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A Bridge Between: Law and the New Intellectual Histories of Capitalism

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INTRODUCTION

The American historical profession has in recent years witnessed a significant revival of two subfields that were once thought to be nearly dead. Both intellectual history and what is often referred to today as the history of capitalism—and what was earlier considered a variant of business or economic history—are flourishing. They are thriving mainly because of a newfound desire and interest among scholars and the public, alike, for better ways to understand the past. A generation or so ago, both of these areas of historical investigation seemed bound for the dustbin of history. Their demise, however, has been greatly exaggerated.

In some cases, the two fields have converged. Since at least the late 1970s, American intellectual historians have been explicating past arguments and reasoning about

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capitalism and the social consequences of political economy.¹ Likewise, historians of capitalism have recently been analyzing not only the social and material foundations of modern market relations,² but also the ideational and ideological aspects of our “propensity to truck, barter, and exchange one thing for another.”³

What role has law and legal history played in this revival and convergence? How have formal and informal laws, legal institutions, and legal actors and processes informed our conceptual understanding of the origins and development of modern American capitalism? What better place to explore these historiographical and programmatic questions than in a symposium directed at *Opportunities for Law’s Intellectual History*.

As the many papers in this volume attest, the opportunities for law’s intellectual history are vast and varied. Indeed, the prospects for Law’s Intellectual History in the analysis of capitalism and risk are particularly promising. This Paper focuses on just one of those opportunities: how law and legal history have been—and can continue to be—a bridge between intellectual history and the new histories of capitalism.

In many ways, law has always been central to our conceptual understanding of markets and democracy, and the relationship between the two. From the classic sociological work of Max Weber and Joseph A. Schumpeter to the more materialistic analyses of American institutional economists like John Commons and Robert Hale to certain aspects of the Critical Legal Studies Movement,⁴ law has

1. See generally Richard F. Teichgraeber III, *Capitalism and Intellectual History*, 1 MOD. INTELL. HIST. 267 (2004).

2. Sven Beckert, *History of American Capitalism*, in AMERICAN HISTORY NOW 314, 314-16, 319-22 (Eric Foner & Lisa McGirr eds., 2011).

3. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 25 (R.H. Campbell & A.S. Skinner eds., Oxford Univ. Press 4th ed. 1976) (1776).

4. See generally JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); JOSEPH A. SCHUMPETER, CAPITALISM,

nearly always been among the key factors in understanding the dynamics of market economies and the ideas that undergird and challenge them.

Yet in more recent years, law has frequently been at the center of the intersection between intellectual history and the new histories of capitalism. As historians have become more concerned with tracing the “public nature of intellectual life,”⁵ and as external conditions triggered by the 2008 financial crisis have brought economic issues to the fore of nearly all scholarship, law has once again provided the connective tissue to bring these two subfields together. Thus, both factors internal to the development of American historiography and changing external conditions have brought law together with the resurgence of intellectual history and the new histories of capitalism.

This brief Paper explores the role of law and legal history as a bridge between the two revived subfields. It does so in three parts. Part I briefly chronicles the recent revival of the two subfields. Part II explores why law, in its broadest sense, may be particularly well suited to help integrate the convergence between intellectual history and the new histories of capitalism. Why, that is, law has been and may continue to be a bridge between the two subfields. Part III uses the history of American tax law and policy as one example to show how law is vital to our understanding of the new intellectual histories of capitalism. The Paper concludes with a modest set of observations on where the new literature on law and the intellectual histories of capitalism may be headed.

SOCIALISM, AND DEMOCRACY (3d ed. 1950); MAX WEBER, *ECONOMY AND SOCIETY* (Guentner Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1968); MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils & Max Reinstein trans., Harvard Univ. Press 1954); Robert Hale, *Economic Theory and the Statesman*, in *THE TREND OF ECONOMICS* 189 (Rexford Guy Tugwell ed., 1924).

5. Leslie Butler, *From the History of Ideas to Ideas in History*, 9 *MOD. INTELL. HIST.* 157, 157, 166 (2012) (internal quotation marks omitted).

I. THE REVIVAL AND CONVERGENCE OF HISTORICAL SUBFIELDS

Other scholars have already sufficiently outlined how both intellectual history and the history of capitalism have each recently emerged as leading subfields of historical analysis.⁶ Although these accounts have referenced the role of law in each of these subfields,⁷ there has been little investigation of why law may be a key link between the two areas. Indeed, in some cases, there has even been some skepticism about law's role in intellectual history, with commentators questioning whether the history of legal ideas has been integrated into the "broader fabric of intellectual history."⁸

Before one can make the case for why law and legal ideas are, in fact, integral to the intersection of intellectual history and the histories of capitalism, it may be instructive to review briefly how each of these subfields rose to prominence and what role law and legal history played in their development.

A. *American Intellectual History*

The academic journal, *Modern Intellectual History*, recently published a forum on *The Present and Future of*

6. See generally Thomas Bender, *Introduction to Forum: The Present and Future of American Intellectual History*, 9 MOD. INTELL. HIST. 149 (2012); Lou Galambos, *Is This a Decisive Moment for the History of Business, Economic History, and the History of Capitalism?*, 32 ESSAYS ECON. & BUS. HIST. 1, 7-12 (2014), www.ebhsoc.org/journal/index.php/journal/article/download/271/253; David A. Hollinger, *American Intellectual History, 1907-2007*, 21 OAH MAG. HISTORY, no. 2, Apr. 2007, at 14; Angus Burgin, *The "Futures" of American Intellectual History*, U.S. INTELL. HIST. BLOG (Oct. 21, 2013), <http://s-usih.org/2013/10/the-futures-of-american-intellectual-history-guest-post-by-angus-burgin.html>; Julia Ott & William Milberg, *Capitalism Studies: A Manifesto*, PUB. SEMINAR (Apr. 17, 2014), <http://www.publicseminar.org/2014/04/capitalism-studies-a-manifesto/#>.

7. See generally MICHAEL E. TIGAR, *LAW AND THE RISE OF CAPITALISM* (2000).

8. Andrew Porwancher, *History Departments, Law Schools, and the Abyss in Between*, U.S. INTELL. HIST. BLOG (posted by Ray Haberski) (Oct. 3, 2014), <http://s-usih.org/2014/10/history-departments-law-schools-and-the-abyss-in-between.html>.

American Intellectual History.⁹ In it, a multigenerational group of leading U.S. intellectual historians took stock of the subfield's past, present, and future. Although there was some healthy disagreement among the authors on the defining aspects of the current state of the field and its future prospects, there was nearly unanimous agreement that in the last five decades American intellectual history has gone through a process of decline and recent rejuvenation.¹⁰

By now, the resurgence of American intellectual history is a somewhat familiar story. During the immediate post-World War II years, intellectual history was an esteemed and prominent part of the American historical profession. Scholars such as Perry Miller, Henry May, Merle Curti, and others exemplified a consensus view of the past and America's place in the world.¹¹ Eliding the fundamental divisions within American society, the consensus version of U.S. intellectual history stressed those traits that were seen as part of an all-encompassing American culture and tradition. Frequent use of the royal "we" and book titles about the *American mind* and *American thought*, exhibited the confidence with which post-war intellectual historians described the teleological advance of American modernity.¹²

In the 1960s and 1970s, the post-war prominence of American intellectual history came under attack when the "new social history" began to stress the fissures and tensions within American culture and society. By focusing on the importance of class, racial, and gender differences, the new

9. Bender, *supra* note 6. The existence and relative success of this journal is itself a testament to the robust development of the subfield. For more on the history of the journal, see Charles Capper & Anthony La Vopa, INTELL. HIST. NEWSL., <https://www.bu.edu/mih> (last visited Oct. 31, 2015); *Modern Intellectual History*, CAMBRIDGE UNIV. PRESS, <http://journals.cambridge.org/action/displayJournal?jid=MIH> (last visited Oct. 31, 2015).

10. Bender, *supra* note 6, at 149-50.

11. See, e.g., MERLE CURTI, THE GROWTH OF AMERICAN THOUGHT (3d ed. 1964); HENRY F. MAY, THE END OF AMERICAN INNOCENCE: A STUDY OF THE FIRST YEARS OF OUR OWN TIME: 1912-1917 (1959); PERRY MILLER, THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE (1953).

12. See, e.g., HENRY STEELE COMMAGER, THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880S (1950).

social history amplified subaltern voices from the past.¹³ By rejecting the study of elites of nearly all kinds, the new social history focused more on particular groups and local communities. The emphasis on a “bottom up” approach carried with it a methodological and ideological valence.¹⁴ As a result, the mandarin texts of the previous generation of intellectual historians fell out of favor, and a greater attention to quantitative trends and social patterns took shape. American intellectual history seemed to be at its nadir.

But even as intellectual historians were desperately searching for new vibrancy, particularly through events such as the famous 1977 Wingspread Conference,¹⁵ there were novel academic trends that were shifting the terrain. Most notably, the “linguistic turn” radically altered the intellectual landscape. Not only did this greater attention to epistemology and textual representations move social history closer toward cultural meanings and contexts, it also revived an interest in language and texts that helped fuel a revitalization of intellectual history.¹⁶ The systematic focus on language allowed intellectual historians to move away from the staid study of the “history of ideas,” toward a more innovative and interdisciplinary “history of meaning.”¹⁷ Texts once again became salient, but now in a much broader context.¹⁸

13. Alice Kessler-Harris, *Social History*, in *THE NEW AMERICAN HISTORY* 231, 231-34 (Eric Foner ed., rev. & expanded ed. 1997).

14. See ELLEN FITZPATRICK, *HISTORY'S MEMORY: WRITING AMERICA'S PAST, 1880-1980*, at 3 (2002).

15. The papers presented at the Wingspread Conference were published in: *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* (John Higham & Paul K. Conkin eds., 1979).

16. Bender, *supra* note 6, at 150.

17. John E. Toews, *Intellectual History After the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience*, 92 *AM. HIST. REV.* 879, 879, 881 (1987).

18. John E. Toews, *Thinking Historically When the Margins Become the Center: Intellectual History as Historical Critique in Martin Jay's Essays from the Edge*, 51 *HIST. & THEORY* 397 (2012).

While the linguistic turn may have provided some solace, it was the subsequent emphasis on the importance of culture that seemed to profoundly shape both social and intellectual history. Consequently, social history became more attuned to beliefs and habits of subaltern groups as it moved away from quantitative trends to examine the qualitative, cultural aspects of everyday social life. For intellectual history, taking culture seriously meant tracing the circulation of ideas within a broader culture, whether that was part of a wider “discourse of communities of intellectuals” in a “communicative context,”¹⁹ or the professional culture of academic disciplines or “epistemic communit[ies].”²⁰

Regardless of what the precise accelerant was, most commentators agree that American intellectual history has achieved a regained status and prominence in recent years. The subfield’s prior publication, *The Intellectual History Newsletter*, has now been transformed into a significant Cambridge University Press journal.²¹ University press book lists and academic department course guides now consistently include intellectual history titles and courses. There is even a recently formed professional organization (The Society for U.S. Intellectual History) that hosts an annual conference, along with—that greatest marker of success in the electronic age—a popular online blog.²²

Throughout intellectual history’s decline and Phoenix-like revival, law has always been a regular, if at times underemphasized, part of the subfield. In fact, jurisprudence as a subfield of American legal history has gone through a somewhat similar fall and resurgence.²³ Within the canon of

19. See David Hollinger, *Historians and the Discourse of Intellectuals*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 15, at 42.

20. See Thomas Bender, *The Cultures of Intellectual Life: The City and the Professions*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 15, at 181, 181-95.

21. Capper & La Vopa, *supra* note 9; *Modern Intellectual History*, *supra* note 9.

22. SOC’Y FOR U.S. INTELL. HIST., <http://s-usih.org> (last visited Nov. 16, 2015); U.S. INTELL. HIST. BLOG, <http://s-usih.org/blog> (last visited Nov. 16, 2015).

23. Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 *CARDOZO L. REV.* 601, 605, 704-05 (1993).

American intellectual history, the ideas and writings of the great jurists have never been completely excluded. Consider, for example, that Oliver Wendell Holmes, Jr.'s classic essay, *Natural Law*, has been included in all six editions of *The American Intellectual Tradition*, the well-known reader edited by Charles Capper and David Hollinger.²⁴ Yet, even though legal ideas have been part of the long tradition, the integration of intellectual history with the new histories of capitalism has in many ways relied on law as the critical connective tissue.

B. *The New Histories of Capitalism*

Like American intellectual history, the recent revival in the history of capitalism has also been part of an ongoing transformation. Back in the 1960s and 1970s, the rise of the “new economic history” signaled an innovative engagement between economists and historians interested in some of the biggest issues and questions in the profession. From the economic efficiency of slavery, to the role of the railroads in American economic development, studies by the new “cliometricians”—as they are known—applied sophisticated statistical and econometric analysis to numerous historical questions and topics.²⁵

Not all of these works stressed historicity. Some of the early economic history tended toward applied microeconomic theory, simply using historical data to test contemporary economic theories. Still, there were many other economic historians genuinely interested in understanding the past on

24. See, e.g., Oliver Wendell Holmes, Jr., *Natural Law*, 32 Harv. L. Rev. 40 (1918) reprinted in 2 THE AMERICAN INTELLECTUAL TRADITION 197 (David A. Hollinger & Charles Capper eds., 5th ed. 2011) (1989). This reader has also regularly contained key legal documents from the Founding Era, including excerpts from the Federalist Papers.

25. See, e.g., ROGER WILLIAM FOGEL, RAILROADS AND ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY (1964); ROGER WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974); Lance E. Davis et al., *Aspects of Quantitative Research in Economic History*, 20 J. ECON. HIST. 539 (1960) (introducing the discipline of “cliometrics”).

its own terms, and their research yielded a significant trove of sophisticated scholarship.²⁶

At roughly the same time, business historians also began tracing the origins and early development of fundamental economic changes. Earlier versions of business history tended to focus on individuals and firms and their pioneering roles in advancing economic prosperity. By the 1970s, a new generation of business historians began focusing on more structural explanations of American political and economic development. Alfred Chandler's award-winning *The Visible Hand: The Managerial Revolution in American Business*, became a key marker of the arrival of business history into the mainstream of historical scholarship.²⁷ More books followed, chronicling the dominant factors and seminal events in the development of American capitalism and the relationship among economy, state, and society.²⁸ Legal scholars took an active part in this early phase of the subfield by demonstrating the importance of legal rules and institutions in the historically specific aspects of American economic change.²⁹

Yet, while early histories of capitalism may have been flourishing in economics departments and professional schools of business and law, history departments began to retreat from the study of economic history and historical political economy.³⁰ With the new social history dominant in most history departments, concerns about historically marginalized groups superseded studies of entrepreneurs and their firms, or the broader structural forces undergirding

26. See generally A NEW ECONOMIC VIEW OF AMERICAN HISTORY (Susan Lee & Peter Passell eds., 1979) (edited volume of valuable period-specific essays).

27. ALFRED CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 1 (1977).

28. See, e.g., LOUIS GALAMBOS & JOSEPH PRATT, THE RISE OF THE CORPORATE COMMONWEALTH (1988); THOMAS K. McCRAW, PROPHETS OF REGULATION (1984).

29. See, e.g., GUY ALCHON, THE INVISIBLE HAND OF PLANNING: CAPITALISM, SOCIAL SCIENCE, AND THE STATE IN THE 1920S (1985) (discussing the role of institutions); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977) (discussing the role of the law).

30. Jeremy Adelman & Jonathan Levy, *The Fall and Rise of Economic History*, CHRON. HIGHER EDUC., Dec. 5, 2014, at B9.

economic transformations. There were, to be sure, still plenty of historical social scientists interested in the economy, and several acknowledged the important role that law and politics played in shaping economic changes.³¹ But, for the most part, historians seemed willing to concede questions about economy and society to other scholars.

All that began to change in the 1990s when there was a fresh synthesis of the different strands of existing scholarship. In some ways, the decline of economic history in history departments provided an opening for historians to re-engage with other historically-minded social scientists—and re-engage they did. New historical studies of capitalism began to re-emphasize the importance of context and sequence to economic changes, while at the same time denaturalizing some of the premises of the neo-classical economic order. The new histories of American capitalism “trace how economic and political forces influence one another, without treating the sociopolitical and economic worlds as discrete and intrinsically separate entities,” as Sven Beckert has explained.³² “They make questions of economic change central to the history of North America, but embed into that account the complexity and diversity of American politics, society, and culture.”³³ In short, this new subfield attempts to bring the fundamentals of historical analysis to broader economic issues.

Like intellectual history, the new histories of capitalism have also garnered significant scholarly and public attention. Course syllabi on the topic have proliferated. Academic conferences on historical political economy have made a tremendous return. Columbia University Press recently introduced a new book series on “Studies in the History of Capitalism.”³⁴ University department websites now host

31. See, e.g., NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904* (1985); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916* (1988).

32. Beckert, *supra* note 2, at 319.

33. *Id.*

34. *Columbia Studies in the History of U.S. Capitalism*, COLUM. UNIV. PRESS, <http://cup.columbia.edu/series/columbia-studies-in-the-history-of-us-capitalism> (last visited Nov. 18, 2015) (introducing the series and noting that it “takes the

numerous resources on the topic.³⁵ *The New York Times* has even recognized “[t]he new history of capitalism” as a “cohort” of scholars, if not a full-fledged intellectual movement.³⁶

Recently, there has even been a highly fruitful merger of the new histories of capitalism with the re-emergence of American intellectual history. Studies about the ideological and epistemological underpinnings of economic theories are just one example of how scholars have begun to historicize and denaturalize economic concepts. Building on the Marxist cultural critiques of an earlier generation of scholars,³⁷ historians like Jeff Sklansky, Howard Brick, and James Livingston have creatively combined cultural/intellectual history with histories of capitalism.³⁸ Indeed, Sklansky has gone so far as to contend that capitalism may be the major theme of new developments in American intellectual history.³⁹

Historians of economic thought have, likewise, been a crucial catalyst in melding the history of ideas with the history of capitalism. Some have examined how the

full measure of the complexity and significance of capitalism, placing it squarely back at the center of the American experience.”).

35. See, e.g., *Teaching the History of Capitalism*, HARV. UNIV., <http://studyofcapitalism.harvard.edu/teaching-resources> (last visited Nov. 18, 2015); *History of Capitalism Initiative*, CORNELL UNIV., <http://hoc.ilr.cornell.edu> (last visited Nov. 18, 2015).

36. Jennifer Schuessler, *In History Departments, It's Up With Capitalism*, N.Y. TIMES (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/education/in-history-departments-its-up-with-capitalism.html>.

37. See generally DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976); WALTER BENJAMIN, *CHARLES BAUDELAIRE: A LYRIC POET IN THE ERA OF HIGH CAPITALISM* (Harry Zohn trans., NLB 1977) (1969); WALTER BENJAMIN, *THE ARCADES PROJECT* (Rolf Tiedemann ed., Howard Eiland & Kevin McLaughlin trans., Harvard Univ. Press 2002); MARSHALL BERMAN, *ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY* (1982).

38. See HOWARD BRICK, *TRANSCENDING CAPITALISM: VISIONS OF A NEW SOCIETY IN MODERN AMERICAN THOUGHT* (2006); JAMES LIVINGSTON, *THE WORLD TURNED INSIDE OUT: AMERICAN THOUGHT AND CULTURE AT THE END OF THE 20TH CENTURY* (2010); JEFFREY SKLANSKY, *THE SOUL'S ECONOMY: MARKET SOCIETY AND SELFHOOD IN AMERICAN THOUGHT, 1820–1920* (2002).

39. Jeffrey Sklansky, *The Elusive Sovereign: New Intellectual and Social Histories of Capitalism*, 9 MOD. INTELL. HIST. 233 (2012).

economics profession itself has varied across place and time,⁴⁰ while others have focused on the interaction between ideas and institutions and the role that each has played in understanding and changing the economic order.⁴¹ Still, others have investigated the ideological underpinnings of economic theories. In fact, there is now a cottage industry of scholarship exploring the origins and early development of the “Chicago School of Economics” and its social, political, and intellectual consequences.⁴² The “Chicago School,” of course, had a strong legal component. And, thus, legal histories have been part of this tripartite synthesis of law, ideas, and capitalism.⁴³

II. LAW AND THE NEW INTELLECTUAL HISTORIES OF CAPITALISM

As we’ve seen, law was never wholly absent from the earlier histories of American political economy. Yet, even before Morton Horwitz’s classic work,⁴⁴ legal historians like James Willard Hurst were investigating the role of law and legal institutions in the “release of energy” that undergirded American economic development.⁴⁵ Hurst was at times pessimistic about the role of law in purposefully guiding public policy, particularly in his study of the Wisconsin lumber industry, where he attributed a great deal of legal

40. See MARION FOURCADE, *ECONOMISTS AND SOCIETIES: DISCIPLINE AND PROFESSION IN THE UNITED STATES, BRITAIN, AND FRANCE, 1890S TO 1990S*, at 2-3 (2009).

41. See MICHAEL A. BERNSTEIN, *A PERILOUS PROGRESS: ECONOMICS AND PUBLIC PURPOSE IN TWENTIETH-CENTURY AMERICA* 7-9 (2001).

42. See, e.g., *BUILDING CHICAGO ECONOMICS: NEW PERSPECTIVES ON THE HISTORY OF AMERICA’S MOST POWERFUL ECONOMIC PROGRAM* (Robert Van Horn et al. eds., 2011); ROSS B. EMMET, *FRANK KNIGHT AND THE CHICAGO SCHOOL IN AMERICAN ECONOMICS* (2009); JOHAN VAN OVERTVELDT, *THE CHICAGO SCHOOL: HOW THE UNIVERSITY OF CHICAGO ASSEMBLED THE THINKERS WHO REVOLUTIONIZED ECONOMICS AND BUSINESS* (2007).

43. See *generally* COASEAN ECONOMICS: LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS (Steven G. Medema ed., 1998).

44. HORWITZ, *supra* note 29.

45. JAMES WILLIARD HURST, *LAW AND THE CONDITIONS OF FREEDOM* 3 (1956).

policymaking to “drift and default.”⁴⁶ Nevertheless, Hurst attended to law, legal processes, and legal institutions. And in time his scholarship influenced many other legal historians working at the “borderland” of legal and economic history.⁴⁷

That borderland between economic and legal history has expanded recently to include the history of ideas. Law and legal ideas have come to play an increasingly important role in our scholarly understanding of the new intellectual histories of capitalism. There are at least two reasons for this. First, intellectual historians have begun to move away from simply tracing high-brow texts in their particular contexts to emphasizing “the political, or at least public, contexts of intellectuals and [their] ideas.” They have moved, as Leslie Butler has put it, “from the history of ideas to ideas in history,” showing the impact that ideas have had on the formation of social and economic policy.⁴⁸ Whenever historians talk about policy formation, as Hurst noted long ago, they are discussing law, writ large.⁴⁹ Thus, recent intellectual historians have naturally turned to law as a vehicle for understanding the “public oriented nature of intellectual life.”⁵⁰

Most intellectual historians may not expressly acknowledge that their work is engaging with the law and legal processes. But, just about any study of social reform that examines the dynamics of state power, or the way that public policy has changed or stayed the same, has some

46. JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN: 1836–1915* (1964); see also Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 *LAW & HIST. REV.* 1 (2000).

47. Harry N. Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 *AM. HIST. REV.* 744 (1970). See generally William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 *LAW & HIST. REV.* 97 (2000).

48. Butler, *supra* note 5, at 166.

49. HURST, *supra* note 45, at 71, 104-05; Novak, *supra* note 47, at 114; see also John L. Campbell, *Institutional Analysis and the Role of Ideas in Political Economy*, 27 *THEORY & SOC’Y* 377 (1998).

50. Butler, *supra* note 5, at 166.

relation to legal issues. Law, after all, is the “traditional language of the state.”⁵¹ Thus, Ed Purcell’s *Crisis of Democratic Theory*, James Kloppenberg’s *Uncertain Victory*, and Daniel Rodger’s *Atlantic Crossings* are all arguably ideal examples of intellectual histories of social reform that take law seriously.⁵² These and many other studies also display how transnational forces have become increasingly important to our understanding of our legal and intellectual past.⁵³

A second reason why law has become more salient is because recent histories of capitalism have also stressed how law has been integral to the structures and representations of economic and social relations. Although there are still plenty of staid “structural-functionalist” accounts, more novel histories of capitalism have explored how law has been constitutive with a market economy.⁵⁴ Not only do legal rules and categories, like property and contract, come to define economic and social relations, legal institutions and processes provide the rational and routinized system of governance that is so critical to an effective market economy. Due process, equal protection, and the rule of law as a whole are all pivotal to capitalist development. In this sense, the legal form, as Isaac Balbus noted long ago, is akin to the commodity form.⁵⁵ Indeed, studying the historical development of capitalism without attending to the importance of rules governing private property, contract, and numerous other legal categories is a bit like studying military

51. Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC’Y REV. 409, 413, 456 (1998).

52. JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920* (1986); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998).

53. For more on the rise of transnational histories, see THOMAS BENDER, *A NATION AMONG NATIONS: AMERICA’S PLACE IN WORLD HISTORY* (2006).

54. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 83, 124 (1984).

55. Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law*, 11 LAW & SOC’Y REV. 571, 573 (1977).

history without analyzing wars or conflict. Hence, in many ways, law is an organic part of capitalist development. As a result, law has become the locus of the convergence between intellectual history and the history of capitalism.

Here too legal historians have played an important part in bringing together the history of ideas with the history of capitalism. Consider, for example, the work of Amy Dru Stanley and her examination of liberal contract theory during the age of slave emancipation,⁵⁶ or Robert Steinfeld's exploration of the changing meanings of "free labor,"⁵⁷ or the scholarship of Roy Kreitner on the turn of the twentieth century revolution in contract theory,⁵⁸ or John Witt's excavation of the conceptual and legal origins of worker's compensation,⁵⁹ or Christopher Tomlins's analysis of colonial labor laws and regulations,⁶⁰ or Jonathan Levy's broad investigation of risk and insurance,⁶¹ or Christine Desan's recent history of money.⁶² These and many other works of scholarship have successfully melded the history of legal ideas with the new intellectual histories of capitalism.

III. TAXATION AND THE NEW INTELLECTUAL HISTORIES OF CAPITALISM

What other ways may law serve as a bridge between "ideas in history" and the history of capitalism? Let me suggest another context: the history of U.S. tax law and

56. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998).

57. ROBERT J. STEINFELD, *COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY* (2001).

58. ROY KREITNER, *CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE* (2007).

59. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004).

60. CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865* (2010).

61. JONATHAN LEVY, *FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA* (2012).

62. CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* (2014).

policy and its role in American political and economic development. Most scholars and educated Americans recognize that taxation and revenue extraction are critical to any modern liberal state.⁶³ In fact, for nearly all advanced industrialized nation-states, taxation is the one policy area without which nearly all of the other functions and aspects of the modern state would not be possible. By definition, modern states not only maintain a monopoly on the legitimate use of violence, they must also have an effective system of permanent taxation.⁶⁴ Yet, every industrialized democracy has had a slightly different path to the development of a fair and effective system of taxation and revenue extraction.⁶⁵

In the U.S. context, the transformation of the national tax system occurred at the turn of the twentieth century.⁶⁶ That was when social movements, public intellectuals, reformers, and lawmakers contributed to the creation of our modern system of direct and progressive national taxes. This transformation was, first and foremost, a conceptual revolution. A new generation of professionally trained academics, drawing on the raw social experiences of the modern industrial age and responding to the massive material inequalities of the Gilded Age, changed the way that educated Americans and policymakers perceived the financial basis of government programs.

At the heart of this shift was the idea that citizens owed a debt to society in relation to their “ability to pay.” This curt yet crucial phrase encapsulated the idea that individuals who had greater economic power also had a greater obligation to

63. Isaac Martin et al., *The Thunder of History*, in *THE NEW FISCAL SOCIOLOGY* (Isaac Martin et al. eds., 2009).

64. MAX WEBER, *POLITICS AS A VOCATION* 7 (Franklin Sherman ed., H.H. Gerth & C. Wright Mills trans., 1965) (1919); *see also* Philip T. Hoffman, *What Do States Do? Politics and Economic History*, 75 *J. ECON. HIST.* 303, 306-07 (2015).

65. *See, e.g.*, WENKAI HE, *PATHS TOWARDS THE MODERN FISCAL STATE* (2013); SVEN STEINMO, *TAXATION AND DEMOCRACY: SWEDISH, BRITISH AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE* (1993); *THE RISE OF FISCAL STATES: A GLOBAL HISTORY, 1500–1914* (Bartolomé Yun-Casalilla & Patrick K. O’Brien, eds., 2012).

66. I have elsewhere chronicled this transformation. *See generally* AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929* (2013).

contribute to the public good—to contribute not only proportionally more but progressively more. Influential thinkers and political leaders used the keywords of “ability to pay” as a cognitive map, as a type of mental frame, to illustrate the widening circle of modern associational duties and social responsibilities.

They also used “ability to pay” and similar keywords as political tools. Reformers relied on these keywords to galvanize popular support for the progressive tax reform movement during critical periods of crisis. Progressive activists sought to convince lawmakers, government administrators, and ordinary Americans that a new fiscal system based on the notion of taxing a citizen’s “ability to pay” could transform American state and society

Ideas, in this sense, were critical weapons and blueprints for building powerful political coalitions and perhaps even greater faith in state power.⁶⁷ Public intellectuals promoting taxation based on “ability to pay” believed that citizens as taxpayers would come to accept, and in many cases embrace, the growing powers of the modern state as it solved new problems, created the basis of economic development, and provided aid and assistance to the community in times of stress and crisis. Revenue reformers also understood that “fairness” and “ability to pay” were protean concepts with multiple meanings. Their goal was to mold these words and ideas to energize a social and political movement that reflected the growing antagonism toward the prevailing fiscal order.⁶⁸

67. See WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 128, 210-11 (6th prtng. 1908); DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 190-92 (1987). On the importance of economic ideas to institutional change, see MARK BLYTH, GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY 34-45 (2002); Campbell, *supra* note 49.

68. The ability to pay rationale has been severely criticized by legal theorists and philosophers who have neglected to see how this principle operated historically as a political instrument rather than a coherent, air-tight political theory. For examples of some of the earliest critiques by legal scholars, see WALTER J. BLUM & HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION 64-70 (Phoenix Books 1963) (1953); LOUIS EISENSTEIN, THE IDEOLOGIES OF TAXATION 16, 16-33 (1961); HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE

These new notions of taxation were, of course, a product of their times. The reform-minded political economists who led the intellectual campaign for a new fiscal order harnessed increasing social frustrations to challenge the fundamental assumptions of an earlier age. Recognizing how the forces of modernity had recreated a more interdependent society, these thinkers stressed the need for greater cooperation and bureaucratic authority.⁶⁹ They sought to discredit the Victorian theories of atomistic individualism and laissez-faire political economy that underpinned the existing late-nineteenth-century tax system.

Chief among these outdated theories was the principle that an individual's economic obligations to the state were limited to the benefits that such individual received from the polity. Progressive tax experts targeted nineteenth-century "benefits theory" as an obsolete principle of modern fiscal relations. They played a pivotal role in supplanting the prevailing "benefits theory" of taxation, and its attendant vision of the State as a passive protector of private property, with a more equitable principle of taxation based on one's "faculty" or "ability to pay"—a principle that promoted an active role for the positive state in the reallocation of fiscal burdens, the reconfiguration of civic identity, and the rise of administrative authority. For these reformers, the State was, as University of Wisconsin political economist and labor activist Richard T. Ely once noted, "an educational and ethical agency whose positive aid is an indispensable condition of human progress."⁷⁰

DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 5, 17, 31, 139 (1938). For more recent critiques from philosophers, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 20-30 (2002).

69. See generally THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* 24, 24-47 (1977); SAMUEL P. HAYS, *THE RESPONSE TO INDUSTRIALISM: 1885-1914* (1957); ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920* (1967).

70. Richard T. Ely, *Report of the Organization of the American Economic Association*, 1 PUBLICATIONS AM. ECON. ASS'N 5, 6 (1887). American intellectual historians have identified the significance of progressive taxation to the general reform impulse of the time period. "The graduated income tax, based on the idea that everyone owes a debt to society proportional to his ability to pay," James T.

The origins of our modern system of direct and progressive taxation is not the only place where one can observe how tax law operates as a hinge between “ideas in action” and the development of a modern capitalist economy. Indeed, U.S. tax laws and policies have not always been stable and consistent over time. Like other aspects of our legal system, tax laws have reflected changing American conceptions of risk, wealth, and opportunity. We can see this not only in the origins of our progressive tax system, but also in the contrasting taxation of income from capital (investments) versus income from labor (wages). Exploring this contrast over time can help us understand how and why American social and cultural attitudes towards capitalism and risk have changed over time.

In our current U.S. tax system, there is a lower rate of taxation for income from long-term capital investments.⁷¹ One of the current justifications for this capital gains tax preference is that an incentive is necessary to induce individual investors to take on the risk of making and transferring capital investments. According to neo-classical economic theory, capital investments and the dynamic movement of capital are believed to be vital to long-term economic growth and prosperity, and thus providing incentives for capital mobility is pivotal to economic growth. Some critics have challenged whether the tax preference plays an important role in advancing capitalist growth since there is little empirical evidence to support the causal relationship.⁷² But few have explored how this tax provision

Kloppenbergs has written, “was perhaps the quintessential progressive reform.” KLOPPENBERG, *supra* note 52, at 355.

71. See I.R.C. §§ 1(h), 1221, 1222 (2009). Most tax treatises and casebooks commonly refer to this tax benefit as the “capital gains tax preference.” See BORIS BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* 50-54 (1981); MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 533-40 (2005); WILLIAM D. POPKIN, *FUNDAMENTALS OF FEDERAL INCOME TAX LAW* 57-60 (2002). Legal scholars have, of course, noted that the use of the term “preference” to describe the lower rate for capital gains is highly contingent and political. See Boris I. Bittker, *A “Comprehensive Tax Base” as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 927-29 (1967).

72. CONG. BUDGET OFFICE, *EFFECTS OF LOWER CAPITAL GAINS TAXES ON ECONOMIC GROWTH* (1990) (finding that most studies conclude that “cutting taxes

is deeply embedded in the history of American law and politics.

An exploration of the beginnings and early development of the capital gains tax preference provides an “Opportunity for Law’s Intellectual History.” It allows us to consider a specific legal rule as a point of departure to analyze bigger and broader questions about the causes and consequences of epistemic shifts and economic transformations. In contrast to conventional economy theory, which generally assumes that capitalist relations and arrangements are “natural,” a historical approach to the study of American capitalism questions these assumptions. It interrogates critically what is frequently presumed to be an inexorable part of everyday life.⁷³

Moreover, a history of the ideas that undergird existing tax laws and policies remind us that the development of legal and economic theory is not simply a linear accretion of knowledge. Rather, the neo-classical theories that support the capital gains preference are the product of shifting ideas and beliefs not only about economic growth, but also about the meaning of risk and wealth in modern American society. Building upon some of the recent literature on the intellectual history of the economics discipline and profession, and its relationship to American law and capitalist development,⁷⁴ one could tell a more nuanced and complicated story about the origins of our current capital gains tax preference.⁷⁵

on capital gains is not likely to increase savings, investment and GNP much if at all.”).

73. Beckert, *supra* note 2, at 315.

74. For a sampling of some of this literature, see generally BERNSTEIN, *supra* note 41; BRICK, *supra* note 38; ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2012); PHILIP MIROWSKI, *MORE HEAT THAN LIGHT: ECONOMICS AS SOCIAL PHYSICS, PHYSICS AS NATURE’S ECONOMICS* (1989).

75. Julia Ott and I are currently in the process of exploring the beginnings and early development of the U.S. capital gains tax preference. Ajay K. Mehrotra & Julia C. Ott, *A Brief History of the Capital Gains Tax Preference*, *FORDHAM L. REV.* (forthcoming).

CONCLUSION

As the subfields of intellectual history and the histories of capitalism continue to converge, law and legal history are sure to be at the center of the conjunction. Law will continue to be a bridge traversing the boundary between the two fields. Intellectual history will undoubtedly continue to move away from its traditional focus on disembodied “unit-ideas.”⁷⁶ The field’s new attention to placing ideas in a broader political and public context means that law is certain to play a pivotal role in what James Kloppenberg has referred to as intellectual history’s “pragmatic hermeneutics”; its continued attention, that is, to the “embodied, embedded, and extended” nature of the historical study of ideas.⁷⁷

Likewise, as the new studies of historical capitalism continue to investigate the ideas, texts, and contexts that give rise to changing economic dynamics, law will not be far from the analysis. Not only will the substance of legal categories, from property rights to contract theory, continue to shape the fundamental structures of a market economy, legal processes and institutions will similarly provide the rational and routinized mechanism that has become integral to modern capitalism. Law is constitutive not only with society but also by extension, with the economy.

Where will the study of law and the new intellectual histories of capitalism take our understanding of the past? If Kloppenberg is correct that “American intellectual history in the future will be embodied, embedded, and extended,”⁷⁸ law may be among the key catalysts to ensure this prediction, at least for the new intellectual histories of capitalism. The history of legal ideas about the changing economic order is likely to be “embodied” in persons and institutions; “embedded” in broader cultural and social settings; and “extended” not only from high-brow mandarin texts to low-brow everyday practices, but also across national and

76. See ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA, THE WILLIAM JAMES LECTURES DELIVERED AT HARVARD UNIVERSITY, 1933* (1936).

77. See James T. Kloppenberg, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*, 9 *MOD. INTELL. HIST.* 201 (2012).

78. *Id.*

cultural boundaries. If law is able to shed such light on the new intellectual histories of capitalism, we are certain not only to learn more about the ideas that have undergirded historical continuity and rupture, but also more about why those changes should matter to us today.