

Walton H. Hamilton and
The Public Control of Business*

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An end the great end of public policy is a
betterment of the American standard of living.

Walton H. Hamilton, 1936a

1. Introduction

American institutional economists have, from the beginning of the movement, been vociferous supporters of a greater degree of social control over the economy. It has been claimed that the concept of social control, in the sense of the consciously planned guidance of economic processes, is the central organizing principle or guiding formula of the institutionalist movement (Everett, 1931), but the exact nature and techniques of social control suggested vary between different groups within the movement. Discussion of institutionalist views on the appropriate type of social control has tended to focus on three main groups. First, the Wisconsin group of John R. Commons and a number of his students who were proponents of the use of independent commissions to administer such things as public utility regulations, compensation for industrial accidents, unemployment insurance, and other labor legislation (Commons and Andrews 1936; Chasse 1986). Wisconsin economists, in the persons of Edwin E. Witte and Arthur J. Altmeyer among others, were also very intimately involved with the development of the Social Security Act during the New Deal (Schlabach 1969). The second group, including Wesley Mitchell and others associated with the National Bureau of Economic Research (NBER), were involved with Herbert Hoover's technocratic, but largely corporatist, attempt in the 1920s to eliminate waste from industry, improve business management, develop economic information to provide for some indicative planning, and to promote the counter cyclical phasing of business investment and public works programs (Alchon 1985; Barber 1985). The third group, developing from the second, but significantly more statist in orientation, included Rexford G. Tugwell, Mordecai Ezekiel, and Gardiner Means who were the central figures associated with the planning or structuralist approach that had some influence

during the first phase of the New Deal (Hawley 1966; Barber 1996). These planners pushed for a joint program of recovery and reform and favoured some type of direct government planning and intervention in the economy in order to increase purchasing power, allocate investment, counteract the concentration of economic power, and correct for what they saw as various other failings of the market system. Of course, each of these groups interacted significantly with each other.

In the period from the end of the First World War through to the mid 1930s, however, many of the attempts to further develop regulation and intervention in the economy ran into particular problems in the courts. Legislation was frequently struck down or circumscribed by court decisions and interpretations. Legislation involving minimum wages, regulation of hours of work, regulation of prices, workmen's compensation, and unemployment insurance all ran into difficulty. It was not until 1932 that members of the Wisconsin group (Elizabeth Brandeis, Paul Raushenbush, and Harold Groves)¹ managed to find a form of unemployment compensation bill that could both pass the state legislature and withstand court challenge.² For reform minded economists interested in increased social control a central problem was how to write legislation in a way that would be likely to be upheld by the courts, and this in turn was responsible for the very substantial interest in law and economics displayed by many members of the institutionalist group.³ As is well known, this issue came to a head during the New Deal. In 1935 the Supreme Court declared the system of industrial codes of the National Recovery Administration unconstitutional, and the same fate befell the Guffey Coal Act and some of the key components of the Agricultural Adjustment Act in 1936. After Roosevelt's re-election and threat to pack the Supreme Court, the Court did uphold the constitutionality of the Wagner Act and the Social Security Act, but those aspects of the New Deal agenda concerned with recovery from the depression and with the concentration of economic power and restrictive trade practices moved away from planning and towards a combination of fiscal policy with a more aggressive use of the anti-trust laws. The latter gained particular prominence after 1938 and the appointment of Thurman Arnold as Assistant Attorney

General in charge of the Anti-Trust Division (Hawley 1966; Barber 1996).

This context is one within which the ideas and policy involvement of Walton H. Hamilton have particular interest. Hamilton introduced the term *institutional approach* to the economics literature in 1918, and defined it in a way that placed special emphasis on its relevance to the problem of control (Hamilton 1919a). Hamilton's interests spanned mediaeval history, economics, political science, and law. His graduate work was at the University of Michigan where he and his fellow students, Walter Stewart and David Friday, came under the influence of H. C. Adams and Charles Horton Cooley. He then taught briefly at the University of Chicago, taught at Amherst College from 1915 until 1923, headed the experimental Robert Brookings Graduate School of Economics and Government between 1923 and 1928, and then moved to Yale Law School where he remained until 1948. In all of his teaching he stressed a problem centered approach and a creative search for programs of control (Rutherford 2003). But although Hamilton was a central figure within interwar institutionalist movement, his policy ideas cannot be neatly contained within the categories outlined above.

Hamilton was a member of the American Association of Labor Legislation, a supporter of workers education, and a keen student of the labor problem. During 1918 he worked with the War Labor Policies Board (headed by Felix Frankfurter) as an economic expert dealing mainly with reconstruction issues. In 1923 he wrote a book entitled *The Control of Wages* (Hamilton and May 1923), concerned specifically with the problem of increasing wages. This interest in labor problems continued and in 1935 Hamilton served as US representative to the meeting of the International Labour Organization (ILO) in Geneva (the first occasion the US was officially represented). Outside of labor issues, Hamilton was a member of the 1926 *Committee of Five* established to study the problem of the costs of medical care, and of the subsequent *Committee on the Costs of Medical Care (CCMC)* which functioned between and 1927 and 1932. Hamilton also had an interest in the particular problems of the bituminous coal industry and in two books he and his Brookings colleague, Helen R. Wright, analysed

the problems of the industry and made proposals for substantial reform (Hamilton and Wright 1925;1928). The soft coal industry was an industry much studied and discussed, and Hamilton remained concerned with the problems of the coal industry through to the early 1940s.

At Brookings and Yale Hamilton developed his interest in law and economics in the form of courses dealing in detail with Supreme Court decisions and the judicial control of industry. Hamilton was a legal realist, opposed to legal formalisms, and became a powerful critic of the more conservative of the Supreme Court Justices who sought to interpret the constitution in ways limiting to social and economic legislation. Several of his students wrote on similar issues in law journals and in books, for example Dexter Keezer and Stacy May's Brookings doctoral thesis *The Public Control of Business* (1930).

A number of Hamilton students played prominent parts in the New Deal, particularly Mordecai Ezekiel (Economic Advisor to the Secretary of Agriculture), Isador Lubin (Commissioner of Labor Statistics), Winfield Reifler (Economic Advisor to the Executive Council), Willard Thorp (Director of the Bureau of Foreign and Domestic Commerce) and George Galloway (Assistant Deputy Administrator NRA). Before becoming Commissioner of Labor Statistics, Lubin worked closely with Senator Wagner on labor legislation. Ezekiel and Galloway were among the New Deal planners, although Ezekiel later became a supporter of more Keynesian types of expenditure policy (Barber 1996, pp.126-128). Ezekiel, Lubin, and Thorp were all members of the Industrial Committee of the National Resources Committee (along with Gardiner Means, Laughlin Currie and others). Other Brookings students and colleagues such as Paul Homan, George Terborgh, and Leverett Lyon were much involved in the (critical) analysis of the NRA codes for the Brookings Institution (for example Lyon et al. 1935).

Hamilton himself joined the NRA in 1933 as a member of the Consumers Advisory Board (CAB). Other social scientists who were members of the CAB at various times included William Ogburn, Dexter Keezer, Robert Lynd, Gardiner Means, and George Stocking (Campbell 1940; Donohue

2003, pp.226-229). With the successive changes to the organization of the NRA Hamilton became Chairman of the Advisory Council of the NRA and then a member of the National Industrial Recovery Board. The internal debates over the NRA codes and price policy led, in 1934, to the formation of a Cabinet Committee on Price Policy (which included Lubin as Chairman, Means, Thorp, and Leon Henderson). Hamilton was appointed as Director of Studies, and the 1938 book, *Price and Price Policies* (Hamilton and Associates 1938) contains a selection of these price studies. In July 1935 he was appointed as Advisor on Consumers Problems and Director of the Consumers Division of the NRA. In this capacity he was also a member of the National Emergency Council. His positions in the NRA also led to Hamilton being appointed a member of the Technical Board of the Committee on Economic Security, and late in 1935 he was appointed by John G. Winant, the first Chairman of the Social Security Board, as Director of the Division of Economic Research of the Social Security Board, his mandate being to assemble the research staff. Ewan Clague replaced Hamilton in this position in 1936. Later, from 1938 to 1945, Hamilton became Special Assistant to the Attorney General, working closely with his former Yale colleague Thurman Arnold on issues of anti-trust and patents. Hamilton wrote two studies for the Temporary National Economic Committee (TNEC), *Antitrust in Action* (Hamilton and Till 1940a) and *Patents and Free Enterprise* (Hamilton 1941a). Hamilton's involvement with the New Deal thus spanned many of its different aspects and manifestations. Afterwards, he continued to write extensively on issues of trade practice, anti-trust, patents, judicial decision making, and the ongoing, and ever changing, problem of the control of industry. In 1948 he retired from Yale and joined the Washington law firm of Arnold, Fortas, and Porter.

2. Hamilton's Institutionalism

Hamilton's particular version of the institutional approach to economics was one that was highly problem centred and consistently stressed the need to develop new programs of control. In all of

the educational programs he was involved with his aim was to teach the art of handling problems and to produce people who could make contributions to an intelligent direction of social change (Hamilton 1926a). In this, he would start with an issue or a problem, search for the information and tools to approach that problem with little regard to conventional disciplinary boundaries, and be open and creative in the search for solutions (Rutherford 2003). Hamilton, however, did more than just try to teach this art of handling problems, he also attempted to put it into practice throughout his own work.

In his original manifesto for an institutional economics perhaps the most central of Hamilton's arguments is that economics should be relevant to the modern problem of control (Hamilton 1919a, p. 312-313). This modern problem had arisen out of new economic circumstances creating new social and economic problems and a growing demand for regulation. In order to have relevance to this problem of control, economics must relate to changeable elements of life and the agencies through which they are to be directed, in other words to institutional arrangements. Control is exercised by modifying the arrangements which make up our scheme of economic life, but any such control of the development of industrial society is contingent upon a knowledge of the bundle of conventions and arrangements which make it up. The type of knowledge Hamilton considers necessary is of a detailed nature. For example: If one would understand the corporation problem, he must learn the peculiar features of this form of business, the various devices that together make up its organization, and the place which it takes in industrial society (Hamilton 1919a, p. 314). Moreover, institutional arrangements are in a constant process of change both from within and from outside developments (Hamilton 1919a, p. 315).

What is required, then, is to analyse a problem in terms of how the current reality came to be, how it came out of the past, how it is changing, and how that change might be directed so as to better serve the end of human welfare. For Hamilton, institutional economics had as its basis a long term view of development, a control of process, and an instrumental view of society and social institutions. As such, it presented both an invitation to detailed study and an invitation to the formulation of programs

of control (Hamilton Papers, Box J5, Folder 6).

On a more specific level, Hamilton's institutionalism borrows heavily from Thorstein Veblen and Charles H. Cooley. A great deal of what Hamilton taught in his courses at Amherst and Brookings began with a discussion of the development of modern industrialism from the pre-capitalist manorial system. This process included both the development of technology, culminating ultimately in the widespread adoption of large scale machine methods of production, and a complex of institutional developments relating to property and contract, the rise of markets, the adoption of pecuniary goals and incentives, the corporate form of organization, and to the rise of what Hamilton called at various times the system of business control or the pecuniary order.⁴ This scheme of control developed out of elements long in existence; the instrumentalities it employs are the corporation, the pecuniary calculus, and profit making. It grew partly out of tradition, partly as a result of conscious policy, but mostly as an unintended consequence of judgments made with other ends in view. The system of business control is dominant, but Hamilton never forgets there are significant areas of economic life controlled by other institutions such as the family, professional organizations that may or may not have entirely adopted the values of business, and, of course, government. Government imposes limitations on almost all forms of industrial activity, and controls some of them quite directly (The Control of Industry, Hamilton Papers, Box J3, Folder 3).

The key issue, of course, is the adequacy of this system of business or pecuniary control. In the economics textbooks it is competition that is supposed to operate to reconcile the individual pursuit of pecuniary gain with community welfare, but Hamilton consistently argues that competitive theory and the policies that it suggests apply only to an economy of petty trade, and thus fail to provide an adequate analytical foundation for the understanding or control of large scale industry and big business. The basis of the competitive system is to be found in two pairs of institutions: private property and contract; and profit making and freedom of a trade:

Yet in no industry is competition as simple, mechanical, or articulate as this. Each of the four institutions is a compound of many usages. The right to property is a bundle of equities, such as a voice in control, an interest in disposition, and a claim to income, which may be put together into many permutations. . . . The right of contract, once thought of as a voluntary agreement between equals, is a changing thing; it has been remade by the rise of the corporation, the coming of business and the growth of large scale production. . . . The profit motive appears in many forms; the corn grower and the automobile manufacturer, the baron of steel and the baronet of coal, may be equally devoted to their own pecuniary interests, but the arts of money making which they practice are very different. All trades at law may be equally open, but in fact they are buttressed about by very different barriers against the intruder (Hamilton 1931a).

For Hamilton the fundamental issue stands out in clear cut relief: there is a lack of harmony between the technology of industry and the form of its organization and control. An economic order in which the productive processes belong to big business and the arrangements for its control to petty trade cannot abide. The task is to devise a scheme adequate to the direction of great industry. In a world of change a society cannot live on a wisdom borrowed from our fathers (Hamilton 1932a, p. 593).

3. Some Proposals for Control, 1918-1932

An important source of Hamilton's early ideas concerning forms of social control was his experience of wartime planning in 1918. Hamilton was employed, along with his friend Harold Moulton, as an economic expert in the War Labor Policies Board working primarily on issues of reconstruction and demobilization. Other friends and colleagues, such as Walter Stewart, worked for Wesley Mitchell in the Prices Section of the War Industries Board, and David Friday worked as a consultant to the

Treasury.

Hamilton's major concern was to make the transition to a peacetime economy while maintaining output, employment, and the gains made by labor during the war. To this end he favored the maintenance of some of the wartime planning apparatus in order to control the pace of demobilization and displacement of labor out of war industries. More generally, Hamilton, as many others, was struck by the substantial increase in output generated during the war. Full use of resources had meant an increase in output of some 25-30% over pre-war levels, and this despite the diversion of manpower to war. Such observations seemed to confirm the waste, in terms of loss of potential output, generated by the unplanned system of private business enterprise (Friday 1919; Chase 1925, pp. 3-12), and held out the possibility of providing a modest standard of living for all if only such wastes could be eliminated.

Hamilton proposed the formation of a national economic council or commission which could formulate programs related to the transition to the peacetime economy and make recommendations to government. The commission would consist of prominent people representative of different industries and interests, and could call on the best scientific research (Dorfman 1974, pp. 8-9).⁵ The problems they would face would include how the industrial system might be organized to provide full employment of resources, the terms on which labor and capital should combine their efforts in supplying society with the comforts and vanities of life, and the use that society should make of the surplus of wealth which it produces over and above the necessities of its members. Not just the quantity of output is of concern, but also the kind of goods produced, the uses to which they are put, and their distribution. These problems cannot be solved, even for the moment, by a return to the pre-war scheme of things, they require the conscious guidance of social and industrial development (Hamilton 1919b, pp. 303-305).

Of course, Hamilton was disappointed in his expectations, and the wartime planning system was rapidly dismantled. This Hamilton criticized as an unfortunate lapse to laissez-faire, arguing that ordinary business practice could not be depended on either to secure full employment of productive

resources or to secure within the demobilization period a proper distribution of men and materials among different industries (Hamilton 1919d).

Hamilton's interest in labor issues continued. He, along with his student Stacy May, became particularly interested in worker's education. Both were involved in the development of Brookwood Labor College (established in 1921), Hamilton serving as a member of its Educational Committee.⁶ In Hamilton's view a labor college could do much to stimulate and direct the labor movement. It must be established in the belief that our economic order and its institutions are mere instruments; that at present they very imperfectly serve their purpose; and that, through the intelligent effort of the laborers of the country a new economic and social order can be eventually realized (Hamilton 1924). Hamilton also believed the College should possess a research department to investigate and appraise programs of reform and to draft legislative bills and briefs.

Hamilton was a critic of the craft unionism of Samuel Gompers and of the American Federation of Labor. In a review of Gompers' essays he argues that Gompers provided no overall vision or program for labor. Gompers' focus on the acquisitive efficiency of the business agent of the craft union resulted in a rejection of both industrial unionism and political action and left labor without the weapons to attack the larger issues upon which the welfare of labor depends. Gompers' work provides not a single constructive suggestion for raising the real wages of the whole group of industrial laborers, nor even the semblance of an articulate plan for fighting unemployment (Hamilton 1921). Shortly thereafter, Hamilton himself sought to provide such constructive suggestions for the raising of the real wages of labor, first in a sketch of a theory of the rate of wages (Hamilton 1922), and then in a book co-authored with Stacy May: *The Control of Wages* (1923).

As the title suggests, *The Control of Wages* is addressed to the problem of controlling wages in the sense of increasing the regularity of employment and of raising real wages in order to make wages as nearly adequate as may be. It is presented as the next step in the general campaign for the elevation

of wages (Hamilton and May 1923, pp. 18-19). As might be expected the argument places considerable stress on raising the productivity of labor, improving management, introducing new technology and equipment, improving organization and eliminating various wastes. There is, however, an equal emphasis on the improvement of the economic arts, in particular policies to reduce business cycles and unemployment, including the introduction of a tax assessed against irregularities in the volume of employment, with the receipts disbursed as unemployment benefits (Hamilton and May 1923, p. 66).⁷ Additionally, Hamilton offers what he calls a plan for the eventual liquidation of ownership in natural elements, intangible assets, and other corporate property. The plan involves recalling all outstanding securities and replacing them with terminable annuities (of, say, fifty years) of equal value. This effectively buys out all the returns due to ownership fifty or more years from now (Hamilton and May 1923, p. 68-70), providing for future increases in wages.⁸ Other institutional adjustments Hamilton and May discuss include collective marketing, collective research organizations, and the economies that might be generated through various schemes for the unification of industry. This last possibility is discussed in tentative terms, pointing out the problems of private monopoly power, the unsettled state of the debate over the nationalization of industries, and the preliminary nature of various other proposals for the unification of industry under the control of management representatives and workers, of workers and consumers, or of workers alone. Hamilton calls the last type of scheme of control both fascinating and promising as it safeguards the interests of the public against private exploitation while also avoiding the deadly sin of bureaucracy (Hamilton and May 1923, pp. 75-79).

The gains achieved in the ways outlined above need to be secured by the broad mass of labor and not just by some groups within the labor movement. Hamilton advocates collective bargaining by industrial unions and stresses the importance of spreading the gains achieved in the form of lower prices rather than as increased nominal wages. Unions need to give constant attention to their interests as consumers (Hamilton and May 1923, p. 90). Hamilton also discusses the importance of a stabilized

dollar to the worker and consumer.

A last important element in the real wage is the non-monetary benefit provided by employers and the public goods provided by the state. On the latter, Hamilton notes the extension of the role of the state in areas such as compensation for industrial accident, and the provision of an elaborate health service, educational institutions, and facilities for recreation. In the very near future the state may provide some sort of guarantee of regular employment (Hamilton and May 1923, p. 100).

Some of the key themes in Hamilton's work on wages reappear in his later investigation of and recommendations for the coal industry. Coal was one of the areas of research strongly emphasized in the Institute of Economics (which later became part of the Brookings Institution), founded in Washington DC in 1922 and headed by Harold Moulton.⁹ In 1923 Hamilton was appointed as head of the companion Robert Bookings Graduate School of Economics and Government. Helen R. Wright also taught at the School and she and Hamilton wrote two books on the bituminous coal industry (Hamilton and Wright 1925; 1928). Hamilton was already very familiar with the findings of the British Coal Industry Commission of 1919 (Hamilton 1922, p. 585).

Hamilton and Wright's first book characterized the bituminous coal industry as beset by persistent excess capacity, irregular operation, low wages, unsafe working conditions, strikes and labor unrest. This state of affairs is contrasted with that suggested by the theory of competitive markets. The institutions of competitive free enterprise are supposed to ensure efficient operation, protection of the consumer, and conditions of work as good as circumstances will permit (Hamilton 1926b). Instead none of these conditions pertain. The basic problem, according to Hamilton, is one of technological advance increasing capacity and creating a cost structure with high overheads and decreasing costs. Under these conditions competition leads to price cutting, low profits and low wages. This is combined with uncoordinated investment decisions and bankruptcy laws that allow for reorganizations that retain the mining capacity in the industry.¹⁰ The industry is characterized more by chaos than by an orderly

state of normal profits and capacity matched to demand. The economic organization of the industry is backward; there is a lag between the technical development of the industry and its economic organization; the scheme of arrangements surrounding the production of coal fails to adequately serve the ends of consumers or workers; it is a system within which each individual tries to do good, but evil comes of it (Hamilton 1926, pp. 225-226; Hamilton and Wright 1925, p. 256; Hamilton 1928a).¹¹

Hamilton and Wright's second book (Hamilton and Wright 1928) put forward a controversial proposal for the reorganization of the industry. Indeed, the book contains two dissenting opinions written by other members of the Institute of Economics, something quite unique. The proposal put forward is a modified version of one made by Henry Clay in 1919 for the British coal industry, and Clay's original memoranda are contained in an appendix to the book.¹² In the form given it by Hamilton and Wright, the proposal calls for the merger of all coal companies into a single enterprise of a corporate form but under the joint control of workers and consumers. The right to income from investment and the right to a voice in control are to be separated.

In the new company the existing ownership equities are to be exchanged by an issue of debentures upon the basis of an equivalence of values, the interest payments on these debentures being a first charge on the new company. Control is to be given by a small number of shares of common stock, which entitle the various classes of holders to participate in various ways in the direction of the enterprise. These shares pay no dividends. 110 shares of class A stock are to be issued. Each share gives a right to one vote in the election of a voting member of the board. These shares are to be defined as belonging to specific blocks of eleven shares each, which represent the right to fill a specified seat at the board. As far as possible groups with similar interests are to be allocated shares in the same block so that different interests are properly represented. 55 shares are to be allocated to workers in the form of a general association of which every employee of the company is to be a member, and 55 shares go to consumers in the form of trade associations or other representative bodies. These shares are to be

divided among consumers in proportion to their consumption. As domestic consumers have no representative body their shares will be held in trust by the President of the United States. In addition 44 shares of class B stock are to be issued, again in blocks of eleven, but this time each block represents a non-voting seat on the board. These shares are to be distributed to administrative and technical staff, their representatives on the board to provide advice, information, and criticism. The board is thus fourteen members (ten voting) plus a non-voting Chairman to be selected from without (Hamilton and Wright 1928, pp. 166-173).

Hamilton was clearly very pleased with his proposal and it is mentioned as an example of an inventive scheme of control in a number of his courses and published papers.¹³ His suggestions do not seem to have had the impact he hoped for, but Hamilton was involved in discussions concerning the regulation of the coal industry, both immediately before and during the New Deal, and it is quite likely that his involvement did result in the specific inclusion of representation of the consumer interest, which is a notable feature of the 1935 Bituminous Coal Conservation Act (Guffey Coal Act).¹⁴

Hamilton's proposals for the unification of the coal industry would, of course, run afoul of the anti-trust laws, and Hamilton was an active participant in the debates over anti-trust which developed in the late 1920s and early 30s out of the 1926 proposals of the Committee on Revision of the Anti-Trust Laws of the American Bar Association, and the Swope plan of 1931 with its suggestion for industrial control and price fixing by trade associations (Fetter 1932; Barber 1985, p.121; Mayhew 1998, pp. 193-195). In this period of his thinking Hamilton was 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 stave 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 points 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). But, for Hamilton, the most fundamental problem is that in many industries, such as bituminous coal, lack of competition is not the problem, and an enforced competition would simply lead to more waste and disorder. Isolated judgments by the executives of rival businesses do not necessarily exercise plant waste, eliminate surplus capacity, and articulate neat establishments into an orderly industry. The tyranny of overhead costs and excess capacity can lead to an overdone competition with unprofitable prices, low wages, and irregular production (Hamilton 1932c, p. 167). Nevertheless, the danger of monopoly control means that the anti-trust acts cannot simply be repealed, they must be replaced by some other form of control.

Hamilton suggests that order might be achieved along three lines. First, competition could be retained, but regulated to escape the evils which attend it. The plane of competition could be established by law, and new devices invented to take up the shock of competition. A body could be established to pass in advance upon the practices of trade. Second, some industries could be recognized as monopolistic in nature and regulated through commissions. Such commissions are supposed to protect the public interest, and Hamilton notes the popularity of this form of regulation. All the same, he argues that the dual control inherent in commissions means in effect that private interests are able to do as they please, subject to the delayed approval or disapproval of the commission, and disagreements are likely to end up in court. Third, there is at least a possibility of contriving for certain industries a control from within, but it is essential here that control of the industry not be limited to those who make profits from it, but also include labor and consumer interests (Hamilton 1932b, pp.11-12). He suggests

no single solution for all industries. Industries vary in many ways and schemes of control need to be tailored to the conditions of that industry. In all his writing on this subject Hamilton rejects panaceas and creeds. What is needed is an intellectual and experimental attitude (Hamilton 1932b, p. 21).

This attitude is also apparent in Hamilton's work on the provision of medical care. Interest in medical care and health insurance had a considerable history among American progressives. Indeed, the American Association for Labor Legislation had begun studying compulsory health insurance (along the lines of European schemes) as early as 1912, and by 1915 was actively promoting a model bill (Chasse 1994; Ross 2002). Despite initial support, the efforts of the AALL ultimately failed, but the pursuit of the issue was revived in the late 1920s due to increasing concern over the rising costs of medical care costs which were leaving even those of reasonable means unable to pay for medical services. Technical developments in medicine, advances in surgery, and higher physician's fees were all partly responsible. In 1926 a small group, including Walton Hamilton, was formed to discuss a possible reorganization of medicine. Out of this came the Committee on the Costs of Medical Care which set about a five year study of the economics of health care. Hamilton was an important member of this Committee.¹⁵

The final report of the Committee was issued in 1932. It contained a set of majority recommendation, two sets of minority recommendations, and two individual statements of dissent, one written by Hamilton. The majority report favored group practice and the extension of basic public health services to the whole population, but while it recommended group payment schemes of various possible types, it stopped short of compulsory health insurance. The first minority report opposed group practice and any government involvement other than in the care of the indigent, and even opposed voluntary insurance unless professionally controlled. This was the position adopted by the American Medical Association (AMA). Hamilton occupied the other extreme of the opinions expressed. For him, the majority report failed to go far enough and should have made a clear cut recommendation for compulsory

medical insurance¹⁶ and outlined a well defined organizational alternative. As it stood the majority report failed to keep the distinction between the technology of medicine and its organization clearly in mind, failed to place the problem in its proper social and historical setting, and failed to realize the essentially instrumental character of the agencies which we employ toward health (Hamilton 1932d, p.190).

What Hamilton saw in the case of medicine was an older ideal of professional practice becoming converted into a system of individual business competition (Hamilton 1932d, p. 193). But in medicine the market mechanism suffers from a number of deficiencies. The patient has insufficient knowledge to judge the quality of the service given; medical charges can vary substantially between doctors and are not usually known in advance; medical costs can be high, come unexpectedly, and be difficult or impossible to meet out of current income; and the incentives of money making may be inconsistent with professional standards and ethics. At the same time the technical advances in medicine were making medicine an increasingly complex network of interlocking services (Hamilton 1932d, pp. 193-194; Hamilton 1930a). Hamilton's solution was compulsory insurance, group practice, and the removal of the aims and the arrangements for profit making from the practice of medicine (Hamilton 1932d, p. 195). This last was to be accomplished by making each group a corporation with a board of trustees made up of lay people, no one of whom should have any commercial interest in the venture. The professional staff should be paid by salary and promotion based on medical competence. The corporation could set aside reserves, establish pension funds, but it should not pay out dividends or engage in profit making. In its larger outlines this scheme of organization is not a novelty; it is adapted to a profession engaged in public service; its value has been attested by its employment in education (Hamilton 1932d, p. 197). The involvement of the state must be invoked to make membership compulsory, to insure the collection of the premiums or taxes involved, and to make financial redistributions between centers if required, but it is to be hoped that the concern of the state in the venture can be limited to a use of its power of compulsion in financial matters (Hamilton 1932d, p. 198).

The majority recommendations of the CCMC failed to withstand the organized opposition of the AMA, and Hamilton's more radical proposals fared even worse. Hamilton did remain involved in health issues and compulsory health insurance was discussed for inclusion in the Social Security Act. Continued opposition from the medical profession, however, resulted in Edwin Witte removing medical insurance from the bill, in order not to endanger the main provisions with respect to unemployment insurance and old age pensions (Schlabach 1969, p. 114; Hirshfeld 1970, pp 45-59).¹⁷

4. The Judicial Control of Industry

Hamilton's interests had always spanned the disciplines of law and economics, but in the last two years he was the Brookings Graduate School and then during his long tenure at Yale Law School he very much refined and developed his interest. One of the first signs of this is to be found in the 1926 and 1927 outlines for *The Place of the United States Supreme Court in the Economic Order*, which Hamilton taught at Brookings. This course subsequently became called *The Judicial Control of Industry* and then *The Public Control of Business* and was taught first at Brookings and then at Yale (Hamilton Papers Box J4, Folder 1 and J45, Folder 6).¹⁸ The course outlines consist of long lists of court cases. In the 1927 outline these are arranged under three major headings: *The Competitive System*; *The Regulation of Industries*; and *Law and Order*. In the first category the issues dealt with include restraint of trade, the plane of competition, price fixing and price maintenance, the nature of the corporation, freedom of a trade, and the limits of contract. The second section includes cases dealing with consumer protection, hours of labor, conservation of natural resources, conservation of human resources, taxation, public expenditure, industry affected by a public interest, banking regulation, railroads, valuation of public utilities, labour unions, prohibition of industries, state industry, state or federal government, and problems in regulation. The last section contains cases dealing with the rights of individuals, rights of the accused, power of government, state and federal government, status of the Indian, civil rights, and a

bundle of puzzles. The 1928 outline indicates some rearrangement but also considerable expansion with previous sections being broken up into several parts. In 1928 Hamilton began publishing regularly in law journals and quickly established a reputation for penetrating critiques of particular Supreme Court decisions and fascinating historical analyses of the changing judicial interpretation of key legal terms and doctrines.

Hamilton's particular concern was with the Court interpreting the Constitution in ways overly limiting to the exercise of the police power of the state. The underlying question is 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 1928b; 1936b). Hamilton's particular target for criticism was Justice Sutherland who often spoke for the conservative majority of the Court,¹⁹ while his sympathies were more with the opinions of the liberal contingent of Justices Holmes, Stone, Brandeis, and Cardozo (after he replaced Holmes).²⁰ 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. 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 1936b; Hamilton and Adair 1937).

A nice example of the type of critical analysis of judicial decisions Hamilton provides is his article *The Regulation of Employment Agencies* (Hamilton 1928b). 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 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 1928b, 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 1928b, p. 233-234).²¹

Analysis such as this led Hamilton to enquire 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 1930b), and the due process and equal protection clauses of the 14th Amendment (Hamilton 1938a).²² 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 1930b, 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 1930b, p. 1099).²³ This 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 1930b, 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 slaughtermen attempted to argue that a property the right to follow their trade had been removed without due process.²⁴ 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 by an 1886 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). In the 1890s rulings on the ability of the Railroad Commission to set rates 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 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, p. 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).

5. The New Deal, Consumers, and Price Policy

The coming of the Depression, its persistence, and the obvious dislocation of the economic order, only confirmed to Hamilton the pressing need for new forms of control. In a 1931 discussion of ways out he emphasized the paradox of a vast capacity to produce in excess of current production together with and an equally large capacity to use in excess of current consumption, and argued for some form of centralized control of the conditions upon which the general welfare of the people in an industry rests. The solution lay not in individualism, or any other ism, but in a system where decentralized decision making in business was combined with a social control that recognized the public interest in the performance of business and industry (Hamilton 1931e).

Two years later, and exactly as the National Industrial Recovery Act (NIRA) was being passed, Hamilton reviewed Rexford Tugwell's plea for a more planned economy, *The Industrial Discipline and the Governmental Arts* (Hamilton 1933b; Tugwell 1933). As Hamilton points out, the book lacks a detailed discussion of devices for control, but Tugwell's notions of the governmental arts certainly include the encouragement of industrial integration (to increase efficiency), control over the allocation of capital, and price controls to protect consumers. Despite the lack of detail, Hamilton welcomes the book as an opportune credo for a grand adventure into social experimentation. It is a philosophy or a charter for a purposive and orderly industrial system, an exposition of the storm centres in our industrial culture, a revelation of the potentialities in our social resources and the grandest sort of sermon to clear the way for the [N]ational Industrial Recovery Act (Hamilton 1933b, p. 185).

The National Industrial Recovery Act (NIRA) was passed in the summer of 1933, along with

much other legislation. Title I of the NIRA declared a national emergency and stated the policy of Congress to promote the organization of industry for the purpose of co-operative action among trade groups, to induce and maintain united action of labor and management, to eliminate unfair competitive practices, to promote the full use of resources, to increase consumption by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and to rehabilitate industry and conserve natural resources (Lyon et al. 1935, pp. 15-16). The act established the National Recovery Administration (NRA) which was to be the vehicle to administer this policy through a set of industrial codes, under which an industry agreeing to minimum wages and certain other labor conditions could establish trade practices to eliminate unfair competition and receive immunity from prosecution under the anti-trust laws.

The original administrative structure of the NRA created three advisory boards, an Industrial Advisory Board, a Labor Advisory Board, and a Consumers Advisory Board to advise the Recovery Administrator (General H. Johnson) on the codes. Even at the time it was recognized that the CAB worked under the handicap of having no organized pressure group behind it. Moreover, General Johnson tended to identify business prosperity with the public interest, so that in the early days of the NRA there was a general impatience with consumer interruption and a tendency to see the CAB as an annoying and unnecessary fifth wheel calculated to slow up the recovery procession (Lyon et al. 1935, pp. 123-129; Campbell 1940, p. 31, Lynd 1934, p. 221). Nevertheless, it was also recognized that the explicit inclusion of consumer representation in the NRA (and even more so in the AAA) represented a significant development in the area of business regulation.²⁵ As stated by Robert Lynd: The recovery machinery officially recognizes for the first time that the consumer is sitting in on the game, and that the rules and procedures built up over decades of federal coaching to help business do not automatically afford equal aid to the consumer across the table (Lynd 1934, p. 220).

The first Executive Director of the CAB was William Ogburn, but he resigned in August of 1933

and was replaced by Dexter Keezer. Keezer recruited Walton Hamilton to the CAB in October 1933. The CAB also appointed Corwin Edwards to head up a Price Section to undertake research on prices and price policies, Robert Brady to head up a Standards Unit which attempted to develop standard grades and other quality standards and have them established in the codes, and Paul Douglas to head a Bureau of Economic Education which was to work on establishing consumers councils to provide a consumer organization.²⁶ The overall concern of the CAB, however, was that the code making machinery was being used to advance business interests by establishing minimum prices or some degree of price fixing, effectively raising prices at the expense of consumers. As argued by Gardiner Means the codes were being used to raise prices to a point where they yield a profit which could be justified only on a very much larger volume of business (Means 1934). The CAB's strategy in response was to undertake as much careful study of proposed codes as they could and to present well documented arguments against provisions they felt were unreasonable. A model for these studies was provided by the submission made late in 1933 objecting to the price provisions for the petroleum industry. This submission was produced by the Price Section together with Board members George Stocking and Walton Hamilton. Shortly after Hamilton produced a published version (Hamilton 1934).

The main arguments concerning the petroleum code were that it proposed to establish prices much higher than those then existing with serious adverse consequences for consumer purchasing power. Control of output was suggested as an alternative and preferable way to bring some order into the industry, provided that the control was supervised by all the interests concerned and not just by producers. The brief also contained a more general argument in which Hamilton discussed the difficulties in transferring control of prices to an administrative board. In this part it becomes clear that Hamilton's reservations about the commission form of control had grown. He argues that commissions do not contain real consumer representation. The personnel with authority are government appointees and all of the indirection, exigency and pressure which we associate with the word politics find

expression in appointments and in judgment:

The powers possessed by a commission to create or destroy property values and to divert income from one economic group to another make a commission a prize worthy of political capture. The system of regulation has put public utilities into politics; and a small compact group is usually, if not always, more powerful than a larger and unorganized host (Hamilton 1934, p. 78).

Thus, any board or agency set up to control prices must have proper representation of consumers and not be dominated by the producer interest. It must also have available to it objectively determined (by independent technical staff) information concerning the necessary social costs of production that the prices charged would have to cover. In Hamilton's mind this involved not merely an accounting of actual business costs, but a social accounting based on benchmark operating standards and standards of living (Hamilton 1934, p. 96).

The early months of 1934 saw a large amount of criticism of the NRA codes from sources both inside and outside of the NRA.²⁷ Two results of this debate are relevant here. In May of 1934 an Advisory Council of the NRA was established to reconcile differences of opinion between the three advisory boards. Walton Hamilton was the first Chairman of this Council and appears to have created a less charged atmosphere within which proposals could be discussed and such evidence as was available assessed (Campbell 1940, p. 75). Given this, and the equal representation given to the three boards, the consumer point of view began to fair somewhat better. At the same time, and apparently in response to George Terborgh's critical analysis *Price Control Devices in NRA Codes* (Terborgh 1934)²⁸ a Cabinet Committee on Price Policy was established. Isador Lubin, then Commissioner of Labor Statistics, became the Chair of this committee, and Walton Hamilton was placed in charge of a study into prices

and price policies. This study became Hamilton's greatest interest, and he clearly hoped much would come of it.

The study as planned contained a number of lines of investigation: first a discussion of the price system in genetic, descriptive, and analytical terms with the ultimate goal of outlining the structure of the price system and the adequacy with which it performs its function; second, a quantitative study of the behavior of prices under the NRA and a comparison of code and pre-code prices; third a series of case studies of price formation in particular industries; and fourth a series of studies on particular policy problems including a study of the NRA codes, the cost formula for price, the general problems of price control, and the operation of the anti-trust laws. The case studies formed the core of the project and were presented as attempts to discern the sources of order, and to diagnose the disorders, of various industries. The industries to be studied were chosen on the basis of availability of data, public interest in the industry, and the contribution that the study would make to a general account of the price system. In some places Hamilton suggests that the industries were chosen as representing items important in determining the standard of living (Hamilton 1936a). Included were automobiles, tires, gasoline, cottonseed, milk, whiskey, women's dresses, paper, wastepaper, razor blades, cigarettes, ice, and several others.²⁹ The goal was to complete a minimum of 20 case studies in order to secure a picture of the broader aspects of the price system and to reveal those factors which any price policy on the part of the Federal Government must take into consideration (Walton Hamilton to Isador Lubin, October 8, 1934, Leon Henderson Papers, Series: NRA Papers, Folder: Price, Cabinet Committee; Minutes of Meeting of Committee on Prices, October 22, 1934, Gardiner Means Papers, Series I, Folder: Price Fixing). This plan was never to be carried out entirely as the Supreme Court decision declaring the code system unconstitutional came down in May of 1935, resulting in the fairly rapid demise of the whole NRA organization. The price studies were first transferred to the Consumers Division of the NRA (which also absorbed the Consumers Advisory Board and the Consumers Division of the National

Emergency Council). Hamilton was named Adviser on Consumers Problems and Director of the Consumers Division,³⁰ but by the end of 1935 Hamilton had left to for the Division of Economic Research of the Social Security Board, the Consumers Division had been transferred to the Department of Labor, and in February of 1936 was reduced to the Consumers Project within the Department of Labor and funded by the Works Progress Administration. Clarence Ayres took over the Consumers Project, and continued the price studies through to November 1936 when he resigned.³¹

A selection of the price studies (the case studies on automobiles, tires, gasoline, cottonseed, dresses, whiskey, and milk), together with an introductory and concluding chapter by Hamilton, were eventually published in 1938 (Hamilton and Associates 1938).³² Given the highly concrete nature of these case studies it is hard to summarize them or make generalizations but this was a significant part of Hamilton's point. Here and elsewhere Hamilton repeatedly argues that industries are not alike; they have their own particular sets of practices and conventions that have grown up within the trade; they differ in scale of enterprise and in the number of competitors; in the structure of costs and the existence of joint products; in the arrangements made with suppliers and distributors; in the impacts of new technology or of new regulations; in advertising and packaging; and in the ability, and the exact methods used, to confine or limit competition. Each industry's particular pattern is also undergoing continuous change (Hamilton and Associates 1938; Hamilton 1940b). There is no sharp line of demarcation between competition and monopoly, nor even a line running from perfect competition through monopolistic competition, oligopoly, duopoly, to pure monopoly on which particular cases may be set down. To do so is to make hypothetical economic phenomena the subject of mathematical exercises. The trick may be pulled off; but the result is not a picture of the pragmatic reality called industry (Hamilton and Associates 1938, p. 23).³³

For Hamilton, to understand the variety of industrial practice, to get behind the abstractions of demand, supply, and to come to understand why a price is what it is could serve two important purposes.

The first has to do with understanding what, if any, barriers stand in the way of improving the American standard of life: of bringing the good things of life within the reach of the great mass of people (Hamilton 1936a, p 7). Here, the point of attack of the price studies is what lies back of a price to make it high or low to restrict or enlarge supply to bring it within the reach of the few or the many. They are thus part of a campaign against waste, disorder, and restriction, and for greater abundance and higher living standards (Hamilton 1936a, p. 9). This is entirely of a piece with Hamilton's earlier work on the costs of medical care. The second function has to do with the design of business regulation and programs for control. Business interests and the mechanism of price do not necessarily lead to an industry functioning in a way compatible with the public interest, but any system of control has to be sensitive to particulars:

The road towards industrial government runs by way of authority and the particular. A proper freedom of collective action, within strict limits of public interest, must be accorded the agencies of business. The state in formulating public policy, must have a wide discretion, and statutes should be written in the broadest of terms. But a way of order and a program of control can be crowded into no set formula. The general standards of industrial code and legislative standard must be adapted to the shifting circumstances of particular industries. Since usage is forever on the make the exercise of authority must be grounded in a continuing exploration of industrial arrangements (Hamilton and Associates 1938, p. 555).

6. The NRA and the Supreme Court

Hamilton's involvement with the CAB, his chairmanship of the Advisory Board, and his membership of the National Industrial Recovery Board brought him into close contact with the processes

of code making under the NRA. Hamilton gave testimony to the Senate hearings in 1935 considering the continuation of the NRA. Apart from public utilities, Hamilton divided industries into those where competition works not perfectly but at least reasonably well, those where competition is underdone due to restrictive practices of some kind, and those where competition is overdone, such as in coal and textiles. The last two cases represent areas for intervention although the problems involved are quite distinct (Hamilton 1935c, p. 2047).

It is clear that Hamilton favored the retention of the NRA although with some modifications. Hamilton wished to see a clear statement that all industry is affected by a public interest, to give the State the right to break in whenever the State decides that the conduct of the industry is not serving the interests of all who have a stake in it (Hamilton 1935c, p. 2053); a clear positive affirmation that the codes must be constructed with a view to preventing monopoly, and not merely that they should not encourage monopoly; and that all interest groups, including consumers and workers, have input into the code making. In terms of the administration of codes, if the code controls prices or production then the code authority must include more than the business interest (Hamilton 1935c, pp. 2046-2050). If the code involves a public interest then public officials should be involved in its administration; no group should be in the double position of an interested party and a judge of their actions at the same time (Hamilton 1935c, p. 2052). Further, the notion of unfair competition should be broadened to include unethical business practices that might lower the plane of competition, competition that is unfair to labor, and competition that is unfair to the consumer. The provision of information to the code authorities should also be required.

In terms of the anti-trust laws, Hamilton states that he has no quarrel with the ultimate purposes of the acts, but reiterates his view that the mechanism of legal proceeding and criminal prosecution is flawed. The issue is whether we can devise better mechanisms than the Antitrust Act for accomplishing the same purpose (Hamilton 1935c, p. 2057). The anti-trust laws and the Federal Trade Commission

provide only a measure of protection of the public interest. Hamilton argues that it is quite possible through the NRA to add to that another measure of protection and probably a more important measure of protection than has yet been achieved. The antitrust act is only a tentative answer to the problem of the control of industry, it is an instrument, it is a mechanism, and not a final answer to the problem (Hamilton 1935c, p. 2058):

I think the NRA can do a constructive job that the Federal Trade Commission and the Department of Justice cannot do, by devising administrative remedies against monopoly. I think they can also address themselves to the job of trying to find out why various industries are not turning out goods in greater abundance and why the American standard of living is as low as it is. That is a long time job; it is not a matter of panacea; it is a matter of detailed treatment (Hamilton 1935c, p. 2059).

It is no surprise, then, to find Hamilton 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.³⁴ In retrospect Hamilton conceded that the NRA should have begun with key industries such as coal, oil, lumber, and textiles where disorder was notorious. The NRA could have been revised to surrender its control over local industries and had its deficiencies repaired by new legislation (Hamilton and Associates 1938, p. 21).³⁵ 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 with 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, but, as Hamilton argued at length, 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).

In 1937, after Roosevelt's threat to pack the Court but before any change in membership, the Court began a rapid process of reversing its opposition to social legislation. The Social Security and National Labor Relations Acts were upheld and a body of constitutional doctrine, lately overlooked or relegated to dissent, was rediscovered (Hamilton 1938b, p. 19). A replacement Coal Act was passed in 1937 without the labor conditions, and was upheld.³⁶ New membership changed the attitude of the court even further (Hamilton 1941d), but the larger NRA experiment would not be revisited, and Hamilton had already turned elsewhere for other possible instruments of control.

7. Anti-Trust, Patents, and Corporate Control

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),³⁷ 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. For Hamilton, Arnold's approach to anti-trust linked to his own. Hamilton wrote to 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 (Hamilton to Keezer, May 11, 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 (Hamilton to Hugh Kelly, May 11, 1938, Walton Hamilton Papers, Box J22, Folder 2).³⁸

Hamilton's involvement included work on briefs including anti-trust suits brought against the AMA for their actions against experiments in group health (Hamilton 1938d), 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 the first of these studies, and in a related paper (Hamilton and Till 1940b), Hamilton repeats many of the concerns he had expressed before concerning the inappropriate nature of legal proceedings, particularly criminal proceedings, for dealing with matters of trade practice, and the problems of some industries being an overdone competition rather than a lack of it. In such industries where the problem is an overplus of competition as in bituminous coal, women's dresses, shoe making, and automobile dealerships any concerted move against disaster may run afoul of the law (Hamilton and Till 1940a, p. 19). Hamilton 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). This concern was to become increasingly insistent in Hamilton's work in the years after World War II.

The issue of patents and their use in certain industries to maintain privileged market positions came to Hamilton's attention during the price studies. As he continued work on this issue he came to see it as a preeminently 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 an 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). With the American involvement in World War II Hamilton also became concerned over Axis control of patents holding up the delivery of strategic

materials (Hamilton 1943a).

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.³⁹ 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).

In his work in the late 1940s and 1950s Hamilton elaborated on this theme and gave it 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 1949, p. 83; 1957).⁴⁰ The NRA 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 World War II. 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).

All of these problems were compounded by the development of the corporation, its treatment as a natural individual by a series of legal fictions; its internationalization; its ability to create subsidiaries and complex and intricate patterns of control; its ability to choose and change its domicile; and its ability to exist in perpetuity or dissolve itself and reappear under a new name. The elaborate web of fictions 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).

8. Conclusion

Hamilton's career of examination and experiment in control is revealing in many respects. It complicates the picture of the policy positions taken by institutionalists in the inter-war period. The usual picture is to divide institutionalists into those who believed in commissions (mainly the Wisconsin

group) and the planners such as Tugwell and Ezekiel. Bringing Hamilton into this indicates a much greater complexity and diversity of opinion within institutionalism. All the members of the institutionalist group used the rhetoric of social control, but what was meant by that by different people varied significantly.

In Hamilton's case it is clear that he was not a proponent of big government, or of commissions, or of industrial government by trade association. His work on the decisions of the Supreme Court leave no doubt that he disagreed with the interpretation of the Constitution as severely limiting to the exercise of the police power of the state. The state must have the power to govern and to regulate in the public interest. At the same time, his suggestions for the coal industry have no direct role for government in the operation of the industry, he did not favor a British style nationalization, and was concerned about the dead hand of bureaucracy. His proposals for the provision of health services also avoid direct government involvement in the delivery of medical services; the model proposed being based on that of the university. Even in the case of the NRA he was trying to create a flexible form of control with input from industrialists, workers, and consumers, within a framework of public oversight, and not simply a scheme imposed from outside. This was Hamilton's version of industrial self-government. His occasional use of that term led to accusations that he was suggesting a control by business interests alone, but that was never Hamilton's idea. Self government of industry always meant, for Hamilton, the participation of all interests. This notion of representation of interests does provide a commonality between Hamilton and Commons, but Commons' plans for commissions tended to include only business and labor interests, with the public interest represented by academics and not by consumers themselves.

Hamilton's positions during the New Deal serve to break down some of the traditional equivalences drawn between those representing the consumer interest and those promoting anti-trust in place of planning. Hamilton's concern with the representation of the consumer interest were shared by

many planners, notably those involved with the AAA such as Rexford Tugwell (Tugwell 1935).

Hamilton's work also cuts across the more basic distinction usually made between the planners and the anti-trusters. For Hamilton, anti-trust, particularly if reformed, could play a vital role in combatting restraint of trade, but this did not necessarily mean that there was no place for a reformed NRA or a Decree Section of the anti-trust administration given to the task of working out acceptable trade practices in advance, and on the basis of detailed study. Perhaps the most controversial aspect of Hamilton's thinking was his notion of industries such as coal where competition is overdone, and he obviously did not believe that more competition rather than less was the solution for every industry.

Hamilton's work also brings out the experimentalist and instrumentalist aspects of institutionalist policy thinking very well. He was not wedded to particular instruments for policy, and this is really quite unusual. His ends in view always remained the same: how to provide an institutional framework that would lead business to operate in a way consistent with the public interest, and how to provide a higher standard of living and a fuller measure of life to the average citizen. This gives to Hamilton's work a consistent emphasis on improving productive efficiency on the one hand, and the elimination of restrictive trade practices on the other. For Hamilton markets had proved insufficient to properly direct the operation of business to these ends much beyond the stage of small scale production and petty trade. The passage of the anti-trust acts, while based on a faith in competition, were themselves a recognition that the market alone could not ensure the public good, and a judicial oversight of the activities of business was required. Anti-trust had had limited success and did not always result in appropriate policy where technological efficiency demanded larger scale or some broader industrial coordination. The major alternative, regulation by administrative commission, had also been less than entirely successful. Commissions had been captured by the interests they were supposed to be regulating. Many supposed controls such as professional standards, licencing requirements, quality controls, and the like had been turned into sanctions. Patents, too, had been diverted from their proper

function and become a vehicle for restriction rather than for technological advance and dissemination of knowledge. In general the political arts had not kept pace with the development of business and professional practice.

Hamilton must have been one of the first to explicitly discuss the issue of agency capture, and of the tendency of business to turn regulation into a barrier to entry or an aid to price fixing. This is an idea usually associated with more recent Chicago economics,⁴¹ but Hamilton was talking about this problem in 1934 and his criticism of the commission form of organization goes back even further. 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. There is a necessity for the direction of industry toward objectives that serve the general welfare, but until the political arts reach a maturity they do not now possess the question of the maintenance of competition will remain insistent. Where competition needs to be superseded by another method of control the case needs to be made clear. 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. There is no panacea; the only way forward for economic control in the public interest is that of eternal vigilance (Hamilton 1957, pp. 166-168).

Notes

1. It is worth noting here that Paul Rashenshush was a student of Hamilton's at both Amherst and Brookings. Raushenshush married Elizabeth Brandeis, Louis Brandeis' daughter.
2. A key aspect of the 1932 Groves bill was the shift from pooled reserves to a scheme of unemployment compensation with individual employer reserves. This Wisconsin approach to unemployment compensation stressed prevention and the provision of incentives for businesses themselves to stabilize their own employment. The Wisconsin plan became the focus of much disagreement in the debates concerning the Social Security Act (Schlabach 1969).
3. This includes Walton Hamilton, John R. Commons, J. M. Clark, Rexford G. Tugwell, James Bonbright, Robert Hale, and many of Commons' and Hamilton's students.
4. From his notes and teaching materials available in the Hamilton papers, it is clear that Hamilton knew a great deal both about the history of technology and about the history of legal and economic institutions (see Hamilton Papers Box J3, Folder 3; J4, Folder 7; J22, Folder 1; J30, Folder 4).
5. A number of Hamilton's wartime memoranda on reconstruction and demobilization issues are available in the Walton Hamilton File in the Papers of the War Labor Policies Board. See also Hamilton 1919c. Hamilton, in addition, concerned himself with food policy during the war (Hamilton 1918).
6. Other members of the Educational Committee included William Ogburn, Joseph Willits, and Leo Wolman. Stacy May taught workers education classes through Amherst College in 1920-22 and at Brookfield College in 1922-23. May was a student of Hamilton's at Amherst and at Brookings. Another faculty member at Brookfield was David Saposs, a John R. Commons student, who taught there between 1922 and 1933. Bookwood's public support of industrial unionism led to a split with the AFL in 1928. It seems likely that it was through their mutual interest in workers education that Hamilton first came into personal contact with the English economist Henry Clay. Clay visited the US for the first time in the summer of 1921 and taught at the first Summer School for Women Workers in Industry at Bryn Mawr. There is a lengthy dedication to Henry Clay in Hamilton and May (1923).
7. Hamilton does not make it clear whether he is supporting pooled reserves or individual employer reserves, but the emphasis he places on penalizing employers for their particular contribution to unemployment and on the prevention of unemployment are more suggestive of what became the Wisconsin plan rather than the alternative Ohio plan formulated by William Leiserson, based on pooled reserves and insurance against risk principles. See Eisner (1967) and Schlabach (1969).
8. Hamilton mentions that this scheme is to be elaborated in a forthcoming article by himself and Willard L. Thorp entitled *The Liquidation of Ownership* (Hamilton and May 1923, p.180). A search of indexes failed to turn up any such publication.
9. Other books on the Coal industry were produced by the Institute of Economics written by Isador Lubin (1924) and by Lubin and Helen Everett (1927). A US Commission on the coal industry worked between 1922 and 1923. Joseph Willits was a member of this Commission working on industrial relations issues. 1922 was a year of many strikes in the industry.

10. There is a strong resemblance between Hamilton's analysis of the coal industry and Veblen's 1904 discussion of chronic excess capacity created by continuing technological change. See Veblen (1904, pp. 217-255). Hamilton did not, however, apply the argument as generally as did Veblen.

11. Clarence Ayres wrote to Hamilton after reading his book describing the argument that ours is a system in which each man can do good and evil come of it as more pregnant in meaning than Veblen's maxims of business baulking industry as it is more impersonal. It makes confusion a misfortune of a confused transition rather than a conspiracy of malevolent freebooters. Ayres wonders if this is not the point of departure for institutional economics (Ayres to Hamilton, May 3 no year, Hamilton Papers, Box J45, Folder 1).

12. Hamilton and Clay had come to know each other well and corresponded on this and other issues. Clay sent his proposal to the British Coal Commission as an alternative to nationalization of the coal industry under a government ministry on the one hand and unrestricted private enterprise on the other. R. H. Tawney, a member of the Commission, responded with the question where does the State come in? (Clay to Hamilton, January 24, 1928, Walton Hamilton Papers, Box J5, Folder 5).

13. The course outline for Control of Industrial Development given at Brookings in 1925 contains significant discussion of Hamilton's scheme. This indicates that the scheme, at least in a basic form, had been worked out well before the publication of the second coal book in 1928. Here Hamilton calls his ideas a pretty way out of a pretty mess (Control of Industrial Development, Walton Hamilton Papers, Box J6, Folder 1). Hamilton also discusses his scheme in Hamilton (1932b).

14. See Norman Myers to Hamilton April 27, 1933; and Nathan Margold to Hamilton, April 27 1933, Hamilton Papers Box J5, Folder 5. See also Hamilton to Norman Myers, May 23 1933, Walton Hamilton Papers, Box J46, Folder 3, and a letter to Hamilton from an unknown correspondent (second page of the letter is missing) at Yale Law School, May 19, 1933, Hamilton Papers Box J4, Folder 5. This last refers to Hamilton's Coal Bill and the use of a rebate of tax to obtain the assent of the operators.

15. The Committee eventually grew to 48 members. Wesley Mitchell was a member although less involved in the Committee's work than Hamilton. The research staff of the Committee included three of Hamilton's students from Brookings, and one, Harry H. Moore, was the Director of Research and wrote *American Medicine and the Peoples Health* (1927), and the chapter on health, Health and Medical Practice, in *Recent Social Trends* (1933). Hamilton planned to write a book on the economics of health, initially with Helen Wright as a co-author. Some drafts were written, but no book was ever published (Wright to Hamilton, November 18, no year, Hamilton Papers, Box J4, Folder 5; and the drafts of *Medicine in the Making*, Hamilton Papers, Box J12, Folder 1 and Box J41, Folder 4).

16. Eight signers of the majority report dissented on the issue of compulsory insurance alone. These included Wesley Mitchell. The authors of the first minority report were eight private practitioners and one representative of the Catholic hospitals (Chasse 1994, p. 1070; Ross 2002, p. 132).

17. The Social Security Act did provide federal grants to the states for public health programs, and in 1937 the movement for voluntary group prepayment of hospital costs resulted in the Blue Cross program. A leading figure in this was C. Rufus Rorem, who had been a member of the CCMC research staff (Chasse 1994; Ross 2002). For further information on the CCMC and the later campaign for compulsory medical insurance see Perkins (1998) and Hirshfeld (1970).

18. At Yale Hamilton also taught a class in Judicial Process and a course on Social Economics, the latter including the economics of medicine, workmen s compensation, unemployment insurance, agricultural support programs, housing, land use planning and more (Hamilton Papers, Box J3, Folder 9).

19. The four most consistently conservative justices, Sutherland, Butler, McReynolds, and Van Devanter were popularly known as the four horsemen.

20. Hamilton was quite aware of the differences in approach of Justices such as Holmes, Brandeis, and Cardozo. He was also not unaware of their failings. On Holmes and Brandeis see Hamilton (1931d; 1941b), on Cardozo see Hamilton (1938b). Hamilton also previewed Felix Frankfurter when he became a Supreme Court Justice (Hamilton 1939a).

21. 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 1931b), and a decision written by Justice Roberts allowing a political party, as a voluntary association, to exclude blacks from voting in primaries (Hamilton 1935a). He also wrote on a number of the decisions concerning New Deal legislation which will be dealt with below.

22. Hamilton also wrote pieces on the history of caveat emptor (Hamilton 1931c), of the concept of property (Hamilton 1932e), the treatment of small debtors (Hamilton 1933a), of the law surrounding compensation for workplace accident (Hamilton 1937), and anti-trust (Hamilton 1940a). 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.

23. A number of institutionalist writers of the 1920s looked to this principle of affectation with a public interest to provide a basis for legislatures to regulate prices quite broadly. See particularly Tugwell (1922). For a more sanguine view see Clark (1926). Keezer and May (1930) also discuss the principle in detail.

24. 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 (1924, 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. For Hamilton s contribution see (Hamilton 1938c).

25. For discussion of consumer representation in the AAA see Campbell (1940). The AAA included an office of Consumers Council with a significant staff. For further discussion of consumers representation in the New Deal see Lynd (1936), Keezer (1934), and Douglas (1934).

26. Edwards Price Section was absorbed into the Research and Planning Division of the NRA in April 1934. Douglas resigned in April 1934. Opposition to the original CAB plan to set up some 3,000 consumers councils resulted in only about 150 being established. Brady left in the early summer of 1934 frustrated by lack of resources, but remained involved with issues of industrial standardization (Campbell 1940, pp. 48-53; Donohue 2003, p. 240). Keezer left the CAB to take up the Presidency of

Reed College in July 1934.

27. The NRA held a series of price hearings in January, there was a Senate debate on price and production policy under the NRA also in January, a conference for code authorities held in March, and in May the Darrow report on the NRA codes was released. Objections to the codes also came from the Department of Agriculture due to the effects on farm incomes, from the CAB, and from elsewhere within government. See Hawley (1966, pp. 79-97).

28. George Terborgh had been a student of Hamilton's at the Brookings Graduate School. The reference to his book prompting the formation of the Cabinet Committee on Prices comes from a memo written by Leon Henderson to Miss F. M. Robinson, May 11, 1934 (Leon Henderson Papers, NRA Papers, Prices, Cabinet Committee Folder).

29. Industries such as coal, movies, sugar are mentioned in some places. The first of the studies were completed in 1934, the last in 1936. They were confidential and not circulated. Hamilton even had a study of the market for Art done by an artist Robert Hallowell. Hamilton gave the piece to Mark Adams to revise. Adams eventually produced an essay *The Price of Art* in 1951 (Walton Hamilton to Mark Adams, August 11, 1951, Walton Hamilton Papers, Box J26, Folder 1). Irene Till wrote several of the studies. Her study of the milk industry also became her 1937 PhD thesis in political science from Columbia. She became Hamilton's second wife.

30. Campbell argues that in this capacity Hamilton did a poor job of promoting and ensuring some continued basis for the representation of the consumer interest. There is no doubt that Hamilton's major focus at this point was on the price studies. See Campbell (1940, p. 84) and Hamilton (1935b).

31. Ayres had been a close friend of Hamilton's since 1916 when they were both first at Amherst. Hamilton was Ayres' introduction to institutional economics (see Rutherford 2003). Ayres visited Washington to spend a month with Hamilton's group in the summer of 1935. This period and his time in charge of the Consumers' Project was his only employment with the Federal government. According to Campbell, Ayres did not agree with Hamilton's ideas concerning the functional representation of economic interests, in the form of industry, labor, and the consumer. Ayres thought this likely to lead to fascism (Campbell 1940, pp.86-87). He also had arguments with Robert Brady about standards for automobiles (Clarence Ayres Papers, Robert Brady Folder and Walton Hamilton Folder).

32. The quantitative aspect of the study, *Recent Price Behavior*, was completed by Willard Thorp (with a number of assistants) in 1934 but not included in the published selection. A copy is available in the Columbia Law Library.

33. Needless to say Hamilton's price studies did not go down well with more orthodox economists. See the review by Mund (1938) and Hamilton's reply titled *Industrial Inquiry and Sectarian Dogma* (Hamilton 1939b).

34. 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. Cardozo was in a minority of one in that opinion. See (<http://newdeal.feri.org/court/293US388.htm>).

35. After the NRA decision a number of people, including Tugwell, Ezekiel, and Galloway attempted to gather interest in an Industrial Expansion Act. This act was modelled on the ideas contained in Mordecai Ezekiel's book *\$2,500 A Year* (Ezekiel 1936) which argued that a moderate standard of living could be attained by all via a planning agency similar in some respects to the AAA. It was also to use a processing tax, the receipts to go to those signing agreements concerning output, price, working conditions, and etc. The effort picked up some support and bills were introduced in 1937 (See Hawley 1966, pp. 179-184). A copy of the bill and correspondence between Hamilton and Galloway concerning it can be found in the Walton Hamilton Papers (Box J45, Folder 1). Ezekiel's later *Jobs for All* (Ezekiel 1939) was a summary version of the industrial expansion plan (Mordecai Ezekiel Papers, Boxes 11, 12, and 19).

36. When this act was due to expire in 1941 it is interesting that Hamilton leapt to the defence of continuing with the experiment in control. Eugene Rostow, a Yale Law School colleague of Hamilton's, wrote an article arguing that the 1937 act had been an experiment that failed to work. Conditions had changed, and expansion of the economy and public welfare would be better served by government spending and imaginative enforcement of the anti-trust laws (Rostow 1941). Hamilton replied with a defence of the 1937 act, that maintained that all the causes of past disorder were still present in the industry, and that both the coal act and deficit spending were experiments which would require adjustment as they proceeded (Hamilton 1941c).

37. In the Hamilton papers there is an undated piece called *Scattered Thoughts on Thorstein Veblen* written by Hamilton for Thurman Arnold. It ends: This, I hope, supplies enough material for a bridge from Veblen to Arnold. Once the bridge is half way crossed, Arnold is on his own (Walton Hamilton Papers, Box J29, Folder 3).

38. 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, March 14, 1939, Walton Hamilton Papers, Box J31, Folder 3).

39. Hamilton discusses professional associations such as the AMA, the spread of professional licencing 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.

40. 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.

41. It is interesting to note that Hamilton was on good terms with Edward Levi at the Chicago Law School who was also interested in anti-trust and who brought Aaron Director into the teaching of his class. Hamilton's work in law and economics was also an inspiration to H. H. Leibhafsky who was to continue the institutionalist tradition in law and economics at Texas from 1956.

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