

been regarded since the earliest days of the field as one of the three major institutional devices available to society to improve efficiency and equity in the workplace. But in recent years this topic has assumed even greater saliency both in this country and other nations due to a growing scholarly and political debate on the merits of regulation versus deregulation of labor markets. The second feature of past IRRA volumes—the steadily increasing sophistication and rigor of IR research—is also manifest in the chapters of this volume. Readers will find state-of-the-art theory and empirical analysis in this volume, yet in keeping with the “pracademic” tradition of the IRRA this discussion is nevertheless accessible and relevant to the association’s many non-academic members.

In assembling chapters and authors for this volume I endeavored to include a wide range of topics spanning the employment relationship; achieve a mix of theory, empirical analysis and policy; have academic authors from a variety of IR-related disciplines and schools of thought; and provide an opportunity for representatives of management and labor to express their points of view. All of this is in keeping with long-held IRRA traditions. I might note that not all perspectives on regulation (e.g., critical legal studies) and disciplines (e.g., sociology) are represented in the volume, but this is partly due to space constraints and partly due to an unsuccessful search for willing and able authors.

Special thanks go to the authors of these chapters for laboring long and hard—often through three or more drafts—to produce works of high quality and considerable value-added. Also deserving thanks is Paula Voos, IRRA Editor-in-Chief, who helped develop the topic, assemble the authors, and provide comments on individual chapters. And to Kay Hutchison, Administrator and Managing Editor of the IRRA, goes a special and profuse thanks for all the hours and effort she invested in helping transform this volume from an idea to a finished product. And, finally, thanks goes to Jeanette Zimmermann of the IRRA staff for very capable editing. It was a team effort!

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INTRODUCTION

Government Regulation of the Employment Relationship

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Industrial relations as a field of study and area of business practice first appeared in the United States in the early 1920s. The catalyst for the birth of the field was growing public and professional concern over the human and social consequences of what were then called “labor problems.” The number one labor problem, most experts agreed, was a growing crescendo of overt, often-times violent conflict between workers and their employers with its accompanying bloodshed, destruction of property, and radicalization of emotions. A plethora of other labor problems also captured the public attention, such as astonishingly high rates of employee turnover, widespread “soldiering” (loafing) on the job, poverty-level wages, excessive work hours, and arbitrary and capricious discipline. All of these were seen as not only a serious impediment to the efficient and equitable operation of the workplace but also a threat to the very foundations of the American economic and social order.

As I have described elsewhere (Kaufman 1993), out of this concern with labor problems was born the field of industrial relations. Labor problems and industrial relations were conceived as opposite sides of the same coin—labor problems were the result of various maladjustments and imperfections in the employment relationship and industrial relations was the academic science and vocational practice that sought to understand the causes of these problems and devise solutions thereto.

Given this orientation, industrial relations attracted into its ranks numerous academics and practitioners with a strong commitment to reformist and progressive principles. While they shared both an aversion to the doctrine of laissez faire and a faith in the ability of purposeful human action to improve social and economic conditions, beyond this intellectual “common denominator” agreement among them tended to fragment. In particular, by the late

1920s three different approaches or "solutions" to labor problems had emerged as focal points for research and debate in the field. The first was generally referred to as *employers' solutions*, the second as *workers' solutions*, and the third as *the community's solutions* (Estey 1928). The core part of employers' solution to labor problems was adoption of modern, progressive practices of personnel management, the central principle of workers' solution was trade unionism and collective bargaining, while the main element of the community's solution was government regulation in the form of protective labor legislation and social insurance programs.

Most of the early participants in the field of industrial relations, whether academics, business people, or workers' representatives, recognized the utility of all three approaches to resolving labor problems and saw them, at least within broad limits, as complements rather than substitutes. Considerable disagreement remained, however, over the relative weight to be given to progressive personnel management practices, trade unionism, and government regulation as society's main instrument for promoting increased efficiency and equity in the workplace. Also highly contentious was the question of to what extent the adoption of these "solutions" should be a matter of voluntary choice or social compulsion.

It is interesting to gaze over the near-eight decades of American history that separate us from the early 1920s and examine the twists and turns that policy and public opinion have taken on these issues. During the "welfare capitalism" period of the 1920s, for example, the dominant emphasis in industrial relations and the broader society was on voluntarism and the primacy of employers' solution to workplace problems.

The Great Depression of the 1930s then brought on a complete reversal in course, as the economic calamity seemed to both discredit the regime of welfare capitalism and call for strong state intervention. Out of this sentiment arose the New Deal of the Roosevelt administration, the hallmark of which was skepticism of the efficacy of free markets, a substantial increase in government regulation of business, and a shift toward encouragement of collective bargaining. Suddenly, the personnel management solution to labor problems seemed not only ineffective but all too often duplicitous, while the solutions of trade unionism and government regulation now appeared to have a double virtue—they promised a more effective and broad-based improvement in labor conditions than voluntary actions by employers and, at the same time, were seen as effective instruments for promoting macroeconomic stabilization and growth (Kaufman 1996; Craygo in this volume). To promote the "workers' solution" to labor problems, the Roosevelt administration enacted in 1933 the National Industrial Recovery Act (NIRA) which contained the famous Section

7(a) guarantee of labor's right to organize and collective bargain and, in 1935, the National Labor Relations Act (NLRA) which spelled out these rights and their enforcement in much greater detail. The community's solution to labor problems was considerably strengthened through several other landmark pieces of legislation, including the Social Security Act (unemployment and old age insurance, aid to families with dependent children) and the Fair Labor Standards Act (minimum wages, maximum hours, and abolition of child labor).

Although the New Deal sought to improve employment relations by strengthening both the labor movement and protective labor law, for the next three decades, it was the former that proved the most influential and dynamic in reshaping the American workplace. Over this period union density (proportion of the work force represented) nearly tripled and a host of innovative employment practices were pioneered at the collective bargaining table, such as binding arbitration of contract disputes, cost-of-living allowance clauses, multi-year contracts, and supplemental unemployment benefits. By way of contrast, the new protective labor laws and social insurance programs of the 1930s had a relatively modest impact on existing workplace practices and institutions and, furthermore, were not extended in new directions for the next twenty-five years.

Beginning in the early 1960s, however, the pendulum began to swing back toward direct government intervention in labor markets. Partly this reflected the slowdown in both union membership growth and bargaining innovation, but more important was the growth of public concern over new or long-neglected labor problems that collective bargaining either seemed not well suited to solve or, in one or two cases, seemed to perpetuate. First and foremost was race and gender discrimination, attacked first in 1962 by the Equal Pay Act and then again in 1964 by Title VII of the Civil Rights Act. Other labor problems that gained headlines were technological unemployment, poverty, employment problems of older workers, workplace safety and health, and pension abuse. Each of these was in turn addressed by new legislative initiatives, some of which channeled public investment funds to disadvantaged socioeconomic groups, such as through manpower training programs, while numerous others imposed new regulation on employers (and in some cases unions). Examples include the Age Discrimination Act (1967), Federal Mine Safety and Health Act (1969), Occupational Safety and Health Act (1970), and Employee Retirement and Income Security Act (1974).

Although the relative weight given to collective bargaining versus government labor legislation varied between the late 1930s and late 1970s, a substantial majority of the electorate supported selective intervention in labor markets to reduce or ameliorate pre-existing or newly emergent labor problems

and saw unions and government regulation as, on net, effective instruments toward this end. All of this seemingly changed, however, with the election of Ronald Reagan to the office of President in 1980.

President Reagan forcefully argued that the nation's social and economic problems had been exacerbated, not ameliorated, by growing government intervention in the economy and his campaign promise was to "get government off the backs of the people." With regard to labor, Reagan attacked the very philosophical foundation of the post-New Deal political order. The traditional view both within industrial relations and the broader society was that the experience of the 1900s-1930s clearly demonstrated that labor markets contain a number of serious imperfections that cause a range of undesirable employment problems, such as inadequate wages, excessive work hours, unsafe working conditions, and so on. The existence of these labor problems thus provides the rationale for the public support of trade unionism and government regulation of labor markets. Reagan effectively turned public dissatisfaction with high inflation, eroding industrial competitiveness, and declining standards of living into an attack on the New Deal ideology by persuading a substantial portion of the electorate that the best antidote to these problems is greater reliance on free markets and less reliance on government and other forms of employment regulation (e.g., collective bargaining). In terms of the trilogy of employers', workers', and community's solutions to labor problems, the "Reagan revolution" in many ways represented a return to the priorities of the 1920s in which employers' solutions were given primacy of place and the latter two were significantly downgraded in importance.

These new priorities played themselves out during the Reagan and Bush presidencies of the 1980s and early 1990s, although with mixed results. Certainly public policy toward collective bargaining turned hostile, evidenced by the events such as the Reagan administration's hard-line stance in the air controllers' (PATCO) strike, administration opposition to striker replacement legislation, and a series of important pro-management rulings by the National Labor Relations Board. Rhetoric against "big government" also intensified, including attacks on various regulatory programs in the labor area, such as affirmative action, unemployment compensation, the minimum wage, and the Davis-Bacon Act (the setting of "prevailing wages" in government construction projects).

And certainly the business community rose in stature and gained new power and influence during these years. This trend was in part due to a more conservative, pro-business political ideology, while another part probably stemmed from public disenchantment with perceived excesses and/or failures of organized labor and government regulatory programs. But business must also be given considerable credit, for much evidence exists that in recent

decades American companies have substantially improved the way they manage and motivate employees. More satisfied employees naturally have a smaller demand for external intervention and protection in the workplace, be it in the form of government legislation or union representation (Farber and Krueger 1993).

These events notwithstanding, other trends and developments emerged during the 1980s and early 1990s that either softened the blow against forms of labor market regulation or actually strengthened it. One aspect is what did not happen to government regulation. Although the minimum wage was not raised during the 1980s, neither was it abolished. Likewise, a favorite object of attack by economic and political conservatives—the Occupational Safety and Health Act—suffered from budget cuts and staff reductions but was not eliminated or fundamentally changed. The same applies to another favorite target, the Equal Employment Opportunity Commission. A final example is the National Labor Relations Act, which liberals failed to strengthen in their campaign to promote collective bargaining and labor law reform but which conservatives likewise failed to weaken.

A second aspect of note is that even while public opinion noticeably soured toward government in general, the public still supported a limited number of new interventions in labor markets to resolve specific types of employment problems. Examples include the Worker Adjustment and Retraining Act (1988), Americans with Disabilities Act (1990), and the Civil Rights Act of 1991.

The coming to office of the Clinton administration in 1992 suggested that possibly the federal government would again turn toward a more interventionist and activist approach regarding workplace regulation and public support of collective bargaining. Although the full record of the Clinton administration is not yet written, so far the experience is again decidedly mixed. Certainly the rhetoric of the administration, and particularly that of certain key spokespersons such as first-term Labor Secretary Robert Reich, has been on the side of greater activism. To some extent rhetoric has been matched by deeds, such as raising the minimum wage, passage of the Family and Medical Leave Act, stricter enforcement of the Occupational Safety and Health Act, appointment of more pro-labor (or less pro-management) members to the National Labor Relations Board, and administration support for striker replacement. On the other hand, President Clinton has also antagonized organized labor by strongly supporting the North American Free Trade Agreement, more recently signed what many liberals regard as draconian welfare reform legislation, and has failed to demonstrate more than token support for strengthening the NLRBA.

Perhaps emblematic of the quandary and cross-currents afflicting American labor policy at this historical juncture is the fate of the report issued by the Commission on the Future of Worker-Management Relations (a.k.a. Dunlop Commission), appointed by President Clinton in 1993 and chaired by Harvard Professor and former IRLRA president and U.S. Labor Secretary John Dunlop. The mission of the commission was to review the nation's labor law and make recommendations for change. During eleven regional hearings the commission members heard a welter of conflicting testimony and opinion, out of which they attempted to craft a compromise set of recommendations that on one hand strengthened the National Labor Relations Act but which on the other sought to reduce litigiousness in employment disputes and promote greater flexibility in the administration of labor regulation. None of the three parties with major influence on the fate of the commission's recommendations (organized labor, the business community, the Clinton administration) expressed more than lukewarm enthusiasm for them, and hence they died rather quickly in the political process.

As the United States approaches the 21st century, national employment policy thus seems caught in the political eddy spawned by a deep-seated public mistrust of government and "big labor" combined with a pragmatic desire that government (possibly in conjunction with organized labor) do something to improve specific workplace hardships and inequities. It is to this public sense of ambivalence and uncertainty about labor market regulation and institutions that this volume seeks to speak.

Assembled herein, in the best IRLRA tradition, are outstanding scholars and practitioners drawn from a variety of academic disciplines, business and labor organizations, and policy perspectives who address in clear, understandable prose the major research issues and empirical evidence on this topic. It is not claimed that at the end of this volume the reader will find a consensus program for labor market regulation and reform thereof, for crafting such is probably impossible. What the reader will take away from this volume is a much enhanced perspective on the current corpus of labor market law and regulation, the implications that different theoretical schools of thought have regarding the economic efficiency and social equity of these laws and regulations, the weight of empirical evidence for and against their social utility, and thought-provoking suggestions for the future direction of regulatory reform.

Contents of the Volume

The volume is composed of eighteen chapters and is divided into four sections. The first section contains three chapters on different theoretical perspectives concerning employment regulation. The first one by Bruce Kaufman

examines the "old institutional" perspective of John R. Commons and the Wisconsin School, the second by Gregory Dew examines the "new institutional" perspective pioneered by Oliver Williamson, and the third by Stuart Schwab examines the "law and economics" perspective associated with Richard Posner and others at the University of Chicago.

The second section is devoted to an analysis of empirical evidence on the outcomes and effects of employment regulation, both in terms of the overall economy and as a result of individual programs. In the fourth chapter John Addison and Barry Hirsch begin this section with a comprehensive review and evaluation of past research evidence on the labor market impact of a wide range of regulatory programs. Following this in chapter five, Dale Belman and Michael Belzer examine the theoretical and empirical evidence regarding both the benefits and costs of greater competition in labor markets, particularly as they bear upon employees.

The remaining six chapters in this section take a more in-depth view of particular areas of labor market regulation. Charles Craypo examines labor standards legislation, most particularly the Fair Labor Standards Act and Davis-Bacon Act, from a neoclassical and institutional perspective; John Burton and James Chelius look at the area of safety and health, focusing particularly on the stated rationale for government regulation, the research evidence thereon, and the administration of the Occupational Safety and Health Act; Daphne Tarras examines reasons for divergences in the legal and administrative regulation of collective bargaining in Canada versus the United States, giving particular emphasis to historical, political, and cultural factors; Mary Radford analyzes the evolution of American labor policy on affirmative action, with special attention given to the development of case law and judicial interpretation regarding this unsettled and controversial area of regulation; La-mont Stallworth focuses on employment disputes within organizations, the development of regulation in this area of employment policy, and the search for alternative methods of dispute resolution that are less litigious, costly, and time consuming; and finally, Richard Edwards examines alternative regulatory approaches to protecting employee rights in the workplace, with special emphasis on the development of what he calls "enterprise rights."

The third section of the volume is devoted to issues of regulatory structure, administration, and enforcement. Two chapters are featured. The first by David Weil develops a conceptual framework identifying the three major steps or links in the regulation process which separately and together influence the overall effectiveness of regulation. He then provides a comprehensive review of the research evidence on these issues for a wide variety of employment-related regulatory programs. The second contribution in this section is by

David Levine. He critiques existing "command and control" methods of employment regulation and suggests an alternative model of self-regulation.

The fourth and concluding section of the volume features five chapters that are written as personal "opinion pieces" on employment regulation. Both academics and practitioners are featured, as are people who approach the subject from a management and labor perspective. The first of these chapters is by Ray Marshall, who makes a case for wide-ranging reform of safety and health regulation. The second of these chapters is by Robert Pleasure and Patricia Greenfield. They point out that deregulation of employment relations does not necessarily imply a return to a level legal playing field as relations between employers and workers, and the rights and duties of each, are then governed by the common law which, in reality, invariably tilts toward the interests of employers. Thomas Schneider is author of the third opinion piece. He argues that, while government regulation is an important instrument for promoting socially desirable employment conditions, in many respects the organized labor movement is a superior instrument for this task, and thus he advocates reform of the labor law to facilitate the spread and effectiveness of collective bargaining. The fourth chapter is by Herbert Northrup. Northrup argues that traditional economic pressure tactics by unions have lost much of their effectiveness and, as a result, unions are increasingly using regulatory agencies and processes in illegitimate ways to exert pressure on employers as part of corporate campaigns. Finally, in the fifth opinion piece John Randaugh argues that the nation's labor law needs to encourage greater employee involvement and labor-management cooperation, but that the National Labor Relations Act is premised on an adversarial model of employee relations and is hence increasingly counterproductive to the nation's social and economic interests.

Conclusion

As noted in the beginning of this chapter, industrial relations as a field of study has from its birth in the early 1920s been directed at the task of discovering the causes and solutions to labor problems. Many labor problems that were the focus of attention in the 1910s remain very much a concern in the 1990s, although in most cases notable progress has been made over the course of the century in reducing their extent and severity. Examples include poverty-level wages, workplace injuries, and protection of individual rights. Other labor problems, such as child labor, that were once endemic to the workplace of the 1910s have now largely receded as matters of ongoing social concern, while others (e.g., equal opportunity, AIDS in the workplace) have greatly increased in importance.

I believe it is indisputable that government regulation of labor markets and employer-employee relations has made, on net, a very significant contribution to the remarkable progress made over the course of the 20th century in achieving a more productive and humane workplace. Some may argue that government regulation of employment conditions has not been aggressive enough, while others may argue that it has gone too far. I doubt many informed observers would argue, however, that the nation should return to the days of *laissez faire* in labor markets as existed eight decades earlier. Seen in this light, the reformers and progressives of the late 1910s-early 1920s who founded the field of industrial relations and pushed the cause of government regulation of employment conditions have had their efforts—then widely viewed as impractical and even subversive—soundly vindicated by the passage of time and events.

It also remains the case, however, that the nature of society and the economy has evolved greatly since the 1920s and, as noted above, so have the labor problems that confront us as we approach the 21st century. Part and parcel of this evolution is an ongoing, sometimes intense debate about the continued efficacy of government regulation of the workplace and the manner in which such regulation should be practiced. This volume does not resolve the debate, but I believe it does provide a significant contribution to framing the issues, developing theory, and providing an objective review of the empirical evidence on the subject. If this research proves of value to fashioning more efficient and effective regulation, then not only is the purpose of the volume achieved, but a fitting tribute is made to the vision of those early industrial relations pioneers who founded the Industrial Relations Research Association fifty years ago.

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CHAPTER 1

Labor Markets and Employment Regulation: The View of the "Old" Institutionalists

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The true ideal of society is not *laissez faire*, but economic freedom, and freedom is the child, not the enemy, of law and regulation. Thomas Adams and Helen Sumner, *Labor Problems* (1905:15)

The equilibrium of democracy may not be easy to work out, but what else is there to do? John R. Commons, *Industrial Goodwill* (1919:43)

The first group of academic scholars to extensively study and advocate regulation of the employment relationship was the institutional economists of the Wisconsin school, led by John R. Commons (1862-1945). Their work contributed to enactment of numerous pieces of labor legislation, including workers' compensation, unemployment insurance, minimum wages, maximum hours, civil service reform, prohibitions of child labor, immigration quotas, old age insurance, restrictions on the use of court injunctions in labor disputes, protection of collective bargaining rights, and government commitment to maintenance of full employment. The apogee of their reform program was reached during the New Deal years of the Roosevelt administration when many of these initiatives were first passed into law on a national basis.

Given the pioneering role the Wisconsin school played in the movement for employment regulation, the expansion over this century in the breadth and complexity of such regulation and the growing debate in the country over the merits of regulation versus deregulation of the labor market, it seems appropriate to devote the first chapter of this volume to a review and evaluation of the institutional perspective on this subject. Surprisingly, no previous study

known to the author exists that provides an in-depth analysis and evaluation of this important body of literature.

The "Old" Institutionalists and the Wisconsin School

In this chapter I refer to the economists of the Wisconsin school as the "old" institutionalists. This is to clearly distinguish them from the "new" institutionalists of more recent times, such as Oliver Williamson (1985). The transaction cost theory of Williamson and colleagues is considered in the next chapter (see Dow). The old and new institutional economics share a common focus on explaining the origins and characteristics of economic institutions (e.g., hierarchical firms versus decentralized markets) and, following Commons, Williamson makes the transaction a key part of his theory. Beyond this, however, the two approaches are largely dissimilar in terms of methodology and theoretical orientation (Rønnebo 1996), particularly regarding the role of power versus efficiency as the primary motive force in economic affairs.

The old institutional school of economics, of which the Wisconsin school is a major component, emerged in the United States in the 1890s, grew in prominence during the first three decades of the 20th century, reached its apex of influence in the early New Deal years of the 1930s, and since then has experienced a slow but cumulatively significant decline in both influence and number of adherents. The field of labor economics has been no exception to this trend. Beginning in the early 1940s, a new generation of labor economists (e.g., John Dunlop, Clark Kerr, Richard Lester, Charles Myers, Lloyd Reynolds, Arthur Ross) largely unconnected to Commons and the Wisconsin school became the dominant intellectual force in the field, and while they continued the institutional emphasis on an interdisciplinary perspective and the constructive role of collective bargaining and labor legislation, they also made a concerted effort to shift the study of labor to a more analytical, market-based orientation and away from the historical, reformist approach pioneered by Commons and associates (Kaufman 1988). After the early 1960s, this second generation of labor economists was itself largely displaced by the resurgent neoclassical school, spearheaded by economists at the University of Chicago. Under the influence of the Chicago school, labor economics became a branch of applied microeconomic theory with a methodological and policy perspective in many respects the opposite of the Wisconsin school. Today relatively few labor economists identify themselves as "institutionalists," although a diverse but modest-sized group (frequently participants in the allied field of industrial relations) continue to write and do research in the institutional tradition (Kaufman 1993).

The key figure in the birth of the "old" institutional school is Richard T. Ely. Ely, along with a small band of other young scholars (e.g., Henry Carter Adams, Simon Patten), did graduate study in economics in Germany during the 1880s and then came back to America determined to breathe new life into the economics discipline which, they thought, had become largely a sterile, unrealistic exercise in deductive logic (Ely 1938).

The new life they sought to impart to economics was to be supplied by extensive empirical fact gathering and close attention to historical processes, which together would furnish the raw material for construction of theories more attuned to the economic, social, and political realities of the day (Jacoby 1990). Commingled with their dedication to a different approach to economics as a science was an equally strong inclination toward social and political reform, marked by an aversion to doctrines such as *laissez faire* and Social Darwinism and a concomitant dedication to the idea that advancement of economic efficiency and social justice requires various forms of state regulation and control of the market system.

Although Ely and compatriots started the institutional rebellion, the birth of institutional economics as a bona fide school of thought is generally credited to three economists who followed in Ely's footsteps. They are Thorstein Veblen, Wesley Mitchell, and John Commons (Dorfman 1963). Of these three men, it was Commons who specialized in the study of labor and had by far the biggest impact on labor theory and policy in America in the first three decades of the 20th century. Indicative is the statement of Kenneth Boulding (1957:7) that "Commons was the intellectual origin of the New Deal, of labor legislation, of social security, of the whole movement in the country toward a welfare state."

Ely recruited Commons to join him on the economics faculty at Wisconsin in 1904 and together the two men built a department of national reputation (Cain 1993). Labor was an especially strong area, and numerous students who studied under Ely and Commons went on to make notable contributions in labor scholarship, practice, and policy (Saposs 1960). The core members of the Wisconsin school included Edwin Witte, Helen Sumner, Selig Perlman, Don Leschier, William Leiserson, John Andrews, Elizabeth Brandeis Rauschenbush, John Fitch, and David Saposs. Several other prominent labor economists of the period, such as Sumner Slichter and Harry Mills, studied under Commons before going on for doctoral work elsewhere. The labor theories and policy prescriptions of these economists were sufficiently distinct and unique that Commons and colleagues became known in academic circles as the "Wisconsin School" (Barbush 1994) and as key contributors to what was widely recognized in political circles as the "Wisconsin Idea" (McCarthy 1912).

Commons and colleagues produced monumental works on trade unionism and collective bargaining and took a generally advocacy stance regarding their proper place in the economic system (Commons 1918). Although rarely acknowledged in contemporary accounts of the history of management thought, Commons was also the most influential academic writer in the newly emergent field of personnel administration in the late 1910s-early 1920s (Commons 1919; Kaufman forthcoming). Equally pathbreaking but underappreciated is the work of Commons and associates in the area of law and economics. Two aspects of this work are of particular relevance for this chapter.

The first is in the area of "high theory" and entailed integration of law and legal analysis into the main corpus of economic theory. Commons' two theoretical treatises, *Legal Foundations of Capitalism* (1924) and *Institutional Economics* (1934a), are the exemplars of this literature. Although today's conventional wisdom is that the field of law and economics is a post-World War II development largely originating at the University of Chicago, in actuality the institutional economists of two generations earlier were the first ones to examine the interface between economic and legal theory (see Hovenkamp 1990 and Commons' 1925 article entitled "Law and Economics"). The key difference is that the institutionalists emphasized the transference of legal concepts and reasoning into economic theory, while the modern day law and economics movement approaches the intellectual interface from the opposite direction (see Schwab's chapter in this volume).

A second area of law and economics pioneered by the institutional economists is with respect to labor and the employment relationship. The institutionalists were the first American economists to systematically develop a theoretical rationale for employment regulation and were among the most active and prominent advocates of such legislation. Ely and Commons, for example, were largely responsible for the founding of the American Association for Labor Legislation (AALL) in 1908, and under the direction of their former student John Andrews (with considerable assistance from his wife, Irene Osgood Andrews), it soon became the most active and influential research and lobbying group in the nation on behalf of employment regulation (Pierce 1953; Chasse 1994; Moss 1996). Its quarterly journal, *The American Labor Legislation Review*, was the leading outlet for progressive thought on methods to improve the conditions of labor. In addition, the text, *Principles of Labor Legislation* (1st edition, 1916; 4th edition 1936), co-authored by Commons and Andrews, was widely recognized at the time as the most authoritative source on employment law.

The economists of the Wisconsin school were part of a broader coalition of progressive liberal reformers who promoted the cause of expanded social

welfare legislation during the 1900-1930 period. Within American economics, for example, nearly all labor economists, including leading figures such as Paul Douglas, Sumner Slichter, Harry Mills, were strong advocates of additional employment regulation (Douglas 1934, 1938; Slichter 1928; Mills and Montgomery 1938a, 1938b). The institutionalists also had allies or sympathizers among economic theorists, such as Irving Fisher (an AALL president), Alvin Hansen, John M. Clark, Rexford Tugwell, Edwin Seligman, and Henry Seager. Also influential in the development of institutional thought, though from a distance, were several English economists, notably Sydney and Beatrice Webb and John Hobson.

Outside of academia, numerous social reform groups agitated for strengthened employment regulation, including engineers affiliated with the Taylor Society (e.g., Ordway Tead, Morris Cooke), progressive businessmen (e.g., Edward Filene, Henry Deming), social workers (e.g., Paul Kellogg, Florence Kelley), liberal Christians affiliated with the "Social Gospelers" (e.g., Josiah Strong), leaders of organized labor (e.g., Samuel Compers, Sydney Hillman), socialists and radicals (e.g., Eugene Debs, Morris Hillquit), and progressive politicians (e.g., Robert La Follette, Robert Wagner).

Labor Problems

The beginning point for discussion of the institutional perspective on employment regulation is the concept of *labor problems* (Kaufman 1993). In the Preface to the first edition of their *Principles of Labor Legislation* (1920:xi), for example, Commons and Andrews state that the purpose of the book is "to sketch the historical background of the various labor problems, indicate the nature and extent of each, and describe the *legislative remedies* which have been applied" (emphasis added).

Labor problems, as a concept, were typically defined as a maladjustment or lack of harmonious balance in the employment relationship (Daugherty 1933). This maladjustment or lack of harmonious balance took a number of concrete forms (typically labeled "evils") that adversely affected employers and/or employees. Prominent examples from the early decades of the century are the following (for a general overview, see Fitch 1924; Andrews 1932):

- Employee turnover: Slichter (1918) found the majority of companies in the 1910s experienced annual employee turnover of 100% or more. It was not unusual at a number of companies for average length of job tenure among production workers to be three months or less (Lecschner 1919).
- Long hours. In 1909 three-quarters of employees in manufacturing firms worked 54 or more hours per week (Lanck and Sydenstricker

1917:183). The institutionalists considered the steel industry to be the most egregious case of excessive work hours. Until 1924 most of the industry worked its employees 12 hours a day, 7 days a week (Fitch 1924).

- Industrial accidents. Over 25,000 American workers were killed in workplace accidents each year in the early 1910s, and another 700,000 were disabled for four weeks or more. The industry with one of the worst safety records was coal mining. Each year 1 of every 300 miners was killed in a work-related accident (Lauck and Sydenstricker 1917:195).
- Poverty incomes. It was judged that in the early 1910s the ordinary wage-earning family (two adults and three children) needed an annual family income of \$800 for "a reasonable minimum" standard of living. Two-thirds of families earned less than this amount, even though the wife and one or more children often were gainfully employed (Lauck and Sydenstricker 1917:249, 376).
- Excessive work speed. Assembly lines, semiautomatic machine production, and piece rate compensation plans led to a steady increase in the pace of work in a number of industries to the point where many workers were "old before their day" due to the physical and mental strain. Industries such as steel, autos, and meat packing were particularly noted for the grueling pace of work, and many employees were worn-out by the age of 40-45. Often companies used seasonal layoffs as an opportunity to cull older employees from their work force, and it was widely recognized that many companies refused to hire new workers past the age of 40 (Commons and Andrews 1936; Millis and Montgomery 1938a).
- Irregular work. Each year the average worker was unemployed between one-sixth and one-third of the time (Lauck and Sydenstricker 1917:360). Reasons included frequent job changing and haphazard search for work, large seasonal swings in production and employment, large numbers of employee discharges, personal sickness and disability, and generalized unemployment during business downturns.
- Workplace autocracy. The common law of that day termed the relationship between employer and employee as one of "master and servant." The employer (master) had an almost unrestricted right to administer whatever personnel policies were deemed appropriate with regard to hiring, firing, pay, discipline, and work speed. Employment was "at will" and workers could be summarily fired for any reason. Formal grievance systems were nearly nonexistent outside unionized establishments, and thus quitting work was the employee's major source of protection (Fitch 1924).

- Conflict. American society witnessed a growing crescendo of strikes and workplace violence between 1880 and 1920. A number of strikes (e.g., the Pullman Strike, the Ludlow Massacre) turned into large scale "labor wars" with mass destruction of property, pitched battles in which numerous people were killed and injured, and use of federal troops to restore order (Lens 1974). Numerous acts of violence were also practiced by employers and workers in efforts to unionize or remain nonunion, including dynamite bombings, lynchings, and beatings.

The Cause of Labor Problems: The Orthodox Perspective

Having documented the widespread, serious nature of labor problems in American industry, the second step in the research and policy program of the institutionalists was to diagnose the cause of these problems. Appreciation of the institutional perspective on this matter is facilitated by a brief overview of the tenets of *laissez-faire* economics and Social Darwinism, which together represented the dominant, "orthodox" school of thought at the turn of the century.

The doctrine of *laissez-faire* originated with the French physiocrat economists of the mid-1700s, but it was Adam Smith's *Wealth of Nations* (1776) that gave the concept its most compelling rationale. After additional elaboration by other members of the British classical school of economics, the doctrine was imported to America after the Civil War and adopted by American economists and businessmen with both less qualification and more zeal. Social Darwinism also had British origins, particularly in the work of Herbert Spencer who took the theories of evolution and "survival of the fittest" propounded by Charles Darwin and applied them to the development of human societies.

Laissez-faire and Social Darwinism share four basic assumptions (Fine 1956):

1. The existence of certain fundamental laws of nature, such as competition and survival of the fittest, and inalienable natural rights, such as individual freedom and liberty of contract. The laws are held to be immutable, often God-given, and the rights are held to be sacrosanct.
2. The efficacy of self-interest. As Adam Smith (1776) explained, people's pursuit of their self-interest in earning a living and doing business leads them "as if by an invisible hand" to produce the goods and provide the services that promotes the good of the larger society.
3. The merits of free competition. Competition is desirable because it provides a spur to personal initiative, makes individual success a function of ability and effort, not status or privilege, and efficiently and fairly regulates economic production and distribution.

4. The inefficiency of government and the stultifying effect of legislation on economic and social progress. From the perspective of the late 1800s, it was put forth as self-evident that government is corrupt and manipulated for the advantage of special interests and cannot be entrusted to efficiently manage either enterprise or administration.

The evident conclusion from these assumptions is that the best government is the one that governs least. The role of the state is to protect civil liberties and individual property rights; enforce the laws of contract; and provide certain essential services in the realms of education, health, defense, and public protection. Beyond this, the state must not go.

Proponents of *laissez faire* and Social Darwinism did not dispute the existence of labor problems, such as those listed above. Their diagnosis of the causes of these problems, however, led them to deny nearly all forms of state intervention (Fine 1956). For example, many forms of labor problems were viewed as largely stemming from the individual's own actions or character defects, such as carelessness in the case of work accidents, or laziness in the case of unemployment. State action on these matters would only abrogate individual responsibility and take resources from the provident and transfer them to the improvident. Alternatively, it was argued that competition rewarded people for the assumption of risk (through higher wage differentials for more dangerous or insecure jobs) and that people taking those jobs thus had no legitimate claim for redress. A third argument rested on liberty of contract—as long as employment contracts are free of fraud and duress, there are no legal or ethical grounds for the state to overturn them, since both parties to the contract voluntarily agreed to the wages, hours, and terms of employment and presumably gained from the exchange. Employment regulation is thus an infringement on personal liberty and a cause of economic inefficiency. Finally, proponents of *laissez faire* and Social Darwinism frequently rationalized labor problems, such as low wages and long hours, as the price that has to be paid for economic and social progress and saw attempts by workers to form trade unions or to strike over these conditions as the work of radicals and agitators intent on overthrowing the system of private property and individual liberty.

These beliefs held wide sway in America in the latter part of the 19th century. Although government might regulate employment conditions for certain groups that are either incapable of safeguarding their own interests (children, the mentally deficient) or for which a clear public purpose is served (women, since harm to them is a harm to future generations), the prevailing view was that employment regulation was unwise policy that violated constitutional guarantees of individual liberty and freedom of contract (Ely 1907; Commons

1924; McCurdy 1984). Examples of employment laws declared unconstitutional were mandates that workers be paid at fixed intervals, wages be paid in cash, women be paid a minimum wage, employees cannot be fined for imperfect work, overtime pay has to be given for work hours of more than eight per day, and companies cannot discharge employees on account of their membership in a labor union.

Illustrative of the reasoning of the courts and the power of the ideology of *laissez faire* is the decision of the Pennsylvania Supreme Court in a case decided in 1886 involving a state law requiring that wages be paid in cash rather than scrip. The court declared the law unconstitutional and said: "The act is an infringement alike of the right of the employer and employee; more than this it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the U.S. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any or every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void (Lehrer 1987:49).

Labor Problems: The Institutional Perspective

Ely, Commons, and the other institutional economists took a very different view of the causes of labor problems. Their effort to articulate this view and give it scientific credence took them down the path of "science building"—the creation of a new corpus of economic theory to replace (or at least substantially modify) the classical model of political economy upon which the theory of *laissez faire* was based. An overview of their "new political economy" is provided below.

The End Purpose of Economic Activity

The first place the institutionalists departed from the classical economists is with regard to the end purpose of economic activity (Conce 1966). In the classical view, the primary objective of economic activity is creation of material wealth and its ultimate purpose is satisfaction of consumer wants (Clark 1926:46). Illustrative is the remark of John Stuart Mill (1874:137) that "Political Economy is concerned with him [man] solely as a being who desires to possess wealth," and Adam Smith's (1776:625) contention that "Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as necessary for promoting that of the consumer."

The institutionalists took a different view. Economic theory and evaluative judgments of an economy's performance have to be based, says Commons (1924:377), on the *purpose* the economic system is intended to serve. And this purpose, he says (p. 38), is not maximization of consumer satisfaction or material wealth (although these are important) but facilitation of each person's quest for self-development and self-realization. This theme is also struck by Ely (1886:3), who defines the purpose of humanity as "the full and harmonious development in each individual of all human faculties—the faculties of working, perceiving, knowing, loving—the development, in short, of whatever capabilities of good there may be within us."

Shifting the focus of economics from material wealth and consumer satisfaction to individual self-development and self-realization has profound implications for economic theory and the analysis of labor problems. Consider work, for example. In classical and modern neoclassical theory, work is assumed to be an irksome, unpleasant activity (i.e., a source of disutility) and people perform it only to obtain an income to buy consumer goods (Ehrenberg and Smith 1994). Labor, in turn, is usually treated as a commodity-like factor input that derives its value from the goods and services produced. But this view, say the institutionalists, is fundamentally flawed.

Consumption of more goods and services gives people a temporary feeling of greater satisfaction, but over the longer run, happiness with life bears only modest relation to income level or quantity of material possessions. Rather, happiness with life has much more to do with a continuing sense of accomplishment and self-development—that one is learning new things, mastering new challenges, and involved in meaningful activities and relationships (Lane 1991). It is for this reason that Ely (Ely and Bohn 1935:210) says, "Work is the greatest blessing," since work, more than consumption, provides opportunities for self-development and self-realization. In institutional theory, therefore, the activity of work has intrinsic value, and labor is not just a commodity input valued for the output it produces but is embodied in human beings whose welfare as producers is as important as their welfare as consumers (Leiserson 1938:11-18).

This perspective helps illuminate why the institutional economists were more critical of a free market, *laissez-faire* economic system than their classical and neoclassical colleagues. In orthodox theory, for example, long hours of work or low rates of pay may be regrettable on purely humanitarian terms but do not provide justification *per se* for government intervention in the market, as competition ensures that employment outcomes are the product of voluntary choice and yield a welfare maximizing level of production. If self-development and self-realization are the end goals, however, numerous reasons exist to doubt that competitive outcomes are optimal.

For example, the most important prerequisite for human self-development, according to Commons (1934a), is security of one's person and livelihood. Without a minimum level of security, people revert to more primitive forms of behavior (e.g., physical violence) and shy away from cooperative enterprise and forward-looking, economically productive investments (Chasse 1986). Will a *laissez-faire*, free market system provide the necessary minimum level of security for self-development? Definitely not, he thought, since the hallmark of competitive markets is volatile prices (as in stock or grain markets), short-term, "spot" relationships between buyers and sellers, and the constant threat to workers and firms that some rival will underbid them and take away their jobs and business.

Competitive, *laissez-faire* markets are detrimental to human self-development and self-realization in numerous other ways. For example:

- Self-development requires that each person earn what the institutionalists called a "living wage," meaning the income necessary to purchase the social minimum standard of living (Seager 1913; Lauck 1929). A free market system, however, provides no assurance that workers will receive a wage at least equal to this amount, and indeed, the record of competitive markets is that workers with low skills or from minority groups often earn considerably less.
- Competitive markets can result in extensive child labor or employees working 60, 70, or more hours per week, which may be efficient from a narrow economic perspective but is clearly injurious to the self-development of the worker and the well-being of families and the broader community.
- Competition may make a minute division of labor and authoritarian "command and control" management system the most efficient method of production, but self-realization is not promoted by boring, unchallenging work or jobs with no opportunity for employee participation in decision making (Slichter 1928:652).
- Economic efficiency and personal self-realization are both promoted by ethical, law-abiding behavior and cooperative forms of endeavor, but unrestrained competition induces people to engage in selfish, opportunistic behaviors that undercut ethical standards and cooperation.

Self-Interest and Competition

The second fundamental respect in which the institutionalists departed company with the classical economists (and their neoclassical successors) is with respect to the virtues of self-interest and competition. In orthodox theory,

pursuit of self-interest and the process of competition are regarded as beneficent forces which should be given as much free rein as possible, subject to minimal legal safeguards (e.g., protection of property rights, prohibition of contracts made through duress or fraud) and the occasional, infrequent need for regulation due to market failure, such as in the case of natural monopoly (Clark 1926).

The institutionalists had a more ambivalent view of self-interest and competition. Their basic position was that both forces can promote the social good, but only if channeled in the appropriate direction by public policy and kept within well-defined limits by social control mechanisms. One reason, states Commons, is that people are not the rational, dispassionate beings envisioned in orthodox theory's "economic man." Rather, the starting point for a model of the human agent, he claims (Commons 1934a:874), is "passion, stupidity, and ignorance," or what Herbert Simon (1978) later characterized as "bounded rationality." Choices and actions, Commons says, reflect to varying degrees a reasoned, logical process in which people weigh benefits and costs, but the choice process is often heavily influenced by underlying emotional states (e.g., anger, envy, lust, greed) and constrained by people's limited ability to think through problems and acquire the relevant information to make an informed decision. The consequence is that human behavior is prone to suboptimization, is heavily influenced by custom and social comparisons, is driven by desire for power and control, and can all too easily degenerate into acts of aggression and violence.

Given this model of human behavior, it is not surprising that the institutionalists took a less sanguine view of the social benefits to be had from the pursuit of individual self-interest and the process of free competition. Commons (1893:61) says of self-interest, for example, "Private self-interest is too powerful or too ignorant or too immoral to promote the common good without compulsion," while Adams (1886:34) says of competition, "Competition is neither malevolent nor beneficent but will work malevolence or beneficence according to the conditions under which it is permitted to act." This same sentiment is voiced by Leiserson (1938:15), "There is nothing inherent in economic laws that makes them necessarily work out to promote human welfare if allowed free play. They need to be controlled and directed if we want them to accomplish human purposes." The challenge, then, is to construct institutions and "working rules" so that society obtains the benefits of self-interest and competition and avoids the evils.

One particular set of institutions and working rules is associated with free markets and laissez faire, but the institutionalists believed these lead to numerous labor problems. The reason is that a free market system contains a variety of defects and imperfections that, when combined with human beings'

bounded rationality, generates conflict, poverty, harsh working conditions, job insecurity, and dynamic instability in the macro economy. The sources of market failure are several.

The most important defect is the inability of competitive markets and the price system to maintain the economy at full employment. Commons identified involuntary unemployment as the single most important labor problem and the Achilles heel of American capitalism (Commons 1934a:804-05; Commons and Andrews 1936:1; also see Clark 1926:144; Slichter 1928:850).

Unemployment in the institutional view is not typically the fault of the person unemployed, nor can market forces of demand and supply be counted on to automatically solve the problem. Indeed, while classical and neoclassical theory points to a reduction in wages as the cure for an excess supply of labor, the institutionalists presaged J. M. Keynes (1936) in their belief that wage cuts are ineffective and often counterproductive (Ely, 1886:116; Clark 1926:410). Like Keynes, the institutionalists instead placed greater emphasis on eliminating unemployment through measures that stabilize and expand purchasing power, such as easier credit conditions and countercyclical public works (Whalen 1993; Kaufman 1996a).

Commons and the institutionalists attributed a number of the nation's most grievous labor problems to the effects of unemployment. For example:

- The nation suffers a tremendous waste of economic resources when labor and capital remain idle—a waste that seems all the more irrational and unjust when millions of jobless people suffer from acute privation due to lack of the basic necessities of life.
- Unemployment and the threat of joblessness promotes a consciousness of insecurity in the worker. This undercuts the incentive for employees to exert effort and diligence at work, since they may at any moment lose their job and a return on this investment, and promotes various defensive, protective stratagems on the part of employees to stretch out the work or shield themselves from competition (Commons 1918).
- Workers and their families also suffer considerable financial, physical, and emotional distress from unemployment, including in severe situations destitution, family break-up, and alcoholism.
- Firms react to slack times by cutting wages, layoffs, reduced hours, speed-ups, and heightened, often-times arbitrary discipline, all of which are detrimental to employee well being.
- Unemployment demoralizes its victims and erodes their strength of character, leading to a diminution in the nation's quantity and quality of labor input (Commons and Andrews 1936:3).

- Unemployment stokes conflict between management and labor and between social classes and ethnic groups.

A second important defect of the market system is the failure of price in many economic transactions to fully incorporate social costs and benefits. It is a basic theorem of microeconomics that social welfare is maximized when products are produced or activities pursued to the point where marginal social benefit equals marginal social cost. But externalities, public goods, limited information, and restrictions on factor mobility can cause a divergence between the private benefits and costs as seen by individual economic agents and the costs and benefits experienced by society. The result will be either too much or too little of the product or activity relative to the social optimum.

Several examples of labor problems will illustrate the point. Consider, first, work accidents. According to Adam Smith's theory of compensating differentials, firms with dangerous work processes are forced by competition for labor to pay a wage premium sufficient to compensate workers for the higher risk of injury and attendant financial loss and pain and suffering. This higher wage premium, in turn, motivates firms to be safety conscious, while the costs are in the long run passed on to consumers who, as the ultimate user of the product, are legitimately expected to pay for them.

While fine in theory, the institutionalists maintain that most real life labor markets contain defects that allow firms to shift a portion of the cost of accidents to third parties, be it workers, families, communities, or society at large (Clark 1924:371; Slichter 1928:550; Stabile 1993, 1996; Moss 1996). If the economy is at less than full employment, for example, a slew of available job seekers will undercut the pressure on firms to pay a compensating differential. Likewise, restrictions on worker mobility, such as moving expenses, discriminatory restrictions on hiring, loss of seniority rights or nonportability of pension benefits, will hinder the ability of workers in dangerous jobs to leave and seek work elsewhere. Alternatively, workers may not have adequate information about the extent of danger in the workplace and thus underestimate the true level of risk. Whatever the cause, the private cost of accidents to firms will be less than the social cost, leading to excessive numbers of accidents and additional costs for third parties.

This same analysis applies to numerous other aspects of employment. If firms owned labor, for example, they would have an incentive to wisely manage the health and physical stamina of their human asset in order to maximize its financial return. But when firms can rent labor by the hour or week and the costs of maintenance and training fall upon the worker or community, management's time horizon shortens and the incentives change. Particularly

when an excess supply of labor is available, whether from cyclical unemployment, immigration, or some other source, the optimal labor policy is to get the maximum work effort from the employee each and every hour and, when the employee's health or physical stamina cracks, replace him or her with a new worker. The problems from this policy are threefold: some of the nation's labor input is wasted, the cost of the damage and depreciation of the labor input is shifted from the firm to the worker (or family/community), and feelings of rancor and bitterness develop in the work force over a policy employees see as patently exploitative.

A third example concerns human rights and dignity. Most people in advanced, Western countries believe that workers have a basic right to justice, fair dealing, and respect in the workplace. Violation of these rights and obligations is a social cost, albeit of a nonmonetary form. It is probable that labor markets will underproduce the socially optimal level of worker rights and protections, since firms are motivated to provide equity and dignity only to the extent that they add to profit. Not only are relative wage offers and employee quit decisions unable to satisfactorily signal firms the nature of employee preferences on these matters, the combination of scarce jobs, significant costs of mobility, and management's desire to preserve power and control in the workplace ensure that justice and dignity will be undersupplied in a free market system.

Social benefits may also exceed private benefits in a *laissez-faire* market system, leading firms to underproduce some employment "good." An example is general training. Since general training, such as reading blueprints or learning a software program, provides work skills that several or more companies find valuable, individual firms are reluctant to incur the cost of providing the training, because the worker may quickly be lured away by a more attractive job offer from a competitor. The result is a general undersupply of training and an underskilled work force (Clark 1924:362-63).

These considerations of social cost led the institutionalists to look at labor, not as a commodity, but as a human resource and at labor legislation as a crucial instrument for the conservation and development of this resource. If left to the free market, labor will be wasted and exploited, much as happens with unprotected natural resources. Thus Commons (1918:129) remarks that "Somebody must pay for the conservation of the nation's human resources. If left to demand and supply, the most valuable resources are not conserved"; and the American Association for Labor Legislation emblazoned on the masthead of early publications this statement: "The fundamental purpose of labor legislation is the conservation of the human resources of the nation."

Noncompetitive labor market structures are a third type of market defect and source of labor problems (Douglas 1938). Employers are motivated to

provide competitive wages and other conditions of employment by the necessity of recruiting and keeping a qualified work force. However, if other employers are not actively competing in the labor market or workers face significant costs of mobility in moving from one firm to another, competition loses some of its effectiveness as a regulator of employment practices. As a result, firms gain the ability to exploit workers by paying less than competitive, full employment wages or by providing substandard hours, working conditions, and management practices. (Note that the institutionalists define "exploitation" broadly to include any situation where the worker's wage is depressed due to some form of contrived dependency or restriction of opportunity. See Taylor [1977].)

Labor economists of the period were almost unanimous in their opinion that employer competition for labor was highly imperfect (Kaufman 1994). Particularly noteworthy are the statements on this matter by two Chicago labor economists, Harry Mills and Paul Douglas. Mills (Mills and Montgomery 1945:364-65) states, for example, "Industry affords an abundance of evidence that a competitive demand for labor does not go far to protect the workers against long hours, excessive overtime, fines, discharges without sufficient cause, and objectionable working conditions." Douglas (1934:95)—the foremost analytical labor economist of the interwar period—similarly states, "It can thus be said that up to the summer of 1933 the forces which operated against labor receiving its marginal product were stronger than those which tended to prevent capital from securing its margin. An increased activity by the state in behalf of labor, or further unionization on the part of the wage-earners themselves, would have helped to redress this balance."

One reason for lack of employer competition for labor is monopsony in the labor market (only one buyer of labor), such as exists in a one-company town. According to one estimate (MacDonald 1938:77), over two million workers in the 1930s lived in towns dominated by a single employer. The extent of employer power over the work force in these towns was often considerable—as witnessed by Senator Wagner's remark (Huthmacher 1968:64) after visiting a number of coal mining towns in 1928 that "had I not seen it myself, I would not have believed that in the United States there were large areas where civil government was supplanted by a system that can only be compared with ancient feudalism." His allusion to feudalism was prompted by life in the coal camps. They were frequently in isolated, mountainous areas; the company often owned the housing and could evict the miners at will; the company also often owned the store at which the miners purchased the necessities of life, as well as the church and other public buildings; payment for work would sometimes be in scrip that was only of value at that camp; the

police and camp guards were on the company payroll; and the entire camp was in a number of cases encircled by fencing so that entrance and exit took place through a single gate controlled by the guards.

Another source of imperfect competition in labor markets was oligopsony (only a few buyers of labor) and collusive activities promoted by employers' associations. With regard to the latter, most medium-large cities had an active employers' association, as did most major industries and trades (e.g., the National Erectors Association). One of the principal purposes of these associations was to promote employer interests in the labor area. Toward that end, the associations monitored labor market developments, disseminated information to member companies about wages and union activity, and tried to stabilize labor supply through training programs and other means. Relatively little research has been done on the labor activities of these associations (for an illuminating exception, see Harris [1991]), and modern-day economists tend to either ignore them or downgrade their likely effectiveness as agents of collusion. But Mills (1935) in his presidential address to the American Economic Association painted a far different picture when he said, "Even in a city like Chicago, an industry may dominate a large community, and the firms engaged in it may control the situation within rather wide limits. Going beyond this, I would cite a number of instances where associations of manufacturers or merchants have fixed wage scales or, indeed, maximum wages to be paid and have enforced them more successfully than any American state has enforced its minimum wage standards."

A third type of imperfect labor market structure of relevance to this historical era is segmented labor markets, particularly with regard to race, ethnicity, and gender. Discrimination in wages and job assignments was widely practiced by employers and condoned by a significant part of the public in early 20th century America (Mills and Montgomery 1938a; Milkman 1987). Most occupations were strictly segregated by gender, women ordinarily earned only one-half to two-thirds the wage of men, and it was common for members of particular ethnic and racial groups to be hired for only one set of jobs in a plant or mill. Although one version of neoclassical theory (Becker 1957) predicts that competition should undermine and eventually eliminate these types of employer discrimination (because nondiscriminating firms can get equally qualified minority workers at a lower wage, thus earning more profit), this process worked only very imperfectly and slowly in the pre-New Deal years and, in some cases, had counterproductive results (e.g., greater competition sometimes fueled outbreaks of racial violence against blacks and orientals).

The institutionalists (Commons 1907, 1934a:844; Ely and Bohn 1935:236-37) flatly rejected the contention in the Declaration of Independence that "all

men are created equal." It was taken as an accepted fact that races and ethnic groups coming from countries closer to the equator lag behind those from countries in the mid-latitudes in terms of the strength and development of their intellect, character, and culture. Likewise, men were thought to be superior to women in most lines of work due to their stronger physiques and more disciplined emotional temperaments, while it was also accepted that women more than men needed to be at home to raise children and manage the household.

A portion of the disparity of rewards and treatment given native white men versus other groups (circa the early 1900s) could thus be rationalized by the institutionalists as a legitimate reflection of differences in genetic and cultural "endowments." They also recognized, however, that another significant portion of the differential in rewards and treatment at work reflected plain and simple discrimination (Commons and Andrews 1936:47-48, 319; Mills and Montgomery 1938a; Leher 1987). This discrimination arose from several sources, such as race prejudice, fear of labor market competition from minorities, social custom regarding appropriate gender and ethnic roles, and the desire of native white men to maintain their economic and social hegemony. These motives interacted with market imperfections, such as involuntary unemployment, employer market power, and worker collusion (solidarity), to initiate and maintain segmented markets and discriminatory differentials.

Although imperfect forms of competition in labor markets were believed to be widespread by the institutionalists, they did not form the central or most important part of their argument in favor of employment regulation and collective bargaining, despite numerous statements to this effect (e.g., Reynolds 1984; Cain 1993). Rather, it was *excessive competition*, not lack of competition, that was deemed a far more serious cause of labor problems (Ely 1907; Seager 1913; Commons 1918:28-29; Commons and Andrews 1936:47-48, 372-74). The terms usually used by the institutionalists to describe this situation were "destructive" or "cutthroat" competition.

The Wisconsin school institutionalists tended to use these terms loosely and did not give them precise definition. The institutionally sympathetic economist J.M. Clark of Columbia University, however, devoted several chapters of his path-breaking book, *Studies in the Economics of Overhead Costs* (1924), to this subject. He describes three conditions that are conducive to destructive competition: fixed costs are a large proportion of total cost of supply, substantial excess productive capacity exists in the market, and factor mobility is costly. The outcome of these three conditions is likely to be a sea of red ink for producers and a decline in prices far below the break-even point of average total cost (as in railroad rate wars) until enough firms go bankrupt that a balance between production capacity and sales is restored.

The innovation of the institutionalists was to apply the model of destructive competition to labor markets. A person's marginal cost of supplying an extra hour of labor, particularly in terms of direct money outlay, is quite small; but the fixed cost of supplying that labor (e.g., food, shelter, clothes, health care) is large. In a situation of excess labor supply (either due to generalized unemployment or low mobility out of depressed areas due to financial and family constraints), the dearth of jobs, the continuing pressure of fixed costs (particularly for breadwinners who have a family to support), and the fact that workers cannot inventory labor hours and sell them at a future date soon results in a bidding down of wage rates to very low levels as the most financially desperate workers undercut their rivals in an effort to obtain employment. This process is described by Commons and Andrews (1936:48) thus:

Another reason for the low wage scale, largely the result of the first [extensive immigration], is the cutthroat competition of the workers for work. Among the unskilled, unorganized workers, the wage that the cheapest laborer—such as the partially supported woman, the immigrant with low standards of living, or the workman oppressed by extreme need—is willing to take, very largely fixes the wage level for the whole group.

In orthodox economic theory the low wage described above by Commons and Andrews is not a labor problem but a labor *solution*, since a lower wage is what must happen in the labor market if a situation of excess labor supply is to be corrected and an equilibrium restored where jobs are available for all those who desire work (Reynolds 1991). But from an institutional perspective this neglects the fixed cost of labor. If the quantity and quality of the nation's work force is to be maintained, workers must earn a wage at least equal to the minimum amount of money required for ongoing (fixed) costs of food, shelter, clothing, education, etc., for themselves and all dependent family members. Earnings less than this amount mean that workers and their families suffer a gradual erosion in their physical health and human capital, while firms are "parasitic" in that their existence is subsidized by shifting part of the costs of production to the community at large.

Property Rights and Inequality in Power

Another source of labor problems, according to the institutionalists, lies outside the market mechanism. This is the unequal distribution of property rights and power in society.

Standard microeconomic theory typically takes the institutional structure of the economy, such as the distribution of property and wealth and the provisions

of constitutional and contract law, as a "given" and proceeds to analyze how market forces determine an equilibrium level of prices, production, and allocation of resources. From Commons' point of view, however, it is these "givens" in orthodox theory that are the ultimate determinant of prices and outputs because they determine each trader's endowment of resources and bargaining power. Indeed, the reason why Commons' economics is "institutional" economics is because it is, at a fundamental level, these institutional "givens," not the mechanistic operation of supply and demand per se, that determine price and quantity in the market.

Since property rights, contract law, etc., are determined through the political process, it is not surprising that the "rules of the game" are set up to promote the interests of the rich and powerful. In *Legal Foundations of Capitalism*, Commons described a process of conflict and struggle dating from the Norman invasion of England to early 20th century America in which one disenfranchised group after another (e.g., feudal lords, town merchants, American colonists, black slaves) fought wars, staged revolutions, formed new political parties, etc., in a quest to gain entrance to the polity and use their newly gained political power to change the "rules of the game" in ways that better protected and advanced their interests. Institutional economics is thus "political economy" in that it explicitly recognizes the interaction between political power and market outcomes.

When Commons and fellow institutionalists looked at political government in America, they saw considerable, albeit imperfect, progress in the direction of decentralized power and democratic control. The unlimited power of English kings had given way to representative democracy in which the laws of the land require the consent of the governed, and the arbitrary use of power and privilege was checked by the Bill of Rights and policed by an independent judiciary culminating in a Supreme Court. But when the institutionalists looked at American industry at the turn of the century, they saw a retrogression in security, liberty, and equality of workers as a class. The source of this retrogression was a skewed system of property rights and power that overwhelmingly favored employers, leading to exploitation of labor, injustice in the workplace, and growing labor conflict and social unrest.

The presumption of both law and orthodox economics at the turn of the century was that the individual worker and individual employer have equal liberty to agree or not agree to an employment contract. Furthermore, the worker may quit at any time, just as the employer can fire the worker at any time. This reciprocal freedom, combined with competitive markets, was thought to create an ideal institutional arrangement in which power is highly

dispersed and balanced among individual workers and firms with neither party having an ability to coerce or exploit the other.

The reality, said Commons (1924), is quite different. A half century earlier when America was still a country of small shops and firms, a rough equality of power existed between workers and employers. With the rise of large-scale industry and giant trusts in the last part of the 19th century, however, the balance of power tipped substantially in favor of employers. Now the employee, though treated in the law as a fictional person, was a large corporation with numerous plants, thousands of employees, and a multimillion dollar pool of capital drawn from thousands of individuals. The worker, on the other hand, was likely to be a poorly educated, semiskilled or unskilled male breadwinner with a family to support and little if any financial reserve. In the rare situation when the economy was at full employment, the scarcity of labor gave the individual worker a semblance of equal bargaining power. But in normal times, employers had an excess supply of job seekers and the bargaining power of the individual worker, unless skilled or strategically placed, was minimal. "Take it or leave it" became the labor relations philosophy of most firms, and many workers quickly had to take it given their scant resources, dependency on earnings from work, and near complete lack of what is today called a social safety net. Conditions of monopsony, segmented markets, and other market defects only exacerbated the imbalance in power.

For the institutionalists, the inequality of bargaining power between the individual worker and employer was the fundamental source of labor problems. While the tendency in modern economic analysis is to dismiss inequality of bargaining power as a vacuous concept (see Reynolds 1991 and Schwab in this volume; an exception is Bowles and Gintis 1993), to the institutionalists it was transparent that the individual worker did not compete on anything close to a level playing field with individual firms; that this tilted playing field results in very low wages, long hours, and harsh working conditions for many employees; and that these conditions are neither preordained by the laws of supply and demand (reflecting as they do socially determined property rights and wealth endowments) nor are they efficiency maximizing (because the sense of inequity that accompanies low wages and harsh treatment leads to a concomitant withdrawal of employee "goodwill" [Commons 1919] and thus motivation to work). Likewise, instead of promoting a harmony of interests, competition with unequal bargaining power degenerates into a cutthroat struggle of "survival of the fittest" in which the more liberal, progressive employers are forced to lower labor standards to the level of their most grasping rival. Inside firms, the inequality of power was manifested in the master-servant relationship that existed between employer and employee. Employers

had almost unfettered authority in all areas of personnel policy and practice, including the right to fire employees for any reason. Because employees had little avenue for redress of grievances, quitting, striking, and physical violence were the principal means of resolving disputes.

Seen as a totality, therefore, industrial government at the turn of the century was far more despotic and authoritarian than political government, and the operation of labor markets, rather than making the worker a free man, forced him through economic coercion to accept wages and conditions of employment that were often injurious and unjust. Thus *laissez faire* was naturally endorsed and labor unions and labor legislation condemned by the ruling elites since they were looking to protect their power and privileged position. The institutionalists, on the other hand, saw unions and labor legislation as essential instruments for balancing power and democratizing industry (Commons and Andrews 1936:502-34).

Solutions to Labor Problems

Having diagnosed the cause of labor problems, the institutionalists next turned to a search for solutions. What they came up with encompassed an overall policy strategy toward labor problems as well as a number of specific proposals regarding the resolution of individual problems.

The strategy of the institutionalists is captured in the comment by Commons (1934b:143) that his goal was "to save capitalism by making it good." The point to note about this comment is that the goal is to reform capitalism, not replace it. Ely, Commons, and most other institutionalists were political progressives (an American version of European social democrats with respect to social legislation and the welfare state, but much less so with regard to the role and purpose of the labor movement) who accepted the basic institutions of private property, a market-organized system of production and exchange, and representative democracy but thought these needed greater social control and shared governance.

The essential problem, the institutionalists thought, was that the institutional structure within which the profit motive and competition functioned and the dominant economic and social philosophy that guided public policy were by the late 1800s seriously out of date. *Laissez faire* and limited government were appropriate in the early part of the 19th century in a largely agricultural economy but were increasingly dysfunctional in an economy of huge corporations, national and international trade, and a large urban working class dependent on wages for the necessities of life.

According to Commons (1934a:876-903), the first and most important strategic goal is stabilization of the economy. The jagged ups and downs of

production and employment and the persistence of substantial involuntary unemployment in most years were the single greatest source of labor problems. During the entire 1920s, therefore, he devoted his attention to methods of macroeconomic stabilization (Whalen 1993). Policies he advocated included use of open market operations by the Federal Reserve to maintain a stable price level (he was a pioneer in this effort and worked closely with noted monetary economist Irving Fisher), countercyclical spending on public works, a system of unemployment insurance in order to stabilize consumer income during recessions, expansion of collective bargaining in order to prevent destabilizing wage deflation and augment household purchasing power, and public employment exchanges to facilitate adjustment of labor demand and supply. It is noteworthy that J. M. Keynes wrote Commons a personal letter in 1927 and stated (Skidelsky 1992:229), "There seems to be no other economist with whose general way of thinking I feel myself in such general accord."

The next part of the strategy involved a three-pronged effort to improve employment practices. The first prong focused on improvements in the organization and practice of management, particularly in the personnel and employee relations areas. Commons (1918, 1921) was particularly impressed with the progressive personnel management practices of the nation's leading-edge employers and thought that these practices set a benchmark for others to follow. He stated that this group of firms represented between 10% to 25% of employers and were so advanced that unionization had nothing to offer their workers. Although initially skeptical of the new employee representation or "industrial democracy" plans that firms introduced in the late 1910s and early 1920s, by the end of the decade institutionalists such as William Leiserson (1929) admitted that many of these plans were a net plus for the employees (an attitude that soured, however, during the Depression). The institutionalists did not propose direct government intervention in business to promote adoption of improved personnel management practices. They did believe, however, that the spread of such practices would be materially aided by, first, macroeconomic stabilization efforts (because labor scarcity motivates good management practices) and, second, the extension of collective bargaining and protective labor legislation as a means to shield progressive employers from competitive underbidding by unscrupulous or financially distressed rivals who used low labor standards to gain a cost advantage.

The second prong was extension of collective bargaining. The institutionalists recognized that trade unions are imperfect instruments to accomplish the social good, as they often engage in restrictive practices, sometimes boost wages far above market rates, and occasionally are as authoritarian or corrupt

as the firms they are attempting to organize (Commons 1913:120-48). Nonetheless, trade unions perform four functions that the institutionalists believed are vital to the public interest.

1. The introduction of industrial democracy or "constitutional government in industry" into the workplace (Leiserson 1922). Commons and associates saw the bloody labor strikes, voluminous labor turnover, and widespread employee dissatisfaction of the late 1800s/early 1900s as the inevitable outcome of an autocratic form of industrial government in which employers had unchecked power and workers were denied elementary rights and dignities of due process and respect. Although the individual worker was powerless to change the system, trade unions through the power of collective action could do so. In particular, trade unions checked the arbitrary exercise of management power, introduced bilateral methods of dispute resolution, and gave workers a voice in the determination of the system of workplace rules they worked under.
2. The equalization of bargaining power between labor and capital in the determination of wages and other conditions of employment. Commons and Andrew (1936:373) state it thus: "The need for collective bargaining arises from the serious discrepancy in 'withholding power' between the individual employer and the individual wage earner, a discrepancy which tends to result in terms of employment highly oppressive to the worker and injurious to society in general. . . . The employer is usually a corporation, which is itself a combination of capital; but the disadvantage of the laborer is even more fundamental. Being propertyless, he has no opportunity to make a living except by working on the property of others. Having no resources to fall back upon, he cannot wait until he can drive the most favorable bargain. It is a case of the necessities of the laborer pitted against the resources of the employer." The additional requirement for effective power balancing, they thought, is that collective bargaining must cover all or most of the firms in a product market in order to take labor cost out of competition. In the short run, the standard rate serves as a floor preventing the downward nibbling of wages and working conditions due to cutthroat competition. In the longer run, trade unions gradually increase the standard rate, thereby redistributing income from profit to wages. This, it was thought by many, would help maintain consumer purchasing power and thus help stabilize the economy at full employment (see Kaufman 1996a).
3. An offset to market failures associated with externalities, public goods, imperfect information, and so on. For example, the institutionalists

thought free markets would lead to plant-level working conditions, such as safety, sanitary conditions, and equitable dispute resolutions, that are substantially below the socially optimal level (Slichter 1928:651-64). The reason is that many working conditions are "public goods"—once provided no person can be excluded from consuming them. It is well known that free markets will underproduce a public good, since each employee has an incentive to remain silent and "free ride" in the hope that some other worker will take the initiative (and risk of management displeasure) and speak up. Collective bargaining, however, can overcome the free-rider problem because workers have an incentive to voice their demands to leaders of the union, and the leaders, in turn, are far more willing than individual workers to present these demands to management.

4. A counterbalance to the business class' otherwise preponderant power in the political system. Veblen (1904:286) observed that "representative government means, chiefly, representation of business interests." Without unions and the influence they exert through lobbying and political endorsements, the rights and interests of the average working person are likely to be underrepresented in legislatures and executive offices. The court system also is likely to become dominated by judges that cater to business interests.

The third prong of the institutional strategy to improve employment conditions is legal enactment. Legal enactment involves use of the sovereign power of the state to prohibit or limit certain practices deemed injurious to the public interest. Legal enactment was seen as the strategy of last resort. Wherever possible, the institutionalists sought social control mechanisms that achieved their purpose through voluntary agreements and the give and take of negotiation. This method, they thought, was far more likely to achieve workable results and be obeyed by those affected. Accordingly, the institutionalists were philosophically opposed to binding arbitration and government intervention in labor disputes. They were also well aware of the dangers of relying on state power, as it is easily manipulated by special interests and can quickly become a tyranny. Nonetheless, the inequality of bargaining power and authoritarian master-servant relationship that were the root cause of so many labor problems are, in the final analysis, legal phenomena (since law establishes the structure of property rights and the permissible methods of competition) and thus have to be corrected through changes in the law.

The institutionalists advocated two basic types of employment law. The first is protective labor legislation. Examples include minimum wages, maximum hours, prohibition of child labor, immigration quotas, and abolition of

payment in scrip. Legislation such as antidiscrimination laws also fall in this category. The presumption of protective labor legislation is that competition in labor markets results in certain practices or outcomes that are antisocial, that workers so affected have no reasonable prospect of remedying the situation through individual action, and thus collective action in the form of legislation is necessary to establish minimum standards or to prohibit the practice outright (Seager 1913).

The second major category of labor law is social insurance. Examples include unemployment insurance, workmen's compensation, state-operated health insurance, and old age insurance (Social Security). The rationale for insurance is that individuals generally cannot save enough to provide back-up funds in case of a financial calamity (e.g., a house fire) but that by making contributions to a common fund, money will be available to compensate those few who are struck by disaster. For most people, one form of disaster is loss of livelihood, be it from ill health, the infirmities of old age, a disabling accident, or prolonged unemployment. Social insurance, in turn, is made necessary by the fact that private markets do not provide adequate protection at a reasonable cost for many types of employment-related risks. The reason is due to two market failures (Millis and Montgomery, 1938:121-22) known today as "moral hazard" (people have an incentive to purposely engage in the risky behavior in order to qualify for benefits) and "adverse selection" (the people most likely to suffer the risk are the ones most likely to buy coverage). If workers are to have access to employment-related insurance, then, it falls on government to establish and operate the program (Moss 1996).

Having stabilized the economy and promoted improved employment practices through the three mechanisms described above, the next part of the institutional strategy is to use collective bargaining and legal enactment to gradually raise what they called the "plane of competition." The plane of competition, first articulated by Henry Carter Adams (1886), denotes the minimum level of employment practices and standards that at any one time all competitors must meet. The object of social policy, and a fundamental prerequisite for social and economic progress, is to first establish a minimum floor of labor standards and then gradually increase these standards over time. Progressive, liberal employers typically chart the way through voluntarily adopted improvements in wages and other labor standards, and then unions and government pressure the remainder to follow by gradually increasing minimum labor conditions through the "stick" of collective bargaining and legal enactment.

The institutionalists subscribed to a labor market version of "Cresham's law"—just as bad money drives out good without government regulation of

the money supply, so too bad employment practices drive out good without government- or union-enforced minimum standards. Commons stated (1913:411) with regard to safety regulation, for example, "It is an application of the well-recognized principle of political economy that the competition of the worst employers tends to drag down the best employers to their level." They are able to do this by practicing ethically and economically unfair trade practices, such as skimping on safety or sanitary expenditures, and/or by undercutting established standards through the use of "lower forms of competition," such as impoverished immigrants or child labor. The inability of high-standard employers to resist the forces of unfair competition was called by Ely (1913:405) the "problem of the twentieth man"—nineteen employers would like to increase the safety in their plants but are prevented from doing so by the recalcitrant twentieth employer who refuses to go along and thus threatens the competitive position of the rest. The problem of the twentieth man was vividly illustrated to the institutionalists by the failure of employers in the match industry to eliminate the use of phosphorus (a cause of a grotesquely disfiguring disease among match workers) without government compulsion (see Moss 1996).

From a strategic policy point of view, establishing an appropriate plane of competition through employment regulation is thus vital, for it prevents labor standards from sinking to socially unacceptable levels and also shields progressive, high-standard employers from the competitive pressure of firms less well managed or less socially responsible (Linder 1989; Crypso in this volume). Over time, employment regulation and collective bargaining should be used to then gradually raise the minimum level of employment standards. Although doing so is generally opposed by companies because of the higher cost, it nevertheless serves the public interest by acting as a spur to greater technological innovation, capital investment, employee training and development, and more efficient work organization and management practices (see Filene [1923] for testimony to this effect by a progressive businessman). In the long run, these factors, not low wages and poor working conditions, are the key ingredients to higher living standards and competitive advantage (Marshall and Tucker 1992).

Another useful social purpose of setting a marketplace plane of competition is to eliminate "unfair" methods of competition. The institutionalists support free trade in product and labor markets only as long as it is also *fair* trade. Fair trade, in turn, requires that competition take place on a reasonably level playing field, traders fully incorporate social cost into their prices and wages, and no one uses unscrupulous or unethical trade practices to gain an advantage. For this reason, the old institutionalists believed white, male,

native American wage earners at the turn of the century needed protection from newly arrived immigrants, dependent women, convict labor, foreign Third World labor, and other "substandard" groups.

Since workers in these groups have a much lower standard of living, are (in the case of immigrants and foreign labor) often far more necessitous of a job at any price, and have living costs that are in many cases subsidized (e.g., convict labor, married women), these workers will undercut the plane of competition for white-male labor and thus force down their wages and employment conditions (Perman 1928). Employment regulations that restrict the terms and conditions these workers can accept (e.g., a minimum wage law) or that outlaw such competition altogether (e.g., prohibition of child labor) are thus justified on the grounds that they not only protect substandard groups from exploitation but also protect the most advanced group of workers from unfair competition. Similar reasoning was used to support tariffs on imported goods from low-wage countries (Ranstad 1987). The old institutionalists recognized that these types of restrictions on trade in product and labor markets, while socially beneficial in principle, could in practice become instruments of privilege and monopoly rents for industrialists and other politically powerful groups (as envisioned in theories of regulatory capture), but they were relatively sanguine (probably overly so) that the influence of special interests could be kept at bay through devices such as civil service reform; creation of independent, professionally staffed regulatory agencies; and countervailing organizations of consumers and other "weak" or disorganized bargainers.

Critics object that establishing a plane of competition through collective bargaining and legal enactment raises the price of labor and causes some members of these groups to lose their jobs (Stigler 1946; Reynolds 1991). Then gradually raising the plane of competition only exacerbates the problem. The institutionalists respond, however, that keeping marginal, low-productivity jobs is myopic social policy (Fileene 1923). The better approach is to accept that companies will reduce employment in marginal jobs, use private and social forms of investment (e.g., education and training programs) to raise the productivity of the majority of the displaced workers who are employable, and accept that a minority of the displaced are unemployable at reasonable wages and must be supported through state welfare programs (Seager 1913). In effect, the institutionalists see raising the plane of competition as a method to promote continuous quality improvement in the nation's work force. Toward this end, they promoted employer "Americanization" programs in the 1920s as a way to upgrade the social and work skills of immigrants. They also favored prohibition of child labor on grounds that increased length of schooling will increase their productivity as future workers, prohibition of night work for

women as a means to improve family life and the "quality" of children, and public employment programs for the able bodied who cannot otherwise find work (Lehrer 1987; Ely and Bohn 1935:256-64).

The final part of the institutional strategy for employment reform was development of a new economic and legal theory of the employment relationship. The institutionalists quickly discovered that newly enacted pieces of labor legislation, such as minimum wage and maximum hour laws, were frequently declared unconstitutional by the courts. The justification was typically that such legislation violated the U.S. Constitution's 14th amendment and, in particular, its stricture that no person's property can be taken without "due process of law" (Commons and Andrews 1936). The institutionalists sought to convince the court that a different standard should be adopted. They argued that while individual male workers confronted the employer on a legal plane of equality, the economic plane of competition was so tilted against the unskilled worker that many adult males were themselves in a dependent position and, thus, open to exploitation (Commons and Andrews 1936:373-74). Since contracts can be ruled null and void when consummated under the pressure of coercion, labor legislation was for this reason constitutional. He further argued that labor of all types was invested in a public interest, since the conditions of labor materially affect the development and character of every worker-citizen and, in addition, the health of the overall economy. Labor, he thought, should be treated as a "public utility" and thus regulated for the benefit of the community (Commons 1918:30).

Administration and Enforcement of Employment Regulation

Many economists regard the administration and enforcement of employment regulations as "institutional details" and accordingly give them short shrift. Not so the institutionalists. They not only devote considerable attention in their writings to issues of administration and enforcement but also put forth innovative proposals on how these processes should best be implemented. It is symbolic in this regard that Commons had two offices—one at the university and the other at the state capitol.

The importance given to administration and enforcement is indicated in this statement of Commons and Andrews (1936:448): "More important than the hasty enactment of additional laws is the adoption of methods of administration that will enforce them. It is easy for politicians or reformers or trade union officials to boast of the laws which they have secured for labor, and it is just as easy to overlook details or appropriations or competent officials that are needed to make them enforceable." With this general admonition they then proceed to develop a number of specific points.

The starting place is reiteration of the general principle that "free contract must rule" (Ely 1914:731). Wherever possible, the institutionalists want to preserve individual bargaining and responsibility. But adherence to the doctrine of freedom of contract is a qualified one—it is "toleration within limits" (Commons and Andrews 1936:196). Determining the boundaries or limits of freedom of contract occupied Commons for many years and led to one of his major theoretical concepts—"reasonable value" (Commons 1934a:860; Barabush 1976).

Reasonable value, in essence, is an ethical/legal judgement that the terms of a contract are the product of a "reasonable" use of bargaining power by each party and the outcome is likewise "reasonable" in the sense it does not violate the average person's sense of justice and fair dealing. Contracts that are not reasonable fall outside the "limits of toleration" and provide a rationale for regulation. Since "reasonableness" is inherently a subjective, socially determined judgment, public and judicial opinion regarding the need for and merits of regulation necessarily varies over time and across people. It also means that ethics is necessarily a part of the discipline of economics, contrary to standard neoclassical thought.

If regulation is deemed necessary, the second principle is that it should be accomplished with as little coercion as possible. Commons' preferred method to accomplish this end is to enlist the profit motive in pursuit of social goals (Commons 1934a:875). Thus Commons drafted the first Wisconsin worker's compensation statute so that employer insurance premiums rise in tandem with the number of accident claims. This procedure, he thought, was far more effective than the traditional method of state safety inspections and punitive fines for safety violations. The former appeals to employer self-interest to be safety conscious, while the latter provides employers an incentive to be litigious and evasive. Experience rating in unemployment insurance has a similar rationale.

The third principle of administration and enforcement is that the parties affected should whenever possible be represented in the regulatory process (Commons 1913:382-424; Wunderlin 1992). As already mentioned, this consideration predisposed Commons to favor collective bargaining over legal enactment. When legal enactment is necessary, he advocated that the legislature pass broad enabling legislation and then delegate to an independent commission the responsibility for establishing the precise regulatory standards and procedures. Further, the commission should include representatives of employers, workers, and the public so that all interests and points of view are heard. In effect, he proposed that employment regulation be developed and administered through much the same structure and process as used in collective

bargaining. Not only will the parties be more likely to obey the regulatory standards if they have a voice in their development, the standards are also more likely to be practical and cost effective.

Certain institutionalists, primarily from the "Veblenian" wing, advocated a further extension of the tripartite representation of interests to include agencies responsible for some form of economic planning at the industry and national level. The Wisconsin school of institutionalists, however, saw this as an engine for fascism and opposed it (Commons 1934a:876-903). During the New Deal these divergent viewpoints often came into conflict within the Roosevelt administration (Barber 1994).

The fourth principle put forward to guide the implementation of regulation is that "reasonable" regulatory standards should be defined in practice as those equal to the standards currently practiced on a voluntary basis by "best practice" employers (Commons 1934a:860). Thus regulation avoids on one hand setting an impractical high standard, yet on the other, it accomplishes a significant upgrading in employment conditions. As the "best practice" standards of employers rise over time, regulatory standards should move in tandem.

The fifth principle of regulation is that effective administration and enforcement requires significant social investment to recruit and train a competent, professional cadre of administrators and to provide them with the human and physical capital necessary to carry out their responsibilities. Effective regulation cannot be done "on the cheap." Commons was pessimistic about the willingness of Americans to make this investment and their ability to effectively implement it. He characterized Americans as "excessively individualistic, politically diverted, and administratively incompetent" (Commons 1934a:846).

Implications

As noted in the introduction, many of the employment laws and regulations advocated by the old institutionalists were enacted into law on a national basis during the New Deal years of the 1930s. None of the old institutional economists would be surprised to learn that sixty years later these laws, even as subsequently amended, may well need further, perhaps substantial revision. Change and adaptation are, after all, the essence of evolution.

What in our current system of employment law and regulation should be preserved, what parts should be revised or eliminated, and what new parts added?

If the old institutionalists first stopped to consult the academic literature in labor economics, they would be pleasantly surprised to learn that labor problems have largely disappeared from the American workplace. Not only is the term no longer mentioned, but most labor market phenomena, such as

wage rates, hours of work, and even unemployment, tend to be portrayed as efficient, welfare-maximizing outcomes arising from rational, optimizing choices made in a system of competitive markets (Elheneberg and Smith 1994; Dow and Schwab in this volume). Their impression on this matter would then be further reinforced when they find next to nothing in the academic literature that recommends additional employment laws or regulation and a great body of research that argues for considerably less. The reasons, they learn, are that many scholars dismiss inequality of bargaining power as having neither conceptual nor practical significance; that many others maintain that competition in labor markets necessarily results in efficient, welfare-enhancing outcomes (competition spurs workers and firms to search out contract terms that exhaust all gains from trade); and equity is a metaphysical concept that is now held to be outside the realm of economic theory.

After leaving the library, the old institutionalists would discover quite a different world when they visit with managers and workers in real life workplaces. Their first reaction would probably be amazement at the advanced technology of production; the much cleaner, safer, and more pleasant conditions of work; the number of dual-earner couples; and the extensive pay and benefits. They would conclude, no doubt, that the workplace of today is vastly superior to that of their day. They would also quickly discover, however, that even in today's workplace there exist numerous, sometimes widespread labor problems.

A number of these labor problems appear quite similar to those of the early 1900s, while others are new. Insecurity of employment, though not as severe, remains pervasive and affects even the white-collar and executive ranks. Large pockets of the work force are also employed in menial, low-paying jobs that provide few benefits and even smaller opportunities for self-development, while millions of other adults don't work at all and survive on welfare. Work-related injuries and fatalities also remain unexpectedly high, and equally surprising are the millions of Americans working two or more jobs to make ends meet. Surprise would turn to shock when the institutionalists learn that 35 million Americans do not have health insurance (the AALL began a nationwide campaign for national health insurance in the mid-1910s).

The distinct trend toward greater income inequality would also worry the old institutionalists, as would the decade-long stagnation in real family income. Inside the workplace, they would encounter a number of serious social ills, such as drug abuse, AIDS, sexual harassment, violent behavior, and discrimination of all kinds. As shocking as the lack of health insurance would be the survival of the employment-at-will doctrine in many states and, only slightly less disturbing, the lack of well-defined workplace rights and dispute

resolution procedures. Finally, the old institutionalists would also encounter many situations where employers flout the rights and protections given workers to join trade unions and bargain collectively. They would conclude, I think, that while much has changed, much hasn't.

The economics literature, much of the business community, and a majority of elected government officials claim that the economic and social problems of the country stem from too much government paternalism and regulation. The solution is getting government out of people's lives through deregulation and a return to competitive markets.

The old institutionalists would, I think, give this position qualified support in certain areas. In other areas of employment, however, they would advocate either maintaining or increasing the scope of regulation, albeit in ways that promote greater flexibility and consensus.

One rationale for decreased and/or more flexible employment regulation, for example, is the diminution over time in the scope and severity of employer power over wages and other terms and conditions of employment (Kaufman 1989, 1991). For example, the most significant source of employer power—large scale, persistent involuntary unemployment—is considerably reduced relative to pre-World War II years. Contributing factors include Keynesian-inspired countercyclical monetary and fiscal policies, the "automatic stabilizer" effect of social insurance and income transfer programs, and the shift from a manufacturing to a service economy. Also, less unemployment causes individual labor markets to operate in a more competitive manner, such as with respect to the size of compensating wage differentials and inclusion of social costs of production in price.

Other developments have also reduced the need for employment regulation. Certainly the extent of monopoly and collusion on the part of employer associations has declined significantly, for example, due to improved worker mobility and economic development in rural areas. Labor problems have also been substantially reduced due to significant improvements in work organization, personnel practices, and the quality and social responsibility of modern management. Finally, American society has become more egalitarian over time due to reduced class barriers, broader access to higher education, and a higher social consciousness on the part of the American people.

These considerations suggest that the inequality of bargaining power between individual workers and firms in today's labor markets has been reduced, but not eliminated, in both scope and severity. The greatest source of employer power over the worker—the threat of job loss and the availability of numerous desperate job seekers willing to replace him—is certainly still present in a number of industries and occupations, but less so than in the

early 20th century. Not only does the economy operate closer to full employment, but the social safety net provided by the modern welfare state, the much greater number of dual-earner families, the greater wealth of households, and the greater proportion of skilled, highly educated employees in the work force all reduce the financial vulnerability of the typical worker and, thus, increase his/her bargaining power in wage determination. (These conclusions are sensitive to the date of comparison—relative to the early 1900s they are certainly true, but a net retrogression may have occurred if attention is restricted to the post-1970s.)

With respect to unions, this analysis suggests that legislation like the National Labor Relations Act still serves the public interest but that it needs revision. Some workers still suffer exploitation and unjust treatment, and the law does not adequately protect their rights to obtain union representation. Collective bargaining also helps maintain a socially acceptable plane of competition in the labor market. For these reasons, the penalties for antiunion discrimination and refusal to bargain first contracts should be strengthened. The definition of the set of employees covered under the act should also be expanded to reflect today's more diverse types of employer-employee relationships (e.g., leased employees, members of self-managing work teams).

On the other hand, the public must have guarantees that unions will inhibit both greater restraint in the use of their collective bargaining power and more interest in promoting the economic performance of the firm than has been typically demonstrated in past years (Kaufman 1996b). In effect, society needs to strengthen the "monopsony-reducing" function of unions (where monopsony is defined broadly to cover all sources of employer power) but place stronger curbs on the "monopoly creating" face of unions. Although not ideal, the most effective device for curbing union power is the threat of striker replacement. In exchange for stronger guarantees of the right to organize, either the legality of striker replacement must be written in the NLRA (with certain restrictions to prevent blatant union busting) or some other safeguard must be devised, such as mandatory profit sharing so that union members have greater incentive to accept wage moderation and flexible work rules. Also, the ban on company-dominated labor organizations ("company unions") is overly restrictive and should be relaxed in order to facilitate employee involvement programs in nonunion companies. The availability of the union election process (particularly in strengthened form) will prevent the more egregious forms of management domination, as occurred in the pre-NLRA days.

Because the playing field in today's labor market is more balanced than in the days of the institutional economists, there is also a case for reducing the amount of countervailing power contained in other labor laws, such as the

minimum wage. Allowing the minimum wage to decline from the traditional one-half of the average manufacturing wage to, say, one-third as in more recent years is consonant with this idea. As long as some unorganized workers suffer from a bargaining disadvantage, however, the minimum wage should be retained. Similar reasoning (i.e., maintaining the legislation but making the standards less restrictive) applies to other protective labor legislation, such as overtime laws and prevailing wage standards in construction.

Employer power is not the only rationale for employment regulation, however, and other considerations must also be examined. Employment security, for example, is considered by the institutionalists to be a vital social concern, both because of its intrinsic value to workers and the important part it plays in fostering productive attitudes (e.g., employee commitment) and employment practices (e.g., training). The bulk of the evidence strongly suggests that employment security (or the perception of such security) in the American workplace has declined significantly in the last two decades due to factors such as downsizing, reengineering, outsourcing, and greater global competition.

While the decline in employment security carries with it some socially beneficial results in the form of greater organizational flexibility, reduced cost, and an end to an initiative-killing entitlement mentality, there are numerous other consequences that are inimical to the social interest and warrant improved or additional regulation. Too many companies, for example, use downsizing as a pretext for laying off older employees in order to save money on salaries, pensions, and benefits. Strengthened protections against age discrimination are thus appropriate. Likewise, in many states, particularly those adhering closely to the doctrine of employment at will, employees lack basic legal protections against arbitrary, unfair dismissal. Strengthened termination procedures and requirement that "just cause" be demonstrated in dismissals are thus desirable. As a third example, the recently enacted plant closing legislation (the WARN Act), while good in intent, has proven mediocre in accomplishment due to overly broad exemptions and lack of enforcement (see Addison and Hirsch in this volume). All of these issues can also effectively be dealt with through collective bargaining, thus providing an additional rationale for strengthened protections of the right to organize.

These types of regulation address the negative consequences of employment insecurity; but they do not deal with the underlying causes. Here, too, regulation has a role to play. Part of the motive for downsizing, reengineering, and other such initiatives is the desire of companies to shift part of the cost of labor to third parties. Using temporary workers or part-time employees, for example, allows firms to avoid various employee benefits costs, such as health insurance. This practice, while good for short-run profits, imposes substantial

social costs on the workers and community that are more nearly a legitimate charge against production. Some type of universal health insurance, therefore, not only serves the public interest but helps strengthen income security for workers.

Another contributing factor to employment insecurity in today's economy is intensified international competition in product markets. In his masterful article "American Shoemakers," Commons (1909) described how the extension of markets brought successive rounds of pressure upon shoe manufacturers to reduce wages and speed up the work. The same process is at work today, only the extension of markets has proceeded to every corner of the world economy. Thus American workers and companies find themselves in competition with workers and firms in China and Mexico where wages and benefits are a fraction of the American level. And just as with the shoemakers of the 19th century, firms of today find themselves under considerable pressure to reduce cost to stay competitive, be it through wage reductions, greater work speed, replacement of permanent employees with contingent workers, movement of production abroad, domestic plant closings, and other such methods.

The institutionalists recognized that no state or country can isolate itself behind a wall of protection. But equally blind is a public policy that allows free trade to undermine minimum social standards of employment or that subjects American workers to the destructive effects of unfair foreign competition. While reduced trade barriers, as accomplished in the North American Free Trade Act (NAFTA), are thus in the public interest, American companies cannot be allowed (or forced) to compete by paying less than living wages or by shifting the social cost of labor to the community. (The same applies reciprocally to Mexico and other trading partners.) Likewise, it is against the public interest to allow unfettered free trade when countries such as China gain competitive advantage through convict labor and theft of intellectual property rights. From an institutional perspective, therefore, it is critical that employment regulation and selective use of tariffs and other trade weapons be used to both maintain labor standards in this country and promote fair trade practices in others.

The discussion has already touched on the issue of social cost in several places, but it has numerous other implications for contemporary employment regulation. The old institutional economists, for example, would strongly support legislation such as the Family and Medical Leave Act. It requires firms to internalize a portion of the costs associated with employees' childbirth and childrearing activities on the grounds that this is both elementary justice (it is unfair for a woman to lose her job because she requires several weeks maternity leave) and is an ongoing expense associated with production (as with sick

leave, firms should bear the cost, not workers or the community). Looked at from another perspective, such expenditures are a form of social investment in the next generation of the work force. Institutionalists would use similar arguments in support of new legislation requiring firms to finance a portion of child care expenses for working parents.

Another area of regulation that the old institutional economists would give a higher priority than their neoclassical colleagues is workplace governance, such as protection of worker rights and institutional methods for employee voice. From an institutional point of view, workers' rights and voice in industry are both means to an end (greater efficiency and equity) and a valuable end in themselves. These considerations again provide a rationale for strengthened protections of the right to organize and bargain collectively. Given the small share of the work force that belongs to labor unions, however, the institutionalists would also support legislation that provides alternative forms of representation and due process, such as nonunion employee involvement committees (with some appropriate safeguards to prevent undue management domination) and a provision requiring nonunion firms to have an employee handbook that is enforceable in courts of law (Edwards 1993 and in this volume).

The old institutionalists would also support strong legislation and regulation combating all forms of discrimination and harassment. They also believed, however, that a portion of the unequal outcomes among race and gender groups arises from innate differences among them. They would thus support equality of opportunity, but not equality of results. Quotas and minority set-asides in affirmative action programs would thus be viewed with considerable concern. They would also support substantial social investment in programs aimed at strengthening the social and human capital of disadvantaged groups in an effort to reduce intergroup disparities in human and social capital.

Another area of employment policy deserving attention from an institutional perspective is the interface between the labor market and macroeconomic stability and growth. As previously noted, Commons thought the greatest threat to reasonable employment conditions is the presence in normal times of an excess supply of labor. The single greatest accomplishment government can make to reasonable employment standards, therefore, is maintenance of a full employment macroeconomy. The old institutionalists were thus active supporters of the Employment Act of 1946 and would continue to lobby today for measures to move the economy closer to full employment. Among these would be public training and employment programs to reduce structural unemployment and tighter immigration laws to stanch the flow of low-skill labor into the United States.

The final area of employment policy deserving comment is the administration and enforcement of regulation. The old institutionalists would no doubt look at contemporary programs, such as the Occupational Safety and Health Act (OSHA), and shake their heads in disbelief that Americans have not learned that "command and control" methods of regulation coupled with punitive sanctions are rarely effective. They would counsel a more voluntary, participative approach where workers and firms are given incentives to meet certain targets and responsibility to jointly fashion a solution.

They would also suggest, I think, that a good deal of the criticism directed against workplace regulation has less to do with the merits of the regulation than the ineffective, sometimes incompetent way the programs are designed and administered. They would see this, in part, as an outcome of the excessive individualism and "ready, fire, aim" approach to organization that permeates American culture (Zuckerman and Hatala 1992). Finally, they would remind us that effective enforcement and administration of labor law requires well-paid and respected civil servants. A social ethos that disparages government, regulatory programs, and the people who administer them makes it difficult to have anything other than a self-fulfilling prophecy.

Conclusions

Although the old institutionalists of the Wisconsin school were the first group of academics to do significant research on the operation of labor markets and the rationale for employment regulation, this work has languished in relative obscurity in recent years. Given the vigorous debate in the nation over the merits of regulation versus deregulation of labor markets, a fresh look at this body of literature seems both appropriate and overdue.

Out of this review emerges a number of conclusions and implications regarding both research and policy on employment regulation. With regard to research, for example, a clear lesson is the power of assumptions in theoretical models. It is not surprising, for example, that neoclassical economists find scant justification for collective bargaining and most employment regulation, when the model they use assumes individuals are highly rational and dispassionate people, markets are highly competitive, the distribution of property rights and wealth is frequently taken as a "given," and concepts such as Pareto optimality are used to evaluate the welfare effects of a policy change. It is almost axiomatic that tinkering with a near-perfect world is likely to do more harm than good.

If one starts with different assumptions, different conclusions inevitably flow. A case in point is the work of the old institutionalists. They assume much the opposite—a model of the human agent in which emotion, ignorance, and stupidity create conditions of bounded rationality; markets are often characterized by

extremes of competition—either too little or too much; the distribution of property rights and wealth are skewed in favor of the rich and powerful; and concepts of justice and commonweal are used to evaluate the efficacy of public policy. Not unexpectedly, they conclude that unregulated labor markets and unabridged freedom of contract often result in outcomes that are both highly inefficient and unjust. Regulation, per the quote at the beginning of the chapter, is thus regarded as the friend, not the enemy, of personal freedom and well being.

Which of these two models best explains the operation and outcomes of modern labor markets and employment relationships is an open question. My conjecture is that both have validity and capture a portion of reality. Unfortunately, an ecumenical perspective and disinterested testing of hypotheses is not always the hallmark of modern research in labor economics. Rather, many labor economists take it as their professional mission to demonstrate that models of rational behavior and competitive markets can explain any and all forms of behavior and that the resulting outcomes are efficient and welfare maximizing. Other explanations and conclusions are either ignored, ruled out of court on procedural grounds (e.g., fairness is a metaphysical concept), or reinterpreted to be consistent with orthodoxy. Also, standard microeconomic models of labor markets almost always implicitly assume conditions of full employment. For these reasons, mainstream contemporary labor economics has much to say about the pros and cons of employment regulation, but the nature of the theory and the way it is used inevitably places the emphasis on the "con" part and very little on the "pro" part. As this chapter has suggested, such a conclusion is neither foreordained by objective economic analysis nor the best solution to many of the nation's pressing labor problems.

With regard to policy, this chapter offers a mixed assessment of the efficacy of current employment law and regulation. In certain respects, labor markets have become more competitive in recent decades (e.g., a decline in monopoly and discrimination). This trend suggests that the amount of protective, countervailing power that needs to be provided to individual employees through law and collective bargaining can be correspondingly reduced (or made more flexible). This conclusion, however, is contingent on the ability of policymakers to keep the macroeconomy near full employment. As unemployment increases, so too does the optimal amount of countervailing power law should give employees.

Employment regulation can be justified on many other grounds besides as an offset to employer market power. Most of these, it is concluded, point in the direction of either maintaining or expanding the sphere of employment regulation. Some of these rationales include promoting higher quality of worklife

for employees, providing reasonable levels of job and income security for workers, ensuring that firms pay the full social cost of labor, preventing unfair competition, protecting workers' rights and promoting employee voice in work force governance, motivating companies to devote more resources and attention to technological innovation, capital investment, and new or improved work organization and human resource management methods, and promoting increased stability and growth in the macroeconomy.

Although it is today's conventional wisdom that the institutional economists sought employment regulation to protect wages and labor conditions from lack of employer competition for labor (as in monopoly), in truth they considered the greater evil to be excessive competition. Excessive competition, in the form of such things as substantial involuntary unemployment, large-scale immigration of low-skill workers, child labor, or low-wage foreign competition in product markets, leads to a cutthroat competitive struggle with substantial downward pressure upon wages and labor standards—particularly in the low end of the labor market (see Behman and Belzer in this volume).

This phenomenon appears to have reemerged in the last two decades in many American labor markets (and European labor markets, per extensive concern over "social dumping" and a "race to the bottom"). Principal causes are a much-expanded flow of low-skill immigrants into the country, a large-scale trade imbalance due to America's relatively open markets and the more restricted markets of some of our trading partners (particularly in Asia), a skill-twist in technological change that has wiped out many low-wage jobs, and the continuing presence of a reserve army of the unemployed and underemployed. The result has been a pronounced widening in income inequality, stagnant real income growth, a loss in job security for tens of millions of American workers, longer and more intense work hours, reduced benefits or cost shifting to workers, a phenomenal growth in part-time and contingent work, a movement of jobs offshore, and a marked increase in antisocial attitudes and behaviors, such as cynicism, greed, violence, and drug abuse.

Combating these problems is difficult, per the quote of Commons at the beginning of the chapter, but steps must be taken nonetheless if the social and economic progress of previous decades is to be preserved. Certainly the position of many conservative economists—that there is no problem or free markets will take care of it—is untenable. No one, including the old institutional economists, will deny that regulation brings with it significant costs. But they will also claim that the costs of ignoring our social problems or relying on the blind, Darwinian forces of free competition to solve them are even greater.

Were the old institutional economists alive today, they would no doubt be disappointed to learn how little impact their research has had on contemporary

economics. They would be able to look with considerable satisfaction, however, on the enduring nature of their contribution to policy. Few economists in this century have had the impact on the lives of working people as have Commons and colleagues. Today the public takes for granted minimum wages, overtime pay after forty hours, unemployment insurance, Social Security, and the right of workers to join unions; but a century ago these ideas were radical, and F. L. and Commons were nearly driven out of academe for espousing them.

Although with the passage of time these measures now seem in principle relatively noncontroversial, when attention is turned to solving contemporary labor problems, suddenly the path is not clear at all. More regulation? Less regulation? What kind? I have attempted to deduce what Commons and the other old institutionalists might say to these questions, based on their writings and major precepts, but this is informed conjecture. The one thing we can say with certainty, however, is that they would insist on certain key principles—that people come before things, all interests must be represented, power must be balanced, and outcomes must pass the test of reasonableness. In many ways these remain radical ideas.

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