

# The Judicial Control of Business: Walton Hamilton, Antitrust, and Chicago

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## INTRODUCTION

The institutionalist movement in American economics thrived during the period between the two World Wars. The institutionalist approach to economics stresses four key points: (1) the importance of institutions (defined both as social rules and organizations) in the determination of economic outcomes; (2) the changing and changeable nature of these institutions; (3) the many problems and failures created by existing market institutions; and (4) the resulting need for new forms of “social control” through institutional change. Institutionalism combines these positions with a strongly empirical view of scientific method and a pragmatic and instrumental philosophy borrowed largely from John Dewey.<sup>1</sup>

Even this very brief description of institutionalism is enough to indicate that institutionalists had an interest in law. Institutionalists such as John R. Commons, J.M. Clark, Robert Hale, Walton Hamilton, Rexford Tugwell, and Leo Wolman all contributed to an institutionalist literature on law and economics. Of these scholars, both Hale and Hamilton moved into law schools, Hale to Columbia Law School and Hamilton to Yale Law School in 1928. Furthermore, there were close relationships between institutionalists and legal scholars of the realist school such as Karl Llewellyn, W.W. Cook, Underhill Moore, Herman Oliphant, A.A. Berle, and Thurman Arnold.

The institutionalist interest in law was both analytical and instrumental. The analytical aspect dealt with the relationship between law and economic outcomes: the issues of how the law shapes economic activity both through organizations and individuals, and how the law itself

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1. See generally Malcolm Rutherford, *Science and Social Control: The Institutional Movement in American Economics, 1918–1947*, 3 ERASMUS J. FOR PHIL. & ECON. 47 (2010).

changes over time, through court decisions and the actions of legislatures. The interest in law as an instrument related to the institutionalist concern with “social control.” Social control meant developing the means for an “intelligent handling” of contemporary economic problems.<sup>2</sup> Institutionalists attributed problems such as business cycles, unemployment, workplace accidents, labor unrest, poverty, monopoly, restrictive trade practices, manipulation of consumer wants, resource depletion, externalities of various kinds, and waste and inefficiency to a failure of markets—or “pecuniary institutions” more generally—to control or direct economic activity in a manner consistent with the public interest. The institutionalist notion of an economics relevant “to the problem of control” required an economics that “relate[d] to changeable elements of life and the agencies through which they are to be directed,”<sup>3</sup> and this naturally created a close interest in the law as a means of social control. It is this second aspect, specifically law as an instrument for the control of business,<sup>4</sup> that is the primary focus of this Article.

In the early 1920s through to the mid-1930s, the interest in law as an instrument for the control of business became especially urgent as many of the institutionalist attempts to further develop regulation and intervention in the economy ran into particular problems in the courts. Legislation was frequently struck down or circumscribed by court decisions and interpretations. Legislation involving minimum wages, regulation of hours of work, regulation of prices, and unemployment insurance all ran into difficulty. Leo Wolman, writing in 1927, lamented the retreat from social control that had occurred since the First World War, and the increasing resistance to even “modest programs of reform,”<sup>5</sup> a point of view widely shared among institutionalists. This problem with the courts culminated during the New Deal with Roosevelt’s threat to pack the Supreme Court.

The institutionalist approach to law and economics declined markedly after the Second World War and was replaced by a very different law and economics literature associated with the Chicago School. This literature represented a clear rejection of the institutionalist arguments for more social control and a renewed emphasis on the market and the ability of market forces to generate efficient results. The Chicago School saw government intervention much more as the *source* of problems ra-

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2. Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 309, 312 (1919).

3. *Id.* at 313.

4. See generally JOHN M. CLARK, SOCIAL CONTROL OF BUSINESS (William Homer Spencer ed., McGraw-Hill Book Co., Inc. 1939) (1926).

5. See generally Leo Wolman, *The Frontiers of Social Control*, 17 AM. LAB. LEGIS. REV. 233, 233 (1927).

ther than the solution. There are, however, links between the Chicago School and the institutionalists. Both contain discussions of court decision-making, both contain important considerations concerning antitrust and patent law, and both deal with issues of agency capture and the use of government regulations as barriers to entry.

This Article begins by examining the institutionalist approach to the issues of law and economics, concentrating on the work of Walton Hamilton. Hamilton devoted considerable attention to the issues of judicial decision-making, and to antitrust and patents in particular. He was closely involved in various phases of the New Deal: in the Consumers' Advisory Board of the National Recovery Administration; in a series of important studies of pricing in a wide variety of markets; and in work with Thurman Arnold on antitrust and patents. The Article will then briefly discuss the Chicago School of law and economics with a concern for both the points of difference and points of contact between the Chicago and institutionalist literatures.

#### I. PUBLIC INTEREST LEGISLATION AND JUDICIAL DECISION-MAKING

One of the key questions in the legal-realist approach and institutionalist approach to law concerned how courts actually decide cases. The realist answer was that court decisions "could not be deduced mechanically from an abstract jurisprudence of rights, but emerged instead from the unexamined and unarticulated cultural and political assumptions of the judges themselves."<sup>6</sup> Institutional writers expressed this in terms of the role of the "habitual assumptions" of judges: "Supreme courts, like individual human beings, are dominated by these habitual assumptions arising from the prevailing customs of the time and place."<sup>7</sup> The opinions of the court "change by changes in judges, or by new cases which present old assumptions in a new light, or by changes in economic or political conditions, or even by revolutions."<sup>8</sup> Hamilton certainly shared these views and was particularly concerned with the habitual assumptions of the more conservative members of the Supreme Court. Hamilton believed these habitual assumptions were out of touch with the changed economic realities generated by American industrialization.<sup>9</sup>

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6. BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 12 (1998) (footnote omitted).

7. JOHN R. COMMONS, *INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY* 699 (Univ. of Wis. Press 1959) (1934).

8. *Id.*

9. The discussion of Hamilton that follows uses material in Malcolm Rutherford, *Walton H. Hamilton and the Public Control of Business*, in *THE ROLE OF GOVERNMENT IN THE HISTORY OF ECONOMIC THOUGHT, ANNUAL SUPPLEMENT TO VOLUME 37, HISTORY OF POLITICAL ECONOMY*

For Hamilton, the underlying question was “the kind of thing the Constitution is”: is it “a fetish which must be served whatever be the resulting inability of the State to look after its own affairs,”<sup>10</sup> or is it “an instrument of government” and an “[i]nstrument of [p]ublic [w]elfare”?<sup>11</sup> Hamilton in particular criticized Justice Sutherland, who often spoke for the conservative majority of the Court, while he sympathized more with the opinions of the liberal contingent of Justices Holmes, Stone, Brandeis, and Cardozo (after he replaced Holmes).<sup>12</sup> For Hamilton, the coming of industrialism had created a host of new economic and social problems that demanded some response in the form of state regulation, including the regulation of prices, and in his view there was nothing in the Constitution that prevented the use of the police power of the state in the cause of public welfare.<sup>13</sup>

An example of the type of critical analysis of judicial decisions Hamilton’s work provides appears in his article *The Regulation of Employment Agencies*, which dealt with judicial interpretation of the phrase, “affected with a public interest.”<sup>14</sup> The majority of the Court had denied the state of New Jersey the right to regulate the fees charged by private employment agencies.<sup>15</sup> Hamilton presented the majority opinion, written by Justice Sutherland, in the form of a syllogism:

The major premise comes easily; if a business is not “affected with a public interest,” the fixing of prices by the state is “a deprivation of property” without “due process of law.” The minor premise presents more difficulty and is achieved only through a series of steps. They are in order: (1) the business of dealing in theatre tickets has been held to be not “affected with a public interest”; (2) therefore, the work of “a broker, that is of an intermediary” is not “affected with a public interest”; (3) “the business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker”; and (4) therefore, the business of running an employment agency is not affected with a public interest.<sup>16</sup>

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234 (Steven G. Medema & Peter Boettke eds., 2005). That research was supported by Social Science and Humanities Research Council of Canada research grants.

10. Walton H. Hamilton, *The Regulation of Employment Agencies*, 38 YALE L.J. 225, 235 (1928).

11. Walton H. Hamilton, *The Constitution as an Instrument of Public Welfare*, 26 AM. LAB. LEGIS. REV. 103, 103 (1936) [hereinafter *The Constitution as an Instrument*].

12. See generally Hamilton, *supra* note 10.

13. See generally *id.*; WALTON H. HAMILTON & DOUGLASS ADAIR, *THE POWER TO GOVERN* (1937).

14. Hamilton, *supra* note 10.

15. *Id.* at 225.

16. *Id.* at 231 (footnote omitted).

Hamilton raised many questions. Does the regulation of fees amount to price fixing?<sup>17</sup> “Why is the statute not valid under the police power, as a regulation” designed to correct a persistent and well-recognized evil?<sup>18</sup> “Why does the concept of ‘public interest’ have to be employed . . . [in the cases involving regulation of] price when it does not have to be [so] used to justify” many other forms of government regulation?<sup>19</sup> What exactly is the basis for “affectation with a public interest” if not a “need for regulation . . . evidenced by (1) the importance of the business to the public, and (2) the failure of the competitive system to protect” the public interest?<sup>20</sup> Where does the category of “brokers” come from, all of whose business is not affected with a public interest?<sup>21</sup> “[W]hy does the basis of distinction lie in a mere . . . stage of a marketing process . . . [with no connection to the issues of] evils, regulation, or . . . government[] control?”<sup>22</sup>

Hamilton contrasted Justice Sutherland’s opinion with the dissenting opinion written by Justice Stone (and supported by Holmes and Brandeis), which he found “simple, clear cut, and direct.”<sup>23</sup> As the issue was “the validity of an act of regulation,” Stone “look[ed] to see whether there was warrant for the specific exercise of power.”<sup>24</sup> He was interested in whether evils existed, whether they were grave and persistent, and whether they had adverse consequences for the public.<sup>25</sup> He asked whether the regulation was suited to its purpose. He had no difficulty distinguishing ticket brokers from employment agencies in terms of their importance to the public. Instead, he saw the action of the legislature “as a proper regulation” designed to remedy a public evil. Hamilton viewed the minority position as in accord with the longer legal tradition and believed that Sutherland and the “conservative” majority were providing the “radical innovations” and “read[ing] into the Constitution of the United States the original ideas of ingenious attorneys for plaintiffs-in-error.”<sup>26</sup>

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 232.

21. *Id.*

22. *Id.* at 233.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 234. Other decisions Hamilton analyzed include a 1929 decision unfavorable to farmers’ cooperatives written by Justice Sutherland, Walton H. Hamilton, *Judicial Tolerance of Farmers’ Cooperatives*, 38 YALE L.J. 936 (1929); a 1931 decision favorable to the regulation of commissions paid by insurance companies to agents and written by Justice Brandeis, Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931) [hereinafter Hamilton, *Caveat*

Hamilton's experience with analyses like the above led him to inquire more deeply into the beginnings and subsequent histories of interpretation of a number of key legal concepts and doctrines. His most significant investigations are of "affectation with a public interest,"<sup>27</sup> the Due Process and Equal Protection Clauses of the Fourteenth Amendment,<sup>28</sup> and interstate commerce.<sup>29</sup>

#### *A. Affectation with a Public Interest*

"Affectation with a public interest" was a significant concept for Hamilton and the institutionalists with regard to state regulation. According to Hamilton, "affectation with a public interest" is a term lifted from a decision of Lord Hale in England in 1676 concerning the regulation of charges at a public wharf. Hale does not stress the term, and he does not make it a test for the right of the state to regulate prices. At that time, the regulation of prices was commonplace; in England "even to this day Parliament decides for itself how far it may go in the control of industry."<sup>30</sup> The term came into American law in the famous case of *Munn v. Illinois*<sup>31</sup> in 1876, concerning the regulation of charges by grain elevators. In that case, the elevator operators argued that the "affectation with a public interest" principle limited legislative action to only those businesses affected with a public interest. They lost the case, but the Court accepted their interpretation of principle. In successive decisions, the principle went through some changes in definition that extended the concept but narrowed its meaning. It was used to allow regulation of railway rates on the grounds of "public use." The concept was later translated back to a broader "public concern" with business, and by 1914, the principle had

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*Emptor*]; and a decision written by Justice Roberts allowing a political party, as a voluntary association, to exclude blacks from voting in primaries, Walton H. Hamilton, *Black Justice*, 140 NATION 497 (1935).

27. Walton H. Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089 (1930).

28. Walton H. Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269 (1938).

29. These points of law were also discussed by other institutionalists. See generally CLARK, *supra* note 4; COMMONS, *supra* note 7; REXFORD G. TUGWELL, *THE ECONOMIC BASIS OF PUBLIC INTEREST* (Augustus M. Kelley ed., 1968) (1922). Hamilton, however, provides the most extensive analysis. Hamilton also wrote pieces on the history of caveat emptor, Hamilton, *Caveat Emptor*, *supra* note 26; the concept of property, Walton H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864 (1932); and of the law surrounding compensation for workplace accident, Walton H. Hamilton, *The Living Law*, 26 SURV. GRAPHIC 632 (1937). Hamilton's former teacher and friend, Alvin Johnson, asked Hamilton to write the entries for the *Encyclopaedia of the Social Sciences* on accumulation, acquisition, affectation with public interest, caveat emptor, celibacy, collective bargaining, collectivism, competition, constitutionalism, Charles Horton Cooley, damages, freedom of contract, institution, judicial process, John Stuart Mill, organization—economic, police power, and property. See 8 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (E. Seligman ed. 1932).

30. Hamilton, *supra* note 27, at 1094.

31. 94 U.S. 113 (1876).

become “a general, if indefinite, invitation to the legislature to extend price control where public concern demands it.”<sup>32</sup> In the 1920s, institutionalist writers explicitly looked to the principle to provide a legal basis for the regulation of business.<sup>33</sup>

Legal interpretations, however, began to change more drastically with the Supreme Court of 1921–1923. This Court “formal[ly] recogni[z]ed ‘affectation with a public interest’ as a definite test of constitutionality” of price-fixing regulation but still sought to narrow its range.<sup>34</sup> The test was more often invoked to prevent regulation, leading Hamilton to comment that throughout the 1920s “a phrase brought into constitutional law to sanction price fixing” was “consistently used to outlaw price fixing.”<sup>35</sup> The principle became a barrier to states’ ability to respond to public concerns via price regulation; the constitutional “test” of affectation was substituted for a recognition of police power and an appraisal of the need for and reasonableness of the regulation in question.

#### B. The Due Process and Equal Protection Clauses

The injunction that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law”<sup>36</sup> was contained in the Fifth Amendment, but until after the Civil War was regarded as a procedural concern only. After the Civil War, the Legislature passed the Fourteenth Amendment to ensure the rights of the newly enfranchised blacks. The key phrases in the Amendment are “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,” and:

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>37</sup>

Hamilton traced the history of the attempts to read substantive rights into the Due Process Clause. The first of these occurred with the well-known *Slaughter-House Cases* of the 1870s.<sup>38</sup> In these cases, a cor-

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32. Hamilton, *supra* note 27, at 1099.

33. See generally TUGWELL, *supra* note 29. For a more sanguine view see CLARK, *supra* note 4. Hamilton’s students Dexter Keezer and Stacy May also discuss the principle in detail. See generally DEXTER M. KEEZER & STACY MAY, *THE PUBLIC CONTROL OF BUSINESS* (Arno Press 1973) (1930).

34. Hamilton, *supra* note 27, at 1099.

35. *Id.* at 1100.

36. U.S. CONST. amend. V.

37. Hamilton, *supra* note 28, at 271 (citing U.S. CONST. amend. XIV, § 1).

38. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

poration had been given a monopoly on slaughtering, and independent slaughtermen argued that their property—the right to follow their trade—had been removed without due process.<sup>39</sup> The argument failed.<sup>40</sup> A few years later, when the monopoly privilege was revoked, the corporation attempted the same line of argument.<sup>41</sup> It, too, failed, but two concurring justices revisited the original case and argued that the original grant of the monopoly privilege was indeed unconstitutional and should never have been given in the first place. Despite these decisions, the due process argument remained in use, “acquir[ing] [a] momentum and an enhancing repute in the opinions in dissent.”<sup>42</sup> The power of the Fifth Amendment was strengthened in 1886 when the Supreme Court held that the term “person” included corporations and extended to them the protection of due process and equal protection.<sup>43</sup>

These judicial rulings created, in the name of due process, a “judicial overlordship over what had up to the moment been set down as the province of the legislature.”<sup>44</sup> In later decisions, the word “liberty” became defined to encompass “freedom of contract,” but, according to Hamilton, it was only in 1905 and the case of *Lochner v. New York* that “due process first won in a clean-cut combat” with the regulatory power of the state.<sup>45</sup>

The *Lochner* case concerned the regulation of the work hours of bakers, purportedly on grounds of public health. The Court held that “[f]reedom of contract . . . was an aspect of liberty and property which a state might not abridge without due process of law.”<sup>46</sup> The majority’s opinion “was intended to be an apostolic letter to the many legislatures in the land appointing limits to their police power and laying a ban upon social legislation.”<sup>47</sup> The case, however, also occasioned Justice Holmes’s famous dissent where he argued that the relation of the hours of bakers to public health was one of fact, that “[g]eneral propositions do

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39. See *id.* John R. Commons also discusses this sequence of cases concerning the Liberty, Property, and Due Process Clauses of the Fourteenth Amendment, but more with an eye to the shift in the property concept from tangible to intangible. See JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 11–21 (Augustus M. Kelley Pubs. 1974) (1924). These cases were also important in the area of public utility regulation and were discussed in that context by Commons, James Bonbright, and Robert Hale as well as by Hamilton.

40. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36.

41. See *id.*

42. Hamilton, *supra* note 28, at 284.

43. *Id.* at 284–86.

44. *Id.* at 287.

45. *Id.* at 287–90.

46. *Id.* at 291.

47. *Id.* at 291–92.



not decide concrete cases,”<sup>48</sup> that “[t]he liberty of the citizen . . . is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable,”<sup>49</sup> and that “[t]he 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”<sup>50</sup>

Hamilton was more in line with the dissent than the majority in *Lochner*. He argued that while “[i]t is common for latter-day liberals to set this down as the first blast of the trumpet in behalf of a social oversight of human rights . . . the historian is more likely to view it as a lance worthily broken in behalf of an ancient cause now in retreat”:<sup>51</sup>

A constitutional doctrine contrived to protect the natural rights of men against corporate monopoly was little by little commuted into a formula for safeguarding the domain of business against the regulatory power of the state. The chartered privileges of the corporation became rights which could be pleaded in equity and at law against the government which created them. In a litigious procedure in which private right was balanced against the general good the ultimate word was given to the judiciary.<sup>52</sup>

### *C. Interstate Commerce: The New Deal and the NRA*

Hamilton, as noted above, was closely involved with the New Deal and the National Recovery Administration (NRA). While Hamilton was himself critical of the actual workings of the NRA codes and the encouragement they gave to monopoly pricing, he felt that the NRA could be reformed to work as a system for the control of business practice in the public interest.<sup>53</sup> Therefore, it is not surprising that he reacted negatively to the series of Supreme Court decisions that struck down the NRA code-making machinery in 1935, and then the Bituminous Coal Conservation Act (Guffey Coal Act) and parts of the Agricultural Adjustment Act (AAA) in 1936. Hamilton outlined the course of development of Court decisions: in 1934 in the *Nebbia* case “it was willing to allow remedial legislation to take its course”; in the next year, the Court first began to use “procedural devices” against federal legislation, but then moved to substantive issues to strike down the industrial codes of the NRA.<sup>54</sup> “By the winter the Court was ready to pass the death sentence upon the Agri-

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48. *Lochner v. New York*, 198 U.S. 45, 76 (1905).

49. *Id.* at 75.

50. *Id.*

51. Hamilton, *supra* note 28, at 292.

52. *Id.* at 293.

53. See generally Rutherford, *supra* note 9.

54. Walton H. Hamilton, *Cardozo the Craftsman*, 6 U. CHI. L. REV. 1, 17 (1938) (footnote omitted).

cultural Adjustment Act; and in the spring of 1936 it laid on with abandon against all social legislation, state and national.”<sup>55</sup> Fear of the President’s power and the “ghost of an imaginary fascism” deflected even Brandeis and Stone from their customary views.<sup>56</sup>

In the NRA case, the Court held that the NRA codes represented an unconstitutional delegation of legislative power to the President. Cardozo and Stone concurred but did not go as far. They also found the delegated powers granted to be too unconstrained, but they agreed that Congress itself could not set up standards for regulation for all industries given their variety and number.<sup>57</sup> The case concerning the AAA was decided by a majority of the Court who found the tax on processors that provided revenue to pay farmers to take land out of production—a central part of the program—to be coercive and unconstitutional. Stone, Brandeis, and Cardozo dissented on the grounds that the tax was levied in accord with legislation passed by Congress, and “Courts are not the only agency of government that must be assumed to have capacity to govern.”<sup>58</sup>

The Guffey Coal Act was passed in 1935 to replace the NRA code and to regulate prices, minimum wages, maximum hours of work, and “fair practices.” A tax was levied, but those who complied were given tax refunds. The Act established a National Bituminous Coal Commission, a Coal Labor Board, and a Consumers’ Council. In 1936, the Act was declared unconstitutional, largely on the grounds that labor conditions were local, not interstate evils and therefore did not fall under federal jurisdiction. Cardozo, Brandeis, and Stone again dissented, taking the view that coal production was an interstate business and that the conditions in the coal industry meant that “Commerce had been choked and burdened; its normal flow had been diverted from one state to another; there had been bankruptcy and waste and ruin alike for capital and for labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot.”<sup>59</sup>

Hamilton poured scorn on the view that interstate commerce was to be narrowly construed to apply only to interstate movement of goods. This interpretation was the one Justice Sutherland claimed was “used in the Constitution.”<sup>60</sup> Hamilton argued that such prohibitions as Justice

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55. *Id.* (footnotes omitted).

56. *Id.* at 18.

57. In an earlier case concerning the “hot oil” industry, Cardozo had not objected to the delegation of powers as the delegation was “narrow” and “[w]hat c[ould] be done . . . is closely and clearly circumscribed both as to subject-matter and to occasion.” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 443 (1935).

58. *United States v. Butler*, 297 U.S. 1, 87 (1936).

59. *Carter v. Carter Coal Co.*, 298 U.S. 238, 331 (1936).

60. *Id.* at 298.

Sutherland discovered were not plainly in the text of the Constitution, but were the result of attaching new meanings and constructions to words, and reading into the Constitution meanings and economic philosophies quite alien to the minds of its framers.<sup>61</sup> In Hamilton's view, the Constitution was written by a group with a mercantilist mentality, for whom "commerce" meant nothing less than the whole of production and trade.<sup>62</sup> He found it paradoxical that "[a]s industry has become more and more interstate in character, the power of Congress to regulate has been given a narrower and narrower interpretation."<sup>63</sup>

## II. HAMILTON, ANTITRUST, PATENTS, AND CORPORATE PERSONALITY

After the demise of the NRA, the New Deal entered a second phase with a renewed stress on antitrust as a tool with which to control business. In 1938, Thurman Arnold was appointed head of the Antitrust Division of the Department of Justice. In the past, Arnold had been a severe critic of the antitrust laws,<sup>64</sup> but he came into his new job determined "that the anti-trust laws should be revised so that the government could strike at market domination, regardless of how the power over prices had been acquired and regardless of motive or intent."<sup>65</sup> Arnold had been a long-time colleague of Hamilton's at Yale, and between 1938 and 1945, Hamilton worked with Arnold as a Special Assistant to the Attorney General.

Previously, Hamilton had been engaged in a series of price studies, in connection with the New Deal discussion over price policy, some of which were published as *Price and Price Policies*.<sup>66</sup> These studies demonstrated to Hamilton the wide variety and ever-changing nature of the practices used by businesses to restrict competition.<sup>67</sup> He realized that industries are not alike; there is no sharp demarcation between competition and monopoly. In other words, "a program of control can be crowded into no set formula," and since trade practice is always developing, "the exercise of authority must be grounded in a continuing exploration of industrial arrangements."<sup>68</sup> Hamilton felt that Arnold's approach to antitrust linked exactly to this. Hamilton wrote:

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61. See generally HAMILTON & ADAIR, *supra* note 13; Hamilton, *supra* note 11.

62. See generally HAMILTON & ADAIR, *supra* note 13.

63. *Id.* at 192.

64. See generally THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

65. ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 411 (1966).

66. WALTON HAMILTON ET AL., *PRICE AND PRICE POLICIES* (1938).

67. *Id.*

68. *Id.* at 555.

[Arnold] is definitely persuaded that if the Anti-Trust Acts are to serve a constructive purpose, they must come to grips with the web of usage in distinctive industries, so he wants to get a number of industrial studies underway. Each will appear as a memo and in form should be comparable to an opinion of the United States Supreme Court that grapples with the law as public policy and stakes its judgments upon a recitation of industrial fact.<sup>69</sup>

On the same day, Hamilton wrote to the publisher of *Price and Price Policies* that Arnold was insisting that the Department of Justice “get down to concretions,” and deal with the “web of industrial usage,” and that Arnold’s approach was “an application of the approach worked out in ‘Price and Price Policies,’ and [he wished there was] some way of advertising the fact.”<sup>70</sup>

In his earlier work, Hamilton had been sharply critical of the anti-trust laws. The Sherman and Clayton Acts and the Federal Trade Commission were attempts to enforce competition based on the textbook model of competitive markets. Hamilton believed that model was one that applied to a world of “petty trade” and not to a world of modern technology and big business. The antitrust laws, in their attempt “to stay the development of large-scale enterprise and to make big business behave as if it were petty trade”<sup>71</sup> embodied and “express[ed] the common sense of another age.”<sup>72</sup> Hamilton also pointed out the difficulties in translating economic concepts into legal categories such as “conspiracies in restraint of trade”; the clumsy attempts by courts to decide issues of trade practice; the business tactics of delay and invention of new and alternative practices; the way decisions made in one case sometimes became unfortunate and limiting precedents in others; and the uneven enforcement of antitrust laws.<sup>73</sup> Hamilton did not see the potential positive role of antitrust law in attacking bigness as such, but only its role in ap-

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69. Letter from Walton Hamilton to Dexter Keezer (May 11, 1938), in WALTON H. HAMILTON PAPERS (on file in Tarlton Law Library, Univ. of Texas at Austin, Box J9, Folder 8).

70. Letter from Walton Hamilton to Hugh Kelly (May 11, 1938), in WALTON H. HAMILTON PAPERS (on file in Tarlton Law Library, Univ. of Texas at Austin, Box J22, Folder 2). The Arnold/Hamilton case-by-case approach did not find favor with all antitrusters. Frank Fetter clearly wanted a more general approach to antitrust policy. Paul Homan wrote to Jerome Frank and Hamilton expressing hope that the disagreements would not work to the detriment of the whole antitrust enterprise. See Letter from Paul Homan to Jerome Frank (Mar. 14, 1939), in WALTON H. HAMILTON PAPERS (on file in Tarlton Law Library, Univ. of Texas at Austin, Box J31, Folder 3).

71. Walton H. Hamilton, *The Control of Big Business*, 134 NATION 591, 591 (1932).

72. *Id.* at 592.

73. See generally *id.*; Walton H. Hamilton, *The Anti-Trust Laws and the Social Control of Business*, in THE FEDERAL ANTI-TRUST LAWS: A SYMPOSIUM 3 (Milton Handler ed., 1932); Walton H. Hamilton, *The Problem of Anti-Trust Reform*, 32 COLUM. L. REV. 173 (1932).

proving or disapproving of business practices, a function similar to that which he had desired of the NRA.

Hamilton's work with the Antitrust Division did not change his opinion of antitrust laws. Though he did other work,<sup>74</sup> the major products of Hamilton's time with the Antitrust Division were two reports for the Temporary National Economic Committee (TNEC): *Antitrust in Action*<sup>75</sup> and *Patents and Free Enterprise*.<sup>76</sup> In the first of his TNEC studies, and in a related paper,<sup>77</sup> Hamilton repeated many of his concerns about anti-trust but also voiced new concerns. He discussed the development of new forms of restraint, involving various forms of tacit collusion, price leadership, delivered price systems, "quality standards," patents and license agreements, unequal bargaining power between large manufacturers and their suppliers or distributors, and regulations originally enacted to protect a public interest being turned into a "smoke screen for vested interest."<sup>78</sup>

Hamilton suggested two avenues of change: a "streamlining" of the Antitrust Acts and a move to an administrative rather than a judicial base. Streamlining would involve providing adequate funding, a power of subpoena, a greater use of the equity decree in place of criminal actions, a shift from crime to tort, a penalty equal to twice the total net income gained during the period of wrongdoing, placing the burden of proof on the party that enjoys access to all the facts, and providing the consumer with a cause of action.<sup>79</sup> Additionally, a move to an administrative rather than judicial base would be necessary to penetrate to "the heart of the difficulty." This movement could provide for a flexible and timely case-by-case approach.

Hamilton had specific concerns for how the administrative shift would take place and how it would function. The new system could not "come into practice full blown" but would "begin as 'a cautiously experimental power.'"<sup>80</sup> An administrative system would allow for the ap-

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74. Hamilton's involvement with the Antitrust Division included work on briefs including suits brought against the American Medical Association (AMA) for their actions against experiments in group health (Walton H. Hamilton, *The Doctors' "Union,"* 96 NEW REPUBLIC 117 (1938)), the movie industry for its distribution practices, and many others (Walton H. Hamilton, *THE PATTERN OF COMPETITION* (Courtney C. Brown ed., 1940)).

75. WALTON HAMILTON & IRENE TILL, MONOGRAPH NO. 16: ANTITRUST IN ACTION (Da Capo Press 1974) (1940).

76. WALTON H. HAMILTON, TEMP. NAT'L ECON. COMM., MONOGRAPH NO. 31: PATENTS AND FREE ENTERPRISE (1941).

77. Walton Hamilton & Irene Till, *Antitrust—The Reach after New Weapons*, 26 WASH. U. L. Q. 1 (1940).

78. HAMILTON & TILL, *supra* note 75, at 12–19.

79. *Id.* at 101–06.

80. *Id.* at 108.

proval in advance of “a code of industrial behavior,” with “[t]he government and industry in cooperation spell[ing] out a line of business activity which is believed to accord with public policy, and in the furtherance of which immunity from prosecution is promised.”<sup>81</sup> Because conditions change, agreements could not be permanent, meaning every measure would be subject to correction. Agreements would require oversight and policing, and breaches would be treated as a civil offence, punishable by fines. A “Decree Section” would be established, concerned with industrial analysis and remedies rather than litigation. Judicial review would only be by a “specially constructed industrial court” with five or seven members well-versed in the ways of industry.<sup>82</sup>

As a caveat to his proposals, Hamilton raised the potential problem of administrative processes being “captured” by the business interests they are supposed to regulate. Commissions have “clos[ed] public utilities to outsiders”; “the various agricultural controls . . . have been very sensitive to the plight of the farmers, negligent of farm labor, and indifferent to the general public who must pay the bill”; “[t]he NRA . . . staged a full dress performance of the hazards of the administrative process” in which “wide powers were granted . . . [only] to become sanctions under which the strategic group could lord it over the industry.”<sup>83</sup>

#### *A. Patents and Privileged Market Positions*

The issue of patents and their use in certain industries to maintain privileged market positions also came to Hamilton’s attention during his price studies. Hamilton came to see this issue as an extremely important and particularly difficult policy problem. He believed that knowledge was more important than real property, natural resources were largely what the current state of knowledge makes them, and “modern industry . . . [was] nothing more than our accumulated technical knowledge.”<sup>84</sup> For those reasons, abundant production and rising standards of living rested on the advance of knowledge and its dissemination.

The purpose of a patent is the promotion of technological advance, but Hamilton’s investigations indicated to him that the existing patent system had numerous failings in achieving that end. Research and invention had become a matter of corporate research and development laboratories. In the hands of corporations, the patent system could easily be used to create control of an industry. A flood of closely related products could be patented, blocking out other competitors; patents could be used

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81. Hamilton & Till, *supra* note 77, at 19.

82. HAMILTON & TILL, *supra* note 75, at 101–15.

83. Hamilton & Till, *supra* note 77, at 25.

84. Walton H. Hamilton, *A New Patent Policy*, 17 CURRENT HIST. 338, 339 (1949).

to “fence” in an invention, “block” the work of rivals, or “trawl” for information. Patent protection could be extended in time by patenting successive modifications, and special terms and conditions could be written into patent licenses, dividing the market between producers by quota, territory, or product, and setting prices for various users. Moreover, patents could be pooled, resulting in a closed and collusive market, and international agreements involving patents provide the basis for trade agreements between firms and international cartels.<sup>85</sup>

Hamilton made a number of proposals to improve the patent system. He believed the Justice Department should push forward cases involving restrictive covenants in order to more clearly define what could and could not be included in a patent license. He also believed that, while an easier and more expeditious method of validation of patents might prevent some pooling of patents, where pooling was required for efficient production, the pool should be accepted and placed under public authority. Patents not in use should be cancelled or compelled to license, and higher standards for patentability should be established or different types of invention given different types of patent. Hamilton wanted to differentiate between genuinely novel and important inventions and mere modifications or variations. For example, he would prohibit applications for reissue or renewal. Hamilton also suggested the establishment of a “Public Counsel on Patents” to exercise general oversight of patent grants, of assignments and leases, and of all patent litigation, and with a right to intervene in applications and institute suits in order to protect the public interest.<sup>86</sup>

These steps, however, still did not satisfy Hamilton, who believed they would “fall[] short” of answering the problem of “accommodat[ing] the [patent] grant to its corporate and industrial habitat.”<sup>87</sup> If a “fresh slate were at hand,” he believed a system of compulsory licensing might be best, but in the existing circumstances, Hamilton suggested an expert commission of inquiry to consider a more fundamental redesign based on “further study and the formulation of a program.”<sup>88</sup> A National Patent Planning Commission was established in 1942, but produced not a close study or a new program but a skimpy eleven-page report that “white-washed” the patent system, ignored the major problems, made proposals

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85. See generally HAMILTON & TILL, *supra* note 75; Walton Hamilton & Irene Till, *What Is a Patent?* 13 LAW & CONTEMP. PROBS. 245 (1948).

86. HAMILTON & TILL, *supra* note 75, at 146–52.

87. *Id.* at 156.

88. *Id.* at 163.

that would, if anything, lower the standards of patentability, and suggested extending the time a patent grant could run.<sup>89</sup>

The conclusion of this work on antitrust and patents was a growing concern on Hamilton's part with the development of what he called "property rights in the market" or "market equities."<sup>90</sup> These property rights could take the form of a wide variety of business practices; the requirements of a profession or trade; the control of a strategic ingredient or resource; the protection given to local industries or favored producers by state or national regulations; regulations originally adopted for public benefit turned into barriers to entry; and patents, patent licenses, and patent pools used as a basis for the control of markets.<sup>91</sup> Most significantly, Hamilton was concerned that corporations had discovered "that regulation is a two-edged thing," with controls that could be captured and put to uses never intended.<sup>92</sup>

Hamilton's concerns about the difficulty of controlling business were strengthened by the Court's giving corporations the rights of natural persons. The treatment of the corporation as a natural individual required a series of legal "fictions" that effectively ignored the corporate ability to internationalize, to create subsidiaries and complex and intricate patterns of control, to choose and change domicile, and to exist in perpetuity or dissolve itself and reappear under a new name. He wrote that "the elaborate web of 'as-ifs' which the courts have woven, have put corporate affairs pretty largely out of the reach of the regulations we decree,"<sup>93</sup> and that the techniques of public control encountered legal fictions "which have left fact far behind." Hamilton did not provide a program for the "domestication of the corporate ghost":

But as a necessary antecedent to positive action we can bring our fictions up to date. The corporation is not a person; nor can it be made a person by a heroic . . . [act] of "judicial contemplation." The corporation is a legal form into which a going concern is cast; the corporation is a device through which persons operating within bodies of social usage carry on. If the law cannot escape the fiction as

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89. See generally Walton H. Hamilton, *Whitewashing the Patent System*, 109 NEW REPUBLIC 278 (1943).

90. See generally Walton H. Hamilton, *Property Rights in the Market*, 2 J. LEGAL & POL. SOC. 10 (1943).

91. Hamilton discusses professional associations such as the AMA, the spread of professional licensing to cover many trades and occupations, the control over news by the Associated Press, international cartels as operating in tin and rubber, Florida regulations concerning the citrus fruit industry, regulations on milk, and patents.

92. Hamilton, *supra* note 90, at 29.

93. WALTON H. HAMILTON, ON THE COMPOSITION OF THE CORPORATE VEIL 4 (1946).



an essential of its trade, it can at least replace its shopworn stock with fictions which bear some resemblance to . . . [reality].<sup>94</sup>

*B. The Politics of Industry*

In his work in the late 1940s and the 1950s, Hamilton gave his concerns a more historical perspective. The failure of the market to properly control business in the public interest had resulted in a move towards regulation. But regulation broke down the previous division between state and economy. The most used form of regulatory device, the commission, was particularly susceptible to be captured by the interests it was supposed to be regulating, and the campaign for regulation ultimately produced “its own counterrevolution.”<sup>95</sup> The “interest to be regulated is compact, organized, mobile, [and] alert” to opportunities.<sup>96</sup> “The public interest is general, sluggish, diffused, [and] unable to effect a united front or to move in time.”<sup>97</sup> The business to be regulated has the initiative, the commission becomes bogged down in detail, staff who earn a reputation for understanding business can move into a career in industry, routines are established and maintained, and competition from new sources may be stifled to maintain older privileges.<sup>98</sup>

Looking back at the NRA, Hamilton argued that it began as an exercise in price fixing, but as these “sanctions were toned down or refused . . . business . . . gradually lost interest in NRA.”<sup>99</sup> Despite the demise of the NRA, it was “not without its effect upon the economic structure.”<sup>100</sup> “Representatives of different companies . . . had been brought together in . . . Washington,” and the NRA left “many industries much more tightly organized than they had been before.”<sup>101</sup> This move toward a “private government of industry” making use of “the devices and procedures of politics” was much advanced by World War II. The War Production Board (WPB) brought business personnel to Washington to serve

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94. Walton H. Hamilton, *The Economic Man Affects a National Role*, 36 AM. ECON. REV. 735, 744 (1946).

95. See generally Walton Hamilton, *The Genius of the Radical*, in YEARS OF THE MODERN 63 (John W. Chase ed., 1949) [hereinafter Hamilton, *Genius of the Radical*]; WALTON HAMILTON, THE POLITICS OF INDUSTRY (1957) [hereinafter HAMILTON, POLITICS OF INDUSTRY].

96. Hamilton, *Genius of the Radical*, *supra* note 95, at 85.

97. *Id.*; see also Walton Hamilton, *The Law, the Economy, and Moral Values*, in GOALS OF ECONOMIC LIFE 248, 268 (A. Dudley Ward ed., 1953).

98. Hamilton, *Genius of the Radical*, *supra* note 95 (listing examples given by Hamilton including the ICC being given the regulation of canals and motor transport, to the advantage of the railroads, and the Civil Aeronautics Board discouraging low cost carriers). See generally HAMILTON, POLITICS OF INDUSTRY, *supra* note 95.

99. HAMILTON, POLITICS OF INDUSTRY, *supra* note 95, at 96.

100. *Id.* at 97.

101. *Id.*

as public officials, and “a hierarchy of primary contracts” resulted in a consolidation of business empires.<sup>102</sup> The NRA gave representation to labor and the consumer, but in the WPB “it was the business interest alone which was enthroned.”<sup>103</sup>

On the other hand, for Hamilton there was no going back to the market. That phase in industrial and institutional development had passed. Hayek and Mises,<sup>104</sup> writing in 1944, were “voices from the grave.” Each sought a return to the separation of state and economy, but “the free market they [sought] to restore never was,” and the currents of the time were moving in other directions. State and economy had become inexorably intertwined and could not now be separated. There was no return to *laissez faire*: “[a] great corpus of the law stands as proof of the incapacity of the industrial system to regulate itself.”<sup>105</sup> Hamilton believed mergers should not be allowed where technology did not require it and where there were dangers in the concentration of economic power. The grant of patent should be limited to “its proper office.”<sup>106</sup> Government procurement should not encourage concentration or restrictive practices. Hamilton wrote that the problem of commissions and administrative agencies would remain “[u]ntil political invention contrives an adequate substitute.”<sup>107</sup> Business would continue to play a strategic game with the regulator. There was no panacea: the only way forward for economic control in the public interest was that of “eternal vigilance.”<sup>108</sup>

### III. THE CHICAGO VIEW

The history of the development of the “neoliberal” Chicago School in economics and in law and economics has been well-detailed by Robert Van Horne and Philip Mirowski.<sup>109</sup> The Chicago School developed from what was, initially, an attempt to defend a classic liberal position against the institutionalist emphasis on regulation and increased government intervention in the economy. One can see this in Frank Knight’s strong

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102. *Id.*

103. *Id.*

104. F. A. Hayek and Ludwig von Mises were the two leading members of the Austrian school of economics and strongly anti-regulatory in opinion.

105. HAMILTON, *POLITICS OF INDUSTRY*, *supra* note 95, at 166.

106. *Id.* at 168.

107. *Id.*

108. *Id.*

109. See generally Robert Van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, in *THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 139 (Philip Mirowski & Dieter Plehwe eds., 2009) [hereinafter *ROAD FROM MONT PELERIN*]; Robert Van Horn, *Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics*, in *ROAD FROM MONT PELERIN*, *supra*, at 204.

attacks on institutionalist concepts of social control,<sup>110</sup> and in Henry Simons's *Positive Program for Laissez Faire*.<sup>111</sup> Simons's program included, among other things, a proposal for much stronger enforcement of the antitrust laws, based on clear per se rules. As against the tide of institutionalist and Keynesian thinking, Simons hoped that Chicago might be maintained as a "place where some political economists of the future may be thoroughly and competently trained along traditional-liberal lines."<sup>112</sup> Simons taught half-time in the law school. He died in 1946, but he was replaced by Aaron Director, who was appointed to the law school the same year.

Simons's wish began to bear fruit with the commencement in 1946 in Chicago of the "Free Market Study." This project was funded by the Volker Foundation, organized by Fredrick Hayek, led by Aaron Director, and involved Milton Friedman and many others at Chicago.<sup>113</sup> As the project developed, those involved came to adopt a viewpoint that was relatively unconcerned with the problem of monopoly. Particularly important in this respect was Warren Nutter's study of monopoly that took direct aim at A. R. Burns's "decline of competition" thesis.<sup>114</sup> The upshot was a view that innovation in products and techniques, or indeed the exercise of monopoly power itself, tended to undermine monopoly positions, provided that such monopoly was not supported by government regulations or licensing requirements. For Director, competition, even when not visible, had the ability to undermine and destroy all forms of monopoly.<sup>115</sup>

Following on from the Free Market Study, Aaron Director took the lead on the Antitrust Project, which ran from 1953 to 1957.<sup>116</sup> This project also involved Edward Levi of the law school. Interestingly, Levi knew Walton Hamilton well. He had been a student at Yale Law School and was later employed as Special Assistant to the Attorney General, working for several years under Thurman Arnold in the Antitrust Division. He and Walton Hamilton were, at that time, very much on the same side on the monopoly issue.<sup>117</sup> At least up until the early 1950s, Levi, like

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110. Frank H. Knight, *The Newer Economics and the Control of Economic Activity*, 40 J. POL. ECON. 433 (1932).

111. HENRY C. SIMONS, *A POSITIVE PROGRAM FOR LAISSEZ FAIRE: SOME PROPOSALS FOR A LIBERAL ECONOMIC POLICY* (Harry D. Gideonse ed., 1934).

112. Ronald H. Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239, 244 (1993).

113. See generally Van Horn & Mirowski, *supra* note 109; Van Horn, *supra* note 109.

114. See generally G. WARREN NUTTER, *THE EXTENT OF ENTERPRISE MONOPOLY IN THE UNITED STATES, 1899-1939* (1951).

115. Van Horn, *supra* note 109, at 217.

116. *Id.* at 205.

117. Hamilton admired Edward H. Levi's *INTRODUCTION TO LEGAL REASONING* (1949), and they corresponded concerning antitrust issues.

Hamilton, argued that monopoly power and anticompetitive practices were common, and that the antitrust laws had not been effectively enforced. By the mid-1950s, however, Levi, along with Director, was arguing the opposite view: that the problem of monopoly was not as serious as previously thought and that many “exclusionary practices” did not enhance or extend monopoly power.<sup>118</sup>

There were a number of key elements in the development of this line of argument: that many markets were not characterized by monopoly so much as by oligopoly, to which the theory of monopoly could not be readily applied; that the growth of many firms had come about through internal growth, not by takeovers, and could be the result of economies of scale; and that many “abuses” could be seen as forms of price discrimination that did not create monopolies. It was Director and Levi’s position that antitrust decisions should be based on their brand of economic theory and not on notions of “fair conduct.” They also supported a “rule of reason” approach, which may have come originally from the case-by-case approach taken by Arnold and Hamilton, but which now presumed that exclusionary or coercive practices would not increase monopoly power except in exceptional cases and, as a result, shifted the burden of proof from the firms involved to the Department of Justice. Under this approach, special cases were possible, but a case-by-case inquiry would be necessary to determine if the specific practice concerned qualified.<sup>119</sup>

Another central aspect of the Chicago School was its view of the goal of antitrust policy exclusively in terms of achieving increased economic efficiency. Robert Bork argued that not only was this the original intention of the antitrust laws, but it was also the basis on which the courts had actually decided cases.<sup>120</sup> In this view, other objectives, such as restraining the political power of large corporations, protecting small businesses, or protecting consumers, dropped from sight. Significantly, price discrimination can be consistent with economic efficiency while at the same time redistributing income from consumers to producers. This contrasted sharply with Hamilton’s emphasis on protecting the consumer interest. Moreover, the Chicago School presented efficiency as an objective criterion, so that the political preconceptions of judges were no long-

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118. Aaron Director & Edward Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956).

119. Van Horn, *supra* note 109, at 225–26.

120. See generally Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

er an important determinant of judicial decision-making. This view was, again, very much in contrast to the older realist tradition.<sup>121</sup>

Economic concerns involving innovation and dynamic efficiency also inspired the Chicago School view of patents and intellectual property rights. Patent policy had traditionally been seen as a balancing of the interest of the innovator in obtaining a return against the interest of the consumer in rapid and wide dissemination. Hamilton's concern was with the abuse of the patent system to create positions of market power and actually restrict innovation. Here again, the Chicago School moved the balance towards the business interest on the grounds that patents would promote innovation and produce gains from technological progress. The moves toward compulsory licensing that were promoted by Hamilton and once widely supported had been reversed. Restrictive licensing agreements, the Chicago School argued, should not be challenged. Although they represented attempts to capture more of the social surplus, they did not harm competition, and, indeed, drove the technology market.<sup>122</sup>

Finally, although Hamilton was quite likely a source for the Chicago School's concerns with agency capture and of the ability of firms to turn government regulation into barriers to entry, Hamilton drew very different implications from this than have more recent Chicago School commentators. Friedman, for example, takes the argument to the point of expressing a preference for private monopoly over public monopoly or public regulation of monopoly.<sup>123</sup> Along similar lines, Chicago School writers have expressed little, if any, concern over the penetration of business into politics that seriously worried Hamilton. The Chicago School literature suggests that this stems from a focus on economic factors and an apparent belief that removing government from overt regulatory activity will result in a separation of the economic and the political, as if the market itself can somehow be made to lie outside of politics. This view is directly contrary to Hamilton's view that the integration of big business and politics have gone much too far to ever be undone and that the solution must be sought elsewhere.

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121. For a broader view of Chicago law and economics, see Steven G. Medema, *Wandering the Road from Pluralism to Posner: The Transformation of Law and Economics in the Twentieth Century*, in FROM INTERWAR PLURALISM TO POSTWAR NEOCLASSICISM, ANNUAL SUPPLEMENT TO VOLUME 30, HISTORY OF POLITICAL ECONOMY 202 (Mary S. Morgan & Malcolm Rutherford eds., 1998), and Steven G. Medema, *Chicago Law and Economics*, in THE ELGAR COMPANION TO THE CHICAGO SCHOOL OF ECONOMICS 160 (Ross B. Emmett ed., 2010) [hereinafter ELGAR COMPANION].

122. See F. M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 30, 38 (Robert Pitofsky ed., 2008).

123. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 28; Van Horn, *supra* note 109, at 220.

There have been recent reactions against what some see as the excesses of the Chicago view.<sup>124</sup> This work has reintroduced the arguments that the political preconceptions of judges matter, and that efficiency considerations cannot explain court decisions.<sup>125</sup> It has been argued that antitrust is (and always was) intended to protect consumers, not efficiency,<sup>126</sup> and that in many of its arguments concerning exclusionary dealing, restrictive patent licensing, mergers, and vertical arrangements, the Chicago School has consistently “overshot” the mark.<sup>127</sup> There seems, however, less interest in abandoning a rule of reason approach for per se rules. These developments appear to take us at least a little way back towards a Hamiltonian position.

#### CONCLUSION

Hamilton’s institutional and realist blend of law and economics was characteristic of what has been called the “old” law and economics movement, to be later overtaken by the Chicago-based “new” law and economics.<sup>128</sup> There are, very clearly, huge differences in the attitudes behind these two literatures. In the older literature, law was a potential instrument to control business, restrain monopoly power, and restrict practices. In the newer Chicago-based literature, the regulatory interventions previously promoted and acted upon have been transformed into problems worse than the ones they were supposed to solve. In the absence of government regulation, it is now claimed, competition will have its corrosive effect on any established market positions. In the Chicago literature, there is an almost total lack of concern about the penetration of corporate power into the broader political arena, the increasingly restrictive use of patents and intellectual property rights, and the issue of corporate personality. All of these areas are even bigger and more crucial issues now than when Hamilton was writing.

Yet there are some links between these two schools. Hamilton and those associated with the Chicago position both moved away from the older view of antitrust as displayed in the work of Simons, and were not

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124. See generally HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 122.

125. See generally Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 122, at 40.

126. See generally John B. Kirkwood & Robert H. Lande, *The Chicago School’s Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 122, at 89.

127. See generally HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 122.

128. See generally Steven G. Medema, *Wandering the Road from Pluralism to Posner: The Transformation of Law and Economics in the Twentieth Century*, in FROM INTERWAR PLURALISM TO POSTWAR NEOCLASSICISM, ANNUAL SUPPLEMENT TO VOLUME 30, HISTORY OF POLITICAL ECONOMY 202 (Mary S. Morgan & Malcolm Rutherford eds., 1998).

in favor of per se rules, but of case-by-case study. The key difference lies in the direction of the prior presumption and the burden of proof.<sup>129</sup> More importantly, as the review of Hamilton's work illustrates, the older literature did not ignore the problems of agency capture and the restrictive use of regulation. In fact, Hamilton was one of the first to take these issues seriously. One cannot characterize institutionalist literature as being unconcerned with the potential problems of government regulation. The primary difference between Hamilton and the Chicago School is that, for Hamilton, it is simply no longer possible to bring about a separation of state and economy. In a world of big business, the activities of the state affect the fortunes of private businesses in many and multifarious ways. The two are so intimately bound up with each other that no separation is possible.

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129. As Rutherford (Malcolm Rutherford, *Chicago Economics and Institutionalism*, in ELGAR COMPANION, *supra* note 121, at 25) and Medema (Steven G. Medema, *Chicago Law and Economics*, in ELGAR COMPANION, *supra* note 121, at 160) both point out, there are more general connections between the older institutionalist/realist tradition in law and economics and Chicago law and economics. Medema argues that "the ferment of legal realism was a big reason why law and economics could gain a foothold at Chicago and eventually sprout and spread in new form." *Id.* at 171.