Introduction:

The institutionalist movement in American economics thrived during the period between the two World Wars. The institutionalist approach to economics can be briefly characterized as stressing four key points: (1) the importance of institutions (defined both as social rules and organizations) in the determination of economic outcomes; (2) the changing and changeable nature of these institutions; (3) the many problems and failures created by existing market institutions; and (4) the resulting need for new forms of “social control” to be achieved through institutional change. These positions were combined with a strongly empirical view of scientific method and a pragmatic and instrumental philosophy borrowed largely from John Dewey (Rutherford 2010).

Even this very brief description of institutionalism is enough to indicate that institutionalists would have an interest in law. Institutionalists such as John R. Commons, J. M. Clark, Robert Hale, Walton Hamilton, Rexford Tugwell, and Leo Wolman all contributed to an institutionalist literature on law and economics. Hale and Hamilton both moved into law schools, Hamilton to Yale Law School in 1928, and there were close relationships between
institutionalists and legal scholars of the realist school such as Karl Llewellyn, W. W. Cook, Underhill Moore, Herman Oliphant, A. A. Berle, and Thurman Arnold. The institutionalist interest in law was both analytical and instrumental. The analytical aspect dealt with the relationship between law and economic outcomes, the issues of how the law shapes economic activity, both by organizations and individuals, and how the law itself changes over time through court decisions and the actions of legislatures. The interest in law as an instrument relates to the institutionalist concern with “social control.” Social control meant developing the means for an “intelligent handling” of contemporary economic problems (Hamilton 1919, p. 313). Problems such as business cycles, unemployment, workplace accidents, labor unrest, poverty, monopoly, restrictive trade practices, manipulation of consumer wants, resource depletion, externalities of various kinds, and waste and inefficiency, were all attributed to a failure of markets, or “pecuniary institutions” more generally, to control or direct economic activity in a manner consistent with the public interest. The institutionalist notion of an economics “relevant to the problem of control” required an economics that related “to the changeable elements in life and the agencies through which they are to be directed” (Hamilton 1919, p. 313), and this naturally created a close interest in the law as a means of social control. It is this second aspect, specifically law as an instrument for the control of business (Clark 1926), that is the primary focus of this paper.

What brought some special urgency to this interest in law was that in the period from the early 1920 through to the mid 1930s many of the institutionalist attempts to further develop regulation and intervention in the economy had run into particular problems in the courts. Legislation was frequently struck down or circumscribed by court decisions and interpretations. Legislation involving minimum wages, regulation of hours of work, regulation of prices, and
unemployment insurance all ran into difficulty. Leo Wolman, writing in 1927, lamented the retreat from social control that had occurred since the First World War, and the increasing resistance to even “modest programs of reform” (Wolman 1927), a point of view widely shared among institutionalists. This problem culminated during the New Deal with Roosevelt’s threat to pack the Supreme Court.

This paper examines the institutionalist approach to the issues of law and economics found in the work of Walton Hamilton. Hamilton devoted considerable attention to the issues of judicial decision making, and to the specific issues of anti-trust and patents. He was closely involved in various phases of the New Deal: in the Consumers’ Advisory Board of the National Recovery Administration; in a series of important studies of pricing in a wide variety of markets; and in work with Thurman Arnold on anti-trust and patents.

Public Interest Legislation and Judicial Decision Making

In the institutionalist and legal realist approaches to law, one of the key questions concerned how courts actually decide cases. The realist answer was that court decisions “could not be deduced mechanically from an abstract jurisprudence of rights, but emerged instead from the unexamined and unarticulated cultural and political assumptions of the judges themselves” (Fried 1998, p. 12). Among institutional writers this was expressed in terms of the role of the “habitual assumptions” of judges: “Supreme Courts, like individual human beings, are dominated by these habitual assumptions arising from the prevailing customs of the time and place” (Commons 1934, p. 699). The opinions of the court change “by changes in judges, or by new cases which present old assumptions in a new light, or by changes in economic or political conditions, or even by revolutions” (Commons 1934, p. 699). Hamilton certainly shared these
views, his particular concern being the habitual assumptions of the more conservative members of the Supreme Court. Hamilton’s view was that these habitual assumptions were out of touch with the changed economic realities generated by American industrialization.¹

For Hamilton, the underlying question was “the kind of thing the Constitution is:” is it “a fetish which must be served whatever be the resulting inability of the State to look after its own affairs,” or is it “an instrument of government” and an “instrument of public welfare” (Hamilton 1928; 1936). Hamilton’s special target for criticism was Justice Sutherland who often spoke for the conservative majority of the Court, while his sympathies were more with the opinions of the “liberal” contingent of Justices Holmes, Stone, Brandeis, and Cardozo (after he replaced Holmes). For Hamilton the coming of industrialism had created a host of new economic and social problems that demanded some response in the form of state regulation, including the regulation of prices, and in his view there was nothing in the Constitution which prevented the use of the police power of the state in the cause of public welfare.

An example of the type of critical analysis of judicial decisions Hamilton provides can be found in his article “The Regulation of Employment Agencies” (Hamilton 1928). The majority of the Court had denied to the state of New Jersey the right to regulate the fees charged by private employment agencies. The majority opinion written by Justice Sutherland is presented in the form of a syllogism:

The major premise comes easily: if a business is “not affected with a public interest,” the fixing of prices by the state is “a deprivation of property” without “due process of law.” The minor premise presents more difficulty and is achieved only through a series of steps. They are in order: (1) the business of dealing in

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theatre tickets has been held to be not “affected with a public interest;” (2) therefore the work of “a broker, that is of an intermediary” is not “affected with a public interest;” (3) “the business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker;” and (4) therefore, the business of running an employment agency is not affected with a public interest (Hamilton 1928, p. 231).

The questions Hamilton raises are many. Does the regulation of fees amount to price fixing? Why is the statute not valid under the police power, as a regulation designed to correct a persistent and well recognised evil? Why does the concept of “public interest” have to be employed in the cases involving regulation of price when it does not have to be so used to justify many other forms of government regulation? What exactly is the basis for “affectation with a public interest” if not a need for regulation evidenced by the importance of the business to the public and the failure of the competitive system to protect the public interest? Where does the category of “brokers” come from, all of whose business is not affected with a public interest? Why does the basis of distinction lie in a mere stage of a marketing process with no connection to the issues of evils, regulation, or government control? Hamilton makes a contrast with the dissenting opinion written by Justice Stone (and supported by Holmes and Brandeis) which is “simple, clear cut, and direct.” As the issue is the validity of an act of regulation, he “looks to see whether there was warrant for the specific exercise of power.” He is interested in whether evils exist, whether they are grave and persistent and with adverse consequences for the public. He asks whether the regulation is suited to its purpose. He has no difficulty distinguishing ticket brokers from employment agencies in terms of their importance to the public. He sees the action
of the legislature “as a proper regulation” designed to remedy a public evil. Hamilton sees the minority position as in accord with the longer legal tradition, it is Sutherland and the “conservative” majority who are providing the “radical innovations” and who “read into the Constitution of the United States the original ideas of ingenious attorneys for plaintiffs in error” (Hamilton 1928, pp. 233-234).² Analyses such as this led Hamilton to inquire more deeply into the beginnings and subsequent histories of interpretation of a number of key legal concepts and doctrines. Most significant are his investigations of “affectation with a public interest” (Hamilton 1930), and the “due process” and “equal protection” clauses of the 14th Amendment (Hamilton 1938a).³ These points of law were also discussed by other institutionalists such as Clark (1926), Commons (1934), and Tugwell (1922), but Hamilton provides the most extensive analysis.

According to Hamilton “affectation with a public interest” is a term lifted from a decision of Lord Hale in England in 1676 concerning the regulation of charges at a public wharf. The term is not stressed and it is not made a test for the right of the state to regulate prices. At that time the regulation of prices was a commonplace, and in England “even to this day Parliament decides for itself how far it may go in the control of industry” (Hamilton 1930, p. 1094). The term came into American law in the famous case of Mun v. Illinois in 1877, concerning the regulation of charges by grain elevators. Here the representatives of the elevator operators argued the principle to be a limitation of legislative action to only those businesses affected with a public interest. They lost the case, but the opinion of the Court accepted the principle. In successive decisions the principle went through some changes in definition which extended the concept, but narrowed its meaning. It was used to allow regulation of railway rates on the grounds of “public use.” The concept was later translated back to a broader “public concern”
with a business, and by 1914 the principle had become “a general, if indefinite, invitation to the legislature to extend price control where the public concern demands it” (Hamilton 1930, p. 1099). In the 1920s institutionalist writers explicitly looked to the principle to provide a legal basis for the regulation of business.  

Legal interpretations, however, began to change with the Supreme Court of 1921-1923. The work of this Court was marked by the formal recognition of “affectation with a public interest” as a “definite test of constitutionality of price fixing regulation” (at least by the majority), but the same Court sought to narrow its range. Throughout the 1920s “a phrase brought into constitutional law to sanction price fixing” was “consistently used to outlaw price fixing” (Hamilton 1930, p. 1100). The principle became a barrier to the ability of states to respond to public concerns via price regulation; the constitutional “test” of affectation being substituted for a recognition of police power and an appraisal of the need for and reasonableness of the regulation in question.

The injunction that “no person shall be deprived of life, liberty or property without due process of law” was contained in the 5th Amendment, but until after the Civil War was regarded as a procedural concern only. After the Civil War the 14th Amendment was passed to ensure the rights of the newly enfranchised blacks. The key phrases in the Amendment are “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside;” and “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (Hamilton 1938a, p. 271).

Hamilton traces the history of the attempts to read substantive rights into the due process
clause. The first of these occurred with the well known “slaughterhouse cases” of the 1880s. Initially a corporation was given a monopoly on slaughtering, and the legal representative of independent slaughter men attempted to argue that a property—the right to follow their trade—had been removed without due process. The argument failed, but a few years later when the monopoly privilege was revoked, the corporation attempted the same line of argument. That too failed, but in a concurring opinion two justices effectively revisited the original case and argued that the original grant of the monopoly privilege was indeed unconstitutional and should never have been given in the first place. Thus, despite the losses to the older doctrine of police power, the argument remained in use acquiring “a momentum and an enhancing repute in the opinions in dissent.” It was strengthened in 1886 by recognition that the term “person” included corporations and which extended to them the protection of due process and equal protection (Hamilton 1938a, p. 284-286). This is an issue Hamilton was to return to later in his career.

Overall, these judicial rulings created, in the name of due process, a “judicial overlordship over what up to that moment been set down as the province of the legislature.” In later decisions the word “liberty” became defined to encompass “freedom of contract,” but, according to Hamilton, it was only in 1905 and the case of *Lochner v. New York* that “due process first won in a clean-cut combat with the police power” (Hamilton 1938a, pp. 287-290).

The *Lochner case* concerned the regulation of the hours of work of bakers, purportedly on grounds of public health. The majority opinion of the Court found freedom of contract an aspect of liberty and property which “a state may not abridge without due process of law.” The opinion of the court was “intended to be an apostolic letter to the many legislatures in the land appointing limits to their police power and laying a ban on social legislation” (Hamilton 1938a, pp. 291-292). The case, however, also occasioned Justice Holmes’ famous dissent where he
argued that the relation of the hours of bakers to public health was one of fact, that “general propositions do not decide concrete cases,” that the liberty of the citizen “is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable,” and that “the Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*” (http://laws.findlaw.com/us/198/45.html). Hamilton argues that while it “is common for latter-day liberals to set this down as the first blast of the trumpet in behalf of social oversight of human rights,” the historian is more likely to see it “as a lance worthily broken in behalf of an ancient cause now in retreat” (Hamilton 1938a, p. 292):

A constitutional doctrine contrived to protect the natural rights of men against corporate monopoly was little by little commuted into a formula for safeguarding the domain of business against the regulatory power of the state. The chartered privileges of the corporation became rights which could be pleaded in equity and at law against the government which created them. In a litigious procedure in which private right was balanced against the general good the ultimate word was given to the judiciary (Hamilton 1938a, p. 293).

Hamilton, as noted above, was closely involved with the New Deal. While Hamilton was himself critical of the workings of the NRA codes and the encouragement they gave to monopoly pricing, it is not surprising to find him reacting negatively to the series of Supreme Court decisions that struck down the NRA code making machinery in 1935, and then the Guffey Coal Act and parts of the AAA in 1936. Hamilton outlines the course of development of Court decisions: in 1934 in the *Nebbia* case “it was willing to
allow remedial legislation to take its course;” in the next year the Court first began to use “procedural devices” against Federal legislation, but then moved to substantive issues to strike down the industrial codes of the NRA. By the winter the Court “was ready to pass the death sentence upon the Agricultural Adjustment Act; and in the spring of 1936 it laid on with abandon against all social legislation, state and national” (Hamilton 1938b, p. 17). Fear of the President’s power and the “ghost of an imaginary fascism” deflected even Brandeis and Stone from their customary views.

In the NRA case the Court held that the NRA codes represented an unconstitutional delegation of legislative power to the President. Cardozo and Stone in their separate concurring opinion went less far. They also found the delegated powers granted to be too unconstrained, but agreed that Congress itself could not set up standards for regulation for all industries given their variety and number. The case concerning the AAA was decided by a majority of the Court who ruled the tax on processors to provide revenue to pay farmers to take land out of production—a central part of the program—to be coercive and unconstitutional. Stone, Brandeis and Cardozo dissented on the grounds that the tax was levied in accord with legislation passed by Congress, and “Courts are not the only agency that must be assumed to have capacity to govern” (http://newdeal.feri.org/court/297US1.htm). The Bituminous Coal Conservation Act (Guffey Coal Act) was passed in 1935 to replace the NRA code and to regulate prices, minimum wages, maximum hours of work, and “fair practices.” A tax was levied but those who complied were given tax refunds. The Act established a National Bituminous Coal Commission, a Coal Labor Board, and a Consumers’ Council. In 1936 the Act was declared unconstitutional largely on the grounds that labor conditions were local, within state and not interstate evils and therefore did not fall under Federal jurisdiction. Cardozo, Brandeis, and Stone again dissented, taking the
view that coal production was an interstate business and that the conditions in the coal industry meant that “Commerce had been choked and burdened; its normal flow had been diverted from one state to another; there had been bankruptcy and waste and ruin alike for capital and for labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot” (http://newdeal.feri.org/court/298US238.htm).

Hamilton poured scorn on the view that the meaning of interstate commerce was to be narrowly construed to apply only the interstate movement of goods. This interpretation was the one Justice Sutherland claimed was “used in the Constitution.” Hamilton argued that such prohibitions as Justice Sutherland discovered were not to be found plainly in the text of the Constitution, but were the result of attaching new meanings and constructions to words, and to a reading into the Constitution of meanings and economic philosophies quite alien to the minds of those who had first constructed it (Hamilton 1936; Hamilton and Adair 1937). In Hamilton’s view, the Constitution was written by a group consisting in large part of those of a mercantilist mentality for whom “commerce” meant nothing less than the whole of production and trade (Hamilton and Adair 1937). The paradox is that “as industry has become more and more interstate in character, the power of Congress to regulate has been given narrower and narrower interpretation” (Hamilton and Adair 1937, p. 192).

Anti-trust, Patents, and Corporate Personality

After the demise of the NRA, the New Deal entered a second phase with a renewed stress on anti-trust as a tool with which to control business. In 1938 Thurman Arnold was appointed head of the Anti-Trust Division of the Department of Justice. In the past Arnold had been a severe critic of the anti-trust laws (Arnold 1937), but he came into his new job determined that
the anti-trust should be revised so “that the government could strike at market domination, regardless of how the power over prices had been acquired and regardless of motive or intent” (Hawley 1966, p. 411). Arnold had been a long time colleague of Hamilton’s at Yale, and between 1938 and 1945 Hamilton worked as a Special Assistant to the Attorney General working on problems of patents, monopoly, and restraint of trade.

Previous to this, Hamilton had been engaged in a series of price studies, some of which were published as *Price and Price Policies* (Hamilton and Associates 1938). These studies demonstrated to Hamilton the wide variety and ever changing nature of the practices used by business to restrict competition. Industries are not alike, there is no sharp demarcation between competition and monopoly, a “program of control can crowded into no set formula,” and since trade practice is always developing “the exercise of authority must be grounded in a continuing exploration of industrial arrangements” (Hamilton and Associates 1938, p. 555). Hamilton felt that Arnold’s approach to anti-trust linked exactly to this. Hamilton wrote to Dexter Keezer that Arnold:

> is definitely persuaded that if the Anti-Trust Acts are to serve a constructive purpose, they must come to grips with the web of usage in distinctive industries, so he wants to get a number of industrial studies underway. Each will appear as a memo and in form should be comparable to an opinion of the United States Supreme Court that grapples with the law as public policy and stakes its judgments upon a recitation of industrial fact (Walton Hamilton to Dexter Keezer, 11 May 1938, Walton Hamilton Papers, Box J9, Folder 8).
On the same day Hamilton wrote to the publisher of *Price and Price Policies* that Arnold is insisting that the Department of Justice “get down to concretions,” and deal with the “web of industrial usage,” and that Arnold’s approach “is an application of the approach worked out in ‘Price and Price Policies,’ and I wish we had some way of advertising the fact” (Walton Hamilton to Hugh Kelly, 11 May 1938, Walton Hamilton Papers, Box J22, Folder 2).  

Hamilton’s involvement with anti-trust included work on briefs including suits brought against the American Medical Association for their actions against experiments in group health (Hamilton 1938c), the movie industry for its distribution practices, and many others (Hamilton 1940). But the major products of Hamilton’s time with the Anti-Trust Division were two reports for the TNEC: *Antitrust in Action* (Hamilton and Till 1940a) and *Patents and Free Enterprise* (Hamilton 1941).

In his earlier work, Hamilton had been sharply critical of the anti-trust laws. The Sherman and Clayton Acts and the Federal Trade Commission were attempts by the state to enforce competition based on the textbook model of competitive markets. But that model is one that applies to a world of “petty trade” and not to a world of modern technology and big business. The anti-trust laws, in their attempt to “stay the development of large scale enterprise and to make big business behave as if it were petty trade” embody and “express the common sense of another age” (Hamilton 1932a). Hamilton also pointed out the difficulties in translating economic concepts into legal categories such as that of “conspiracies in restraint of trade;” the clumsy and often inappropriate nature of cases at law in deciding issues of trade practice; the business tactics of delay and invention of new and alternative practices; the decisions made in one case sometimes becoming unfortunate and limiting precedents in others; and the highly uneven record of enforcement (Hamilton 1932a; 1932b; 1932c).
In the first of his TNEC studies, and in a related paper (Hamilton and Till 1940b), Hamilton repeats many of these concerns. He also discusses the development of new forms of restraint, involving various forms of tacit collusion, price leadership, delivered price systems, “quality standards,” patents and licence agreements, unequal bargaining power as between large manufacturers and their suppliers or distributors, and regulations originally enacted to protect a public interest being turned into a “smoke screen for vested interest” (Hamilton and Till 1940a, pp. 12-19).

Hamilton goes on to suggest two avenues of change, the first involving a “streamlining” of the anti-trust acts, and the second a move to an administrative rather than a judicial base. Streamlining would involve providing adequate funding, a power of subpoena, a greater use of the equity decree in place of criminal actions, a shift from crime to tort, a penalty equal to twice the total net income gained during the period of wrongdoing, placing the burden of proof on the party that enjoys access to all the facts, and providing the consumer with a cause for action (Hamilton and Till 1940a, pp. 101-106). These reforms, however, Hamilton regards as insufficient as they fail to penetrate to “the heart of the difficulty.” What is required is a movement that develops the advisory opinion and consent decree of the Department of Justice into an administrative system that can provide for a flexible and timely case by case approach. This cannot “come into practice full blown” but must “begin as a cautiously experimental power” (Hamilton and Till 1940a, p. 108). An administrative system would allow for the approval in advance of “a code of industrial behavior,” with the government and industry in cooperation spelling out “a line of business activity which is believed to accord with public policy, and in the furtherance of which immunity from prosecution is promised” (Hamilton and Till 1940b, p. 19). This process requires information about the industry to be gathered, analysed,
and kept up to date. Agreements cannot be permanent as conditions change, so that every measure is subject to correction. Agreements require oversight and policing, but with breaches treated as a civil offence and punishable by fines. A “Decree Section” should be established, and be concerned with industrial analysis and remedies rather than litigation. Judicial review should be by a “specially constructed industrial court” with five or seven members well versed in the ways of industry.

As a “caveat” to his proposals Hamilton raises the problem of administrative processes being “captured” by the business interests they are supposed to regulate. Commissions have “closed public utilities to outsiders;” the various agricultural controls have been “sensitive to the plight of the farmers, negligent of farm labor, and indifferent to the general public who must pay the bill;” the NRA “staged a full dress performance of the hazards of the administrative process” in which wide powers were granted only to “become sanctions under which the strategic group could lord it over the industry” (Hamilton and Till 1940b, p. 25).

The issue of patents and their use in certain industries to maintain privileged market positions also came to Hamilton’s attention during his price studies. As he continued work on this issue he came to see it as a pre-eminently important and particularly difficult policy problem. Knowledge is more important than real property, natural resources are largely what the current state of knowledge makes them, and modern industry is “nothing more than our accumulated technical knowledge” (Hamilton 1949a, p. 339). Abundant production and rising standards of living rest on the advance of knowledge and its dissemination.

Patents have as their purpose the promotion of technological advance, but Hamilton’s investigations indicated to him that the existing patent system had numerous failings in achieving that end. Research and invention had become a matter of corporate research and development
laboratories. In the hands of corporations the patent system could easily be used to create control of an industry. A flood of closely related products could be patented, blocking out other competitors; patents could be used to “fence” in a invention, “block” the work of rivals, or “trawl” for information; patent protection could be extended in time by patenting successive modifications; special terms and conditions could be written into patent licences, dividing the market between producers by quota, or territory, or product, and setting prices for various users; patents could be pooled, resulting in a closed and collusive market; and international agreements involving patents provide the basis for trade agreements between firms and international cartels (Hamilton 1941; Hamilton and Till 1948).

Hamilton made a number of proposals to improve the patent system. Justice should push forward cases involving restrictive covenants in order to more clearly define what could and could not be included in a patent licence. An easier and more expeditious method of validation of patents might prevent some pooling of patents, but where pooling was required for efficient production the pool should be accepted and placed under public authority. Patents not in use should be cancelled or compelled to licence. Higher standards for patentability should be established, or different types of invention given different types of patent. Here Hamilton wanted to differentiate between genuinely novel and important inventions and mere modifications or variations. For example, applications for reissue or renewal should be prohibited. He also suggested the establishment of a “Public Counsel on Patents” to exercise general oversight of patent grants, of assignments and leases, and of all patent litigation, and with a right to intervene in applications and institute suits in order to protect the public interest (Hamilton 1941, pp.146-152).

These steps, however, “fall short” of an answer to the problem of accommodating the
patent grant “to its corporate and industrial habitat” (Hamilton 1941, p. 156). If a “fresh slate” were at hand a system of compulsory licensing might be best, but in the existing circumstances Hamilton suggests an expert commission of inquiry to consider a more fundamental redesign based on “further study and the formulation of a program” (Hamilton 1941, p. 163). A National Patent Planning Commission was established in 1942, but produced not a close study or a new program but a skimpy eleven page report that “whitewashed” the patent system, ignored the major problems, made proposals that would, if anything, lower the standards of patentability, and suggested extending the time a patent grant could run (Hamilton 1943a).

The conclusion of this work on anti-trust and patents was a growing concern on Hamilton’s part with the development of what he called “property rights in the market” or “market equities” (Hamilton 1943b). These property rights could take the form of the a wide variety of business practices; the requirements of a profession or trade; the control of a strategic ingredient or resource; the protection given to local industries or favored producers by state or national regulations; regulations originally adopted for public benefit turned into barriers to entry; and patents, patent licences, and patent pools used as a basis for the control of markets. Most significantly, corporations have discovered that “regulation is a two edged thing,” controls can be captured and put to uses never intended (Hamilton 1943b, p. 29).

Hamilton’s concerns about the difficulty on controlling business were strengthened by the tendency of the courts to give to corporations the rights of natural persons. The treatment of the corporation as a natural individual required a series of legal “fictions,” that effectively ignored the corporate ability to internationalize, to create subsidiaries and complex and intricate patterns of control, to choose and change domicile, and to exist in perpetuity or dissolve itself and reappear under a new name. The “elaborate web of ‘as ifs’ which the courts have woven,–have
put corporate affairs pretty largely out of the reach of the regulations we decree” (Hamilton 1946a, p. 4). The techniques of public control encounter legal fictions “which have left fact far behind.” Hamilton did not provide a program for the “domestication of the corporate ghost:”

But as a necessary antecedent to positive action we can bring our fictions up to date. The corporation is not a person; nor can it be made a person by a heroic act of “judicial contemplation.” The corporation is a legal form into which a going concern is cast; the corporation is a device through which persons operating within bodies of social usage carry on. If the law cannot escape the fiction as an essential of its trade, it can at least replace its shopworn stock with fictions that bear some resemblance to reality (Hamilton 1946b, p. 744).

In his work in the late 1940s and 1950s Hamilton gave his concerns more historical perspective. The failures of the market to properly control business in the public interest had resulted in a move towards regulation. But regulation broke down the older division between state and economy. The most used form of regulatory device, the commission, was particularly susceptible to capture by the interests it was supposed to be regulating, and the campaign for regulation ultimately produced “its own counterrevolution” (Hamilton 1949b; 1957). The “interest to be regulated is compact, organized, mobile,” and alert to opportunities. The public interest is general, sluggish, diffused, and “unable to effect a united front or move in time” (Hamilton 1949b, p. 85; 1953, p. 268). The business to be regulated has the initiative, the commission becomes bogged down in detail, staff who earn a reputation for understanding business can move into a career in industry, routines are established and maintained, and
competition from new sources may be stifled to maintain older privileges (Hamilton 1949b, p. 83; 1957). Looking back at the NRA, Hamilton argued that it began as an exercise in price fixing, but as these sanctions were toned down or refused “business gradually lost interest in the NRA.” Despite the demise of the NRA it was “not without its effect on economic structure.” Representatives of different companies had been brought together in Washington, and the NRA left many industries “much more tightly organized than they had been before” (Hamilton 1957, p. 97). This move toward a “private government of industry” making use of “the devices and procedures of politics” was much advanced by the Second World War. The War Production Board brought business personnel to Washington to serve as public officials, and “a hierarchy of primary contracts” resulted in a consolidation of business empires. The NRA gave representation to labor and the consumer, but in the WPB “it was the business interest alone which was enthroned” (Hamilton 1957, pp. 97-98).

On the other hand, for Hamilton there was no going back to the market. That phase in industrial and institutional development has passed. Hayek and Mises, writing in 1944, were “voices from the grave.” Each seeks a return to the separation of state and economy, but “the free market they seek to restore never was” and the currents of the time are moving in other directions. State and economy have become inexorably intertwined and cannot now be moved apart. There is no return to laissez faire: “a great corpus of the law stands as proof of the incapacity of the industrial system to regulate itself.” Mergers should not be allowed where technology does not require it and where there are dangers in the concentration of economic power. The grant of patent should be limited to “its proper office.” Government procurement should not encourage concentration or restrictive practices. The problem of commissions and administrative agencies will remain until “political invention contrives an adequate substitute.”
Business will continue to play a strategic game with the regulator (Hamilton 1957, pp 166-168).

**Conclusion**

Hamilton’s institutional and realist blend of law and economics was characteristic of what has been called the “old” law and economics movement. In this literature, law was approached primarily as a potential instrument in the control of business, in the restraint of monopoly power and restrictive practices. Hamilton, however, was a sharp critic of the existing “judicial control of industry.” There are several aspects to this criticism. First, the decisions of the Supreme Court had often worked to limit what Hamilton saw as the legitimate power of the state to regulate business through narrow or questionable interpretations of the Constitution or other legal doctrines. Moreover, some of these interpretations had given corporations new rights and privileges that further constrained the regulatory power of the state. Of special importance here was the introduction of the doctrine of corporate personhood. Second, and in the absence of other methods, the control of business practice was left to the antitrust acts, but these acts were based on an outmoded ideal of competitive industry and relied on legal concepts and processes ill-suited to the control of rapidly evolving trade practice. The ability of firms to create new restrictive practices particularly concerned Hamilton, a nice example being the use of existing patent law to create a raft of barriers to trade. None of these problems have diminished over time.

What Hamilton proposed was a combination of an administrative system to approve of trade practices and control by commission where monopolistic conditions required. Hamilton was aware of the difficulties of such systems, of the issues of the “capture” of regulatory agencies and commissions, and of administrative rules and regulations being turned into business
advantages. Despite the claims of later Chicago School writers to have invented the idea of regulatory capture, Hamilton has a claim to be one of the first to take the issue seriously. One cannot characterize Hamilton as being unconcerned with the potential problems of government regulation. The key difference here is that for Hamilton, it is simply no longer possible to bring about a separation of state and economy. In a world of big business the activities of the state affect the fortunes of private businesses in many and multifarious ways. The two are so intimately bound up with each other no separation is possible. There is no panacea, the only way forward for economic control in the public interest is that of “eternal vigilance” combined with institutional innovation (Hamilton 1957, p. 168).

Notes

1. The discussion of Hamilton that follows uses material in Rutherford (2005). That research was supported by Social Science and Humanities Research Council of Canada research grants.

2. Other decisions analysed by Hamilton include a 1929 decision unfavorable to farmers co-operatives written by Justice Sutherland (Hamilton 1929), a 1931 decision favorable to the regulation of commissions paid by insurance companies to agents and written by Justice Brandeis (Hamilton 1931), and a decision written by Justice Roberts allowing a political party, as a voluntary association, to exclude blacks from voting in primaries (Hamilton 1935).

3. Hamilton also wrote pieces on the history of caveat emptor (Hamilton 1931), the concept of property (Hamilton 1932d), and of the law surrounding compensation for workplace accident (Hamilton 1937). Hamilton’s former teacher and friend, Alvin Johnson, asked Hamilton to write
the entries for the *Encyclopaedia of the Social Sciences* on accumulation, acquisition, affectation with public interest, caveat emptor, celibacy, collective bargaining, collectivism, competition, constitutionalism, Charles Horton Cooley, damages, freedom of contract, institution, judicial process, John Stuart Mill, organization–economic, police power, and property.

4. See particularly Tugwell (1922). For a more sanguine view see Clark (1926). Hamilton’s students Dexter Keezer and Stacy May (1930) also discuss the principle in detail.

5. John R. Commons also discusses this sequence of cases concerning the liberty, property, and due process clauses of the Fourteenth Amendment, but more with an eye to the shift in the property concept from tangible to intangible. See Commons (1924a, pp. 11-21). These cases were also important in the area of public utility regulation and were discussed in that context by Commons, James Bonbright, and Robert Hale as well as by Hamilton.

6. It is in the work of Herbert Spencer that one finds this close connection between market freedom and “freedom of contract.” Adam Smith, in contrast, was more concerned that markets be open. He was aware of issues such as unequal bargaining power.

7. In an earlier case concerning the “hot oil” industry Cardozo had not objected to the delegation of powers as the delegation was “narrow” and what could be done “is closely and clearly circumscribed both as to subject-matter and to occasion.”

8. The Arnold/Hamilton case by case approach did not find favor with all anti-trusters. Frank Fetter clearly wanted a more general approach to anti-trust policy. Paul Homan wrote to Jerome Frank and Hamilton expressing hope that the disagreements would not work to the detriment of the whole anti-trust enterprise (see Paul Homan to Jerome Frank, 14 March 1939, Walton Hamilton Papers, Box J31, Folder 3).
9. Hamilton discusses professional associations such as the AMA, the spread of professional licensing to cover many trades and occupations, the control over news by the Associated Press, international cartels as operating in tin and rubber, Florida regulations concerning the citrus fruit industry, regulations on milk, and patents.

10. Examples given by Hamilton include the ICC being given the regulation of canals and motor transport, to the advantage of the railroads, and The Civil Aeronautics Board discouraging low cost carriers.
References


—. 1938c. The Doctors’ “Union.” *New Republic* 96 (September 7): 117–118.


