The Progressive Tradition: An LPE Reading List and Introduction

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The Progressive Era was a period of political and social reform broadly spanning the late 19th century and the early 20th century. It challenged concentration of private power in the Gilded Age, calling for increased social control over business and the economy. The progressives had significant and long-lasting influences on American economic and political life. They helped shape the modern regulatory state, and inspired burgeoning leftist movements in the twenty-first century—most notably, the New Brandeisians. The bibliography below is intended to provide an introduction to ideas and writings by and about Progressive Era thinkers. The text that follows tries to be thorough but does not claim to be comprehensive.

The Emergence of the Progressives

The Progressive Era emerged in the late nineteenth century in response to America's first Gilded Age, also known as the *Lochner* era. From the late nineteenth century to the early twentieth century, the United States came under the influence of a monopolization movement. Men like John Rockefeller and J.P. Morgan controlled large corporations which dominated most major industries, from railroads to telecommunications to finance to oil. Progressive era legal-economic scholars Adolf A. Berle and Gardiner C. Means, in their seminal 1932 text *The Modern Corporation and Private Property*, articulated the astonishing new scale of private enterprise and pointed to the need to view it in a different light:

The economic power in the hands of a few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organizations which they control have passed far beyond the realm of private enterprise—they have become more nearly social institutions.

The concentrated power of corporate giants left citizens vulnerable to economic and political exploitation. In *The Politics of Industry*, progressive era economist Walton Hamilton explained that "[t]he emergence of the factory system" led to new "ways of handling human labor . . . In advance of the fact, there was little understanding of the human misery and poverty which was to result." In *Democracy Against Domination*, contemporary legal scholar K. Sabeel Rahman argued that, to progressive era thinkers, industrialization poses "new threats to liberty, particularly the 'absolutism' of powerful corporations who dominated their workers, and monopolies that threatened the broader economic and political order."

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In response to these conditions, American Progressives launched a movement toward increased legal and political control of businesses and the market. The progressives rejected early liberal conceptions of the state, which understood governmental regulation as an invasion of personal liberty and encroachment upon the regime of free contract—and which helped to enable and to justify the concentration of power in industry. Instead, progressives saw governmental regulation as critical to protecting personal liberty from industrial domination and exploitation. Rahman argues that this domination manifested itself in two forms. First, concentrated private power led to what Rahman termed "dyadic domination," an imbalance of institutional power between economic elites and regular citizens, enabling a small group of private actors to, "by virtue of their position and wealth, . . . dominate others in society whether directly in the economy or indirectly in the policy process." Second, the domination of the "market as a system, a confluence of human-made rules that while lacking a single directing actor, nevertheless constrains the prospects of individual well being." Rahman calls the second "structural domination."

The Institutional Economists

Progressive era economic regulation was rooted in the work of a new school of economists—the institutional economists. The institutionalists rejected the unrealistic theories and abstractions of classical economics, and especially the conception of the economy as separate or distinct from the state or the political realm. Instead, Hamilton argued in *The Politics of Industry*, that "industry" and "politics" were inextricably fused:

"[T]he market which of old was sovereign to the whole economy has been deposed . . . It is not that the market is no longer of importance . . . It is rather than the throne has had to be shared . . . A host of procedures and arrangements—political in character—have invaded the dome of business. As a result there has arisen, quite apart from the ordinary operations of state, a government of industry which in its own distinctive way has its constitution and its statutes, its administrative and judicial processes, and its own manner of dealing with those who do not abide by the law of the industry.

Private power, in other words, had invaded the sphere of the political. Preeminent legal historian William Novak, in *Institutional Economics and the Progressive Movement for the Social Control of American Business*, explains that institutionalists believed that "neither the individual nor the economy could be understood abstracted from the real social and institutional world that gave them meaning and possibility." The institutionalists developed ideas about the means through which business and the economy could be controlled—particularly, in Novak's words, "those mechanisms of control available through law, politics, the state, and new technologies of legislative and administrative regulation. For the institutionalists, the problem of control was not exogenous to the operations of a free market or a second-order question in theorizing the modern economy; rather, it was constitutive and foundational."

From the progressives and the institutionalists emerged a broad program for governmental control of industry, which culminated in the modern American regulatory and administrative state. The progressive conception of governmental regulation, as articulated by institutional economist Henry Carter Adams in his 1918 text *Description of Industry: An Introduction to Economics*, was one in which "The State" exercised "a controlling and regulating authority over every sphere of social life, including the economic, in order to bring individual action into harmony with the good of the whole."

Progressive Era Strategies for Reform

Progressive reformers developed three main strategies to advance their agenda of social control over business and the economy: antitrust, public utility regulation, and public options.

Antitrust, in the progressive era, was conceived of as a check on private concentrations of power. Progressive reformers understood antitrust as encompassing far more than the contemporary conception of antitrust law, which focuses on consumer pricing and economic efficiency. Justice Brandeis, the leading architect of progressive era antitrust law, argued that breaking up large corporations would prevent exploitative monopolies, ensure a competitive market, and protect democracy from the corrosive influence of corporate power. Brandeis extended the logic of James Madison's Constitutional design into the private sphere—just as the Constitution disperses power among the different branches of government, antitrust law enables a system of checks and balances in the private sphere.

Public utility regulation was developed by progressive reformers to impose special legal obligations on certain business activities. Private business activities affected with the public interest were monitored and supervised through comprehensive administrative regulation. The progressives understood "public utilities" to encompass far more than natural monopolies like railroads and electricity and telecommunications. Progressive era state and local governments regulated a wide range of goods and services as public utilities, including banks, insurance companies, housing, milk, and fuel. In *Challenging the New Curse of Bigness*, Rahman explains that "[l]eading reformers and scholars, from Brandeis to Robert Hale to John Commons, suggested that such public utility regulation could be justified not only in industries that possessed economies of scale in production, but also in those industries that provided social necessities, where the vulnerability of citizens, businesses, and communities to exploitation by the private provider was most threatening and troubling."

Where regulation was insufficient, progressive era policymakers sought to provide a "public option"—a service provided for the public through government-chartered entities. During this period, the first municipally owned utilities in electricity, water, and transportation were created.

A Revival of the Progressive Tradition

Since the 1970s, there has been a paradigm shift in the American political economy. Progressive era reforms have been gradually undermined through the resurgence of concentrated private power. Today, we have recreated both the economics and politics of a century ago. The United States and other major nations have weakened laws meant to control the size of corporations, enabled nearly unrestricted economic consolidation, and created a twenty-first century Gilded Age.

In response, new movements to revive the spirit and the strategies of the progressive era have emerged—most notably, the New Brandeisian movement. As its name suggests, New Brandeisian scholars trace their intellectual roots to Justice Brandeis, and aim to revive his vision of competition policy and antimonopoly.

Lina Khan and Zephyr Teachout, prominent New Brandeisian scholars, understand antimonopoly as addressing the problem of unchecked private power. They argue that "[m]arket structure is deeply political," because it is "governed by law" and it is "product of political decisions – made and not made – about how the players in that market will be allowed to use their power." They understand economic consolidation to "impose on citizens…form[s] of private governance unaccountable to the public" and see the goal of public policy as imposing checks on such excessive private power.

Rahman conceptualizes market regulation as a problem of democratic theory. He argues for an embrace of democratic governance; a recognition of the political nature of antimonopoly and a rejection of the pretense of formalist neutrality that is reflected in both laissez faire and regulatory managerialism. The solution, Rahman argues, is to create "sufficiently powerful channels through which citizens can contest the exercise of power by the economic elite."

In summary, as explained by Political Scientist Gerald Berk in his forthcoming article *The New Brandeisians*, this new movement of progressives reject the contemporary regulatory regime's framing of antitrust and competition policy through the lens of economics and efficiency. Rather, they seek to reclassify antimonopoly as a political problem, and, in alignment with their intellectual predecessors, situate their understanding of antimonopoly in the context of liberty and democracy.

Bibliography

William Novak, *Institutional Economics and the Progressive Movement for the Social Control of American Business,* 93 BUS. HIST. REV. 665 (2019).

- Novak explores the ideas of Progressive Era thinkers and economists, who were part of a movement for the social control of business and the market. The thinkers of this era understood that neither the individual nor the economy could be abstracted from the real social and institutional world that gave them meaning and possibility. They fought for broad governmental control of industrial action in service of the public interest, which led to the creation of the modern American regulatory and administrative state.

Adolf A. Berle & Gardiner Means, The Modern Corporation and Private Property (1932).

- Ch1-3: Berle and Means explore the evolution of big business through a legal and economic lens. Large corporations have come to dominate most major industries in the United States, and large corporations have been growing at two or three times the rate as all other non-financial corporations. This corporate system has drawn together wealth into aggregations of constantly increasing size, putting economic, industrial, and political control into the hands of a small number of powerful people. As a result, the principles of duopoly—rather than competition—are more applicable to present business conditions.
- Ch 4: The modern corporate landscape has separated ownership from control, creating economic empires and delivering those empires into the hands of corporate management. Owners are merely in the position of supplying the means, while management holds power and control, and is able to perpetuate its own position.

K. Sabeel Rahman, *Challenging the New Curse of Bigness,* THE AM. PROSPECT (2016).

- Rahman documents the intellectual legacy of progressive reformers, including Supreme Court Justice Louis Brandeis, who understood the problem of concentrated private power to raise fundamental concerns of economic and political liberty. Brandeis and his fellow reformers devised a number of strategies to curtail private power: antitrust, public utility regulations, and public options.
- Beginning in the 1970s, progressive era regulation was gradually undermined through the resurgent political power of business, given legitimacy by influential critiques from the rising conservative law and economics movement. Today, we are experiencing levels of corporate power that echoes Progressive Era abuses and reforms. Progressive Era tools should be revived to regulate "too-big-to-fail" financial firms; internet service providers and other internet-based technology giants; health insurance; and housing.

Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUROPEAN COMPETITION L. & PRAC. 131 (2018).

- A concise summary of the core tenants of the "New Brandeis School," a theory of competition and antitrust that traces its intellectual roots to Supreme Court Justice Louis Brandeis. New Brandeisians believe that: (1) antimonopoly is critical to a democratic society; (2) antimonopoly aims to create a system of checks and balances in the commercial and economic spheres; (3) industries that tend naturally toward monopoly should be regulated to prevent exploitation; (4) regulators should focus on structuring markets to promote openness and competition, rather than any particular social outcomes;

(5) the political economy is structured through law and policy, and there are no such things as natural market forces.

Gerald Berk, *The New Brandeisians* (unpublished).

- Berk surveys the burgeoning school of New Brandeisians, their ideas, principles, prescriptions, and political strategies. Berk explains that the New Brandeisians are involved in a "jurisdictional, normative and epistemological struggle with the current regulatory and professional regime in antitrust. Jurisdictionally, they argue that antitrust is a species of constitutional and statutory law. As such, it needs to be rooted in a political theory of power, not an economic theory of efficiency. Normatively, they argue that antitrust ought to check market power and promote competition in service of a variety of goals, liberty and democracy central among them. Epistemologically, they argue that conceptualizing antitrust through a lens of structural power and anticompetitive behavior is superior to the Law and Economics focus on efficiency."

Walton Hamilton, The Politics of Industry (1957).

- Hamilton argues that the idea of a self-regulating market has become obsolete with industrialization and changes in the economic order. There is no distinction between industry and politics, and the economic sphere and the political sphere must be understood as being inextricably tied together.

Louis D. Brandeis, Other People's Money and How the Bankers Use It (1914)

- Brandeis argues that bankers collude with corporations to create monopolies, which stifles competition and creates economic inefficiency.

***Louis K. Liggett Co. v. Lee,* 288 U.S. 517 (1933) (Brandeis, dissenting).**

- Brandeis warned presciently of the social and political disadvantages of large corporations and concentrated economic power. He attributed these disadvantages to the separation of ownership and control which characterized the modern publicly held corporation.