SOCIAL CONTROL, POLITICS AND BUSINESS

THE COLONIAL ORIGINS OF MODERN SOCIAL CONTROL

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"There shall be standard measures of wine, beer, and corn--the London quarter--throughout the whole of our kingdom--two ells within the selvedges; and there shall be standard weights also."

Magna Carta*

Our system of nonmarket controls over economic life is atavistic. In this paper we examine some remote origins of our methods of control, and survey briefly their development into our own era. We will be concerned primarily with 17th and 18th century laws and practices, although in some cases we will push back a good deal farther. This paper is a preliminary synopsis of work I have pursued since 1969, but began a good deal earlier.** I have some very general conclusions from this work which I will present in brief outline initially.

I
A Schematic View

Our nonmarket control system from the earliest Colonial beginnings has been part of our general economic evolution. Historically nonmarket control has been primarily concerned with four categories of economic activity, (1) the number of firms, (2) entry into given activities, (3) prices, and (4) quality of service, output or whatever. If we assign these four elements either freedom or control, counting them 0 or 1, there are 2^4, sixteen, general combinations with two "pure" forms:

1. One firm, entry restricted, price fixed, quality controlled.
⋮ running through the permutations ⋮
16. Many firms, entry free, price free, quality uncontrolled.

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*J. J. Bagley and P. B. Rowley, A Documentary History of England 1066-1540, London, Penguin Books, 1968, Paragraph 35, p. 106.

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The former is the purest form of nonmarket control, the latter, the basic conditions for perfect competition, represents the purest form of the price mechanism as a social control device. Between these forms there was always plenty of scope for regulation. Laws relating to these combinations form part of the basic evidence the historian seeks in a study such as this. It is the mix of these forms, from the simplest Colonial settlements to Federal control of economic processes of enormous scope, that has been acted out in our history. In a way, this history has been the nonmarket system chasing the consequences of the market system through the world of economic change and development. The recent fuel crisis found the Federal nonmarket control system facing the international conglomerate; once more the market system has stepped beyond the reach of the nonmarket control.

We are looking at a sliver of economic history which runs through 350 years of American history and some centuries of English history before that. There are essentially four determining categories, collections of elements the economic historian must consider.

1. The background conditions, which comprise the nonmarket control system of the English as it was transplanted to this continent.

2. The initial conditions, those which, given all else, were repeated over and over again historically: these include geographic expansion, population growth, technical change, institutional development in the private sector, urbanization--the well-known catalogue of economic history. So far as my interests are concerned, the consequences of these can be generalized into two parts:

    (a) The Spread Effect - geographic regarding political jurisdictions.

    (b) The Size Effect - both geographic in the larger sense and economic, primarily in terms of scale and external economies.

3. The inherent capability, as it turned out, of the Federal system to co-opt powers of control from lower levels of government. This, of course, involved a long and well-known legal history.

4. Sensitivity of the political system to popular and/or vested interest pressure. It is this part, primarily, that has been illuminated recently by the work of Davis and North.

Given these four general categories, the condition which historically has been the immediate source, proximate "cause," of the extension of nonmarket control has been production of scarcity, in a real sense, by the price system. The course of these extensions was determined by permutations of our four basic categories of historical determinants.

Since the continuation and extension of nonmarket controls during the early Federal period were molded by the colonial past, I have gone far back to the remote colonial and English origins. Schematically, this long-period sliver of economic history developed as follows:

I. Colonial and Very Early Republic. In this period one sees that the old system of control and its objects were roughly conformable to each other regarding both the spread and size effects. Local businesses were part of a small domestic system. Businesses which lay beyond local control institutions were subject to special rules which governed innkeepers, ferries, tool bridges, draymen, etc.--the origins of our special laws governing common carriers. Large scale businesses had monopoly powers, were established and controlled as such. The early colonial governments were at once "national" (one for each colony, but with an imperial connection) and local; a charter, a governing organization down to the township level.

(a) Colonial spread was at first met by replication, in New England, the townships. In New England the initial intermediary institutions (country) were weak, although country government in other parts, e.g. Virginia, was strong. The nonmarket control relationship ran directly from the colonial (later the state) government to the local authority.

(b) With spread effects and the first appearance of significant size effects the old "national" nonmarket control powers were expanded and developed by state and local governments, but the intricacies of economic development produced confusion, overlapping jurisdictions, and hiatus where business organization was growing beyond any nonmarket agency's power of control. There is a neat description of this circumstance in the Handlins' Commonwealth of the final stages of the old system in Massachusetts, about 1860:

> "It was as if, imperceptibly, all the familiar metes and bounds that marked off one man's estate from another vanished to leave a vast and open space, familiar but with the old landmarks gone. Somewhere, everyone knew, the state could act directly, somewhere it could legislate as arbiter, and somewhere it had no place at all. But where one field ended and another began, no one knew; the master map was not yet drawn....In practice, a society that found 'a disposition in the people to manage their own affairs' also witnessed a remarkable extension of government interference with the personal lives of its citizens."*

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*Oscar Handlin and Mary F. Handlin, Commonwealth, A Study of the Role of Government in the American Economy: Massachusetts 1774-1861, New York University Press, 1947, p. 260.

(c) The states began to respond to size effects with special franchises for both private corporations and the famous mixed enterprises of the 1830's and 1840's. The Federal government was at first hesitant; e.g., Madison, Monroe and Jackson all thought Federal expenditures for internal improvements were beyond the constitutional power of the Federal government, and Monroe suggested that the Constitution be amended to allow this extension of the Federal power. Since both spread and size effects were involved in such enterprises as canals and railroads, the mixed corporation of the antebellum period was a logical compromise.

II. The Federal System and Growth. Market size became the outstanding feature of American development as Westward expansion, and then the massive European immigration began. By the third quarter of the 19th century the weakness of state powers of control produced escalation to the Federal level, and the Federal government began, slowly, to take over those powers which had spiraled up from the township, to the country and state; 1863 banking fell under the Federal power for good. Scale economies in the world of business were now producing region-sized, and even business organizations of national scope. The state regulatory powers reached their limits. Validation of the Granger laws in Munn v Illinois in 1877 was probably the most dramatic historical episode of this nature. Recognition that state power was at or beyond its limit came in the Wabash case in 1886, and a year later the Federal power moved in under the Commerce Clause with the ICC. The ICC countered both spread and size effects in transportation. Three years later the organizing genius of the nation's business leaders was again countered by the Sherman Act. The Federal power now faced off big business. Great business combines, capturing both scale and external economies had moved the size effect to center stage. By 1914, with the FTC, the Clayton Act, the Federal Reserve System, the Food and Drug Act, the Federal government was well on its way to a regulatory role as conformable to the scale of its free-market control objects as were the Colonial governments' regulatory powers in the economically miniature world of the 17th and 18th centuries. To put the matter crudely, we went from mercantilism to mercantilism with an intervening period, the heyday of the price system as our social control mechanism, when the private economy ran ahead of the control power of government.

In every case, expansion of the regulatory power was triggered by the price mechanism producing relative scarcities which were unacceptable to society in one or more of its sub-group permutations. These conditions occur regularly in our history as agitation with a political object.

Viewed in this way the history of nonmarket control in this country has been a problem of proportions. What is perfectly clear is that "free enterprise" was not, in our society, a universal equilibrium condition--ever. Nonmarket control was in continuous existence and the spectacular

development at the Federal level at the end of the 19th century represented a catching-up. But the exhilaration of the periods and areas free from control was real too, giving us a double tradition, the one, an open economy, and the other, the economy of nonmarket control. The process continues; e.g., with the national environment, state and local zoning powers face a problem beyond their reach. And as we have already noted, with the international oil companies the Federal government has just faced, with shocked surprise, the fact that its old rival, private enterprise, has raised the table stakes again. One cannot doubt that the nonmarket power will make a response, given our history and institutions.

II
Implications of the Colonial Perspective

My generation's concern, as economic historians, with the technical and quantitative determinants of long-term growth has precluded until recently the consideration of institutional change and its impact upon the functioning of the market economy, the concern of an older generation of scholars, perhaps exemplified by John R. Commons' Legal Foundations of Capitalism. The extra dimension added by such studies is important. Let me give an example. We ask of what institutional importance was the decision in Dartmouth College v Woodward? The automatic answer, supplied either by commons[1] or, more recently, Davis and North[2], will be seen as only a small part of a much larger world of institutional development. Considered in this larger historical context the point of Dartmouth College v Woodward becomes far more profound than the definitive test of the contract clause. Why? The answer to the question is the beginning of wisdom regarding the institutional history of the American economy.

Dartmouth College v Woodward sustained through the fire of revolution the property rights granted by King George III. Throughout the new Republic men cultivated land, towns and cities existed, wharfs and bridges, roads and ferries were built, mines dug, waters navigated, a native people disinherited, and an African one enslaved, all on the accepted right of England's king to his feudal authority. It was by that authority that rights in the real property of America had been granted. As Justice Story said, it was a settled "principle of the common law that the division of an empire works no forfeiture on previously vested rights of property...,"[3] and he considered the suggestion "monstrous" that the Revolution might have disturbed charters granted by the previous government, i.e., the British Crown. Daniel Webster, representing the College, cut smartly into the pretensions of the ex-Revolutionaries: "'The legislature of New Hampshire has no more power over the rights of the plaintiffs than existed, somewhere, in some department of the government before the Revolution. The British parliament could not have annulled or revoked this grant as an act of ordinary legislation.'"[4] Chief Justice Marshall was even more English about it. "'It is too clear to require the support of argument that all contracts, and rights, respecting property, remained unchanged by the

revolution.'"[5] As his master, Sir William Blackstone had said: "...a contract for any valuable consideration...can never be impeached at law; and, if it be of sufficient adequate value, is never set aside in equity."[6] Law would carry the English world into the American Republic, and far more than the sanctity of contract made the journey.

III
The Original Institutional Set in Perspective

Economic behavior involves bargaining over the exchange of property rights if goods and services are marketed. Rights in real property, rights in intangible property (incorporeal hereditaments), rights in chattel goods, rights in labor, these are the stock in trade. Economic historians have long agreed that such bargaining is best accomplished where there are mutually understood rules of the game--the "calculable law" of economic history. Such generally accepted and enforced law or custom renders routine the behavioral framework within which bargaining occurs. Violence, or the threat of it, as an input into bargaining is reduced, and the resulting consumers' and producers' surpluses are optimal solutions, given the conditions of the market. Property rights can be transferred on contractual understandings which, by their permanence, make possible calculations involving extended time periods, and thus encourage long-term decisions regarding the disposition of the investible economic surplus. Such decisions are the remote sources of economic growth.

So long as we were English the heuristic abilities of our colonial assemblies were largely held within limits by the common law and statute law (where relevant) of England and by the judicial review of the Board of Trade lawyers. Once independence was achieved the same legal tradition, explicitly provided for in state constitutions and then anchored to the Federal Constitution continued to form the framework of allowable economic behavior. Two more centuries produced our own conditions.

When we seek to discover the rationale for the profusion of agencies of nonmarket control which now encursts American capitalism we usually think back to the populist era, to the Granger laws, the Wabash case of 1886, the Act to Regulate Commerce of 1887, and the Sherman Act of 1890. We commonly applaud the justice of controlling those enterprises called public utilities and the threat to small producers of large-scale enterprises with real or potential monopoly power.[7] Those who are not controlled are made "free" by the constraint upon those controlled.

Such freedom may be the result of superior wisdom, or majority rule in the political process. It is not achieved, however, without the exercise of power. Limitation of economic freedom to certain forms of enterprise only is held to be the desirable norm, and government power is supposedly used to correct "abuses" only. Milton Friedman's famous discourse, Capitalism and Freedom, covers these ideas with three general propositions.

1. "Freedom is a rare and delicate plant. Our minds tell us, and history confirms, that the great threat to freedom is the concentration of power. Government is necessary to preserve our freedom, it is an instrument through which we can exercise our freedom; yet by concentrating power in political hands, it is also a threat to freedom."[8]

He follows by arguing that two broad principles are "embodied in our Constitution...".

2. "...the scope of government must be limited. Its major functions must be to protect our freedom both from the enemies outside our gates and from our fellow-citizens; to preserve law and order, to enforce private contracts, to foster competitive markets."[9]

3. "If government is to exercise power, better in the country than in the state, better in the state than in Washington."[10]

All this seems unexceptional. But is it really? I would argue that these propositions are misleading as a guide to understanding American economic history, and, perforce, the present economy. They are confounded by the facts of our institutional background and its historical exegesis.

One must agree that economic freedom is pretty rare in this country. But given the nature of our government's historical relationship to economic activity it is amazing to me that we have as much economic freedom as there is. Examination of our institutional origins undermines the idea that positive government power in economic life was typically conceived of as a freedom-granting agency. Perhaps it should have been, or, as Henry C. Simons argued, it should be. But to expect economic freedom as an automatic bi-product of our governmental institutions, is like expecting to harvest grapes from tomato plants. Freedom, a la Friedman, could exist only if the law explicitly recognized the competitive system as the legal mode of economic life. Such might be desirable, but our present circumstances and our past do not illustrate any such reality unambiguously. What the law recognizes as legal is activity not successfully prosecuted as illegal.

Second, while our governmental tradition has certainly been one of protecting us from each other, "law and order"--the King's Peace of the Statute of Winchester[11]--the law has been curiously blind in important cases; e.g., the American Indians, whose laws, especially regarding real property, were outside the boundaries of English and American custom. For them law and order involved simply the loss of the land, from the Massachusetts Bay Colony to the boundaries of the present reservations. Contracts are not enforced by government.

Contracts can be enforced by court proceedings, but if you think the government enforces private contracts, complain to the police or the

Department of Justice the next time you have a contract broken. Enforcement is according to court order, only a long and costly extenuation of government enforcement. Under no stretch of the imagination is this, or has this been, equal protection under the law, something the Constitution (Fourteenth Amendment) does guarantee from our government. Contracts were not to be interfered with by state laws under the Federal Constitution. That does not mean Federal guarantee of contract fulfillment. Enforcement between the colonial era and the Nader era of the consumer contract, the most common one, has been left largely to the caprices of the courts. The several regulatory agencies concerned with this problem turned in a deficient performance despite decades of experience with it. The passing of title to chattel goods traditionally involved a warrant of legitimacy on the part of the seller, protected by caveat emptor, a notion that did not embrace willful fraud as a legitimate business procedure.[12] We seem now to be returning to the earlier tradition of real consumer sovereignty embodied in the medieval law of assumpsit[13], according to the relatively new (1961) doctrine of strict liability in tort, the responsibility for defects imposed upon the maker of goods.

As for competition in the markets there is nothing in the Federal Constitution about it; hence Justice Holmes' exasperated remarks in Lochner v New York (1905): "This case is decided upon an economic theory which a large part of the country does not entertain....," and, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[14] There is also his great dissent in the Northern Securities case (1904), in which he noted the Court's efforts to shift the meaning of the Sherman Act away from a strict interpretation of combination in restraint of trade to the doctrine that competition was to be enforced by the courts: the court had reasoned "...as if maintaining competition were the expressed object of the Act. The Act says nothing about competition."[15] Holmes believed such a commitment would involve the courts in a hopeless contest under the Sherman Act. Congress could pass a law defining competition and making it obligatory, and the course might enforce that, but that would be a different sort of proposition.

Professor Friedman's third point about government, that it is meant to remain local to protect freedom may be a value judgment (one I certainly would favor in many cases, at this point of time, except perhaps in the county in which Professor Friedman and I reside). But if it is meant to convey a sense of American history on the subject, I doubt that our history will support such an interpretation. The colonial governments were intimately local, yet until our own times they were the most restrictive of individual freedoms of any government in our history. Our tradition (legal precedent) of nonmarket social control over economic life comes from a remote period in history, and in the colonial era was a mixture of municipal, feudal and central (Crown) government law. The government of each small colony was at once "state and local" until the population spread out. Even so, every charter contained provision that no law be passed that was "repugnant" to the laws of England.[16] What is important to comprehend in this matter is that the nonmarket control preceded the sort of world

envisaged by Professor Friedman's notion of economic freedom; his paradigm is in this sense ahistorical. As we will see, so far as our tradition of nonmarket controls is concerned the "free market," one characterized by absence of government power in determining the conditions of bargaining, came long after such activities had developed within the grip of controls that characterized medieval England, the source of so much of our institutional background. The idea of caveat emptor and the freedom of domestic factor mobility that characterizes the free-market paradigm was not really present in England in the age of American colonization (below). Americans engaging in laissez faire economics in the 17th century were violating their own laws as well as England's--as in the case of free trade in Massachusetts (below).

The common law of England passed into the Federal Republic via the state constitutions, which served as institutional conduits for it.[17] The Federal Constitution, enacted after the major post-Revolutionary state constitutions came into existence, was at once the supreme law of the land, but was intended, until widened by Supreme Court decisions and the Civil War, to fill a hiatus at the top of the institutional structure. It was not meant to displace the ancient governmental powers inherent in the state constitutions and local governments. I think the discussion at the constitutional convention makes that abundantly clear. Hence the Nullification Controversy of 1828, and hence, also, Holmes' comment in Tyson v Banton (1926): "The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has sufficient force of public opinion behind it."[18] He argued thusly against the Munn doctrine that businesses affected with a public interest only (below) were subject to political control in our legal tradition. The states had no special categories of businesses to which their powers of control were limited. Such had never been the case before. In Nebbia v New York (1934) the Supreme Court agreed with Holmes: "It is clear that there is no closed class or category of businesses affected with a public interest."[19] Far from a revolutionary New Deal era doctrine, this idea that any business was legally controllable was of ancient provenance in our institutional history.

The power to regulate economic life extensively was explicit in English law from at least Magna Carta[20] onwards, and the barons after all, were re-stating traditional rights and powers against recent encroachments of the crown. Nonmarket controls were always constraints upon someone's freedom, in favor of someone else, sometimes in favor of monopoly (gild privileges), sometimes in favor of the general public (assumpsit, a law of 1285, Edward I, under which the public was allowed to bring suit against persons in public businesses who failed to serve properly[21], there were also extensive rules governing common carriers, innkeepers, etc.[22]), and sometimes in favor of the Crown and the established social structure (land tenures).

I might add here that I am not certain how the idea came into American thought that nonmarket control was supposed to be benevolent

and that government oppression, or non-freedom, has been somehow an unfortunate accidental feature of the controls. Perhaps the notion that democratic government is necessarily less oppressive than other forms of state power (a belief that has been axiomatic in this country despite vigorous disclaimers from de Tocqueville and Mrs. Trollope to the present) has been generalized from political to economic life without due consideration of the utterly necessary feature of non-market control, arbitrary interference with economic freedom. As E.A.J. Johnson has recently reminded us, the full spectrum of belief about government's role was present in American public life at the time the first Federal Congress met.* Louis Hartz thought that the success of the private business sector in the 19th century allied to private ownership produced an idealogy that what worked must be virtuous.** Government decision-making in the economic sphere necessarily substitutes a non-economic for an economic decision, a political, judicial, or social solution for a cleared market. Whether such control can be considered as freedom-enhancing depends upon whose ox is being gored. The original set of nonmarket controls that formed this country's institutional framework was such that its historical exegesis quite naturally led to our own government-ridden neomercantilism. We have not gotton here by bad luck, but by being true to our tradition, as befits a common-law country. Chief Justice Waite, delivering the fateful decision in Munn v Illinois said it well: "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government."[23] the nature of the old English government regarding control of economic life was one of specific measures and rules to meet specific circumstances. As it turned out, growth and development produced gaps within which a structure of economic freedom and an ideology were developed. But such was not economic freedom in the robust sense of Professor Friedman's essay. Indeed, later on when Friedman attacks the idea of licensing he is aware that such is not compatible with his ideal.[24]

IV
A Sampling of Specific Controls

Let us now put a decent covering of historical examples over the naked skeleton we have developed thus far. The background tradition embraced virtually all areas of economic life with government control in the colonial era and set the tone for the development of American law regarding economic activity.

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*E. A. J. Johnson, The Foundations of American Economic Freedom, Minneapolis, University of Minnesota Press, 1973.

**Louis Hartz, Economic Policy and Democratic Thought: Pennsylvania, 1776-1860, Harvard Press, 1948, pp. 309-320.

1. Land Ownership. There were many kinds of property rights in land in pre-colonial England.[25] The property right allowed in the colonies, however, was limited to a single tenure, free and common socage. From Virginia to Georgia this tenure was explicitly stated in each charter. The great advantage of this tenure was that land ultimately could be bought and sold in parcels of any size; the rights of the tenure included waste, direct heritability without escheatment, devise by will, and separation of subsoil from surface rights.[26] The fact that feudal subdivision was prohibited by the medieval statute Quia Emptores (except in Maryland, Pennsylvania and Delaware)[27] turned out to be a powerful inducement to westward settlement by independent farmers. What was prohibited was the development of Latin-American style latifundia,[28] first because alienation was by sale, and second because the incidents of socage included the satisfaction of "rents and services certain," which included property taxes (originally quit rents)[29], so that the large tracts of idle land in private hands became impracticable. New York State's troubles with its variations from socage (as a result of the Dutch tenures) make an amusing historical vignette, with its legislature still trying to exorcise "feudalism" from its land tenure as late as 1846.[30]

We might indeed call socage tenure freedom, but partly because by practice we are unfamiliar with the advantages of some of the practices prohibited. Such advantages might be considerable. For example, when land left in the public domain was withdrawn from sale by the Homestead Act and land began to be granted by the Federal government for specified services, we had the possibility of a return to quasi-feudal tenure. But conversion into ownership in fee simple after the homestead contract was satisfied prevented establishment of state serfs on the frontier and the successful homesteader ended with the standard tenure. The fee simple, or simple feud, was free and common socage, the incidents of which became "services and rents certain" converted by American practice (except for homesteading) into a single price of fixed sum plus real property taxes.[31] But one long-run consequence of this tenure is the practical impossibility of a tax strike. American owners of real property cannot easily resist tax exactions placed upon them. If real property taxes are not paid the owner's right can be sold by the "donor"--the state--for taxes, the donor's prior right. A freedom available to any allodial landowner (where God is the donor), to go to jail instead, is denied us. We must pay or lose our real property. That is socage tenure, and a good example of the colonial legacy.[32] In addition, our liability to lose land in judgment against private debt is due remotely to colonial law.[33]

2. Labor. Trade in services involved the labor contract. The background tradition of the labor contract was one of oppression of labor rights in favor of real property, no doubt explained easily enough by observing who the laborers were in medieval England, and who the land owners were. It was decided just before the Revolution in the Sumerset Case[34] that Negro slavery was a labor contract incompatible with the English constitution, too late to save us from the

ravages of Civil War and another century of civil strife. The other parts of English law and custom applying to all forms of labor were embodied in Elizabeth's Statute of Artificers and Apprentices[35], a really no-nonsense "incomes policy". This law remained the basic English labor law throughout the American colonial period. The Statute provided a background which was hardly conducive to freedom, for it sanctioned servitude and indentures of all sorts, and strict controls over entry into trades. Wages and conditions of employment had thus been controlled in England in favor of owners of rights in real property, and such was again the case in colonial America.[36] Even members of skilled trades who had served out apprenticeships could be made to labor in the harvest at wages set by local property owners (a condition in both the Statute and in the Colonial Laws of Massachusetts.[37]) Even after the stigma of automatic criminal conspiracy was removed from organized labor in this country in Commonwealth v Hunt (1842)[38], the place of organized labor in American society was shadowy until it was established by the Wagner Act. The long record of anti-labor court decisions before then represented the spirit of the Elizabethan law of master and servant far more than it did any defensible logic.

I will go one more step just for the sake of argument. Real property rights were so long dominant over labor property because of the common law. Those practices did have rationale. Real property rights in England were designed to maintain the structure of the medieval English state and its military levies. Against such a force, the claims of labor were weak, especially since in the established gilds of the corporate (and colonial) cities the functions of labor, manufacturer and merchant overlapped, an issue which was illuminated in this country's history by the case of the Philadelphia Cordwainers.[39] In colonial times attempts to control wages by local authority were common. In the primary wage contract, as well as in such matters as the labor of women and children, maximum hours, safety regulations, compensation for injuries, the background tradition was one of an inferior role for the claims of labor against those of real property.[40] So strong was the tradition that only a political turnabout and establishment of bargaining rights by Federal statute could change it. When the Wagner Act was passed the government was used to give freedom to some, but only by cutting down the rights of others. The Wagner Act did not intrude the state power where previously there had been none; in the Wagner Act the state changed sides. No doubt some hoped the government had found a safe fence to straddle in an eternal and fundamental area of contention.

3. Commercial Organization and Practice. Trade in commodities involved the transfer of title to chattels. Outside of London the English tradition had been that at certain designated fairs and markets at specified times clear title was passed for goods traded under the authority of recognized clerks and wardens of the market.[41] By a law of Edward III merchants in England were allowed separate coursts of their own, the courts of piepowder, once the most frequently-held courts of England. Such trade took place outside the manorial organization, but in controlled market towns. These were

"markets overt". The courts attached to markets were regular courts of record, and appeals to the King's Courts were possible.[42] Colonial laws show that markets overt and even piepowder courts were transported here with the rest of English law.[43] Such customs were clearly inappropriate To American conditions, and had become largely obsolete by the time of the Revolution. Bridenbaugh[44] traces the beginnings of retailing in the colonial cities, and colonial shoemakers, who sold out of their shops even attempted to penalize those of their number who sold in the open markets.[45] Chancellor Kent said it was agreed that the English laws of market overt no longer applied by the late colonial period.[46] The practices continued; for example, see Richard Wade on building of market halls in early frontier cities of the 19th century,[47] and of course, there are still faint echoes of the system in our smaller towns and cities. The tradition served as the basis for our own developing laws and practices of municipal licensing and control, including closing hours, quality controls, restrictions against socially undesirable businesses, zoning ordinances and so forth.

Controls of those businesses lying upon the routes of transit were particularly well-developed in medieval England: carters, draymen, wharfingers, wayside innkeepers, ferrymen, keepers of taverns, operators of toll bridges, all such were kept under strict controls which included regulation of charges and quality of service. Colonial ordinances show that this whole structure of control was transplanted into the colonial world. These controls in England were probably more a matter of symmetry than of imputed monopoly, the "natureal monopoly" usually given as cause of such controls. The controls were imposed where no such monopolies existed, for example, carters. In medieval England control was either in the manorial courts, or in towns or incorporated boroughs. Businesses serving the transit of people and goods tended to fall between such jurisdictions, and were not to be left free of control. And indeed the idea that "common carriers" were uniquely common callings subject to control has been refuted.[48] It is just that special rules applied to them because of their jurisdictional situation. A powerful precedent was set, however.

4. Social Measures. Colonial poor relief followed the English example of local control, a tradition which continued through the 19th century, and remained to bedevil this country in the depression of the 1930's, and is still the rule in much of our social policy (Federal grants-in-aid to states and municipalities). This is a really curious example of history's power: Henry VIII imposed the burdon of relief of the poor directly upon the parishes of England (when he was destroying) the economic power of the English Church.[49] That tradition of local control, continued mindlessly in England through the reform of the poor laws in 1834; and over here a century after that, became an economic constraint of enormous proportions in the early 1930's. It is curious to hear modern praise for something whose origins and remote justification are so utterly archaic.

President Hoover seemed to believe that somehow the national character itself had been formed by the nature of the old Tudor poor laws, and would only lend Federal money[50] to the states for poor relief. The appearance of federal power in this area, finally, during the New Deal, is a neat example of the spiraling ascent of nonmarket control I described earlier.

5. Finance, Trade, Bailment, Water. The Crown had made vain attempts to control the American genius for printing paper money,[51] and it is instructive that no tradition of laissez faire in banking existed in this country, apart from the fabled frontier wildcating from the antebellum era and the small unincorporated nonpar banks, some of which still exist. Little need be said here about control of banks as its history is familiar. Our first one was given corporate existence by the Continental Congress.[52] Congress set the terms of existence for our three central banks. The states and the comptroller of the Currency gave charters to commercial banks. The tradition of merchant banking grew up in this country, developed into investment banking, and was put under a variety of controls in the 1930's.[53]

The colonial crucible contained the whole apparatus of English law and practice concerning trade, tariffs, navigation, laws, ports, docks, and Chancellor Kent, writing in the 1820's of the American laws noted with wry amusement:

> "The Acts of Congress 31st December, 1972 and 18th February 1793, constitute the basis of the regulations in this country for the foreign and coasting trade, and for the fisheries of the United States; and they correspond very closely with the provisions of the British statutes in the reign of George III."

Reviewing the court cases of 1801-1815 in Cranch's Reports, Kent went on to say:

> "It is curious to observe in these reports the rapid cultivation and complete adoption of the law and learning of the English admiralty and prize courts, not withstanding these courts had been the constant theme of complaints and obloquey in our political discussions for the fifteen years preceding (the War of 1812)."[54]

Massachusetts had tried free trade in the laws of 1645, but this liberality was stopped after the English revolution, the Navigation Acts were imposed,[55] and the native American tradition of free trade died an early death, obviously, never to return.

The English law of bailment covered, in addition to the obligations of Wharfingers and common carriers, properties left with innkeepers, pawnbrokers and other public depositories.[56] Colonial ordinances also covered use of waters where the common law did not apply in complete generality (clamming), conservation, animal genetics (the size of horses allowed to roam free, support of the town bull).[57] There were controls of woodcutting, and evidence of uses of common land and pastures which include the possibility of medieval rotation of holdings in Massachusetts. As in England, Colonial New England had sumptuary laws.[58]

Such, in desperate brevity, was the general nature of the background of nonmarket social control colonial Americans knew as their own. It is important to recognize that it was very extensive, and left few kinds of economic activity untouched. It contained elements which make even the jaded 20th century observer blink, especially the common colonial practice of splitting fines between the court and informers for successful prosecutions of false weighing, excessive pricing, and other forms of commercial fraud and deception.[59] These were the rules of a coherent and controlled society. They were mainly at the local level, since the colonies were separate corporate entities, and separated from each other physically as well. The laws pertaining to trade and the sea were enforced by central authority, the admiralty courts. But all of the colonies existed under the injunction that their laws "be not repugnent" to the laws of England, so the tradition of judicial review, although not English, we received from the English.[60] In the eighty years 1696-1776 more than 400 laws (fifty a year) passed by colonial assemblies were disallowed by the Board of Trade lawyers.[61] The majority of those overturned dealt with credit, money, stop laws and bankruptcy, but Ben Franklin's scheme for the union of the colonies was among those overturned.[62]

Since the colonial laws and the common law of England as well as such basic laws as the Statute of Frauds either passed directly and explicitly through the Revolutionary hiatus via state constitutions into modern America, or like the Navigation Acts, were rephrased and legislated by longress and applied by the courts after the Revolution, the new American economy of independence was launched on its continental expansion from its English platform of nonmarket control over economic activity. As Hartz and the Handlins showed, in the early federal period the colonial system of nonmarket control by the new states was considerably extended. But the tradition of laissez faire became widespread with the movement across the Appalachians, and as Frederick Jackson Turner noted, the true inheritor of the squatter mentality was the American capitalist of the last third of the 19th century.[63] It was he who wanted applied to commerce what the squatter had discovered, the real laissez faire came not from the government's fescue, but from the absence of government altogether. As we have already seen, Justice Holmes noted that logic and precedent were not on the side of those who wanted the constraints of anti-trust to imply a federal sanction of competition.

V
Live Hand of the Past

That brief introduction to the colonial origins of American institutional development regarding economic activity is a sample of our background conditions. They established the boundaries of social behavior regarding nonmarket control, and it is astonishing how powerful an influence that background has been. Possibly the astonishment arises from our typical American disregard of history, and our general misconception that our system of government began with the Federal Constitution. An excellent cure for that scholarly malady would be a requirement that students of American history read all of Dartmouth College v Woodward. The practical consequences of our English legal ancestry become indelibly apparent in those pages.

Basically the scheme may now be simply re-stated as a simple proposition: As the American economy developed, resort to nonmarket controls occurred when economic factors became relatively scarce, and the political mechanism to impose control existed or could be created by interested groups. I must add now that the novelty of the scheme appeared to be greater before the follies that began in August of 1971 when the Nixon administration first tried repealing the laws of supply and demand. The scheme was derived from our history, although, alas, it could now be deduced from recent events. I concluded that, historically speaking, Americans have distrusted and rejected the free market unless the going was good. Again recent events have robbed my conclusions of their novelty, except perhaps the observation that the free market was as little supported in the past as it is now whenever it produces unpopular results.

Our initial conditions, together with the background conditions produced the imposition of nonmarket controls over and over in American history: the old "institutional technology" of the mercantilist age was continued and expanded, hopefully amended to meet new permutations of basic economic problems. Apart from such exotic transplants as French riparian law,[64] it was the American colonial tradition that ruled. Laissez faire, in the sense of economic agents left free to contract bargains without resort to violence became the American way of economic life only when inequities were kept to a minimum, or no control mechanism was ready to hand when problems arose. In fact it is also surprising how Americans did, and do, prefer nonmarket agencies no matter how incompetent, to the chill winds of the market mechanism when crucial factors of production were (are) in short supply. I say "surprising" if you consider the steady blast of propaganda regarding the virtues of free enterprise we have had from theoretical, political, or commercial sources. I doubt that someone like Karl Polanyi would have been surprised, since he considered the whole idea of the price mechanism as a social-control device to be an absurd piece of utopianism,[65] arguing that it would produce chaos and threaten the stability of organic society itself. If you consider the sum of the apparatus of nonmarket control we have developed since the

Civil War, you would have to admit that someone else reached similar conclusions.

If one could measure such things, my impression is that the greatest extent of laissez faire, defined as absence of nonmarket control, existed in this country between about 1816 and the Civil War. But even then, of course, municipal controls of all sorts continued in the older areas of the country, and as Wade emphasized, even in the frontier cities elaborate provisions were made to continue those traditions in the wilderness. Corporate charters, grants of franchises, controls over external trade and navigation, uses of mixed governmental and private instrumentalities to create internal improvements--all these nonmarket methods of control were employed before 1861 in those many permutations familiar to economic historians. Even so, there was not much nonmarket control at the federal level in 1861. It was the last third of the 19th century that produced the great change. By 1914 the ICC, the Sherman Act, the Food and Drug Act, the Clayton Act, the Federal Trade Commission, the Federal Reserve System, and more had come into existence. Thirty years earlier none of this existed.

The Civil War had marked the largest single episode of government "interference" with private enterprise--slavery--in the nation's history. But that war, like all our wars since, also witnessed an augmentation of government control in the economy. The Federal government made opportunity of necessity and produced the beginning of order from the nation's financial weakness with the National Bank Act. The first transcontinental railways were launched to provide better transportation with government assistance (and then control).[66] In both cases the market mechanism had not resulted in a (politically) satisfactory level of performance and sound banking and rail transportation into the west had become "scarce" in our special sense of the word. The same was true elsewhere; as we have already noted, the Homestead Act, which greatly narrowed land sales out of the public domain was potentially a feudal-style nonmarket control device. The price system, as it was utilized since the early days of the Republic, was held to be inadequate to the needs of settlement beyond the 100th meridian. Farm land with sufficient water and soil properties had become scarce. Nonmarket control was the solution, and from that time to the present private access to the public domain would be mainly based upon nonmarket considerations.

The major turning point came with the railways. Paradoxically, railway service could not become scarce in an economic sense until sufficient supplies had been created cheaply enough for the nation to become dependent upon that mode of transportation. The price mechanism could not be held a failure until it had succeeded. (The 1973-74 energy crisis is a modern case in point.) The Granger Laws represented applications of controls at the state level that had been long sanctified in American law, Colonial law, English law. Hence, when Chief Justice Waite in 1877[67] reached all the way back to the 17th

century English jurist, Sir Matthew Hale (judge at England's most famous witchcraft trial) and his essay De Portibus Maris in order to justify public regulation of businesses affected with a public interest, he was doing more than merely throwing dust into the eyes of lawyers to confound them. He was applying for support from a living tradition, the common law and the record of social control. He was talking of a reality when he said the Revolution changed the form and not the substance of our system of government. Waite commented on the regulatory tradition thus: Such powers had been used

> "...in England from time immemorial, and in this country from its colonization to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers...and in so doing to fix a maximum charge to be made for services rendered, accomodations furnished, and articles to be sold. To this day, statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within the constitutional prohibitions against interference with private property."[68]

He sustained state controls in the Granger cases, but since railroads were engaged in interstate commerce, those state laws came into conflict with the powers of Congress and within a decade the railroads succeeded in escaping the grasp of the states only to fall into the embrace of a Federal version of the regulatory selectment of New England, the Interstate Commerce Commission. A new chapter in a long story began.

Since it was the overthrow of Munn legislation in the Wabash case in 1886 that led a year later to the creation of the Interstate Commerce Commission, Lord Hale's shadow falls heavily across American history and its economic destiny. The ICC began the reign of the Federally-established regulatory bodies which, by 1974 constituted a non-very-invisible form of economic government in this country. The common law also, of course, played a role in the creation of the Sherman Anti-trust Act, since it was supposedly adherence to the true anti-monopoly principles of the common law of England that give the sanction of legal respectability to the legislation.[69]

The steady growth of regulation in this country since 1887, augmented by the bureaucracy-engendering influence of this century of wars and crises, comprise a familiar story. What I want to do in this short space is to emphasize, as a matter of historical perspective, that the Sherman Act of 1890 and the Act to Regulate Commerce of 1887 were not the origins of the powerful system of nonmarket controls that now bless this country, but were important way stations along a much longer road.

There is an additional point about our institutional behavior which has had a profound effect upon us: old regulatory agencies rarely die, they just linger on, becoming part of the bureaucratic apparatus of what we call, in the largest sense, government. Any modern historian can look at the list of nonmarket economic control agencies published by the General Services Administration and construct a social and economic history of this country for the past ninety years from the acronyms, from the ICC to the FEO (the latest one I know of). Out of this mass of officialdom the Administrative Conference of the United States is developing as if by parthenogenesis, and the economic constitution of the country is changing accordingly. The institutional debris of our reactions to particular crises in our past not only lives, but has become a system of nonmarket economic nonplanning control. Oil production, refining, importing, sale, "controlled" by bits and pieces of our history, the Webb Pomerene Act of 1918, the Connally Hot Oil Act of 1935, the Texas Railroad Commission, secret agreements between the companies and various presidents--these are examples of the kind of achievements our nonmarket control system produces, in case the ICC and the railroads, or the CAB and the air passenger service in this country had slipped your minds. There was also the laughable performance of the Office of Emergency Preparedness when the fuel crisis struck in the autumn of 1973. Our system of nonmarket control is rooted in an ancient history, is a product of a sequence of economic crises, is consistent with our legal tradition, has power, but is not a planning device. It is merely the sum of specific solutions to specific problems through time, problems now forgotten in large part, but the institutional solutions live on.

So our excursion is not mere antequarianism, since we hear constant appeals to our history as the mother lode of the laissez faire tradition. It is not. What one finds in our history is, as Adam Smith emphasized (considering, after all, the same tradition) the mother lode of nonmarket social control over private economic activity. As in 1776, the better place now to look for a justification of laissez faire and an emphasis upon the price mechanism as a superior social-control device in this country is the logic of economic theory. If competition in the economy is really considered to be desirable, we would best look to Congress, not to tradition, to get it; and, from commercial policy to labor unions, from the production of butter to the production of steel, I suspect Congress, if asked to legislate competition into being, would find reason to adhere to a new version of laissez faire -- "don't rock the boat".

Footnotes

[1]John R. Commons, Legal Foundations of Capitalism, Madison, University of Wisconsin Press, 1968, pp. 144-5, 185-6.

[2]Lance E. Davis and Douglass C. North, Institutional Change and American Economic Growth, Cambridge University Press, 1971, p. 72. These authors appear to believe that Dartmouth College's charter had been granted by the state of New Hampshire, a misconception of major proportions.

[3]Dartmouth College v Woodward, 4, Wheaton (518), p. 707.

[4]Ibid., pp. 558-9.

[5]Ibid., p. 651.

[6]William Blackstone, Commentaries on the Laws of England, New York, W. E. Dean, 1840, BK. II, p. 359. All references to Blackstone hereafter refer to the pagination of this edition.

[7]The public utilities controlled by the various independent regulatory agencies, laws such as the Public Utility Holding Company Act of 1935, and threat of monopoly, of course controlled by the Antitrust Division of the Justice Department under the Sherman and Clayton Antitrust laws, as amended.

[8]The University of Chicago Press, 1962, p. 2.

[9]Ibid.

[10]Ibid., p. 3.

[11]This great statute was the basis of English notions of law and order until Victorian times when local authorities established police. Its hue-and-cry provisions continued earlier English traditions, and were found, along with set requirements providing local stores or arms, in early colonial laws. J. J. Bagley and P. B. Rawley, A Documentary History of England, 1066-1540, London, Penguin Books, 1966, pp. 152-162. The Colonial Laws of Massachusetts, reprinted from 1660 edition, containing the "Body of Liberties" of 1641, Boston, City Printers, 1889, p. 139. Hue-and-Cry Ordinance of 1646; pp. 175-181 on arming of militia.

[12]For a survey of English and early American law regarding caveat emptor, James Kent, Commentaries on American Law, Boston, Little, Brown and Co., 1873 edition, vol. 2, pp. 654-705.

[13]On assumpsit, Charles K. Burdick, "The Origin of the Peculiar Duties of Public Service Companies," Columbia Law Review, Vol. XI, 1911, pp. 515-523.

[14]198 U.S. 45, p. 75 (1905).

[15]193 U.S. 197, (1904), p. 403. He pointed out, in fact, that those who framed the act were not interested in promoting competition. "It was the ferocious extreme of competition with others not the cessation of competition among the partners (in a trust), that was the evil feared." p. 405.

[16]Governor Winthrop wrote an essay (1639) explaining how the Puritans might carry on their practices illegally and yet not suffer the consequences. Such was necessary in their case, since they had emigrated precisely for the reason that it was the laws of England they wanted to escape.

> "For that it would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England, and that we are assured we must do. But to raise up laws by practice and custom make no transgression; as in our church discipline, and in matters of marriage, to make a law that marriages shall not be solemnized by ministers, is repugnant to the laws of England; but to bring it to a custom by practice for the magistrates to perform it is no law made repugnant." Colonial Laws of Massachusetts, op. cit., pp. 7-8.

In fact, such was doubtless the way new practices developed throughout the colonies, by practice, not by legislation; for example the development of retailing and sales outside established markets, sales by farmers from their farms, or by peddlers in the countryside.

[17]It was settled doctrine that the whole of the English common law together with all statutes passed prior to colonization except those specifically excluded by Charter (e.g., Quia Emptores lifted in Pennsylvania, Maryland and Delaware) formed background law of the colonies. See Kent's Commentaries, op. cit., vol. I, pp. 537-8; for a late colonial legal view, Franklin Bowditch Dexter, ed., The Literary Diary of Ezra Stiles, New York, Scribners, 1901, vol. I, p. 331, entry for 6 January, 1773. Also Richard Morris, "Massachusetts and the Common Law: The Declaration of 1646," American Historical Review, Vol. XXX, 1925-6, in which Morris showed the wisdom of Winthrop's scheme and that Massachusetts had indeed succeeded in operating contrary to some English law. The colonial charters typically gave full rights of native-born Englishmen to the colonists from Humphrey Gilbert's patent of 1578. For example, James I gave to the Virginians in the 1606 Charter "...all Liberties, Franchises, and Immunities...as if they had been abiding and born, within this our Realm of England...". Francis Newton Thorpe, ed., The Federal and State Constitutions, Colonial Charters and Other Organic Laws, Washington D.C., U.S. Government Printing Office, 1909, p. 3788. Some early laws, like the Statute of Frauds, 20 Charles II, c. 3, 1677, were repassed by state legislatures, Kent, op. cit., vol. 2, p. 685, vol. 4, pp. 482, 550. The Continental Congress, 14 Oct., 1774 claimed the common law of England and the statutes at the time of colonization outright. Documents Illustrative of the Formation of the Union of the American States, Wash., D.C., U.S. Govt. Printing Office, 1927, "Declarations and Resolves of the first Continental Congress, Oct. 14, 1774," pp. 1-5. The constitutions of

the states of Massachusetts, New York, New Jersey, Delaware and Maryland simply adopted the major body of English law directly and thus passed it straight into the legal bloodstream of the new nation. See Kent, op. cit., vol. 1, pp. 537-8. A general discussion of the issue is found in Rene David and John E. C. Brierly, Major Legal Systems of the World Today. London, Stevens and Sons, 1968, pp. 336-380.

[18]273 U.S. 261 (1926) p. 446.

[19]291 U.S. 502 (1934) p. 536.

[20]See opening quotation in this paper, p. 1 above.

[21]Burdick, op. cit., p. 515.

[22]Ibid., pp. 523, 527-531.

[23]94 U.S., 113 (1877) p. 124.

[24]Capitalism and Freedom, p. 9. What Friedman says here is true by his lights, that anyone who is required to obtain a license in order to enter business is "being deprived of an essential part of his freedom." My point is that licensing of businesses, close restriction of entry by law is so ancient that the right to be free of the practice would have to be established by law. The case for entry restriction by government has the whole weight of our legal history behind it. For example Henry III's charter to Liverpool in 1229, setting up a gild merchant, "...no one who is not of that gild may trade in the said borough...". Bagley and Rowley, op. cit., p. 84. Among the reasons for this kind of social control was doubtless the suppression of inferior workmanship when Massachusetts restricted leather working in 1642 in order to improve the quality, Colonial Laws, op. cit., pp. 168-70. Brewing was limited in 1641 to those who had "sufficient skill and knowledge in the art or mystery of brewing," ibid., p. 126. Colonial laws were plentiful on this issue. Phillip Alexander Bruce, Economic History of Virginia in the Seventeenth Century, New York, Macmillan, 1896, vol. II, pp. 412-429. Thomas Jefferson Wertenbaker, The Puritan Oligarchy, New York, Scribners, 1947, p. 49. Carl Bridenbaugh, Cities in the Wilderness, New York, Oxford Press, 1971 (Galaxy ed.) pp. 199-200, 245, 357. In fact Elizabeth's Statute of Artificers and Apprentices, the basic law of the colonial era regarding employments stated in article XXXI that none should "...exercise any art, mystery or manual occupation...except he shall have been brought up therein seven years at least as an apprentice..." 5 Elizabeth, C. 4. If logic is on Professor Friedman's side, tradition is not. See Richard C. Wade, Urban Life in Western America, 1790-1830," LXIV American Historical Review, no. 1, Oct. 1958 on the elaborate controls established to restrict entry and impose controls over ordinary business affairs.

[25]The best discussions are Blackstone, op. cit., Book II. Sir William Holdsworth, A History of English Law, London, Methuen, 1936, 4th edition, pp. 29-275. W. A. Maitland, The Constitutional History of England, Cambridge University Press, 1961, pp. 23-39. S. F. C. Milsom, Historical Foundations of the Common Law, London, Butterworths, 1969, pp. 88-205. Marshall Harris, The Origin of the Land Tenure System in the United States, Ames, Iowa State College Press, 1953, pp. 2-15.

[26]The grant to Georgia, as a charitable enterprise, gave the land in socage, but the Trustees of the Company attempted to control the conditions of tenure given to colonists in the interests of social uplift. The attempt was abandoned, Negro slavery was admitted, rum imported, the sumptuary law repealed and in 1750 full socage tenure was given to the colonist by allowing normal inheritance of land. Charles C. Jones, The History of Georgia, Boston, Houghton Mifflin, 1883, vol. I, p. 428.

[27]The charters of these colonies were patterned after the Palatine County of Durham, and the Proprietors' rights corresponded to those of the Bishop of Durham, sub-infeudation was allowed. Thorpe, op. cit., p. 1678, for Maryland Charter. Jonathan Hughes, The Vital Few, Oxford, (Galaxy edition) 1973, pp. 52-57 on Pennsylvania Charter. Harris op.cit., p. 123, on lifting of Quia Emptores in Pennsylvania. A fine discussion of Maryland's charter is in Newton D. Mereness, Maryland as a Proprietary Province, New York, Macmillan, 1901, pp. 1-10, 49-58, 518.

[28]An interesting example of what might have been was the "manor counties" of New York where the original Dutch tenures had long-lasting influences. My colleague, E. L. Jones, argues that the relative agricultural underdevelopment of this region in the early 19th century was due to the great estates and their feudal land rights. See Harris, op. cit., pp. 91-97 on the New York tenures; Henry Christman, Tin Horns and Calico, New York, Henry Holt, 1945, on the "rent wars" of the 1840's that resulted.

[29]Harris, op. cit., pp. 376-378. He notes, pp. 408-410 the transmogrification of feudal dues into our present array of land fees and taxes.

[30]Thorpe, op. cit., pp. 2654-2655, Art. 1, Sec. 12 of New York's 1846 Constitution.

[31]Kent, op. cit., col. III, pp. 647-648. Harris, op. cit., pp. 15, 408-9, emphasizes the imperfection of modern American fee simple. Americans cannot be absolute (allodial) land owners. The state remains the "donor". Socage remains, even if we, like Kent, insist upon calling it "fee simple".

[32]Ibid., loc. cit.

[33]5 George II, C.7. By this law colonial real estate was reduced to the status of personal property so it could be seized and sold for debts owed to subjects living in England. Such a law made no sense in English land law, but did in America. Kent, op. cit. vol. 4, pp. 443-4 discusses this issue, noting that such had already been done in Massachusetts in 1696 and in Pennsylvania in 1700 and 1705.

[34]In London in 1771 the Negro slave, Somerset, was freed on a writ of habeas corpus. The presiding judge, Lord Mansfield, ruled that slavery could not exist in the English constitution. Kent, op. cit., vol. 2, p. 306. Also, Edward McCrady, The History of South Carolina Under the Royal Government 1719-1776, New York, Macmillan, 1899, pp. 381-385.

[35]Op. cit.. This statute provides in article IV that all persons remarried, who served three years in any craft, who had not specified means could under conditions listed be compelled to serve in the crafts.

[36]Ibid.. The statute listed in article VII the classes exempt from obligatory service in agriculture. These generally were trades, professions, scholars, clergymen, persons with certain amounts of incomes, gentlemen, etc.. Articles IX, X, XI defined satisfactory service and conditions for leaving employment and being re-employed. Article XII specified hours of employment. Article XV requires that wages be set by local officers, justices of the peace, mayors, sheriffs, bailiffs, etc.. Articles XVII and XIX, provide punishments for offering higher or accepting wages higher than those authorized. In the Colonial Laws of Massachusetts, op. cit., p. 174, laws of 1630, 33, 35, 36, 41 provide that "...the freemen of every Town may from time to time as occasion shall require, agree amongst themselves about the prizes and rates of all workmen's labor and servants' wages". Penalties were provided for overpayment, and for the freemen of one town to seek redress against those of another town in country court for overpayment of wages.

[37]Statute of Artificers, op. cit., article XXII; Colonial Laws, op. cit., p. 203, a law of 1646 compelling colonial artisans to labor in the harvest. David J. Saposs, writing in John R. Commons and Associates, History of Labor in the United States, New York, Macmillan, 1918, vol. I, p. 43, thought this Massachusetts law an example of early American class discrimination. It was not more than provided for in the background law of England.

[38]Heard by Supreme Court of Massachusetts. The crucial words were, regarding labor organizations: "The legality of such an association will therefore depend upon the means to be used for its accomplishment," Stephen J. Mueller, Labor and the Law, Cincinnati, Southwestern Publishing Co., 1949, p. 44.

[39]John R. Commons and Associates ed., A Documentary History of American Industrial Society, Cleveland, Ohio, Arthur H. Clark and Co., 1910, vol. III, pp. 19-27.

[40]A classic argument in this regard, equating as equally "free" the two sides of the wage contract, no matter how unequal the contest was Justice Sutherland's opinion in Adkins v Children's Hospital, 261 U.S. 525 (1923) overturning the District of Columbia's 1918 attempting to fix minimum wages for women and children.

[41]Blackstone, op. cit.. Book II, pp. 363-5 on the function of "market overt" in English practice.

[42]Ibid.. Book III, pp. 28-29. Edward A. Adler, "Business Jurisprudence," Harvard Law Review, vol. XXVIII, 1914-15. According to Holdsworth, op. cit., (7th ed., 1956), vol. I, pp. 569-572, the Common Law Courts were taking jurisdiction from courts of piepowder as early as the 16th century.

[43]I have found but one reference to piepowder courts in Colonial America, in Maryland, where other English legal antiquities got a new lease on life, as we have seen. Mereness, op. cit., pp. 420-421. The establishment, and attempted establishment of markets overt are too numerous to list more than a sample here. See: Thorpe, op. cit., p. 1868, "the commission of Sir Edmund Andros," for general authority to establish markets overt; John Romeyn Broadhead, History of the State of New York, New York, Harper and Bros., Vol. I, p. 289; Colonial Laws of Massachusetts, op. cit., pp. 124-5, 150 for Massachusetts markets; Edward P. Allinson and Bois Penrose, Philadelphia 1681-1887, The Johns Hopkins Press, 1887, p. Li; Mereness, op. cit., pp. 416-419 for Maryland; W. Ray Smith, South Carolina as a Royal Province 1719-1776, New York, Macmillan, 1903, p. 185; Jones, op. cit., vol. I, pp. 479-485, for Georgia. William B. Weeden, Economic and Social History of New England 1620-1789, Boston, Houghton Mifflin, 1890, Vol. I, p. 406, Vol. II, pp. 524-26. This form of strictly controlled market was not always a success, even at the start. See Carl Bridenbaugh, Cities in the Wilderness, New York, Oxford Press (Galaxy ed.) 1971, pp. 194-5 on colonial Boston's experience.

[44]Ibid., pp. 27-29, 41-42, 180-181, 192-193, 334-336, 349-354, 355. Retail trade outside established markets was actually outlawed in Virginia and Connecticut in the mid-17th century. Saposs, op. cit., p. 40.

[45]Commons and Associates, A Documentary History, op. cit., p. 128.

[46]Commentaries, vol. 2, pp. 417-418.

[47]"Urban Life in Western America," op. cit., p. 21.

[48]Regulations covering common carriers, innkeepers, ferries, etc. in colonial America were abundant. Colonial Laws of Massachusetts, op. cit., pp. XIII, 126, 137, 150-151, 166, 190-191; Weeden, op. cit., vol. I, pp. 112-113, 207, 313 on New England generally, Brodhead, op. cit., vol. II, pp. 71-75 on New York; Mereness, op. cit., p. 353 for Maryland; Thomas Jefferson, Notes on the State of Virginia, London, John Stockdale, 1788, p. 253; Bridenbaugh, op. cit., pp. 44, 113-115, 156, 197, 198, 268-274, 354-355, 426-435 on general licensing and rate control. Also Weeden, op. cit., vol. I, pp. 110-111, 114, 185, 205-206, 211, 311, vol. II, pp. 511, 879 for control of ferries and rates in New England. Kent, op. cit., vol. 2, pp. 802-830 on innkeepers and common carriers generally in English, colonial and early New York law. Edward A. Adler, op. cit., p. 140 concludes that the separation of common callings was an error, that originally all persons in business in England were subject to the laws of common callings. But, as Burdick, op. cit., Part I, passim shows, the special treatment given to carriers, innkeepers, etc. was of early English origin before Americans copied it.

[49]27 Henry VIII, c. 25 (1535). Also Albert Deutsch, "The Sick Poor in Colonial Times," American Historical Review, vol. XLVI, No. 3, April 1, 1941, pp. 560, 561, 578-9. Frances Fox Diven and Richard A. Cloward, Regulating the Poor, New York, Vintage Books, 1971, Chp. 1 contains a useful survey of the English and American tradition. The idea of strictly local poor relief of all sorts as the only rational procedure was given a powerful theoretical boost by David Ricardo in The Principles of Political Economy and Taxation, first published in 1817. Poor relief should be taxed and spent at the parish level: "Each parish raises a separate fund for the support of its own poor. Hence it becomes an object of more interest...to keep the rates low...". A national system would lead to fiscal disaster: "If by law every human being wanting support could be sure to obtain it...theory would lead us to expect that all other taxes together would be light compared with the single one of poor rates." Principles, Richard Irwin, Homewood, Illinois, 1963, p. 54. The tradition lingers.

[50]Robert E. Sherwood, Roosevelt and Hopkins, New York, Bantam Books, 1950, Vol. I, pp. 55-56.

[51]It began with the suppression of the Massachusetts Land Bank in 1741 by 14 George II, C. 37, "An Act for Restraining and Preventing Several Unwarrantable Schemes and Undertakings in His Majesty's Colonies and Plantations in America." The Bubble Act of 1720 was applied with rigor. The Massachusetts scheme folded immediately. But other means were found, and paper money flourished.

[52]Paul Studenski and Herman Krooss, Financial History of the United States, New York, McGraw Hill, 1952, pp. 31-32.

[53]The Banking Act of June 16, 1933, and requirements of the Securities Exchange Act of 1934. The first separated commercial banking from investment banking, the second contained restrictions about disclosure of information, use of it by "insiders," etc.

[54]Commentaries, op. cit., Vol. 3, pp. 198-199, and Vol. 1, p. 503 for the two quotations.

[55]Colonial Laws of Massachusetts, op. cit., "...all ships which come for trading only, from other parts, shall have free access to our Harbours, and quiet Riding there, and free Liberty to depart without any Molestation from us..." p. 192. But a law of 7 Aug., 1661 repeals the law of 1645. Ibid., p. 220. In the end, irregularity of enforcement of the Navigation Acts was among the reasons the crown abolished the old Massachusetts charter in 1684. Viola Florence Barnes, The Dominion of New England, Yale University Press, 1923, p. 23.

[56]Blackstone, op. cit., Book II, pp. 367-370. On American adaptation of English law in this regard, Kent, op. cit., Vol. 2, Lecture XL.

[57]The Colonial Laws of Massachusetts show the changes that experience brought the colonists regarding such matters as fishing, clamming, free-roaming horses, etc.: Common fields, 1643, 1647; damage by free-roaming animals, 1646, 1647, pp. 130-133: on fishing and fowling, 1641 and 1647, pp. 37, 170; genetics, law of 1668 restricting size of freely-roaming horses to 14 "hands" and over, because: "whereas the breed of horses in the country is utterly spoyled..." p. 243; Mining law of 1641, p. 181.

[58]On uses of common lands, John Gorham Palfrey, History of New England, Boston, Little, Brown, 1882, Vol. I, p. 343: Kent, Commentaries, op. cit., Vol. LV, p. 468: Weeden, op. cit., pp. 60-68. Sumptuary laws were common in medieval Europe. English statutory sumptuary laws printed in Statutes at Large begin with 1 Henry VIII, c. 14 (1509) are repealed and reimposed during his reign and Elizabeth's reign and are finally repealed by 1 James, C. 25 (1603). The first Massachusetts Sumptuary Law printed in 1658 thus post-dates the end of English legislation on the issue. Colonial Laws of Massachusetts, p. 123. Another such law was passed in 1662, ibid., p. 220. Weeden, op. cit., Vol. I, pp. 286-289 on New England in general. Bridenbaugh, op. cit., pp. 97, 412. He cited a Massachusetts ordinance of 1712 which attempted to limit expenditures on funerals.

[59]Colonial Laws of Massachusetts, op. cit., regarding inspection (gauging of goods packed in containers for weight and quality, a law of 1641 reads "...if such goods...shall be put to sale without the Gagers mark he shall forfeit the said goods, that so puts them to sale, the one halfe to the Informer the other halfe to the countrey." p. 130.

[60]The literature on this is immense. Roscoe Pound argued that judicial review would have become English practice had it not been for the Puritan Revolution and its ultimate consequences, Parliamentary supremacy in the modern English constitution, "The Development of American Law and Its Deviation from English Law," Law Quarterly Review, vol. 67, January, 1951, pp. 158-9. The delegates to the Constitutional Convention were well aware of the value of the Board of Trade's review of colonial laws; see the statement of Charles Pinckney of South Carolina on this issue in Documents Illustrative of the Formation of the Union of the American States, Washington, D.C., Govt. Printing Office, 1927, p. 174.

[61]Charles G. Haines, The American Doctrine of Judicial Supremacy, Berkeley, University of California Press, 1932, Ch. I, n. 1, puts the number of laws annulled at 469 out of a total of 8563 acts of colonial assemblies examined by the Board of Trade, nearly 5.5 percent. It was Marshall's great contribution in Marbury v Madison to extend judicial review to the federal level. The consequences to the American economy have been profound and have imposed a kind of control over economic legislation that is uniquely American.

[62]Benjamin Franklin, The Autobiography and Other Writings, New York, Signet, pp. 141-142.

[63]The Frontier in American History, New York, Henry Holt, 1921, pp. 320-321.

[64]Samuel C. Weil. "Waters: American Law and French Authority," Harvard Law Review, Vol. XXXIII, 1919-1920. Justice Story and Chancellor Kent are generally credited with introducing French riparian law in the early Federal period to compensate for deficiencies in the Common Law and American statute law.

[65]The Great Transformation, Boston, Beacon Press, 1957, p. 73.

[66]Their charters were granted during the Civil War, the vast land grants were the main federal aid. The Thurmond Act of 1878 requiring that a quarter of their net earnings be set aside as a sinking fund constituted a fairly rigorous form of financial control. In the resulting Sinking Fund Cases, 99 U.S. 700 (1879) p. 726 Chief Justice Waite referred to such direct federal control of the railroads as "...a reasonable regulation of the affairs of the corporation and promotive of the interests of the public and the corporators." A strong precedent.

[67]Munn v Illinois, 94 U.S. 113 decision given 1 March, 1877. A fine analysis of the consequences of this fateful decision is Breck P. McAllister, "Lord Hale and Business Affected With a Public Interest," Harvard Law Review, Vol. 43, March, 1930. A less impressive, but useful essay on Munn is Maurice Finkelstein, "From Munn v Illinois to Tyson v Banton, A Study in the Judicial Process, Columbia Law Review,

Vol. XXVII, 1927. Recently Harry Scheiber has show that Justice Waite was not so idiosyncratic as has been commonly assumed; that, in fact, Lord Hale's doctrine in De Portibus Maris had been applied earlier and regularly in American courts, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," Perspectives in American History, Vol. V, 1971.

[68]Munn v Illinois, op. cit., p. 125.

[69]William Letwin, Law and Economic Policy in America, New York, Random House, 1965, Ch. 2. Holmes was attempting, unsuccessfully, to hold the Supreme Court to a common law definition of "contract in restraint of trade" in his dissent in the Northern Securities Case, op. cit.. He pointed out that such contracts had nothing to do with monopoly unless they "covered the whole of England," p. 404. An extensive discussion of the common law origins of American antitrust laws is found in Hans B. Thorelli, The Federal Antitrust Policy, Stockholm, 1954. A short discussion of the presumed common law ideas behind the Sherman Act found in A.D. Neale, The Antitrust Laws of the USA, Cambridge University Press 1970, pp. 13-15. An interesting older discussion of the background of the Sherman Act is, William B. Hornblower, "Anti-Trust Legislation and Litigation," Columbia Law Review, Vol. XI, 1911, pp. 701-705.