

# Appraising the Progressive State

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*ABSTRACT: Since its origins in the late 19th century, the most salient characteristics of the progressive state have been marginalism in economics, the greatly increased use of scientific theory and data in policy making, and the encouragement of broad electoral participation. All have served to make progressive policy less stable than classical and other more laissez-faire alternatives. However, the progressive state has also performed better than alternatives by every economic measure. One of the progressive state's biggest vulnerabilities is commonly said to be its susceptibility to special interest capture. The progressive state makes many decisions via either legislation or administrative agencies, and both are thought to be prone to special interest control at the expense of the public. Nevertheless, the superior economic performance of the progressive state calls that conclusion into question. How can a state policy that is so prone to special interest capture also produce superior results?*

*One severe weakness of the capture argument against the progressive state is that it uses the free market as a baseline for identifying what is in the public interest. Under such a standard, any political theory that believes that market failure is more widespread and in need of correction will generate too many false positives suggesting capture. In fact, special interest capture often explains failures to regulate as much as special interest regulation itself, and today the former dominates the latter on many important issues. Ironically, one exacerbating factor in producing such capture is the structural features of the Constitution itself, which place much higher burdens on those seeking to regulate than on those seeking to resist regulation.*

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## I. INTRODUCTION

The legal and political institutions that comprise the modern progressive state had many of their origins in the historical United States Constitution, but progressivism's most distinctive modern features began to emerge in the late 19th century. The structures we identify with the modern progressive state were largely in place by the beginning of World War II and continued on an expansion course through the years of the Warren Supreme Court (1953–1969) and LBJ administration (1963–1969).<sup>1</sup> Since that time the progressive state has been heavily criticized by conservatives and libertarians<sup>2</sup> but defended by many liberals and moderates.<sup>3</sup>

The most important attributes of the modern progressive state are a belief that legal policy should be guided by the best available scientific knowledge; marginalism in economics; anti-historicism in the social sciences; a strong commitment to non-market institutions, heavily reflected in policy making carried out by government agencies; deferential judicial review of

1. On the historical development of the progressive state, see generally HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970* (2015). On politics and social movements, see generally JOHN WHITECLAY CHAMBERS II, *THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890–1920* (3d ed. 2000); RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955); and MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920* (2003). See generally DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* (2013).

2. Recent examples include THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* (2016); 1–2 ELLIS WASHINGTON, *THE PROGRESSIVE REVOLUTION: LIBERAL FASCISM THROUGH THE AGES* (2013).

3. See generally, e.g., JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016); IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013); SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* (1993).

economic legislation that does not clearly violate express provisions of the Constitution, but harsher review of provisions that adversely affect underrepresented minorities or impair the practice of fundamental rights.

One other progressive value is equally important, although its meaning has shifted over the years. That is progressives' strong commitment to broad political participation by voting, including flirtations with direct democracy.<sup>4</sup> Broad voter participation was central to the early Progressive Era,<sup>5</sup> but it produced tension with later progressives' increased reliance on science and expertise to make policy.<sup>6</sup> The latter impulse triumphed during the New Deal, giving way to ideas about statecraft favoring expertise, administrative law, and judicial deference—and in the process insulating government decision-making from direct citizen control.<sup>7</sup> As legal realist James Landis put it, in a complex world where policy is driven by scientific conception, it is essential that issues be decided “by those best equipped for the task.”<sup>8</sup> Despite this tension, the concern with citizen participation has had consistent support in the progressive state. One example is the Civil Rights Era's concern with redistricting and equal voting, strongly expressed by the Voting Rights Act.<sup>9</sup> Another is the more recent concerns about campaign finance reform, voter ID laws or polling place closure that threaten to limit voter participation.<sup>10</sup>

Another progressive value is government stimulation of labor participation and welfare. Progressive support for labor in large part reflects progressivism's “demand-side” approach to the economy. That has entailed broad support for both labor unions and minimum wage laws, as well as a government commitment to full employment, even if it produces some

4. See generally IN DEFENSE OF THE FOUNDERS REPUBLIC: CRITICS OF DIRECT DEMOCRACY IN THE PROGRESSIVE ERA (Lonce H. Bailey & Jerome M. Mileur eds., 2015).

5. See HOFSTADTER, *supra* note 1, at 257–60; MICHAEL WALDMAN, THE FIGHT TO VOTE 73–124 (2016). Contemporary sources include BENJAMIN PARKE DEWITT, THE PROGRESSIVE MOVEMENT: A NON-PARTISAN COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS 4–5 (1915).

6. One good example is articulated by New Deal legal scholar and administrative law expert James M. Landis. See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 22–25 (1938).

7. See FELIX FRANKFURTER, THE PUBLIC & ITS GOVERNMENT 130–50 (1930) (describing the superiority of expert managers over lay voters as policymakers). For sharp qualifications, see generally Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954).

8. James M. Landis, *Administrative Policies and the Courts*, 47 YALE L.J. 519, 536 (1938).

9. WALDMAN, FIGHT TO VOTE, *supra* note 5, at 125–70.

10. *Id.* at 213–65. See generally Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21 (2014); Tiffany R. Jones, *Campaign Finance Reform: The Progressive Reconstruction of Free Speech* 321, in THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME (John Marini & Ken Masugi, eds., 2005); see also generally *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (striking down a Texas voter ID provision).

inflation.<sup>11</sup> This commitment may explain why economic growth has been significantly more robust under more progressive administrations.<sup>12</sup>

This article is not a defense of the progressive state. Rather, it attempts to understand the progressive legal mindset, to appreciate its strengths and weaknesses, to assess its comparative advantages and disadvantages against alternatives, and to suggest areas of improvement.

## II. IDENTIFYING THE PROGRESSIVE STATE

The modern progressive state owes many of its origins to the political movement called progressivism, or the Progressive Era. Dating its beginning is difficult. In hindsight, state regulation of hours and conditions of labor from the late 19th and early 20th century<sup>13</sup> certainly signaled the origins of progressivism, as did such federal statutes as the Sherman Act (1890)<sup>14</sup> and the Pure Food and Drug Act (1906).<sup>15</sup> In 1908, Edwin R.A. Seligman wrote a book entitled *Progressive Taxation in Theory and Practice*,<sup>16</sup> but he was really referring to taxation schemes that taxed wealthier people at higher rates, which was only a small part of the Progressive agenda. Herbert Croly, founder of *The New Republic*, published his very influential *The Promise of American Life* the next year.<sup>17</sup> Croly advocated a more corporatist state that did a greater amount of economic planning.<sup>18</sup> During the 1912 presidential campaign, all three major candidates (incumbent Howard Taft, Theodore Roosevelt, and Woodrow Wilson) claimed the label “progressive” to one extent or another. But it really fell to mid-century historians looking back to define and label the Progressive movement. Most notably, Richard Hofstadter did so in *The Age of Reform*, followed by others.<sup>19</sup> Today we generally think of the Progressive Era as running from sometime in the very late 19th century until 1920.<sup>20</sup> The latter date is somewhat firmer, at least at the federal level, identified by the election of President Warren G. Harding.

The modern progressive state developed during a period of rapid scientific and demographic change. First, beginning in the late 19th century,

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11. See ROBERT POLLIN, BACK TO FULL EMPLOYMENT 128–40 (2012).

12. See discussion *infra* notes 163–64 and accompanying text.

13. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding a maximum-hour provision for women); *Lochner v. New York*, 198 U.S. 45, 64–65 (1905) (striking down a maximum-hour provision); *In re Jacobs*, 98 N.Y. 98, 112–15 (N.Y. 1885) (striking down a statute prohibiting cigar rolling in tenement houses).

14. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7 (2012)).

15. Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed 1938).

16. See generally EDWIN R.A. SELIGMAN, PROGRESSIVE TAXATION IN THEORY AND PRACTICE (1908). On Seligman’s influence on American tax policy, see HOVENKAMP, *supra* note 1, at 92–100.

17. See generally HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (1909).

18. *Id.* at 141–214, 315–98.

19. See generally HOFSTADTER, *supra* note 1; see also generally HAROLD U. FAULKNER, THE DECLINE OF LAISSEZ FAIRE, 1897–1917 (1951).

20. See HOFSTADTER, *supra* note 1, at 132–48.

progressive economics and science entered the American academy.<sup>21</sup> The principal developments were economic marginalism, which led to expanding ideas about market failure and the need for regulation; recognition that inequality of wealth is an appropriate concern of legal policy; and acknowledgement that risk management often requires the aggregation of populations for purposes such as social security, insurance, and even contract and tort law.<sup>22</sup> Another important characteristic of the first generation of American progressives was the greatly increased use of science, particularly social science, in policymaking.<sup>23</sup> While the first generation of progressives enthusiastically turned to the social sciences, the social science of the day was heavily Darwinian, and genetic determinism was the ruling model.<sup>24</sup> More environmentalist models for the social sciences came a little later and soon overran progressive social science methodology.<sup>25</sup> Early on, many American progressives were also strongly Christian, but with a “social” interpretation of the gospel that was eventually rejected by much of the Christian mainstream.<sup>26</sup>

#### A. THE MYTHICAL LIBERTARIAN CONSTITUTION

Though the Progressive movement is a convenient point for defining the scope of the modern progressive state, the ideological roots can be traced back much farther. In fact, the progressives’ experiment with an active state had ample precedent. It was an integral part of the constitutional and early national periods, reflected in both the United States and state constitutions as well as contemporary economic policy.<sup>27</sup> While some believe that the United States Constitution was historically “classical,” or antistatist, from its inception,<sup>28</sup> that view is not faithful to the history of either the federal

21. See HOVENKAMP, *supra* note 1, at 1–74.

22. *Id.*

23. See DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 98–140 (1991). See generally MARY O. FURNER, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865–1905* (1975).

24. HOVENKAMP, *supra* note 1, at 36–74.

25. See generally Herbert Hovenkamp, *Racism and Public Law in the Progressive Era* (Dec. 2016) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2812257](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812257).

26. See generally ROBERT M. CRUNDEN, *MINISTERS OF REFORM: THE PROGRESSIVES’ ACHIEVEMENT IN AMERICAN CIVILIZATION, 1889–1920* (Illini Books 1984) (1982); SUSAN CURTIS, *A CONSUMING FAITH: THE SOCIAL GOSPEL AND MODERN AMERICAN CULTURE* (2001); NELL IRVIN PAINTER, *STANDING AT ARMAGEDDON: A GRASSROOTS HISTORY OF THE PROGRESSIVE ERA* (2008).

27. See generally, *e.g.*, FRANK BOURGIN, *THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC* (1989); OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861* (1947); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

28. See generally, *e.g.*, RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014); Randy E. Barnett, *Is the Constitution Libertarian?*, 2008–2009 CATO SUP. CT. REV. 9; see also generally RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016).

constitution or early state constitutions.<sup>29</sup> Adam Smith's *Wealth of Nations*, with its anti-government bent, was published in 1776.<sup>30</sup> Nevertheless, his ideas did not have a significant impact on American views about political economy and state nonintervention for another two generations. Smith's work was ignored by the framers of the United States Constitution.<sup>31</sup> The federal and state constitutions of the formative era and early national period contemplated a government that was active in economic development, although the tools it used were different from the tools that were developed during and following the New Deal.<sup>32</sup>

At the beginning of the 19th century the United States was severely underdeveloped. Government intervention in the economy took the form of monopoly grants to encourage economic development, as well as tax breaks and other subsidies dedicated to the creation of infrastructure.<sup>33</sup> The early American state also took a much heavier role in fostering innovation through the patent system, encouraging the actual development and deployment of patented devices and processes.<sup>34</sup> Under the leadership of Chief Justice Marshall the Supreme Court facilitated the use of monopoly grants.<sup>35</sup> It also furthered a strongly national and pro-regulatory interpretation of the Commerce Clause, designed to facilitate national development and limit state free riding and other self-interest.<sup>36</sup>

The so-called "classical," or anti-regulatory, Constitution was not the one contemplated by most of the early framers of federal and state constitutions. Rather, it developed during the 1830s and continued thereafter as part of the eclectic Jacksonian revolution intended to wrest power from entrenched economic interests that had profited heavily from earlier more activist public policy. The election of Andrew Jackson in 1828 signaled the development of constitutional doctrine dedicated to pushing government out of the economy, including a more restrictive interpretation of the Commerce power.<sup>37</sup>

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29. See generally Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1 (2015); Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452 (2015) (reviewing EPSTEIN, *supra* note 28). On the Framers' concern with a strong economic state, see generally MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016).

30. 1-2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (R.H. Campbell & A.S. Skinner eds., LibertyClassics 1981) (1776).

31. See CLINTON ROSSITER, 1787: THE GRAND CONVENTION 69 (1966); GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981).

32. Hovenkamp, *supra* note 29, at 7-12.

33. *Id.* at 11-12.

34. See generally Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 ARIZ. L. REV. 263 (2016).

35. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 160-73 (1977); Hovenkamp, *supra* note 29, at 19-20.

36. See Hovenkamp, *supra* note 29, at 14-19.

37. See Felix Frankfurter, *Taney and the Commerce Clause*, 49 HARV. L. REV. 1286, 1294 (1936). See generally FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND*

limitations on the power of the states to create durable monopolies,<sup>38</sup> and limits on state power to use taxes to subsidize business.<sup>39</sup> Through a substantially revised Patent Act in 1836 and the administration of Chief Justice Roger Brooks Taney, the Jacksonian era turned the American patent system into one more similar to what we have today, where patents are regarded as private property rights imposing few social obligations on their owners.<sup>40</sup> The culmination of Jacksonian policy was the rise of substantive due process, or liberty of contract, doctrine. Chief Justice Taney suggested that doctrine for federal law already in the 1850s.<sup>41</sup> It migrated into the state courts in the 1880s and 1890s<sup>42</sup> and the United States Supreme Court around the turn of the century.<sup>43</sup> This Jacksonian constitution is the one that provoked the progressive reaction, not the constitution of the framers.

While the Jackson era was staunchly laissez-faire in its economic policy, it cannot be described as libertarian. In fact, at no time in our constitutional history have we been governed at either the federal or the state level by a predominantly libertarian view of the State. The original federal Constitution left the question of religious tests for state offices entirely to the states, but most state constitutions excluded non-Christians,<sup>44</sup> or in some cases even

WAITE (1937).

38. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 17-41 (1991); Hovenkamp *supra* note 29, at 19-26.

39. See, e.g., *Cole v. La Grange*, 113 U.S. 1, 6-9 (1885) (declaring a tax subsidy to an iron company unconstitutional because it benefitted a private company); *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 667 (1874) (declaring that taxation must be for "public purpose").

40. See generally *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405 (1908) (dominant firm had no duty to license externally acquired and unused patent to rival); see also generally Hovenkamp, *supra* note 34.

41. See *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 553 (1852) (concluding that "a special act of Congress" extending one person's patent retroactively "certainly could not be regarded as due process of law"); see also *infra* notes 223-24 and accompanying text.

42. See HOVENKAMP, *supra* note 1, at 242-45. See generally *Millett v. People*, 7 N.E. 631 (Ill. 1886) (striking down a statute requiring miners doing piecework to be paid by weight rather than by easily manipulated box); *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886) (striking down a statute requiring iron workers to be paid in money rather than goods); *In re Jacobs*, 98 N.Y. 98 (N.Y. 1885) (striking down a statute preventing cigar rolling in tenement houses).

43. See generally *Lochner v. New York*, 198 U.S. 45 (1905) (striking down hours regulations for bakery employees); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down statute excluding out-of-state insurance companies from the state).

44. See, e.g., DEL. CONST. art. 22 (1776) ("Every person who shall be chosen a member of either house, or appointed to any office or place of trust . . . shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit: 'I, A.B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration . . . .'); MD. CONST. art. 35 (1776) ("That no other test or qualification ought to be required . . . than such oath of support and fidelity to this State . . . and a declaration of a belief in the Christian religion."); MASS. CONST. pt. 1, art. II (1780) ("The governor shall be chosen annually, and no person shall be eligible to this office, unless . . . he shall declare himself to be of the Christian religion."); MASS. CONST. pt. 2, ch. 6, art. 1 (1780) ("[All persons elected

Catholics,<sup>45</sup> from holding many public offices. Many of them also supported established churches with tax proceeds.<sup>46</sup> Further, no credible case can be made that the states became more libertarian in matters of religion and morals during the Jackson era. The previous years had witnessed the splintering of the evangelical Protestant churches, including loss of establishment in the northern colonies and states.<sup>47</sup> As the Christian Church lost its authority, the states filled the vacuum. Just as the Jackson period became a symbol for the extraction of the state from economic management, it also represented a significant increase in state control of morals, characterized by the great “reform” movements of that era.<sup>48</sup> Among the Jacksonian moral revolutions was new hostility toward alcohol consumption and lotteries, now enforced by law, and even expanded efforts to enforce “victimless” offenses such as blasphemy and various forms of Sabbath breaking.<sup>49</sup> This is hardly the stuff of libertarians.

One important feature of the Substantive Due Process doctrine that followed the Jackson era was a triumvirate of interests that were acknowledged exceptions to liberty of contract—namely, “health, safety, and morals.” Regulatory intervention was acceptable if the state could show a qualifying

to State office or to the Legislature must] make and subscribe the following declaration, viz: ‘I, A.B., do declare, that I believe the Christian religion, and have firm persuasion of its truth . . .’”; PA. CONST. § 10 (1776) (“And each member [of the legislature] . . . shall make and subscribe the following declaration, viz.: ‘I do believe in one God, the creator and governor of the universe, the rewarder to the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.’”).

45. See, e.g., GA. CONST. art. VI (1777) (“The representatives shall be chosen out of the residents in each county . . . and they shall be of the Protestant religion . . .”); N.J. CONST. art. XIX (1776) (“[N]o Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right . . . all persons, professing a belief in the faith of any Protestant sect . . . shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature . . .”); N.C. CONST. art. XXXII (1776) (“That no person who shall deny the being of God, or the truth of the Protestant religion, or the divine authority either of the Old or New Testament . . . shall be capable of holding any office, or place of trust or profit in the civil department within this State.”).

46. MD. CONST. art. XXXII (1776) (“[T]he Legislature may, in their discretion, lay a general and equal tax for the support of the Christian religion . . .”); N.H. CONST. Pt. I, art. VI (1784) (“[T]he legislature . . . authorize[s] . . . the several towns . . . to make adequate provisions, at their own expense, for the support and maintenance of public protestant teachers of piety, religion and morality . . .”).

47. See generally 1–2 WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* (1971).

48. See CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815–1846*, at 202–68 (1991). See generally ROBERT H. ABZUG, *COSMOS CRUMBLING: AMERICAN REFORM AND THE RELIGIOUS IMAGINATION* (1994); IAN R. TYRRELL, *SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800–1860* (1979).

49. HOVENKAMP, *supra* note 1, at 255–62 (noting that Jackson initiated state legislative campaigns against alcohol, lotteries, and Sabbath breaking). See generally *Murphy v. Simpson*, 53 Ky. (14 B. Mon.) 419 (1854) (refusing to enforce a contract made on Sunday); *Hulet v. Stratton*, 59 Mass. (5 Cush.) 539 (1850) (same); *Lyon v. Strong*, 6 Vt. 219 (1834) (invalidating the sale of horses made on Sunday).



concern with the health, safety, or morals of either the regulated persons or their customers.<sup>50</sup> While liberty of contract may have been viewed as based on fundamental rights or natural law, the health, safety, and morals exceptions were factual qualifications whose application opened the way to scientific inquiry. Eventually this trio of justifications became the back door through which a theory of market failure entered constitutional adjudication.

More than one thousand decisions during the Substantive Due Process era, including *Lochner* itself, recited the “safety, health, [and] morals” litany.<sup>51</sup> Speaking of the limits on state power to regulate hours of employment, Justice Peckham’s opinion for the Court clarified that it was the Court’s obligation to determine whether “any piece of legislation was enacted to conserve the morals, the health or the safety of the people,” and not something that the state could simply assert and have taken at face value.<sup>52</sup> While substantive due process doctrine was quick to protect property and contract rights, it allowed exceptions when the rights taken away had to do with such things as lotteries or consumption of alcohol, even if these interests were lawful when created.<sup>53</sup> As a result, the substantive due process era is much more properly classified as Christian conservative rather than libertarian.

Under the health, safety, and morals exceptions to liberty of contract, a state could defend a statute that interfered with the market by showing that it protected the health or safety of someone *other* than the contracting parties, who as adults were presumed to be able to contract for their own health or safety. If the regulation pertained to morals then it would be upheld even if it protected only the morals of the person to which the statute applied.<sup>54</sup> Justice Peckham emphasized the first point in *Lochner*, which struck down a statute limiting the working hours of New York bakers to ten per day or 60 per week.<sup>55</sup> He concluded that the health and cleanliness of the workers themselves did not justify these state-imposed limitations because the bakers were able to bargain for themselves.<sup>56</sup> A protective statute would place the state in “the

50. See HOVENKAMP, *supra* note 1, at 249–51.

51. *Lochner v. New York*, 198 U.S. 45, 53 (1905); see also HOVENKAMP, *supra* note 1, at 249–51. On the health, safety, and morals triumvirate as the gateway to a constitutional theory of market failure see *id.* at 9, 279–81. On the number of decisions reciting the triumvirate, see Herbert Hovenkamp, *Progressive Legal Thought*, 72 WASH. & LEE L. REV. 653, 678 (2015) (finding that health, safety, and morals appeared “in forty-four judicial decisions prior to 1890, an additional 100 decisions between 1890 and 1900, and in another 1,100 decisions between 1900 and 1930”).

52. *Lochner*, 198 U.S. at 56.

53. See generally *Mugler v. Kansas*, 123 U.S. 623 (1887) (denying compensation for the closing down of a distillery that was lawful when built); *Phalen v. Virginia*, 49 U.S. (8 How.) 163 (1850) (permitting Virginia to renege on a previous grant made to a lottery company); *State v. Murphy*, 41 A. 1037 (Vt. 1898) (upholding a statute that closed bars without compensation).

54. On the case law that developed this distinction, see HOVENKAMP, *supra* note 1, at 243–62.

55. See generally *Lochner*, 198 U.S.

56. *Id.* at 62.

position of a supervisor, or *pater familias*, over every act of the individual.”<sup>57</sup> Justice Peckham accepted on principle that the law could be sustained if it affected the “healthful quality of the bread” that the bakers produced, but he found no evidence of such a link.<sup>58</sup> That link, if proven, would have been a benefit for people who were not parties to the bakers’ employment agreement.

Three years later, progressive attorney Louis Brandeis successfully defended a ten-hour law that applied to women by presenting a social-science brief showing that long hours of labor affected the children of overworked women laborers.<sup>59</sup> Acceptance of this third-party benefit justified the statute, which the Court upheld.<sup>60</sup> The subheadings of the first “Brandeis Brief” explicitly named “health,” “safety,” and “morals” as the relevant concerns of the challenged statute, presenting evidence that all three required protection.<sup>61</sup>

In important ways progressive constitutionalism was a return to the Constitution’s more activist economic roots, although with some different tools for encouraging economic development as well as different constituencies. The vast rural areas, yeomen farmers, traders and small businesses that dotted the national landscape at the end of the 18th century had given way to a country that was far more urban, more dominated by non-owner laborers, and with a much more uneven distribution of wealth.<sup>62</sup> The urban population of the United States was less than seven percent in the late 18th century, when the Constitution was created.<sup>63</sup> By 1890, the census showed that more than a third of Americans lived in urban areas, and in the Northeast the percentage was nearly 60%.<sup>64</sup> By 1920 more than half of the population was urban, as was every individual American region except the South.<sup>65</sup>

#### B. THE SCOPE OF THE PROGRESSIVE MARGINALIST REVOLUTION

Historically, economists had taken their theory of value from the past, mainly by considering how much labor had gone into making something.

57. *Id.*

58. *Id.* See discussion *infra* text accompanying notes 236–37.

59. See generally Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107).

60. *Muller*, 208 U.S. at 422–23.

61. Brief for the State of Oregon, *supra* note 59, at 28–55; see also HOVENKAMP, *supra* note 1, at 249–51.

62. See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY*, at xii, xxxiv (2013) (identifying the Gilded Age, the 1920s, and the present time as the three periods the exhibiting largest differences in distribution of wealth).

63. U.S. DEP’T OF COMMERCE, *UNITED STATES SUMMARY: 2010: POPULATION AND HOUSING UNIT COUNTS 20* (2012), <https://www.census.gov/prod/cen2010/cph-2-1.pdf>.

64. *Id.*

65. *Id.* at 20–26.

Adam Smith wrote in *The Wealth of Nations*: “The real price of everything . . . is the toil and trouble of acquiring it.”<sup>66</sup> This perspective on value was entirely backward looking. For example, classical political economists believed that the rate of wages was determined by the size of a “fund” determined by the surplus that had been saved out of the previous year’s production.<sup>67</sup> Likewise, the legal value of a business corporation was based on the amount of capital that had been paid in, an entirely backward-looking figure.<sup>68</sup>

In the late 19th century, economists in England, Continental Europe, and the United States began to view economic value in forward-looking, or marginalist, terms.<sup>69</sup> These included William Stanley Jevons and Alfred Marshall in England, Carl Menger in Austria, Leon Walras in Switzerland, and John Bates Clark at Columbia University in the United States.<sup>70</sup> The extent to which they were acting independently or were influenced by one another remains unclear.<sup>71</sup>

The early marginalists completely upended the classical theory of value by migrating British marginal utility theory from philosophy, where it had been developed by Jeremy Bentham, John Austin and John Stuart Mill, into a theory of market exchange.<sup>72</sup> Beginning with the premise that value is based on a person’s willingness to buy or sell, the early marginalists worked out the elementary mathematics of marginalism. People would continue to trade until “at the margin” they placed the same value on everything in their stock. At that point they would have no incentive to trade further. They would produce whenever the expected proceeds from production exceeded the expected cost. Resources flowed from lower to higher values until they reached a point of “equilibrium,” when they would stop flowing unless unsettled by some outside force. Early important marginalists, such as Cambridge economist Alfred Marshall and Yale economist Irving Fisher, were fascinated by mechanics and conceived of markets as fluids flowing from higher to lower places until they came to rest in equilibrium.<sup>73</sup>

These models were to have profound implications, not only for economic thought but also for the social sciences and policy concerning risk management. For example, for the marginalists the rate of wages was not

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66. 1 SMITH, *supra* note 30, at 47.

67. See HOVENKAMP, *supra* note 38, at 193.

68. *Commonwealth v. Lehigh Ave. Ry. Co.*, 129 Pa. 405, 418 (1889) (declaring that a stock’s value to a subscriber is “so much and no more than the amount actually paid upon it”). See also the prominent Gilded Age treatise, 1 WILLIAM W. COOK, *A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK* 125 (Little, Brown, & Co., 7th ed. 1913) (1887) (explaining that a share of stock represents “its par value in money or money’s worth paid in or to be paid in to the corporation”).

69. See HOVENKAMP, *supra* note 1, at 28.

70. See *id.* at 28–29.

71. See *id.* at 28.

72. See *id.* at 3, 27–28.

73. See *id.* at 31–33.

determined by any previously existing fund, but entirely by the laborer's marginal contribution to the value of the employer's firm. If the employer anticipated that the laborer would contribute five dollars per day in added value, he would be willing to pay any amount up to five dollars but not more.<sup>74</sup> The value of a corporation no longer depended on the amount of capital that had been put in when it was formed, but rather on reasonable expectations about the corporation's business prospects.<sup>75</sup>

The marginalists were not merely writing new rules about private markets. Marginalism represented a fundamental shift in human understanding of value and motive. First, the classical theory of value was not merely backward-looking, it was also objective in the sense that it saw value as residing in a particular thing. By contrast, the marginalist theory of value was both forward-looking but also behavioral, depending on willingness to pay. Marginalism also enabled the quantification of risk and uncertainty,<sup>76</sup> the rise of the modern insurance industry,<sup>77</sup> and deterrence based theories of criminal punishment.<sup>78</sup> Progressivism's attention to risk management led to the rise of forward looking institutions that manage risk by aggregating populations, such as Social Security, and health and casualty insurance.<sup>79</sup> This fact suggests why libertarians or others with strong theories about natural rights tend either to ignore modern economics or have great difficulty accommodating it.

The impact of marginalism on legal thought is difficult to exaggerate. Contract law abandoned its insistence on completed, fully-specified agreements in the past and began to see commercial contracts as devices for managing ongoing business relationships. Thus, the rise of the good-faith-purchaser-doctrine and, eventually, legal recognition of long-term business franchises and other distribution arrangements where price, quantity, and

74. See generally, e.g., JOHN BATES CLARK, *THE DISTRIBUTION OF WEALTH: A THEORY OF WAGES, INTEREST AND PROFITS* (Sentry Press 1965) (1899); J. B. Clark, *The Ultimate Standard of Value*, 1 YALE REV. 258 (1892).

75. See 1 ARTHUR STONE DEWING, *THE FINANCIAL POLICY OF CORPORATIONS* 55-56, 71-73 (1919). See generally Richard H. Hollen & Richard S. Tuthill, *Uses of Stock Having No Par Value*, 7 A.B.A. J. 579 (1921) (advocating use of no-par stock because it switched emphasis away from paid-in capital and toward earning prospects); Victor Morawetz, *Shares Without Nominal or Par Value*, 26 HARV. L. REV. 729 (1913) (similar).

76. See generally, e.g., FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* (Sentry Press 1964) (1921). While a law professor, Supreme Court Justice-to-be William O. Douglas became a pioneer in the legal theory of risk management. See William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929); William O. Douglas, *Vicarious Liability and Administration of Risk II*, 38 YALE L.J. 720 (1929).

77. See generally ALLAN H. WILLETT, *THE ECONOMIC THEORY OF RISK AND INSURANCE* (Richard D. Irwin Inc., 1951) (1901); H.P. Stellwagen, *Automobile Rate Making*, 11 PROC. CASUALTY ACTUARIAL SOC'Y 276 (1925).

78. See HOVENKAMP, *supra* note 1, at 42-52.

79. See *id.* at 123-55.

even the identity of the goods to be sold were not specified.<sup>80</sup> The concerns of tort law moved away from redress for past wrongs and toward risk management, placing new emphasis on the quantification of negligence, causation, and eventually on strict liability for dangerous products as a way of spreading losses.<sup>81</sup> Already by the time of the Restatement (First) of Torts in the 1930s, its drafters were developing an early form of cost-benefit analysis for analyzing harm. The Restatement found actionable negligence when the risk of conduct “is of such magnitude as to outweigh what the law regards as the utility of the act”<sup>82</sup> or a nuisance for a nontrespassory invasion of an interest in land “unless the utility of the actor’s conduct outweighs the gravity of the harm.”<sup>83</sup>

Marginalism also enabled economists and lawyers to study the concept of competition much more finely. They classified markets, firms, and costs in different ways, and developed the technical conditions for “perfect” competition.<sup>84</sup> In the process they learned that those conditions are in fact quite strict, and that nearly all markets deviate from them to some degree. Marginalists came to believe that markets could be improved by state intervention much more than classical political economists did. The classical political economists had a very robust theory of markets that acknowledged failure only infrequently.<sup>85</sup> One important exception was John S. Mill’s study of the British postal service, but it came rather late in the history of classical economics.<sup>86</sup> What is often not fully appreciated is how quickly the theory of market failure developed, from the laissez-faire state to the New Deal regulatory state in a few decades time.

However, marginalist progressivism was much less stable than the classical legal theory that preceded it. One destabilizing characteristic was its

80. See, e.g., *Marrinan Med. Supply, Inc. v. Ft. Dodge Serum Co.*, 47 F.2d 458, 466 (8th Cir. 1931) (finding a long-term franchise contract valid in which price and quantity were not specified); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (“It is true that [the plaintiff] does not promise in so many words that he will use reasonable efforts to place the defendant’s indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed . . . .”); see also K. N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 789–90 (1939) (contrasting the backward-looking theory of contract taught in law schools with distribution contracts in the real business world).

81. HOVENKAMP, *supra* note 1, at 123–55.

82. RESTATEMENT (FIRST) OF TORTS § 291 (1) (AM. LAW INST. 1934).

83. RESTATEMENT (FIRST) OF TORTS § 826 (AM. LAW INST. 1939).

84. See generally George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1 (1957). For a severe critique, see generally Joseph A. Schumpeter & A.J. Nichol, *Robinson’s Economics of Imperfect Competition*, 42 J. POL. ECON. 249 (1934).

85. See HOVENKAMP, *supra* note 1, at 75–90.

86. See *id.* at 78, 280; 1 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY: WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 164–68 (1849).

penchant for data gathering and science, which inclined progressives to change policies when prevailing scientific doctrine changed. Another destabilizing factor was that, although theories of value based on reasonable expectations give a more satisfactory account of human behavior, they are also more uncertain and more subject to speculation or manipulation. A good example is corporate finance theory. Under classical theory the value of a corporation depended on previously paid-in capital, a figure that could be determined by a lawyer or judge from account books.<sup>87</sup> By contrast, the neoclassical value of the firm was built on expectations about future performance—something that involved a great deal more complexity and prediction, requiring information not only about the firm but also about the market in which it operated. The rise of government agencies to assess corporate value reporting paralleled these changes, first under state “blue sky” laws and later in the federal securities statutes.<sup>88</sup>

An additional burden that marginalism carried was its mathematical seriousness, which tended to drive away those not mathematically inclined. This has particularly been true of social and intellectual historians, who have generally paid too little attention to the marginalist revolution. Rather, they have used terms such as “Social Darwinism” to describe the free market, anti-government views of the right and “Reform Darwinism” to describe the pro-regulatory interventionist views of the left.<sup>89</sup> Justice Holmes himself contributed to the problem in his *Lochner* dissent by attributing substantive due process to Social Darwinist Herbert Spencer’s *Social Statics*.<sup>90</sup>

Very little about the liberty of contract doctrine against which Holmes was reacting had anything to do with Darwin. Darwinians tended to see human beings as biological organisms and the human mind as only one of its many organs. The human being lacked free will but was guided by an instinct for survival that forced it to act in response to its environment. As Holmes described the behaviorist thought of Darwinian psychologist John B. Watson in a 1928 letter to Harold Laski, Watson is “so preoccupied with resolving all our conduct into reflex reactions to stimuli, that he almost denies that consciousness means anything and that memory is more than a useless and misleading word.”<sup>91</sup> Behaviorism, with its radically anti-historicist premises

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87. See discussion *supra* note 68.

88. See HOVENKAMP, *supra* note 1 at 159–71; William W. Cook, “Watered Stock”—Commissions—“Blue Sky Laws”—Stock Without Par Value, 19 MICH. L. REV. 583, 589–91 (1921).

89. The terms come from Richard Hofstadter’s *Social Darwinism in American Thought*. See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1944).

90. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”).

91. Letter from Justice Holmes to Harold J. Laski (Nov. 23, 1928), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 1113, 1113 (Mark DeWolfe Howe ed., 1953).

and its opposition to genetic determinism and eugenics, became fundamental methodology for progressives in the 1920s.<sup>92</sup>

By contrast, marginalist economists pictured the human being as relentlessly rational, controlled by a mind with an unrestricted set of preferences. Rationality required that the preferences must be transitive, which means that if someone preferred A over B and B over C, then she must also prefer A over C. Unlike the Darwinian view, the environment was not seen as imposing any constraints on the permissible range of preferences. Perhaps more precisely, the marginalist economists did not care whether these constraints existed or what they were. Further, preferences always looked forward and were based on reasonable expectations about the future.<sup>93</sup>

Marginalism also derived a strongly cooperative theory that emphasized voluntary exchange and the conditions for facilitating it. In contrast, Darwinism emphasized the individual struggle for existence. To the extent it existed, cooperation for Darwinians was not based on any rational theory of exchange but rather on the evolution of survival mechanisms. If group survival turned out to be superior, as it did among bees, beavers, and other cooperative organisms, then these relationships developed through a process of natural selection and not by anything as rational as the organization of markets. For example, some plants and microbes develop symbiotic relationships, meaning that they cannot exist without each other, even though they do not have a “mind” at all.<sup>94</sup>

Holmes was one early 20th century American legal scholar who recast legal and policy problems in marginalist terms, even though he did not practice marginalism’s mathematics. Unfortunately, too many historians and biographers have looked almost exclusively to Holmes’ occasional statements about Darwin while failing to appreciate that Holmes’ legal theory was marginalist to its core. While his statements about Darwin are almost always mere asides, his writings on contract, torts, and criminal law are obsessed with problems of incentives and risk management. Forward-looking valuation was much more central to his theory of law than any notion of Darwin.<sup>95</sup>

So why has the history of progressive thought been skewed so heavily in favor of Darwinian explanations? Two phenomena seem to account for most of it. First, as noted above, marginalism in economics very quickly became mathematical. Already in 1890 the great Cambridge economist Alfred Marshall felt obliged to apologize to his readers for the technical apparatus contained in his *Principles of Economics*, at the same time assuring them that

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92. See Hovenkamp, *supra* note 25 (manuscript at 45–46).

93. See HOVENKAMP, *supra* note 1, at 106–22.

94. See generally Lynn Margulis, *Symbiosis and Evolution*, in READINGS IN BIOLOGY AND MAN 140 (1973) (describing, among others, symbiotic relationships among plant roots and soil bacteria, hermit crabs and sea anemones).

95. On Holmes’ underappreciated marginalism, see HOVENKAMP, *supra* note 1, at 38–42.

learning the mathematics would be highly rewarding.<sup>96</sup> The marginalism question divided American economists sharply, with older political economists such as Simon Newcomb adhering to traditional, backward looking assessments of value.<sup>97</sup> The result was an enormous fight within the discipline, leading to the formation of the American Economic Association, initially dominated by progressives but later becoming more conservative.<sup>98</sup> By contrast, Darwinian explanations were much easier to interpret. They were fact driven rather than analytic and did not depend much on mathematics. They were easy to state verbally. The eugenics movement for selective breeding to improve the race experienced a similar division. Its heavy use of mathematics explains why it was embraced so heartily by mathematicians, statisticians, and economists, but not nearly as much by other social scientists.<sup>99</sup>

Second, and of particular importance for those writing the intellectual history of the progressive movement, Darwinian ideas engaged the public in ways that marginalism never could. Most significantly was the outrage that Darwinism produced. Although marginalism's self-oriented hedonism was inconsistent with evangelical principles, it could not possibly compete with the idea that mankind descended from the apes. No state appears to have ever passed a statute forbidding the teaching of marginalism in the schools,<sup>100</sup> and orthodox clergy did not write sermons railing at the evils of marginalist economics. As a result, the marginalist evolution never captured the attention of historians and other commentators the way that Darwin did—even though marginalism had much greater implications for legislative and legal policy.

The result was that intellectual and social historians of the Progressive Era wrote lengthy discussions of Social Darwinism without ever mentioning marginalism. They painted long and adoring portraits of economic dissenters such as Thorstein Veblen, Lloyd George, or Richard T. Ely, but gave short shrift to economists such as John Bates Clark, Irving Fisher, or Frank Knight, who were much more influential within their discipline and, eventually, in policy making.<sup>101</sup>

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96. 1 ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS*, at x-xi (1890). Today, Marshall's mathematics are child's play to even an undergraduate economics major.

97. See generally Simon Newcomb, *The Two Schools of Political Economy*, 14 *PRINCETON REV.* 291 (1884).

98. For a contemporary participant's account, see generally Richard T. Ely, *The Founding and Early History of the American Economic Association*, 26 *AM. ECON. REV.* 141 (1936). See also generally A.W. Coats, *The First Two Decades of the American Economic Association*, 50 *AM. ECON. REV.* 55 (1960).

99. See Hovenkamp, *supra* note 25 (manuscript at 11-18).

100. Cf. *Scopes v. State*, 289 S.W. 363, 367 (Tenn. 1927) (upholding a state statute that forbade the teaching of evolution). On the anti-evolution movement in education, see generally EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* (1997).

101. See generally HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S* (1950) (providing a lengthy discussion



## C. THE PROGRESSIVE STATE AND SCIENCE

Progressives were strongly tied to the science of their day and have been so ever since. Much of the literature on the rise of administrative law has been focused on the relationship between administrative agencies and the courts, as well as questions of democratic legitimacy.<sup>102</sup> But the rise of administrative agencies was just as prominent for its collection and use of data—something the courts could not readily do and that legislatures had not done to any significant extent. Data collection for the purpose of guiding state policy was a prominent feature of early federal agencies such as the Interstate Commerce Commission (1887), the Bureau of Corporations (1903), the Food and Drug Administration (1906), and the Federal Trade Commission (1914).<sup>103</sup> Early on, for most of these agencies their power to collect information was far more significant than their power actually to make and enforce rules. Some earlier progressive legal leaders, such as Roscoe Pound, were enthusiastic proponents of agency data collection.<sup>104</sup> Nevertheless, Pound was also skeptical of agency adjudicative powers, preferring to see them limited more to the collection and dissemination of data. In his conception, agencies would collect the data and legislatures would respond by changing the law. In fact, this difference in attitude toward the scope of agency power accounted for a substantial part of the rift between Pound and the legal realists.<sup>105</sup> The legal realists themselves were largely enthusiastic supporters of administrative agency adjudication as well as data collection and interpretation. New Deal government came to represent their views.<sup>106</sup>

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of Veblen; no mention of Knight; and a single mention of Clark, incorrectly labeled a “classical political economist”); HOFSTADTER, *supra* note 1 (mentioning progressive economists Veblen, Ely, and Commons many times, but never Clark, Fisher, or Knight); MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949) (making frequent references to Veblen, but none to Clark, Fisher, or Knight).

102. See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); MARK R. LEVIN, *PLUNDER AND DECEIT: BIG GOVERNMENT’S EXPLOITATION OF YOUNG PEOPLE AND THE FUTURE* (2015). For much more balanced historical treatments, see DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

103. Among the hundreds of examples are U.S. BUREAU OF CORPS., U.S. DEP’T OF COMMERCE & LABOR, *REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE PETROLEUM INDUSTRY* (1907); U.S. BUREAU OF CORPS., U.S. DEP’T OF COMMERCE & LABOR, *REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE TRANSPORTATION OF PETROLEUM* (1906); U.S. BUREAU OF CHEMISTRY, U.S. DEP’T OF AGRIC., *INFLUENCE OF FOOD PRESERVATIVES AND ARTIFICIAL COLORS ON DIGESTION AND HEALTH* (1904) (The Department of Agriculture Bureau of Chemistry was later merged into the Food and Drug Administration.). For a roughly contemporary account, see generally Franklin D. Jones, *Historical Development of the Law of Business Competition*, 35 *YALE L.J.* 905 (1926).

104. E.g., Roscoe Pound, *Criminal Justice in the American City—A Summary*, in *CRIMINAL JUSTICE IN CLEVELAND* 557, 559–652 (Roscoe Pound & Felix Frankfurter eds., 1922).

105. See HOVENKAMP, *supra* note 1, at 117–19.

106. *Id.* at 263–98.

Dependence on science made the progressive state less stable than the classical statecraft that preceded it. For example, from today's perspective much of the data collection from the New Deal era seems anachronistic in that it was tied to scientific models now regarded as obsolete. A good example is the 37 volumes of economic studies and thousands of pages of hearings produced by the New Deal Temporary National Economic Committee ("TNEC"), condemning such things as vertical integration based on assumptions that are no longer accepted by most economists.<sup>107</sup> The longest report, on the ownership of large American business corporations, ran to more than 1,500 pages filled with charts and statistics.<sup>108</sup> A related example is changes in regulatory doctrine between the 1930s and the 1980s, from broad conceptions of market failure and the need for regulation called for in the TNEC reports and given effect by the New Deal Congress, to strongly neoclassical arguments for deregulation, largely reflected in government economic reports and legislation from the 1980s and 1990s.<sup>109</sup>

Another powerful, early example is the progressive response to changes in social science doctrine. The prevailing social science of early progressivism was genetic racism. Progressives, including Woodrow Wilson, Edward A. Ross, Irving Fisher, John R. Commons, Elizabeth Cady Stanton, Carrie Chapman Catt, and many others, could be very forward-looking on questions of economics but white supremacists and racists on questions concerning interracial social relations, crime, education, and immigration.<sup>110</sup>

State-managed eugenics and racism gave us such institutions as the sterilization of "defectives," even if they had not been convicted of a crime, although the evidence does not suggest that these programs were uniquely or even substantially a Progressive initiative.<sup>111</sup> They also led to the United States'

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107. See generally Robert A. Brady, *Reports and Conclusions of the Temporary National Economic Committee (U.S.A.)*, 53 *ECON. J.* 409 (1943). Most of the Reports are available electronically at the University of Pennsylvania's electronic resources website, <http://onlinebooks.library.upenn.edu/webbin/book/lookupname?key=United%20States.%20Temporary%20National%20Economic%20Committee>.

108. See generally U.S. SEC. & EXCH. COMM'N, *THE DISTRIBUTION OF OWNERSHIP IN THE 200 LARGEST NON-FINANCIAL CORPORATIONS* (1940).

109. See generally, e.g., FTC, *DEREGULATION IN THE TRUCKING INDUSTRY* (1988); U.S. GEN. ACCOUNTING OFFICE, *TRUCKING REGULATION: PRICE COMPETITION AND MARKET STRUCTURE IN THE TRUCKING INDUSTRY* (1987); U.S. GEN. ACCOUNTING OFFICE, *AIRLINE DEREGULATION: CHANGES IN AIRFARES, SERVICE, AND SAFETY AT SMALL, MEDIUM-SIZED, AND LARGE COMMUNITIES* (1996).

110. See HOVENKAMP, *supra* note 1, at 36-74; see also Herbert Hovenkamp, *Progressive Racism*, *NEW RAMBLER REV.* (Feb. 10, 2016), <http://newramblerreview.com/book-reviews/history/progressive-racism>.

111. See generally, e.g., *Buck v. Bell*, 274 U.S. 200 (1927). *Contra* THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 109-28* (2016) (arguing that eugenics and racism drove Progressive economic reforms); see also generally GREGORY MICHAEL DORR, *SEGREGATION'S SCIENCE: EUGENICS AND SOCIETY IN VIRGINIA* (2008); PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (2008); Hovenkamp, *supra* note 25.

experiment with racial zoning, which came to an official end in 1917 in the Supreme Court's decision in *Buchanan v. Warley*.<sup>112</sup> The record in that case is notable for the "Brandeis Brief" submitted by the city of Louisville in defense of the segregation ordinance, dominated by the work of genetic racists.<sup>113</sup> Although the Court brought racially exclusionary zoning to an end, the reason had nothing to do with racial equality but rather with liberty of contract. The zoning law in question made it unlawful for a white person to sell his house to anyone he pleased.<sup>114</sup> In any event, as a matter of *private* ordering, enforced racial exclusivity lasted another three decades in the form of racially restrictive covenants, initially tolerated by the Supreme Court,<sup>115</sup> but finally declared unenforceable in 1948.<sup>116</sup>

The period from the 1910s through the 1930s witnessed a gradual but dramatic change in the social sciences, away from nature-based and toward nurture-based theories of human development.<sup>117</sup> In psychology it included behaviorism, a radically anti-genetic theory of human behavior and response.<sup>118</sup> Starting from anthropology it also included cultural relativism, pioneered by Franz Boas, whose writing stretched from the 1910s into the 1940s. His followers included Melville Herskovits, whose influential work on "Afro-Americans" in the 1920s and after led to the emergence of modern racial science emphasizing nurture rather than nature; Herskovits' contemporary, Ruth Benedict; and many others. Cultural relativism quickly migrated into other social sciences, and even into religion and ethics. Its message was strongly environmentalist.<sup>119</sup> An important scientific amicus brief submitted in behalf of the petitioners in *Shelley v. Kraemer* relied exclusively on social sciences sources reflecting the new environmentalism and describing race as nothing more than an artificial construct.<sup>120</sup>

112. See generally *Buchanan v. Warley*, 245 U.S. 60 (1917).

113. Supplemental and Reply Brief for Defendant in Error on Rehearing 142–254, *Buchanan v. Warley*, 245 U.S. 60 (1917). See generally Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624 (1985). The term "Brandeis Brief" comes from the work of Justice Louis Brandeis during the *Lochner* Era. See *supra* note 59 and accompanying text.

114. On *Buchanan* and its aftermath, see HOVENKAMP, *supra* note 1, at 66–69.

115. See *Corrigan v. Buckley*, 271 U.S. 323, 331–32 (1926) (holding that the court lacked jurisdiction because purely private enforcement of a racially restrictive covenant raised no federal question).

116. See generally *Shelley v. Kraemer*, 334 U.S. 1 (1948).

117. See Hovenkamp, *supra* note 25 (manuscript at 41–51); see also generally HAMILTON CRAVENS, *THE TRIUMPH OF EVOLUTION: AMERICAN SCIENTISTS AND THE HEREDITY-ENVIRONMENT CONTROVERSY, 1900–1941* (1978).

118. Hovenkamp, *supra* note 25 (manuscript at 46–51).

119. See *id.* (manuscript at 43–46); see also MARVIN HARRIS, *THE RISE OF ANTHROPOLOGICAL THEORY* 242, 250–89, 398–411 (1968) (discussing the work of Franz Boas, Ruth Benedicts, and Melville Herscovits).

120. See Application for Leave to File Brief Amicus and Brief Amicus Curiae on Behalf of Congress of Industrial Organizations and Certain Affiliated, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291), 1947 WL 30436, at \*20–22 & nn. 2–5; see also Hovenkamp, *supra*

The instability of the progressives is sometimes confused with lack of commitment, but that is a fundamental misunderstanding of the progressives' more empirical and scientific mindset. They tended to follow theories in need of periodic revision and largely do so to this day.

#### D. PROGRESSIVE LEGISLATION AND REGULATION

In the early 1980s, Guido Calabresi lamented that the United States had changed from a legal environment dominated by common law rules to one that was "choking on statutes."<sup>121</sup> Politically, the regulatory state was largely the consequence of urbanization and imbalance in economic performance, including widespread belief that even when the economy performed well it did not serve everyone. Economist and journalist Henry George opened the progressive period with his *Progress and Poverty*, which examined why the country could be amassing so much wealth but yet produce so much poverty.<sup>122</sup>

As noted earlier, the rise of marginalist economics led to severely broadened conceptions of market failure. In studying the economy in the early 20th century, marginalists rather quickly came to focus on the numerous deviations from perfect competition, which had been a more-or-less universal assumption of classical political economy. They became obsessed with the technical problem of fixed costs, a characteristic of modern heavy industry that appeared to make perfect competition impossible.<sup>123</sup> The problem is that competition drives prices to marginal cost. Such a firm would not be able to pay off its fixed-cost investments in land, plants, and equipment, and instead would be driven into bankruptcy. Prior to the 1930s, economists were unable to solve this problem of "ruinous competition," and it became a major issue during the early years of railroad regulation and antitrust law in the United States.<sup>124</sup> Early progressive writers such as Henry Carter Adams believed that only price regulation would work in industries with high fixed costs.<sup>125</sup> The problem largely subsided in the 1930s, with economic models that took product differentiation into account, but these models posed their own problems for competition.<sup>126</sup> Under them, firms could have significant

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note 25 (manuscript at 49-51).

121. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

122. See generally HENRY GEORGE, PROGRESS AND POVERTY (1879).

123. See HOVENKAMP, *supra* note 38, at 308-22.

124. See Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1040 (1988); see also ELIOT JONES, THE TRUST PROBLEM IN THE UNITED STATES 197-200 (1921). See generally, e.g., Spurgeon Bell, *Fixed Costs and Market Price*, 32 Q.J. ECON. 507 (1918); Frank H. Knight, *Cost of Production and Price Over Long and Short Periods*, 29 J. POL. ECON. 304 (1921).

125. See Henry C. Adams, *Relation of the State to Industrial Action*, 1 PUBLICATIONS AM. ECON. ASS'N 7, 55, 59-64 (1887).

126. See Mark Blaug, *Economic Theory in Retrospect* 375-79 (5th ed. 1997) (describing how the product differentiation revolution made the fixed cost controversy irrelevant). For

amount of market control, or monopoly power, simply because they were differentiated to some degree from other firms, thus making perfect competition impossible.<sup>127</sup>

At various times over the 20th century economists and government policy makers have had widely different views about both the ubiquity of market failure and the value of state intervention as a corrective. For example, New Deal policy rapidly expanded the domain of government regulation, an expansion that lasted through the early 1970s.<sup>128</sup> Beginning during the twilight of the Carter administration and accelerating through the Reagan administration, however, the federal government moved just as quickly to “deregulate” practically every regulated industry.<sup>129</sup>

The Supreme Court’s *Carolene Products* decision has become one of the great constitutional symbols of the progressive revolution in economic regulation.<sup>130</sup> That decision’s expression of extreme deference to federal economic regulation effectively brought the classical era of harsh judicial scrutiny to an end.<sup>131</sup> Interestingly, it was fundamentally not a “Roosevelt Court” or even a progressive decision. *Carolene Products* was handed down in April, 1938.<sup>132</sup> At that time Roosevelt had made two appointments to the Supreme Court, Justices Hugo Black and Stanley Reed.<sup>133</sup> Reed, who took his seat only three months before the case was argued, did not participate in the decision. The Court contained two Wilson appointees (McReynolds and Brandeis), one Harding appointee (Butler), one Coolidge appointee (Stone, who wrote the opinion), and three Hoover appointees (Chief Justice Hughes, Roberts, and Cardozo, who also did not participate).<sup>134</sup> Two of the original “four horsemen” (McReynolds and Butler) who had opposed a great deal of New Deal legislation, were still on the bench.<sup>135</sup> In all, four of the seven

example, Chamblin’s monopolistic competition model reaches equilibrium when price equals long-run average cost, a measure that includes fixed costs and can be significantly above marginal cost. See ROBERT B. EKELUND, JR. & ROBERT F. HEBERT, *A HISTORY OF ECONOMIC THEORY & METHOD* 513–16 (6th ed. 2014).

127. See HOVENKAMP, *supra* note 1, at 78–79.

128. The classic study is ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (1966).

129. For good historical discussions, see generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* (1985); Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 *YALE J. ON REG.* 325 (1990).

130. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

131. See *id.* at 154 (“The prohibition of shipment in interstate commerce of appellee’s product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce.”).

132. *Id.* at 144.

133. See HOVENKAMP, *supra* note 1, at 267.

134. See *id.* at 266–67.

135. See *id.* The other two were Willis Van Devanter, who had retired in 1937 and would be replaced by Hugo Black, and George Sutherland, who had retired three months earlier and was

participating Justices were appointed by Republican presidents.<sup>136</sup> One of the two participating Democrat appointees, McReynolds, ended up being one of the Court's most conservative members and was the lone dissenter. In sum, *Carolene Products* was decided with only two Democratic appointees (Brandeis and Black) in the majority.<sup>137</sup> Further, while Justice Black concurred in the result, he expressly refused to go along with that portion of the opinion marked "Third," which was the section containing the famous "Footnote Four," which reserved a higher standard of review for statutes that injure discrete and insular minorities.<sup>138</sup> The Court's personnel would change dramatically, however. By the time Roosevelt died seven years later he had replaced every seat on the Supreme Court except that of Owen Roberts.<sup>139</sup> The result was a sharp turnaround, on questions of race as well as economic regulation.<sup>140</sup>

### III. ECONOMIC PERFORMANCE

The economic policy of the progressive state is both experimental and decidedly "mixed," which means that it relies on a combination of private rights, markets, and government intervention to produce its results. Progressives were and remain strongly committed institutionalists. They understand that traditional markets are only one of many ways that resources move through society, and not always the best one. In addition, progressive policy is seldom fixed, but tends to vary with developments in science, economics, demographics, politics, or the pull of interest groups. In the progressive state, most means of production remain privately owned, although with significantly more government intervention than is true of a more classical state. In sum, the underlying principles of the progressive state are more complex and considerably less elegant than those of classicism, libertarianism, or any other theory that employs more categorical, less empirically driven conceptions about the appropriate roles of government and the market.

This pragmatism has contributed to an image that the progressive state is unstable and, to a certain extent, lacking in ideological commitment. It also lacks some of the rhetorical advantages of more laissez-faire alternatives. For example, it is quite easy to formulate arguments that taxes produce

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succeeded by Stanley Reed. On the Four Horsemen, see Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559-61 (1997), who observes that they were actually much more complex than caricatured in the popular literature. On how the "Four Horsemen" acquired their name, see HOVENKAMP, *supra* note 1 at 267.

136. See HOVENKAMP, *supra* note 1, at 267.

137. See *Carolene Products*, 304 U.S. at 144.

138. *Id.* at 152 n.4.

139. See HOVENKAMP, *supra* note 1, at 267-68. Roberts left the Court in July, 1945, three months after Roosevelt had died.

140. See Hovenkamp, *supra* note 25 (manuscript at 44-49).

deadweight loss and inefficiency by raising producers' marginal costs, or that minimum wage laws do a version of the same thing, thus destroying jobs. By contrast, theories favoring government spending and higher wages are more complex. In the case of taxes for infrastructure and other government services, their success is often thought to depend on theoretically controversial "multiplier" effects—namely, that government stimulation induces additional investment and employment in complementary markets, boosting parts of the economy beyond the market where the investment was made.<sup>141</sup> For example, a river bridge costing the government \$20,000,000 might produce many times that in the saving of transportation and commute times, increasing the size of the job market, which, in turn, produces more goods and services, and so on.<sup>142</sup> The effect of multipliers can be either positive or negative, depending on how the money is spent and what its ripple effects are.<sup>143</sup> Further, they are likely to be harmful to the extent that government spending is inefficient because of special interest capture. This includes unjustified regulation which often has a negative impact on consumers and competitors of those seeking the regulation, or investment in unnecessary infrastructure or other projects. In any event, the very existence of multipliers requiring a governmental cure presupposes a broader theory of market failure than neoclassical economics has traditionally allowed. After all, if these multiplier gains were there to be had, private investors would have corrected the problem.

The story on wages presents similar issues. High wages increase employers' marginal costs, but they also increase employee spending power in areas that the employer does not control. Critics typically look at the first part, the impact on marginal cost, while playing down or ignoring the second part. Progressives, by contrast, usually look at both blades of the scissors, where the story is more complex. Positive welfare effects of mandated higher

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141. A multiplier is the ratio of enhanced income or growth to spending intended to stimulate it. See generally HUGO HEGELAND, *THE MULTIPLIER THEORY* (1966).

142. See John F. Cogan et al., *New Keynesian Versus Old Keynesian Government Spending Multipliers* 7 (Nat'l Bureau of Econ. Research, Working Paper No. 14782, 2009), <http://www.nber.org/papers/W14782.pdf>. See generally THE KEYNESIAN MULTIPLIER (Claude Gnos & Louis-Philippe Rochon eds., 2008). On the multiplier effects of federal spending during the New Deal as well as comparison with multiplier effects of more recent spending, see Price V. Fishback, *How Successful Was the New Deal? The Microeconomic Impact of New Deal Spending and Lending Policies in the 1930s* 20–27 (Nat'l Bureau of Econ. Research, Working Paper No. 21925, 2016), <http://www.nber.org/papers/w21925.pdf>.

143. On some of the problems in tax policy, see generally Yair Listokin, *Equity, Efficiency, and Stability: The Importance of Macroeconomics for Evaluating Income Tax Policy*, 29 *YALE J. ON REG.* 45 (2012). Multiplier effects can also drive business cycles, by producing both positive and negative immediate effects that have significant repercussions in related markets. See generally J.R. HICKS, *A CONTRIBUTION TO THE THEORY OF THE TRADE CYCLE* (1950); A.W. MULLINEUX, *THE BUSINESS CYCLE AFTER KEYNES: A CONTEMPORARY ANALYSIS* (1984).

wages become possible, depending on the size of the increase, the consumer savings rate, and the extent of spillover effects.<sup>144</sup>

Political theories such as progressivism, with their strong commitments to institutional diversity, are more cumbersome and rhetorically less appealing than theories that can point to a single institution, the market, as central to all resource movement. The theory of well-functioning markets is rhetorically powerful, universal, and easy to articulate. By contrast, market failures are more complex and more idiosyncratic, in the sense that the failure and appropriate corrective can vary considerably from one market to another. When markets succeed they are all more-or-less alike and the best policy approach, which is letting them alone, works for all. By contrast, when they fail their failures are unique and require distinct fixes. They are like the marriages in *Anna Karenina*.<sup>145</sup> Further, because markets change with technology and demographics, progressive policy has always been subject to a relatively high degree of doing and redoing. That was particularly true during the New Deal era, when so much of federal regulation was being written on a clean slate. Even today, however, many changes in regulatory policy are driven by technological change.

These observations naturally invite questions about performance, or how well the progressive state fares in producing results that are important to social well-being. Performance can be measured in many different ways. Economic growth, wealth, or security may have to be traded against competing values, such as individual property or liberty rights, or the expression of religious or other values, or distribution. Market efficiency theses are elegant and simple largely because they make questions about distribution irrelevant, or nearly so. By contrast, a multi-institutional approach to resource management is likely to include concerns about distribution, even though they are difficult to manage. In addition, high economic growth may increase volatility, and some might value stability more than expansion.

Nevertheless, few would deny that economic performance is important. The state that does better at providing growth, jobs, or wealth may also be in a better position to protect other rights as well, and it hardly seems that there is an inverse correlation between the two. For example, the former Soviet state and the government of North Korea offer both very poor economic performance *and* systematic deprivation of a wide range of individual rights.

Libertarians and conservatives have been particularly critical of the progressive state because of its propensity to special interest capture. The core of their argument is that too much progressive decision-making occurs

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144. See generally CONG. BUDGET OFFICE, THE EFFECTS OF A MINIMUM-WAGE INCREASE ON EMPLOYMENT AND FAMILY INCOME (2014), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/44995-MinimumWage.pdf>.

145. See LEO TOLSTOY, ANNA KARENINA 1 (1877) (Constance Garnett trans., 2000) (“Happy families are all alike; every unhappy family is unhappy in its own way.”). Thanks to Suzanna Sherry.



through legislation and agency regulation, two types of law making that are particularly prone to capture. One important element of this public choice critique is that regulation and special interest capture harm economic performance.<sup>146</sup> By contrast, the free market and the common law are relatively immune to capture. If that is true it should be easy to show that the progressive state performs poorly by comparison to these alternatives.

Most of these critiques suffer from some version of the Nirvana fallacy. That is, they criticize the progressive state by comparing it to the rhetorically powerful vision of the free market that neoclassical economics offers. What they do not do, however, is compare the performance of the progressive state to actual historical alternatives. If one does that, a very different story appears. Even by conventional neoclassical measures that ignore wealth distribution as a factor, the progressive state appears to have performed better than more conservative or laissez-faire alternatives in the United States during the same time period, and even better than the much vaunted 19th century that preceded it. Growth in GDP (real Gross Domestic Product per capita) during the 19th century (roughly 1.4%–1.5% per year overall) was significantly lower than it was after progressive policy appeared on the scene, notwithstanding the 19th century's heavy free-market orientation, lack of publicly financed safety nets or high taxes or other significant involvement in wealth distribution, and very considerable progress in technology.<sup>147</sup> Even the

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146. See *infra* notes 241–42 and accompanying text.

147. The Government has computed GDP each quarter since 1929. GDP for earlier periods can be estimated, however, and these estimates generally show that 19th century growth was more volatile but generally not higher overall. For one set of estimates going back to 1871, see LK, *US Real Per Capita GDP from 1870–2001*, SOC. DEMOCRACY FOR 21ST CENTURY (Sept. 24, 2012, 3:43 AM), <http://socialdemocracy21stcentury.blogspot.com/2012/09/us-real-per-capita-gdp-from-18702001.html>. According to these estimates, decadal growth rates since 1960 have exceeded 19th century rates after 1870. See *id.*; see also Thomas Weiss, *U. S. Labor Force Estimates and Economic Growth, 1800–1860*, in *AMERICAN ECONOMIC GROWTH AND STANDARDS OF LIVING BEFORE THE CIVIL WAR* 193–1.3 (Robert E. Gallman & John Joseph Wallis eds., 1992) (showing 1800–1860 GDP growth in a range from 0.85% to 3.10%, although only one decade (1850–1860) is above 3.0). Table 1.4 shows higher growth rates during the period from the American Revolution to 1810. See *id.* at 34 tbl.1.4. Estimates show very low real GDP per capita growth during the overall period 1800–1840 (0.69% on average, although highly variable), higher growth during the period 1840–1880 (1.84%), and more moderate growth during 1880–1920 (1.32%). See Samuel H. Williamson, *Annualized Growth Rate of Various Historical Economic Series*, MEASURINGWORTH, <https://www.measuringworth.com/m/calculators/growth> (check the box next to “US”; then enter the date ranges in the “Select years” boxes and click “Calculate”) (last visited Dec. 10, 2016) (permitting estimates of GDP growth going back to the beginning of the 19th century). Real GDP per capita growth was 2.75% from 1940 to 1980 and 2.28% from 1980 to 2000. *Id.* The American Economic Association endorses the MeasuringWorth site, noting that the author, economic historian Samuel H. Williamson, acknowledges that the quality of the data is more problematic as one goes back further in time. *RFE: Resources for Economists on the Internet*, AM. ECON. ASS'N, [https://www.aeaweb.org/rfe/showRes.php?rfe\\_id=17&cat\\_id=3](https://www.aeaweb.org/rfe/showRes.php?rfe_id=17&cat_id=3) (last visited Dec. 10, 2016). The statistic most generally used here is Real GDP per capita, which is GDP per person, adjusted by time in comparison with a base year. Nearly all of these 19th century growth numbers would be considered quite mediocre by today's standards.

railroad-induced growth of the 1840 to 1860 pre-Civil War period (roughly 1.75%) or the Gilded Age's technology-induced economic growth during 1880 to 1900 (roughly 1.9%) falls far below growth during progressive administrations that would be regarded as mediocre.<sup>148</sup>

Economic growth data for the 19th century must be pieced together after the fact, making assessments somewhat less reliable. But even if 19th century growth were proven to be much greater, head-on comparison would be inappropriate. During the 19th century, the United States was a developing country playing catch-up. Undeveloped nations generally grow more quickly than developed ones. In any event, progressive policy has appeared overall to be a very considerable inducement to economic growth.

New Deal economic policy was the first to use a broad combination of taxation and spending policies in order to manage economic growth and distribution. For the most part, New Deal policy makers were writing on a clean slate, and their error rate must be read in that light. Nevertheless, more active management very likely contributed heavily to the smaller size and shorter duration of extreme recessions since that time, including the very large recession of 2007 to 2008.<sup>149</sup> At the same time, the motivations for New Deal management were both economic and political. For example, the Roosevelt administration pumped more money into areas where unemployment was higher and poverty more widespread, but many of these also happened to be areas that were more likely to swing Democrat.<sup>150</sup> The distribution also reflected the power of individual members of Congress,<sup>151</sup> and particularly the Roosevelt administration's favoritism toward the South, where Roosevelt was politically vulnerable.<sup>152</sup> New Deal growth in federal spending contributed significantly to the rise of personal incomes, suggesting overall returns that exceeded outlays, although they were variable.<sup>153</sup> Federally financed public-work projects produced particularly strong returns in the form of improved economic performance at the local level.<sup>154</sup> By contrast, the impact of the National Industrial Recovery Act is ambiguous and difficult to assess.<sup>155</sup> Overall, however, when one uses microeconomic measures of performance to evaluate the New Deal with 80 years of hindsight, it appears to have succeeded in stimulating both income and durable goods

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148. See Williamson, *supra* note 147.

149. See Fishback, *supra* note 142, at 8–10 (presenting a well-documented and methodologically explicit study which contains an exhaustive bibliography).

150. *Id.* at 15–16.

151. *Id.* at 16.

152. On Roosevelt's strategy of keeping the South in the democratic coalition through appeasement, see KATZNELSON, *supra* note 3, at 131–224.

153. Fishback, *supra* note 142, at 21–23. See generally Price Fishback & Valentina Kachanovskaya, *The Multiplier for Federal Spending in the States During the Great Depression*, 75 J. ECON. HIST. 125 (2015).

154. Fishback, *supra* note 142, at 30.

155. See *id.* at 37–40.

consumption, and reducing mortality and crime rates, although perhaps not private unemployment.<sup>156</sup>

On economic performance subsequent to the New Deal, the most numerous and useful comparative statistics concerning economic performance align with the political party owning the White House, which is certainly an imperfect surrogate. Some Republicans, such as Richard Nixon and Ronald Reagan, have been much more progressive than others. Nevertheless, the rhetoric of the political parties has followed a progressive/conservative divide on many fundamental points, with Republicans generally urging smaller government, less regulatory intervention, lower taxes, less regulation of wages and working conditions, and opposition to labor unions. By contrast, Democrats to various degrees have supported government growth and regulation and, to some extent, higher taxes and support for organized labor, as well as a greater commitment to wealth redistribution. These differences have generally been more pronounced since the 1980s than they were previously, and were quite extreme during the 2016 election cycle.

Another problem with using presidential administrations as data points is that the number is relatively small. There were eighteen elections from Truman through Obama's first term, or 23 elections if one includes Hoover and FDR. The result is a small sample, but a very wide disparity in performance.

The statistics on basic economic growth are quite stunning. Growth in real GDP per capita per year is not merely higher under Democrat presidents, it is roughly 70% higher. Going back through the administration of Harry Truman, GDP growth increased at a rate of 4.35% under Democrat Presidents as opposed to 2.54% under Republicans.<sup>157</sup> The factual record, based on generally available statistics<sup>158</sup> is reliable, although the authors of the most prominent report comparing administrations' decline to relate the differences to presidential economic policy.<sup>159</sup>

The government has actively kept statistics on GDP since 1929 to 1930,<sup>160</sup> which go back further than Truman and covers all of the Franklin D. Roosevelt presidency and three years of Herbert Hoover's. If one includes these, the differences are even more pronounced, approaching two-to-one. Annual GDP growth during the included three years of Herbert Hoover's presidency (1930 to 1932) was approximately -10%, while during FDR's

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156. See *id.* at 62–63.

157. Alan S. Blinder & Mark W. Watson, *Presidents and the U.S. Economy: An Econometric Exploration*, 106 AM. ECON. REV. 1015, 1017 (2016).

158. See, e.g., Kimberly Amadeo, *U.S. GDP by Year Compared to Recessions and Major Events*, BALANCE (Nov. 8, 2016), <https://www.thebalance.com/us-gdp-by-year-3305543>.

159. Blinder & Watson, *supra* note 157, at 1043.

160. These statistics are currently kept by the United States Bureau of Economic Analysis, which is part of the Department of Commerce. See *National Economic Accounts*, BUREAU ECON. ANALYSIS, <http://www.bea.gov/national/index.htm#gdp> (last visited Dec. 13, 2016).

administration it was around +8.0%.<sup>161</sup> That comparison is unfair, however, because the Hoover administration reflected the worst years of the Great Depression, while the Roosevelt years reflected both the recovery and the rapid growth caused by the lead-up to World War II. As a result, both Hoover's highly negative number and FDR's highly positive one are best considered as outliers.

Other comparisons are noteworthy.<sup>162</sup> For example, average annual GDP growth during the eight years of the presidency of Ronald Reagan, a Republican hero, was no higher (term 1, 3.12%; term 2, 3.89%; average, 3.51%) than growth under Jimmy Carter (3.56%), whom Reagan supporters have vilified.<sup>163</sup> In fact, the only post-War presidents to produce higher numbers were Kennedy/Johnson (shared term, 5.74%), Johnson (4.95%) and Clinton (term 1, 3.53%; term 2, 4.03%; average, 3.78%).<sup>164</sup> Both Presidents George H.W. Bush (2.05%) and George W. Bush (term 1, 2.78%; term 2, .054%; average, 1.42%) also fared much more poorly.<sup>165</sup>

The story on jobs and employment is even more telling. Numbers concerning job creation are more significant than GDP growth to the extent that they reflect the shorter-term effects of presidential administrations and distinctive policies directed at labor and employment. In any event, job creation and GDP growth are strongly correlated, moving almost in tandem since the 1960s.<sup>166</sup> The same thing cannot be said of tax cuts. Considerable evidence suggests that cuts in marginal tax rates have no measurable impact on economic growth.<sup>167</sup> Further, to the extent a correlation exists it is between

161. *National Data*, BUREAU ECON. ANALYSIS, <https://www.bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=1&isuri=1&904=1930&903=5&906=a&905=1945&910=x&911=0> (last visited Dec. 13, 2016) (Click "Section 1—Domestic Product and Income"; click "Table 1.1.1. Percent Change in Preceding Period in Real Gross Domestic Product (A) (Q)"; click "Modify"; select "Annual" and set the first year as "1930-A" and the last year as "1945-A"; click "Refresh Table.>").

162. For example, Total Factor Productivity ("TFP") growth has been roughly twice as high in Democrat administrations. Blinder & Watson, *supra* note 157, at 1021. TFP is a measure of productive efficiency considering the extent to which the value of outputs exceeds the value of inputs (labor and capital). The surplus, or difference, is attributed in significant part to innovation. See generally Charles R. Hulten, *Total Factor Productivity: A Short Biography*, in *NEW DEVELOPMENTS IN PRODUCTIVITY ANALYSIS 1* (Nat'l Bureau of Econ. Research, Studies in Income and Wealth Ser. No. 63, 2001).

163. Blinder & Watson, *supra* note 157, apps. at 4 tbl. A.3.

164. *Id.*

165. *Id.*

166. See Russ Koesterich, *Why Job Creation and GDP Growth Go Hand-in-Hand*, MARKET REALIST (Feb. 13, 2015, 10:09 AM), <http://marketrealist.com/2015/02/job-creation-gdp-growth-go-hand-hand>.

167. See Henry Blodget, *Bombshell: New Study Destroys Theory that Tax Cuts Spur Growth*, BUS. INSIDER (Sept. 21, 2012, 7:59 AM), <http://www.businessinsider.com/study-tax-cuts-dont-lead-to-growth-2012-9>; see also WILLIAM GALE ET AL., THE GROWTH MIRAGE: STATE TAX CUTS DO NOT AUTOMATICALLY LEAD TO ECONOMIC GROWTH 6 (2015), <http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/2000377-the-growth-mirage.pdf> (finding no correlation between tax cuts and growth); William G. Gale et al., *The Relationship Between Taxes and Growth at the State Level: New Evidence*, 68 NAT'L TAX J. 919, 938 (2015) (same).

economic growth and tax cuts at the bottom of the income ladder. There is no measurable correlation between tax cuts to higher earners and job growth. The most likely explanation for this is that tax cuts to employers do little to stimulate job creation but result mainly in more savings. By contrast, tax cuts to lower wage earners enables them to spend more, stimulating growth in the process.<sup>168</sup>

Both real nonfarm wages and labor productivity have increased more quickly under Democrats than under Republicans. Further, Democratic presidents have overseen the creation of roughly twice as many private-sector jobs per year as Republican administrations.<sup>169</sup> During its eight years, the Reagan administration saw a smaller increase in jobs per year (roughly two million) than the Carter administration (roughly 2.55 million).<sup>170</sup> Overall, annual job growth was the best during the administrations of Presidents Clinton, Carter, and Johnson.<sup>171</sup> However, recent job growth in the Obama administration enabled him to finish his presidency with a similar record as well.<sup>172</sup> In any event, the economy produced many more new jobs during the Obama administration (roughly 15 million) than the eight years of the Bush administration (roughly 1.3 million).<sup>173</sup> Household income growth as of January 2013, five years into President Obama's presidency, lagged behind Reagan and Clinton, particularly for older Americans; but it was very far ahead of rates under both Presidents Bush.<sup>174</sup> Overall, these data show that older

168. See Owen M. Zidar, *Tax Cuts for Whom? Heterogeneous Effects of Income Tax Changes on Growth and Employment* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 21035, 2015) (finding a positive correlation between income tax cuts and job growth in lower tax brackets, but no correlation with respect to tax cuts for the top 10% of earners); see also Pedro Nicolaci Da Costa, *Tax Cuts Boost Jobs, Just Not When Targeted at Rich*, WALL STREET J. (Apr. 20, 2015, 12:09 PM), <http://blogs.wsj.com/economics/2015/04/20/tax-cuts-boost-jobs-just-not-when-targeted-at-rich>.

169. See Rich Exner, *Jobs Numbers Stronger Under Democratic Presidents Historically; But Details Offer Arguments for Republicans as Well*, CLEVELAND.COM (Apr. 15, 2015, 3:31 PM), [http://www.cleveland.com/datacentral/index.ssf/2015/04/jobs\\_numbers\\_improve\\_historica.html](http://www.cleveland.com/datacentral/index.ssf/2015/04/jobs_numbers_improve_historica.html).

170. *Id.*

171. *Id.*

172. See Bill McBride, *Public and Private Sector Payroll Jobs: Carter, Reagan, Bush, Clinton, Bush, Obama*, CALCULATED RISK (Apr. 1, 2016, 7:33 PM), <http://www.calculatedriskblog.com/2016/04/public-and-private-sector-payroll-jobs.html> (noting that Obama is on track to finish his second term with 10,480,000 jobs added); see also Paul Waldman, *Guess What: Barack Obama has Been a Great President for Job Creation*, WASH. POST: PLUM LINE (Jan. 8, 2016), [https://www.washingtonpost.com/blogs/plum-line/wp/2016/01/08/guess-what-barack-obama-has-been-a-great-president-for-job-creation/?utm\\_term=.825f4a69827f](https://www.washingtonpost.com/blogs/plum-line/wp/2016/01/08/guess-what-barack-obama-has-been-a-great-president-for-job-creation/?utm_term=.825f4a69827f) (predicting that 16 million jobs will be created by the end of Obama's second term).

173. Heather Long, *The Obama Economy Has Now Created 15 Million Jobs*, CNN: MONEY (Oct. 7, 2016, 9:42 AM), <http://money.cnn.com/2016/10/07/news/economy/obama-15-million-jobs>.

174. See ROBERT J. SHAPIRO, *INCOME GROWTH AND DECLINE UNDER RECENT U.S. PRESIDENTS AND THE NEW CHALLENGE TO RESTORE BROAD ECONOMIC PROSPERITY* 3 fig.2 (2015), <https://www.brookings.edu/wp-content/uploads/2016/06/ShapiroV3.pdf>. In 2015, the last year for which the Census Bureau has released data, older households continued to show some of the lowest rates of household income growth. BERNADETTE B. PROCTOR ET AL., *U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2015*, at 5 tbl. 1 (2015).

Americans (above 45), and particularly those without a college education, are lagging behind in income growth in all administrations.

The historical record is much the same on wages, labor unions and collective bargaining. Few areas have served to divide the progressive state from its critics more than attitudes toward labor unions. Progressives began to observe at the beginning of the 20th century that shareholders are unified into a single person by virtue of corporate legal personality, while labor unions are treated as cartels.<sup>175</sup> For them, this fact explained why labor needed to be organized in order to get its fair share. Today, thanks in part to a rising tide of anti-union activity and the growth of right-to-work provisions, labor is receiving an ever declining share of the benefits of increased productivity,<sup>176</sup> and wages in strong right-to-work states are lower than those in the nation as a whole.<sup>177</sup> That fact itself explains a significant portion of the increasing disparity of wealth in the country: wages are growing much more slowly than productivity.<sup>178</sup> The result is that the benefits of increased productivity are accruing mainly to capital.

The historical relationship between marginal tax rates and economic growth also gives little support to the anti-progressive argument for continually reducing taxes of most types. One Congressional Research Service report in 2012 found little to no evidence that higher marginal tax rates impeded economic growth, although lower tax rates on upper income ranges contributed noticeably to uneven wealth distribution.<sup>179</sup> That study concluded that historically “higher tax rates are associated with slightly higher real per capita GDP growth rates.”<sup>180</sup> Today inequality is at its highest point in a century, and a reversal could be a major boost to growth, both domestically<sup>181</sup> and worldwide.<sup>182</sup>

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175. See HOVENKAMP, *supra* note 1, at 89.

176. See generally Robert Z. Lawrence, *The Growing Gap Between Real Wages and Labor Productivity*, PETERSON INST. FOR INT’L ECON. (July 21, 2015, 2:30 PM), <https://piie.com/blogs/realtime-economic-issues-watch/growing-gap-between-real-wages-and-labor-productivity>; *The Productivity–Pay Gap*, ECON. POLICY INST., <http://www.epi.org/productivity-pay-gap> (last updated Aug. 2016).

177. See generally ELISE GOULD & WILL KIMBALL, “RIGHT-TO-WORK” STATES STILL HAVE LOWER WAGES (Econ. Pol’y Inst., Raising America’s Pay Briefing Paper No. 395, 2015), <http://www.epi.org/files/pdf/82934.pdf>.

178. See *The Productivity–Pay Gap*, *supra* note 176.

179. See THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., R42729, TAXES AND THE ECONOMY: AN ECONOMIC ANALYSIS OF THE TOP TAX RATES SINCE 1945, at 4–12 (2012), [http://online.wsj.com/public/resources/documents/r42729\\_0917.pdf](http://online.wsj.com/public/resources/documents/r42729_0917.pdf).

180. *Id.* at 9. For sharply opposing views, see generally EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY (2015) (advocating increasing revenue); and MICHAEL D. TANNER, GOING FOR BROKE: DEFICITS, DEBT, AND THE ENTITLEMENT CRISIS (2015) (advocating cutting taxes further).

181. See Nicholas Parker, *Divergence: Wealth and Income Inequality in the United States*, ECON SOUTH, Sept.–Dec. 2014, at 5, <https://www.frbatlanta.org/-/media/Documents/regional-economy/econsouth/2014/14q4-divergence-wealth-income-inequality.pdf>.

182. For worldwide conclusions, see generally ERA DABLA-NORRIS ET AL., INT’L MONETARY FUND,

Even when statistics such as these are not gamed, they virtually never end any debates. Nevertheless, one inescapable conclusion is that no general empirical case can be made that progressive policy has harmed the United States economy, at least not when it is compared to historical alternatives. To the contrary, the shoe is on the other foot.

Nevertheless, to return to the point that opened this section, economic growth is hardly the sole driver of policy choices. Many constituencies may have strong preferences for other values, even to the point of prioritizing economic growth to a lesser degree in order to obtain them. That is, no one lobbies for higher economic growth in the abstract. In any event, these are value judgments and there is little point in debating them. Rather, my conclusion here is a humbler one: to the extent that the progressive state's success is measured by its economic record, comparatively speaking it has done quite well, notwithstanding the amount of meandering and experimentation in its policy choices. In any event, the data on performance should suffice to shift the burden of proof to those arguing against progressive policies on economic grounds.

#### IV. CAPTURE AND THE PROGRESSIVE STATE

As discussed earlier, one prominent criticism of the progressive state from libertarian and conservative voices is the increased likelihood of special interest capture.<sup>183</sup> “Capture” occurs when an interest group or small number of individuals is able to assert disproportionate control over democratic decision-making. The result can be state policies that do not reflect the “public” interest, but rather represent the interests of the group in control. The effects can range from cartel-like results where the cartel profits at the expense of competitors and consumers; excessive bureaucracy and rigidity, making it difficult for governments to respond to social or technological change; or unappealing wealth transfers. Over its lengthy history, the theory of capture has been described many ways and given many names.<sup>184</sup> Its study has ranged from casual observation to heavily empirical to purely theoretical. As a general matter, legislation and agency regulation at all government levels are identified as particularly prone to capture. Unregulated markets and the common law are relatively resistant.

The relationship between capture and economic growth has been an important subject of macroeconomic thought for decades, and has included such diverse writers as Daron Acemoglu and James Robinson, as well as

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CAUSES AND CONSEQUENCES OF INCOME INEQUALITY: A GLOBAL PERSPECTIVE (2015), <https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf>; ORG. FOR ECON. CO-OPERATION & DEV., IN IT TOGETHER: WHY LESS INEQUALITY BENEFITS ALL (2015), [http://www.keepeek.com/Digital-Asset-Management/oecd/employment/in-it-together-why-less-inequality-benefits-all\\_9789264235120-en](http://www.keepeek.com/Digital-Asset-Management/oecd/employment/in-it-together-why-less-inequality-benefits-all_9789264235120-en).

183. See *supra* text accompanying note 146.

184. See HOVENKAMP, *supra* note 1, at 308–14.

Francis Fukuyama. Although they disagree sharply about many things,<sup>185</sup> all emphasize the extent to which capture and crony capitalism can inhibit economic growth.<sup>186</sup> Fukuyama's favorite term for capture is "clientelism," or the practice by which political administrations reward constituencies for loyalty with various government perquisites.<sup>187</sup> For example, the "spoils system" of the Jackson era tended to make party loyalty rather than expertise a qualification for the civil service.<sup>188</sup> By contrast, Acemoglu and Robinson emphasize the harmful effects of "extractive" institutions that take resources out of the economy for private benefit, rather than more inclusive institutions that are either self-sustaining or that put resources in.<sup>189</sup>

The concern with capture is hardly new. In the Federalist Papers, James Madison fretted about the possibility that a representative democracy could be captured by special interest groups for their own purposes, referring to these groups as "factions."<sup>190</sup> When Charles Beard wrote his constitutional histories during the Progressive Era, he used the term "economic interpretation" to refer to the struggle between various interest groups in the Constitution's formation.<sup>191</sup> Beard argued that, although the population was well over 90% rural, the Constitution in fact represented the triumph of urban merchants and creditors over agrarian debtors.<sup>192</sup> Two generations later the public choice literature referred to "interest group capture."<sup>193</sup> Writers about entitlements or regulation often speak of capture as "rent-seeking."<sup>194</sup> Another term, "crony capitalism," suggests the same general thing, although the emphasis is more typically on executive favoritism rather than legislation. For example, crony capitalism might explain why a governor

185. On their differences, see generally Francis Fukuyama, *Acemoglu and Robinson on Why Nations Fail*, AM. INT. (Mar. 26, 2012), <http://blogs.the-american-interest.com/2012/03/26/acemoglu-and-robinson-on-why-nations-fail>.

186. See DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 369-403 (2012); FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 7, 81-93, 126-48 (2014).

187. See FUKUYAMA, *supra* note 186, at 86-88.

188. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 328-66, 483-524 (2007) (discussing the Jackson-era spoils system and party loyalty).

189. ACEMOGLU & ROBINSON, *supra* note 186, at 73-76.

190. See generally THE FEDERALIST No. 10 (James Madison) (Benjamin F. Wright ed., 1961) (originally published on November 29, 1787).

191. See generally CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

192. *Id.*

193. See *infra* notes 187-92 and accompanying text.

194. See generally THE POLITICAL ECONOMY OF RENT-SEEKING (Charles K. Rowley et al. eds., 1988).



would pack an agency with people favorable to a certain position, or why a state official might give monopoly rights to favored businesses.<sup>195</sup>

Capture has frequently been identified as a particular problem of the progressive state, particularly during the New Deal Era.<sup>196</sup> The Supreme Court's *Carolene Products* decision itself provides evidence, with its expression of trust in economic legislation even though the statute under consideration was a thorough product of capture. The decision upheld special interest legislation passed at the behest of the dairy industry to make illegal a substitute for whipping cream that was both better performing and healthier.<sup>197</sup>

But if the progressive state is so prone to capture, how is it that it appears to achieve better economic performance than the alternatives?<sup>198</sup> That question is perplexing, because a fundamental element of the capture thesis is that captured regimes hinder economic growth by favoring special interests over more public values.<sup>199</sup>

One possible answer is that the regulatory state's superiority in economic performance is so significant that it more than offsets the effects of capture. Another answer, which I personally believe is better, is that the capture critique has been built on an excessively impractical and narrow conception of market failure. More precisely, the public choice literature that developed the capture hypothesis has largely equated the public interest with the unrestrained market and identified as "capture" most things that deviate from that norm.

Welfare economics, which was significantly reconstructed in the mid-1930s and after, came to conclude that economics as a science is unable to rank social states based on interpersonal comparisons of subjective utility.<sup>200</sup>

195. See generally Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983 (2013).

196. For an example, see James V. DeLong, *The Coming of the Fourth American Republic*, AMERICAN (Apr. 21, 2009), <https://www.aei.org/publication/the-coming-of-the-fourth-american-republic> (referring to the New Deal as "special interest capture on steroids"). Cf. William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 25 (Daniel Carpenter & David A. Moss eds., 2014) (noting and challenging this general assumption). See generally BURTON W. FOLSOM, JR., NEW DEAL OR RAW DEAL?: HOW FDR'S ECONOMIC LEGACY HAS DAMAGED AMERICA (2008).

197. See HOVENKAMP, *supra* note 1, at 305–06. A version of the product is sold to this day under the name "Milnot."

198. See *supra* Part III.

199. See William J. Baumol, *Entrepreneurship: Productive, Unproductive, and Destructive*, 98 J. POL. ECON. 893 (1990) (similar); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 302–03 (1974); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 624 (1969) (speaking of regulatory capture as "distort[ing] economically sound judgments"). See generally MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES (1982) (blaming capture for economic decline).

200. See generally LIONEL ROBBINS, AN ESSAY ON THE NATURE & SIGNIFICANCE OF ECONOMIC SCIENCE (1932); J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939). For good critiques, see generally I.M.D. LITTLE, A CRITIQUE OF WELFARE ECONOMICS (1957), and the

It was able to show, however, that perfectly competitive markets produce Pareto optimal results.<sup>201</sup> Other forms of social decision-making can never be shown to be Pareto efficient unless they are the unanimous outcome of a social choice process in which all affected persons are permitted to participate.<sup>202</sup> Building on this foundation, in the mid-1950s Paul Samuelson and Francis M. Bator developed what became the dominant theory of correctable market failure.<sup>203</sup> These theoretical critiques were paralleled in the legal literature by a harsh critique of the history of regulation up to that time, including Special Counsel James M. Landis' very critical report on regulatory agencies to President-elect Kennedy in 1960.<sup>204</sup> Landis, who had been a champion of New Deal regulation argued that the New Deal regulatory state had become a mess of conflicting assertions of jurisdiction and control of the process by the regulated firms themselves.<sup>205</sup> The 1960s then produced harsh criticisms of government intervention in the economy. By using perfect competition as a baseline, however, much of that work severely exaggerated both the ubiquity and the effects of capture.<sup>206</sup>

#### A. MADISON'S INADEQUATE STRUCTURAL APPROACH TO CAPTURE

The approach that Madison defended in *The Federalist Papers* for the problem of special interests was entirely structural. This included Representatives selected directly by the people for two-year terms,<sup>207</sup> Senators selected by state legislatures for six-year terms,<sup>208</sup> and the President selected by an electoral college for a four-year term.<sup>209</sup> Federal judges had lifetime

review by Kenneth J. Arrow, *Little's Critique of Welfare Economics*, 41 AM. ECON. REV. 923 (1951). For a summary of the debate, see HOVENKAMP, *supra* note 1, at 110-13.

201. This is the First Welfare Theorem, rigorously proven by GERARD DEBREU, *THEORY OF VALUE: AN AXIOMATIC ANALYSIS OF ECONOMIC EQUILIBRIUM* (1959); Kenneth J. Arrow, *An Extension of the Basic Theorems of Classical Welfare Economics*, in PROCEEDINGS OF THE SECOND BERKELEY SYMPOSIUM ON MATHEMATICAL STATISTICS AND PROBABILITY 507 (Jerzy Neyman ed., 1951); Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954).

202. This was initially proven in Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950), and later elaborated in KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

203. See generally Francis M. Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351 (1958); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

204. See generally JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960).

205. See *id.* Also see the excellent account in THOMAS K. MCCRAW, *PROPHETS OF REGULATION* (1984).

206. See discussion *supra* section II.B.

207. U.S. CONST. art. I, § 2, cl. 1.

208. *Id.* § 3, cl. 1 (amended 1913). This was changed to direct election by the Seventeenth Amendment. *Id.* amend. XVII.

209. *Id.* art. II, § 1 (amended 1951). The presidency was limited to two terms by the Twenty-Second Amendment. *Id.* amend. XXII.

appointments.<sup>210</sup> Madison's theory was that constantly revolving, asynchronous leadership terms would limit the formation of factions or undermine their formation in the process.<sup>211</sup> In addition, Madison advocated for limits on the power of any faction to obtain legislation, which required a majority of both Houses plus the President's signature.<sup>212</sup> If the President vetoed, then two-thirds of both Houses would be required for an override.<sup>213</sup> In any event, if the Constitution's intent was to eliminate capture with this set of structural devices, it failed. Richard Epstein seems quite correct to conclude that this purely structural approach to special interest capture was "woefully inadequate."<sup>214</sup>

But a much more fundamental problem was at work, reflecting Madison's own more laissez-faire ideology. Madison apparently assumed that the effect of factions would show up in efforts to pass legislation, not in efforts to prevent it from being passed. Under the Constitution's requirements, it is much easier for a focused interest group to prevent a bill from being passed than to pass one. For example, a faction that controlled the President and one-third of the membership of one chamber would be sufficient to sustain a veto. A faction that controlled just over half of one chamber would be sufficient to prevent legislation even if the president and an overwhelming majority of the other chamber approved it. Neither of these coalitions would be close to sufficient to get a bill passed. So the Constitution's constraints on bill passage are successful in limiting the power of factions if doing nothing is the baseline, and the faction wants socially harmful legislation. These same limitations are counterproductive, however, if the public interest requires legislation but a faction opposes it.

Further, while the Constitution as Madison defended it took great care to divide the power of government agents and institutions, nothing in the Constitution addressed the capture problem directly. No language authorized courts to strike down legislation simply because judges see it as a product of capture. The Takings Clause in the Fifth Amendment can of course reach a subset of instances where established property rights are taken from a disfavored interest group.<sup>215</sup> The First Amendment prohibits capture that establishes or discriminates in favor of or against particular religious or other ideological groups, and so on. The best candidate for a more general anti-

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210. *Id.* art. III, § 1.

211. *See* THE FEDERALIST NO. 51, *supra* note 190, at 356–57 (James Madison) (Benjamin F. Wright Ed., 1961) (originally published on February 6, 1788).

212. *See* THE FEDERALIST NO. 10, *supra* note 190, at 132–33.

213. *See* U.S. CONST. art. I, §, cl. 2.

214. *See* EPSTEIN, *supra* note 28, at 22.

215. *See generally, e.g.,* Kelo v. City of New London, 545 U.S. 469 (2005); *see also generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN (2015).

capture provision is the Equal Protection Clause of the Fourteenth Amendment, which can be used to condemn legislation that singles out particular groups for unreasonably favorable or unfavorable treatment.<sup>216</sup> But the Equal Protection Clause as a limitation on state power did not come into existence until 1868, and there is no similar express limitation on the powers of Congress. In any event, an essential part of the progressive state was its generally deferential Equal Protection and Due Process review of purely economic legislation.<sup>217</sup> That deferential review has opened progressive state policy to a harsh capture critique.<sup>218</sup>

The other interesting aspect of Madison's and the original Constitution's approach to capture was that it completely ignored the states, even in its structural limitations. While the Federal Constitution defined national political leaders, their method of selection and unequal terms of office with great specificity, it said nothing about state leadership. The only provision limiting state capture prior to the Civil War was the Contract Clause,<sup>219</sup> largely intended to prevent debtor interests from undermining debts through retrospective revision of payment obligations.<sup>220</sup> Ironically, however, the Contract Clause became a major *source* of capture, at least in the eyes of Jacksonians in the 1830s and after. For example, the *Charles River Bridge* case in 1837 set the tone for a strong Jacksonian attack on Contract Clause jurisprudence for creating perpetual monopoly rights and privileges for favored interest groups.<sup>221</sup> The Jacksonian constitutional law writers who gave birth to substantive due process doctrine largely built their critique of special interest legislation by attacking Marshall era contract clause jurisprudence.<sup>222</sup> This Jacksonian offensive against monopoly grants and other corporate

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216. *E.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) (holding that even under the rational basis test, a statute that made it unlawful for all but licensed funeral directors to sell caskets violated the Equal Protection Clause); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (ruling that a similar statute prohibiting the sale of caskets by all but licensed funeral directors violated the Equal Protection clause under the rational basis test).

217. *E.g.*, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491 (1955) (upholding a special interest statute that forbade opticians from preparing eyeglasses without a prescription from an ophthalmologist or an optometrist); *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287–88 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016) (upholding a special interest statute that excluded non-dentists from whitening teeth of consumers after reviewing Supreme Court decisions).

218. *See* EPSTEIN, *supra* note 28, at 238, 220, 305–06, 311–12 (deploring the rational basis test).

219. U.S. CONST. art. I, § 10, cl. 1.

220. The most comprehensive study is BENJAMIN FLETCHER WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938). *See also* HOVENKAMP, *supra* note 38, at 17–35.

221. *See* Hovenkamp, *supra* note 29, at 19–27; *see also generally* *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

222. Hovenkamp, *supra* note 29, at 22 (referring to Thomas M. Cooley, John F. Dillon, Christopher Tiedeman, and Francis Wharton).

special privileges granted by the states became the first American “deregulation” movement.

B. CAPTURE AND THE CLASSICAL CONSTITUTION: THE UNREGULATED MARKET AS BASELINE

The Taney Court confronted the problem of *federal* legislative capture in 1852, in *Bloomer v. McQuewan*, a patent case.<sup>223</sup> In the process Chief Justice Taney first stated what came to be substantive due process, although speaking of the Fifth Amendment’s clause that applies to the federal government.<sup>224</sup> *Bloomer* involved two different, retroactive extensions of a patent term that the patentee sought to apply against someone who purchased the patented good prior to the term extensions and was required to pay royalties during the patent’s life.<sup>225</sup> A general term extension in the 1836 Patent Act applied retroactively to all previously issued patents.<sup>226</sup> When that extension expired the patentee’s heirs went to Congress and obtained a second extension that applied exclusively to his patent, mentioned by name.<sup>227</sup> The Supreme Court responded, not by making retroactive patent term extensions unlawful *per se*, but instead by holding that once a buyer purchased a patented article, the patent for which had expired, he could not be suffered to pay additional royalties based upon a retroactive legislative extension. Once the “machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly.”<sup>228</sup> Further, Taney presciently added, any “special act of Congress, passed afterwards,” that deprives a person of the right to use property he had already acquired “certainly could not be regarded as due process of law.”<sup>229</sup>

Economic substantive due process review of state legislation was born from these Jacksonian roots. State courts adopted it during the Gilded Age and the United States Supreme Court around the turn of the century.<sup>230</sup> As a result, what some see as a defining characteristic of substantive due process is its efforts to combat capture.<sup>231</sup> The Fourteenth Amendment’s Due Process clause became the undeclared constitutional statement against special interests.

223. See generally *Bloomer v. McQuewan*, 55 U.S. 539 (1852).

224. *Id.* at 553.

225. *Id.* at 547–48.

226. See Patent Act of 1836, ch. 357, § 18, 5 Stat. 117.

227. See, for example, An Act to Extend a Patent Heretofore Granted to William Woodworth, ch. 27, 6 Stat. 936 (1845). See generally *Bloomer v. Millinger*, 68 U.S. (1 Wall.) 340 (1863) (describing the patent extensions).

228. *Bloomer*, 55 U.S. (14 How.) at 549.

229. *Id.* at 553.

230. See *supra* notes 41–43 and accompanying text.

231. See generally, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988).

But substantive due process doctrine never evolved into an effective vehicle for controlling capture. First, it simply assumed that the unregulated market was the baseline from which capture should be measured. That was certainly the tenor of the decisions that struck down wage and hour legislation. Second, it was inattentive to facts. While progressive judges generally assumed that legislation was passed in the public interest, as they did in *Carolene Products*, substantive due process judges assumed just the opposite, but also without investigation. Justice Peckham's *Lochner* opinion is a good example.<sup>232</sup> He observed that the Court could not "shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."<sup>233</sup> However, the Court neither cited nor insisted on evidence of these motives.<sup>234</sup> The proponents of the ten-hour law for bakers had argued that the statute was justified by concerns for health.<sup>235</sup> Initially supposing this to refer to the health of the bakers themselves, Peckham concluded that such protection was illegitimate because the workers were fully capable of contracting for it themselves and did not require the state's paternalistic oversight.<sup>236</sup> Peckham also rejected the proposition that the statute was concerned for protecting the "healthful quality of the bread" that the bakers produced, concluding that this was incapable of proof.<sup>237</sup>

As noted previously, Peckham's approach was consistent with the "health, safety, and morals" exceptions to substantive due process.<sup>238</sup> Namely, workplace and other regulations could be justified on health or safety grounds if the regulation applied to someone other than the people to whom the regulation applied.<sup>239</sup> These others would not be in a position to protect themselves.<sup>240</sup> The Court never required any factual determination of the statute's actual effects or intended purpose, nor identification of the groups

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232. See *supra* notes 51–52 and accompanying text.

233. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

234. See *id.*

235. *Id.* at 51.

236. *Id.* at 62.

237. *Id.* at 62–63 ("In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a 'health law,' it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.").

238. See *supra* note 51 and accompanying text.

239. See *supra* note 54–56 and accompanying text.

240. See *supra* note 54–56 and accompanying text.

behind it. For all that it appears, substantive due process courts simply inferred capture from a regulation that intervened in the market without an adequate explanation justified by health, safety, or morals.

Even if the Court had attempted to identify the interest groups behind the bakers' legislation, their mere existence is not a reliable sign of capture. To be sure, interest groups are invariably selfish, whether or not their interests coincide with those of the public. One serious error is to proclaim legislation to be a sign of special interest capture merely because a particular interest group was behind it. For example, wind turbine producers can be expected to favor alternative energy subsidies, and health insurers very likely profit from restrictions on smoking. The archery industry might profit from harsher gun control. But this hardly means that legislation supporting alternative energy or limiting smoking or guns is not in the public interest. One case in point is the libertarian attempt to "rehabilitate" the *Lochner* decision by identifying the interest groups behind it.<sup>241</sup> The argument proceeds mainly by showing that unionized bakers favored the legislation and campaigned for it as a way of protecting their own agreements limiting working hours and improving conditions.<sup>242</sup> As a factual matter, that is true, although other interest groups supported the legislation as well.<sup>243</sup>

In any event, the evidence about *Lochner* shows nothing more than that statutory employment regulation was a good thing for competing unions, who had reached similar outcomes through union bargaining.<sup>244</sup> Competitors can be expected to feel one way about a regulation, while producers of complements, vertically related firms, and consumers feel a different way. Nearly every rule with any impact at all produces these winners and losers, and simply pointing out one of them is meaningless unless we know something about the overall impact. Even the various Koch foundations' lobbying against climate change legislation in order to protect investments in oil drilling and refining does not establish that such legislation is beneficial.<sup>245</sup> Determining that requires cost-benefit analysis that takes all affected interests into account.

One cannot identify capture without having a baseline for determining when a government act is truly in the public interest or when it represents capture. One important characteristic of substantive due process judges was

241. See generally BERNSTEIN, *supra* note 231; EPSTEIN, *supra* note 28.

242. See generally BERNSTEIN, *supra* note 231; EPSTEIN, *supra* note 28.

243. For a contemporary glimpse at the diversity of interests behind *Lochner*, see *War on Filthy Bakeries: Women Join in Striving for Needed Improvements*, N.Y. TIMES (Apr. 8, 1896), <http://query.nytimes.com/mem/archive-free/pdf?res=9505E3D9123EE333A2575BCoA9629C94679ED7CF> (describing organized efforts of both the principal bakers' union and the New York Ladies' Health Protective Association to obtain the legislation that *Lochner* struck down).

244. See HOVENKAMP, *supra* note 1, at 272–73.

245. On the various Koch foundations' activities in opposition to climate action, see *Global Warming Skeptic Organizations*, UNION CONCERNED SCIENTISTS, [http://www.ucsusa.org/global\\_warming/solutions/fight-misinformation/global-warming-skeptic.html](http://www.ucsusa.org/global_warming/solutions/fight-misinformation/global-warming-skeptic.html) (last visited Dec. 15, 2016).

that they saw the unregulated market as the baseline, defined by “liberty of contract.” Capture occurred when something deviated from this principle without a good reason. Further, the burden of proof was on the proponents of the legislation and the courts were to be the ultimate arbiter. This fact has served to make the substantive due process era attractive to some libertarians and conservatives today, because they agree about both the baseline and the assignment of proof burdens.<sup>246</sup>

The unregulated market was also the baseline chosen by most mid-20th-century public choice writers.<sup>247</sup> One important example is Mancur Olson, whose influential 1965 book, *The Logic of Collective Action*, has come to define the antiregulatory branch of public choice theory.<sup>248</sup> Olson was a graduate student of Harvard economist Edward Chamberlin, one of the most important industrial organization economists of the 1930s.<sup>249</sup> *The Logic of Collective Action* began as a doctoral dissertation under Chamberlin’s supervision,<sup>250</sup> and Olson borrowed heavily from Chamberlin’s theory of oligopolies and cartels. Under the theory, cartels work best when they consist of homogenous members with the same set of interests, and when they are small so that each of them has a large stake in the outcome.<sup>251</sup> In addition, the cartel managers must be able to detect “cheaters” and discipline them effectively. Cheating by a member of a small group is much more disruptive and thus easier to detect than in a large group.

Olson’s brilliance was to apply this theory of cartels in traditional economic markets to decision-making in democratic institutions, particularly legislatures and regulatory agencies.<sup>252</sup> According to him, the characteristics of successful special interest groups are that they are small but homogenous and well organized.<sup>253</sup> They are then able to defeat larger, more diverse groups that have less homogenous interests.<sup>254</sup> For example, even though taxi operators are few, the taxi operators earn their livelihood from taxis while taxi fares represent a small part of the budgets of taxi passengers, who are a large and diverse group. As a result, the taxi operators will actually show up, speak more effectively to the decision-making body, and succeed in obtaining such things as restrictions on the number of new taxicabs that can enter the market,

246. See generally, e.g., BERNSTEIN, *supra* note 231; EPSTEIN, *supra* note 28.

247. Most, but not all. Important exceptions were writers from the political left. See generally BEARD, *supra* note 191; GABRIEL KOLKO, RAILROADS AND REGULATION, 1877–1916 (1965).

248. See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

249. Mainly because of his work *The Theory of Monopolistic Competition*. EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933).

250. Chamberlin died before Olson was able to finish.

251. See RICHARD TUCK, FREE RIDING 196 (2008).

252. See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (revised ed., 1971).

253. *Id.* at 5–52.

254. *Id.*



or higher fares. This illustration can readily be generalized to the problem of legislative capture, providing an explanation for why single-sector regulatory agencies serve the interests of regulated firms and their investors rather than the general public. Importantly, the free market becomes the baseline, while the special-interest cartel becomes the harmful deviation.

Olson subsequently extended these ideas, arguing that an inverse relationship exists between interest group activity and economic growth.<sup>255</sup> Once again he related interest groups to cartels, which he termed “distributional coalitions,” arguing that they were rigid and resistant to technological change.<sup>256</sup> The result, he predicted, was that as nations matured they would become more susceptible to interest group activity, adversely affecting their economic growth.<sup>257</sup>

Writing about the same time as Olson, James Buchanan and Gordon Tullock developed a theory of democratic and constitutional decision-making driven by the need to limit rent-seeking.<sup>258</sup> For them, as for Olson, the market produced the baseline for identifying capture. Because market decisions are made by unanimous consent, they are always Pareto improvements. Buchanan and Tullock accepted unanimity as the most robust criterion for assessing social choice.<sup>259</sup> As a result it is easy to devise a model showing that capture is impossible in a well-functioning, traditional economic market, which transacts only by unanimous consent, while it is highly likely to occur in a representative democracy. The message, of course, is that wherever possible policy choices should be made by markets rather than by nonunanimous legislation.

One qualification that Buchanan and Tullock discussed at some length is the possibility of side payments that can mimic unanimous results when gainers are able to compensate losers in full for their loss. So, for example, if a practice is efficient in the Kaldor–Hicks sense,<sup>260</sup> perhaps producing \$100 in gains to the supporters and \$60 in losses to the opponents, then the gainers could afford to compensate the opponents in full with some gain left over.

255. See FUKUYAMA, *supra* note 186, at 481 (relying on Olson’s book). See generally Olson, *supra* note 199.

256. OLSON, *supra* note 199, at 62–65.

257. *Id.* at 65 (stating that distributional coalitions “slow down a society’s capacity to adopt new technologies and to reallocate resources in response to changing conditions, and thereby reduce the rate of economic growth” (emphasis omitted)); see also *id.* at 69–73 (arguing that distributional coalitions move more slowly and increase bureaucracy).

258. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962), *reprinted in* 2 *THE SELECTED WORKS OF GORDON TULLOCK* 81–92 (Charles K. Rowley ed., 2004).

259. *Id.* at 6. Unanimity is not the same thing as majoritarian direct democracy, however. See EPSTEIN, *supra* note 28, at 25, 137 (critiquing majoritarian direct democracy because of its tendency to trample on the individual rights of minorities).

260. A change is efficient in the Kaldor–Hicks (cost-benefit) sense if gainers gain enough to compensate losers fully for their losses, thus effectively turning the change into a Pareto improvement.

That is just another way of saying, however, that everybody wins or is at least indifferent, so we are right back at unanimity.<sup>261</sup>

Finally, Kenneth J. Arrow's much more technical work on democracy and voting made the same opening assumption about the proper baseline and drew similar conclusions.<sup>262</sup> Decisions made by the unanimous consent of all affected people are Pareto optimal and capable of defining a social welfare function, which is a social state that can be shown to be both stable and superior to alternatives.<sup>263</sup> By contrast, Arrow showed, decision-making by majority voting or other nonunanimous coalitions can never achieve that result because it is prone to instability and cycling, making it dependent on a dictator's decisions about how the agenda is to be set.<sup>264</sup>

### C. OBJECTIVE WELFARE JUDGMENTS

One prominent feature of Progressive regulation is welfare judgments that are "objective" in the sense that they do not actually count or weigh individual preferences. In other words, these judgments do not depend on any actual determination that people have specific preferences, but rather on an assumption that rational people would have them.<sup>265</sup>

Objective welfare judgments do not make the capture problem go away. To the contrary, special interests might control the distribution of wealth, objectively measured. When policy is based on objective welfare judgments, however, market-based critiques have much less bite. The two critiques apply different criteria for assessing welfare.

Progressive welfare policy, which developed in the early 20th century and became a central part of the federal safety net during and after the New Deal, defined "welfare" mainly in objective terms.<sup>266</sup> The criteria included things such as wealth, food, clothing, shelter and education. Progressive welfare policy has done some version of that ever since.<sup>267</sup> The use of such criteria

261. See generally BUCHANAN & TULLOCK, *supra* note 258. In any event, in most public voting settings, side payments in exchange for vote changes are unlawful. See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 141 (1992).

262. See generally ARROW, *supra* note 202.

263. *Id.*

264. *Id.* For critiques and discussions of limitations, see generally Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949 (1990); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994).

265. On the development of objective welfare criteria during the Progressive Era, see HOVENKAMP, *supra* note 1, at 16, 75, 98–100, 122.

266. *Id.*

267. On the use of objective welfare judgments in policy, see generally Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4 (1994); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990). On objective welfare judgments in health care systems, see generally Thomas L. Greaney, *How Many Libertarians Does It Take to Fix the Health Care System?*, 96 MICH. L. REV. 1825 (1998). See also HOVENKAMP, *supra* note 1, at 113–14 (providing a brief history of the use of objective judgments by post-New Deal agencies).

entails two things. First, actual counting of preferences becomes less important, although not irrelevant. The progressive state relies mainly on objective measures that are often taken from the health or social sciences about what contributes to welfare. As a result, objective welfare judgments are aggregated over larger populations rather than reflecting purely individual preferences.

Second, objective welfare judgments enable progressive policy to take wealth distribution into account in a way that neoclassical economics was largely unable to do after the mid-1930s. During the 1930s neoclassical welfare economics largely read interpersonal utility comparisons out of economic science because they were not verifiable. In the process, the discipline very largely lost its ability to rank social orderings on the basis of distributional criteria.<sup>268</sup> By contrast, because objective judgments relate welfare to some “basket” of goods or qualities that can be measured, wealth distribution once again becomes a welfare concern. This makes objective welfare judgments particularly relevant in times when concerns for wealth distribution are prominent, as they were during the Gilded Age when the original Progressive movement was forming,<sup>269</sup> and today when wealth distribution is once again very lopsided.

The other place where objective welfare judgments are dominant is in technical regulation of markets based on microeconomic theory. For example, the treatment of natural monopoly in economics literature typically does not examine individual preferences at all. It simply illustrates that in a natural monopoly, which is typically characterized by high fixed costs, the equilibrium minimally profitable price rises as the number of firms increases above one. As a result, under the traditional formulation one gets the best results in such a market by limiting the number of sellers to one and using price regulation to prevent the firm from taking advantage of its monopoly status. To the extent “preference” is at issue, it is no more than an inference that consumers prefer higher output and lower prices.

That these technical judgments drive a great deal of economic regulation is beyond dispute, as is evidenced by the distribution of regulation across markets. For example, if the decision to regulate prices were purely a function of special interest capture, then one would expect to see such schemes scattered over a randomized set of industries. But the landscape that we actually have exhibits competitively structured industries in which prices are, for the most part, set by the market, and natural monopolies such as public utilities where retail prices are mainly regulated by agencies. That is to say, the system gets it right, or at least reflects a coherent theory, most of the time. To be sure, historically the domain of price regulation has exhibited anomalies—“regulatory mismatches” such as trucking, as then-Professor Breyer once

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268. See HOVENKAMP, *supra* note 1, at 110–13.

269. See *supra* notes 13–20 and accompanying text.

observed. Those could be either signs of capture, deficiencies in theory, or some elements of both.<sup>270</sup>

#### D. CAPTURE AND INACTION

One important insight of the progressive revolution was that markets can and do fail more often than classicists had supposed. The problem of capture hardly goes away in a society where market failure is relatively common. It does take on a much different look, however. Mainly, non-intervention can no longer be assumed as the baseline.

When the unregulated market does not provide a baseline, then capture can become much more difficult to identify. Most importantly, *failure* to regulate may be just as much a sign of capture as regulation itself. Even when a market does not perform well, some special interests will profit from its unregulated state. To the extent that these interest groups can prevent regulatory legislation from occurring we can get “capture” in the other direction. Further, in such cases the Constitution’s restrictive set of checks and balances may produce a perverse result to the extent that not doing anything is easier than doing something. That is, under the Madisonian Constitution it is typically far easier for a special interest group to obstruct good legislation than it is for it to facilitate bad legislation.<sup>271</sup>

To illustrate, over the last few decades, some of the most controversial regulatory issues involve tobacco, firearms, and the environment. All three exhibit strong signs of special interest capture—namely, firms and other entities with well-organized specific interests over a large and diverse population. The result has been: (1) significant resistance and delays to warnings, limits on advertising, and other restrictions on the dissemination of cigarettes; (2) heavy and quite successful resistance to gun control and tort responsibility for gun manufacturers; and (3) continued resistance to stronger limitations on fossil fuels in order to combat environmental harm.<sup>272</sup> Weapons manufacturers have obtained immunity from tort law, which means that the manufacturers lack the incentive to make handguns and other weapons safer or less promiscuous.<sup>273</sup> One particularly troublesome exemption is legislation passed in 1996 preventing the Center for Disease

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270. For Breyer’s treatment of mismatch generally, see STEPHEN BREYER, REGULATION AND ITS REFORM 191–96 (1982). For mismatch and airlines, see *id.* at 197–221; for mismatch and the trucking industry, see *id.* at 222–39; and for a look at mismatch and how it pertains to rent control and wholesale natural gas prices, see *id.* at 240–60.

271. See *supra* Part IV.A.

272. See generally James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 87 (2014). In the international context, see Shi-Ling Hsu, *A Game-Theoretic Model of International Climate Change Negotiations*, 19 N.Y.U. ENVTL. L.J. 14, 32 (2011).

273. Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901–7903 (2012).

Control from even collecting data about gun violence.<sup>274</sup> Significantly, nearly all of these special interest initiatives show up as opposition to regulation.

Not all of the special interest failures to regulate proceed through inaction, however. Sometimes they are affirmatively passed as exemptions to regulation. For example, free riders constitute a powerful set of interest groups, obtaining such things as right-to-work laws, which permit their beneficiaries to obtain the benefits of unionization without having to pay the dues.<sup>275</sup> The result is that wages are lower in right-to-work states than in others, exacerbating the problem that labor is not sharing the returns from increases in productivity.<sup>276</sup>

Historically, public choice literature has focused on enacted legislation, particularly during the New Deal. One thing that our regulatory history reveals, however, is that almost every economic decision, to regulate or not to regulate, exposes a conflict between interest groups. *A priori*, there is no reason for thinking that decisions to regulate are more prone to capture than decisions not to regulate. Further, as noted before, the Constitutional structure places a thumb on the scales by making it easier to resist legislation than to pass it.<sup>277</sup>

## V. REFLECTIONS AND CONCLUSION

While the progressive state has its share of imperfections, it also has much to offer, including a superior record of economic performance and, when it is working well, a sincere concern that both political participation and the gains from economic growth be widely distributed. The progressive state has proven to be reasonably adept at using economics and social science in service of the public interest. Many of these activities are sector specific and involve collection and interpretation of data that Congress could never do itself. This makes agencies essential.

The progressive state's biggest challenge, as would be true of any government dominated by legislative and agency decision-making, is the need to limit special interest capture. Here, the historical record of progressive intervention is not pretty. Progressive legislative and agency policymaking reflects many instances of special interest control or crony capitalism. This is hardly an argument for abolishing the progressive state.<sup>278</sup> Indeed,

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274. See Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, Pub. L. No. 112-74, § 218, 125 Stat. 1065, 1085 (2012); Arthur L. Kellermann & Frederick P. Rivara, Silencing the Science on Gun Research, 309 JAMA 549, 549 (2013).

275. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 60 Stat. 136 (codified as amended at 29 U.S.C. §§ 401-531 (2012)).

276. ELISE GOULD & WILL KIMBALL, ECON. POLICY INST., "RIGHT-TO-WORK" STATES STILL HAVE LOWER WAGES 3-6 (2015), <http://www.epi.org/files/pdf/82934.pdf>.

277. See *supra* Part IV.A.

278. See *supra* Part IV.D.

notwithstanding its greater propensity to capture, the progressive state has outperformed alternatives.

Rather, history suggests that the boundary between markets and regulation, and between healthy and misguided regulation, is a set of empirically driven and moving targets. The continued success of the progressive state's ability to maintain or improve its record of economic performance depends on its ability to keep special interest legislation and crony capitalism at bay. Further, it must combat special interest movements in opposition to socially desirable legislation. Several things might help.

As a guiding principle, policymakers at all levels should make consumer welfare the focus of regulatory design. Far too often regulators have listened carefully to producers, who are large and well organized, rather than disorganized and individually small consumers. Given consumer disunity and difference, this will require institutions to develop more objective, or external, criteria for assessing consumer welfare. Examples of regulatory initiatives lacking a significant consumer perspective are legion, but they include things like federal intellectual property law, state statutes limiting public broadband expansion at the behest of private interests,<sup>279</sup> and state or local laws limiting competition by various classes of common carriers. Identifying consumer welfare implications of proposed legislation is largely a tool for cost-benefit analysis.

Next, for enacted legislation and rules, the courts should adopt as a rule of statutory construction that when capture is suspected, a statute or administrative rule that is sufficiently ambiguous should be interpreted against the interests of those behind its drafting. Such a rule of construction forces special interests to return to their legislative benefactors, perhaps repeatedly, and in the process make their actions more transparent.<sup>280</sup> This rule of interpretation is particularly important when cost-benefit analysis has not been done, as is often true of direct legislation.<sup>281</sup> The Constitution cannot reasonably be read to impose cost-benefit analysis on Congress or state legislatures directly,<sup>282</sup> but the proposed rule of statutory construction could

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279. See *Tennessee v. FCC*, 832 F.3d 597, 614 (6th Cir.) (striking down an FCC rule that would prevent states from limiting municipal broadband expansion).

280. See generally EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008); Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567 (2006) (proposing such an approach to the pervasive producer capture reflected in the 1976 Copyright Act).

281. On cost-benefit analysis, see generally RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008); CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002); and John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008). For a pessimistic conclusion regarding cost-benefit analysis of financial regulation and legislation, see generally John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015).

282. See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV.

help. Survival of cost-benefit analysis is certainly not a guarantee that capture is absent, but it does promote transparency and forces constituents to consider which interests are worth calculating, capable of being calculated, and how they trade against each other.

Third, the Constitutional and other legal tools we already have for disciplining capture could be made more effective. Equal Protection (and to a lesser extent Due Process) review of economic legislation should have greater bite.<sup>283</sup> While “rational basis” and “strict scrutiny” are well established parts of Equal Protection analysis in the courts, those phrases are not a part of the Constitutional text.<sup>284</sup> Capture should be an evidentiary question to be examined, not presumed one way or the other. Today, variations in the level of Equal Protection analysis depend mainly on the classification that a state decision makes. Race discrimination gets the highest scrutiny, economic regulation the lowest, gender and legitimacy intermediate scrutiny, and the like. Just as important as the classification, however, is the rationale for the distinction that the challenged legislation or other legal rule imposes.

In its current form, rational basis Equal Protection analysis is practically impotent against nearly all forms of special interest capture involving economic legislation. Surveying the Supreme Court landscape in *Sensational Smiles*—a case upholding the power of Connecticut dentists to exclude nondentists from whitening teeth—Judge Calabresi recently concluded that “[t]he simple truth is that the Supreme Court has long permitted state economic favoritism of all sorts,” including statutes that used licensing to shield professionals from competition.<sup>285</sup> Ultimately, he concluded, a great deal of state activity operates “to favor certain groups over others on economic grounds. We call this politics.”<sup>286</sup> But that cannot be an acceptable answer. Politics knows no limits; that is one of the reasons we have a Constitution.

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495 (1989).

283. One recent example of very weak Equal Protection analysis is *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016) (upholding, under rational basis test, an Equal Protection challenge to a statute that excluded nondentists from the provision of teeth whitening services). Contrast *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (statute that forbade all but licensed funeral directors from selling caskets violated Equal Protection clause); and *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (similar).

284. See Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products* (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 16-9, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2741287](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741287) (observing that “rational basis” really refers to differential levels of scrutiny, but defending traditional progressive view that market activities should be subjected to less intrusive review than state actions affecting fundamental noneconomic rights).

285. *Sensational Smiles*, 793 F.3d at 286 (citing *Fitzgerald v. Racing Ass’n of Central Iowa*, 539 U.S. 103 (2003)) (favoring riverboat gambling over racetrack gambling). See generally *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (banning street vendors); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) (discriminating against opticians who operated out of retail stores).

286. *Id.* at 287.

As devices for addressing capture, the Supreme Court's 1905 *Lochner* decision and its 1938 *Carolene Products* decision reflect opposing mistakes.<sup>287</sup> *Lochner* struck down economic legislation after presuming capture, but without insisting on proof or even acknowledging the capturing interests in a particular situation.<sup>288</sup> *Carolene Products* went to the opposite extreme, approving a statute that was an obvious product of anti-consumer capture by the dairy industry without significant review.<sup>289</sup> Instances of capture that are factually proven to be more severe should invite a more probing analysis.<sup>290</sup> The arguments made here are to some extent at odds with the progressive legacy of constitutional interpretation, which has been unnecessarily deferential to economic legislation.

Closer and more substantive scrutiny should apply in other areas as well. One example is exercises of the eminent domain power where the public use requirement seems dubious. The constitutional language of the Takings Clause is open ended and a more restrictive interpretation would be consistent with the text. Overly broad use of eminent domain for the benefit of private parties, including direct transfer to developers, is particularly prone

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287. See *supra*, text accompanying notes 197, 232–40.

288. See generally *Lochner v. New York*, 198 U.S. 45 (1905).

289. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

290. Because the challenged statute was federal, *Carolene Products* was a challenge under the Fifth Amendment's Due Process clause. See *id.* at 151. However, the Court not only declined to find a violation of Due Process, but also concluded that factual analysis of the statute's basis was unnecessary:

We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

*Id.* at 152.



to crony capitalism.<sup>291</sup> One likely example is the facts underlying the Supreme Court's *Kelo* decision, which has provoked an enormous critical literature.<sup>292</sup>

Some of these approaches can operate as significant limitations on state sovereignty, unless the states decide to go along. In *Sensational Smiles*, Judge Calabresi also observed that interpreting the Equal Protection clause more broadly so as to reach instances of capture that did not violate any specific provision of the Constitution would be “destructive to federalism and to the power of the sovereign states to regulate their internal economic affairs.”<sup>293</sup> This problem is a real one and exposes a conundrum for both conservatives and libertarians. On the one hand, concerns about federalism operate so as to give the states significant control over their domestic economies even if their control reflects significant special interest capture. For example, Justice Alito dissented from the *North Carolina State Board of Dental Examiners* decision disapproving that association's exclusion of non-dentist teeth whiteners. He accused the majority of faulting a state process because it was “not structured in a way that merits a good-government seal of approval.”<sup>294</sup> At the same time, however, capture at any governmental level threatens the legitimacy of democratic, representative government.

All of this leads to a fourth tool, although one of limited utility. Antitrust law can combat economic capture in some cases. Its “state action” exemption attempts to navigate the line between control of anticompetitive instances of capture and protection of state prerogatives. Under it, a state is largely free to regulate internally as it will, even to the point of permitting large-scale special interest capture. However, it must articulate its wish to do so clearly, and any private discretionary conduct must be adequately supervised by a disinterested public official. Acting under that doctrine, the Supreme Court struck down a North Carolina rule somewhat similar to the Connecticut rule that the Second Circuit upheld.<sup>295</sup>

The analogy between the North Carolina and Connecticut provisions is not perfect, however. The North Carolina rule prohibiting anyone except dentists from whitening teeth came from a professional association

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291. See generally Calabresi & Liebowitz, *supra* note 195; Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 *FORDHAM URB. L.J.* 1023 (2011).

292. See generally, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005). For a good, if somewhat restrictive, critique, see generally SOMIN, *supra* note 215. On the legislative response to *Kelo*, see generally Dana Berliner, *Looking Back Ten Years After Kelo*, 125 *YALE L.J.F.* 82 (2015).

293. *Sensational Smiles*, 793 F.3d at 287.

294. *North Carolina State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1117 (2015) (Alito, J., dissenting).

295. *Id.* See generally Herbert Hovenkamp, *Rediscovering Capture: Antitrust Federalism and the North Carolina Dental Case*, *CPI ANTITRUST CHRON.*, Apr. 2015, 1, <https://www.competitionpolicyinternational.com/assets/Uploads/HovenkampApr-152.pdf>; see also generally Herbert Hovenkamp, *Progressive Antitrust* (Jan. 2, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2892336](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892336).

dominated by practicing dentists and with no government review. By contrast, the teeth whitening rule in the Connecticut case was issued under a statute requiring approval by the Commissioner of Public Health, a public official.<sup>296</sup> Whether the Connecticut Commissioner of Public Health “actively supervised” the dentists’ decision in the antitrust sense is unclear. Agencies that simply rubber stamp private regulatory requests do not satisfy the requirement. For example, in *Ticor Title Insurance Company*, the Supreme Court required “[a]ctual state involvement, not deference to private price-fixing.”<sup>297</sup> It then concluded that an agency that simply approved joint regulatory requests without review failed to meet the requirement.<sup>298</sup> Judge Calabresi declined to pass judgment on how the Connecticut teeth-whitening rule would fare under an antitrust challenge, which was not before it.<sup>299</sup> That would require fact finding into the authority of the Commissioner, including whether it had and actually exercised power to review and disapprove proposed rules after considering their competitive effects. Even here the state could articulate as anticompetitive a goal as it pleased, provided that a state official carried it out faithfully. Or to say this somewhat differently, the antitrust state action doctrine does not eliminate capture, but it may force state actors to make their intentions more transparent.

Fundamentally, the progressive vision of statecraft is sound. Its position on the robustness of markets is less categorical than alternatives, but more realistic. That position calls for significant regulatory intervention, but regulation itself must be metered so as to account for changes in theory, demographics, or historical experience. The progressive state’s biggest challenge remains how to accomplish this while not succumbing to special interest capture. Managing that will require it to yield some of the territory that it has claimed since the 1930s.

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296. See *Sensational Smiles*, 793 F.3d at 283.

297. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

298. *Id.* at 638.

299. *Sensational Smiles*, 793 F.3d at 288. *But see* *Teladoc, Inc. v. Texas Med. Bd.*, No. 1-15-CV-343, 2015 WL 8773509, at \*10 (W.D. Tex. Dec. 14, 2015) (holding that simple state-agency review of a private decision was insufficient supervision), appeal filed, No. 16-50017, 2015 WL 8773509 (5th Cir. Jan. 12, 2016).