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PUBLIC ECONOMIC POLICY AND THE AMERICAN LEGAL SYSTEM: HISTORICAL PERSPECTIVES

Harry N. Scheiber* 

I. INTRODUCTION

The extensive scholarly reappraisal of government and the economy in American historical development that has occurred in the last quarter century has challenged and largely displaced the classic Progressive interpretation.1 Given the leading role that Willard Hurst’s scholarship has played in the recent wave of writing by historians and legal scholars on this topic,2 it is timely on this occasion to revisit the borderland of law and economic history—that fascinating, if still untamed, region of investigation that Hurst has traversed and mapped for us—to appraise the accomplishments of recent studies and to explore some lines of inquiry that remain to be pursued.3 As is widely acknowledged, throughout the nineteenth century and well into the twentieth, though the impact of law was only marginal in many areas of American life, it was far-ranging and deep in the shaping of the economic marketplace, economic and business institutions, and the dynamics of material growth and innovation.4

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"[T]he core of United States legal history," Hurst has written, is the analysis of legal agencies (their structure, capacities, and functions) and "their relative contributions to the body of public policy." How popularly held values were led by, and also expressed in, law as a formal body of doctrine; how the competing values of possessive individualism and of constitutionalism produced public economic policies that first fostered private entrepreneurial effort and later energized government itself, in more autonomous roles; and how policy efforts succeeded or failed to realize the divergent goals of individualism and public values, all have been at the center of Hurst’s writings of the last two and a half decades. As political scientists (and that new self-styled breed, "policy scientists") and others have shifted their concerns from a focus narrowly on policy process to a focus more broadly embracing outputs and effects, the relevance of Hurst-style historical investigations becomes manifest. The formulation of new typologies—both those descriptive of “arenas” or “categories” of policy and policy conflict, and those descriptive of “stages” of policy over time—and the blossoming of new historical studies and syntheses, lend further relevance to the hypotheses offered by Hurst over the years. How influential his work and that of fellow scholars have been in displacing the Progressive framework and interpretation of government and the economy, and how much we know about new questions opened up by recent studies, provide windows for perspectives on an in-

5. J. W. Hurst, Law and Social Order in the United States 42 (1977) [hereinafter cited as Law and Social Order].


II. THE NINETEENTH CENTURY

The classic Progressive historiography portrayed the development of American society, and especially of political conflict, in Manichean terms, the "good" Jeffersonian tradition (eventually absorbing Hamiltonian preferences for big government) confronting the repeated challenges of the competing elitist tradition. Political cleavages corresponded with class lines, or at least with "democratic-agrarian" versus "aristocratic-industrial" alignments. This interpretation offered, as Robert F. Berkhofer has written, "a complete model of the United States' past." Successive scholarly forays into territory once marked out by the Progressives seriously challenged the established interpretations; but no comprehensive alternative view has emerged to dominate historiography today as the constructs of Beard and Turner once did. Nonetheless, the ongoing reexamination of the record on public economic policy—a subject always at the center of Progressive history—has advanced significantly the state of historical knowledge on this subject; and much of the new work is either written in a framework that Hurst did much to build or else addresses the assumptions and main conclusions of the Hurst view.

The most remarkable single feature of scholarship since the 1950s on the history of American public economic policy is the expansion of the area of inquiry. Historians of law, following Hurst's lead, have combined efforts with students of policy and administration to provide a portrayal of the "complex reality" of legal process that far exceeds in range of institutions examined and dynamics explored what had been studied before. In the 1940s, some studies of individual states by historians and political scientists—most notably the Handlins on Massachusetts, Hartz on Pennsylvania, and Heath on Georgia—had shattered the myth of laissez-faire in antebellum economic policy. Each of these studies was based mainly on analysis of stat-

9. LAW AND SOCIAL ORDER, supra note 5, at 25.
utes and of political rhetoric, with some attention to the work of the courts. From them came the view that a "Commonwealth" concept was the validating canon for governmental intervention to promote growth and to regulate economic interests before 1860; they gave close attention to localism and interstate rivalries; they examined internal-improvements policy as the cornerstone of typical developmental strategies; and they offered at least preliminary analysis of policy regarding corporations.\(^\text{11}\) In the 1960s, scholars who explored further the dimensions of state-level policy opened up the administrative history and began to trace more systematically the impact of state programs on the economy. Working in archival records of major state agencies, for example, Nathan Miller produced evidence of striking innovativeness on the part of Erie Canal Fund commissioners to promote economic development in New York State.\(^\text{12}\) Similarly, my own examination of Ohio government and economy in the canal era\(^\text{13}\) attempted analysis of "state mercantilism" at its height in an especially active state that mobilized capital on a grand scale and developed bureaucracy for the management of public enterprises.

Ohio and New York, like Pennsylvania, were what we may term public-enterprise states: each of them undertook major state-sponsored and directed ventures in transportation. They exemplified one, but only one, pattern of state action in the antebellum era.\(^\text{14}\) A very different pattern was being delineated by Hurst in his Wisconsin studies, with their focus on a state in which there was no comparable commitment to outright public enterprise yet in which, as Hurst demonstrated, there was a significant commitment to promotion of economic development through uses of the law.\(^\text{15}\) Hurst’s great contribution was to show how it was not only through public law but also through initia-


\(^{14}\) This argument is given in extenso in Scheiber, supra note 2, at 93-96.

tives by the courts that antebellum state governments engaged in the purposeful allocation of resources, the assignment of special privileges and immunities, the establishment of broad priorities for economic development, and the granting of effective or outright subsidy to favored types of enterprise. The courts responded pragmatically to the needs of the emergent early-phase industrial economy, adopting an instrumentalist posture, as Hurst argued, balancing the imperatives of "constitutionalism" (the ideal that "organized power [must be] useful and ... just") with the perceived obligation to open the channels of enterprise, to "release entrepreneurial energy," and to expedite material growth. Absent in the non-public-enterprise states like Wisconsin was the sort of explicit cost-benefit analysis of projects that engineers and politicians offered in the states that undertook major canal projects or considered state railroads; absent in Wisconsin and other such states was the element of ideology that infused debates over major capital commitments, with polarization on questions of planning versus free market, "equal benefits" on the distribution of governmental largesse, and the like. Notable in Wisconsin and other non-public-enterprise states was, instead, the governmental style that lacked autonomy, that was subject to what Hurst terms "drift and default," and that seldom raised to the level of explicit public debate and consideration the hard questions of long-range costs for the society of resource policies.

In this manner, Hurst's Wisconsin-oriented studies contributed to an understanding of how diverse policy actually was in the antebellum states. If this finding made it more difficult to generalize about policy and politics, it also posed a challenge to what was left of the old Progressive interpretations. Hurst further enriched the literature with his analysis of franchise policy, the police power, and constitutionalism. All were themes that stressed uses of law in the public interest; they constituted, in effect, the prehistory of the modern regulatory state. Thus,

while indicating how full was the extent and ingenious the means by which the legal system favored “dynamic property” over “static, vested rights,” Hurst also raised important questions about social values as expressed in the law. On the one hand, he contended, and he continues to argue, that a large measure of “consensus” existed for giving material growth and development a high priority in the scheme of legal values and the validation of policies. On the other hand, he explored the extent of continuing commitments to procedural norms, the vitality of individualism as something to be protected through constitutionalism as well as nurtured by opening entrepreneurial opportunities, and the beliefs of nineteenth-century Americans in federalism, limited government, and other ideological matters as articles of faith.20

The lines of scholarly inquiry that Hurst pursued so creatively served to reinforce the impact of other pioneering scholarship upon the field of American legal history, especially the important studies of colonial law by Richard B. Morris21 and George Haskins22 and of the Massachusetts court under Chief Justice Shaw by Leonard W. Levy.23 Hurst’s studies provided the framework for Friedman’s innovative book on contract law24 and Horwitz’s studies of common-law changes25 and my own on eminent domain and on the police power.26 This work, along


with other scholarship in legal history in the 1960s, dovetailed with Lauer's highly original reappraisal of riparian law27 and new monographic work on major themes such as Friedman and Ladinsky explored in a widely cited article.28 Meanwhile, Stanley Kutler's careful study of the Charles River Bridge Case29 and other work by Harold Hyman30 and Charles McCurdy31 accomplished an integration of classic constitutional themes with some of the newer concerns in legal history that flowed from work in the Hurst mold. More recently, on the question of commercial law's development, Tony Freyer has imaginatively woven the strands from state law into the larger fabric of federal common law and constitutional doctrine.32 The specific contributions of these scholars and others have been thoroughly considered elsewhere and will not be given detailed attention here, except in the course of analysis that cuts across the entire recent literature of legal history.33

What difference has all this recent scholarship made in the historiography of public economic policy? How have Hurst's contributions and the work of other historians and legal scholars altered our view of policy process, output, and effects in the nineteenth century?

First of all, one is struck by the absence of some leading actors and prominent ideas that animated Progressive historiography.34 There is a shift away from the focus upon conflict of major "traditions"—Jeffersonian and Hamiltonian, with their

latter-day variants and mutants, diversely defined—with its concomitant emphasis upon national politics. The tariff, national banking legislation, and federal aid to internal improvements (to say nothing of foreign affairs and even "Manifest Destiny," which on its face, at least, speaks volumes about American legal values) are largely absent in the new legal history. Instead of the drama of national politics and the quadrennial Presidential contest, we are given the intriguing incremental process of statute and judge-made law. The relevant image is the metaphor of the glacier, rather than that of the political earthquake; the landscape changes, but by dint of gradual erosion from the winds of doctrine and the rains of changing interests, not by effect of cataclysmic events. Even the "great cases" in the United States Supreme Court do not always provide the temporal benchmarks or analytical sighting-points that they did in the Progressive version of American history. Indeed, the newer studies make us keenly aware that great areas of policy, not least economic policy, remain in the hands of state legislatures and state judges. The domains which Congress abdicated or in which the Supreme Court left the states with wide latitude—including even the demarcation of rights of property and the definition of free and slave labor, both central to the definition of American capitalism—are the most prominent matters of scholarly attention in Hurst-style legal history.35

Secondly, the modern studies in legal history offer widely varying interpretations as to "consensus" and as to "conflict," but there is consistent attention to the legal system as it reflected the society's values. In the analysis of economic policy, what is most important is to understand whether ideology played a role in the policy-making process (and if so, how), be it in establishing the parameters of legitimacy for constitution-writers and legislatures or in influencing the thought of judges. Hurst's writings, clearly, stress the pragmatic strain that promoted material growth; his recognition of principled conflict tends to be by way of parenthesis or qualifying rider.36 From his


36. Diamond, Legal Realism, supra note 2, at 789, criticizing Hurst's use of the term "consensus" on grounds that given his terminology "there appears to be no issue so divisive it cannot be described as demonstrating a consensus of a sort." Scheiber, supra note 3, at 754-55, provides a critique from an evidentiary base in 19th-century legal and constitutional debates. See note 20 supra. See also Hurst, Old and New Dimensions of Research in United States Legal History, 23 AM. J. LEGAL HIST. 1, 9-18 (1979), responding to criticism from commentators who subscribe to a "ruling-class explanation" of American legal history.
harshest critics come charges that he has blocked out the history of radical ideas and the "reality" of purposive exploitation of the downtrodden and dispossessed in American history.\(^{37}\)

Without accepting extreme criticisms of that sort, one can still raise some questions as to the degree to which pragmatism characteristically shaped policy process and content. To be sure, the many studies of transport policy, most notably Goodrich's,\(^{38}\) concluded that there was little or no principled, laissez-faire opposition of any weight aligned against transport promotion before 1850; and that even to 1890, in effect the state and local governments moved in to support, subsidize, and promote transport schemes whenever capital in the private sector was short in any given region or state.\(^{39}\) Along similar lines, careful state-by-state analyses of voting on economic issues revealed that it was largely in banking policy, and in no other areas, certainly not transport promotion, that the old-style Progressive historians' categories made any sense in explaining political alignments.\(^{40}\)

All this was consistent with Hurst's emphases and gave credence to his view of dominant pragmatism. Still, two problems remain. On the one hand, there were some major ideological confrontations, even on the basis of evidence taken from law as an autonomous system. Most notably, there was a continuing tension in nineteenth-century American law between an emergent concept of "rights of the public" and the better-known judicial preoccupation with property rights (including both "vested rights" in the traditional sense and rights in "ventures," for entrepreneurial change, as stressed by Hurst). This tension embraced not only questions of franchise and police power, as we find in Hurst's Wisconsin lumber study,\(^{41}\) but also a wide range of issues and legal concepts that affected the judicial allocation of water resources, the emergence of regulatory law, the definition and reappraisal of nuisance law, and even a nascent doctrine of public trust (placing limits on what government itself

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37. With more stridency than soundness of evidence, Holt attacks Hurst's studies for "mirroring 19th-century majoritarian ideological attitudes," so that they "denigrate or at least infantilize radicalism and dissent." Holt, Now and Then: The Uncertain State of Nineteenth-Century American Legal History, supra note 33, at 627. Compare Diamond, supra note 2.


41. Law and Economic Growth, supra note 15.
might do with certain vital resources) that would emerge in the twentieth century as a cornerstone of environmental-law pressures from conservationists. Withal, the content of judicial decisions reveals a “public interest” tradition more diverse, perhaps, and certainly of greater doctrinal richness than has usually been recognized.

On the other hand, analysis of law as a reflection of popularly held values is an exercise fraught with difficulties. Utter cynicism, empty judicial rhetoric, meaningless pedantry or cant—all can be found, at least on occasion, in the record of the courts; so too can corruption, of the narrowest, most venal sort. This is the rawest kind of evidence, but not the only kind, that suggests the legal system may work to filter, to distort, to suppress; policy content, no less than legislative or judicial rhetoric, may reveal more the triumph of a narrow interest than what “the majority,” or “the society,” may think. Thus we must be alert not to assume that pragmatic doctrines, “style”, or substantive policy are uniformly the product of a system that is working so as to be responsive to a popular will or Volksgeist. It is equally misguided, however, to assume that if a pattern of action is discerned—whether it be innovation of common-law doctrines that tend to reduce private entrepreneurial costs, or any other pattern of that sort—it is because a silent conspiracy exists or even because lawmakers and judges understand with precision the effects of their doctrinal innovations.


43. For citations on corruption, see, e.g. Scheiber, supra note 2, at 65 n. 22. See also Diamond, supra note 2, at 788.

44. On methodological problems of a cognate nature, on interpretation of legal evidence to illuminate intellectual history and common assumptions, see generally White, The Appellate Opinion as Historical Source Material, 1 J. INTERDISCIPLINARY HIST. (1971).

45. For a thorough and persuasively reasoned critique of Morton Horwitz’s recent contentions on this score, arguing that there was purposive (if not to say collusive) transformation of the law to effect a revolution conducive to exploitation, cf. McClain, Legal Change and Class Interests: A Review Essay, 68 CAL. L. REV. 382-97 (1980). See also my own critique of Horwitz, in Scheiber, Back to “The Legal Mind”? Doctrinal Analysis and the History of Law, 5 REVIEWS IN AM. HIST. 458-66 (1977). Recently A. W. B. Simpson has subjected Horwitz’s evidence and reasoning on the major subject of change in contract law to what appears to me a devastating attack that leaves little of Horwitz’s work on this theme, including his handling of some critical items of evidence, intact: Simpson, The Horwitz Thesis and the History of Contracts, 46 U. CHI. L. REV. 533 (1979).
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Thirdly, the new legal history, with its stress on judicial policy-making at the state level, has reinforced interest in how the legal system was shaped by the postulates and imperatives of a working federalism. Hurst himself opened the inquiry with his imaginative portrayal of various "federal effects," illustrating how because states were part of a federal system they suffered certain policy constraints that had an impact on economic development. Apart from one analysis that provides an overview of "real" versus "formal" power in the American federal system, there have been detailed forays into constitutional, legal, and policy-process history that offer new insights into how federal structure has affected government's economic role. Of signal importance was Keller's study of the life insurance industry and its regulation, illustrating how either reformers or the industry that is the object of their reform zeal can engage in a kind of forum-shopping. Reformers, in this instance, concentrated upon obtaining regulatory legislation from the states; the regulated industry—including components in states considering but not yet adopting regulation—then sought uniform national legislation, to supercede state control, hoping for more benign (or at least predictable) rules. In the Roosevelt-Wilson era of political Progressivism, both business leaders and prominent political spokesmen would draw from the insurance industry's experience to advocate uniform state laws; uniform codes were, in effect, an alternative to outright centralization of policy responsibilities, hence responsive to enduring faith in dual federalism—what John Fiske termed in 1880 "the sublime conception of a nation in which every citizen lives under two complete and well-rounded systems of law . . . moving one within the other, noiselessly and without friction."

Perhaps the nearest the American reality ever came to such an innocent vision of federalism-in-action was early Americanruled California. Painstaking examination, in the Hurst mode of analysis, of the California Supreme Court's work has been undertaken by Charles W. McCurdy. His studies show how the

47. Scheiber, supra note 2, at 67-72.
hand of federal power was stayed, with Congress deferring to the wisdom of the state authorities in the complex and vital area of establishing property rights in mines, water, and uses of farmland.\textsuperscript{50} Like the comparable study, on a much larger scale, of the Massachusetts court by Levy, McCurdy's research uncovers a remarkably wide-ranging judicial activism, with a constant balancing of values associated with stability of property rights, on the one hand, and values associated with promotion of rapid growth, on the other.\textsuperscript{51} Consider the evidence and themes that dominate the story: mining-camp codes, adjudication of claims concerning lodes and percolating water across property boundaries, the rights given to mineral-prospectors to enter on the land of cultivators and herdsman, riparian versus appropriator claims in water law, fencing obligations, and the like. We suddenly recognize that the new legal history is delineating areas of agreement and of conflict, and is examining real-life struggles that found expression in the legal system's operation, that have precious little to do with Hamiltonians and Jeffersonians, the old forces of Light and forces of Darkness in the Manichean Progressive drama.\textsuperscript{52} Moreover, one of the great ironies—indeed, tragedies—of the California record is that when popular opinion, mobilizing the force of the urban laborers, the landless white farm workers, and the small yeoman types, was voiced, it was directed in a particularly vicious way against the Mexican and Chinese minorities. These minorities were denounced—and repressed—as competitors in the marketplace and instruments of the large corporate interests. Even the sort of piercing criticism directed against the large corporate railroad, mining, and banking firms by Henry George was combined with a sympathy for the racist side of Kearneyite-Workingmen's Party doctrine. And many of the "reforms" embodied in the 1879 California constitution were designed as much to exclude Asian labor and landown-

\textsuperscript{50} McCurdy, Stephen J. Field and Public Land Law Development in California, 1850-1866, 10 LAW AND SOC’Y REV. 235 (1976).
\textsuperscript{51} Id.; L. Levy, supra note 23.
\textsuperscript{52} Cf. Scheiber & McCurdy, Eminent Domain Law and Western Agriculture, 1849-1900, 49 AGRIC. HIST. 112-30 (1975). This is not to deny that there are ideological strains in jurisprudence that can reasonably be termed "Jacksonian" or "Whig"; for example, apart from such outright political analyses of the role of the judiciary in conventional party-oriented conflict as R. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic (1971), students of judicial biography have pursued ideology as an element of continuity from the 1830s and 1840s to the heyday of conservative constitutional thought in the late nineteenth century. See, e.g., McCurdy's forthcoming biographical study of Stephen Field; or Jones, Thomas M. Cooley and "Laissez-Faire" Constitutionalism: A Reconsideration, 53 J. AM. HIST. 751 (1967).
ership as to accomplish income redistribution by means that would please modern-day historians who romanticize the "radical heritage" in United States history.

Again, if Hurst can be faulted for insufficient attention to how such conflicts over public policy and law reflected deep divisions in American society, even a view of the California record that takes full account of the ugly side of "radicalism" hardly comports with the old Progressive view of political cleavages. Hurst himself has said in his recent writings that "law did foster a good deal of injustice" and that to some degree "the country achieved apparent consensus by ruling some major groups out of the calculus of consent, notably the Indians, the blacks, and women" until the late twentieth century. To recognize exclusion, oppression, and discrimination *en passant* is no more useful, however, than a romantic retrospective on radicalism in comprehending the full range of law's processes and effects in a situation like early American California. Only when this darker side of American law is studied, to understand how it related to law and economic policy more directly concerned with "release of energy" in the marketplace, will we have a full picture of the legal system as it shaped institutions and the dynamics of change. We may well conclude that federalism-in-action was a shifting mosaic—or kaleidoscope—of individual state policies and legal systems that were far more varied in the "mix" of their individual programs and legal cultures than we have imagined until now.

Finally, the newer studies in legal history have opened up some important questions on the matter of continuity *versus*

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55. John Wunder of the Texas Tech (Lubbock) faculty has in progress exactly such a study, on treatment of the Chinese in the law of the Far Western states, in relation to the larger fabric of the legal system's interaction with the economy. Similarly, Paul W. Gates has recently called for scholars to give the same degree of serious attention to the manner in which some 69 per cent of Indian lands as of 1875 has come into the hands of whites as they have given to disposal of the U.S. public domain. See P. W. Gates, *Introduction*, in *The Rape of Indian Lands* (ed. Gates, 1979), not paginated. An exemplary study of the blatantly exploitative side of American law is William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. SOUTHERN HIST. 31-60, reprinted in *American Law and the Constitutional Order*, supra note 28, at 317-30.
discontinuity in the area of regulatory law. The classic Progressive historiography portrayed modern regulation as beginning, uncertainly, in a few Midwestern states with the Granger Laws of the 1870s. Moreover, Progressive historians quite consistently viewed the successive accomplishments of the late nineteenth century—the Granger legislation, the national regulation of railroads undertaken in 1887 when the courts rendered state control ineffective, the antitrust act of 1890—as victories that must be taken seriously, i.e., as triumphs of “the public interest” over “the special interests.” All this has been challenged by scholars like Gabriel Kolko, who contend that public regulation was (a) an explicit goal of business interests themselves, who provided some if not most of the political clout to obtain such legislation at the national level, having been frightened by state politics and regulation, and (b) accomplished in effect by the creation of administrative agencies such as the Interstate Commerce Commission which were early and quite completely “captured” by the regulated interests themselves.66

Hurst’s and Levy’s studies of the police power have shown that “public purpose” doctrine emerged early in American law; subsequent research has indicated that the decision in Munn v. Illinois that upheld Granger Law regulation had deep roots in the rich prior history of jurisprudence in the states. Moreover, close examination of the contending interests in the cases that produced that jurisprudence makes it impossible to view the doctrinal or political history of regulation as a confrontation of monoliths, posing “agrarian” against “industrial” special interests or ideological Hamiltonians against ideological Jeffersonians. After Munn, the doctrine of public purpose became not only a lodestone of regulatory law but also a test of the legitimacy of taxation and a key part of the calculus of “compensability” in judicial weighing of the “takings” question in police-
power cases.  

III. THE TWENTIETH CENTURY

With a few notable exceptions, the best work in the newer literature of American legal-economic history has concentrated upon nineteenth-century subjects. By contrast, the rise of the administrative state and welfare programs, the high visibility of policy issues in politics, and the availability of archival records all have served to attract historians, political scientists, and legal scholars to the study of the policy process and its impact in the modern period of our history. Recognizing this difference, this section will survey some of the leading features of contemporary scholarship on modern public economic policy; then, a concluding section will suggest some lines of inquiry that offer promise to scholars seeking to integrate the techniques and concerns of Hurst-style legal history with those of investigators from sister disciplines.

The framework for many of the recent policy studies is provided by a pluralistic conflict model. There is wide acceptance, in the literature, of the model of policy process formulated by V. O. Key, Earl Latham and others in political science. An extreme expression was Latham's view that

what may be called public policy is the equilibrium reached in this struggle [among interest groups] at any given moment, and it represents a balance which the contending factions of groups constantly strive to weight in their favor.

At the risk of doing some violence to important differences among studies that accept this model of the policy process, the following lines of analysis can be identified as important in works that variously focus on the Progressive era, the World War I period, and the New Deal.

First, there is an understanding now that promotion and regulation both can serve as instruments to the same end, for specific interest groups. Thus in the matter of public aid for railroads, the same region or locality as in one period of development prominently favors governmental assistance might, as soon as the railroads are actually built, become prominent in a drive for regulation.  

61. Scheiber, Road to Mann, supra note 26, at 381-98. See also Reznick, supra note 26.
century variant, of communities in Wisconsin and other states that voted bond-aid for railroads, then tried to default when the lines were never built or went bankrupt—and in the Wisconsin case, when farm families actually faced loss of their homes and livelihood because private property had been mortgaged to back the bond issues. Indeed, the functional relationship between stage of local development and attitude toward promotion or regulation is a theme that carries forward from the canal era through the Granger Law fights and to the modern day.

Second, in probing the question of cleavages that appear during policy conflicts, we have become more prone to recognize differences that appear within important economic interest groups—even within the ranks of firms in a given industry, or the varied trades and industrial unions in the labor sector. Thus Robert Wiebe's analysis of business and the Progressive movement demonstrated that policy issues caused divisions between small versus large firms. There were also differences over policy attributable to regional interests that diverged, within industries; and there were differences in market orientation that could be as important as differences of size or place. Following this line of inquiry, Arthur Johnson did path-breaking studies of the oil-pipelines industry and public regulation; his work is particularly interesting to legal historians because he shows how the fight over policy, pitting Standard Oil against the independents, was fought not only in legislative halls but also in the courts. The law came into play in curious ways, with the independents first invoking the public-purpose principle to obtain regulatory measures by the state against their giant competitor, only to find that legal precedent set the stage for state power to be turned on


66. See G. Miller, supra note 63.

67. Thus the business press today reports that medium- and small-sized cities once provided with major-line service after pressing hard for public aid for airport construction and for free play to taxi airlines a few years ago, now strenuously oppose the lifting of CAB route regulation that can leave them with vastly reduced or even no airline service.

themselves as well.69 The intensity of the fight and range of casualties within the industry itself has been well delineated in Charles McArthur Destler's biography of the independent oil firms' attorney, Roger Sherman.70

A study totally unsympathetic to Brandeis and his fellow Progressive reformers, Martin's work on railroad regulation in the Roosevelt-Taft years, serves to remind us that reformers were not all non-ideological or drawn from various segments of the same interest-group universe; they could be deadly serious, inflexible, and hostile to business interests.71 However, even Martin's work, while in that respect reminiscent of older-style Progressive historiography, does not deny that the milieu of policy decisions in railroad regulation was a complex pattern of particularistic and ideological responses against a troubled economic background.72 Numerous other works on later periods, such as Cuff's on World War I, indicating the range of differences on policy issues coming from the various businessmen and firms associated with the War Industries Board,73 or Sidney Fine's monumental study of the automobile industry and the NRA in the New Deal years,74 give similar evidence of intrasectoral cleavages. Withal, there is much evidence in support of Hurst's warning that in appraising policy conflicts in modern industrial society (which in the U.S. certainly I would date from 189076), "the specialization of interests [makes] . . . it difficult in a given instance to identify where public interest lay."76

Third, most of the studies that have been researched in the foregoing framework have concluded that policymaking is incremental. They comport with the view of policy process recently set out by George Gordon in a basic textbook on public administration:

The policy-making process is characterized by a lack of cen-

70. C. Destler, Roger Sherman and the Independent Oil Men (1967).
76. Law and Social Order, supra note 5, at 217.
tralized direction at every level of government; it is complex, very loosely coordinated, highly competitive, fragmented and specialized, . . . and largely incremental.\textsuperscript{77}

Rather than being a "smoothly functioning, ongoing sequence" in which there is a logical progression of phases, the American policy process "responds . . . to pressures placed upon it at many points along the way."\textsuperscript{78} This version of the process is consistent with studies of federal structure and dynamics that insist—mistakenly, in my own view—that there are so many pressure points, so many opportunities for diverse interests to seek advantage or to modify or blunt the edge of policy, and so many prerogatives that remain decentralized in state and local government, that the system must be regarded as "non-centralized."\textsuperscript{79}

Either an interpretation that finds incrementalism dominant or one that rests on a concept of "noncentralization" can easily support a benign view of the legal system: if power is fragmented, hard to mobilize, and seldom used to make swift and far-reaching changes, then oppressive uses of power are improbable. It seems fair to say that this bias characterizes Galambos's interpretation of the economic-policy process in the interwar era. He speaks of "the slow and erratic manner in which such important policies as antitrust have been implemented," and of the bargaining and extended dialogue (in contrast to unequivocal, definitive statements of policy goals and uncompromising enforcement) that characterized the federal government's relations with the cotton-textile industry.\textsuperscript{80} Such incrementalism, Galambos avers, was salutary because it softened and attenuated conflict. It served an educative function on both sides, and it worked to prevent the sort of unyielding confrontation that might easily have "hardened business resistance to any form of social control or welfare system" later on.\textsuperscript{81} From a different perspective, Hurst has contended that the Sherman Antitrust Act, just as Mr. Chief Justice Hughes once said, had "a generality and adaptability comparable to that found to be desirable in

\textsuperscript{78} Id.
\textsuperscript{79} The "noncentralized power" argument as to American federalism is associated mainly with the work of Daniel Elazar. For a discussion of his work, together with my own alternative view, see Scheiber, Federalism and Legal Progress, supra note 18, at 507-13.
\textsuperscript{81} Id.
constitutional provisions, thus serving perfectly as a charter for a bargaining, or balancing, relationship between government and business, with public policy being left by Congress and by lack of “compelling public opinion” to the discretion of the judiciary. Hurst does not find the results benign. How the judiciary opened the way—a way not taken—for the states to play a formative role once again in corporate regulation is also the subject of a far-ranging revisionist study recently published by Charles McCurdy.

A leading study of New Deal securities-market regulation, by Michael Parrish, similarly indicates that complexity and competitiveness of the policy process, with compromises forged as the result of pressure and counterpressure, was not necessarily benign. There was remarkable diversity of policy aims and interests evident in the debate of legislation: brokers, regional political spokesmen, bankers, Federal Reserve officers, and Executive Branch officials. The compromise and attenuation of previously announced New Deal aims was the result. The process was neither educative nor particularly constructive: it produced a substantial measure of obeisance to “entrenched economic power.”

Fourth among the themes prominent in works that largely accept a pluralist model of policy process is the analysis of fragmentation and proliferation in governmental structure, especially since 1933. Attitudes and values are shared by subgroups of bureaucrats and professionals in government, in industry or private associations, and in reform movements—most often by persons who have professional ties and identify themselves with values that transcend the government/private sector dichotomy or that even overbalance loyalty to a particular firm, agency, or group. We have had studies of how such professionalization

82. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (Hughes, C.J.). See LAW AND SOCIAL ORDER, supra note 5, at 246.
83. LAW AND SOCIAL ORDER, supra note 5, at 259.
86. Id. at 177. Evidence similar to Parrish’s on the securities-regulation issue, indicating “conflicting ideologies, divergent goals, and different sets of values” contending in the policymaking process, is in E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966), esp. at 476-77, 492-94. The result was “partial, piecemeal, pressure-group planning and not strong coordination and direction of the economy.” Id. at 485.
87. See text accompanying note 79 supra. See also H. SCHRIBER, THE CONDITION OF AMERICAN FEDERALISM: AN HISTORIAN’S VIEW (U.S. Senate, Comm. on Govt. Opns., 1966).
changed the terms of policy debate on forest conservation; and we know much, now, of how a complex "agricultural Establishment" emerged, involving the Extension Service, the land-grant colleges, the Farm Bureau Federation, and farm-related industrial interests, in the tug and haul of agricultural policymaking. At times, there have been parallel cleavages and fragmentation in managerial and engineering subgroups of industry's professional cadres, with each fragmented group having counterparts or allies in the public sector's bureaucracy. In recent years, especially since the Great Society period of Lyndon Johnson's Presidency, this feature of interest-group politics and the policy process has been reinforced by what Samuel Beer has called "public sector politics": a policy-formation process in which governmental specialists and generalists, the "intergovernmental lobby," and so-called public-interest organizations such as the Conference of Mayors or the Council of State Governments take the initiative in shaping legislation and administrative policies.

All these developments have affected profoundly the tasks of the judiciary—itself an intriguing research problem for the legal historian. But scholars in this field need to accept the new reality, that the history of legal process must now embrace (as Hurst has said) "politics and political parties, lobbies, and the whole range of processes that go into forming public opinion and nerving will to action." Furthermore, historians ought to give to policy at the state level in the twentieth century the same sort of intense

90. See R. CUFF, supra note 73. An intriguing subtheme, running through much of the recent literature, involves antitrust policy and law. One finds that the Justice Department is in continuous interaction with industry spokesmen, the Commerce Department, regulatory agencies, and (in the 1933-35 period) the National Recovery Administration. Industrial spokesmen seeking modifications of policy or seeking to head off potential trouble can negotiate directly with the Antitrust Division or often will enlist allies in other agencies to disarm threats of antitrust prosecution. Cf. M. UROFSKY, BIG STEEL AND THE WILSON ADMINISTRATION 179 (1969); G. NASH, UNITED STATES OIL POLICY, 1890-1964, 102 (1968); Galambos, supra note 80.
93. Hurst, supra note 36, at 6.
study that has been devoted to pre-1860 state government and law.\textsuperscript{94} Fascination with the mutations undergone by federalism, and also absorption with the intriguing issues of state-federal relationships that surface in constitutional litigation,\textsuperscript{95} make it all too easy to forget that “despite the conspicuous weight of the federal government, the states remain important alternative actors in major fields of public policy.”\textsuperscript{96}

A fifth major substantive theme in the recent literature on history of public economic policy concerns foreign affairs in two dimensions: the relationship of U.S. foreign economic policy to (a) special-interest pressures and ideology in the policy process, and (b) the larger congeries of policy and power relationships traditionally termed “political economy”. Unlike the themes previously discussed, this one has not documented or fit into the framework of “pluralism” so much as it has supported the alternative notion of intimate cooperation between government and the elite interests in the domestic business community.\textsuperscript{97} So far as process was concerned, there is considerable evidence of what Gerald Nash has called “rapprochement between government and the industry,”\textsuperscript{98} not only in regard to the oil industry (Nash’s subject) but respecting other industrial interests as well. The State Department had autonomous concerns—security, strategic thrusts to offset initiatives by rival powers, and the like—but often they fed back into the policy process to affect law and the economy. For example, the large American investment-banking houses became involved in international consor-

\textsuperscript{94} Id. at 8 (the years since 1945 constitute “probably a period of creative and destructive disjunction in the course of roles of law at least as important as any in the prior record”). I have sought to delineate some of the contours of change in policy process and the legal order in this recent period, in Scheiber, \textit{American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives}, 9 U. Tol. L. Rev. 619, 648-80 (1978).


\textsuperscript{96} \textit{Hurst, Commentary: Constitutional Ideals and Private Associations}, 11 \textit{NOMOS} 63, 65 (1969).


\textsuperscript{98} G. \textit{Nash, supra} note 90, at 239.
tium arrangements for loans to China in the Taft Administration years, then some of the same interests obtained modification of long-standing antitrust legislation to expedite a marketing drive abroad during and after World War I, as well as to permit anticompetitive arrangements in the oil industry.99 More recently, the diffusion of regulatory responsibilities vis-a-vis banking has had a major impact on international banking development—and crises.100 As Hurst has pointed out, moreover, an initiative under law such as the Export-Import Bank's program for the underwriting of foreign sales by U.S. private firms is a modern-day counterpart of nineteenth-century policies such as tariffs and land grants that supported part of the risks of investment.101 For some commentators, the burden of findings in this area of historical and contemporary investigation is to support the view—at the polar extreme from the pluralist model—that there has been a "fusion of economic and political power" in the United States, making "government by private groups . . . an operational reality" in our society.102 This notion of powerful private interests monopolizing the levers of public power, using the legal system for their own ends—and the associated idea that there has been a weakening or disappearance of "distinctions between private and public, business and government, civilian and military, and ultimately between the individual and the state [sic]"103—has been disputed by Hurst. He contends it underestimates the reality of pluralism.104 Wherever the truth may lie in this dispute, there is no denying that mobilizing a political movement in the public interest, against the opposi-


100. E.g., failure of the nation's 20th largest bank in 1974 has been attributed in part to diffusion of regulatory responsibility and in very large part to operations under the Edge Act (supra note 99). See J. SPERO, THE FAILURE OF THE FRANKLIN NATIONAL BANK 6, 16-24 (1980).

101. LAW AND SOCIAL ORDER, supra note 5, at 120.


104. Hurst, supra note 36, at 16.
tion of well-organized private interests with much at stake, is at best a difficult matter. In the case of air-pollution control, for example, the "bias" of the legal system in this respect has been well recognized: The costs, to those who advocated the collective good (clean air), were high in terms of research effort and lobbying, while "those opposed to control, primarily pollution sources, were organized and able (largely through trade associations) to carry out research in support of their positions, and to hire public relations experts and lobbyists to promote them. Perhaps more importantly, they also had only the easy job of showing that things were not clear."106

The case of air-pollution control illustrates that modern changes in the legal system have not eliminated "drift and default." Public policy can still lurch from uncertainty to half-conviction; and there is no question that it took a catastrophe—a smog disaster in a major city—to overcome "inertia and uncertainty."108 Still another legacy of the nineteenth century is the abiding "voluntarist motif," as it has been termed in a brilliant study of employment policy, by Selznick and Nonet.107 There is heavy reliance upon voluntary compliance with rules; initiative is taken by affected interests, instead of by the government agency; "administration . . . proceed[s] by responding to claims, not by systematic regulation and surveillance."108 Thus, if unfettered administrative discretion and abuse of power, unchecked by the legislature or even by courts is a danger,109 so too is the voluntarist mode of regulation: "When government looks to the initiative and participation of affected parties, there is a serious risk that the aims of public policy will be redefined and public

106. Id. at 267.

I have not dwelt much here on Hurst's use of the "drift and default" theme, as I think both my understanding of his concept and my critique of it stand up well from my At the Borderland, supra note 3, at 746-50, 754-55. But for an interesting alternative view, contending that the concept "devolves from a neo-Newtonian, post-Nietzsche view of the universe as chaotic, valueless, and impersonal"—a cosmology that, candidly, I find hard to associate in any way with the thought of Willard Hurst—see the provocative review by W. W. Holt, Jr., Hurst: The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970, 1971 Wis. L. Rev. 981, 987-89. To give weight to "mindlessness and chaos in experience," or to credit the force of "primitive fears of what lies in the surrounding murk and muddle"—the nearest ideas I can find in Hurst's work to what Holt contends is there—is something else, I think. (Quotations from Hurst, Old & New Dimensions, supra note 36, at 19-20.)
108. Id. at 225.
109. Cf. LAW AND SOCIAL ORDER, supra note 5, at 150-54.
purpose attenuated.”

Finally, mention must be made of a recently popular effort at systematizing our knowledge of change in the legal order, especially the relationships of government and business, in terms of an “organizational synthesis.” In this view, the key to understanding the policy process is identification of points in time at which dominant types of bureaucratic organizations have shifted. “The focal point of modern history,” as one proponent writes, “becomes the underlying patterns of social, political, and economic organization— as opposed to particular political events or ideologies.” As I understand this concept, it proposes placing organization forms and interactions at the forefront of analysis; policy “episodes” that have characterized most of the studies that use pluralist models, and that have a place equally as important as analysis of structures and values in the approach championed by Hurst, are to be downplayed.

To be sure, “patterns of . . . organization” offer a seductive kind of attraction; as one scholar who subscribes to the organizational synthesis has written, it tends to free historical analysis from undue concern with (or influence of) rhetoric and ideologies. Still, I would contend, there is an ideological bias in such an approach—a conservative bias that creeps in when ideological content of policy debates, values expressed in legal documents and political discourse, and short-term outcomes of policy decisions are crowded into the background of study. The proposed synthesis is, then, a comprehensive rejection of the Progressive historiographic tradition.

IV. CONCLUSION: BEYOND PROGRESSIVE AND PLURALIST MODELS

It is worth recalling that the founding efforts of Progressive scholarship were directed, at least in part, at what was seen as arid abstraction and mythification of law; thus Beard’s Eco-

110. P. Selznick et al., supra note 107, at 228. Elsewhere, Selznick and Nonet characterize public policy with respect to employment as “inchoate, open-ended, and weakly implemented” (Id. at 239), a view strikingly reminiscent of Hurst’s judgements of nineteenth-century public policy and legal process. Cf. Scheiber, supra note 3, at 750.


112. Id. Many of the same objections as Professor Laurence Tribe has directed against policy “science” can be raised against the organizational synthesis in public-policy history. See Tribe, Policy Science: Analysis or Ideology?, 2 PHILOSOPHY AND PUBLIC AFFAIRS 66 (1972).

113. Cuff, supra note 103, at 256.

114. See Tribe, supra note 112.
nomics Interpretation" was an attack on the notion of timeless constitutional ideals, created in a breath-taking moment of creativity and nurtured through the decades by a Supreme Court striving for objectivity. This latter concept had its counterpart, of course, in the study of law and related scholarship in legal history as the evolution of doctrine—the Langdell tradition. Indeed, as one commentator has said, the first historical overview that represented the Langdell tradition—Two Centuries’ Growth of American Law (1901)—was “remarkable for the way in which the authors succeeded in describing the evolution of the law as if it had all happened in outer space rather than in the real world.”

All this is much changed. “Langdell [is] out and Hurst in,” and the history of the legal system is now seen, at least in the Hurst mode, as “an infinitely complex tapestry of ever-changing values, relationships, and priorities.” Let it be said candidly that some students have denied that Hurst’s own works or those of other scholars that they denominate the “Hurst school” do in fact recognize the realities behind the behavior of courts, the application of doctrine, and the interaction of law and economic change. One school of criticism finds fault because the Hurst mode of inquiry is too sympathetic to the modern liberal state and its pretensions. This source of criticism, clinging to a definition of sentimentalism that would have pleased William Graham Sumner, refuses on principle to view any evidence of public interventionism as constructive in the processes of economic change, and it takes refuge in the comforting scientific rhetoric of profit-maximization theory. Another school of critics at-

115. C. Beard, An Economic Interpretation of the Constitution (1913).
118. Coleman, supra note 116, at 3.
119. E.g., Max Hartwell’s commentary on the essays on property rights, in Proceedings of the Internat’l Econ. Hist. Assoc., 7th Cong. 1:112-115 (1978). Earlier, my contention that nineteenth-century American eminent-domain law served effectively to subsidize privileged private enterprises (and the related contention that “vested” property rights were, in the process, often brutally shoved aside), when presented in a lecture, drew a heated reaction from a well-respected “Chicago School” laissez-faire economist. This could not possibly be so, he declared, since it was “axiomatic” that the great achievements of the 19th-century American economy were attributable to the absence of significant governmental interventions. Ironically, my contention in another lecture presentation that “rights of the public” in antebellum legal doctrine represented an important effort by jurists to develop a public-interest principle in jurisprudence met with
tacks Hurst and others for their failure to find unremitting, carefully orchestrated, unerringly effective exploitation of the weak and powerless in the operation of American law, historically. Unfortunately, much of this criticism is misguided because it fails to recognize or understand what seems to me patently obvious marshalling of evidence and argument in Hurst's writings on the very problems he is charged with overlooking: the ordering of priorities by courts, the redistributive effects of often-subtle allocation of privileges and effective subsidies in aid of special interests, and the like. Moreover, this school of criticism is especially prone to confine attacks to a general framework and not come to terms with either interpretations or clearly articulated caveats in works they attack; one critic who has traded heavily in chic radicalism as a posture for his own work managed to omit even Hurst's name from his writings and citations on themes that Hurst had explored for three decades, then draped some old theory in newly furnished rhetoric designed, it would seem, to obscure intellectual debts. Hurst has dealt with some of these arguments in a recent article, and no further attention need be given them here except to indicate that Hurst's fairly steady adherence to the pluralist model has raised storm signals energizing criticism from both sides of the ideological spectrum. These attacks are instructive, if for no other reason, because they reflect accurately current divisions of opinion in social science and historiography.

There are other models that engage scholars today who reject the pluralist model as generally used by Hurst. Of special importance is one that was offered sixteen years ago by Theodore J. Lowi, setting up a typology of policies—

equally strident condemnation from a Marxist legal scholar who dismissed all such doctrine as a “mere facade” covering the unremitting exploitation of the poor through property law; he went so far as to say that exploitation was the outcome of every [sic] case decided in every antebellum courtroom. Withal, theory without evidence and untroubled by subtleties continues to have its charms.

120. See my review essay on Horwitz's work, Back to the “Legal Mind,” supra note 45, at 460-66.
121. Id.; Hurst, supra note 36, at 9-18. See also the extensive criticism of Horwitz's citation and uses of evidence, together with an overarching critique of the main hypothesis, in Simpson, supra note 45.
regulatory, and redistributive—and contending that each type of policy will likely be the outcome of a distinctive type of decision-making process. Hurst's studies of the early- and mid-nineteenth-century legal process, stressing fragmentation, response to interest-group pressure, heedlessness of long-term costs, "drift and default," and atomization of decisions, is the richest example in the literature of American history of how "distributive" policy worked in fact. As noted, earlier (page 0004 supra) the public-enterprise states differed in major ways from the Hurst model; and regulatory policy, especially in the fields of control of banking and corporations, deserves much fuller investigation than it has received until now. Only when the nineteenth-century history is understood more fully will fruitful integration of such historical analysis with legal and social-science studies of more modern policy decisions be possible.

Three strategies offer great promise, I think, for such investigations. First, there is the strategy of trying to embrace the whole range of public policy and law as they have affected the development of a single industry. Only Hurst himself has undertaken this terribly difficult, labor-costly task in any great depth—in his history of law and the Wisconsin lumber industry during three quarters of a century. This approach permits the researcher to master some of the intricacies of the industry itself and its entrepreneurial and economic history, affording insights that can be gained in no other way when investigation turns to the "autonomous" development of law as well as law's interaction with the sector under study. Second, it is high time that the geographical boundaries that have limited historical studies be recognized; too much of contending interpretations and the body of evidence in the literature pertain to the northeastern states and one mid-western jurisdiction. How confining (and distorting) the effects can be is suggested by what we find when attention to the law of resource allocation is directed to the region west of the Mississippi: the entire concept of dominant

124. Cf. Scheiber, supra note 3, at 753-56; McCormick, supra note 34, at 233n. and 283ff.
125. See the suggestive analysis of Lloyd N. Cutler and David R. Johnson, Regulation and the Political Process, 84 Yale L.J. 1395-1418 (1975).
126. Law and Economic Growth, supra note 15.
"formalism" crowding out previously dominant "instrumentalism" becomes utterly anachronistic and clearly place-bound, if it has any validity at all.\textsuperscript{128} Gordon Bakken’s studies\textsuperscript{129} of western constitution-making and mortgage law in California, and also a series of studies by younger historians of California law embodying new approaches in the Hurst tradition,\textsuperscript{130} indicate the beauties of transcending parochial geographic perspectives.\textsuperscript{131} Finally, we need studies that focus as intensively on the policy-making process as, say, Haar’s study of Model Cities\textsuperscript{132} or Lowi and Ginsberg’s analysis of public policy and political behavior in the Weston accelerator controversy,\textsuperscript{133} studies that will reveal how federalism affects policy formation and legal process, that will permit reappraisal of judicial behavior and constitutional doctrine in the light of real-life conflicts, and that will permit us as close a look at “administrative style” as we have given to “judicial style” for the earlier period of American legal and public-policy history.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{131} Moreover, even within regions, as Nash has indicated for southern law on slavery, enormous state-to-state variations and variation by time period can be identified; cf. Nash, Reason of Slavery, supra note 128, at 190-205. An exemplary study is Woodman, Post-Civil War Agriculture and the Law, 53 Agric. Hist. 319 (1979). An example familiar to all economic historians is the diverse recognition of riparian and appropriative rights in the Far West. See, e.g., Wiel, Fifty Years of Water Law, 50 Harv. L. Rev. 252 (1936).
\item \textsuperscript{132} C. HAAR, BETWEEN THE IDEA AND THE REALITY: A STUDY IN THE ORIGIN, FATE AND LEGACY OF THE MODEL CITIES PROGRAM (1975). Haar’s account, though by a legal scholar, is also an insider’s view. It may be noted that why pluralism, like consensus, can send up storm signals is well illustrated by a passage in this work summarizing “the many lessons of model cities”: that in preparing legislation for Congressional consideration, goals must be clearly defined, and “[a]fter the program’s hard core is designed, it can be decorated to account for the smorgasbord pluralism of American society. In order to build support, a proposal can be given certain chameleon qualities . . . .” “Decorating” programs seems to me a recipe for gross deception.
\item \textsuperscript{133} T. LOWI & B. GINSBERG ET AL., POLISCIDE (1976).
\item \textsuperscript{134} On the problem of “judicial style” in the methodology of legal history, see
\end{itemize}
Another area of research that can be a meeting-ground for the disciplines is regulatory policy and the problems of resistance and of "lag." In critical respects, the private sector of the American economy has typically outrun the capacity (or will) of the political system to exercise effective direction and regulation. Examples are corporations policy, an area in which a "monopoly problem" was popularly perceived decades before centralization of authority was accepted as the only effective route to restoring public control; another notorious instance was railroad regulation—an area of policy in which "self-regulation" was attempted by the railroads themselves as early as the 1850s; and even more extreme was the area of banking policy. A focus on the mechanisms—including resort to the courts—by which business interests have resisted governmental direction or tried to shape it to their own advantage can teach us much of how law has been used. The phenomenon of "capture" of regulatory agencies is only one aspect of this area of study. Related problems are the sort of cooptation techniques that Philip Selznick discovered in the Tennessee Valley Authority—a comparable phenomenon in the public sector—and the problem of changes in the vitality and purposiveness, or in political orientation, of regulatory agencies over time. As Selznick, Nonet, and Vollmer have shown, moreover, by taking a broad view of public policy and "private government," investigation of a field such as industrial justice can yield high dividends and suggest lines of study for earlier periods until now much neglected by legal historians.

If all the foregoing, as I freely admit, betrays the historian's preference for the concrete particular case, so too will my concluding suggestion: that we give close, tightly focused local study to the contention of Grant McConnell, in his Private Power and

White, supra note 44, at 499-500; Nash, supra note 128, at 210ff.; Scheiber, supra note 128.

135. Cutler & Johnson, supra note 125; Scheiber, supra note 2, at 109-10, 116-17.
139. Cutler & Johnson, supra note 125, at 1407-09.
140. P. Selznick et al., supra note 107.
American Democracy (1960), that “narrowly based and largely autonomous elites” have captured control of a substantial part of the elaborate regulatory and distributive apparatus constructed under the liberal state’s regime in the twentieth century, especially since the New Deal. McConnell’s book offered uniquely important suggestions as to two major problems in the literature of American legal history, neither of which has been pursued adequately despite the passage of two decades since McConnell wrote. The first has to do with federalism, which, he writes, has been

perhaps the greatest mark of American political genius. . . . It has been the means whereby local elites that could have turned their leadership to the ends of separatism have instead been induced to give limited commitment to national values. It has provided substantial autonomy to functional groups through geographic decentralization . . . [so that] federalism and the interest group ‘pluralism’ with which it is associated today are instruments of conservatism and particularism.

The second issue raised by McConnell concerns that hotly debated notion of “consensus” in American society, historical and contemporary. In an ironic twist that reveals, in a single stroke, the pitfalls of a priori formulae in connection with this touchy issue, McConnell contends that in fact a consensus of a broad sort has prevailed—but to a conservative end, essentially exploitative. It is, he contends, because of classic, widely shared American belief in decentralized power, in voluntarism, and in federalism, that both manipulation of symbols and the much more concrete self-interested achievements of local elites in capturing and holding power are made possible. It seems to me that here is a challenge similar to that thrown down by Hurst when he formulated his generalizations on drift and default, bastard pragmatism, instrumentalist judicial style, and the limitations of a governmental process that was in essential respects lacking in autonomy because it was underdeveloped. Like Hurst’s provocative constructs, McConnell’s can be tested adequately only when we pay respect to the need to study concrete

142. Id. at 357.
143. See note 36 supra and accompanying text.
144. This is another theme in itself, in the literature of political behavior. It was opened up by M. Edelman, The Symbolic Uses of Politics (1964). See also the brief comments in Gusfield, supra note 127, at 379.
historical developments in their unique temporal, geographic, and jurisdictional contexts.

Such knowledge of the uniqueness of place and context is a demanding order. It is appropriate here to recognize that Willard Hurst's studies not only have done so in an exemplary and brilliant way, but they also have presented the complexities of legal history and public economic policy from a perspective that reflects mastery of several disciplines. Like only a few others in modern historical scholarship—in the North American tradition, one thinks at once of Charles Beard, Harold Adams Innis, Edward S. Corwin, Paul Wallace Gates, and David Brion Davis—Hurst's craftsmanship displays the unique quality that can only come from bringing to the workbench the mysteries of several scholarly guilds, not only one. It was with extraordinary insight that Hurst presented to the scholarly world a penetrating critique of public-policy process and output in the American legal system, when it was the fashion more to celebrate the system's virtues. No less remarkable was his insistence on recognizing what must be confronted and judged in moral-philosophical terms, when it was all the fashion to celebrate "value-free" social-scientific inquiry and the quantification of behavior and institutions. These achievements bespeak the sort of moral courage that has consistently informed Hurst's quest for historical understanding.

A man of qualities similar to Hurst's, John Bartlet Brebner, once said that the quintessential, though paradoxical, quality of humanistic scholarship is the fusion of that sort of courage—the nerve to see the limits of orthodoxy, of received knowledge, and of trendy movements—with the humility to recognize the limits of one's own understanding and insights, however much they may be celebrated by others or what fame they bring.146 It is a gift rarely given to scholars to have these qualities and also to enjoy the energy to apply them to so many important enterprises—or to have the generosity to share them with fellow scholars so freely—as in the career and contributions of Willard Hurst.

146. Brebner, Address at the 1954 Bicentennial Convocation of Columbia University, in St. John's Cathedral, New York, from author's notes.