desirable, again in the name of efficiency. It was based on a conception of market failures that was fully compatible with marginalist views of the economy. These views became truly dominant at the end of the period, with the victory of the Neoclassical Synthesis version of the Keynesian Revolution in the United States.

3. The Misinterpretation of the Deregulation Agenda

The Progressive Era saw a significant effort to regulate the so-called cartels, and many Institutionalists were associated with the efforts to curb corporate power and the establishment of regulatory agencies. The administrative state that resulted from the Progressive and New Deal eras was built on the foundations of a mix of Institutionalist[19] and Neoclassical Synthesis Keynesian ideas about how markets formed and behaved, and the notion was that unregulated markets regularly fail to achieve socially desirable results. That consensus was challenged by a set of scholars that coalesced at Chicago, often seen as the pioneers of the modern field of law and economics. Emphasizing that an awareness of the interplay between law and economic life is at least as old as political economy itself, Steven Medema (1998) takes Ronald Coase's "The Problem of Social Cost" as uniquely formative for the new law and economics promulgated from Chicago. In this view, Coase's contribution originated in his close study of the broadcasting industry, and was a call to critically evaluate the various institutional remedies that might be adopted in the face of externalities and non-negligible transaction costs. The law and economics tradition that subsequently developed at Chicago largely discarded this aspect of Coase's work, with the article instead serving as the stimulus to apply neoclassical microeconomic tools to the analysis of agents' behavior in the legal realm and beyond.

William Novak (2014), among others, puts Stigler and the notion of regulatory capture at the center of the rise of Chicago, and of the intellectual movement that provided a theoretical foundation for the Deregulation Era.[20] Edward Nik-Khah (2011) contends that while Stigler fell well short of Milton Friedman's influence as a teacher, he was the "empire builder" of Chicago-style economics, attracting and channeling private funding to promote skepticism of the state's ability to

[19] Rutherford (2015: 78) while noting that Institutionalists did not use the term market failure, they believed "market failure to be… endemic."

[20] The Coase Theorem, as interpreted by many, reinforced the idea that only secure property rights were required for efficient market solutions. Hayek's notion that complexity implies that control remains out of reach, also played a role. In addition, even though dismissed by Chicago and affiliates, the Arrow-Debreu model, also developed during this period, provided an authoritative argument for the preeminence of markets. In other words, the post-war period saw a flourishing of views that reinstated the importance of free markets, and significant amount of money was poured by conservative groups to fund these ideas, as noted by Phillips-Fein (2009).

effectively control economic life. Stigler's work gave rise to two interrelated literatures, econometric analyses of the price effects of existing regulation,[21] and the theoretical suggestion that small, well-organized groups of producers, rather than the diffuse public, were more likely to capture and shape regulatory institutions in their interest.[22] The fundamental notion was that government intervention was not required even in the presence of market failures, since government failures were likely to be even worse. The presence of market failures was not necessarily denied, but there was an underlying view that markets might be useful to deal with government failures.[23] Chicago-style arguments framed the regulatory impulse born in the Progressive Era as an historical aberration. Novak (2014: 33) adds that:

> [t]he capture thesis turns on a metanarrative of exposing the short-term historical error in the interest of righting the wrong – returning policymaking to fundamental economic principles and restoring some kind of purer and lost original, natural, and classical order.

That is, a certain degree of economic heterodoxy was necessary for the regulatory impulse in American history. Further, he suggests that the original regulators, as well as the authors that provided the theoretical background that influenced them, namely Commons and Ely, were fully aware of the possibility of capture by corporate interests. McCraw (1984: 187) argues the same, in that early regulators were conscious of the threat of regulatory capture, but believed that the threat could be overcome.

In this view, the rise of the Chicago School restored the primacy of the notion of market efficiency, and countered the heterodox tendencies of the Institutionalist and Keynesian inspired regulators of previous eras. In fact, many progressive New Dealers had moved in the direction of seeing the regulatory agencies as dominated by industry and ineffective in protecting consumers.[24] What we wish to stress is the substantial compatibility of the view of markets underlying both the

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[21] Peltzman (1993: 820-21) reveals that Stigler and Claire Freidland's seminal 1962 article examining the effects of electricity regulation contains coding and specification errors that reduce the estimated price effects of regulation by an order of magnitude.

[22] Stigler (1971: 17) notes, however, that the idea of capture is common in the literature. He says that: "So many economists, for example, have denounced the ICC for its pro-railroad policies that this has become a cliché of the literature".

[23] Stigler (1971) argues that consumer choice between buying and airplane or train ticket is considerably more efficient than government regulation of the transportation industry as a social mechanism to allocate resources. For him:

> [T]he condition of simultaneity imposes a major burden upon the political decision process. It makes voting on specific issues prohibitively expensive: it is a significant cost even to engage in the transaction of buying a plane ticket when I wish to travel; it would be stupendously expensive to me to engage in the physically similar transaction of voting (i.e., patronizing a polling place) whenever a number of my fellow citizens desired to register their views on railroads versus airplanes (10).

Essentially government failures tend occur as a result of higher transactions costs associated with government regulation than with consumer choice.

[24] Landis would be a central New Dealer that moved in that direction. Progressives like Ralph Nader, and his crusade for consumer rights and Senator Ted Kennedy's hearings on the aviation industry that precede the deregulation of the sector are also examples of the trend towards deregulation among those skeptical of market forces (McGraw, 1984).

regulatory and deregulatory periods. Stigler (1957: 10) himself suggests that the "complete formulation" of the modern concept of perfect competition was realized "not first, but most influentially, by John Bates Clark." Stigler goes on to propose that:

> [o]ne method by which we might seek to adapt the definition [of perfect competition] to a historically evolving economy is to replace the equalization of rates of return by expected rates of return (15).

Such an approach is not wholly satisfactory, however, as the process of capitalist development is not smooth, and occurs in "fits and starts." Consequently, the concept of competition should be adapted:

> to insist only upon the absence of barriers to entry and exit from an industry in the long-run normal period…Then we may still expect that some sort of expected return will tend to be equalized under conditions of reasonably steady change (16).

The notion of free entry was central to the concept of competition adopted by both 'true' classical political economy (e.g. Smith, Ricardo, Marx), as well as for the original marginalist views (e.g. Jevons, Marshall, Menger and Walras) on the concept of perfect competition. Its centrality was abandoned in the intertemporal General Equilibrium approach developed in this period. Stigler upheld the importance of free entry, as did the Chicago School in general, as he was resistant to adopting the new intertemporal approach to the theory of value, remaining firmly grounded on Marshallian analysis (Roncaglia, 2019: 129-133). But at the same time, Stigler defended a view of competition that went beyond free entry and emphasized the lack of power of individual firms in the market, something that was alien to classical political economy authors.[25] Competition provided a level playing field, where all agents were equally powerless. Thus, in this power free system, a state intervention would likely tilt the field.[26]

Stigler (1965) charged political economy up to his own era as negligent, having failed to scientifically examine the role of the state in economic affairs. Specifically, he emphasized the near absence of empirical studies on the effects of alternative policies, particularly the relative merits

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[25] Heinz Kurz (2018: 3) argues that:

> Stigler throughout his academic career stuck firmly to methodological individualism and advocated the market form of perfect competition as approximating near enough real world conditions. With perfect competition, no economic agent has any power whatsoever. Market results do not reflect any distortions caused by economic power or control and may therefore be seen to be 'just.' Stigler defended this position also with regard to the literature on monopolistic competition, championed by Edward Chamberlin and Joan Robinson, and thus denied a significant and lasting influence of monopolies on income distribution.

Moreover, the marginalist conception presumed full utilization of resources in equilibrium, including labor, something that was not true in classical analysis.

[26] Stigler (1987: 948) argues that "the classical authors felt no need for a precise definition because they viewed monopoly as highly exceptional." Note that competition was central for classical authors, since it was the force that allowed market prices to gravitate towards natural ones (Eatwell, 1987). Stigler, also, points out, correctly in this case, that "the groundwork for the development of the concept of perfect competition was laid by Augustin Cournot". The implication is that he follows the marginalist concept of competition, and discards the notion of free entry based on classical political economy.

of varying forms of relation as against free competition. In the supposed century of *laissez faire*, "[t]he main school of economic individualism had not produced even a respectable modicum of evidence that the state was incompetent to deal with detailed economic problems of any or all sort" (1965: 7). For Stigler, this failure applied even to those Progressive Era economists that sustained an engagement with questions of economic policy, namely Commons and J.B. Clark (11). They lacked a robust theory of government failure. The Chicago revolt against the regulatory state, led by Stigler, was not then conceived as reshaping the theory of value, competition, or oligopoly, which had cumulatively been given sufficient formal statement. It was instead primarily a charge that the regulatory state had failed in practice to efficiently achieve its purported aims. *Some, but not all,* of the limitations of the regulatory environment against which the prophets of deregulation rebelled resulted from the underlying theoretical problems of both Institutionalist and Neoclassical Synthesis Keynesians regarding the theory of value and distribution. It is important to note that many Institutionalists believed that there was continuity between classical political economy or the surplus approach and marginalism. In fact, Veblen's term neoclassical economics was coined to suggest that very continuity.

Commons (1934: 56) clearly believed that neoclassical economics was a synthesis of classical political economy and marginalism. He contended that "these opposing energies of labor and want, magnified into 'elasticities' of supply and demand, could be physically correlated by the materialistic metaphor of an automatic tendency towards equilibrium of commodities in exchange against each other, analogous to the atoms of water in the ocean, but personified as 'seeking their level' at Ricardo's 'margin of cultivation' or Menger's 'marginal utility.' This equilibrium was accomplished by the 'neo-classicists,' led by Alfred Marshall (1890)." Undoubtedly, Commons wanted to go beyond this consensus,[27] though he failed to break with marginalist supply and demand notions. As Biddle and Samuels (1998: 41) suggest, Commons "was quite explicit that he considered institutional economics to be a supplement to, rather than a replacement for, neoclassical price theory." Commons' (1934: 57) alternative theory of 'reasonable value' hinged on the crucial concept of transactions, a "unit of activity common to law, economics, and ethics."[28] Like marginalist

[27] Commons (1934: 696) also says that:

> [t]he analytic economists of the classical school (Smith, Ricardo) took scarcity for granted, and it was the hedonic school (especially the Austrian school) and the 'neo-classical' school, especially Marshall, who analyzed and perfected its formula.

Clearly, while aware of the distinction between classical and neoclassical authors, Commons thought that they had some type of complementarity, which seems to be based on the objective and subjective aspects of value. In this he followed, not just Marshall himself, and later John Maynard Keynes, but also Veblen.

[28] In his own words:

> the ultimate unit of activity, which correlates law, economics, and ethics, must contain in itself the three principles of conflict, dependence, and order. This unit is a Transaction. A transaction, with its participants, is the smallest unit of institutional economics (58).

theory the central emphasis is therefore on exchange, rather than on the process of production.[29] This suggests similarities between Commons and the New Institutionalist analysis of Douglas North and, perhaps more directly of Oliver Williamson, which is based on Coase's transaction costs, and far from a break with marginalism.[30]

Commons seemed to believe that his originality depended on the analysis of what he referred to as rationing transactions dealing with issues that involved transactions over time, where credit and expectations of future profitability assumed a determinant role. This, one might speculate, could be related to the rise of consumer credit in the 1920s, and the accompanying expansion of mass consumption and consumer society on a scale not seen before. Commons argued (1934: 117) that for "the transactional theorists [like himself], the ultimate unit is an economic activity, in the disposition of ownership of future material things and the creation of debt." In the discussion of rationing transactions Commons (1934: 68) distinguished between the former and what he termed managerial and bargaining transactions. As an illustration of the distinction, he understood that:

> [a] judicial decision of an economic dispute is a rationing of a certain quantity of the national wealth, or equivalent purchasing power, to one person by taking it forcibly from another person. In these cases, there is no bargaining, for that would be bribery, and no managing which is left to subordinate executives. Here is simply that which is sometimes named 'policy-shaping,' sometimes named 'justice,' but which, when reduced to economic quantities, is the rationing of wealth or purchasing power, not by parties deemed equal, but by an authority superior to them in law… Bargaining transactions transfer ownership of wealth by voluntary agreement between legal equals. Managerial transactions create wealth by commands of legal superiors. Rationing transactions apportion the burdens and benefits of wealth creation by the dictation of legal superiors.

What Commons seems to add, at least from his own perspective, is a concern with time and expectations, which was missing in classical political economy and the early marginalist authors.[31] Yet, it is hard to see in this contribution a rupture with marginalist theory. The analysis of dynamic situations with expectations was, of course, being developed by marginalist authors of the time, like the Swedish School and John Hicks. Though Bradley Bateman (2011: 115) has argued that the 'eclectic' use of marginalist methods by early Institutionalist figures "was not the same thing

[29] Also, he suggests (118) that historically the unit of analysis had changed with:

> [t]he commodity economists, of the objective and subjective schools, the former making the usefulness of the commodity (use-value, objective), the latter making the feelings dependent upon the commodity (diminishing-utility, subjective) their ultimate unit of investigation; and the transactional economists who make the various kinds of transactions their units of investigation.

[30] In the same vein, Uni (2017: 17) argues that "Commons believed that the center of power in bargaining transactions lay in the ability of suppliers to withhold supply based on property rights." There are many similarities here between Commons and the work of Oliver Williamson in particular the importance of sovereignty as the power to settle disputes between transactors (see Dugger, 1996).

[31] In this context, he adds, it is:

> the factor of time and especially futurity and expectation… This factor always implies the expected consequences which will follow from present transactions, whereas the analytic method has no time nor futurity—it is pure static relation, without activity and expectation… Scarcity becomes the present opportunity, competition, and bargaining power in which the abilities of the individuals are exercised (697).

as Neoclassicism," his contention ultimately rests on the idea that a distinctive American Neoclassicism critical of Institutionalism is only identifiable following the First World War. The foregoing discussion of Commons' continued embrace of an evolving set of marginalist methods would seem to belie this claim, a difficulty that Bateman side-steps by explicitly excluding Ely and Commons from the Institutionalist camp.

It is also not possible to suggest that the SCOTUS' deliberations, that according to Commons were at the center of his own view of reasonable value, were built upon the old classical political economy, or surplus approach notion of competition. In a series of papers, Nicola Giocoli has attempted to characterize the economic theory adopted by SCOTUS in matters of rate regulation as consistent with classical political economy. Giocoli (2017a: 33) argues that SCOTUS operated from 1898 to 1944 with an understanding of the theory of value that "did not stem from an appreciation of marginalist theory but rather… continued allegiance to classical political economy." In Giocoli's (2018: 452) view, the Court judged that:

> [c]ompetitive market returns, and only such, represented the morally justified profits that even privileged businesses like railroads and utilities were entitled to gain… Courts should just establish by factual analysis what the competitive return on the present market value of a given enterprise would be and compare it with that implied by the regulated rates.

While this seems an entirely reasonable characterization of the Court's deliberative process, the suggestion that this constituted a classical approach to the question of value is hard to defend.[32] Classical political economists did not understand the specific rate of profit obtainable in competitive conditions as a morally justified ideal. The classical uniform rate of profit was the outcome of competition, of free entry, and often the notion of market prices tending towards their naturals level was described using an analogy to Newtonian mechanics. Only once distributive conflict, which reflected the vested interests of landowners and the comparatively weak bargaining power of labor relative to capital, and technical conditions had been analysed could the objective costs of production be determined. The cost of production around which competitive equilibrium or natural prices would gravitate was thus grounded in the commodity's social-historical cost of production, and reflected objective and impersonal forces.

In fact, during the formative years of the regulatory state, the classical theory of value and distribution was submerged and forgotten. This theory only began to be rediscovered by the mid-1920 as a result of the critique of Marshallian economics developed by Piero Sraffa. It is true that Sraffa's (1926) initial critique led to the development of imperfect competition, within the marginalist framework, but Sraffa himself did not pursue that route. Rather than developing the notion of competition along neoclassical lines, Sraffa in his subsequent work held that the advancement of understanding required the recovery of the classical conception of value and distribution. In that

[32] It is also possible that Giocoli's interpretation of the classical nature of the SCOTUS decisions is based on his peculiar definition of classical political economy. Indeed, it is instructive that one of Giocoli's (2017b: 182-4) regular citations on the classical conception of competition is Stigler (1957). Giocoli (2017a: 40) seamlessly includes Stuart Mill, clearly a transitional author, a representative of classical economics. Subsequently (2017b: 185) he seems to suggest that Nassau Senior, clearly a vulgar economist that departed from classical views on profits, was a follower of Smith, and adopted his views on competition.

framework, equilibrium prices are not about scarcity, but about the material conditions for the reproduction of the system. Stigler, and most of the scholars behind the dismantling of the regulatory state, were well aware of Sraffa's critique of Marshallian economics, and of his work on the reconstruction of classical political economy. In fact, Stigler wrote a review of Sraffa's edition of Ricardo's Works, full of praise, but that avoids engaging in any substantial way with the analytical framework proposed by Sraffa (Kurz, 2018).

The regulatory environment that arose from the reasonable value doctrine was one that readily accepted that markets might fail to provide efficient outcomes, but this possibility arose on the basis of market imperfections. It further suggested that the relative scarcity of factors of production could be manipulated by the bargaining positions of capital and labor. Legislation only tried to mitigate these imperfections and imbalances of bargaining power, protecting consumers, and creating more favorable conditions for the cooperation between capital and labor. Common's depiction of this regulatory environment, given in his transactions approach to the determination of reasonable value, is one that accepts the essence of the marginalist approach to value and distribution, albeit with an acceptance that market imperfections are endemic. One can therefore identify significant theoretical *continuity* between the regulatory and deregulatory eras. The critiques subsequently offered by the heralds of free markets and deregulation were skeptical about the prevalence of market imperfections, and doubted whether regulatory interventions would be successful given the possibility of regulatory capture. These critiques did not, however, try to undermine the core theoretical framework upon which the original regulatory environment was built.

The new regulatory impulse, if we can talk about one now,[33] also does not depart from conventional views on value and distribution. Instead, it seems to once more involve a reversal concerning the relative importance of market and government failures. The possibility of regulatory mis-steps continues to be acknowledged, though this risk pales in comparison to that of continued inaction against growing market power. Philippon (2019: 4) tells us that:

> regulators make policy decisions under a great deal of uncertainty… We must be able to let the government make some mistakes. Sometimes it will be too lenient. Sometimes too tough. It should be right on average, but it is unlikely to be right in every single case. Tolerating well-intentioned mistakes is therefore part of good regulation, provided that there is due process and that there is a mechanism to learn from these mistakes.

[33] It seems reasonable to suggest that reregulation has been seen in more positive light, in particular after the 2008 crisis, even if it might be premature to talk about a new regulatory era. If that is possible, then the Consumer Financial Protection Bureau (CFPB), established in 2010, could be seen as a symbol of this new period. The CFPB's champion and architect, Elizabeth Warren, is equally emblematic. Hailing the virtues of prudently constructed regulation "as the basic framework that permits commerce to flourish," Warren (2018: 3) emphasizes that "regulations level the playing field for everyone competing for [consumers'] business." Warren thus understands the basic functions of regulation as the insurance or restoration of competition that once established can be expected to deliver beneficent results. Similarly, Warren (2018: 7-8) suggests that a basic danger of the regulatory process is that "sometimes rules get perverted into government-sponsored protections for giant corporations instead of protection for the public," and that such anti-competitive regulations are the legitimate targets for dismantling.

Reasonable mistakes from government regulation are to be tolerated since, on the whole, a rebalancing of relative bargaining power would provide for a more efficient allocation of resources.[34]

4. Conclusion

The rise of the regulatory state during the Gilded Age was closely associated with the development of Institutionalist ideas in American academia. Notwithstanding the differences between Institutionalism and later Neoclassicism, the basis for the antitrust legislation and the operations of the regulatory agencies established in this and subsequent periods was the marginalist theory of value and distribution. As illustrated throughout the work of John Commons this engagement with marginalism was not superficial, nor was it an affectation that served as professional *bona fides*. Rather the marginalist framework consistently supplied Commons with his baseline conception of the competitive market system. His accompanying observations of the Court's judgements, and discussion of the juridical conditioning of agents' relative bargaining power supplement this baseline model without fundamentally reshaping it. For Commons, the legal system is both a producer of, and potential remedy for, market imperfections. The fact that some key Institutionalist authors were involved in developing and complementing the precepts of emergent marginalist theory is a central explanation for the ultimate ascendancy of neoclassical economics, and the attendant market failure view of the initial regulatory state in the Progressive and New Deal Eras, on par with the role of the Neoclassical Synthesis Keynesians in the latter period.

The rise of the Chicago School did constitute a rupture with these earlier eras, one achieved without rejecting prevalent conceptions of competition and value. The rupture lies instead in the Chicago School's effort to minimize the practical manifestations of market failure, and to magnify the problems associated with government failure and capture, which were known to previous generations of economists and regulators. Capture theory becomes relevant, not because it provides a critique of market failures, or an alternate approach to the theory of value, but because it suggests that government failures are even worse. The idea that markets were instruments for the efficient allocation of scarce resources, or that the distributional outcomes achieved in competitive conditions could be regarded as efficient, was not being disputed in any of these transitions. This theoretical continuity and compatibility is all but acknowledged by Alfred Kahn (1970: vii), the

[34] In terms of the labor market, for example, Philippon (2019: 23) argues that:

> competition increases economic freedom. In a competitive labor market, workers have the freedom to quit and find a better job. When employers compete, they offer more options to workers: different jobs, different hours, and different benefits. Labor market competition is the best defense against employers abusing and bullying their employees.

In other words, regulation that reestablishes competition would allow for markets to provide the efficient allocation of resources and remuneration according to productivity.

preeminent prophet of deregulation according to McCraw (1984), who argued in his classic textbook on *The Economics of Regulation* that his work was "an attempt to join neoclassical theory with 'institutional economics.'"[35]

It is beyond the scope of this paper to elaborate a regulatory framework compatible with the classical political economists' notion of competition, but it would be clearly more concerned with precluding barriers to entry, and dealing with asymmetric power of social classes in the productive arena. In that sense, it is important to emphasize that the classical notion of competition, in contrast with the marginalist notion of perfect competition, does not imply absence of power, or that the economic agents are small. Classical competition was compatible with a market dominated by large corporations, with significant power. Regulation that curbs that power, manifest in the bargaining process with the working class, and in the ability to build barriers to entry against potential competitors, would be more in line with classical ideas. It would be less concerned, hence, with consumer welfare, and with cooperation between capital and labor. The aim of regulation would not be to bring back an ideal of perfect competition, in which, in the absence of power, markets efficiently allocate resources, but to tame the power that exists and prevails in competitive systems.

Finally, the continuity in the understanding of value theory and the role of markets casts doubts about the resurgent regulatory impulse in the present New Gilded Age, one that is simply concerned with imperfections and consumer rights. We must add that we also do not suggest that all the problems with the regulatory environment can be explicitly connected to the ideas of economists. There are social and institutional factors beyond economic ideas that played an important role, in spite of Keynes' view that ideas and not vested interests are more relevant for policy outcomes. But the ebbs and flows of regulation and deregulation, and possibly reregulation, reflect particular views on the relevance of market versus government failures, and are firmly established under marginalist views of the functioning of market economies.

References

Backhouse, R. E. (2005), The Rise of Free Market Economics: Economists and the Role of the State since 1970, *History of Political Economy*, 37(5): 355-392.

Bateman, B. W. (2011), German Influences in the Making of American Economics, 1885-1935 in Kurz, H. et al., (eds), *The Dissemination of Economic Ideas*, Cheltenham, Edward Elgar.

Bernstein, M., A. (2001), *A Perilous Progress: Economists and Public Purpose in Twentieth Century America*, Princeton, Princeton University Press.

[35] For Kahn, public policy efforts are "aimless if it is not informed by theory. And a normative theory of public policy is not of much use if it cannot be related to the selection of the best set of social arrangements for achieving those norms." In practice this meant that a conventional neoclassical model of perfect competition supplied the ideal type to which regulators should aspire. The practical merits of any regulatory endeavor could be assessed only by examining "the institutional arrangements in the regulated industries that determine how closely those norms are in fact achieved" (19).

Biddle, J. E. and Samuels, W. J. (1998), John R. Commons and the Compatibility of Neoclassical and Institutional Economics, in Holt, R. and Pressman, S. (eds), *Economics and its Discontents*, Cheltenham, Edward Elgar.

Boulding, K. E. (1957), A New Look at Institutional Economics, *The American Economic Review*, 47(2): 1-12.

Chipman, J. S. (2005), Contributions of the Older German Schools to the Development of Utility Theory, in Scheer, C. (ed.), *Studien zur Entwicklung der ökonomischen Theorie XX: Die Ältere Historische Schule: Wirtschaftstheoretische Beiträge und wirtschaftspolitische Vorstellungen*, Berlin, Duncker & Humblot:157-259.

Collum, S. M. (1886), *Report of the Select Committee on Interstate Commerce,* Washington, Government Printing Office.

Commons, J. R. (1893), *The Distribution of Wealth*, New York, Macmillan.

Commons, J. R. (1907), *Races and Immigrants in America*, New York, Macmillan.

Commons, J. R. et al., (1918), *History of Labour in the United States, Vol. I*, New York, Macmillan.

Commons, J. R. (1924), *Legal Foundations of Capitalism*, Clifton, Augustus M. Kelley, 1974.

Commons, J. R. (1934), *Institutional Economics*, New York, The Macmillan.

Commons, J. R. (1963), *Myself: The Autobiography of John R. Commons*, Madison, University of Wisconsin Press.

DeCanio, S. (2015), *Democracy and the Origins of the American Regulatory State,* New Haven, Yale University Press.

Dorfman, J. (1934), *Thorstein Veblen and his America,* New York, The Viking Press.

Dorfman, J. (1955), The Role of the German Historical School in American Economic Thought, *The American Economic Review,* 42(2): 17-28.

Dorfman, J. (1965), The Foundation of Commons' Economics, in Commons, J., *The Distribution of Wealth,* New York, Augustus M. Kelley.

Eatwell, J. (1987), Classical competition, in *The New Palgrave Dictionary of Economics*, London, Palgrave-Macmillan, 3rd edition, 2017.

Ely, R. T. (1884), *The Past and Present of Political Economy*, Baltimore, Johns Hopkins.

Ely, R. T. (1893), *Outlines of Economics*, Meadville, Flood and Vincent.

Ely, R. T. (1938), *Ground Under Our Feet: An Autobiography*, New York, The Macmillan Company.

Eisner, M. A. (2000), *Regulatory Politics in Transition*, Baltimore, Johns Hopkins Press.

Fiorito, L. (2013), When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation, *Review of Political Economy*, 25(1): 139-163.

Giocoli, N. (2017a), The (Rail) Road to *Lochner*: Reproduction Cost and the Gilded Age Controversy over Rate Regulation, *History of Political Economy*, 49(1): 31-58.

Giocoli, N. (2017b), Free From What? Competition, Regulation and Antitrust in American Economics 1870-1914, in Fanti, L. (ed.), *Oligopoly, Institutions and Firms' Performance*, Pisa, Pisa University Press.

Giocoli, N. (2018), 'Value is Not a Fact': Reproduction Cost and the Transition from Classical to Neoclassical Regulation in Gilded Age America, *Journal of the History of Economic Thought*, 40(4): 445-470.

Giocoli, N. (2020), Free From What? Classical Competition and the Early Decades of American Antitrust, *New Political Economy*, published online Jan 10th.

Glaeser, E. and Shleifer, A. (2003), The Rise of the Regulatory State, *Journal of Economic Literature*, 41(2): 401-425.

Glick, M. (2018), The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust, *The Antitrust Bulletin*, 63(4): 455-493.

Gonce, R.A. (1996), The Social Gospel, Ely, and Commons's Initial Stage of Thought, *Journal of Economic Issues*, 30(3): 641-665.

Hamilton, W. H. (1919), The Institutional Approach to Economic Theory, *The American Economic Review*, 9(1): 309-318.

Henderson, J. P. (1988), Political Economy and the Service of the State: The University of Wisconsin, in Barber, W. J. (ed.), *Breaking the Academic Mould: Economists and American Higher Learning in the Nineteenth Century*, Middletown, Wesleyan University Press.

Herbst, J. (1965), *The German Historical School in American Scholarship*, Ithaca, Cornell University Press.

Hodgson, G. M. (2001), *How Economics Forgot History*, London, Routledge.

Hurd, R. W. (1976), New Deal Labor Policy and the Containment of Radical Union Activity, *Review of Radical Political Economics*, 8(3), 32-43.

Kahn, A. E. (1970), *The Economics of Regulation: Principles and Institutions*, New York, John Wiley and Sons.

Kaufman, B. (2017), The Origins and Theoretical Foundation of Original Institutional Economics Reconsidered, *Journal of the History of Economic Thought*, 39(3): 293-322.

Knies, K. (2015 [1855]), Theory of Value in National Economics, in Chipman, J. S., *German Utility Theory: Analysis and Translations*, New York, Routledge.

Kurz, H. (2018), Stigler on Ricardo, *Centro Sraffa Working Papers*, n. 27.

Levi-Faur, D. (2013), The Odyssey of the Regulatory State, *Law & Policy*, 35(1-2): 29-50.

Leonard, T. C. (2015), Progressive Era Origins of the Regulatory State and the Economist as Expert, *History of Political Economy*, 47 (annual suppl.): 49-76.

Mayhew, A. (1987), The Beginnings of Institutionalism, *Journal of Economic Issues*, 21(3): 971-998.

McGraw, T. K. (1984), *Prophets of Regulation*, Cambridge, The Belknap Press.

Medema, S. G. (1998), Wandering the Road from Pluralism to Posner: The Transformation of Law and Economics in the Twentieth Century, in Morgan, M. S. and Rutherford, M. (eds), *From Interwar Pluralism to Postwar Neoclassicism*, Durham, Duke University Press.

Medema, S. G. (2007), The Hesitant Hand: Mill, Sidgwick, and the Evolution of the Theory of Market Failure, *History of Political Economy*, 39(3): 331-358.

Milonakis, D. and Fine, B. (2009), *From Political Economy to Economics*, London, Routledge.

Nik-Khah, E. (2011), George Stigler, the Graduate School of Business, and the Pillars of the Chicago School, in Van Horn, R. et al. (eds), *Building Chicago Economics,* Cambridge, Cambridge University Press.

Novak, W. J. (2014), A Revisionist History of Regulatory Capture, in Carpenter, D. and Moss, D. A. (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It,* Cambridge, Cambridge University Press.

Papadopoulos, K. and Bateman, B. W. (2011), Karl Knies and the Prehistory of Neoclassical Economics: Understanding the Importance of Die Nationalökonomische Lehre vom Werth (1855), *Journal of the History of Economic Thought*, 33(1): 19-35.

Peltzman, S. (1993), George Stigler's Contribution to the Economic Analysis of Regulation, *Journal of Political Economy*, 101(5): 818-832.

Philippon, T. (2019), *The Great Reversal: How America Gave Up on Free Markets*, Cambridge, Belknap Press.

Phillips-Fein, K. (2009), *Invisible hands: The making of the conservative movement*, New York, NY, Norton.

Roncaglia, A. (2019), *The Age of Fragmentation: A History of Contemporary Economic Thought*, Cambridge, Cambridge University Press.

Rutherford, M. (2006), Wisconsin Institutionalism: John R. Commons and His Students, *Labor History*, 47(2): 161-188.

Rutherford, M. (2009), Towards a History of American Institutional Economics, *Journal of Economics Issues*, 43(2): 308-318.

Rutherford, M. (2011), *The Institutionalist Movement in American Economics, 1918-1947*, Cambridge, Cambridge University Press.

Rutherford, M. (2015), Institutionalism and the Social Control of Businesses, *History of Political Economy*, 47(Suppl. 1): 77-98.

Sandilands, R. (2001), The New Deal and 'Domesticated Keynesianism' in America, in Keaney, M. (ed.), *Economist with a Public Purpose: Essays in Honor of John K Galbraith*, New York, Routledge: 55-100.

Sherwood, S. (1897), *Tendencies in American Economic Thought*, Baltimore, The Johns Hopkins Press.

Sraffa, P. (1926), The Laws of Returns under Competitive Conditions, *Economic Journal*, 36(144): 535-550.

Stigler, G. J. (1957), Perfect Competition, Historically Contemplated, *Journal of Political Economy*, 65(1): 1-17.

Stigler, G. J. (1965), The Economist and the State, *The American Economic Review*, 55(1 and 2): 1-18.

Stigler, G. J. (1971), The Theory of Economic Regulation, *The Bell Journal of Economics and Management Science*, 2(1): 3-21.

Stigler, G. J. (1987), Competition, in *The New Palgrave Dictionary of Economics*, London, Palgrave-Macmillan, 3rd edition, 2017.

Streissler, E. and Milford, K. (1993-1994), Theoretical and Methodological Positions of German Economics in the Middle of the Nineteenth Century, *History of Economic Ideas*, 1/2(3 and 1): 43-79.

Streissler, E. (2001), Rau, Hermann and Roscher: Contributions of German Economics around the Middle of the Nineteenth Century, *The European Journal of the History of Economic Thought*, 8(3): 311-331.

Uni, H. (2017), Scope of John R. Commons's Criticism of the Classical Theory of Value: Progress and Limitations in the 1927 Manuscript, in Uni, H. (ed.), *Contemporary Meanings of John R. Commons's Institutional Economics: An Analysis Using a Newly Discovered Manuscript*, Berlin, Springer.

Warren, E. (2018), Remarks at the Coalition for Sensible Safeguards Symposium, Washington, https://www.warren.senate.gov/imo/media/doc/2018-6-5%20Warren%20Regulations%20Speech.pdf

Wu, T. (2018), *The Curse of Bigness: Antitrust in the New Gilded Age*, New York, Columbia Global Reports.

Yonay, Y. P. (1998), *The Struggle over the Soul of Economics: Institutionalist and Neoclassical Economists in America between the Wars,* Princeton, Princeton University Press.

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